Presidium of the Supreme Arbitrazh Court of the Russian Federation, 5 October 2010, No. 6547/10[1]

Parties:	Petitioner: AB Living Design (Sweden)
	Respondent: Sokos Hotels Saint Petersburg (Russian Federation)
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Commentary Cases:	

Excerpt

[1]The Presidium of the Supreme Arbitrazh (State Commercial) Court of the Russian Federation, consisting of:

[2]Chair- Chief Justice of the Supreme Arbitrazh (State Commercial) Court of the Russian Federation, A. A. Ivanov;

[3]members of the Presidium: S.M. Amosov, T.K. Andreeva, E.Y. Valyavina, V.V. Vitryansky, T.V. Zavyalova, N.P. Ivannikova, A.A. Makovska, T.N. Neshataeva, A.G. Pershutov, S.V. Sarbash, and V.L. Slesarev.

[4] having reviewed the statement from Limited Liability Company Sokotel for a review through supervisory proceedings (*v poryadke nadzora*) of the Ruling in Case No. A56-63115/2009 dated 11 December 2010 of the Arbitrazh (State Commercial) Court of the City of Saint Petersburg and Leningrad Oblast and an order of the Federal Arbitrazh (State Commercial) Court of the North-West District on the same case dated 09 February 2010.

[5] Having heard and discussed the report from Judge T.N. Neshataeva and the explanations from the representatives involved in the case, the Presidium establishes the following:

[6] Agreement No. 2006-08 dated 10 January 2007 (the 'Agreement') was executed between Limited Liability Company Sokos Hotels Saint Petersburg (as the customer), whose legal successor is Limited Liability Company Sokotel (the 'LLC'), and the company AB Living Design (Kingdom of Sweden) under which AB Living Design is obligated to supply and install architectural elements to the interiors of 278 hotel rooms, and the LLC will pay EUR 2,006,958 for these services. Clause 17.2 of the Agreement contained a provision on the procedure for reviewing disputes arising from the Agreement in the Arbitration Institute of the Stockholm Chamber of Commerce. According to Clause 17.3 of the Agreement, the relations of the parties under the Agreement, as well as their relations arising from the Agreement, are subject to the international law in Sweden.

[7] In order to eliminate difficulties arising from the Agreement, the parties executed an out-of-court settlement dated 22 October 2007 (the 'Settlement Agreement') of which Clause 1.2 stipulates that all provisions of the Agreement which were not amended shall remain in force. Clause 8.2 of the agreement stipulates that all disputes and disagreements between the LLC and AB Living Design, having a direct relationship to the agreement, and any other relations between the parties, shall be considered by the Arbitrazh (State Commercial) Court for the City of Saint Petersburg and Leningrad Oblast.

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[1] The General Editor wishes to thank Mr. Roman Zykov, Hannes Snellman Attorneys, Moscow/Helsinki, for his invaluable assistance in providing and translating this decision.

[8] On 19 November 2007, AB Living Design was liquidated. The Living Consulting Group AB (the 'Company') referencing the fact that it is the legal successor to AB Living Design, performed the latter's obligations under the Agreement and appealed to the Arbitration Institute of the Stockholm Chamber of Commerce (the 'Arbitration Institute,' 'Arbitration') with a claim against the LLC to collect debts under the Agreement and to apply punitive damages.

[9] The Board of the Stockholm Chamber of Commerce , in accordance with Clause 4, Article 45 of the Arbitration Rules of the Arbitration Institute ruled for an advance payment for the arbitration costs in the amount of EUR 66,000, payable by the parties in equal shares. The company had paid the advance on costs for the proceedings, which was subtracted from its total fee due. Because of this, the Company had to make an advance payment of EUR 31,125, and the LLC had to make a payment of EUR 33,000 by 22 January 2009.

[10] Because of the LLC's refusal to make this advance payment, the Company made the payment in full and appealed for arbitration with a request for compensation for the share of the advance payment above the required 50 per cent.

[11] The Arbitration Institute issued a separate award dated 04 June 2009 to Arbitration Hearings No. 142/2008 which required the LLC to reimburse the Company for its advance payment of EUR 33,000 for arbitration costs, as well as interest accrued since 19 March 2009 in the amount of 8 per cent above the interest rate established by the Bank of Sweden until payment is made.

[12] Due to the fact that the LLC did not voluntarily execute the arbitral award dated 04 June 2009, the Company appealed to the Arbitrazh Court of Saint Petersburg and Leningrad Oblast with a motion to recognise and enforce the foreign arbitral awards.

[13] The LLC objected to the Company's claim, because they considered that the arbitral award could not be recognised and enforced as rendered because it did not relate to the dispute and was not final for the parties.

[14] The Decision of the Arbitrazh Court of Saint Petersburg and Leningrad Oblast dated 11 December 2009 satisfied the Company's claim, and an order of enforcement was issued.

[15] The Federal Arbitrazh Court of the North-West District upheld the decree of the Count of First Instance on 09 February 2010. The Cassation Court agreed with the conclusion of the Court of First Instance that neither international law, nor the laws of the Russian Federation limit the ability to recognise and execute foreign arbitration rulings rendered based on their merits.

[16] In a statement filed with the Supreme Arbitrazh Court of the Russian Federation on the review through supervisory proceedings (*v poryadke nadzora*) of the Court of First Instance and the Court of Cassation, the LLC requests to cancel the ruling due to a violation of the uniformity in interpretation and application of the rules of law by the Arbitrazh (State Commercial) Court.

[17] In its statement of defense, the Company requests that that the disputed judicial acts be upheld as meeting legislation.

[18] After reviewing the validity of the arguments set forth in the statements, statements of defense, and presentations made by the representatives of the entities participating in the case, the Presidium believes that the disputed judicial acts be repealed and that the case proceedings be terminated under the following grounds:

[19] In accordance with Part 1 of Article 241 of the Arbitrazh Procedural Code of the Russian Federation, arbitrazh (state commercial) courts recognize and enforce the awards adopted in foreign states by international commercial arbitration in disputes and other matters arising during the implementation of business and other commercial activities, if the recognition and enforcement of such awards is provided for in international agreements of the Russian Federation and federal laws.

[20] According to Article 31 of Law of the Russian Federation No. 5338-1 *on International Commercial Arbitration* dated 07 July 1993 (the 'Law on International Arbitration') an arbitral award is defined as an act which contains a conclusion to satisfy or reject a claim and determines the amount of the arbitration fees, the cost of the case, and their distribution between the parties. Arbitral awards, unlike other acts made by arbitration panels, complete the consideration of the merits of a case as a whole or in its relevant parts.

[21] Arbitral Award dated 04 June 2009 on Arbitration Proceedings No. 142/2008, obligating the LLC to reimburse the Company for the advance payment of EUR 33,000 made by the Company on the LLC's behalf for arbitration fees was sustained as a separate award. With regards to this, Clause 17 of the Award indicates that the partial advance payment for arbitration costs does not predetermine the final distribution of expenses between the parties, which is determined in the final ruling of the case.

[22] Clause 1(e) of Article V of the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958) (the 'Convention'), and Clause 1, Article 36 of the Law on International Arbitration establish that the recognition and enforcement of an arbitral award may be refused at the request of the party against which it was directed if that party provides evidence to the competent authorities at the location where the party is requesting recognition and enforcement of the award that the award has not yet become binding for the parties.

[23] As follows from the contents in the case materials, the separate Arbitral Award dated 04 June 2009 on the advance payment to cover arbitration fees is an interim foreign arbitration act, which is intended to guarantee the payment of the anticipated costs to the arbitrators by the parties before the hearings begin.

[24] According to Article 43 of the Arbitration Rules of the Arbitration Institute, the final distribution of arbitration costs between the parties for the arbitration proceedings by the Board of Directors of the Stockholm Chamber of Commerce shall be made according to the payment table, including the amount in the award on the merits of the case, considering the outcome of the dispute and other case material circumstances. There is not any proof that a body made such an award in the case materials.

[25] Consequently, the systematic interpretation of the provisions in Part 1, Article 241 of the Arbitrazh Procedure Code of the Russian Federation and subclause e, Clause 1, Article V of the Convention testifies only arbitral awards in connection with procedural hearings of disputes made at the end of arbitration proceedings are subject to enforcement.

[26] In this regard, these norms do not apply to interim arbitral awards, including but not limited to awards by arbiters made on other procedural matters (recovery of court costs, determination of competence to adopt provisional measures).

[27] Such awards are not subject to enforcement in the Russian Federation.

[28] This legal position of not recognizing and enforcing any awards other than final awards or acts of international commercial arbitration made before and after disputes on their merits was formed in Clause 26 of Informational Letter No. 78 of the Presidium of the Supreme Arbitrazh (State Commercial) Court of the Russian Federation dated 07 July 2004 *Review of the Practice of Arbitrazh (State Commercial) Courts Prior to Provisional Measures*.

[29] Under Clause 1, Part 1, Article 304 of the Arbitrazh Procedure Code of the Russian Federation, under these circumstances, contested judicial acts which violate the consistency on the interpretation and application of arbitrazh (state commercial) courts are to be reversed.

[30] Since the enforcement of interim foreign arbitral awards is not assumed in the provisions in international treaties and the rules of law in the Arbitrazh Procedure Code of the Russian Federation, the case proceedings shall be terminated according to Clause 1, Part 1, Article 150 of the Arbitrazh Procedure Code of the Russian Federation.

[31] The interpretation of the law contained in this decree of the Presidium of the Supreme Arbitrazh (State Commercial) Court of the Russian Federation is binding and subject to the application and review of arbitrazh (state commercial) courts in similar cases.

[32] Considering the information stated above and governed by Article 303, Clause 4, Part 1, of Article 305, and Article 306 of the Arbitrazh Procedure Code of the Russian Federation, the Presidium of the Supreme Court of the Russian Federation decided:

(1) To repeal the decision made by the Arbitrazh (State Commercial) Court for the City of Saint Petersburg and Leningrad Oblast on Case No. A56-63115/2009 dated 11 December 2009 and the ruling of the Federal Arbitrazh (State Commercial) Court of the North-West District dated 09 February 2010 on the same case.

(2) To terminate the proceedings of Case No. A56-63115/2009 of the Arbitrazh (State Commercial) Court for the City of Saint Petersburg and Leningrad Oblast.