

HIGHEST ARBITRAZH COURT
OF THE RUSSIAN FEDERATION

RESOLUTION
of the Presidium of the Highest Arbitrazh Court
of the Russian Federation

No. 10718/08

Moscow

20 January 2009

The Presidium of the Highest Arbitrazh Court of the Russian Federation composed of:
Presiding Judge – Chairman of the Highest Arbitrazh Court of the Russian Federation
A.A. Ivanov;

Members of the Presidium: E.Y. Valyavina, V.V. Vitryansky, N.G. Vyshnyak,
Y.Y. Goryacheva, T.V. Zavyalova, N.P. Ivannikova, V.N. Isaycheva, O.A. Kozlova, S.V. Sarbash,
V.L. Slesareva,

examined an application of the company Loral Space & Communications Holdings Corporation for the supervisory review of the ruling of the Moscow Arbitrazh Court of 17 April 2008, rendered in Case No. A40-31732/07-30-319, and the resolution of the Federal Arbitrazh Court for the Moscow District of 20 June 2008, rendered in the same case.

The following representatives participated in the hearing:

on behalf of the company Loral Space & Communications Holdings Corporation: L.S. Baleevskih, D.L. Davydenko, A.I. Muranov;

on behalf of the closed joint stock company Globalstar – Space Telecommunications: Y.V. Gravitskiy, M.V. Kruchinina.

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

The company Loral Space & Communications Holdings Corporation (hereafter – the Corporation) filed with the Moscow Arbitrazh Court an application for the recognition and enforcement of an award of the London Court of International Arbitration (hereafter – the Arbitral Tribunal) of 23 March 2007 in Case No. 6803, ordering the closed joint stock company Globalstar – Space Communications (hereafter – the Company) to pay to the Corporation the principal debt under a loan agreement in the amount of USD 5,946,000; interest on the principal debt in the amount of USD 1,508,809 as of 31 January 2007; additional interest calculated on the basis of LIBOR rate plus 4% beginning from 1 February 2007 until the final payment; GBP 20,873,36 and GBP 1,500 of the arbitration costs, as well as USD 30,000 of the court expenses of the Corporation.

By its ruling of 18 October 2007, the Moscow Arbitrazh Court rejected the application.

By its resolution of 24 December 2007, the Federal Arbitrazh Court for the Moscow District cancelled the ruling of 24 December 2007 and referred the case for a re-examination.

By its ruling of 17 April 2008, the Moscow Arbitrazh Court rejected the application on the ground of improper notification of the Corporation (Respondent) by the Arbitral Tribunal of the time and place of the arbitration hearings at a specific address in London.

The Federal Arbitrazh Court for the Moscow District upheld the latter ruling by its resolution of

20 June 2008.

In the application filed with the Highest Arbitrazh Court of the Russian Federation for the supervisory review of the judicial acts rendered within the framework of the case re-examination, the Corporation requests to cancel them referring to the violation of the uniformity in interpretation and application by the arbitrazh courts of the rules of law and inconsistency of the judicial acts with public interests consisting in assistance to arbitration.

In the response to the application, the Company requests to uphold the challenged judicial acts on the grounds that they complied with the current legislation.

Having examined the reasonableness of the arguments set forth in the application, response to the application and submissions of the parties' representatives at the hearing, the Presidium considers that the application should be granted for the following reasons.

According to Article V(1) of the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 10 June 1958 (hereafter – the UN Convention of 1958), recognition and enforcement of an arbitral award may be refused at the request of the party against whom it is invoked if that party furnishes to the competent authority where the recognition and enforcement is sought proof that, *inter alia*, 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.

In the case under consideration, such party is the Company which claimed that it received a proper notification of the date, place and time of the arbitration at a specific address in London just on 31 January 2007. In the opinion of the Company, this deprived it of the possibility to proceed with a UK visa application for its representative in a timely manner and, accordingly, to provide the Arbitral Tribunal with the oral explanations through its representative at the hearing of 5 February 2007. The Company considered the notifications received earlier as inappropriate as they did not contain the indication of specific time and place of the arbitration hearings at a specific address in London.

Refusing the recognition and enforcement of the award of the international arbitral tribunal, the first instance and cassation courts agreed with the Company's position according to which it was inappropriately notified of the time and place of the arbitration proceedings, and was thus deprived of the possibility to present oral explanations.

However, the courts disregarded the following.

The question of proper notification of the parties to an arbitration proceeding at an institutional arbitration court shall be resolved in accordance with the rules of such court.

In this case, the Company and the Corporation, when entering into the loan agreement, agreed on an arbitration clause, according to which "the agreement shall be governed and interpreted under English law. Any disputes, disagreements and claims arising out of or in connection with this agreement, including any question regarding its existence, validity or termination, shall be referred to and finally resolved by arbitration under the Arbitration Rules of the London Court of International Arbitration, which Rules are deemed to be incorporated by reference into this clause. The number of arbitrators shall be three. Each party shall appoint an arbitrator, and the two arbitrators so appointed shall appoint a third arbitrator, who shall be a chairman. The seat of arbitration shall be London; the language to be used in the arbitral proceedings shall be English."

According to Article 14.2 of the Arbitration Rules of the London Court of International Arbitration (hereafter – the LCIA Arbitration Rules), unless otherwise agreed by the parties, an arbitral tribunal shall have the widest discretion to discharge its duties allowed under such law(s) or rules of law as the arbitral tribunal may determine to be applicable; and at all times the parties shall do everything necessary for the fair, efficient and expeditious conduct of the arbitration.

Pursuant to Article 16.1 of the LCIA Arbitration Rules, the parties may agree in writing the seat (or legal place) of their arbitration. Failing such a choice, the seat of arbitration shall be London, unless and until the LCIA Court determines in view of all the circumstances, and after having given the parties an opportunity to make written comment, that another seat is more appropriate.

Moreover, according to Article 19.2 of the LCIA Arbitration Rules, an arbitral tribunal shall fix the date, time and physical place of any meetings and hearings in the arbitration, and shall give the parties reasonable notice thereof.

Therefore, a notification should not necessarily be executed as a single document. It could consist of several complementary documents, sent if and when they are agreed, *inter alia*, with

participation of the parties, on the details of the place of the arbitration proceedings and location of a hearing, including a specific address where hearings are going to take place.

Thus, the arbitrazh courts, when examining the fact of the Company's notification of the hearings held by the Arbitral Tribunal, should have assessed as a whole all the letters sent by the Arbitral Tribunal to the Company regarding this question, and not to consider as a notification only the last message, which added the postal address of a building in London where the hearings were to take place.

The legal position regarding the necessity to deem a notification proper based on the entire correspondence between an arbitral institution and a party was specified in Resolution of the Presidium of the Highest Arbitrazh Court of the Russian Federation No. 14548/04 of 22 February 2005.

When assessing the fact of notification consisting of several documents sent at different times, it is necessary to establish how well in advance a party to an arbitration was notified of the specific information, which delayed receipt this party refers to as a ground for its submission on improper notification of the arbitration proceedings.

At the same time, the courts established that the Arbitral Tribunal notified the Company by a fax of 9 November 2006 of the final hearings in the case in London on 5 and 6 February 2007 at a place to be agreed by the parties, and later confirmed this date by faxes of 14 December 2006 and 3 January 2007 (paragraphs 36, 45 and 46 of the arbitral award).

The company does not deny the receipt of these messages.

The scheduling by the Arbitral Tribunal of the date of the hearings with a suggestion for the parties to choose a place in London for the hearing venue is consistent with Article 16.1 of the LCIA Arbitration Rules.

Since the mentioned faxes were an integral part of the whole notification of the arbitration proceedings, the arbitrazh courts had no reasons to consider each of these messages as a separate improper notification, which should not be taken into account.

Considering the fact that the parties failed to agree on a place of the arbitration hearings in London, the Arbitral Tribunal determined it under Article 16.1 of the LCIA Arbitration Rules, of which it notified the parties by a fax of 15 January 2007.

The last letter sent to the Company by the Arbitral Tribunal on 25 January 2007 by fax and courier indicated the date and the time of the beginning of the hearings, as well as the postal address of the hearing venue in London.

The arbitrazh courts considered that this last notification, received by the Company on 31 January 2007, was the only proper notification as it indicated all the necessary information simultaneously.

However, this conclusion is wrong. In fact, the letter of 25 January 2007 repeated the information which was earlier reported to the Company.

The place of arbitration in London was agreed by the parties to the dispute on 14 September 2000 by entering into the loan agreement and confirmed by the Arbitral Tribunal in the fax of 9 November 2006. This fax equally specified the dates of the hearings – 5 and 6 February 2007.

Thus, the Arbitral Tribunal notified the Company of the time and the country where the arbitration proceedings were going to take place nearly three months in advance, what is a sufficient period to apply for a visa for the Company's representatives, whose participation was envisaged for the oral hearings.

Failure to indicate in the fax of 9 November 2006 specific time when the hearings would begin, as well as a specific address in London, where the hearings were supposed to take place, cannot be considered as legally relevant information for a visa application and could not confuse the Company regarding the terms and the country for the purposes of a visa application for its representatives.

Furthermore, the Company informed the arbitrazh court that its representatives did not apply for a UK visa, what made impossible their participation in the hearings. Therefore, the Company did not undertake appropriate actions, which the Company considered as necessary for the arbitration proceedings, and thus violated the requirements provided for by Article 14.2 of the LCIA Arbitration Rules.

In these circumstances, the Company's arguments regarding inappropriate notification of the place of the arbitration proceedings, which allegedly deprived the Company of the possibility to provide the Arbitral Tribunal with the oral explanations, are inconsistent with the LCIA Arbitration Rules and

are not justified.

Therefore, the challenged judicial acts shall be cancelled in accordance with Article 304(1) of the Arbitrazh Procedure Code of the Russian Federation as violating the uniformity in interpretation and application by the arbitrazh courts of the rules of law.

Considering the above and based on Articles 303, 305(1)(3) and 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 Moscow Arbitrazh Court of 14 April 2008, rendered in Case No. A40-31732/07-30-319, and the resolution of the Federal Arbitrazh Court for the Moscow District of 20 June 2008, rendered in the same, case shall be cancelled.

The award of the London Court of International Arbitration of 23 March 2007 in Case No. 6803 shall be recognized and enforced.

The Moscow Arbitrazh Court shall issue an enforcement writ.

Presiding Judge

A.A. Ivanov