



Retroactivity of contracts: recent court practice

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According to article 425, par.3, of the Civil Code of the Russian Federation, the parties may agree to apply the terms and conditions of a contract also with respect to the period prior to the execution of the contract. However, this may raise certain legal issues.

In this article we will review some recent court cases illustrating the approach of the Russian courts towards the questions concerning retroactivity of contracts, the impact of retroactivity on the contractual arrangements and the deadline for submitting the relevant claims.

- i. *Retroactivity clause not applicable***
In a court case the parties entered into an addendum to a delivery agreement,

whereby they agreed to anticipate the due dates for payment. It was also specified that this addendum had retroactive effects (namely, it applied to the contractual arrangements between the parties starting from the date of execution of the original contract). Consequently, the supplier claimed the application of penalties for all previous deliveries that had already been made (even though these deliveries were in compliance with the due payment dates indicated in the original agreement). Both the first and appellate court instance¹ upheld such claim.

However, the commercial court of Volga-Vyatka district in the decision dated 21.02.2020 No. Ф01-7960/2019 in the case No. A43-8071/2019 took a different

¹ Decision of the commercial court of Nizhniy Novgorod region dated 25.06.2019 and decision of the first commercial appellate court dated 26.09.2019 in the case No. A43-8071/2019.



position. In particular, the court held that no penalties for late payment could be claimed in respect of contractual obligations, the time of performance of which had already expired prior to the execution of the addendum to the agreement.

In the course of the retrial, the court² pointed out that the retroactivity issue could only be settled together with the liability issue. In the addendum the parties could foresee the negative consequences for the purchaser arising from the anticipation of the due payment dates. Therefore, the purchaser should have specifically approved the fact that the addendum changed the number of overdue days and thus increased the amount of penalties due. In the absence of such a specific agreement, the penalties could not be applied retroactively. Eventually, the cassation instance³ confirmed such approach.

ii. Retroactivity clause confirmed

In another case, by means of an addendum to a contractor agreement, the term of performance of works was postponed, however at that time the delay in the performance of the works had already occurred.

The courts in all three instances⁴ took the position to recover from the contractor the penalty starting from the term of performance for the works agreed in the original contract until execution of the relevant addendum.

However, the Court collegium for economic disputes of the Higher court of the Russian Federation in the decision dated 29.10.2019 No. 305-ЭС19-11225 in the case No. A40-114941/2018 overruled the previous decisions. The

parties stated that the addendum had retroactive effects and it was valid within the term of validity of the agreement. Yet the lower courts had not taken this into consideration. Since the addendum did not specify that the parties allowed the application of the penalty to the delay occurred prior to its execution, the Higher Court of the Russian Federation overruled the decisions with regard to the penalty.

Following the retrial, the penalty was recovered only in respect of the delay that occurred after the term of performance for the works had been postponed. This position was upheld in the decision of the commercial court of the Moscow district dated 02.02.2021 No. Ф05-3320/2019 in the case No. A40-114941/2018.

iii. Retroactivity clause challenged

When the parties enter into an agreement or an addendum containing a retroactivity clause without putting forward any objections thereto, the chances to challenge this clause are rather low. The courts have confirmed the validity of the retroactivity clause in the following cases:

- the addendum was signed without a list of disagreements⁵;
- the list of disagreements or another document with the objections to the draft of the agreements was not forwarded⁶;
- the agreement was signed without objections and notices⁷.

² Decision of the first commercial appellate court dated 07.11.2020 No. 01АП-7395/2019 in the case No. A43-8071/2019.

³ Decision of the commercial court of Volga-Vyatka district dated 06.04.2021 № Ф01-879/2021 in the case No. A43-8071/2019.

⁴ Decision of the commercial court of Moscow city dated 10.09.2018, decision of the ninth commercial appellate court dated 25.12.2018 and decision of the commercial court of Moscow district dated 09.04.2019 in the case No. A40-114941/2018.

⁵ Decision of the commercial court of Moscow district dated 09.09.2019 No. Ф05-14897/2019 in the case No. N A40-162646/2018.

⁶ Decision of the commercial court of Volga-Vyatka district dated 23.06.2020 No. Ф01-10237/2020 in the case No. A28-5234/2018.

⁷ Decision of the commercial court of the Central district dated 15.01.2020 No. Ф10-6106/2019 in the case No. A83-19066/2018.

iv. Retroactivity in cases when disagreements on the text of the contract are resolved by the court

In a court case there was a dispute between the parties concerning the payment of services that were rendered, inter alia, prior to the execution of the agreement in the course of the court proceedings. According to the courts⁸, prior to the execution of the agreement there were certain arrangements between the parties, the agreements contained a retroactivity clause and the parties did not argue the items concerning retroactivity while entering into the agreement in the course of the court proceedings.

In another court case in the course of the pre-contractual disputes there were disagreements between the parties concerning the application of the retroactivity clause. As stated by the court⁹, since neither the law nor the agreement provided explicitly for the retroactivity clause and, in the absence of consent of both parties, such clause cannot be confirmed by the court.

v. Retroactivity clause entered into after the court's decision

In a court case, after using a land plot for a certain period of time the parties decided to enter into a lease agreement, whereby the lessee was obliged to pay for the use of the land for the previous period (i.e., 3 years prior to the registration of the agreement). The appellate instance¹⁰ held that unreasonable gains cannot be recovered for this period. The commercial court of the North-western district in its decision dated 05.10.2020 No. Ф07-5924/2020 in the case No. A26-5814/2019 upheld the decision of the lower instance court and ruled out that the lessor is only entitled to

request payment under the lease agreement by way of court proceedings, unless the lessee performs such payment spontaneously.

vi. Impact of retroactivity clause on statutory limit for claims

In a court case the lessor tried to recover the debt arising from unpaid rent under a lease agreement for the period of more than 5 years. The first and appellate instances¹¹ have confirmed that the statutory limit for some of the claims had already expired. However, the commercial court of the West-Siberian district as cassation instance in the decision dated 14.07.2020 No. Ф04-2655/2020 in the case No. A75-16375/2019 has taken a different position on this issue.

As per the materials of the case, in 2018 the parties entered into an accession agreement to a lease agreement, with attached thereto the calculation of payments due for the preceding period (2013-2018). The cassation instance interpreted this as an acknowledgement of debt. It followed that the statutory limit for the claims started to run once again. Therefore, the decisions of the lower courts were overruled and the debt was recovered by the lessor with respect to the whole period.

Conclusions

The court practice examined above shows that the retroactivity clause in the contracts must be carefully structured, in order to avoid the possibility of different interpretations. By doing so, the risk of further challenges by the courts can be significantly reduced (which is particularly important since the courts in certain cases may either uphold or overrule the retroactivity clause).

⁸ Decision of the commercial court of the West-Siberian district dated 21.09.2020 No. Ф04-3331/2020 and the Decision of the Higher court of the Russian Federation dated 04.12.2020 No. 304-3С20-19601 in the case No. A45-7928/2018

⁹ Decision of the commercial court of the Far-Eastern district dated 30.11.2020 No. Ф03-4865/2020 in the case No. A51-5352/2019.

¹⁰ Decision of the thirteenth commercial appellate court dated 02.06.2020 No. 13АП-34162/2019 in the case No. A26-5814/2019.

¹¹ Decision of the commercial court of Khanty-Mansiisk autonomous district dated 28.01.2020 and Decision of the eighth commercial appellate court dated 16.04.2020 in the case No. A75-16375/2019.



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