Unofficial translation

COURT OF APPEAL OF DNIPROPETROVSK REGION

22ц-4091/11 Presiding Ist instance court judge: O. B. Podorets

Reporting Judge – O. P. Varenko

ORDER

IN THE NAME OF UKRAINE

On 28 March 2011, The Court of Appeal of Dnipropetrovsk Region sitting as a panel of Civil Chamber judges composed of:

Presiding Judge O. P. Varenko,

Judges E. I. Hryhorchenko, O. V. Lachenkova,

and the Secretary O. I. Koliada

on consideration, at an open hearing held in Dnipropetrovsk, of the civil case

based on the appeal filed by HEKRO PET LTD, a Limited Liability Company,

against the order of 11 January 2011 issued by the Amur-Nyzhnodniprovskyi District Court of Dnipropetrovsk City,

in the case based on the application of VA Intertrading Aktiengesellschaft (Austria) for the recognition and enforcement of a foreign arbitral award,

E S T A B L I S H E D:

In June 2010, VA Intertrading Aktiengesellschaft (Austria) filed an application for the recognition and enforcement of a foreign arbitral award issued, on 25 March 2010, by Mr. Jernej Sekolec, a sole arbitrator under the auspices of the International Arbitration Centre of the Austrian Federal Economic Chamber in case No. SCH-5100. The award granted VA Intertrading Aktiengesellschaft (Austria) recovery of a debt owned by HEKRO PET LTD, a Limited Liability Company. Since the debtor has failed to comply with the mentioned award, the court was requested to issue an order for the recognition and enforcement of the award dated 25 March 2010 in favour of VA Intertrading Aktiengesellschaft (Austria) against HEKRO PET LTD, a Limited Liability Company.

The order of the Amur-Nyzhnodniprovskyi District Court of Dnipropetrovsk City dated 11 January 2011 granted the application of VA Intertrading Aktiengesellschaft (Austria). The court granted the recognition and enforcement of the arbitral award dated 25 March 2010 issued by Mr. Jernej Sekolec, the sole arbitrator sitting under the auspices of the International Arbitration Centre of the Austrian Federal Economic Chamber in case No. SCH-5100 relating to the claim of VA Intertrading Aktiengesellschaft (Austria) against HEKRO PET LTD, a Limited Liability Company, according to which HEKRO PET LTD, a Limited Liability Company, was ordered to pay the following amounts to VA Intertrading Aktiengesellschaft (Austria): the amount of the price of the goods supplied under Contract No. 349.249 dated 15 December 2008 and Contract No. 349.294

dated 15 January 2009; the amount of interest at the rate of 12% assessed on USD 764,400.00 from 17 March 2009 to 6 April 2009; the amount of interest at the rate of 12% assessed on USD 1,706,880.00 from 7 April 2009 to 25 March 2010; 12% assessed on USD 1,706,880.00 from 26 March 2010 to the date of payment; the arbitration costs, totalling UAH 15,699,342 (Fifteen Million Six Hundred and Ninety-nine Thousand Three Hundred and Forty-two Hryvnias); UAH 60 of the court fees has been collected from HEKRO PET LTD, a Limited Liability Company, in favour of VA Intertrading Aktiengesellschaft (Austria).

On appeal, HEKRO PET LTD submits that the court of first instance has incorrectly applied provisions of substantive law and violated provisions of procedural law, and therefore requests that the court judgment be set aside and a new one be issued dismissing the application for the recognition and enforcement of the foreign arbitral award in favour of VA Intertrading Aktiengesellschaft (Austria).

Having verified the legality and reasonableness of the court judgment within the scope of the appeal and the asserted claims, the panel of judges finds that the appeal of HEKRO PET LTD should be granted, the court order should be set aside, and a new order should be issued pursuant to Article 307 of the Ukrainian Code of Civil Procedure on the following grounds.

It can be implied from the order that in granting the application of VA Intertrading Aktiengesellschaft (Austria) for the recognition and enforcement of the foreign arbitral award, the court of first instance presumed that the arbitral award No. SCH-5100 dated 25 March 2010 in favour of VA Intertrading Aktiengesellschaft (Austria) against HEKRO PET LTD, a Limited Liability Company, granting recovery of the debt was final and binding, the parties concerned by the award were duly notified of the time and place of the case hearing, and the applicant submitted, along with the application, all the documents required by the procedural laws.

However, such court findings and the order issued in the case are unacceptable as they are inconsistent with the actual circumstances of the case and with the provisions of the substantive and procedural law.

The court has established that under the arbitral award dated 25 March 2010 issued by Mr. Jernej Sekolec, the sole arbitrator sitting under the auspices of the International Arbitration Centre of the Austrian Federal Economic Chamber in case No. SCH-5100 in VA Intertrading Aktiengesellschaft (Austria) against HEKRO PET LTD, a Limited Liability Company, the latter must pay the following amounts to VA Intertrading Aktiengesellschaft (Austria): the amount of USD 1,706,880.00 as the price of the goods supplied under the Contract No. 349.249 dated 15 December 2008 and the Contract No. 349.294 dated 15 January 2009; USD 5,277.50 as interest at the rate of 12% assessed on USD 764,400.00 from 17 March 2009 to 6 April 2009; USD 198,091.61 as interest at the rate of 12% assessed on USD 1,706,880.00 from 7 April 2009 to 25 March 2010, 12% assessed on USD 1,706,880.00 from 26 March 2010 to the date of payment; the arbitration costs of EUR 48,394.15 (file pages 7-44).

Article 35 of the Law of Ukraine on International Commercial Arbitration provides that an award, regardless of the country in which such award was made, shall be recognised as binding and, upon written application, filed with a competent court, shall be enforced subject to this Article and Article 36. Article 36 of the said Law and Article 396 of the Ukrainian Code of Civil Procedure set forth the grounds for the recognition or enforcement of an arbitral award, in particular, if 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 reasonably unable to present his case; or the award has not yet become binding on the parties or has been set aside or suspended by a court of the country in which, or under the law of which, that award was made.

Subject to Article V(1)(b) of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 10 June 1958, which was ratified by Ukraine on 10 October 1960 and became effective for Ukraine on 8 January 1961 (hereinafter, the Convention), the recognition and enforcement of the 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 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.

Clause 15 of Resolution No. 12 of the Plenary Session of the Supreme Court of Ukraine on the Court Practice of Hearing Applications for the Recognition and Enforcement of Foreign Court Judgments and Arbitral Awards and the Setting Aside of the Awards Issued in Ukraine in the Procedure of International Commercial Arbitration, dated 24 December 1999, explains that where a document submitted in confirmation of a party's summons to a court hearing does not evidence how and when such summons was served on said party and said party challenges the said fact, the court must establish the actual circumstances of said party's summons based on other evidence submitted by the parties, and, where necessary, request from the court which issued the judgment, and examine, the documents relating to the party's summons as provided by the procedural law under which the case was heard.

Under the Convention, an application for the recognition and enforcement of a foreign arbitral award may be dismissed due to the failure to notify the debtor of the appointment of the arbitrator and of the time of arbitration proceedings, provided that the debtor seeking such dismissal has furnished proof that he was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case. In determining whether the said notice was duly made, the court must be guided by the relevant procedures determined by the parties in an arbitration agreement or an arbitration clause, or otherwise applied by agreement of the parties.

By executing contracts No. 349.294 and No. 349.249, the parties agreed that all disputes arising out of the contracts or in connection with their violation, termination or invalidity shall be finally resolved under the Rules of Arbitration and Conciliation of the International Arbitral Centre of the Austrian Federal Economic Chamber in Vienna (Vienna Rules) by a sole arbitrator appointed subject to the said rules (file pages 47-48, 51-52).

Subject to Article 13(2) of the Vienna Rules, "communications shall be considered as having been validly served if they are forwarded by registered letter, courier service, telefax or by other means of communication that guarantee evidence of transmission to the address most recently notified in writing to the arbitration court or the sole arbitrator (arbitration tribunal) by the addressee as the address for service, or if the document to be served has been demonstrably transmitted".

Subject to Article 27(5) of the Vienna Rules, "the award shall be served on the parties by the Secretary General. Awards become effective as against the parties on service of the copies. One copy of the award and the records on the serving shall be deposited with the Secretariat of the Centre".

In order to confirm the delivery of the notice of appointment of the arbitrator to, and the receipt of a copy of the arbitral award by, HEKRO PET LTD, the applicant provided the evidence in the form of the letters of the International Arbitration Centre of the Austrian Federal Economic Chamber dated 29 April 2010 (with exhibits of which exhibits 4 and 5 are the copies of the Tracking & Tracing reports) and stipulating that the letter whereby the parties were notified of the appointment of the arbitrator was sent to the respondent on 3 November 2009 by DHL courier delivery service and was received by Mrs. Kozlova on 5 November 2009 at 5:48 pm in Kyiv City, and on 25 March 2010 the arbitrator, Dr. Jernej Sekolec, issued the award in the case. The said award was sent to the respondent on 21 April 2010 by DHL courier delivery service and was received by Mrs. Kozlova on 23 April 2009 at 2:16 pm in Kyiv City (file pages 53-64, 154).

The panel of judges believes that as the said copies of the Tracking&Tracing reports are printouts of web pages and bear no seals, signatures, etc., they cannot be treated as written evidence because they are not electronic documents within the meaning of the Law of Ukraine on Electronic Documents and Electronic Document Flow, Articles 5 and 6 which provide that an electronic document must contain a number of obligatory details and an electronic signature which are absent from the copies of the Tracking & Tracing reports.

Apart from that, the above reports submit that the notice of appointment of the arbitrator and the award of the International Arbitration Centre had been received on the respondent's behalf by Mrs. Kozlova, who had not been working for HEKRO PET LTD since 30 September 2009 (file page 173), in Kyiv rather than at 20 Pilotska St, Khmelnytskyi City. The case files contain no information on the location of HEKRO PET LTD in Kyiv. Therefore, the said copies of the Tracking & Tracing reports do not in any way confirm the receipt by HEKRO PET LTD of the correspondence sent by the arbitration court.

Under such circumstances, the order of the court of first instance dated 11 January 2011 may not remain in force and should be set aside and a new order is issued dismissing the application of VA Intertrading Aktiengesellschaft (Austria) for the recognition and enforcement of the foreign arbitral award.

In reliance on Articles 303, 307, 312, 396 of the Ukrainian Code of Civil Procedure, the panel of judges, -

ORDERED:

The appeal of HEKRO PET LTD, a Limited Liability Company shall be granted.

The order of 11 January 2011 issued by the Amur-Nyzhnodniprovskyi District Court of Dnipropetrovsk City shall be set aside and the new order issued.

The application of VA Intertrading Aktiengesellschaft (Austria) for the recognition and enforcement of the foreign arbitral award shall be dismissed.

This order becomes effective upon its announcement but may be challenged by way of cassation within twenty days of the date of this order.

Presiding Judge

Judges