Unofficial translation

HIGHEST ARBITRAZH COURT OF THE RUSSIAN FEDERATION

RULING

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

No. 5243/06

Moscow 22 January 2008

The Presidium of the Highest Arbitrazh Court of the Russian Federation composed of:

Presiding Judge: the 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, O.A. Kozlova, A.G. Pershutov, S.V. Sarbash, V.L. Slesarev,

Considered the application of an open joint stock company "Moscow Refinery" for the re-examination of the resolution of the Presidium of the Highest Arbitrazh Court No. 5243/06 of 19 September 2006 adopted within the procedure of supervisory review in the case of the Moscow Arbitrazh Court No. A40-64205/05-30-394, due to newly discovered circumstances.

The following representatives participated in a court hearing:

On behalf of the Applicant, the open joint stock company "Moscow Refinery", – A.S. Bodnar, F.A. Vyacheslavov, M.M. Zhukova, A.A. Zurabyan;

On behalf of a joint stock company with limited liability "Joy-Lud Distributors International Inc." – A.V. Polezhaev, L.N. Ryabchenko, E.A. Savenkova.

Having heard and discussed the report of the judge Y.Y. Goryacheva as well as the explanations of the representatives of the parties participating in the case, the Presidium established the following[:]

The joint stock company with limited liability "Joy-Lud Distributors International Inc." (hereinafter – "the Firm") filed with the Moscow Arbitrazh Court an application for recognition and enforcement of the award of an international commercial *ad hoc* tribunal of 14 June 2005 ordering the open joint stock company Moscow Refinery (hereinafter – "Company") to pay the penalties for incomplete delivery of diesel fuel in the amount of USD 28,041,975 with the charge of annual interests on this amount on the basis of official Swedish reference percent rate plus 8 percent starting from 30 June 2005 and up until the total payment is discharged; compensation of the fees and costs of the members of the arbitral tribunal in the amount of USD 226,750 with the charge of annual interests on this amount on the basis of official Swedish reference percent rate plus 8 percent starting from 14 June 2005 and up until the total payment is discharged.

By its ruling of 15 December 2005, the Moscow Arbitrazh Court refused the relief sought by the application.

By its resolution of 21 March 2006, the Federal Arbitrazh Court for the Moscow District upheld the ruling of the first instance court of 15 December 2005.

The courts of both instances found that enforcement of an award of an international commercial arbitral tribunal of 14 June 2005 on the territory of the Russian Federation is contrary to the public policy of the Russian Federation.

By its resolution No. 5243/06 of 19 September 2006, the Presidium of the Highest Arbitrazh Court of the Russian Federation overruled the above judicial acts and granted relief upon the Firm's application. The Moscow Arbitrazh Court was ordered to issue a writ of execution in the case No.A40-64205/05-30-394 for recognition and enforcement of the award of the international commercial *ad hoc* arbitral tribunal of 14 June 2005.

Thereby, the Presidium of the Highest Arbitrazh Code of the Russian Federation specified, *inter alia,* that the civil legislation of the Russian Federation is based on the principle of equality of the

rights and obligations of the Russian and foreign legal entities and natural persons, and envisages charging penalties as a potential liability measure for non-performance or inappropriate performance of the obligations under a contract. Therefore, the penalty is part of the legal system of the Russian Federation and its recovery cannot be in breach of the public policy of the Russian Federation.

In the application filed with the Highest Arbitrazh Court of the Russian Federation, the Company requested the re-examination of the resolution No. 5243/06 of 19 September 2006 adopted within the procedure of supervisory review by the Presidium of the Highest Arbitrazh Court of the Russian Federation in the case No. A40-64205/05-30-394 of the Moscow Arbitrazh Court, due to newly discovered circumstances.

According to Article 310(2) of the Arbitrazh Procedure Code of the Russian Federation the re-examination due to newly discovered circumstances of resolutions and rulings of a court of appeal and cassation instances as well as resolutions and rulings of the Highest Arbitrazh Court of the Russian Federation adopted within the procedure of supervisory review, which changed a judicial act of a first instance court, of a court of appeal or cassation or through which a new judicial act was adopted, shall be made by the court which changed or adopted a new judicial act.

As a ground for re-examination of a judicial act adopted in the case, the Company refers to the existence of the circumstances crucial to the case which were not and could not have been known to the Company.

As the Company argued, during the enforcement procedure it became known to it that the person which was identifying itself as a creditor, provided under the request of the bailiff a copy of the certificate of registration of the company "Joy Lud Distributors International Inc." in the New York State, USA, with an apostilled translation, in which the company is named in Russian as "Joy-Lud Distributors International, Inc.".

At the same time, the contractor of the Company under the Contract, a party to the proceeding in international commercial *ad hoc* arbitration and with arbitrazh courts of the Russian Federation was a different company, namely "Joy-Lud Distributors International, Inc.". The postal addresses of these companies in New York do not coincide.

Having reviewed the data on registered companies on the official web-site of the New York State Department, the Company established that the company "Joy-Lud Distributors International, Inc." was missing on the website. There were the following companies: "Joy Lud Distributors International, Inc.", "Joy-Lud Distributors, Inc.", and "Joy-Lud Electronics, Inc." All of the companies are headed by Mr. T. Sapir. In addition, the mentioned latter two companies have the status of non-operating company. In 1990, the company "Joy-Lud Distributors, Inc." was renamed into "Joy-Lud Electronics, Inc.", which, in turn, was dissolved in 2003. Subsequently, the absence of the company "Joy-Lud Distributors International, Inc." among officially registered companies was confirmed by an official answer of the Division of Corporations of the New York Department of State of 8 March 2007.

In the opinion of the Company, the "Joy-Lud Distributors International, Inc." company had never been registered. The status of this company had never been verified in the proceedings before the international commercial *ad hoc* arbitration and arbitrazh courts of the Russian Federation; confusingly similar in its name, company "Joy Lud Distributors International, Inc." misled the arbitrators and judges, abused the procedural rights with the purpose of illegitimate acquisition of monies.

Therefore, the Company, in whose favor the award of international commercial *ad hoc* arbitration was rendered on 14 June 2005, did not exist, and a company with a similar name applied for the recognition and enforcement of the award.

As the Company believes, these circumstances have essential importance on the case for recognition and enforcement of the award of the international commercial *ad hoc* arbitration of 14 June 2005. The recognition and enforcement of a foreign award upon an application or with indication of a creditor a person, which was not a person in whose favor an award was rendered, would violate the public policy of the Russian Federation, and, thus, it is a ground for refusal to grant the application pursuant to Article V(2)(b) of the Convention of the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958), Article 36(1) of the Law of the Russian Federation No. 5338-1 of 7 July 1993 on International Commercial Arbitration, Article 239(4) of the Arbitrazh Procedure Code of the Russian Federation.

In the court hearing, the representatives of the Company supported the presented position.

The representatives of the Firm filed a petition for termination of the proceeding on the

re-examination of the resolution No. 5243/06 of 19 September 2006 due to newly discovered circumstances, which was dismissed by the Presidium, and then objected to granting the application for re-examination of the said judicial act due to newly discovered circumstances.

According to Article 311(1) of the Arbitrazh Procedure Code of the Russian Federation, as grounds for the re-examination of judicial acts due to newly discovered facts can serve those circumstances that are essential for the case and that were not known and could not have been known to the applicant.

The Company did not provide reasons, which could show the objective impossibility to familiarize itself with the information published on the official web-site of the registered companies of the New York State Department on the Internet before and during the proceedings before international commercial *ad hoc* arbitration as well as during the period of consideration of the Firm's application for recognition and enforcement of the award of 14 June 2005 by the Arbitrazh Courts.

On the contrary, the content of the application of the Company and the way of obtaining the information evidences the open access to this web-site for all interested persons for obtaining information on companies, registered in the State of New York, USA.

Consequently, the Company did not prove that the circumstances to which it refers could not have been known to it earlier.

As the Plenum of the Highest Arbitrazh Court of the Russian Federation clarified in clause 4 of the Resolution No. 17 of 12 March 2007 "On application of the Arbitrazh Procedure Code of the Russian Federation when re-examining judicial acts entered into force due to newly discovered circumstances", when examining an application for re-examination of a judicial act due to newly discovered circumstances, an arbitrazh court should establish whether the facts, set forth by the applicant, confirm the existence of the circumstances essential for the case, which can influence the conclusions of the Arbitrazh Court when rendering a judicial act, and which were not a subject of the court review in the present case.

In this case, the evidence provided by the Company confirm that starting from 1990 in the New York State, USA, there was only one company registered with the name "Joy Lud Distributors International, Inc." which has led to disagreements. It consideration of this, it is not possible that the Company signed a contract with any other company and then during 3 years performed the Contract No. 011/21-11-01/840 of 19 January 1995, made subsequent amendments and has been litigating since 2003, first in international commercial arbitration, and then in the arbitrazh courts of the Russian Federation, who has heard a number of disputes involving the Company and the Firm.

According to the award of the international commercial *ad hoc* arbitration of 14 June 2005, the official text of which was in Russian, when considering the dispute between Joy-Lud Distributors International Inc. (USA) and the open joint stock company Moscow Refinery (Russia), the arbitral tribunal ordered the sums to "the Claimant, Joy Lud Distributors International Inc.".

Therefore, the international commercial *ad hoc* arbitration used both versions of the Firm's name, considering it as a single legal entity.

The Company did not provide any evidence confirming the submission to the international commercial *ad hoc* arbitration objections regarding accuracy of the use in the text of the award of the names of the parties participating in the arbitration proceedings.

The documents present in the case materials and filed by the Firm with objections to the Company's application for re-examination of the case due to newly discovered circumstances, show that the Company itself uses in the correspondence regarding performance of the contract No. 011/21-11-01/840 of 19 January 1995 the Firm's name in English both as "Joy Lud Distributors International, Inc." and as "Joy-Lud Distributors International, Inc.".

The fact that both names "Joy Lud Distributors International, Inc." and "Joy-Lud Distributors International, Inc." belong to the same company was certified by the Special Deputy Secretary of New York State, Daniel Shapiro on 18 September 2007, who attested that the Certificate of Incorporation of the company "Joy-Lud Distributors International, Inc." was executed on 2 August 1990 under the name "Joy Lud Distributors International, Inc." with unlimited term of the deposit, and this company was active.

In these circumstances, the reasoning of the Company that the application for recognition and enforcement of the award of the international commercial *ad hoc* arbitration of 14 June 2005 was filed not by the company in favor of which the award was rendered and cannot be considered to have been

proven.

Consequently, there are no reasons to believe that facts reported by the Company, confirm the existence of the circumstances essential for the case, which can influence the conclusions of the Arbitrazh Court when rendering a judicial act.

Therefore, the information and documents as a whole provided by the Company do not comply with the requirements specified for newly discovered facts according to Article 311 of the Arbitrazh Procedure Code of the Russian Federation.

Considering stated above and based on Articles 303, 305, 310, 311, 317 of the Arbitrazh Procedure Code of the Russian Federation, the Presidium of the Highest Arbitrazh Court of the Russian Federation

Ruled:

The application of open joint stock company “Moscow Refinery” for the re-examination of the resolution adopted within the procedure of supervisory review of the Presidium of the Highest Arbitrazh Court of the Russian Federation No. 5243/06 of 19 September 2006 in the case No. A40-64205/05-30-394 of the Moscow Arbitrazh Court due to the newly discovered circumstances shall be dismissed.

Presiding Judge: A.A. Ivanov