Unofficial translation

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FEDERAL ARBITRAZH COURT
FOR THE MOSCOW DISTRICT

RESOLUTION
No. KG-A40/13476-10

Moscow
12 November 2010

Case No. A40-51459/10-63-440

Operative part of the resolution announced on 10 November 2010
Full text of the resolution prepared on 12 November 2010

The Federal Arbitrazh Court for the Moscow District
composed of
Presiding Judge Plyushkov D.I.,
Judges: Malyushin A.A., Fedoseyeva T.V.;
being present at the hearing:
for the claimant, not present, notified;
for the respondent, Sokolov T.N., power of attorney No. 3-3053 of 19 July 2010;
having examined at the hearing of 10 November 2010
the cassation complaint of OOO Euro-Import Group
against a ruling of the Moscow Arbitrazh Court
of 6 August 2010
handed down by Judge Ishanova T.N.,
following the application of OOO Sandora
against OOO Euro-Import Group
for the recognition and enforcement of an award of the International Commercial Arbitration Court at the Ukrainian Chamber of Commerce and Industry of 12 February 2010, rendered in Case No. AS 193r/2009

ESTABLISHED:

Limited Liability Company Sandora (hereinafter – OOO Sandora, the Creditor) requested the Moscow Arbitrazh Court to recognize and enforce the award of the International Commercial Arbitration Court at the Ukrainian Chamber of Commerce and Industry of 12 February 2010, rendered in Case No. AS 193r/2009 (hereinafter – the ICCA).

By the ruling of the Moscow Arbitrazh Court of 6 August 2010, the application was granted, and the ICCA award of 12 February 2010, rendered in Case No. AS 193r/2009, in the dispute between OOO Sandora and OOO Euro-Import Group (hereinafter – the Debtor), was granted recognition and enforcement.

The Court based its decision on the absence of grounds for the refusal of recognition and enforcement of a foreign arbitral provided for by Article V of the Convention on the Recognition and

Enforcement of Foreign Arbitral Awards (New York, 10 June 1958) and Article 244 of the Arbitrazh Procedure Code of the Russian Federation.

Disagreeing with the ruling, OOO Euro-Import Group filed a cassation complaint with the Federal Arbitrazh Court for the Moscow District requesting the cancellation of the abovementioned judicial act on the grounds that it incorrectly applied the rules of procedural law and that there is inconsistency between the conclusions of the Court and the circumstances of the case. The complainant points out that it was not properly notified of the time and place of the proceedings, either by the Moscow Arbitrazh Court, or by the ICCA, and also relies on the modification of its registered address.

In response to the cassation complaint, OOO Sandora argues that the ruling is well grounded, that it should be upheld, and that the cassation hearing should take place without the participation of a Sandora's representative.

At the hearing, the representative of the complainant maintained its claims and arguments contained in the cassation complaint. OOO Sandora was properly notified of the time and place of the Court's hearing, it did not ensure the presence of its representative at the Court.

Having examined the arguments of the cassation complaint and the case materials, having heard the representative of the Debtor, and having verified, in accordance with Articles 286 and 287 of the Arbitrazh Procedure Code of the Russian Federation, the correctness of the application by the Court of the rules of substantive and procedural law, as well as the conformity of the conclusions contained in the challenged judicial act with the established circumstances and the evidence available in the case, the Court of cassation does not find any grounds for granting the cassation complaint.

The first instance Court established that the ICCA, composed of the chairman Vinokurova L.F., and arbitrators Patschenko E.G. and Kostin A.A., rendered the award of 12 February 2010, in Case No. AS 193r/2009, ordering OOO Euro-Import Group to pay to OOO Sandora (Ukraine), immediately after receiving the award, the sum of USD 656,081.12 – the price of the delivered merchandise, USD 82,796.85 – the penalty for the payment delay, and USD 19,416.74 as compensation for the payment of the arbitration fee.

According to Article 244 of the Arbitrazh Procedure Code of the Russian Federation, an arbitrazh court shall refuse recognition and enforcement of a foreign court decision, fully or partially, in cases where: the award has not yet entered into force according to the law of the State in the territory of which it was rendered; the party against which enforcement is sought was not timely and properly notified of the time and place of the examination of the case or if it could not present its case before the court for other reasons; the examination of the case, in accordance with international treaties to which the Russian Federation is a party, or in accordance with federal laws, falls within the exclusive jurisdiction of the courts of the Russian Federation; there exists a decision handed down by a Russian court, which has entered into force, on the same subject-matter, between the same parties, and on the same grounds; the case is being examined by a Russian court between the same parties, on the same subject-matter, and on the same grounds, in proceedings which were initiated before the initiation of the proceedings in the foreign court, or the court in the Russian Federation first accepted a claim filed in the same case, between the same parties, on the same subject-matter and on the same grounds; the time limit for the coercive enforcement of the foreign court decision has expired, and this time limit has not been reset by an arbitrazh court; the enforcement of the foreign court decision would be contrary to the public policy of the Russian Federation. Furthermore, an arbitrazh court shall refuse the recognition and enforcement of a foreign arbitral award, fully or partially, on the grounds for the refusal to issue an enforcement writ for the coercive enforcement of an award of an international commercial arbitral tribunal, provided for by paragraph 7 of part 1 of the same Article and Article 239(4) of the same Code, unless otherwise provided for by an international treaty of the Russian Federation.

According to Article III of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 10 June 1958), that was acceded to by Russia and the Ukraine, each Contracting State shall recognize arbitral awards as binding, and enforce them in accordance with the rules of procedure of the territory where recognition and enforcement is sought, under the conditions laid down in the following articles. There shall not be imposed substantially more onerous conditions or higher fees or charges on the recognition or enforcement of arbitral awards to which this Convention applies, than are imposed on the recognition or enforcement of domestic arbitral awards.

According to Article V of the Convention, recognition and enforcement of a foreign arbitral award may be refused, at the request of the party against whom it is invoked only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that: the parties to the agreement referred to in Article II were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made; or the party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case; or the award deals with a difference not contemplated by or not falling within the terms of the arbitration agreement or the arbitration clause, or it contains decisions on matters beyond the scope of the arbitration agreement or the arbitration clause in the contract, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced; or the composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or 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 made. In addition, recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that: the subject matter of the dispute is not capable of settlement by arbitration under the law of that country; or the recognition or enforcement of the award would be contrary to the public policy of that country.

Considering the above, and taking into account the particular circumstances of the case, the Court came to the right conclusion that there are no grounds for the refusal of recognition and enforcement of the ICCA award of 12 February 2010, rendered in Case No. AS 193r/2009.

The complainant's argument based on the allegation that it was not properly notified of the time and place of the hearing by the ICCA cannot stand as a ground for the cancellation of the ruling, since it follows from the award of 12 February 2010, rendered in Case No. AS 193r/2009, that a representative of OOO Euro-Import Group, Rogovsky P.V., took part in the arbitration hearing.

The reference of the complainant to the fact that it was not properly notified of the time and place of the hearing by the Moscow Arbitrazh Court at its new address: Moscow, Kotlyakovskaya, 7, cannot be used as a ground for a judicial act.

It follows from the case materials that the Debtor knew about the hearing scheduled for 31 May 2010. This is confirmed by the submissions of the Debtor (case materials, p. 45). Nevertheless, the Debtor did not ensure the presence of a representative at the hearing.

By a ruling of the Moscow Arbitrazh Court of 31 May 2010, the case was scheduled for hearing on 1 July 2010. By a ruling of 1 July 2010, the hearing was postponed to 27 July 2010, subsequently the case was adjourned till 2 August 2010 due to the absence of evidence of proper notification of the Debtor and in order to adopt measures for the notification of the Debtor of the time and place of the hearing.

According to Article 122 of the Arbitrazh Procedure Code of the Russian Federation, a copy of the judicial act shall be sent by an arbitrazh court by registered mail with a confirmation receipt or

by delivery to the addressee against signed receipt at the arbitrazh court's premises, or at the place where the addressee is located, and in cases of emergency, by telex, telegram, facsimile transmission, or email, or using other means of communication.

According to Article 123(4)(3) of the Arbitrazh Procedure Code of the Russian Federation, upon failure to serve a copy of the judicial act to the addressee, because of its absence at the indicated address, the parties are deemed to have been properly notified by an arbitrazh court. The post office informed the arbitrazh Court of that issue, indicating the source of that information.

It follows from the telegrams present in the case materials (pp. 75-79) that OOO Euro-Import Group was informed by the Court on the adjournment till 2 August 2010 at the following address: Moscow, Kotlyakovskaya, 7. It follows from telegram No. 186/81604 33 29/7 1656 (case materials, p. 77), sent to the abovementioned address, that the filed telegram was not delivered, the company's registered address being unknown.

Under these circumstances, the first instance Court came to the reasonable conclusion that the Debtor, with respect to Article 123(4)(3) of the Arbitrazh Procedure Code of the Russian Federation, shall be deemed notified and the absence of a representative of the Debtor shall not prevent the examination of OOO Sandora's application.

The Court fully and comprehensively examined the case materials, assessed them correctly and handed down a lawful decision.

The Court correctly applied the substantive and procedural rules of law.

Under Article 288 of the Arbitrazh Procedure Code, there are no grounds for the cancellation of the judicial act on the basis of the arguments in the complaint.

On the basis of Articles 284 and 286-289 of the Arbitrazh Procedure Code of the Russian Federation

RESOLVED:

The ruling of the Moscow Arbitrazh Court of 6 August 2010, rendered in Case No. A40-51459/10-63-440, shall be upheld and the cassation complaint shall not be granted.

Presiding Judge D.I. Plyushkov

Judges T.V. Fedoseyeva

A.A. Malyushin