

**NINTH ARBITRAZH COURT OF APPEAL**

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**RESOLUTION**

**No. 09AP-10599/2009-GK**

Moscow  
24 June 2009

Case No. A40-27854/09-61-247

Operative part of the Resolution was announced on 18 June 2009.  
Full text of the Resolution was prepared on 24 June 2009.

The Ninth Arbitrazh Court of Appeal composed of:

Presiding Judge  
Judges

N.I. Pankratova,  
T.Ya. Sumarokova,  
I.S. Lyatshevsky,

With the minutes of the court hearing kept by the Presiding Judge N.I. Pankratova,

Having examined in an open court hearing the appeal petition of ZAO UralEnergGaz against the ruling of the Moscow Arbitrazh Court of 22 April 2009, case No. A40-27854/09-61-247, rendered by the Judge O.N. Zvyeryeva,

On the claim of ZAO UralEnergGaz to OOO ABB Electroengineering for recovery of the debt in the amount of RUB 112,305,291.29,

With participation of the following representatives in the hearing: on behalf of the Claimant: F.A. Blinov under Power of Attorney of 1 February 2009, D.Yu. Kulinich (under the Power of Attorney of 1 December 2008), A.D. Tyutyunin (under the Power of Attorney of 27 April 2009); on behalf of the Respondent: D.Yu. Lim (under the Power of Attorney of 6 April 2009),

**ESTABLISHED:**

ZAO UralEnergGaz filed with the Moscow Arbitrazh Court a claim against OOO ABB Electorengineering requesting the debt recovery in the amount of RUB 112,305,291.29.

The claim was filed pursuant to Articles 191, 192, 193, 309, 310, 314, 317, 395, 457, 487, 511, 1102, 1107 of the Civil Code of the Russian Federation and motivated by the fact that the Respondent exceeded the terms of the equipment delivery, due to which the claimant refused to perform the contract and seeks to recover the debt, referring *inter alia* to the provisions on unjust enrichment.

By its ruling of 22 April 2009, the Moscow Arbitrazh Court dismissed the claim of ZAO UralEnergGaz without a hearing on the merits.

Thereby, the court presumed that the dispute cannot be considered by the Moscow Arbitrazh Court since the Delivery Contract No. 12070292 of 24 December 2007 contains an arbitral clause according to which all the disputes and disagreements which may arise out or in connection with the Contract shall be considered by an arbitral tribunal in Moscow under UNCITRAL Rules as in effect when the dispute resolution takes place.

Objecting to the judicial act adopted in the case, ZAO UralEnergo Gaz filed the appeal petition requesting to annul the ruling of the first instance court with the Ninth Arbitrazh Court of Appeal.

In the opinion of the applicant, when rendering the decision the first instance court disregarded and did not clarify all the circumstances, which were important for the case, and incorrectly applied procedural law norms.

Justifying the appeal petition, the Claimant refers to the nullity of the arbitration agreement as it does not contain an indication to a specific arbitration court, it fails to provide for the correct procedure of the arbitrators appointment and does not define the rules of dispute resolution. The first instance court disregarded the fact that the Claimant requested compensation for unjust enrichment that was not covered by the arbitral clause.

At a court hearing of the court of appeal, the representatives of the Claimant fully supported the reasoning of the appeal petition. The Claimant asked that the first instance ruling be annulled and that the case be submitted for a reexamination by a first instance court.

The Respondent resisted granting the appeal petition, claiming that the arbitral clause complied with the law “On International Commercial Arbitration”, which provides for the right of the parties to submit a dispute for resolution to either institutional arbitration or to an *ad hoc* arbitral tribunal established for resolution of a particular dispute.

The court of appeal examined the legality and reasonableness of the ruling adopted by the first instance court according to Articles 266, 268, 272 of the Arbitrazh Procedure Code of the Russian Federation.

Having examined the case materials, scrutinized the evidence contained therein, reviewed the reasoning of the appeal petition, and heard the representatives of the parties, the court of appeal believes that the ruling in question should be annulled and the case should be submitted for a re-examination by the Moscow Arbitrazh Court for the following reasons.

As can be seen from the case materials, on 24 December 2007, OOO ABB Electroengineering (Supplier) and ZAO UralEnergoGas (Buyer) entered into the Delivery Contract No. 12070292, according to which the Supplier undertook to deliver electrotechnical equipment to the Buyer in assortment, volume, terms and for the price specified in the Contract, and the Buyer undertook to accept and pay for the equipment.

Section 8.2 of the said Contract provides that if parties fail to come to an agreement, the dispute shall be resolved by an arbitral tribunal in Moscow according to UNCITRAL Rules in effect when the dispute’s resolution takes place. The President of the International Chamber of Commerce in Paris has the right to appoint the arbitrators.

Having dismissed the statement of claim without a hearing on the merits on the basis of Article 148(4) of the Arbitrazh Procedure Code of the Russian Federation, the first instance court assumed that the parties agreed on the resolution of disputes by an *ad hoc* arbitral tribunal, specified valid procedure for arbitrators’ appointment, and indicated that the UNCITRAL Rules would be applicable to the dispute resolution procedure.

The panel of judges believes that these conclusions of the first instance court are erroneous, based on an incorrect interpretation of the arbitral clause and the applicable law to this case - the law “On International Commercial Arbitration” - for the following reasons:

According to Articles 1, 2 of the law “On International Commercial Arbitration” of the Russian Federation, this law is applicable to international commercial arbitration when it takes place on the territory of the Russian Federation.

The disputes of the companies with foreign investments, established on the territory of the Russian Federation, can be submitted to international commercial arbitration under the parties’ agreement.

As it follows from the Preamble of the Articles of Association of OOO AB Electroengineering, the only member of the company is a private limited liability company ABB Holdings B.V. established under the laws of the Netherlands and located at the address: the Netherlands, 1181NB, Amstelveen, 65 Burgemeester Haspelslaan.

Therefore, the arbitral clause challenged by the Claimant would be governed by the law “On International Commercial Arbitration” of the Russian Federation, whereby, according to Article 2, ‘arbitration’ refers to any arbitration (arbitral tribunal) whether set up specifically for a case or administered by a permanent arbitral institution.

According to Article 7 of the said law, arbitration agreement is an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not. An arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement.

An arbitration agreement shall be concluded in writing. An agreement is deemed to be concluded in writing if it is contained in a document signed by the parties.

Having analyzed the arbitral clause in the Contract (section 8.2), the panel of judges came to the conclusion that the arbitral clause cannot be performed for the following reasons.

According to paragraph 10 of the Resolution of the Plenum of the Highest Arbitrazh Court of the Russian Federation No. 8 of 11 June 1999, when there is an arbitral clause in an international contract an arbitrazh court can still assert its jurisdiction over the case if it considers that this arbitration agreement is null and void, inoperative or incapable of being performed (Article II(3) of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958).

Thus, according to section 8.2 of the Contract, a dispute shall be resolved under the UNCITRAL Rules as in effect when the dispute resolution takes place.

However, the court of appeal believes that this wording is not precise and it does not allow the conclusion that the parties meant the UNCITRAL Arbitration Rules, since Article 1 of the said Arbitration Rules provides for the usage of a standard arbitral clause containing refers to a given document or the Arbitration Rules.

Furthermore, there are effective Rules of the ICC, as Appointing Authority, in UNCITRAL or other ad hoc arbitration proceedings of 1 January 2004, which provide for a different procedure of the appointment of arbitrators and which specify different persons authorized to appoint arbitrators.

Since the sale and purchase contract of 24 June 2007 No 12070292 does not contain a standard arbitral clause, in the opinion of the panel of judges, an arbitration agreement as provided for by section 8.2 of the Contract cannot be performed as the parties did not agree on a particular arbitration rules (UNCITRAL Arbitration Rules or Rules of ICC as Appointing Authority in UNCITRAL or other ad hoc arbitration proceedings).

The panel of judges considers the argument of the appeal petition reasonable that according to the Constitution of the International Chamber of Commerce, there is no position of the President.

This Constitution provides for the following positions: Chairman, Vice-Chairman, Honorary Chairman, Regional Chairman, and Secretary General.

Therefore, the Constitution of the International Chamber of Commerce does not provide for the position of President, which makes it impossible for it to appoint the arbitrators according to the procedure specified by the arbitration agreement.

Considering the fact that arbitration rules are not defined and a person authorized to appoint the arbitrators of an arbitral tribunal is not specified, the panel of judges believes that the arbitral clause (section 8.2 of the Contract) cannot be enforced, and that it violates the rights of the Claimant to judicial protection.

Furthermore, the panel of judges considers it necessary to note that the Claimant’s request is based on the provisions of Articles 1102 and 1107 of the Civil Code of the Russian Federation, which regulates unjust enrichment obligations which are non-contractual in nature.

Since the arbitral clause does not specify that disputes arising out of unjust enrichment shall be considered by an arbitral tribunal, the first instance court did not have the right to apply Article 148 of the Arbitrazh Procedure Code of the Russian Federation and to dismiss the claim without a hearing on the merits.

Having assessed the Claimant’s claims, the first instance court, in fact, did not consider them on the merits, considered them as related to the Delivery Contract, under which the Claimant made a payment; the claim is based on termination of the Contract and return of the advanced payment. Therefore, in breach of the procedural law, the first instance court, in fact, dismissed as unfounded the

reasoning of the Claimant regarding the unjust enrichment.

Proceeding from the above, the panel of judges believes that the ruling of the first instance court of 22 April 2009 was rendered by an incorrect application of the procedural law. As a result, the Claimant was deprived of its right to judicial protection. Therefore, pursuant to paragraph 2 of Article 272(4) of the Arbitrazh Procedure Code of the Russian Federation, the ruling shall be annulled and submitted to the Moscow Arbitrazh Court for re-examination.

The costs of a state duty shall be imposed on the Respondent according to Article 110 of the Arbitrazh Procedure Code of the Russian Federation.

Based on Articles 176, 266-268, 271, paragraph 2 of Article 272(4) of the Arbitrazh Procedure Code of the Russian Federation, the court

**RESOLVED:**

The ruling of the Moscow Arbitrazh Court of 22 April 2009, case No. A40-27854/09-61-247 shall be annulled.

The matter shall be submitted for a reexamination to the Moscow Arbitrazh Court.

OOO ABB Electorengineering shall pay ZAO UralEnergoGaz 1,000 (one thousand) rubles 00 kopek as compensation of a state duty for filing of the appeal petition.

The Resolution of the Ninth Arbitrazh Appeal Court shall enter into force on the day of its adoption and may be challenged with the Federal Arbitrazh Court for the Moscow District within two months starting from date of issuance of full-text of the Resolution.

Presiding Judge:

N.I. Pankratova

Judges:

T.Ya. Sumarokova

I.S. Lyatshevskiy