Unofficial translation

FEDERAL ARBITRAZH COURT FOR THE MOSCOW DISTRICT

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RESOLUTION

Moscow Case No. A40-65888/11-8-553

Operative part of the resolution was announced on 17 January 2012
Full text of the resolution was prepared on 24 January 2012

The Federal Arbitrazh Court for the Moscow District composed of:

Presiding Judge: L.A. Tutubalina,
Judges: L.V. Zaviryuha, T.V. Fyedosyeyeva,
Being present at the hearing:
On behalf of the applicant: I.N. Marisin (under Power of Attorney of 27 September 2011),
On behalf of the interested party: S.P. Pazyuk (under Power of Attorney of 8 December 2011), N.A. Voilokov (under Power of Attorney of 8 December 2011),
Having examined in a court hearing of 17 January 2012 the cassation complaint
of Mabofi Holdings Limited
against the Ruling of the Moscow Arbitrazh Court
of 10 October 2011
rendered by the Judge O.Y. Pyetyelina
upon the application of the company Mabofi Holdings Limited (Zinosia, Kiteos, Kato, Lakatamia. 8c. 3222. Nicosia. Cyprus),
interested party RosGas A.G. (79 Baarerstrasse, Zug, Switzerland)
seeking the annulment of the ruling on jurisdiction rendered by the International Commercial Arbitration Court at the Chamber of Commerce and Industry of the Russian Federation over a dispute concerning the validity of the contract concluded on 28 April 2009 between RosGas and Mabofi for transfer of shares in company Emfesz, in case No. 89/2010, rendered upon complaint by RosGas A.G. against Mabofi Holdings Limited seeking to declare the contract valid and order [Mabofi] to pay USD 1 000 000.

ESTABLISHED:

The company Mabofi Holdings Limited (hereinafter – Company Mabofi, Mabofi, the applicant) filed, with the Moscow Arbitrazh Court an application for annulment of the ruling on jurisdiction of the International Commercial Arbitration Court at the Chamber of Commerce and Industry of the Russian Federation of 19 May 2011, in case No. 89/2010 (hereinafter – ICAC, the arbitral tribunal), recognizing jurisdiction of the ICAC over the dispute concerning validity of the contract concluded on 28 April 2009 between RosGas A.G (hereinafter – RosGas) and Mabofi Holdings Limited for sale of a share in the company EMFESZ.

By a ruling of the Moscow Arbitrazh Court of 10 October 2011, the application of the Company Mabofi Holdings Limited was rejected.

Alleging the violation by the arbitrazh court of the procedural and substantive law rules, the Company Mabofi Holdings Limited has filed the cassation complaint in which it requests the annulment of the judicial act and the adoption of a new judicial act granting the relief sought.

The Company Mabofi Holdings Limited contends that the Moscow Arbitrazh Court unlawfully disregarded a number of arguments set forth in the application, including, the lack of authority of Istvan Goci under the power of attorney issued to him, to sign the contentious contract as well as the arbitration clause contained therein on behalf of Mabofi. According to the applicant, nonexistence of an arbitration clause logically results from lack of authority of Istvan Goci to conclude the contentious contract, signed as a result of the clear *mala fide* actions of Istvan Goci. The failure to conclude a transaction

results from the nonexistence of an arbitration clause contained in the text of the contract and of any agreement between the parties on settlement of disputes by means of arbitration; in such a case, the clause cannot be considered as a separate agreement.

The applicant asserts that the Moscow Arbitrazh Court should have stayed the proceedings until the entry into force of the decision of the Hungarian court rendered upon claims of Mabofi to RosGas for declaring the contentious contract unconcluded or invalid, by which the Metropolitan Court of Budapest on 31 March 2011 granted the relief sought. Having refused to stay proceedings, the court violated the procedural legislation of the Russian Federation and Mabofi's right to judicial protection, calling into question the fulfillment of international obligations of the Russian Federation.

At a court hearing in the court of cassation instance, the representative of the Company Mabofi Holdings Limited supported the reasoning set forth in the cassation complaint and specified that in case the adoption of another judicial act would not be possible, he requests to refer the case to the court of first instance for reexamination; the representative of RosGas insisted on the unfounded character of the cassation complaint and requested to uphold the judicial act, as being lawful and well-grounded.

Having heard the arguments of the parties and having assessed the arguments of the cassation complaint, and having examined the correctness of application of substantive law and the compliance with the rules of procedural law by the court rendering the challenged judicial act, pursuant to Articles 284, 286, 287 of the Arbitrazh Procedure Code of the Russian Federation, as well as the conformity of the court's conclusions with the factual circumstances and evidence provided in the case, the court of cassation instance holds that the adopted ruling shall be annulled and the case shall be referred to the court of first instance for reexamination.

On 19 May 2011, an ICAC tribunal, composed of three arbitrators in case No. 89/2010, rendered a ruling confirming its jurisdiction to hear the claims of RosGas A.G. against Mabofi Holdings Limited seeking to declare valid the contract concluded on 28 April 2009 between RosGas and Mabofi for transfer of shares in the company EMFESZ; at the same time, the tribunal ruled on the lack of its jurisdiction to hear claims seeking the declaration of initiation of court proceedings in Hungary and in Switzerland by Mabofi as abuse of rights causing harm to the business reputation of OOO RosGas, and to order Mabofi to compensate RosGas for the reputational harm in the amount of USD 1 000 000.

Pursuant to Article 16 of the Law of the Russian Federation of 7 July 1993 No 5338-1 (edition of 3 December 2008) "On International Commercial Arbitration", the arbitral tribunal may rule on its own jurisdiction, in particular on any objections with respect to the existence or validity of an arbitration agreement. For that purpose, an arbitration clause which forms part of a contract shall be treated as an agreement separate from its other provisions. A decision by the arbitral tribunal that the contract itself is null and void shall not entail *ipso jure* the invalidity of the arbitration clause.

According to the ICAC rules, the issue of ICAC jurisdiction shall be decided by an arbitral tribunal examining the case. The arbitral tribunal may render a separate decision on jurisdiction before the case is examined on its merits.

Pursuant to Article 235(1) of the Arbitrazh Procedure Code of the Russian Federation, in instances provided by an international treaty of the Russian Federation and by federal legislation, any party to the arbitration proceedings may file with the arbitrazh court an application for the annulment of the ruling of the arbitral tribunal confirming its jurisdiction.

The possibility of challenging the arbitral ruling is provided in Article 16(3) of the Law of the Russian Federation "On International Commercial Arbitration". The general rules of the Arbitrazh Procedure Code of the Russian Federation apply to challenges to rulings rendered on issues of arbitral tribunal's jurisdiction, based on the systemic interpretation of Articles 16(3) and 6(2) of the Law of the Russian Federation "On International Commercial Arbitration", Chapter 30(1) on "procedure on challenges to arbitral awards" of the Arbitrazh Procedure Code of the Russian Federation. The analogous view was upheld by the Constitutional Court of the Russian Federation (ruling of 28 May 2009, No. 623-O-O).

For the purpose of challenging the ruling of the ICAC tribunal of 19 May 2011, pursuant to Article 235 of the Arbitrazh Procedure Code of the Russian Federation, the respondent, Mabofi Holdings Limited, filed with the court an application for annulment of the ruling, in part confirming the ICAC jurisdiction to hear claims to declare valid the contract concluded on 28 April 2009 between RosGas A.G and Mabofi Holdings Limited for the sale of shares in the company EMFESZ.

As a ground for challenging the ruling on jurisdiction, the applicant asserted that it derives from

the case materials that Mabofi and RosGas had not reached an agreement to submit all disputes arising out of the contentious contract to the ICAC, consequently paragraph 11 of the contentious contract is not an arbitration clause within the meaning of Article 7 of the law on international commercial arbitration. Moreover, the exclusive jurisdiction of the Hungarian court and the invalidity of the arbitration clause were also, according to the applicant, determined by the final resolution of appellate instance of the Central Court of Budapest No. 14.Gf.40.592/2009/3 of 19 January 2010 which has entered into force in dispute between Mr. Andras Knopp and RosGas over the declaration of the contentious contract's nonexistence/invalidity. According to the applicant, the legislation of the Russian Federation is not applicable to the issue of existence and validity of the arbitration clause.

The Moscow Arbitrazh Court rejected the application on the grounds that the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 10 June 1958), as an international treaty binding the Russian Federation as well as the States in which the claimant and the respondent operate and are incorporated, was correctly applied to the ruling of the ICAC tribunal concerning its jurisdiction to hear the claimant's claims (including any relation to the arbitration clause in paragraph 11 of the contract). With respect to procedural issues related to the ICAC jurisdiction or to the arbitration clause in paragraph 11 of the contract, the commercial arbitral tribunal correctly applied the Russian procedural law to issues not regulated by the New York Convention, as the arbitration proceedings take place on the territory of the Russian Federation.

The Moscow Arbitrazh Court reached the conclusion that the invocation of the exclusive jurisdiction of the Hungarian courts over claims concerning the validity of the contract, determined by the resolution of the Central Appellate Court of Budapest No. 14.Gf.40.592/2009/3 of 19 January 2010 and of the invalidity of the arbitration clause pronounced by the same resolution, is untenable, as pursuant to Article V(1(a)) of the New York Convention of 10 June 1958 the validity of an arbitration agreement shall be assessed under the law of the country where the award was made.

The court agreed with the finding of the arbitral tribunal that while concluding the contract the parties were guided by the principle of freedom of contract, which is also enshrined in Article 421 of the Civil Code of the Russian Federation, and specified essential terms of dispute settlement as follows: "all contentious issues, relating to the contract shall be settled by the Arbitration Court at the Chamber of Commerce and Industry…" and specified the ICAC.

The panel of judges of the court of cassation instance cannot agree with the conclusions of the Moscow Arbitrazh Court.

Pursuant to Article 16(4) of the Arbitrazh Procedure Code of the Russian Federation, the recognition and enforcement on the territory of the Russian Federation of judicial acts adopted by foreign courts, foreign arbitral awards shall be governed by the international treaties of the Russian Federation and by federal legislation.

Grounds for annulment of ruling of the arbitral tribunal on its jurisdiction are set out in Article 34 of the Law of the Russian Federation "On International Commercial Arbitration", since the law does not provide for specific grounds for annulment of acts of preliminary nature. One of these grounds pursuant to paragraph 2(1) of the above article, is that a party to the arbitration agreement who seeks to set aside the ruling, must provide the proof that the said agreement is not valid under the law to which the parties have subjected it to or, failing any indication thereon, under the law of the Russian Federation.

As it derives from the case materials, the court was aware of the Hungarian state court proceedings (as of 1 September 2009) concerning Mabofi claims to RosGas and the Company EMFESZ, seeking to declare the sale-purchase agreement of shares in the Company EMFESZ unconcluded and invalid which was on appeal stage.

Moreover, the decision of the Metropolitan Court of Budapest was adopted on 30 March 2011 and already existed at the time of the challenged ruling of 19 May 2011 rendered by the ICAC tribunal.

Pursuant to Article 8(2) of the Law of the Russian Federation "On International Commercial Arbitration" in case a suit concerning the subject matter of an arbitration agreement has been brought to court, arbitral proceedings may nevertheless be commenced or continue, and an award may be rendered, as long as the issues of jurisdiction are pending before the court.

RosGas filed the suit with ICAC long after the proceedings in the Hungarian state court were initiated, precisely on 26 April 2010, as it results from the separate ruling on jurisdiction rendered by the ICAC tribunal.

Mabofi filed the lawsuit with the state court in place where the transaction was concluded alleging that a representative who had entered into the contract, which also contained an arbitration clause, lacked any authority to conclude the transaction of sale of the Company EMFESZ's shares, and consequently the arbitration clause never came into existence.

The Moscow Arbitrazh Court deciding the present case did not take into account that the dispute between the parties was litigated in a state court of the Republic of Hungary, not in commercial arbitration; thus, it failed to apply the Treaty between the People's Republic of Hungary and the Union of Soviet Socialist Republics concerning the Provision of Legal Assistance in Civil, Family and Criminal matters, signed in Moscow on 15 July 1958 (edition of 19 October 1971) as well as the provisions of Article 8 of the Law of the Russian Federation "On International Commercial Arbitration".

Pursuant to Article 46(1) of the Treaty concerning the Provision of Legal Assistance, final decisions of courts and guardianship or curatorship authorities of either Contracting Party in matters not relating to property, shall be recognized in the territory of the other Party without further proceedings, provided that they do not conflict with this Treaty and that no court or guardianship or curatorship authority of the other Party has previously rendered a final decision on this matter.

According to the court of the cassation instance, the challenged judicial act also disregards the universal principle of comity, obliging a State to act with due regard and courtesy with respect to a foreign legal order, the principle of reciprocity providing for mutual recognition by courts of each other's judicial activity.

Moreover, the panel of judges of the court of cassation instance considers that the court of first instance upholding the findings of the commercial arbitral tribunal failed to give reasons for the application of the subparagraph "a" of Article V(1) of the New York Convention dated 10 June 1958 to assessment of validity of an arbitration agreement under the law of the country where the award was made. The above subparagraph of the Convention provides for application of law of a State where the award was made only when in the agreement there is no indication of the law to which the parties have subjected it. In the contentious agreement the parties indicated that the Hungarian law shall apply to it.

By virtue of the foregoing, the ruling of the court of first instance shall be annulled as incorrectly applying the rules of substantive and procedural law.

On reexamination of the case the court shall, taking into account the above, fully and objectively examine the circumstances of the case significant for the resolution of the dispute, assess the arguments of the parties and correctly applying rules of substantive law and, complying with the rules of procedural law, adopt a just decision.

The decision regarding the allocation of costs related to the payment of state registration fee for the filing of the cassation complaint shall be reserved. Pursuant to Article 289(3)(2) of the Arbitrazh Procedure Code of the Russian Federation, in case a judicial act is annulled and the case is referred for reexamination, the allocation of legal costs shall be decided by the court reexamining the case.

Based on the foregoing, pursuant to Articles 284, 286-289 of the Arbitrazh Procedure Code of the Russian Federation, the Federal Arbitrazh Court for the Moscow District

RESOLVED:

The ruling of the Moscow Arbitrazh Court of 10 October 2011, No. A40-65888/11-8-553 shall be annulled.

The case shall be referred to the Moscow Arbitrazh Court for reexamination.

Presiding Judge: L.A. Tutubalina

Judges: L.V. Zaviryuha

T.V. Fyedosyeyeva