

FEDERAL ARBITRAZH COURT FOR THE NORTH-WESTERN DISTRICT
Yakubovich Street 4, Saint-Petersburg, 190000
<http://fasszo.arbitr.ru>

RESOLUTION

24 April 2009

Case No. A56-60007/2008

The Federal Arbitrazh Court for the North-Western District composed of Presiding Judge S.V. Afanasyev, Judges R.V. Kazantseva and N.V. Maryankova,

Represented at the hearing: for Stena RoRo AB, by K.V. Smirnova (power of attorney of 9 December 2008), L.G. Erigo (power of attorney of 9 December 2008) and I.E. Selezneva (power of attorney of 9 December 2008); for OAO Baltiysky Zavod, V.V. Nesvit (power of attorney of 12 January 2009), Yu.V. Finogenova (power of attorney of 10 February 2009) and N.S. Puchkova (power of attorney of 12 January 2009),

Having examined at the open hearing of 23 April 2009 the cassation complaint of the company Stena RoRo AB against a ruling of the Arbitrazh Court of Saint-Petersburg and the Leningrad Region of 20 February 2009, rendered in Case No. A56-60007/2008 (Judge V.V. Apranich)

established:

The company Stena RoRo AB, Kingdom of Sweden (hereinafter – “the Company”), filed an application with the Arbitrazh Court of Saint-Petersburg and the Leningrad Region for the recognition and enforcement of an award of the Arbitration Institute of the Stockholm Chamber of Commerce (hereinafter – “the Arbitration Institute”) of 24 September 2008, rendered in Case No. V054-56/2007, ordering OAO Baltiysky Zavod (hereinafter – “the Firm”) to pay to the applicant EUR 20,000,000 in damages for the loss sustained due to the non-performance of ship-building contracts Nos. 443 and 444 of 7 July 2005 (hereinafter – Contracts Nos. 443 and 444) and the option agreement of 7 July 2005 (hereinafter – “the Option Agreement”), EUR 209,364.80 for compensation of arbitration costs, and SEK 1,071,280 and EUR 800 for the compensation of the Company’s expenses related to the arbitration, with incurred interest on these sums.

By the ruling of 20 February 2009, the application was rejected.

In its cassation complaint the Company requests that the ruling of 20 February 2009 be annulled and the application granted, invoking the following:

- The court’s conclusion that the Arbitration Institute’s award of 24 September 2008 in Case No. V054-56/2007 “was rendered in a dispute not covered by an arbitration clause, contained in the contracts that were not entered into” violates Article V of the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 10 June 1958 (hereinafter – “the 1958 Convention”), Article 36 of the Law of the Russian Federation No. 5338-1 “On International Commercial Arbitration” of 7 July 1993 (hereinafter – “Law No. 5338-1”), Articles 243(4) and 244(2) of the Arbitrazh Procedure Code of the Russian Federation (hereinafter – “the RF APC”), as well as the principles of access to justice, adversarial proceedings and equality of parties;

- The court's conclusion that the recognition and enforcement of the Arbitration Institute's award of 24 September 2008, rendered in Case V054-56/2007, is contrary to the public policy of the Russian Federation, is not grounded.

At the hearing, the Company's representatives supported the cassation complaint. The Firm's representatives argued that the cassation complaint should not be granted.

The legality of the challenged judicial act was examined in cassation review.

According to Contracts Nos. 443 and 444, the Firm (the seller) undertook to design, build, float out, equip, fit-out, complete and sell to the Company (the buyer) two ROPAX vessels, with 4020 linear meters long parking lanes and the buyer undertook to accept and buy them from the seller.

Article XIII of Contracts Nos. 443 and 444 provide that any disputes or disagreements arising from them or in relation to them, as well as any breach, termination, or invalidity of Contracts Nos. 443 and 444, shall be settled by a three-member arbitral tribunal under the rules of the Arbitration Court of the Chamber of Commerce of Stockholm in force.

Pursuant to Article 1 of the Option Agreement, in relation to the conclusion of the Contracts Nos. 443 and 444, the Firm shall give to the Company an optional right to purchase two additional vessels under the same terms and with the same characteristics as the vessels under Contracts No. 443 and 444, unless it is otherwise provided for in the Option Agreement. The optional right shall not enter into force as long as the Contracts Nos. 443 and 444 are not signed by the parties and entered into force pursuant to their terms.

Pursuant to Article 8 of the Option Agreement, its entry into force is subject to the entry into force of Contracts No. 443 and 444.

Pursuant to Article 7 of the Option Agreement, the latter is governed by Swedish law, and the arbitration clause contained in Contracts No. 443 and 444 shall be part of the Option Agreement.

Invoking the improper performance by the seller of the terms of Contracts Nos. 443 and 444 and of the Option Agreement, the Company filed a claim with the Arbitration Institute seeking damages from the Firm in the amount of EUR 145,563,862.

By an award of 24 September 2008, rendered in Case No. V054-56/2007, the Arbitration Institute ordered the Firm to pay to the Company RUB [sic] EUR 20,000,000 of damages, arbitration costs and miscellaneous expenses in the arbitration, plus the incurred interest on these sums.

Since the Arbitration Institute's award of 24 September 2008, rendered in Case V054-56/2007, was not voluntarily complied with, the Company filed an application with the Arbitrazh Court.

Pursuant to Article 6(3) of the Federal Constitutional Law No. 1-FKZ "On the Judicial System of the Russian Federation" of 31 December 1996, the compulsory nature of resolutions of foreign courts, international courts and arbitral tribunals shall be determined by the international treaties of the Russian Federation.

Pursuant to Article 241(1) of the RF APC, awards of courts of arbitration and international commercial arbitral tribunals, rendered in 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 by the arbitrazh courts, provided that their recognition and enforcement is envisaged by the international treaties of the Russian Federation and federal legislation.

The procedure for the recognition and enforcement of foreign arbitral awards is provided in the 1958 Convention to which the Russian Federation and the Kingdom of Sweden are parties.

Pursuant to Article V(1)(b) 1958 Convention, 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, to the competent authority where the recognition and enforcement is sought, proof that the recognition or enforcement of the award would be contrary to the public policy of that country.

Pursuant to Article 244(2) RF APC, an arbitrazh court shall refuse to grant recognition and enforcement, in part or in full, of a foreign arbitral award on the basis of Articles 244(1)(7) and 239(4) of the RF APC, which provide the grounds for refusal to issue an enforcement writ for the coercive enforcement of an international commercial arbitral award, unless otherwise provided by an international treaty of the Russian Federation.

Pursuant to Article 244(1)(7) RF APC, an arbitrazh court shall refuse to grant recognition and enforcement of a foreign court decision, in part or in full, if the enforcement of the foreign court decision would be contrary to the public policy of the Russian Federation.

Pursuant to Article 239(4) RF APC, an arbitrazh court may refuse to issue an enforcement writ for the coercive enforcement of an international commercial arbitral award on the grounds provided for by international agreements of the Russian Federation and the federal legislation on international commercial arbitration.

Pursuant to Article 36(1)(2) of Law No. 5338-1, recognition and enforcement of an arbitral award may be refused, without regard to the country where the award was rendered, if the court finds that the recognition and enforcement of the award would be contrary to the public policy of the Russian Federation.

Pursuant to Article 1193 of Chapter 66 “General Provisions” of Section VI “Private International Law” of the Civil Code of the Russian Federation (hereinafter – “the RF CC”), public policy of the Russian Federation refers to the foundations of the legal order in the Russian Federation.

The foundations of the legal order in the Russian Federation includes, aside from the foundations of morality, major religious principles and major economic and cultural traditions which constitute the Russian Civil Society, the fundamental principles of Russian law.

The fundamental principles of Russian law include *inter alia* the fundamental principles of civil law.

Pursuant to Article 1 RF CC “Fundamental Principles of Civil Legislation”, the civil legislation is based on the recognition of the equality of participants in civil law relationships, the inviolability of property, contractual freedom, the inadmissibility of arbitrary interference with private business, the necessity of free exercise of civil rights, the provision of remedies for violation of rights, and their judicial protection (paragraph 1). Citizens (individuals) and entities may acquire and exercise their civil rights freely and in their own interest. They are free to set out their rights and obligations through contract and determine the terms of a contract, provided that they are not contrary to the legislation (paragraph 2).

Similarly, fundamental principles of the Russian civil legislation include basic rules on the imposition of liability for failure to perform obligations; in particular, liability for causing harm (torts liability) shall occur only when the person causing the harm is at fault (Article 1064 of the RF CC) and that the person who does not perform or improperly performs his obligations when conducting an entrepreneurial activity shall be liable if he does not establish that proper performance was rendered impossible due to *force majeure* (Article 401 RF CC).

The Company and the Firm, on the basis of the principle of freedom of contract, entered into Contracts Nos. 443 and 444, which provided in Article XX that one of the conditions for the entry into force of these contracts was their approval by the board of directors of the buyer and the seller. For that reason, the parties specifically agreed that if this condition is not fulfilled before 8 August 2005, Contracts No. 443 and 444 shall be considered as void, invalid and as not having been entered into force, and as a result, the parties undertake not to submit any claims against each other.

It follows from the Arbitration Institute's award of 24 September 2008 that, since in Case No. V054-56/2007 there were no minutes of the board of directors of the Company approving the Contracts Nos. 443 and 444 and no such minutes were provided to the Firm, the first instance court came to the correct conclusion that Contracts Nos. 443 and 444 and the Option Agreement did not enter into force.

With regard to the fact that the Company and the Firm are not bound by any contractual obligations to build and deliver ROPAX vessels, the Firm's liability cannot be incurred in the form of damages for the breach of these obligations.

Evidence that the Company suffered non-contractual damages, the compensation of which is ordered by the Arbitration Institute's award of 24 September 2008 in Case No. V054-56/2007, has not been submitted by the applicant.

Under such circumstances, the recognition and enforcement of the Arbitration Institute's award of 24 September 2008 in Case No. V054-56/2007 is contrary to the public policy of the Russian Federation.

Considering the above, the first instance court rightfully rejected the Company's application.

The following conclusions of the challenged ruling are erroneous: the enforcement of the Arbitration Institute's award of 24 September 2008 would lead to the Firm's bankruptcy, which would, consequently, cause damage to the State, which has special management rights and, thus the enforcement of the award would be contrary to the public policy of the Russian Federation. Moreover, no arbitration agreement (being legally autonomous in relation to Contracts Nos. 443 and 444) was concluded and no Option Agreement was concluded either. However, these conclusions did not lead to the court rendering an incorrect decision in this Case.

Considering the above, there are no grounds for the annulment of the challenged ruling.

Guided by Articles 286, 287, 289, 290 of the RF APC, the Federal Arbitrazh Court for the North-Western District

resolved:

the ruling of the Arbitrazh Court of Saint-Petersburg and the Leningrad Region of 20 February 2009 in Case No. A56-60007/2008 shall be upheld and the cassation complaint of Company Stena RoRo AB shall be rejected.

Presiding Judge

S.V. Afanasyev

Judge

R.V. Kazantseva

N.V. Maryankova