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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. 1787/11

Moscow 14 June 2011

The Presidium of 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: Amosov S.M., Andreyeva T.K., Batsiyev V.V., Valyavina E.Yu., Vitryansky V.V., Zavyalova T.V., Ivannikova N.P., Isaychev V.N., Kozlova O.A., Neshatayeva T.N., Pershutov A.G., Sarbash S.V., Slesarev V.L. and Yukhney M.F.;

examined the complaint of company HiPP GmbH & Co. Export KG for the supervisory review of a ruling of the Moscow Arbitrazh Court of 26 August 2010, rendered in case No. A40-4113/10-25-33, and a resolution of the Federal Arbitrazh Court for the Moscow District of 13 November 2010, rendered in the same case.

The following representatives were present at the hearing:

for the Complainant – company HiPP GmbH & Co. Export KG (the Claimant) – Gerbutov V.S.;

for ZAO SIVMA (the Respondent) – Pylin D.G. and Shtivelberg F.B.

Having heard and considered the report of Judge Neshatayeva T.N., as well as the explanations of the representatives of the participants in this case, the Presidium established the following.

Company HiPP GmbH & Co. Export KG (hereinafter – the Company) and limited liability company SIVMA Baby Foods (hereinafter – OOO SIVMA Baby Foods, or OOO), in order to

continue the long-standing relationship between the Company and OOO (distributor) based on a contract for exclusive distribution in Russia (excluding Kaliningrad), concluded a new exclusive distribution agreement on 6 July 2005 (hereinafter – the Agreement), whereby the Company undertook to sell and deliver to OOO the ordered baby foods, and whereby the Company undertook to timely pay and resell them.

Besides this common Agreement, the parties systematically entered into supply agreements. Thus, the Company (the seller) and OOO (the buyer) entered into contract No. 01/2001 of 1 July 2001 for the supply of baby foods (hereinafter – the Supply Contract). Later, the Company, OOO SIVMA Baby Foods and closed joint-stock company SIVMA (hereinafter – ZAO SIVMA) entered into a three-party guarantee of 6 November 2006 (which replaced the guarantee of 18 April 2002; hereinafter – the Guarantee), whereby, in paragraphs 1.1, 2.1 and 2.2, ZAO SIVMA agreed, as a guarantor, to be jointly liable with OOO towards the Company for full or partial breach by OOO of its obligations towards the Company under the terms of the Supply Contract.

For an extended period of time, the Company and OOO performed the obligations it had undertaken. However, OOO did not timely pay for the merchandise delivered by the Company between 2 July 2007 and 20 November 2007.

In an email of 15 November 2007, OOO recognized the debt and confirmed the outstanding balance as of 31 October 2007 in the amount of EUR 5,351,254.20. By a letter of 20 December 2007, the Company reminded OOO of the existing debt.

Since the debt was not discharged by OOO, on the basis of the arbitration clauses contained in paragraph 25 of the Agreement, paragraph 8 of the Supply Contract, and paragraph 4.1 of the Guarantee, the Company filed a claim before the International Arbitral Centre of the Austrian Federal Economic Chamber (hereinafter – the Austrian Arbitral Centre) for the recovery from OOO and ZAO SIVMA, jointly, of the principal debt, incurred interest and procedural costs.

By an award of 19 August 2009 rendered in case No. SCH-5042 (hereinafter – the Austrian Arbitral Award), OOO and ZAO SIVMA were ordered to jointly pay the Company within 14 days or, upon expiry of that timeframe, would be forced to pay the sum of EUR 4,271,060.92 along with interest on this sum, from 16 March 2008 to 30 June 2008, EUR 7.124 of annual interest, from 1 July 2008 to 31 December 2008, EUR 7.130 of annual interest, from 1 January 2009 to 30 June 2009, EUR 5.357 of annual interest, and from 1 July 2009, EUR 3.470 of annual interest, as well as procedural costs (composed of the costs of the arbitral proceedings and the expenses of the parties) for the amount of EUR 304,261.35.

Since OOO and ZAO SIVMA did not voluntarily comply with the abovementioned award, the Company filed with the Moscow Arbitrazh Court an application to issue an enforcement writ for the coercive enforcement of the Austrian Arbitral Award.

By a ruling of 25 March 2010, the Moscow Arbitrazh Court refused to grant the Company's application.

The Federal Arbitrazh Court for the Moscow District, by a resolution of 27 May 2010, cancelled the ruling of the Moscow Arbitrazh Court, and referred the case for re-examination to that same Court, because the first instance Court issued the ruling without examining and assessing all the circumstances of the case.

By the ruling of 26 August 2010, the Moscow Arbitrazh Court refused to grant the Company's application.

By its resolution of 13 November 2010, the Federal Arbitrazh Court for the Moscow District upheld the ruling of the first instance Court of 26 August 2010.

The Courts came to the conclusion that the Austrian Arbitral Award was contrary to the public policy of the Russian Federation and that it was rendered in violation of the requirements of Article V(1)(c) of the 1958 United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (hereinafter – the Convention), because the wording included in the Supply Contract did not establish a valid arbitration agreement and was equivocal; the delivery of the merchandise to OOO was done on the basis of the Supply Contract, and not on the basis of the Agreement; ZAO SIVMA is the guarantor of the obligations of OOO arising under the Supply Contract of 11 September 2000; at the moment of the conclusion of the Guarantee, the principal obligation did not exist; the Guarantee is an invalid transaction.

In the complaint submitted to the Highest Arbitrazh Court of the Russian Federation for the supervisory review of the first instance ruling of 26 August 2008 and the cassation resolution of 13 November 2010, the Company requests their cancellation, invoking the violation of the uniformity in the interpretation and application by arbitrazh courts of the rules of law, as well as the violation of its rights and legitimate interests in the sphere of entrepreneurial activities, and requests the rendering of a new judicial act on the recognition and enforcement of the Austrian Arbitral Award.

In its response to the complaint, ZAO SIVMA requests that the challenged judicial acts be upheld as they are in conformity with the applicable legislation.

Having examined the arguments set out in the complaint, the response and the commentaries of the representatives of the parties at the hearing, the Presidium considers that the complaint shall be granted on the following grounds.

According to paragraphs 1 and 2 of Article II of the Convention, each Contracting State shall recognize an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them, including an arbitration clause in the contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams.

In paragraph 8 “Arbitration” of the Supply Contract, OOO and the Company agreed that, in case any disputes or disagreements arise in relation to the present contract, such disputes or disagreements shall be submitted for examination to the arbitration court of the country of the seller.

Later, in paragraph 25 “Jurisdiction” of the Agreement, the parties agreed that all disputes arising out of this contract or related to its violation, termination or nullity shall be finally settled under the Rules of Arbitration and Conciliation of the International Arbitral Centre of the Austrian Federal Economic Chamber in Vienna (Vienna Rules) (hereinafter – the Rules) by three arbitrators appointed in accordance with these Rules.

Paragraph 4.1 of the Guarantee contained analogous provisions on the question of jurisdiction over disputes.

By a letter of the Austrian Arbitral Centre of 11 March 2010, it was confirmed that the International Arbitral Centre of the Austrian Federal Economic Chamber is the only arbitration institution in Austria having jurisdiction over international economic disputes.

On 28 March 2008, guided by the above arbitration clauses, the Company filed with Austrian Arbitral Centre a request for arbitration to recover the debts. The parties appointed the arbitrators.

At a later stage, OOO and ZAO SIVMA filed jurisdictional objections arguing the lack of jurisdiction of the Austrian Arbitral Centre, which was examined by the panel of arbitrators in hearings, on 16 December 2009 and 19 March 2009. Considering the interrelationship of the arbitration clauses in the contracts governing the long-term commercial relations of the partners, the

Austrian Arbitral Centre found that the will of the parties to submit the dispute to the Center's jurisdiction was established and definitive.

The decision of the Austrian Arbitral Centre on its jurisdiction was not challenged by the parties to the dispute before the State courts of the place where the decision was rendered.

Therefore, the initial will of the parties to examine the private dispute in an alternative manner is confirmed by the case materials.

Consequently, the examination of the issues concerning the jurisdiction of the Austrian Arbitral Centre, the validity of the Guarantee and other issues is designed to reexamine the merits of the award to collect the debt rendered by the arbitral tribunal and is inadmissible according to the provisions of the Convention.

Therefore, the first instance and the cassation Courts lacked grounds for refusing to the Company the recognition and enforcement of the Austrian Arbitral Award in the territory of the Russian Federation.

Considering the abovementioned circumstances, the challenged judicial acts violate the uniformity in interpretation and application of the rules of law by the arbitrazh courts, as it is provided for by Article 304(1)(1) and Article 304(1)(2) of the Arbitrazh Procedure Code of the Russian Federation, and shall be cancelled.

Judicial acts of the arbitrazh courts, that have entered into force, with similar factual circumstances, rendered on the grounds of an interpretation of the rules of law which is divergent from that of the present resolution can be re-examined on the grounds of Article 311(3)(5) of the Arbitrazh Procedure Code of the Russian Federation, if there are no other obstacles for that purpose.

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 Moscow Arbitrazh Court of 26 August 2010, rendered in case No. A40-4113/10-25-33, and the resolution of the Federal Arbitrazh Court for the Moscow District of 13 November 2010, rendered in the same case, shall be cancelled.

The application of Company HiPP GmbH & Co. Export KG for recognition and enforcement of the award of the International Arbitral Centre of the Austrian Federal Economic Chamber of 19 August 2009, rendered in case No SCH-5042, shall be granted.

The Moscow Arbitrazh Court shall issue to HiPP GmbH & Co. Export KG an enforcement writ for the coercive enforcement of the abovementioned foreign arbitral award.

Presiding Judge A.A. Ivanov