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. 13211/09

Moscow 2 February 2010

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: Amosov S.M., Andreyeva T.K., Vyshnyak N.G., Goryacheva, Yu.Yu., Zavyalova T.V., Ivannikova N.P., Isaychev V.N., Kozlova O.A., Makovskaya A.A., Neshatayeva T.N., Pershutov A.G., Slesarev V.L., Sarbash S.V. and Yuhney M.F.;

examined the application of company Lugana Handelsgesellschaft mbH for the supervisory review of the ruling of the Arbitrazh Court of the Ryazan Region of 24 June 2009, rendered in Case No. A54-3028/2008-S10, and the resolution of the Federal Arbitrazh Court for the Central District of 7 September 2009, rendered in the same case.

The following representatives were present at the hearing:

for the Applicant – company Lugana Handelsgesellschaft mbH – Kuzmin S.Yu. and Skrynnik V.Yu.,

for open joint stock company Ryazan Metal Ceramics Instrumentation Plant – Gordeyev A.Yu.

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.

By an award of 11 August 2005, rendered in Case No. DIS-SV-B-454/04, the German Institute of Arbitration (DIS) ordered open joint stock company Ryazan Metal Ceramics Instrumentation Plant (hereinafter – the Entity) to pay to Lugana Handelsgesellschaft mbH (hereinafter – the Company) a fine of USD 463,317.63 as well as interest of 8 percentage points above the reference rate, starting from 23 January 2003. Under this award, the Entity is also obliged to

provide the Company with information regarding all the contracts entered into since the signing of the exclusive distribution agreement of 10 January 2001, including with Ducentum Verwaltungs GmbH and Loury Investment S.A., and to deliver to the Company's address 500,000 reed switches of the desired assortment for the price of USD 0.072 each.

The DIS award of 14 October 2005, rendered in Case No. DIS-SV-B-454/04, ordered the Entity to pay to the Company expenses based on the payment of the arbitration and attorney fees of EUR 81,652.05 made in advance by the Entity, along with interest of 5 percentage points above the reference rate, starting from 15 September 2005.

According to the DIS award of 27 December 2005, rendered in Case No. DIS-SV-B-454/04, on the final settlement of accounts, the Entity shall reimburse to the Company the expenses for the payment of the arbitration and attorney fees of EUR 57,408.71 along with interest of 5 percentage points above the reference rate, starting from 6 December 2005.

Since the mentioned awards were not voluntarily performed by the Entity, the Company filed with the Arbitrazh Court of the Ryazan Region an application requesting their recognition and enforcement.

In its motion to refine the subject matter of the claims, the Company also requests that the Entity be ordered to pay interest on the amounts of the fine and of the arbitration and attorney fees.

By a ruling of 2 February 2009, the Arbitrazh Court of the Ryazan Region granted recognition and enforcement of the foreign arbitral awards for the part ordering to pay the fine, the arbitration and attorney fees, to provide the Company with information on all the contracts which were entered into since the signing of the exclusive distribution agreement of 10 January 2001, and to deliver to the Company's address 500,000 reed switches of the desired assortment for the price of USD 0.072 each.

The other claims were dismissed on the grounds that calculating interest on the amounts of the fine and arbitration costs was contrary to the public policy of the Russian Federation and was not contemplated by the provisions of the civil legislation.

By a resolution of 9 April 2009, the Federal Arbitrazh Court for the Central District annulled the first instance Court's ruling in the part which had granted the Company's claim to recognize and enforce the foreign arbitral awards, and transferred the case for reexamination, in that part, to the Arbitrazh Court of the Ryazan Region.

By the resolution of 24 June 2009, the Arbitrazh Court of the Ryazan Region rejected the Company's claims.

By the resolution of 7 September 2009, the Federal Arbitrazh Court for the Central District upheld the ruling of 24 June 2009.

The Courts established that there was no agreement between the Company and the Entity on the modification of the arbitration clause and the submission of the dispute for examination to the DIS; the Company's participation in the arbitral proceedings and the fact that it did not raise objections concerning the examination of the case by the DIS in Berlin does not constitute evidence of an arbitration agreement concluded between the parties in the required form.

In its application before the Highest Arbitrazh Court of the Russian Federation for the supervisory review of the judicial acts, the Company requests to cancel the ruling of the first instance Court of 24 June 2009, and the resolution of the Court of cassation of 7 September 2009, invoking the violation of the uniformity in the interpretation and application of the legal rules by the arbitrazh

courts. The Company also requests the issuance of a new judicial act on the recognition and enforcement of the foreign arbitral awards.

In its response to the application, the Entity requests that the challenged judicial acts be upheld.

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 Company's application shall be granted.

Under Article V(1)(a) of the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958), the recognition and enforcement of an arbitral award can be refused, upon the demand of the party against whom it is invoked, only if that party furnishes to the court of the place where enforcement is sought proof that the parties to the arbitration clause in the contract, or to the arbitration agreement, were, according to the law applicable to them, under some incapacity, or the said agreement or clause is not valid under the law to which the parties have subjected it, or failing any indication thereon, under the law of the country were the award was made.

As it was established by the Courts, and confirmed by the case materials, an exclusive distribution agreement was signed between the Company and the Entity on 10 January 2001. According to paragraph 7.2 thereof, the parties agreed that all disputes arising in connection to that contract would be submitted for examination to the Arbitration Court of Stockholm.

On 27 July 2004, the Company addressed to the Entity a letter containing a draft request for arbitration and a proposition to change the arbitration clause in all the agreements and contracts signed between them, including the exclusive distribution agreement of 10 January 2001, so that the disputes between the parties would be submitted for examination according to the Rules of the DIS, in Berlin.

In its response of 30 July 2004, the Entity agreed with the proposal to change the arbitration clause and appointed its arbitrator for the dispute.

In addition, it follows from the wording of the DIS arbitral award of 11 August 2005, rendered in Case No. DIS-SV-B-454/04, that the representative of the Entity took part in the arbitration proceedings, submitted an answer to the Company's request for arbitration, and raised objections on the merits of the case. Neither the Company nor its representative raised any objections to the jurisdiction of the arbitral tribunal.

Consequently, the first instance Court and the Court of cassation, refusing to grant recognition and enforcement of the foreign arbitral awards on the grounds of the absence of a properly formalized arbitration agreement, overlooked the fact that the parties' actions confirmed the written agreement on the modification of the *forum* and on the submission of the dispute to the DIS.

Furthermore, the Courts wrongfully came to the conclusion that the foreign arbitral awards are contrary to the public policy of the Russian Federation in that they provide for calculation of interest on the sums of the fine and the arbitration costs, on the grounds of the absence of similar requirements in the legislation of the Russian Federation.

The foreign arbitral tribunal examined the issue of the validity of the exclusive distribution agreement of 10 January 2001 and of the contract No. 061200 of 14 December 2000 under Russian and German law, and established the rights and obligations of the parties, considering all the consequences related to the breach of those obligations, including the obligation to pay a fine in case of breach of the terms of the agreement and of the contract.

Under Article 1(1) of the Civil Code of the Russian Federation, one of the fundamental values of the civil legislation is the recognition of the equality of participants in the relationships it regulates, and the provision of remedies where rights are violated. One of the available remedies is the possibility to obtain compensation for late payment of the awarded sums. The awarded amounts are not excessive.

On the basis of the legal view expressed in the resolution of the Highest Arbitrazh Court of the Russian Federation No. 5243/06 of 19 September 2006, this type of penalty exists in the legal system of the Russian Federation. The collection of such penalty, and the calculation and collection of interest on the amount of the fines cannot be contrary to the public policy of the Russian Federation.

In view of the above, the challenged judicial acts shall be cancelled in accordance with Article 304(1) of the Arbitrazh Procedure Code of the Russian Federation, as they violate the uniformity in the interpretation and application of the legal rules by the arbitrazh courts.

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 rulings of the Arbitrazh Court of the Ryazan Region of 2 February and 24 June 2009, rendered in Case No. A54-3028/2008-S10, and the resolutions of the Federal Arbitrazh Court for the Central District of 9 April and 7 September 2009, rendered in the same case, shall be cancelled.

Lugana Handelsgesellschaft mbH's application to issue an enforcement writ shall be granted.

The Arbitrazh Court of the Ryazan Region shall issue to Lugana Handelsgesellschaft mbH an enforcement writ for coercive enforcement of the DIS awards of 11 August, 14 October and 27 December 2005, rendered in Case No. DIS-SV-B-454/04.

Presiding Judge A.A. Ivanov