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HIGHEST ARBITRAZH COURT
OF THE RUSSIAN FEDERATION

RESOLUTION
of the Presidium of the Highest Arbitrazh Court
of the Russian Federation

No. 5604/09

Moscow 22 September 2009

The Presidium the Highest Arbitrazh Court of the Russian Federation, composed of:

Presiding Judge – Chairman of the Highest Arbitrazh Court of the Russian Federation Ivanov A.A.;

Members of the Presidium: Andreyeva T.K., Vitryansky V.V., Goryacheva, Yu.Yu., Zavyalova T.V., Ivannikova N.P., Kozlova O.A., Makovskaya A.A., Pershutov A.G., Sarbash S.V., Slesarev V.L., Yukhney M.F.;

examined the application of the company Hebenstreit-Rapido GmbH (Germany) for the supervisory review of the ruling of the Arbitrazh Court of the Saratov Region of 18 August 2008, rendered in Case No. A57-8082/2008-116, and the rulings of the Federal Arbitrazh Court for the Povolzhsky District of 20 October 2008 and 15 December 2009, rendered in the same case.

The following representatives were present at the hearing:

for the Applicant – company Hebenstreit-Rapido GmbH – Aleksenko V.V.;

for OAO Saratov Confectionery Plant – Chesalina N.V.

Having heard and considered the report of Judge Makovskaya A.A., as well as the explanations of the representatives of the participants in the case, the Presidium has established the following.

According to the arbitral award of the International Arbitral Center of the Austrian Federal Economic Chamber of 4 September 2007, rendered in Case No. SCH-4985, OAO Saratov Confectionery Plant (hereinafter – the Company) was ordered to pay EUR 65,430 within 14 days to Hebenstreit-Rapido GmbH (hereinafter – the Firm), as well as annual interest of 8% incurred from 15 May 2006 to the date of payment. The claim of the Firm for the amount of EUR 125,585.86 did not succeed. The arbitral tribunal ordered the Firm to pay within 14 days the expenses relating to the arbitration in the amount of EUR 12,200.23.

The Firm filed an application with the Arbitrazh Court of the Saratov Region for recognition and enforcement of the abovementioned foreign arbitral award.

By the ruling of 18 August 2008, the Arbitrazh Court of the Saratov Region refused to grant the application.

By the ruling of 20 October 2008, the Federal Arbitrazh Court for the Povolzhsky District returned the Firm's cassation complaint.

By the ruling of 15 December 2008, the Federal Arbitrazh Court for the Povolzhsky District upheld the ruling of 20 October 2008.

In its application before the Highest Arbitrazh Court of the Russian Federation for the supervisory review of the abovementioned judicial acts, the Firm requests their cancellation, invoking the violation of the uniformity in interpretation and application by the arbitrazh courts of the rules of law, rights and legitimate interests under the universal principles and rules of international law, as well as under the international treaties of the Russian Federation.

In its answer to the application, the Company considers that the judicial acts are in conformity with the applicable law and demands their upholding.

Having examined the arguments set out in the application, the response and the commentaries of the representatives of the parties at the hearing, the Presidium considers that the ruling of the first instance Court shall be cancelled, and the case shall be referred for reexamination to the first instance Court on the following grounds.

As it was established by the Courts and confirmed by the case materials, according to the provisions of paragraph 10 of contract No. HR 136502 of 23 May 2002 entered into by the parties, all disputes and controversies that arise from the contract or in relation to it, which could not be settled through negotiation by the parties, "shall be excluded from the jurisdiction of State courts and shall be examined in arbitration by the Chamber of Commerce and Industry in Vienna (Austria) under its Rules".

The award settling the dispute between the Firm and the Company, the recognition and enforcement of which was requested by the Firm before the Arbitrazh Court of the Saratov Region, was issued on 4 September 2007 by the International Arbitral Center of the Austrian Federal Economic Chamber, which considered that it had jurisdiction to examine that dispute on the basis of the text of the arbitration clause and the parties' will expressed therein.

Refusing to grant the Firm recognition and enforcement of that foreign arbitral award, the first instance Court concluded that the arbitration clause agreed upon by the parties and included in their contract provided that the disputes shall be submitted to another international commercial court of arbitration and not to the one that issued the award.

On this ground, the Court, invoking Article V(1)(c) of the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958), Article 36(1) of the Law of the Russian Federation No. 5338-1 of 7 July 1993 "On International Commercial Arbitration" and Article 244(1)(3) of the Arbitrazh Procedure Code of the Russian Federation, refused to recognize and enforce the award of the International Arbitral Center of the Austrian Federal Economic Chamber of 4 September 2007.

Therefore, the first instance Court refused to grant recognition and enforcement of the foreign arbitral award on a number of grounds which are different in nature and are not identical to each other.

Meanwhile, in essence, the first instance Court refused to recognize and enforce the foreign arbitral award on the formal grounds that the denomination of the arbitration institution indicated in the arbitration clause was not identical with the denomination of the international court of arbitration that issued the award and applied its own rules when examining the case.

The first instance Court did not take into consideration that, when evaluating the Company's objections to the jurisdiction of the International Arbitral Center of the Austrian Federal Economic Chamber, arguing that the latter is not based on the agreement of the parties, it had to rely upon the rules of law applicable to that clause, taking into consideration the provisions of Article V(1)(a) of the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958) and Article VI(2) of the European Convention on International Commercial Arbitration (Geneva, 1961), to which Germany and Russia are parties and which are applicable in the case at hand.

As it follows from the provisions of the arbitration clause, the parties excluded the jurisdiction of State courts for the examination of their disputes relating to or arising from the contract. As such, the parties indisputably and unambiguously agreed on the place of arbitration – Vienna, Austria. In examining the provisions contained in the arbitration clause under which the dispute shall be examined in arbitration by the Chamber of Commerce and Industry in Vienna (Austria), the first instance Court should have taken into account that the Austrian Federal Economic Chamber is in Vienna, and is an institution analogous to the chambers of commerce and industry, existing in other countries, and that the International Arbitral Center of the Austrian Federal Economic Chamber is the only institutional (permanent) international commercial arbitration court within it.

In such circumstances, the challenged ruling of the first instance Court violates the uniformity of the interpretation and application of the rules of law by the arbitrazh courts, and pursuant to Article 304 of the Arbitrazh Procedure Code of the Russian Federation, it shall be cancelled.

The case shall be referred for reexamination to the first instance Court.

When reexamining the case, the Court shall resolve the issue whether the award shall be recognized and enforced, taking into account the circumstance that, under the award, the Company is obliged to pay to the Firm EUR 65,430, as well as annual interest of 8% incurred from 15 May 2006 till the date of payment, and the Firm is obliged to pay the Firm expenses related to the arbitration proceedings in the amount of EUR 12,200.23, while only the Firm submitted an application for the recognition and enforcement of the above award. In particular, the Court shall decide whether it is possible to apply the rules on set-off provided for by Article 410 of the Civil Code of the Russian Federation.

On the basis of Article 303, Article 305(1)(3) and Article 306 of the Arbitrazh Procedure Code of the Russian Federation, the Presidium of the Highest Court of the Russian Federation

RESOLVED:

The ruling of the Arbitrazh Court of the Saratov Region of 18 August 2008, rendered in Case No. A57-8082/2008-116 shall be cancelled.

The case shall be referred to the Arbitrazh Court of the Saratov Region for reexamination.

Presiding Judge A.A. Ivanov