Unofficial translation

FEDERAL ARBITRAZH COURT FOR THE CENTRAL DISTRICT

RESOLUTION

on review by the court of cassation instance of legality and well-grounded nature of the judicial acts rendered by arbitrazh courts having entered into force

7 September 2009 Case No. A54-3028/2008-S10
F10-915/09(2)
City of Bryansk

Operative part of the resolution announced on 3 September 2009
Full text of the resolution prepared on 7 September 2009

The Federal Arbitrazh Court for the Central District composed of:

Presiding judge	Kozelkin I.I.
Judges	Kirilova L.L. Chadov V.M.
being present at the hearing	
for the claimant	Kuzmin S.Yu. – representative (power of attorney No. 77 NP 8964450 of 1 April 2009) Skryshnik V.Yu. – representative (power of attorney No. b/n of 24 July 2008)
for the respondent	Gordeev A.Yu. – representative (power of attorney No. b/n of 11 March 2009)

Having examined at the open hearing the cassation complaint of the company Lugana Handelsgesellschaft mbH, Germany, Berlin, against a ruling of the Arbitrazh Court of the Ryazan Region of 24 June 2009, rendered in Case No. A54-3028/2008-S10

ESTABLISHED:

The company Lugana Handelsgesellschaft mbH, Germany, Berlin, filed an application with the Arbitrazh Court of the Ryazan Region against OAO Ryazan Metal Ceramics Instrumentation Plant for the recognition and enforcement of foreign arbitral awards rendered by the German Arbitration Institute in Cases No. DIS-SV-B-454/04 of 11 August 2005, No. DIS-SV-B-454/04 of 14 October 2005, No. DIS-SV-454/04 of 27 December 2005.

Pursuant to Article 49 of the Arbitrazh Procedure Code of the Russian Federation, the company Lugana Handelsgesellschaft mbH specified its complaints, and requested:

- The recognition and enforcement of the arbitral award of the German Arbitration Institute of 11 August 2005, rendered in Case No. DIS-SV-B-454/04 ordering OAO Ryazan Metal Ceramics Instrumentation Plant to pay the company Lugana Handelsgesellschaft mbH USD 463,317.63, as well as interest at 8 percentage points above the reference rate, starting from 23 January 2003, to provide information regarding all the contracts entered into since the signing of the exclusive distribution agreement of 10 January 2001, including with companies Ducentum Verwaltungs GmbH and Loury Investment S.A., and to deliver to Lugana Handelsgesellschaft mbH's address 500,000 reed switches of the desired assortment for the price of USD 0.072 per item;

- The recognition and enforcement of the arbitral award of the German Arbitration Institute of 14 October 2005 on the partial expenses, rendered in Case No. DIS-SV-B-454/04, ordering OAO Ryazan Metal Ceramics Instrumentation Plant to pay Lugana Handelsgesellschaft mbH expenses

based on the advance payments of EUR 81,652.05 performed by Lugana Handelsgesellschaft mbH, as well as interest at 5 percentage points above the reference rate, starting from 15 September 2005;

- The recognition and enforcement of the arbitral award of the German Arbitration Institute of 27 December 2005, on the final settlement of accounts, rendered in Case No. DIS-SV-B-454/04, ordering OAO Ryazan Metal Ceramics Instrumentation Plant to pay Lugana Handelsgesellschaft mbH additional expenses of EUR 57,408.71, as well as interest at 5 percentage points above the reference rate, starting from 6 December 2005.

By a ruling of 2 February 2009, the Arbitrazh Court of the Ryazan Region granted recognition and enforcement: of the award of the German Arbitration Institute (located in Germany, Breite Street 29, Berlin) of 11 August 2005, rendered in Case No. DIS-SV-B-454/04 ordering the respondent (OAO Ryazan Metal Ceramics Instrumentation Plant) to pay the claimant (the company Lugana Handelsgesellschaft mbH) USD 463,317.63 deliver to the claimant's (the company Lugana Handelsgesellschaft mbH) address 500,000 reed switches of the desired assortment for the price of USD 0.072 per item and provide information regarding all the contracts entered into since the signing of the agreement of 10 January 2001, including with companies Ducentum Verwaltungs GmbH and Loury Investment S.A.; of the award of the German Arbitration Institute (located in Germany, Breite Street 29, Berlin) of 14 October 2005, rendered in Case No. DIS-SV-B-454/04 ordering the respondent (OAO Ryazan Metal Ceramics Instrumentation Plant) to pay the claimant (the company Lugana Handelsgesellschaft mbH) expenses based on the advance payments of EUR 81,652.05 performed by the claimant; and the award of the German Arbitration Institute (located in Germany, Breite Street 29, Berlin) of 27 December 2005, rendered in Case No. DIS-SV-B-454/04, ordering the respondent (OAO Ryazan Metal Ceramics Instrumentation Plant) to pay the claimant (the company Lugana Handelsgesellschaft mbH) additional expenses of EUR 57,408.71. Other claims were dismissed.

By a resolution of 9 April 2009, the Federal Arbitrazh Court for the Central District annulled the challenged part of the first instance court's ruling, and transmitted it to the Arbitrazh Court of the Ryazan Region for re-examination.

In the re-examination of the case, the company Lugana Handelsgesellschaft mbH specified its complaint, and requested:

- The recognition and enforcement of the award of the German Arbitration Institute, of 11 August 2005, rendered in Case No. DIS-SV-B-454/04 ordering the respondent (OAO Ryazan Metal Ceramics Instrumentation Plant) to pay the claimant (the company Lugana Handelsgesellschaft mbH) USD 463,317.63, as well as interest at 8 percentage points above the reference rate, starting from 23 January 2003, to provide to the claimant (the company Lugana Handelsgesellschaft mbH) information regarding all the contracts entered into since the signing of the exclusive distribution agreement of 10 January 2001, especially with Ducentum Verwaltungs GmbH and Loury Investment S.A.;
- The recognition and enforcement of the award of the German Arbitration Institute of 14 October 2005, rendered in Case No. DIS-SV-B-454/04, ordering the respondent (OAO Ryazan Metal Ceramics Instrumentation Plant) to pay the claimant (the company Lugana Handelsgesellschaft mbH) expenses based on the advance payments of EUR 81,652.05 performed by the claimant, as well as interest at 5 percentage points above the reference rate, starting from 15 September 2005;
- The recognition and enforcement of the award of the German Arbitration Institute of 27 December 2005 on the final settlement of accounts, rendered in Case No. DIS-SV-B-454/04, ordering the respondent (OAO Ryazan Metal Ceramics Instrumentation Plant) to pay the claimant (the company Lugana Handelsgesellschaft mbH) additional expenses of EUR 57,408.71, as well as an interest at 5 percentage points above the reference rate, starting from 6 December 2005;

- Order OAO Ryazan Metal Ceramics Instrumentation Plant, Ryazan, to pay Lugana Handelsgesellschaft mbH, Berlin, expenses for the State registration fee in the amount of 6000 rubles.

By the ruling of 24 June 2009, the Arbitrazh Court of the Ryazan Region (Judge Groshev I.P.) rejected Lugana Handelsgesellschaft mbH's claims.

Invoking the inconsistency between the conclusions of the Arbitrazh Court and the factual circumstances of the case, the violation of rules of substantive and procedural law, the company Lugana Handelsgesellschaft mbH filed a cassation complaint with the Federal Arbitrazh Court for the Central District, in which it requested that the ruling of the Arbitrazh Court of the Ryazan Region of 24 June 2009 be annulled and its claims satisfied.

At the hearing, Lugana Handelsgesellschaft mbH's representative advanced the arguments set out in the cassation complaint.

The representative of OAO Ryazan Metal Ceramics Instrumentation Plant did not recognize the reasoning of the cassation complaint and considered that the challenged judicial act was lawful and well-grounded.

Having examined the case materials, heard the reasoning of the parties' representatives, discussed the reasons for the complaint and replies thereof, the Arbitrazh Cassation Court does not find grounds for granting the cassation complaint.

It follows from the case materials that the award of the German Arbitration Institute (located in Germany, Breite Street 29, Berlin) of 11 August 2005, rendered in Case No. DIS-SV-B-454/04, ordered the respondent (OAO Ryazan Metal Ceramics Instrumentation Plant) to pay the claimant (the company Lugana Handelsgesellschaft mbH) USD 463,317.63, as well as interest at 8 percentage points above the reference rate, starting from 23 January 2003.

Furthermore, the abovementioned award ordered the respondent to deliver to the claimant's address 500,000 items of reed switches of the desired assortment for the price of USD 0.072 per item and to provide to the claimant (the company Lugana Handelsgesellschaft mbH) information regarding all the contracts entered into since the signing of the agreement of 10 January 2001, especially with companies Ducentum Verwaltungs GmbH and Loury Investment S.A.

Similarly, the award of the German Arbitration Institute (located in Germany, Breite Street 29, Berlin) of 14 October 2005, rendered in Case No. DIS-SV-B-454/04, ordered the respondent (OAO Ryazan Metal Ceramics Instrumentation Plant) to pay the claimant (the company Lugana Handelsgesellschaft mbH) expenses based on the advance payments of EUR 81,652.05 performed by the claimant, as well as interest at 5 percentage points above the reference rate, starting from 15 September 2005.

Similarly, the award of the German Arbitration Institute (located in Germany, Breite Street 29, Berlin) of 27 December 2005, rendered in Case No. DIS-SV-B-454/04, ordered the respondent (OAO Ryazan Metal Ceramics Instrumentation Plant) to pay the claimant (the company Lugana Handelsgesellschaft mbH) additional expenses of EUR 57,408.71, as well as an interest at 5 percentage points above the reference rate, starting from 6 December 2005.

The failure to perform the abovementioned awards served as a ground for Lugana Handelsgesellschaft mbH's application for recognition and enforcement.

The court based its disputed ruling on the following reasoning.

Pursuant to Article V(1)(c) of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards signed in New York on 10 June 1958 (hereinafter – "the Convention"), the recognition and enforcement of an award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that the award deals with a difference not contemplated by or not falling within the

terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced.

An analogous provision is set out in Article 36(1)(1) of the Law of the Russian Federation No. 5338-1 of 7 July 1993 "On International Commercial Arbitration" (as amended by Federal Law No. 250-FZ of 3 December 2008), as well as Article 239(2)(3) taken with Article 244(2) of the Arbitrazh Procedure Code of the Russian Federation.

Pursuant to Article 7 of the Law of the Russian Federation No. 5338-1 of 7 July 1993 "On International Commercial Arbitration", an arbitration agreement is an agreement of 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. The arbitration agreement shall be in writing. An agreement is in writing if it is contained in a document signed by the parties or in an exchange of letters, telex, telegrams or other means of telecommunication which provide a record of the agreement, or in an exchange of statements of claim and defense in which the existence of an agreement is alleged by one party and not denied by another. The reference in a contract to a document containing an arbitration clause constitutes an arbitration agreement provided that the contract is in writing and the reference is such as to make that clause part of the contract.

As it was established by the Arbitrazh Court, according to paragraph 9.1 of the Contract No. 061200 of 14 December 2000 concluded between OAO Ryazan Metal Ceramics Instrumentation Plant and Lugana GmbH, Basdorf, Germany, all disputes and disagreements which arise from this contract or in relation to it, shall be settled amicably. In case the parties do not reach an agreement, the case shall be submitted to the Arbitration Court in Stockholm (Sweden).

Pursuant to paragraph 7.2 of the exclusive distribution agreement of 10 January 2001 concluded by OAO Ryazan Metal Ceramics Instrumentation Plant and Lugana Handelsgesellschaft mbH, Basdorf, Germany, disputes arising in relation to this contract which could not be resolved by the parties through negotiations, shall be settled by the Arbitration Court in Stockholm (Sweden).

The letter of 27 July 2004, submitted in the case materials, sent to OAO Ryazan Metal Ceramics Instrumentation Plant's address, requests the rendering of a binding statement regarding the suggestion to finally settle all disputes in accordance with the Rules of the German Arbitration Institute in Berlin.

It follows from the answer of 30 July 2004 that OAO Ryazan Metal Ceramics Instrumentation Plant's representative, Doctor Norbert Buchbinder, indicates that it is necessary to draft a clause so as to allow the reciprocal claims to be taken into account and for these claims to be submitted to arbitration.

Having properly examined all the evidence pursuant to Article 71 of the Arbitrazh Procedure Code of the Russian Federation, the Arbitrazh Court came to the conclusion that it does not follow from the correspondence in the case materials that the parties reached an agreement to amend the arbitration agreement, according to which disputes that arose between them shall be settled by the Arbitration Court in Stockholm (Sweden). For that reason, the composition of the arbitral tribunal and the arbitral proceedings in the German Arbitration Institute in Cases No. DIS-SV-454/04 of 11 August 2005, No. DIS-SV-454/04 of 14 October 2005 and No. DIS-SV-454/04 of 27 December 2005 did not correspond to the parties' agreement.

Lugana Handelsgesellschaft mbH's assertion that the parties reached an agreement to submit the dispute to the German Arbitration Institute in Berlin because OAO Ryazan Metal Ceramics Instrumentation Plant did not object during these arbitral proceedings to the dispute should not be

examined by this arbitral tribunal, was examined by the Arbitrazh Court and was correctly rejected since, in itself, the absence of such objection does not establish that the parties have reached an agreement in the required form.

Lugana Handelsgesellschaft mbH's reference to the fact that OAO Ryazan Metal Ceramics Instrumentation Plant's agreement to amend the arbitration agreement is confirmed by the statement of defense, signed by the attorney, Doctor Buchbinder, also cannot be taken into account since, as the Arbitrazh Court correctly established, there are no documents presented in the case materials confirming the authority of the abovementioned representative to take such actions.

Furthermore, the wording in the statement of defense, as well as the minutes of the hearing of the German Arbitration Institute, do not contain an agreement for the amendment of the arbitration clause.

Taking the above into account, the conclusion of the Arbitrazh Court that there are grounds for the refusal to recognize and enforce the foreign arbitral awards pursuant to Article V(1)(c) of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards signed in New York on 10 June 1958, is correct.

At the same time, the Arbitrazh Court of Cassation cannot agree with the argument of the Arbitrazh Court that Lugana Handelsgesellschaft mbH did not respect the statute of limitations period for the submission of the German Arbitration Institute's awards rendered in Cases No. DIS-SV-454/04 of 11 August 2005, No. DIS-SV-454/04 of 14 October 2005 and No. DIS-SV-454/04 of 27 December 2005 for coercive enforcement.

Under Article 244(1)(6) of the Arbitrazh Procedure Code of the Russian Federation, an arbitrazh court shall refuse to grant recognition and enforcement of a foreign arbitral award, in full or in part, if the statute of limitations for the submission of the foreign arbitral award for coercive enforcement has expired and it has not been restored by an arbitrazh court.

Under Article 246(2) of the Arbitrazh Procedure Code of the Russian Federation, a foreign arbitral award can be submitted for coercive enforcement within three years following the day it has entered into force.

Under Article 203 of the Civil Code of the Russian Federation, the statute of limitations shall be stopped by a properly submitted claim. After the interruption of the running of the state of limitations period, it starts running again; the period until the interruption shall not be included in the new time period.

Considering that the application for recognition and enforcement of the German Arbitration Institute's awards, rendered in Cases No. DIS-SV-454/04 of 11 August 2005, No. DIS-SV-454/04 of 14 October 2005 and No. DIS-SV-454/04 of 27 December 2005, was filed by company Lugana Handelsgesellschaft mbH on 7 August 2008, before the expiration of the statute of limitations period provided for in Article 246 of the Arbitrazh Procedure Code of the Russian Federation, the statute of limitations was reset.

Therefore, the Arbitrazh Court's conclusion that the statute of limitations for submitting the German Arbitration Institute's awards for coercive enforcement had expired is not grounded according to the case materials and the requirements of the law. Since the abovementioned violation did not lead to the adoption of an erroneous decision, it cannot constitute a ground for annulment of the judicial act.

Taking into account the above, the Arbitrazh Court of Cassation considers that there are no grounds for annulling the judicial act.

On the basis of Articles 287(1)(1), 289 and 290 of the Arbitrazh Procedure Code of the Russian Federation, the court

RESOLVED

The ruling of the Arbitrazh Court of the Ryazan Region of 24 June 2009 rendered in Case No. A154-3028/2008-S10 shall be upheld, and the cassation complaint shall not be granted.

This resolution shall enter into force at the moment of its adoption.

Presiding judge	Kozelkin I.I.
Judges	Kirilova L.L.
	Chadov V.M.