Unofficial translation

Federal Arbitrazh Court for the West-Siberian District

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RESOLUTION

Tyumen Case No. A67-1438/2010

Operative part of the resolution was announced on 21 October 2010.
Full text of the resolution was prepared on 27 October 2010.

The Federal Arbitrazh Court for the West-Siberian District composed of:

Presiding Judge O.I. Finko,
Judges E.A. Karankyevich,
G.N. Klinova,

Having examined in a court hearing in presence of the parties' representatives:
on behalf of YUKOS CAPITAL S.A.R.L.: A.V. Skvortsov under Power of Attorney of 21 January 2010,
on behalf of the open joint stock company Tomskneft VNK: O.E. Kokovin under Power of Attorney No. 065/10 of 1 May 2010, L.V. Pokazanyeva under Power of Attorney No. 182/08 of 1 December 2008, A.O. Malginova under Power of Attorney No. 115/10 of 1 May 2010,
the cassation complaint by YUKOS CAPITAL S.A.R.L. against the ruling of the Arbitrazh Court of the Tomsk Region of 7 July 2010 (judge M.O. Popilov) in the case No. A67-1438/2010, rendered upon the application of YUKOS CAPITAL S.A.R.L. against the open joint stock company Tomskneft VNK for recognition and enforcement of a foreign arbitral award,

The Court established:

By an award of the International Court of Arbitration of the International Chamber of Commerce dated 12 February 2007 in case No. 14202EBS composed of the sole arbitrator Robert Briner, open joint stock company Tomskneft VNK (hereinafter – OAO Tomskneft VNK) was ordered to pay to YUKOS CAPITAL S.A.R.L. (hereinafter – YUKOS CAPITAL) the following amounts: RUB 2 300 000 000 plus simple interest at a rate of 9% accruing from 20 July 2004 until the date of the award, plus damages in the amount of RUB 2 300 000 daily, accruing from 1 December 2005 until the date of the award; RUB 1 240 000 000 plus simple interest at a rate of 9% accruing from 28 July 2004 until the date of the award plus damages in amount of RUB 1 240 000 daily, accruing from 1 December 2005 until the date of the award; RUB 810 000 000 plus simple interest at a rate of 9% accruing from 5 August 2004 until the date of the award plus damages in amount of RUB 810 000 daily, accruing from 1 December 2005 until the date of the award; fees and expenses of the sole arbitrator and ICC administrative expenses in the amount of USD 153 622; legal and other costs borne by the claimant in amount of USD 121 603.28 and GBP 52 964.84; plus simple interest at a rate of 9% on all amounts awarded in this arbitral award, accruing from the date of award until the date of payment.

As OAO Tomskneft VNK failed to comply with the award, YUKOS CAPITAL filed with the Arbitrazh Court of the Tomsk Region (the registered address of debtor) an application for recognition of the award of the International Court of Arbitration of the International Chamber of Commerce dated 12 February 2007 in case No. 14202EBS and issuance of an enforcement writ to collect from OAO Tomskneft VNK in favor of YUKOS CAPITAL RUB 7 254 218 987, USD 275 225.84, GBP 52 964.84, as well as simple interest at a yearly rate of 9% on RUB 4 350 000 000, accruing from 12 February 2007 until the date of payment.

By a ruling of 7 July 2010 the Arbitrazh Court of the Tomsk Region rejected the application of

YUKOS CAPITAL for recognition and enforcement of the award of the International Court of Arbitration of the International Chamber of Commerce dated 12 February 2007 in case No. 14202EBS.

In the cassation complaint YUKOS CAPITAL requests the annulment of the ruling of the Arbitrazh Court of the Tomsk Region dated 7 July 2010 by asserting that the court of first instance violated and incorrectly applied the rules of substantive and procedural law conclusions of the court contained in the challenged ruling does not correspond to the factual circumstances of the case as established by the court of first instance and to evidence presented in the case.

According to YUKOS CAPITAL, the court of first instance reached unfounded the conclusions that OAO Tomskneft VNK did not have a possibility to present its defenses in case No. 14202EBS because it was not duly notified of the proceedings, as well as that the recognition and enforcement of the award of the International Court of Arbitration of the International Chamber of Commerce dated 12 February 2007 in case No. 14202EBS would violate the public policy of the Russian Federation.

Relying on Article V(1)(b) of the 1958 United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, the applicant argues that for the refusal to enforce the award the fact that the debtor was not notified of the commencement of arbitration proceedings at all - preventing it from presenting its case - should be taken into account, instead of the fact that different notifications on time and place of the arbitration proceedings were not made.

Consequently, YUKOS CAPITAL asserts that OAO Tomskneft VNK – through its sole authorized representative body, the managing company ZAO YUKOS EP – participated in the arbitration proceedings and presented defenses in case No. 14202EBS.

The applicant also considers that the judicial act denying the leave for enforcement should give reasons as to how the recognition and enforcement of an award rendered by an international arbitral tribunal would be contrary to the public policy and how the court views the public policy applied to the case at hand.

According to YUKOS CAPITAL, in the challenged ruling of the court of first instance these circumstances are not discussed; the court did not examine the circumstances of the case concerning this issue.

In addition, YUKOS CAPITAL asserts that the actions of the creditor and of the debtor did not violate the public policy of the Russian Federation; the right to refer a case to international arbitration is not conditioned by the political or economic views of the parties or their nationality; the case materials contain no evidence that the arbitration agreements or the disputes based upon them were simulated.

According to the applicant, the holding of the court of first instance, that the financial means received by the debtor from the creditor in the form of a loan earlier belonged to the debtor, is not supported by evidence presented in the case, since the contrary has been proven, namely that the indebtedness towards the company resulted from their mutual dealings with respect to the financial means under the loan agreement.

At a court hearing in the court of cassation instance, the representative of YUKOS CAPITAL supported the reasoning set forth in the cassation complaint.

OAO Tomskneft VNK presented a reply to the cassation complaint in which it requests to uphold the judicial act adopted in this case, and to reject the cassation complaint. It contends that after 20 June 2006, OAO Tomskneft VNK did not receive notices from the international arbitral tribunal on the date and the time of the arbitration hearing. Therefore, since OAO Tomskneft VNK could not participate in the arbitration and present its case, it was deprived of the possibility to defend its rights by all possible means.

Moreover, in its reply to the cassation complaint OAO Tomskneft VNK observes that the loan agreements and its additional agreements (altering jurisdiction over the disputes) were concluded pursuant to the instructions of the management of OAO NK YUKOS; thus, abusing its rights with the aim of preserving the assets of OAO NK YUKOS for “legitimate shareholders” and “preventing the expropriation of assets by the Russian State”. Therefore, the recognition and enforcement of the arbitral award, which violates the Constitution of the Russian Federation, would be contrary to the public policy of the Russian Federation based on equality of the parties in civil law relations and their good faith actions.

At a court hearing in the court of cassation instance, the representative of OAO Tomskneft VNK supported the reasoning set forth in the reply to the cassation complaint.

The court of cassation instance, having examined the case materials pursuant to Articles 284

and 286 of the Arbitrazh Procedure Code of the Russian Federation, having analyzed the arguments set forth in the cassation complaint, having heard the representatives of YUKOS CAPITAL and OAO Tomskneft VNK, and having examined the correctness of application of substantive and procedural law rules by the court, concluded the following:

Pursuant to Article 241(1) of the Arbitrazh Procedure Code of the Russian Federation, decisions of the courts of foreign states rendered on disputes and on other matters arising from the conduct of an entrepreneurial or other economic activity (foreign courts), awards of courts of arbitration and international commercial arbitral tribunals adopted on the territories of foreign states in disputes and other matters arising from the conduct of an entrepreneurial or other economic activity (foreign arbitral awards), shall be recognized and enforced in the Russian Federation, if the recognition and enforcement of such decisions (awards) is envisaged by an international treaty of the Russian Federation and by federal legislation.

In accordance with Article 239(4) of the Arbitrazh Procedure Code of the Russian Federation, an arbitrazh court can deny issuance of an enforcement writ for the coercive enforcement of an award of a foreign commercial arbitral tribunal based on the grounds specified in an international treaty of the Russian Federation and by the federal law on the international commercial arbitration.

Pursuant to Article 244(1)(7) of the Arbitrazh Procedure Code of the Russian Federation, an arbitrazh court shall refuse, entirely or in part, recognition and enforcement of a foreign court decision if the enforcement of such a decision contradicts public policy of the Russian Federation.

Pursuant to Article 244(2) of the Arbitrazh Procedure Code of the Russian Federation, an arbitrazh court shall refuse, entirely or in part, recognition and enforcement of a foreign arbitral award on the grounds set forth in Article 244(1)(7) and Article 239(4) for denial of issuance of an enforcement writ for the coercive enforcement of an award rendered by a foreign commercial arbitral tribunal, unless otherwise provided by an international treaty of the Russian Federation.

Pursuant to Article V(1)(b) of the 1958 United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards as well as Article 36(1) of the Law of the Russian Federation of 7 July 1993 No 5338-1 “On International Commercial Arbitration”, 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 the competent authority where the recognition and enforcement is sought, with 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.

It can be determined from the award of the International Court of Arbitration of the International Chamber of Commerce dated 12 February 2007 in case No. 14202EBS that OAO Tomskneft VNK did not participate in the arbitration proceedings in this case.

Pursuant to Article 71 of the Arbitrazh Procedure Code of the Russian Federation, an arbitrazh court assesses the sufficiency and interrelation of evidence in its entirety; the reasons for admission or refusal to admit evidence are reflected in the judicial act.

Having examined and assessed the evidence submitted in the case materials in accordance with Article 71 of the Arbitrazh Procedure Code of the Russian Federation, the Court of first instance came to a correct conclusion that the receipt of correspondence by the closed joint stock company YUKOS EP after 20 June 2006 in case No. 14202EBS, does not prove its receipt by OAO Tomskneft VNK, as on 20 June 2006 the agreement dated 29 September 1998, No. EP-240-1/5 on the transfer of powers of executive organs, concluded between OAO Tomskneft VNK and the closed joint stock company YUKOS EP, was terminated, and powers of the sole executive organ of OAO Tomskneft VNK were transferred to the closed joint stock company YUKOS RM.

Moreover, based on a careful examination of evidence submitted by the parties, the court of first instance rightly pointed out that the following was missing from the case materials: the evidence of sending to the address of OAO Tomskneft VNK the draft timetable; the notification of the date of hearings in Europe, for instance, in Paris on 9 August 2006; the notification of the confirmation of the outstanding issues of 21 August 2006; the temporary timetable of 24 August 2006; procedural orders No. 1 of 29 September 2006; procedural order No. 2 of 23 November 2006; the notification of the closing of the proceedings; and, the submission of comments dated 20 December 2006.

Consequently, the court of cassation instance upholds the conclusion of the court of first instance that OAO Tomskneft VNK was not directly and properly notified of the arbitration proceedings in the case No. 14202EBS and therefore was not able to present its defense, which in itself

is a ground for refusal of recognition and enforcement of a foreign arbitral award.

Pursuant to Article 36(1)(2) of the Law of the Russian Federation of 7 July 1993 No 5338-1 "On International Commercial Arbitration" and Article V(2)(b) of United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958, recognition and enforcement of the award may be refused, if the recognition or enforcement of such an award would be contrary to the public policy of that country.

The public policy of the Russian Federation should be understood as the basics of the social system of the Russian State, a violation of which, including recognizing and enforcing a foreign court decision or an arbitral award, could create results inadmissible from the point of view of the notion of justice in Russia.

Pursuant to Article 11 of the Constitution of the Russian Federation, the courts of the Russian Federation exercise the state authority. With respect to the judicial organs, the state authority is exercised through administration of justice (Article 118 of the Constitution of the Russian Federation).

One of the basic principles of the court procedure is the binding nature of judicial acts which have entered into force and are binding on all state organs, organizations, public officers and citizens in the entire territory of the Russian Federation.

In refusing the recognition and enforcement of the award of the International Court of Arbitration of the International Chamber of Commerce dated 12 February 2007 in case No. 14202EBS, the court of first instance held that, in the appeal petition filed by YUKOS CAPITAL against the decision of 28 February 2008 of the Amsterdam court concerning interim measures, in the course of the proceedings for enforcement of decision ordering OAO NK Rosneft (as the legal successor of the open joint stock company Yuganskneftegaz) to pay debt arising from identical loan agreements, YUKOS CAPITAL confirmed that it concluded additional agreements to the loan agreements altering jurisdiction over disputes (including with OAO Tomskneft VNK) at the direction of the management of OAO NK YUKOS for the purposes of preserving the assets of OAO NK YUKOS for "legitimate shareholders" and "preventing the expropriation of assets by the Russian State".

Moreover, the court of first instance established that at the time of conclusion of the loan agreements No. 02-07 of 20 July 2004, No. 05-07 of 27 July 2004, No. 08-07 of 4 August 2004 together with the additional agreements of 2 November 2005 as well as at the time of filing of the lawsuit with the International Court of Arbitration of the International Chamber of Commerce, OAO NK YUKOS could fully direct actions of companies it controlled, i.e. YUKOS CAPITAL, OAO Tomskneft VNK and ZAO YUKOS EP.

The court of first instance correctly relied on circumstances determined by the decision of 28 May 2004 rendered by the Moscow Arbitrazh Court in case No. A40-17669/04-109-241 and the decision of 28 April 2005, rendered by the Moscow Arbitrazh Court in case No. A40-4338/05-107-9/A40-7780/05-98-90 as well as the extract from the bill of indictment in the criminal case No. 18/432766-07, and after examining these documents, it rightly held that the financing of YUKOS CAPITAL through loans was provided with funds previously withdrawn from OAO Tomskneft VNK as a result of the use of a transfer pricing scheme. Consequently, the loan agreements serving the basis for the foreign arbitral award concealed the return of financial means to OAO Tomskneft VNK, which were unlawfully withdrawn by way of transfer pricing in favor of other entities of the holding, including YUKOS CAPITAL.

The above circumstances evidence the transfers of the financial means within the interrelated group of entities and give rise to doubts as to the genuine character of the loan agreements No. 02-07 of 20 July 2004, No. 05-07 of 27 July 2004, No. 08-07 of 4 August 2004 (Article 807 of the Civil Code of the Russian Federation). In the circumstances established by the court of first instance, the court of cassation instance considers that the recognition and enforcement of the arbitral award rendered by the International Court of Arbitration of the International Chamber of Commerce on 12 February 2007 in case No. 14202EBS, would violate the basis of the constitutional system and the legal order of the Russian Federation and would be thus contrary to the public policy of the Russian Federation.

In these circumstances the court of first instance reached the correct conclusions that OAO Tomskneft VNK was not properly notified of the arbitration proceedings and could not present its case, as well as that the recognition and enforcement of the award of the International Court of Arbitration of the International Chamber of Commerce dated 12 February 2007 in case No. 14202EBS would be contrary to the public policy of the Russian Federation.

The arguments of the applicant were examined and rejected by the court of cassation instance, as they do not rebut the correctness of the conclusions reached by the court of first instance in the present case. The court of cassation instance did not determine any violations of substantive or procedural law which would serve as a ground for the annulment of the judicial act.

Therefore, the court's ruling is correct whereby it lawfully rejected the application of YUKOS CAPITAL for recognition and enforcement of the award of the International Court of Arbitration of the International Chamber of Commerce dated 12 February 2007 in case No. 14202EBS.

Having considered the above, based on Articles 287(1), 289 and 290 of the Arbitrazh Procedure Code of the Russian Federation, the Federal Arbitrazh Court for the West-Siberian District

RESOLVED:

That the ruling of the Arbitrazh Court of the Tomsk Region of 7 July 2010, in case No. A67-1438/2010, shall be upheld and the cassation complaint shall be dismissed.

The resolution enters into force on the date of its adoption.

Presiding Judge: O.I. Finko

Judges: E.A. Karankyevich

G.N. Klinova