

CASE NOTE: RUSSIAN FEDERATION

CASE CITATION:

Case No. A40-43946/08-93-94

NAME AND LEVEL OF COURT:

Arbitrazh Court of Moscow

DATE OF DECISION:

19 September 2008

MEMBER OF THE COURT:

Judge Marina V. Osipova

Digital evidence; construction of contract; e-mails instead of signed transfer and acceptance on paper

Summary

Having regard to the actual relations of the parties and the principles of reasonableness and good faith, the Arbitrazh Court of Moscow accepted e-mails where the contract required communications to be in writing.

The parties entered into a brand naming contract, and the customer (IDC) made an advance payment to the naming agency (MaxCreative). The customer filed a claim against the naming agency to recover the advance payment, alleging that he had never received the proper records of the work done. The naming agency answered the claim, stating that the records were sent by e-mail in accordance with the practice established between the parties.

In September 2008, the Arbitrazh court of Moscow decided against the claimant. It was established that the parties signed a framework agreement on 9 April 2008. In accordance with Clause 1.2 of the agreement, the naming agency was permitted to transfer the records of the work to the customer in electronic form on a CD or by e-mail 'if so directed by the customer in writing'. The contract further provided that the scope of work would be set out in annexes to the agreement, drafted by MaxCreative based on IDC orders and executed by both parties. On the same day, 9 April 2009, the parties signed Annex No. 1, which specified the first stages to be completed within 10 business days upon receipt of the advance payment. The down payment was made at the same time the agreement was signed.

According to IDC, the claimant never sent a written notice, instructing MaxCreative to deliver the records by e-mail. The court, however, looked into the contract definitions and circumstances of the case. The contract defined the order as a '*written* request of the customer pursuant to which the naming agency drafts an annex to

the Contract' (emphasis added). On 7 April 2008 Marina Smirnova, the PR manager of IDC, briefed MaxCreative on the scope of work. The brief was sent from her e-mail address at smirnova_marina@mail.ru to manager@maxcreative.ru. The court qualified this e-mail as the first order on the basis of which Annex No. 1 was drafted, and noted that it was an IDC employee who initiated the exchange of e-mails.

All further electronic correspondence was between the same e-mail addresses. On 17 April 2009, an employee of MaxCreative sent the first package of name options to IDC. On 21 April 2009, Marina Smirnova replied with the list of corrections and defects that she asked MaxCreative to take into account. On 29 April 2009, the revised package was sent. On 20 May 2009, the parties ended the contract. The termination agreement did not provide for the grounds for termination, nor did it provide for the down payment to be returned.

IDC did not deny the fact of the electronic correspondence between its employee and MaxCreative. However, IDC argued that it had no legal effect and did not constitute writing under the Russian law.

Having regard to the actual relations of the parties and in conformity with the principles of reasonableness and good faith, the court did not find for IDC. Given that IDC initiated the e-mail correspondence where the contract required writing and never objected to the method used by MaxCreative to respond, the court found IDC could not invoke the requirements of form. The court then referred to Article 453(3) of the Russian Civil Code, stating that the parties cannot claim back what they have performed under the contract before it was avoided if not otherwise prescribed by law or agreed in the termination agreement.

In December 2008, the Ninth Court of Appeal reversed the judgement of the first instance (Resolution of the 9th Arbitrazh court of appeal dated 5 December 2008 No. 09АП-14933/2008-ГК), stating that the contract directly provided for the form of work record, and this

was not complied with. Under the terms of the contract, the parties agreed to sign the transfer and acceptance act, and the contract was never amended to permit the use of electronic correspondence. The members of the Ninth Court of Appeal therefore ruled there was no admissible evidence that the services had been actually rendered, so that IDC could recover the advance payment.

In February 2009, the Federal Arbitrazh Court of Moscow Region quashed the appeal and remanded the case back to the appellate court (Resolution of the Federal Arbitrazh Court of Moscow Region dated 26 February 2009 No. КГ-А40/983-09). The Ninth Court of Appeal has been instructed to determine the following issues:

1. Who, when and how sent the IDC order to MaxCreative;
2. Whether IDC sent comments on the records of work done to MaxCreative by e-mail;
3. Who, when and how sent these comments on behalf of IDC;

4. What were the reasons for the termination agreement and consequences thereof.

It may be derived from these instructions and the text of the resolution generally, that the Federal Arbitrazh Court of Moscow Region tends to agree with the original judgment of the Arbitrazh Court of Moscow. However, the outcome of the case remains to be seen at the time of writing.

© Alex Dolzhich, 2009

alexander.dolzhich@gmail.com