Unofficial translation

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HIGHEST ARBITRAZH COURT
OF THE RUSSIAN FEDERATION

RULING
Refusing to Refer the Case to the Presidium of the Highest Arbitrazh Court
of the Russian Federation

No. VAS-6587/11

Moscow 25 July 2011

A panel of judges of the Highest Arbitrazh Court of the Russian Federation, composed of presiding judge T.N. Neshatayeva and judges A.I. Babkin and D.I. Dedov, examined in a hearing an unnumbered complaint of 17 May 2011 submitted by Oil and Natural Gas Corporation (Jeevan Bharti, Tower-II, 124, Indira Chowk, Connaught Place, New Delhi-110001, India; address for correspondence: Nikitsky per., 5, Moscow, 125009, Attn: Volfson S.N.; hereinafter the Company), requesting supervisory review of a ruling of the Arbitrazh Court of the Khabarovsk Region of 13 October 2010, rendered in Case No. A73-12888/2009, and a resolution of the Federal Arbitrazh Court for the Far-East District of 18 February 2011, rendered in the same case following the Company's application for recognition and enforcement of an international arbitral award rendered in Mumbai on 11 April 2009, which ordered joint-stock company Amur Shipyard (Alleya Truda, 1, Komsomolsk-on-Amur, Khabarovsk Region, 681000; hereinafter the Shipyard) to pay 2,343,200,000 rupees in damages within 3 months, and 9% annual interest on the abovementioned sum incurred from 6 December 2011 to the moment of the payment, and in case of non-payment of the abovementioned sum within three months following that date, to pay interest at the annual rate of 18% on the amount owed.

The Court established:

By a ruling of 15 January 2010, the Arbitrazh Court of the Khabarovsk Region refused to grant the application.

By a resolution of 5 April 2010, the Federal Arbitrazh Court for the Far-East District cancelled the ruling of the first instance Court, and the case was referred for reexamination to the same arbitrazh Court.

By a ruling of 13 October 2010, the Arbitrazh Court of the Khabarovsk Region refused to grant the Company's application for recognition and enforcement of the international arbitral award of 11 April 2009.

By a resolution of 18 February 2011, the Federal Arbitrazh Court for the Far-East District upheld the ruling of the first instance Court of 13 October 2010.

In the complaint for supervisory review of the judicial acts, the Company requests their cancellation. It relies on the violation by the arbitrazh Courts of the uniformity in the interpretation and application of rules of law. In particular, the complainant relies on the fact that the Shipyard had been properly notified of the date and place of the arbitral proceedings in India, and also on the fact that the enforcement of the arbitral award is not contrary to the public policy of the Russian Federation.

According to Article 299(4) of the Arbitrazh Procedure Code of the Russian Federation, a case can be referred to the Presidium of the Highest Arbitrazh Court of the Russian Federation for supervisory review of challenged acts upon the existence of grounds provided for in Article 304(1) of the Arbitrazh Procedure Code of the Russian Federation.

According to Article 304(1) of the Arbitrazh Procedure Code of the Russian Federation, the grounds for the modification or cancellation in supervisory proceedings of judicial acts that have entered into force are the following: violation by challenged judicial acts of the uniformity in interpretation and application of rules of law by arbitrazh courts; violation of rights and legal interests of an indefinite group of persons or other public interests; as well as violation of human and citizen's rights and liberties according to the recognized principles and rules of international law and international treaties of the Russian Federation.

The Company did not submit such arguments in its complaint for the reexamination of the challenged judicial acts.

It is established by the Courts that, on 24 March 2005, contract No. MR/WOB/MM/GP/New Vessel/35/2003-2004/EB-2083 (hereinafter – the Contract) was entered into by the Company (client) and the Shipyard (builder) for the building of a seismic research vessel (hereinafter – the Vessel). Paragraph 23 of the Contract provides that all disputes arising between the parties concerning the construction, significance, validity, interpretation of the Contract, as well as its breach, shall be settled by an arbitral tribunal composed of three arbitrators, in the city of Mumbai, India.

On the basis of this arbitration clause, the arbitral tribunal recognized its jurisdiction for the examination of the abovementioned dispute. Since the Shipyard did not appoint an arbitrator after receiving notification of the arbitration, the Company, according to Article 11 of the Indian Law on arbitration and conciliation procedures (the Arbitration and Conciliation Act, No. 26, 1996), filed a claim before the Supreme Court of India, requesting the appointment of an arbitrator. This claim was satisfied, the arbitral tribunal was formed.

Refusing to grant the application for recognition and enforcement of the foreign arbitral award, the lower Courts were guided by the fact that the Company did not submit evidence of the entry into force of the award, as it is required by the Treaty between the Russian Federation and the Republic of India on Legal Assistance and Legal Relations in Civil and Commercial Matters of 2000. Moreover, the Courts considered it necessary for notifications of the arbitral proceedings to be sent according to the procedure provided for by the abovementioned international treaty.

Since international commercial arbitration is an alternative form of settlement of civil law disputes based on a contract, awards cannot enter into legal force. According to Article V(1)(e) of the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958 – hereinafter the Convention), one of the grounds for refusing the issuance of an enforcement writ for the coercive enforcement of an arbitral award is the fact that the award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was rendered. This ground is applied upon request of a party, the latter bearing the burden of proof.

Such proof is not contained in the case materials.

The lower Courts also did not take into account the fact that the abovementioned bilateral agreement on legal assistance and legal relations in civil and commercial matters is designed to establish a mechanism of cooperation only between the State courts and judicial bodies, which have their jurisdiction limited to the territory of their respective State, and is not applicable to arbitration.

The procedure for notifying the parties of the date and venue of the arbitral proceedings is governed by the agreement of the parties, and, with regard to the respect of the fundamental procedural guarantees for participants in arbitration proceedings, by the law of the State of the place of arbitration, and the State of the subsequent enforcement of the award.

Paragraph 15 of the Contract provides that all notifications related to it must be done by mail, telex, or fax, and their reception must be confirmed in writing. In paragraph 1.3 of the Contract, the parties agreed to conduct all correspondence and submit all documents in English. The case materials indicate that the procedure for notification provided for by the Contract was complied with by the Company.

Therefore, the conclusion of the Courts that the non-respect of the official procedure for notifying the Shipyard of the date and venue of the arbitral proceedings is a ground for refusing the recognition and enforcement of an arbitral award is not justified.

Meanwhile, according to Article V(1)(c) of the Convention, the recognition and enforcement of an arbitral award can be refused, upon the request of the party against which it is invoked only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that the said arbitral award has been rendered in a dispute not provided for, or that does not meet the conditions of, the arbitration agreement or the arbitration clause in the contract, or that contains decisions on matters beyond the scope of the arbitration clause or the arbitration agreement in the contract.

According to the arbitral award, the Shipyard shall pay, *inter alia*, damages for the improper performance of the obligations under the Contract, for actual loss suffered in the form of travel expenses for the Company's employees, expenses for the hiring of consultants, loss related to the necessity to lease analogous sea vessels from third party operators.

According to the arbitration clause, contained in paragraph 23 of the Contract, the parties limited the jurisdiction of the arbitral tribunal to the examination of disputes related to the interpretation, the validity of the Contract, and its breach. However, the composition of the damages awarded by the arbitral tribunal suggests that they are not covered by the provisions of the Contract. The damages the Shipyard is ordered to pay in relation to the necessity to lease analogous sea vessels from third party operators, within nine months following the date of the termination of the Contract, for the amount of 1,809,000,000 Indian rupees, which corresponds to almost half of the price of the Vessel, cannot constitute a measure of liability under the shipbuilding contract and is not covered by the arbitration clause.

Furthermore, the lower Courts came to the right conclusion that the damage suffered by the Company was compensated by the reception of sums under the USD 8,990,000 bank guarantee provided by the Shipyard in accordance with the terms of the Contract. The Courts gave a correct assessment to that fact, combined with the analysis of paragraph 13 of the Contract, in which the parties agreed as a measure of liability for breach of contractual obligations a predetermined penalty of 3 percent of the Contract price for each month of delay in the performance, provided that the amount of such penalty shall not exceed 10 percent of the total price of the Contract.

On this basis, the lower Courts came to the right conclusion on the presence of grounds stated at Article V(1)(c) of the Convention for refusing the recognition and enforcement of the foreign arbitral award.

Under such circumstances, the panel of judges of the Highest Arbitrazh Court of the Russian Federation does not find grounds, provided for in Article 304(1) of the Arbitrazh Procedure Code of the Russian Federation, under which a case can be referred to the Presidium of the Highest Arbitrazh Court of the Russian Federation, for supervisory review of challenged judicial acts.

Considering the above, and on the basis of Articles 299, 301 and 304 of the Arbitrazh Procedure Code of the Russian Federation, the Court

RULED:

The referral of Case No. A73-12888/2009 of the Arbitrazh Court of the Khabarovsk Region to the Presidium of the Highest Arbitrazh Court of the Russian Federation for supervisory review of the ruling of the Arbitrazh Court of the Khabarovsk Region of 13 October 2010, and of the resolution of the Federal Arbitrazh Court for the Far-East District of 18 February 2012, rendered in the abovementioned case, shall be refused.

Presiding Judge T.N. Neshatayeva

Judge A.I. Babkin

Judge D.I. Dedov