Unofficial translation

FEDERAL ARBITRAZH COURT FOR THE MOSCOW DISTRICT
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RESOLUTION

No. KG-A40/14211-09

Moscow
18 January 2010 Case No. A40-59802/09-97-533

Operative part of the resolution was announced on 11 January 2010
Full text of the resolution was prepared on 18 January 2010

The Federal Arbitrazh Court for the Moscow District composed of:

Presiding Judge: L.V. Busarova,
Judges: O.I. Rusakova, N.S. Chuchunova,
Being present at the hearing:
Claimant failed to appear
On behalf of respondent: A.N. Ganyushkin (Power of Attorney No. 451/E of 15 July 2009)
Having examined in a court hearing of 11 January 2010 the cassation complaint
of the respondent – ZAO Factoring Company Eurokommerz
against the resolution of 7 October 2009 No. 09AP-19223/2009-GK
of the Ninth Arbitrazh Court of Appeal
rendered by Judges E.N. Baranovska, N.I. Pankratova, E.E. Kuznyecova
in Case No. A40-59802/09-97-533
upon the complaint of the company ING Bank N.V.
against ZAO Factoring Company Eurokommerz
claiming the amount of USD 50 283 750

ESTABLISHED:

ING Bank N.V. filed a complaint with the Moscow Arbitrazh Court claiming from the closed joint stock company Factoring Company Eurokommerz (hereinafter – ZAO Factoring Company Eurokommerz) the following amounts: USD 50 283 750, corresponding to USD 45 000 000 – principal debt due under the loan agreement of 19 June 2008; USD 2 700 000 – interest on the loan; USD 2 583 750 interest for delay in the payment of the debt.

By a ruling of the Moscow Arbitrazh Court on 29 June 2009 in case No. A40-59802/09-97-533, the complaint of ING Bank N.V. was rejected.

By the resolution of the Ninth Arbitrazh Court of Appeal of 7 October 2009, the ruling of the Moscow Arbitrazh Court of 29 June 2009 was annulled. The case was referred to the Moscow Arbitrazh Court for reexamination.

Disagreeing with the court of first instance's resolution [resolution of Ninth Arbitrazh Court of Appeal], the respondent filed a cassation complaint where it requested its annulment and the upholding of the first instance court's ruling.

In the cassation complaint the applicant alleges that the court of appellate instance incorrectly applied Article 35 of the Arbitrazh Procedure Code of the Russian Federation, failed to apply Article 148(5) of the Arbitrazh Procedure Code of the Russian Federation, as well as Article II(3) of the New York Convention, and did not take into account that the parties concluded an arbitration agreement contained in Articles 36 and 37 of the loan agreement, pursuant to which all disputes shall be resolved by the London Court of International Arbitration. Therefore, in light of the respondent's objections, the referral of the case to the Moscow Arbitrazh Court shall be excluded.

The terms of the loan agreement, providing the claimant (as the financing party) with a possibility to seize another court that has jurisdiction, envisage that in such a case the only competent courts may be the courts of England, which, according to the respondent, follows from paragraphs 36.1.1, 37.2-37.4 of the loan agreement.

As can be seen from the case materials, on 19 June 2008, ZAO Factoring Company Eurokommerz (Debtor), JPMORGAN CHASE BANK, N.A. LONDON BRANCH (Original creditor) and JPMorgan Europe Limited (Agent) concluded a loan agreement pursuant to the terms of which the Creditor granted the Debtor a term loan in the total amount of USD 138 000 000.

In Article 22 of the agreement the parties provided that the Creditor may, unilaterally, without an additional consent of the Debtor, assign to third parties, its rights, in part or in full, under the above agreement, including the right to claim the return of the amounts due with a proportional share of accrued interest and other fees, and that such an assignment shall be perfected by means of the Certificate of assignment between the previous and the new creditor, a sample of which is contained in the Annex No. 8 to the agreement.

It was established, on the basis of the case materials, that pursuant to the abovementioned clause of the loan agreement, JPMORGAN CHASE BANK, N.A., according to the certificate of assignment of 12 January 2009, perfected a partial assignment of its right to ING Bank N.V. in the amount of account receivables due under the loan, i.e. USD 30 000 000.

The claimant asserted before the Moscow Arbitrazh Court that the respondent defaulted on payment and thus requested to order the respondent to pay its outstanding debt under the loan agreement together with the interest on amounts due and interest for delay in payment.

While rejecting the complaint of the ING Bank N.V., the Moscow Arbitrazh Court derived from paragraph 37.1 of the loan agreement that the London Court of International Arbitration had jurisdiction over all disputes. This condition of the agreement was recognized by the court as an arbitration agreement and since the respondent objected to the examination of the case by the arbitrazh court, the court rejected the complaint of the ING Bank N.V. pursuant to Article 148(5) of the Arbitrazh Procedure Code of the Russian Federation.

The court of appellate instance, annulling the judicial act of the court of first instance, gave a different interpretation to Articles 36.1 and 37 of the loan agreement.

The court of cassation instance agrees with the conclusions reached by the court of appellate instance made after the analysis of the loan agreement terms.

It can be seen from the Russian translations of the loan agreement available in the case materials, that the provisions on procedure for the dispute settlement between the parties, in particular concerning the determination of the body vested with jurisdiction, are contained in Article 36.1 “Jurisdiction” and in Article 37 “Arbitration”.

Pursuant to Article 431 of the Civil Code of the Russian Federation, while interpreting the terms of contract, the court shall take into account the literal meaning of the words and expressions contained in it. In case of ambiguity of the terms of the contract, their literal meaning shall be identified by way of comparison with the other terms and with the meaning of the contract as a whole. If the rules, contained in the first part of the present Article, do not allow identification of the content of the contract, the actual common will of the parties shall be determined while accounting for the purposes of the contract. All relevant circumstances, including previous contracts, negotiations and correspondence, practice established in mutual relations between the parties, business usages, and the subsequent conduct of the parties, shall be taken into account.

Indeed, as the court of appellate instance rightly held, paragraphs 36.1.1. and 36.1.2 of the loan agreement contain provisions that the courts of England shall have exclusive jurisdiction to resolve any dispute arising out of, or in connection with, this agreement; moreover, the parties agree that the courts of England are the most appropriate and convenient *fora* for resolving the disputes and neither party would argue the contrary.

In addition, the following provision of the same Article of the agreement, precisely paragraph 36.1.3, admits a possibility for the financing party to exclude the application of previous paragraphs, taking into account that paragraph 36.1 does not interfere with the financing party’s right to initiate proceedings in any other competent court. To the extent that it is allowed by the law, the financing parties may simultaneously initiate proceedings in any number of jurisdictions. The wording of paragraph 36.1.3, allowing the financing party to initiate proceedings in “any other” competent

jurisdiction, contradicts the provisions contained in the previous paragraphs of this Article (36.1.1-36.1.3) by allowing the financing party to submit disputes to courts other than the courts of England mentioned in paragraph 36.1.1.

Paragraph 37.1 of the loan agreement ("Arbitration"), relied upon by the claimant in the cassation complaint, contains an arbitration clause providing that any dispute, arising out of, or in connection with, the present agreement (including any dispute concerning existence, validity or termination of this agreement and the consequences of its invalidity), shall be submitted to the London Court of International Arbitration and finally settled by arbitration according to its arbitration rules.

Moreover, this provision is also applied exclusively in the interest of the financing party which is entitled, until the appointment of an arbitrator, to require by means of a written notification sent to the debtor that all disputes or a given dispute be submitted to a State court. The determination of a competent (State) court in such a case is thus made pursuant to paragraph 36.1, referred to in paragraph 37.4 of the loan agreement.

Therefore, based on a systematic and consistent interpretation of the terms of the agreement and assessment of their interrelation, it may be concluded that the present loan agreement establishes a variable set of prerogatives, with respect to means of settlement of disputes and mechanisms of determining jurisdiction, depending on who initiates the dispute – the creditor (financing party) or the debtor.

Consequently, the creditor who bears the corresponding financial risks has a right to choose the mechanism of determining the dispute settlement procedure set forth in the agreement, including the possibility to initiate proceedings in arbitration, in a competent English court or a competent court of another jurisdiction.

There is no proof in the case materials that the abovementioned provisions of the loan agreement (in part concerning the choice of jurisdiction to settle a specific dispute) are contrary to the English legislation, or were challenged by someone or declared invalid. Therefore, they are binding on the parties.

Pursuant to Article 35 of the APC RF, the lawsuit shall be filed with the arbitrazh court of the subject of the Russian Federation where the respondent is located or permanently resides.

In such circumstances, considering that the respondent ZAO Factoring Company Eurokommerz is located within the jurisdiction of the Moscow Arbitrazh Court, the conclusion of the court of appellate instance that the Moscow Arbitrazh Court has jurisdiction over the dispute is correct.

The court of cassation instance also holds that pursuant to Article 36 of the loan agreement, the applicable law is English law.

Moreover, the opinion of an English lawyer (solicitor) submitted with the case materials similarly interprets the provisions of the loan agreement related to the determination of jurisdiction to settle disputes. The parties submitted no proof of a different interpretation of the terms of the agreement from the standpoint of the English law.

Therefore, the court considers that in the absence of such grounds provided for in Article 148 of the Arbitrazh Procedure Code of the Russian Federation, the complaint shall be dismissed.

Based on Articles 284, 286-289 of the Arbitrazh Procedure Code of the Russian Federation, the court

RESOLVED:

The resolution of the Ninth Arbitrazh Court of Appeal of 7 October 2009 in case No. A40-59802/09-97-553 shall be upheld, the cassation complaint of ZAO Factoring Company Eurokommerz shall be rejected.

Presiding Judge: L.V. Busarova

Judges: O.I. Rusakova

N.S. Chuchunova