

Federal Arbitrazh Court for the West-Siberian District

RESOLUTION

Tyumen

Case No. A27–781/2011

Operative part of the Resolution announced on 5 December 2011

Full text of the Resolution prepared on 5 December 2011

The Federal Arbitrazh Court for the West-Siberian District comprised of:

Presiding Judge
Judges

T.N. Dubinina,
G.M. Klinova,
A.V. Tril,

Having examined in a court hearing the cassation complaints of OAO Holding Company Siberian Cement, OOO Financial Industrial Association Sibconcord (2B Sovetsky av., Kemerovo Region, Kemerovo, Company State Registration Number 1064200005935, Individual Taxpayer Number 4205119413) and joint-stock company Istanbul Çimento Yatırımları against the Ruling of the Arbitrazh Court of the Kemerovo Region (Judge E.N. Mikhaleiko) of 20 July 2011 in Case No. A27–781/2011 upon an application of Ciments Français (5 Tour Ariane, place de la Pyramide, 92800 Puteaux, France) for recognition of an international arbitral award.

The debtor is OAO Holding Company Siberian Cement (1/4 Karbolitorvskaya Ul., Kemerovo Region, Kemerovo, Company State Registration Number 1044205040175, Individual Taxpayer Number 4205070630).

The following representatives participated in the hearing: on behalf of Ciments Français – M.K. Ivanov under Power of Attorney of 18 January 2011, apostille No. 3647 of 18 January 2011; on behalf of OOO Financial Industrial Association Sibconcord – N.M. Volodin under Power of Attorney No. 15 of 1 December 2011; on behalf of OAO Holding Company Siberian Cement – V.A. Tsvetkov under Power of Attorney of 28 December 2009; on behalf of joint-stock company Istanbul Çimento Yatırımları – D.V. Golubev under Power of Attorney of 14 July 2011, apostille No. 2835 of 15 July 2011.

The Court established the following:

Ciments Français (hereinafter – the Company) filed with the Arbitrazh Court of the Kemerovo Region an application for recognition of the partial arbitral award rendered on 7 December 2010 by the ICC International Court of Arbitration in Istanbul, Turkey, in Case No. 1624/GZ, upon the claim of Ciments Français against OAO Holding Company Siberian Cement (hereinafter – OAO HC SibCem) and joint-stock company Istanbul Çimento Yatırımları, and upon the counterclaim of OAO Holding Company Siberian Cement.

By its Ruling of 20 July 2011, the Arbitrazh Court of the Kemerovo Region granted the application.

OAO HC SibCem filed a cassation complaint requesting the cancellation of the challenged judicial act and the rendering of a new judicial act dismissing the application.

OAO HC SibCem requests that recognition of the arbitral award should be denied; the decision to set aside the arbitral award is subject to immediate enforcement irrespective of an appeal against it; the Company's application should not be considered in an arbitrazh court since the Company requests the recognition, but not the enforcement of the award; the proceeding in the case should be suspended due to alleged violation of public policy of the Russian Federation.

Joint-stock company Istanbul Çimento Yatırımları and OOO Financial Industrial Association Sibconcord (hereinafter – OOO FIA Sibconcord) filed the cassation complaints according to the procedure specified in Article 42 of the Arbitrazh Procedure Code of the Russian Federation (hereinafter – RF APC), whereby they request the annulment of the challenged judicial act and the referral of the case for a new trial to the Arbitrazh Court of the Kemerovo Region.

Istanbul Çimento Yatırımları and OOO FIA Sibconcord refer to the lack of grounds for the judicial act due to the fact that the Court did not involve them into the case, despite the fact that their rights and obligations were affected by the judicial act, and that this, in any case, is a ground for cancelling the judicial act.

The Company provided responses to the cassation complaints and requests to uphold the challenged judicial act, to dismiss the cassation complaint of OAO HC SibCem and to terminate the proceeding on the cassation complaints of joint-stock company Istanbul Çimento Yatırımları and OOO FIA Sibconcord.

At the court hearing, the representatives of OAO HC SibCem, joint-stock company Istanbul Çimento Yatırımları and OOO FIA Sibconcord supported the reasoning of the cassation complaints.

The representative of Ciments Français supported the arguments specified in the statements of defense on the cassation complaints.

Having heard the representatives, considered the reasoning of the cassation complaints, responses thereto, and the case materials, and examined the legality and reasonableness of the challenged judicial act pursuant to Articles 286–288 of the RF APC, the Court of cassation believes that the Ruling of the Arbitrazh Court of the Kemerovo Region of 20 July 2011 shall be cancelled.

The Courts established that, on 7 December 2010, an arbitral tribunal in Istanbul, Turkey, comprised of the Chairman of the Tribunal Pierre Tercier and arbitrators Bernard Hanotiau and Christoph Liebscher, appointed and acting in accordance with the Rules of Arbitration of the International Chamber of Commerce, issued the partial award in Case No. 16240/GZ upon the claim of Ciments Français, France, against OAO HC SibCem, Russian Federation, and joint-stock company Istanbul Çimento Yatırımları, Turkey, and also upon the counterclaim of OAO HC SibCem.

Pursuant to the arbitral award, the following abbreviations were adopted: “SPA” – the Share Purchase Agreement of 26 March 2008; “CF” – Claimant – Ciments Français; “Respondent 1” – OAO HC SibCem; “Respondent 2” – joint-stock company Istanbul Çimento Yatırımları (joint-stock company Istanbul Çimento).

According to the arbitral award of 7 December 2010 (paragraph 207 thereof), the Creditor (the Claimant) requested the Arbitral Tribunal to render a partial award declaring that:

[I–1] the Arbitral Tribunal has jurisdiction over the Respondent 2;

[I–2] the Arbitral Tribunal has exclusive jurisdiction to determine whether the SPA is valid and binding on all its signatories;

[I–3] the SPA is valid and binding on all its signatories;

[I–4] the Claimant properly exercised its right to terminate the SPA, and the termination was valid;

[I–5] as a consequence of the Claimant’s valid termination of the SPA, the Claimant is entitled to retain the initial payment amount;

[I–6] OAO HC SibCem’s counterclaim should be dismissed;

and ordering:

[I–7] the provisional enforcement of the partial award;

[I–8] that the Respondents should pay Ciments Français legal fees and expenses, the Tribunal’s fees and expenses, and ICC’s expenses up to and including the issue of the partial award; and

[I–9] that Respondent 1 should compensate the Claimant for the losses and damages it has suffered as a consequence of the first Respondent’s failure to complete the transaction, and that such losses and damages will be quantified in due course.

Pursuant to paragraph 209 of the arbitral award, OAO HC SibCem asked the Arbitral Tribunal to issue a partial award:

[O–1] declaring that Ciments Français breached the SPA and violated the applicable rules of law by failing to disclose all material information to SibCem during the pre-contractual period, and that CF is therefore required to return OAO HC SibCem’s initial payment amount immediately and

without waiting for a second phase of this arbitration or, at minimum, that CF is therefore liable to OAO HC SibCem for damages in an amount to be determined in the second phase of this arbitration;

[O-2] declaring that CF failed to comply with the Interim Period obligations provided in Article 4 of the SPA, and that CF is therefore required to return OAO HC SibCem's initial payment amount immediately and without waiting for a second phase of this arbitration or, at minimum, is liable to OAO HC SibCem for damages in an amount to be determined in the second phase of this arbitration;

[O-3] declaring that CF unlawfully purported to terminate the SPA or, in the alternative, abused its right to terminate the SPA, leading the SPA to be terminated *ex tunc*, with all performances (including OAO HC SibCem's initial payment amount) to be returned immediately and without waiting for a second phase of this arbitration, and that CF is additionally liable to OAO HC SibCem for loss resulting from the unlawful termination, in an amount to be determined in the second phase of this arbitration;

[O-4] declaring, in the alternative, that CF failed to negotiate in good faith after terminating the SPA, and that CF is therefore liable to OAO HC SibCem for damages in an amount to be determined in the second phase of this arbitration;

[O-5] ordering, in the further alternative, that CF return the initial payment amount to OAO HC SibCem immediately and without waiting for a second phase of this arbitration under one or both of the doctrines of material mistake and reduction of penalties;

[O-6] ordering CF to reimburse all OAO HC SibCem's costs and expenses incurred in connection with the preparation and conduct of this arbitration, and the fees and expenses of counsel, witnesses, the Tribunal and the International Chamber of Commerce;

[O-7] ordering CF to pay interest on the sums awarded, at an appropriate compounded rate, calculated from the date on which the underlying losses were first suffered until the date of full payment of the awarded sums;

[O-8] declaring that the partial award shall be immediately enforceable, notwithstanding the pendency or availability of any action to challenge it or set it aside;

[O-9] putting in motion the second phase of this arbitration: and

[O-10] granting any other relief that the Tribunal may consider appropriate.

Having considered asserted claims, the Arbitral Tribunal rendered the following award:

- Declares that the Arbitral Tribunal has jurisdiction over the Respondent 2 [I-1];
- Declares that the Arbitral Tribunal has exclusive jurisdiction to determine whether the SPA is valid and binding on all its signatories [I-2];
- Declares that SPA was valid and binding on all its signatories [I-3], rejecting [O-5 and O-1];
- Declares that the Claimant properly exercised its right to terminate the SPA, and the termination was valid [I-4], rejecting [O-3];
- Declares that as a consequence of the Claimant's valid termination of the SPA, the Claimant is entitled to retain the initial payment amount [I-5], rejecting [O-1], [O-2], [O-3] and [O-7];
- Dismisses Respondent 1's counterclaim [I-6], rejecting [O-4];
- Orders the provisional enforcement of the present partial award with respect to the Claimant and the Respondent 1 [I-7]/[O-8];
- The decision on all other claims and requests (including in particular [I- 8]/[O-6] and [I-9]/[O-9]) is reserved for a Procedural Order and/or one or more further awards.

The possibility of disputes settlement between the parties in accordance with the Rules of Arbitration of the International Chamber of Commerce, with the place of arbitration in Istanbul, Turkey, is provided by the arbitral agreement between the parties contained in the Share Purchase Agreement of 26 March 2008 (clause 7.1. of the SPA).

The Company filed with the Arbitrazh Court of the Kemerovo Region an application for recognition of the foreign partial arbitral based on the provisions of Articles 241 and 242 of RF APC, as well as the UN Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 10 June 1958 (hereinafter – the New York Convention).

The Arbitrazh Court did not find any grounds to refuse recognition of the foreign arbitral award and granted the application of the Company.

At the same time, the Court failed to consider the following.

Pursuant to Article 244(2) of the RF APC, an arbitrazh court shall refuse recognition and enforcement of a foreign arbitral award on the grounds provided by paragraph 7 of Article 244(1) and 239(4) of the RF APC.

In accordance with Article 239(4) of the RF APC, an arbitrazh court can deny issuing an enforcement writ for coercive execution of an award of a foreign commercial arbitral tribunal based on the grounds specified in an international treaty of the Russian Federation and by the federal law on the international commercial arbitration.

Pursuant to Article V(2)(b) of the New York Convention, recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that the recognition or enforcement of the award would be contrary to the public policy of that country.

According to paragraph 7 of Article 244(1) of the RF APC, an arbitrazh court shall refuse, entirely or in part, recognition and enforcement of a foreign court decision if the enforcement of such decision contradicts public policy of the Russian Federation.

The partial arbitral award of 7 December 2010 declared void the SPA of 26 March 2008. Furthermore, it acknowledged the right of the Company to withhold the initial payment amount (EUR 50,000,000).

By its decision of 13 August 2010, the Arbitrazh Court of the Kemerovo Region in Case No. A27-4626/2009 declared the SPA of 26 March 2008 void and applied the consequences of a void transaction, ordering Ciments Français to return EUR 50,000,000 to OAO HK SibCem.

In accordance with Article 6(1) of the Federal Constitutional Law No. 1-FKZ of 31 December 1996 "On the Judicial System of the Russian Federation" effective resolutions of the federal courts, magistrate courts and the courts of the constituent entities of the Russian Federation shall be binding on each and every State or municipal authority, public associations, officials and other natural persons and legal entities with no exception and shall be subject to strict implementation throughout the territory of the Russian Federation. Identical provision is specified in Article 16 of the RF APC.

The said provision is an element of public policy of the Russian Federation.

Consequently, recognition and enforcement of an arbitral award rendered on the basis of a void transaction would result in existence on the territory of the Russian Federation of judicial acts of equal legal authority with mutually exclusive conclusions and would come into contradiction with the principle of mandatory authority of judicial acts of Russian courts, which are an integral part of the public policy of the Russian Federation.

At the moment of rendering of the challenged Ruling in the present case the abovementioned decision declaring void the SPA and applying the relevant consequences had been already adopted.

Pursuant to Article 2 of the RF APC, the principal objective of arbitrazh court proceedings is the protection of violated or challenged rights and legitimate interests of persons engaged in business and other economic activities, as well as of rights and legitimate interests of the Russian Federation, the constituent entities of the Russian Federation and municipalities in the area of business and other economic activities, State authorities of the Russian Federation, authorities of the constituent entities of the Russian Federation and of the municipalities, other authorities and officials in this area; fair public court hearing by an independent and impartial court within a reasonable time period.

A court decision should not contribute to further uncertainty of the parties' relationships.

Taking into account numerous court proceedings between the parties, including proceedings in the Russian courts, active objections of OAO HK SibCem before the international arbitral tribunal, and the public policy of the Russian Federation, an arbitrazh court while considering this case should have rendered a decision with account of all mentioned circumstances.

Beyond that, proceeding from the provisions of the Article V(1)(e) of the New York Convention the State court considering the case can refuse the recognition and enforcement of an international award if the award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made.

Identical ground for refusal of enforcement of an arbitral award is provided in Article 36(1)(1) of the RF Law No. 5338-1 of 7 July 1993 "On International Commercial Arbitration".

From the provided translation of the application (Vol. 4, p. 4) follows that on 6 January 2011 OAO HK SibCem filed with the Second Court of the First Instance for the Kadykey district, Turkey an

application against Ciments Français requesting to set aside the partial arbitral award of 7 December 2010 made in Istanbul, Turkey in Case No. 1624/GZ.

The Second Court of the First Instance for the Kadykey District, Turkey, confirmed the reception of the application of OAO HK SibCem as well as the fact that acceptance for consideration of this application for setting aside of the said award results in discontinuance of the process of the enforcement of the arbitral award in accordance with Article 15 of the Code of International Arbitration No. 4686.

In turn, the partial arbitral award rendered on 7 December 2010 in Istanbul, Turkey, in Case No. 1624/GZ was set aside by the 31 May 2011 decision of the Second Court of the First Instance for the Kadykey District, Turkey.

Furthermore, the said decision was challenged in an appellate court, therefore the judicial act in the case in a foreign court, as well as the partial arbitral award, have not yet become final.

In these circumstances, based on paragraph 7 of Article 244(1) of the RF APC, paragraphs 1, 2 of Article 36(1) of Law No. 5338–1 of 7 July 1993 “On International Commercial Arbitration”, Articles V(1)(e) and V(2)(b) of the New York Convention, the application on recognition of the partial arbitral award rendered on 7 December 2010 in Istanbul, Turkey, in Case No. 1624/GZ should be dismissed.

Based on the above and pursuant to paragraph 2 of Article 287(1) and Article 288(1) of the RF APC, the Court of cassation instance find necessary to cancel the challenged judicial act and, without submitting a case for a new trial, issue a new judicial act dismissing the application.

The reasoning of the cassation complaints of joint-stock company Istanbul Çimento and OOO FIA Sibconcord, which are not parties to the case, on violation of their rights by the challenged Ruling is groundless.

According to Article 42 of the RF APC, parties that have not participated in the proceeding and on which rights and obligations the court issued a judicial act, are entitled to challenge this act as well as to ask for review of the act in supervisory procedure in accordance with the rules specified by this Code.

As it follows from the content of the challenged judicial act, it does not concern the rights and obligations of joint-stock company Istanbul Çimento and OOO FIA Sibconcord, this judicial act does not affect their rights and obligations, and inter alia does not create any impediments for exercising of their rights or proper fulfillment of their obligations in respect to any party of the dispute.

The proceeding on the cassation complaints of joint-stock company Istanbul Çimento and OOO FIA Sibconcord shall be terminated with regard to paragraph 1 of Article 150(1) of the RF APC.

Based on paragraph 1 of Article 150(1), Article 282, paragraph 2 of Article 287(1), Article 288(1), and Article 289 of the Arbitrazh Procedure Code of the Russian Federation, the Federal Arbitrazh Court for the West-Siberian District

resolved:

to terminate the proceeding on the cassation complaints of joint-stock company Istanbul Çimento and OOO FIA Sibconcord against the Ruling of the Arbitrazh Court of the Kemerovo Region of 20 July 2011, rendered in Case No. A27–781/2011.

The Ruling of the Arbitrazh Court of the Kemerovo Region of 20 July 2011, rendered in Case No. A27–781/2011, shall be cancelled. A new judicial act shall be issued.

The application of Ciments Français for recognition of the partial arbitral award rendered on 7 December 2010 by the ICC International Court of Arbitration in Istanbul, Turkey, in Case No. 1624/GZ, upon the claim of Ciments Français, France, against OAO Holding Company Siberian Cement, Russian Federation, and joint-stock company Istanbul Çimento Yatırımları, Turkey, and upon the counterclaim of OAO Holding Company Siberian Cement, shall be dismissed.

This Resolution shall enter into force on the day of its adoption.

Presiding Judge

T.N. Dubinina

Judges

G.N. Klinova
A.V. Tril