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Is it possible to force a buyer to pay in advance under the contract?

Usually, under the delivery contract, the parties agree on the terms about an advance payment for goods, such provision is aimed at protecting the supplier's interests. However, the provision about an advance payment has negative impacts for a supplier.

The provision about an advance payment results in uncertainty performed by a transaction, i.e. it is not known when the supplier is able to receive the sum of money on which he counts and will stop being under any obligation to the buyer. Besides, the supplier can be forced to deliver unprofitable provisions for him, for example, when there was a change in price of goods, and the buyer requested the contract performance at an old price.

The application of the supplier to court with the claim to recover the advance payment amount will not lead to receiving money by him if only the buyer has not refused the goods. The protection of the supplier's interests requires other actions from him.

It is caused by the fact that the civil legislation of the Russian Federation does not provide a possibility to recover the payment for the goods, which the buyer did not receive from the supplier (Article 487 of the Civil Code of the Russian Federation, Article 516 of the Civil Code of the Russian Federation.)

Thus, the settlement of the dispute about the recovery of contract payment under cases A56-32541/2015 and A49-13339/2017, the courts of cassation, appeal and first instances refused the supplier to recovery the advance payment, penalty clauses for the unpaid amount and also his expenses for storage of the goods. The courts based their decision on the fact that as transfer by the supplier of the goods to the buyer is put into the last dependence on his 100% payment, actually the goods cannot be considered available to the buyer, and the supplier's obligation for the goods transfer is executed. The same opinion is supported in the Definition of the Supreme Court of Arbitration of the Russian Federation, May 7, 2010, in case A40-94854/08 and also in other acts of the highest judicial authorities on affairs with the similar cases.

It should be taken into account that 100% advance payment will be the prepayment divided into parts in case if the goods transfer is made conditional on obtaining all cost of the goods up to its transfer to the buyer.

Making available goods for the buyer, as defined in Paragraph 1 of Article 458 of the Civil Code of the Russian Federation, the following provisions must be simultaneous observed: the goods have to be prepared for the transfer to the place under the contract and to the term specified in herein, and the buyer has to be notified in any way and by any means by the seller on the goods readiness for transfer.

To protect the supplier in similar situations the law provides his right to suspend the execution of the obligation for the goods delivery or to refuse the execution of this obligation (contract) completely, and to demand the indemnification (Paragraph 2 of Article 487 of the Civil Code of the Russian Federation and Article 328 of the Civil Code of the Russian Federation). At the same time, the timely refusal of the contract prevents the possibility of the supplier's compulsion to execute the transaction under unprofitable terms.

An alternative way to protect the supplier's interests can be an effective use of guaranteeing the fulfillment of the buyer's obligations, including providing with a pledge of the transferred goods but not paid in full.

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