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019/2009-21067(1)

FEDERAL ARBITRAZH COURT FOR THE NORTH-CAUCASUS DISTRICT

In the name of the Russian Federation

RESOLUTION
of the arbitrazh court of cassation instance

Krasnodar Case No. A01-342/2009 14 September 2009

Operative part of the resolution was announced on 14 September 2009.
Full text of the resolution was prepared on 14 September 2009.

The Federal Arbitrazh Court for the North-Caucasus District composed of the presiding judge K.K. Aybatulin, judges L.N Plotnikova and I.I. Fyefyelova., in absence of the creditor – the open joint stock company Byerezastroymaterialy, of the debtor - the individual entrepreneur D.V. Goryelov, duly notified of the time and place of the hearing, having examined the cassation complaint of the open joint stock company Byerezastroymaterialy on the ruling of the Arbitrazh Court of the Republic of Adygea of 6 April 2009 in Case No A01-342/2009, established the following:

OAO Byerezastroymaterialy (hereinafter – "the Company") filed with the Arbitrazh Court an application against IP D.V. Goryelov (hereinafter – "the Entrepreneur") for recognition and enforcement of the award rendered by the International Arbitration Court of the Belarusian Chamber of Commerce and Industry on 2 December 2008, in case No 733/14-08, ordering the debtor, the entrepreneur, to pay the company the principal amount of RUB 347 736.48, fines in the amount of RUB 1 760 186.90, a fine for a delayed payment for the delivered goods in the amount of RUB 62 073.64, a fine for failure to provide to the claimant the third copy of the importation of goods certificate in the amount of RUB 11 173.25, for a total of RUB 2 181 170.23 as well as costs of arbitration proceedings in the amount of EUR 2 735.53.

By a ruling of the Arbitrazh Court of the Republic of Adygea of 6 April 2009, the application was rejected with a reference to the fact that the applicant failed to present to the Arbitrazh Court the enforcement document, issued by the International Arbitration Court of the Belarusian Chamber of Commerce and Industry on the basis of the award No 733/14-08 of 2 December 2008 as well as the proof of proper service of process on the other party (the debtor). There is no evidence that the addressee failed to appear to collect the letter.

In the cassation complaint, the company requests a reversal of the ruling of the Arbitrazh Court of the Republic of Adygea, considering it unlawful. The applicant alleges that a copy of the award certified by the International Arbitration Court of the Belarusian Chamber of Commerce and Industry and the receipts of notice to the respondent have been presented to the court. The entrepreneur was informed of the date of the proceedings, which is confirmed by the postal notification of 29 April 2008 as to the date and place of the first hearing, delivered to the respondent on 26 May 2008. The notification as to the date and place of the second hearing was not served on the entrepreneur because his presence was not required.

Having examined the materials of the case and the arguments of the cassation complaint, the Federal Arbitrazh Court for the North-Caucasus District considers that the complaint should be dismissed on the following ground:.

As it appears from the case materials, by the award of 2 December 2008, rendered by the International Arbitration Court of the Belarusian Chamber of Commerce and Industry in case No 733/14-08, the entrepreneur, D.V. Goryelov, was ordered to pay the company the debt in amount of RUB 347 736.48, fines in the amount of RUB 1 760 186.90, a fine for a delayed payment for delivered goods in the amount of RUB 62 073.64, a fine for failure to provide to the claimant the third copy of the importation of goods certificate in the amount of RUB 11 173.25, for a total of RUB 2 181 170.23 as well as costs of the arbitration proceedings in the amount of EUR 2 735.53. In accordance with Article 41 of the law on of the Republic of Belarus "On International Arbitral Tribunal" the award is final and enters into force on the date of its adoption.

The proceedings for recognition and enforcement of foreign court decisions are governed by chapter 31 of the Arbitrazh Procedure Code of the Russian Federation.

Pursuant to Article 244(2) of the Arbitrazh Procedure Code of the Russian Federation, an arbitrazh court shall refuse to grant the recognition and enforcement of a foreign arbitral award on grounds provided for in Article 239(4) of the Arbitrazh Procedure Code of the Russian Federation, unless otherwise provided by an international treaty of the Russian Federation. According to the above provision, an arbitrazh court may refuse to grant the recognition and enforcement of a foreign arbitral award on the grounds provided by international treaty of the Russian Federation and the federal law on international commercial arbitration.

In accordance with paragraph b of Article V(1) of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958) and Article 36(1) of the Law of the Russian Federation "On International Commercial Arbitration" of 7 July 1993, recognition and enforcement of the award may be refused in cases where the party against whom the award is invoked furnishes, to the competent court where the recognition and enforcement is sought, proof that this party was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present its case.

On the basis of Article 34 of the Belarusian Chamber of Commerce and Industry rules, the International Court of Arbitration shall ensure a prompt sending and delivery of the case materials to parties or their representatives.

The statements of claim, the statements of defence, summons and notices, awards and other decisions of the court are communicated by registered mail with the acknowledgment of receipt or delivered personally against signature. Other documents may be sent by ordinary mail, registered mail, or by other means of communication - such as telegraph, telefax, etc. - that provide a record of the information sent. Upon the application of a party and at its expense or on the court's initiative, the delivery may be made by any other reasonable way.

The documents are also deemed to have been delivered if existing evidence confirms that the recipient has refused to receive them or has not received them despite having been informed about their arrival by the post office.

When the location, permanent residence or current address of the recipient cannot be established upon a good faith use of means of inquiry available to the sender, the correspondence is considered to have been received if it has been sent to the last known address of the recipient (as specified in the contract or in the letterhead form of the firm that received from the recipient during correspondence, etc.), and the post office confirmed the impossibility of delivery.

The court was provided with a copy of the notice concerning the court hearing in case No. 733/14-08, dated 3 June 2008 filed to the entrepreneur to the address: Shosseynaya street

3, Maykop, Republic of Adygea, without annotations neither on its delivery or non-delivery, nor on the causes of the non-delivery (exhibited under position 69). From the content of the copy of the award of 2 December 2008 rendered by the Belarusian Chamber of Commerce and Industry, it is evident that several hearings were held in this case. Moreover, the second hearing took place on 21 July 2008 in absence of both parties' representatives. The award is dated 2 December 2008.

Therefore, no proper evidence was presented proving that the entrepreneur was duly notified by the arbitral tribunal of the proceedings of 21 July 2008 (2 December 2008). Thus, the dismissal of the application for recognition and enforcement of the foreign arbitral award is well-grounded.

The company's arguments refer to the circumstances of the case which were examined and correctly assessed during the proceedings before the court of first instance. The cassation instance finds no grounds for their reassessment.

Pursuant to Articles 274, 284, 286-289 of the Arbitrazh Procedure Code of the Russian Federation, the Federal Arbitrazh Court for the North-Caucasus District

RESOLVED:

The ruling of the Arbitrazh Court of the Republic of Adygea of 6 April 2009 in the case No. A01-342/2009 shall be upheld and the cassation complaint shall be dismissed.

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

Presiding judge: K.K. Aybatulin

Judges L.N. Plotnikova

I.I. Fyefyelova

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Absence of notification to respondent of the time and place of the court proceedings in the International Arbitration Court of the Belarusian Chamber of Commerce and Industry is a ground for denial of recognition and enforcement of the foreign arbitral award.