Unofficial translation

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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. 6547/10

Moscow 5 October 2010

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., Valyavina E.Yu., Vitryansky V.V., Zavyalova T.V., Ivannikova N.P., Makovskaya A.A., Neshatayeva T.N., Pershutov A.G., Sarbash S.V. and Slesarev V.L.;

examined the application of OOO Sokotel for the supervisory review of a ruling of the Arbitrazh Court of Saint-Petersburg and the Leningrad Region of 11 December 2009, rendered in Case No. A56-63115/2009, and a resolution of the Federal Arbitrazh Court for the North-Western District of 9 February 2010, rendered in the same case.

The following representatives were present at the hearing:

for the Applicant – OOO Sokotel (Respondent) – Kabakov A.Yu., Karpukhin I.V., Makarov A.V. and Rudakov D.S.;

for company Living Consulting Group AB (Claimant) – Ryabchenko E.N.

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

Limited liability company Sokos Hotels Saint-Petersburg (client), whose legal successor is OOO Sokotel (hereinafter – OOO), and company AB Living Design (Kingdom of Sweden) entered into contract No. 2006-08 on 10 January 2007 (hereinafter – the Contract), whereby AB Living Design undertook to deliver and assemble internal architectural elements in 278 hotel rooms, and OOO promised to pay the amount of EUR 2,006,958 for services rendered. Paragraph 17.2 of the Contract contained an arbitration clause on the submission of disputes arising from the Contract to the

Arbitration Court for Alternative Dispute Resolution of the Stockholm Chamber of Commerce, Sweden. Under paragraph 17.3 of the Contract, the relations of the parties under the Contract or arising from the Contract are subject to Swedish international law.

In order to eliminate difficulties that had arisen in the performance of the Contract, the parties entered into a settlement agreement on 22 October 2007 (hereinafter – the Settlement Agreement), which provided at paragraph 1.2 that all the provisions of the Contract which were not amended remained in force. Under paragraph 8.2 of the Settlement Agreement, all disputes and disagreements between OOO and AB Living Design, which are directly related to the Agreement, or any other relation, shall be submitted for examination to the Arbitrazh Court of Saint-Petersburg and the Leningrad Region.

On 19 November 2007, company AB Living Design was liquidated. Company Living Design Consulting Group AB (hereinafter – the Company), invoking the fact that it was the legal successor of AB Living Design and that it was performing in its place the obligations under the Contract, filed a request for arbitration against OOO to the Arbitration Institute of the Stockholm Chamber of Commerce (hereinafter – the Arbitration Institute, Arbitral Tribunal) in order to obtain the payment of the debt arising under the Contract, and the payment of a penalty.

The Board of the Arbitration Institute, according to Article 45(4) of the Arbitration Rules of the Arbitration Institute, determined the advance on arbitration costs in the amount of EUR 66,000, payable by the parties in equal parts. The registration fee the Company had paid was included in the Company's fraction. Taking that into account, the Company had to pay by 22 January 2009 EUR 31,125, and OOO – EUR 33,000, to cover the advance on arbitration costs.

OOO having refused to pay the advance, the Company paid it in total and filed a request to obtain an award ordering the reimbursement of the fraction of the advance paid beyond the 50% due.

The Arbitral Tribunal issued a separate award on 4 June 2009, in Case No. 142/2008, compelling OOO to reimburse EUR 33,000 to the Company for the advance on arbitration costs it paid for OOO, as well as an interest of 8 percentage points higher than the reference rate that is occasionally established by the Bank of Sweden incurred from 19 March 2009 to the moment of payment.

Since the arbitral award of 4 June 2009 was not voluntarily performed by OOO, the Company filed an application with the Arbitrazh Court of Saint-Petersburg and the Leningrad Region to recognize and enforce the foreign arbitral award.

OOO objected to the Company's application arguing that the arbitral award cannot be recognized and enforced since it was not rendered on the merits of the case and is not binding on the parties.

By the ruling of the Arbitrazh Court of Saint-Petersburg and the Leningrad Region of 11 December 2009, the Company's application was granted and an enforcement writ was issued.

By the resolution of 9 February 2010, the Federal Arbitrazh Court for the North-Western District upheld the ruling of the first instance Court. The Court of cassation agreed with the conclusions of the first instance Court, according to which neither international law nor the law of the Russian Federation limits the possibility of the recognition and enforcement of foreign arbitral awards to awards rendered on the merits of the dispute.

In the application before the Highest Arbitrazh Court of the Russian Federation for the supervisory review of the ruling of the first instance Court and the resolution of the Court of cassation, OOO requested their cancellation, invoking the violation of the interpretation and application of the rules of law by the Arbitrazh Courts.

In its response, OOO requests that the challenged judicial acts be upheld and considered consistent with the applicable law.

Having examined the arguments set out in the application, the response and the pleadings of the representatives of the parties at the hearing, the Presidium considers that the challenged judicial acts shall be cancelled and the proceedings in the case shall be terminated, on the following grounds.

Under Article 241(1) of the Arbitrazh Procedure Code of the Russian Federation, an arbitrazh court shall recognize and enforce international commercial arbitration awards rendered in the territory of foreign States, in disputes and other cases arising from the conduct of business or other economic activities, if the recognition and enforcement of such awards is provided for by international treaties of the Russian Federation and a federal law.

Under Article 31 of the Law of the Russian Federation No. 5338-1 of 7 July 1993 "On International Commercial Arbitration" (hereinafter – the Law on International Arbitration), an arbitral award refers to an act which contains a conclusion on the satisfaction or dismissal of claims, determines the sum of the arbitration fee and expenses and their apportion between the parties. An arbitral award, unlike other acts rendered by an arbitral tribunal, terminates the examination of the case on the merits, in total or in part.

The arbitral award of 4 June 2009, in arbitration Case No. 142/2008, compelling OOO to reimburse to the Company the EUR 33,000 advance on arbitration costs paid for it, was rendered in the form of a separate award. It is provided in paragraph 17 of the award that the co-payment of the advance for arbitration costs does not prejudice the final apportion of costs between the parties, which shall be determined in the final award.

Under Article V(1)(e) of the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958) (hereinafter – the Convention), and Article 36(1) of the Law on International Commercial Arbitration, the recognition and enforcement of an arbitral award can be refused upon the request of the party against whom it is invoked if that party furnishes to the competent authority where the recognition and enforcement is sought proof that the award has not yet become binding on the parties.

It follows from the case materials that the separate award of 4 June 2009 on the payment of an advance covering arbitration costs is an interlocutory act of the foreign Arbitral Tribunal, which is designed to guarantee to the tribunal the payment by the parties of expenses until the beginning of the assessment of the case on the merits.

Under Article 43 of the Arbitration Rules of the Arbitration Institute, the apportion of the arbitration costs between the parties to the arbitration proceedings is performed by the Board of the Arbitration Institute, in accordance with the schedule of costs. The corresponding amounts shall be indicated in the award on the merits, taking into consideration the outcome of the case and other relevant circumstances. There is no evidence in the case materials that such decision was rendered by this body.

Consequently, the systemic interpretation of the provisions of Article 241(1) of the Arbitrazh Procedure Code of the Russian Federation and Article V(1)(e) of the Convention shows that only arbitral awards related to the procedural examination of the dispute on the merits and rendered at the end of the arbitral proceedings are eligible for enforcement.

Therefore, the abovementioned rules are not applicable to interlocutory awards, including decisions of arbitrators on procedural matters (collection of arbitration costs, determination of jurisdiction, and security measures).

Such decisions cannot be enforced in the territory of the Russian Federation.

An analogous legal view on the inadmissibility of recognition and enforcement of other, non-final, awards and acts of international commercial arbitration tribunals, rendered before or after the assessment of the case on the merits, is provided in paragraph 26 of the Information Letter of the Presidium of the Highest Arbitrazh Court of the Russian Federation No. 78 of 7 July 2004 entitled "Review of Practice of Application of Preliminary Security Measures by the Arbitrazh Courts".

In these circumstances, the challenged judicial acts violate the uniformity in the interpretation and application of the rules of law by the arbitrazh courts, and pursuant to Article 304(1)(1) of the Arbitrazh Procedure Code of the Russian Federation, they are subject to cancellation.

Since the enforcement of interlocutory foreign arbitral awards is not acceptable under the provisions of international treaties and the Arbitrazh Procedure Code of the Russian Federation, the proceedings shall be terminated according to Article 150(1)(1) of the Arbitrazh Procedure Code of the Russian Federation.

The interpretation of the rules of law contained in this resolution of the Presidium of the Highest Arbitrazh Court of the Russian Federation is binding and shall be applied by the arbitrazh courts examining analogous cases.

On the basis of Article 303, Article 305(1)(4) and Article 306 of the Arbitrazh Procedure Code of the Russian Federation, the Presidium of the Highest Arbitrazh Court of the Russian Federation

RESOLVED:

The ruling of the Arbitrazh Court of Saint-Petersburg and the Leningrad region of 11 December 2009, rendered in Case No. A56-63115/2009, and the resolution of the Federal Arbitrazh Court for the North-Western District of 9 February 2010, in the same case, shall be cancelled.

The proceedings in Case No. A56-63115/2009 of the Arbitrazh Court of Saint-Petersburg and the Leningrad Region shall be terminated.

Presiding Judge A.A. Ivanov