Unofficial translation

HIGHEST ARBITRAZH COURT OF THE RUSSIAN FEDERATION

RULING

on the refusal to refer the case to the Presidium
of the Highest Arbitrazh Court of the Russian Federation

No. VAS - 7301/11

Moscow 27 July 2011

The panel of judges of the Highest Arbitrazh Court of the Russian Federation, composed of the presiding judge S.P. Bondarenko and judges M.V. Pronina and N.P. Kharchikova, at a hearing, examined the application of 26 May 2011 filed by the company Sporting Supplies International Inc., for a supervisory review of the resolution of the Twentieth Arbitrazh Court of Appeal dated 21 February 2011 and of the resolution of the Federal Arbitrazh Court for the Central District dated 27 April 2011 in Case No. A68-6505/10 of the Arbitrazh Court of the Tula Region. Rendered upon the complaint of the open joint stock company Tula Ammunition Factory (hereinafter – the Factory; city of Tula) against the company Sporting Supplies International Inc. (hereinafter – the Company; USA) seeking the recovery of amounts due for the products delivered under the contracts No. 643/08629358/182-09 and No. 643/08629358/183-09 of 1 April 2009 in the amount of USD 2 191 028.73, which corresponds to RUB 67 473 387.47, according to the official exchange rate of the Central Bank of Russia as of 12 July 2010, as well as interest for use of the other person's financial means in the amount of USD 10 490,35 corresponding to RUB 323 053.47.

The Court established: by the ruling of the court of first instance of 11 January 2011 the proceedings in the case were terminated on basis of Article 150(1)(1) of the Arbitrazh Procedure Code of the Russian Federation (hereinafter – the Code).

By the resolution of the Twentieth Arbitrazh Court of Appeal of 21 February 2011, upheld by the resolution of the Federal Arbitrazh Court for the Central District of 27 April 2011, the above ruling was annulled; the case was remanded for reexamination to the Arbitrazh Court of the Tula Region.

In the application for supervisory review of the challenged judicial acts the Company alleges inconsistency in interpretation and application of the law by the court. It deems that the parties did not reach an agreement pursuant to Article 249 of the Code, conferring competence to an arbitrazh court of the Russian Federation at the location of the claimant to decide the dispute between the parties. The Company notes that according to the general rules of jurisdiction, the dispute shall be decided by the court of the respondent's location and refers to an incorrect application by courts of Article 57(1) of the United Nations Convention on Contracts for the International Sale of Goods.

The Courts established that the contracts were concluded between the Factory (seller) and the Company (buyer) dated 1 April 2009, No. 643/08629358/182-09 and No. 643/08629358/183-09 for delivery of products according to name, quantity, price and other specifications determined in the Annex I to the contracts.

Paragraph 13 of the above contracts provides that if the parties could not solve the dispute amicably, all disputes and disagreements shall be settled by an arbitration court at the location of the claimant, according to the rules of that country governing such proceedings. The award rendered by an arbitrator may be challenged in any court administering justice in such cases. The costs of arbitration shall

be borne by the party against whom the award was rendered. The law of the claimant's State shall apply to the disputes arising out of the performance of the present contract.

Alleging improper performance by the Company of the obligation to pay for the goods delivered pursuant to the above contracts and asserting that pursuant to paragraph 13 of the contracts the complaint shall be heard by an arbitration court at its location, the claimant filed the present lawsuit with the Arbitrazh Court.

The interpretation of the abovementioned provision of the contracts warrants the conclusion that the parties agreed that an arbitral tribunal would be a competent body to settle the disputes arising out of the performance of the contracts.

Consequently, pursuant to Article II(3) of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, the court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed.

In order for an arbitration agreement to be enforceable, clear wording is required from which true intentions of the parties about their choice of an arbitration body can be ascertained. Such determination cannot be made on the basis of paragraph 13 of the contracts.

This conclusion is confirmed by paragraph 13 of the Information Letter of the Presidium of the Highest Arbitrazh Court of the Russian Federation No. 29 of 16 February 1998 entitled "Review of Practice of the Arbitrazh Courts in Resolving the Disputes Involving Foreign Parties."

The conclusion of the applicant, that the parties have agreed to resolve their disputes through international commercial arbitration, is not confirmed by the analysis of the wording of paragraph 13 of the contracts, which simply provides that the disputes would be heard by a court of arbitration and an award would be rendered by an arbitrator, without providing any further details.

Therefore, in the absence of a valid arbitration agreement, the court of first instance, on the basis of the general rules of jurisdiction in disputes involving foreign parties, should have ruled on its competence to hear the disputes.

Since paragraph 13 of the contracts is an invalid arbitration agreement, the reference by the challenged judicial acts to the fact that "disputes and disagreements shall be settled by an arbitration court at the location of the claimant" cannot serve as a ground for parties' agreement on jurisdiction of the Arbitrazh Court of the Tula Region being the court of the claimant's location for the purposes of Article 249 of the Code.

In addition, pursuant to Article 247(1)(3) of the Code the arbitrazh courts of the Russian Federation are competent to hear cases with participation of foreign legal persons, if the dispute has arisen from an agreement, the performance of which should have taken place or took place on the territory of the Russian Federation.

Consequently, the question of the place of performance of the contracts as the criterion for establishing jurisdiction over the dispute shall be decided.

The Vienna Convention on Contracts for the International Sale of Goods does not contain the notion of the place of performance of the contract; it distinguishes between the place of performance of an obligation to deliver goods (Article 31) and the place of payment of the price by the buyer (Article 57).

In the present case the dispute arose out of a nonperformance of the monetary obligation to pay for the delivered goods by the buyer, therefore the place of performance of the above obligation shall play a decisive role in determining the jurisdiction over the case.

According to the abovementioned Article 57 of the Vienna Convention, if the buyer is not bound to pay the price at any other particular place, he must pay it to the seller:

(a) at the seller's place of business; or

(b) if the payment is to be made against the handing over of the goods or of documents, at the place where the handing over takes place.

The applicant invokes the applicability of paragraph "b" of Article 57 of the Vienna Convention, since in paragraph 5.3 of the disputed contracts it was provided that the handing over of the goods shall

take place in the port of Saint-Petersburg with the transfer to the buyer, according to the maritime bill of lading. Paragraph 3.2 of the contracts provided that the delivery shall take place in accordance with the basic terms of delivery FOB, according to which the place of transfer of goods is the port of shipment named by the parties (in this case – the port of Saint-Petersburg).

However, the resolution of the court of cassation instance contains a correct conclusion that in this case the place of performance of a monetary obligation by the buyer shall be determined pursuant to paragraph "a" of Article 57 of the Vienna Convention according to the seller's place of business. Paragraph "b" of Article 57 of the Vienna Convention is inapplicable, as pursuant to Article 6 of the contracts the payment for each delivery shall take place not in the place of transfer of goods but by a bank transfer within 90 days after the date indicated on the invoice.

Therefore, as Tula is the place of business of the seller, pursuant to Article 247(1)(3) of the Code, the Arbitrazh Court of the Tula Region had jurisdiction to hear the case.

According to Article 304(1) of the Arbitrazh Procedure Code of the Russian Federation, the grounds for modification or annulment in supervisory proceedings of judicial acts that have entered into force are the following: violation by the challenged judicial act of the uniformity in interpretation and application of the rules of law as applied by arbitrazh courts; violation of human and citizen's rights and liberties according to the universally recognized principles and rules of international law and international treaties of the Russian Federation; as well as violation of rights and legal interests of an undetermined group of persons or other public interests.

The panel of judges does not find that any of the grounds exist.

Taking into consideration the above, on the basis of Articles 299, 301 and 304 of the Arbitrazh Procedure Code of the Russian Federation, the Court.

Ruled:

The referral of Case No. A68-6505/10 of the Arbitrazh Court of the Tula Region to the Presidium of the Highest Arbitrazh Court of the Russian Federation for the supervisory review of the resolutions of the Twentieth Arbitrazh Court of Appeal of 21 February 2011 and of the resolution of the Federal Arbitrazh Court for the Central District of 27 April 2011 in the same case, shall be refused.

Presiding judge S.P. Bondarenko

Judge M.V. Pronina

Judge N.P. Kharchikova