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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. 9899/09

Moscow 13 September 2011

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., Vitryansky V.V., Valyavina E.Yu., Goryacheva Yu.Yu., Ivannikova N.P., Kozlova O.A., Makovskaya A.A., Novoselova L.A., Pershutov A.G., Sarbash S.V., Slesarev V.L., Yukhney M.F.;

examined the application of Stena RoRo AB (Sweden) for the supervisory review of the ruling of the Arbitrazh Court of Saint Petersburg and the Leningrad Region of 20 February 2009, rendered in Case No. A56-60007/2008, and the resolution of the Federal Arbitrazh Court for the North-Western District of 24 April 2009, rendered in the same case.

The following representatives were present at the hearing:

for the applicant – company Stena RoRo AB (creditor) – Erigo L.G., Selezneva I.E.;

for OAO Baltiysky Zavod (debtor) – Grigoryev A.V.

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

By an award of 24 September 2008, rendered in Case No. V053-56/2007 (hereinafter – the Arbitral Award), the Arbitration Institute of the Stockholm Chamber of Commerce ordered OAO Baltiysky Zavod (hereinafter – the Factory) to pay to Stena RoRo AB (hereinafter – the Company) EUR 20,000,000 in damages, EUR 209,364.80 for compensation of arbitration costs, and SEK 1,071,280 and EUR 800 for the Company's expenses in the arbitration with incurred interest on these sums in relation to the breach of the ship-building contracts Nos. 443 and 444 of 7 July 2005 (hereinafter – the Ship-Building Contracts), and the option agreement of 7 July 2007 (hereinafter – the Option Agreement).

Since the Factory did not voluntarily comply with the Arbitral Award, the Company filed with the Arbitrazh Court of Saint Petersburg and the Leningrad Region an application for the recognition and enforcement of the Arbitral Award.

By the ruling of 20 February 2009 (taking into account the ruling on correction of errors of 4 April 2009), the Arbitrazh Court of Saint Petersburg and the Leningrad Region refused the application.

The Court was guided by the fact that the enforcement of the Arbitral Award against the Factory, which is a strategic enterprise for which the State has special management rights, could lead to the Factory's bankruptcy and be detrimental to the sovereignty and security of the State and is therefore contrary to the public policy of the Russian Federation.

The second ground for refusing to grant the application was the conclusion that the dispute settled in the arbitration was not covered by an arbitration clause. The Court ruled that the arbitration clause was contained in contracts that did not enter into force because the decision of the board of directors of the Company on the approval of the transaction was not vested in the form of minutes. Such minutes were not communicated to the Factory; thus, the fundamental principle of Russian law based on the recognition of equality of participants in a civil law relationship, inscribed in Article 1 of the Civil Code of the Russian Federation (hereinafter – the Civil Code), has been violated.

By the resolution of 24 April 2009, the Federal Arbitrazh Court for the North-Western District upheld the ruling of 20 February 2009. It considered that there was a violation of the foundations of the legal order because of the violation of the fundamental principles of Russian law, fundamental values of civil law, and in particular the principle of contractual freedom, and equality of parties, as well as rules on liability. The Court of cassation indicated once again that the minutes of the meeting of the Company's board of directors were absent and were not communicated to the Factory. Consequently, the Ship-Building Contracts did not enter into force, and the Factory cannot be held liable for their non-performance.

The Court of cassation recognized the wrongfulness of the conclusions of the first instance Court on the absence of conclusion of an arbitration agreement between the Company and the Factory and on that the bankruptcy of the Factory following the enforcement of the Arbitral Award would be contrary to the public policy and would cause damage to the State.

In the application filed before the Highest Arbitrazh Court of the Russian Federation concerning the supervisory review of the mentioned judicial acts, the Company requests their cancellation. It invokes the violation of the uniformity in the interpretation and application of the rules of law by the arbitrazh courts. In the Company's opinion, in violation of the United Nations Convention on Recognition and Enforcement of Foreign Arbitral Awards (hereinafter – the UN Convention of 10 June 1958) and Article 243(4) of the Arbitrazh Procedure Code of the Russian Federation, the Arbitrazh Courts reexamined the foreign Arbitral Award on the merits on the basis of the provisions of the Russian legislation, which were not applicable to the legal relationship between the parties.

In its answer, the Factory requests that the mentioned judicial acts be upheld as consistent with the legislation in force.

These supervisory proceedings were suspended following the Factory's challenge of the Arbitral Award before the competent Swedish State Court (Svea Appeal Court) and were reopened on the Company's request as soon as the circumstances grounding the suspension of the proceedings were lifted.

Having examined the arguments contained in the application, in the answer thereto, and in the commentaries of the representatives of the parties at the hearing, the Presidium considers that the application shall be granted for the following reasons.

As it is established by the Courts, according to the terms of the Ship-Building Contracts, the Factory promised to design, build, float out, equip, fit-out, deliver and sell to the Company two ROPAX vessels, with 4020 linear meters long parking lanes.

In addition, on 7 July 2005, the Option Agreement was entered into between the same parties whereby the Factory undertook to build two more vessels with the same characteristics, which would come into effect under the condition that the mentioned contracts enter into force.

The contracts, as well as the Option Agreement referring to them on this subject, provided that any disputes arising from them or related to them should be settled by the Arbitration Institute of the Stockholm Chamber of Commerce, according to its Rules.

The contracts were to enter into force upon the fulfillment of a range of conditions including their approval by the board of directors of the Factory and the board of directors of the Company.

The Company considered that the conditions to which the parties subjected the entry into force of the Ship-Building Contracts were fulfilled and, upon the refusal of the Factory to perform its obligations to deliver the vessels, it had recourse to arbitration to collect damages.

Examining the dispute between the Company and the Factory, the arbitral tribunal invoked, in particular, the fact that the contracts did not enter into force because they were not approved by the board of directors of the Company in the form of minutes, which were neither formalized nor communicated to the Factory.

The arbitral tribunal specifically addressed this issue and found that the contracts were entered into.

It established that the Ship-Building Contracts and the Option Agreement are subject to Swedish law (paragraphs 11.6 and 11.9 of the Arbitral Award).

On the issue of whether the contracts were approved, the Company and the Factory exchanged electronic correspondence through a third entity – an intermediary.

In these letters, the Company repeatedly confirmed the future approval of the transaction by its board of directors and, at the same time, informed of its new ownership structure (paragraphs 11.16 and 11.17 of the Arbitral Award).

Relevant explanations were given at the meeting between the management of the Company and the Factory on 17 August 2005 in Saint Petersburg, which had been planned for the official signature of the agreements on the contracts and for the confirmation of the entry into force of the contracts. At this meeting, the managing director of the Company presented, signed, and gave to the management of the Factory a letter setting out as follows: “The board of directors of the company Stena RoRo AB hereby confirms the approval of Ship-Building Contracts Nos. 443 and 444 of 7 July 2005, Göteborg, 17 August 2005” (paragraph 11.19 of the Arbitral Award).

As it was established by the arbitral tribunal, the Factory accepted the letter without expressing any remarks and did not request to review a copy of any minutes of the meeting of the Company’s board of directors (paragraphs 11.20 and 11.22 of the Arbitral Award). Following that event, additional agreements were signed during the meeting, and, for that purpose, both parties acted as if the contracts had entered into force. In particular, the Factory issued a press-release on the conclusion of the contracts, approved the members of the Company’s project group, participated in all

meetings and correspondence concerning the contracts, proposed the increase of the price for the vessel, and it is only on 23 June 2006 that it informed the Company of the absence of legal obligations to perform the contracts (paragraphs 11.23 – 11.30 of the Arbitral Award).

Under these circumstances, the arbitral tribunal came to the conclusion that the meeting of the Company's board of directors took place, that the board approved the contracts, and that the confirmation of that approval in the form of a letter, given on 17 August 2005 at the meeting in Saint Petersburg, was sufficient, since it was accepted by the Factory (paragraph 14.4 and 14.8 of the Arbitral Award).

Therefore, the arbitral tribunal, on the basis of the Swedish substantive law applicable to their relationship, chosen by the parties to the contracts, ruled that the entry into force of the mentioned contracts and the Option Agreement depended on their approval by the boards of directors of the Company and of the Factory, but not on the form of this approval. The Company's board of directors had approved the contracts, and the approval was properly communicated to the Factory. The contracts entered into force, they were not performed by the Factory, and the Company is entitled to compensation for loss suffered because of the breach.

According to Article V(1) of the UN Convention of 10 June 1958, the recognition and enforcement of a foreign arbitral award may be refused upon the request of the party against which it is invoked if that party furnishes to the competent authority where the recognition and enforcement is sought, *inter alia*, proof that the arbitration agreement is not valid under the law to which the parties subjected it or, failing any indication thereon, under the law of the country in which the award was made.

According to Article 243(4) of the Arbitrazh Procedure Code of the Russian Federation, when examining a case, an arbitrazh court does not have the right to reexamine a foreign arbitral award on the merits.

In the case in hand, the issue of whether the Company's board of directors complied with the procedure for approving the contracts was settled by the arbitral tribunal sitting in Stockholm, Sweden, on the basis of the substantive and procedural law of that Country, to which the parties to the contracts subjected their legal relationship.

Therefore, the Arbitrazh Court lacked legal grounds for the reexamination of the factual circumstances established by the arbitral tribunal and for the assessment of these circumstances by applying provisions of the Russian legislation.

The Swedish Law "On Arbitration" of 1999 (sfs (1) 1999:116), applicable to arbitral proceedings taking place in Sweden, independently from the existence or not, in the dispute, of an international element, admits the setting-aside of an arbitral award (Articles 33, 34 and 46).

Nevertheless, the Svea Appeal Court, Stockholm, by a decision of 20 May 2010, dismissed the Factory's application for the setting-aside of the Arbitral Award, recognizing that the arguments on the non-approval of the contracts by the board of directors and that the absence of connection between that fact and the contractual obligations between the Company and the Factory were not grounded.

According to Article V(2) of the UN Convention of 10 June 1958, the recognition and enforcement of a foreign arbitral award may be refused, if the competent authority in the country where recognition and enforcement is sought, finds that the recognition and enforcement of that award would be contrary to the public policy of that country.

Pursuant to the resolution of the Court of cassation, it is on the basis of the absence of minutes of the board of directors on the approval of the contracts that the Court of cassation grounded its

conclusion that the enforcement of the Arbitral Award would be contrary to the public policy of the Russian Federation, because of the violation of the principles of contractual freedom and equality of the parties to a contract.

Meanwhile, the requirements concerning the procedure and the formalization of the approval of major deals by legal entities, when applicable, are determined by the law of the country under the law of which the legal entities are established. Discordance between similar rules, established by the laws of different countries, does not violate the principle of equality of the parties to an international commercial contract, and does not provide grounds for evaluating the lawfulness of the actions of one of the parties to the contract on the basis of legal requirements to which that other party is subjected according to its own country's law.

The Russian Factory, according to the law of the Russian Federation, had to formalize, and actually formalized, in minutes, the approval of its board of directors for the conclusion of the contracts. However, this does not imply that, solely because of the Factory's action in light of the requirements of Russian law, and because of the necessity to respect the civil law relationship principle of party equality, the Swedish company had a counter-obligation to formalize an analogous approval of its board of directors in the form of minutes of the board's meeting.

The rules contained in the Russian law on the formalization of decisions of corporate bodies of Russian legal entities do not apply to Swedish companies. By entering into contracts containing terms subjecting the contract to the Swedish substantive law, the Factory took the risk that the corresponding legal system could contain provisions differing from those of Russian law regulating analogous relationships. Additionally, the procedure for approving the transaction, on the breach of which the Factory grounds its claims, is designed to protect the interests of the shareholders of the Swedish company and does not concern the violation of the Factory's rights.

The arbitral tribunal ordered the Factory to pay to the Company EUR 5 million in damages for the breach of its contractual obligations for each of the four non-built vessels.

The arbitral tribunal calculated the damages based on the provisions of the Swedish law applicable to the parties' relationship, taking into account the terms of the contracts and the Option Agreement, which provide for the possibility to recover damages in the form of a predetermined sum (Article XI.B 2(b) of the Ship-Building Contracts (paragraph 6.3 of the Arbitral Award)). Concurrently, the arbitral tribunal considered the damages as the agreed penalty (paragraph 16.27 of the Arbitral Award). By their legal nature, the damages are analogous to a penalty under Russian civil law.

Pursuant to Article 393(1) of the Civil Code, the debtor is obliged to compensate the creditor for loss suffered because of the non-performance or improper performance of its obligations.

According to Article 330(1) of the Civil Code, is considered as a penalty (fine, interest) fixed by a contract or a law, a monetary sum which the debtor is obliged to pay in case of non-performance or improper performance of its obligations. When requesting the payment of a penalty, the creditor is not obliged to provide evidence of loss suffered by him.

Therefore, both penalty and damages are provided for by the law, and fall within the scope of the legal system of the Russian Federation. For that reason, the application of these measures of liability cannot in itself be contrary to the public policy of the Russian Federation, as it is indicated in the resolution of the Presidium of the Highest Arbitrazh Court of the Russian Federation No. 5243/06 of 19 September 2006.

According to Article 1(1) of the Civil Code, the civil legislation of the Russian Federation is based on the recognition of the equality of participants in civil law relationships, the inviolability of property, contractual freedom, the inadmissibility of arbitrary interference with private business, the

necessity of free exercise of civil rights, the provision of remedies for violation of rights, and their judicial protection.

In the case in hand, the predetermined damages for non-performance of the contract, of EUR 5 million for each of the four non-built vessels, were provided for by the contracts and by the Option Agreement between the Company and the Factory, which they privately entered into as equal parties exercising their free will, and which were approved by the relevant corporate bodies of the legal entities.

The Factory violated its obligations, and the Company took measures to restore its rights by having recourse to judicial protection through arbitration, as it was determined by the free will of the parties.

There is no evidence in the case materials indicating otherwise.

Moreover, in its submission sent to the arbitral tribunal, the Factory agreed on the fact that "if the arbitral tribunal assesses the Ship-Building Contracts and the Option Agreement as having entered into force and due for performance, according to their terms, the factory agrees to pay a penalty of EUR 20 million, that is, a sum equivalent to the 'evaluated' damages in accordance with Article XI.B 2(b) of the Ship-Building Contracts, including the Option Agreement" (paragraph 6.3 of the Arbitral Award). Therefore, the Factory itself recognized that the amount it was ordered to pay by the Arbitral Award was proportionate to the consequences of the non-performance.

Under these circumstances, the courts did not have grounds to consider that the recognition and enforcement of the Arbitral Award would 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)(1) of the Arbitrazh Procedure Code of the Russian Federation, as they violate the uniformity in the interpretation and application of the rules of law by the arbitrazh courts.

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 differ from that of the present resolution, can be reexamined on the grounds of Article 311(3)(5) of the Arbitrazh Procedure Code of the Russian Federation, if there are no other obstacles thereto.

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 Arbitrazh Court of the Russian Federation

RESOLVED:

The ruling of the Arbitrazh Court of Saint Petersburg and the Leningrad Region of 10 February 2009, rendered in Case No. A56-60007/2008, and the resolution of the Federal Arbitrazh Court for the North-Western District of 24 April 2009, rendered in the same case, shall be cancelled.

The arbitral award of the Arbitration Institute of the Stockholm Chamber of Commerce of 24 September 2008, rendered in Case No. V054-56/2007, shall be recognized and enforced.

The Arbitrazh Court of Saint Petersburg and the Leningrad Region shall issue an enforcement writ.

Presiding Judge A.A. Ivanov