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THE SUPREME ARBITRAZH COURT OF THE RUSSIAN FEDERATION

RESOLUTION

of the Presidium of the Supreme Arbitrazh Court of the Russian Federation

No. 1831/12

Moscow June 19, 2012

The Presidium of the Supreme Arbitrazh Court of the Russian Federation consisting of:

The Chairperson – the Chairman of the Supreme Arbitrazh Court of the Russian Federation Ivanov, A.A.;

Members of Presidium: Absalyamov, A.V., Andreyeva, T.K., Vitryansky, V.V., Goryacheva, Y.Y., Zavialova, T.V., Kozlova, O.A., Makovskaya, A.A., Pavlova, N.V., Pershutova, A.G., Sarbasha, S.V., Slesareva, V.L, Yukhneya, M.F. –

examined the petition of Russian Telephone Company (original name transliterated from Russian: *Russkaya Telephonnaya Kompaniya*) Closed Joined Stock Company to have a Decision of the Arbitrazh Court of the City of Moscow dated 08/07/2011, case No. A40-49223/11-112-401, the Resolution of the Ninth Arbitrzh Appellate Court dated 14/09/2011 and the Resolution of the Federal Arbitrazh Court of Moscow Region dated 05/12/2011 on the same case reviewed under the supervision procedure.

The session was attended by the following representatives:

- on behalf of the applicant, Russian Telephone Company CJSC (the Plaintiff) – Ischuk, I.N., Samoylov, M.N.;
- on behalf of Sony Ericsson Mobile Communications Rus Limited Liability Company (the Respondent) – Valuysky, A.V., Porokhin, A.I., Porokhin, I.B.

Having heard and having discussed the report of Judge Pavlova N.V. and explanations from the representatives of the parties participating in the case, the Presidium established the following.

Russian Telephone Company CJSC (hereinafter the "RTC") filed with the Arbitrazh Court of the City of Moscow a statement of claim against Sony Ericsson Mobile Communications Rus Limited Liability Company (hereinafter "Sony Ericsson") to enforce performance of obligation: to replace mobile phones with equivalent mobile phones of proper quality.

Under the Ruling of the Arbitrazh Court of the City of Moscow dated 08/07/2011, the claim was left without examination, based on Paragraph 5 of Part 1 of Article 148 of the *Arbitrazh Procedure Code* of the Russian Federation.

Under the Resolution of the Ninth Arbitrazh Appellate Court dated 14/09/2011, the ruling of the court of the first instance was left unchanged.

Under the Resolution dated 05/12/2011 the Federal Arbitrazh Court of Moscow Region left the decision of the court of the first instance and the resolution of the court of instance of appeal unchanged.

RTC, in its petition filed with the Supreme Arbitrazh Court of the Russian Federation to have the aforementioned court acts reviewed under the supervision procedure, requested to have such acts revoked, due to a violation of uniformity in interpretation and in application by arbitrazh courts of the norms of matereial law and to have the case re-submitted for a new hearing in the court of the first instance.

In its response to the petition, Sony Ericsson asked to leave the mentioned court acts unchanged.

Having examined the validity of the arguments presented in the petition, the response thereto and the oral arguments of the representatives of the parties participating in the case, the Presidium believes that the petition should be upheld, in light of the following circumstances.

As was established by the courts and confirmed by the court files, the grounds for the statement of claim resulted from the improper performance by Sony Ericsson of its obligations under the Framework Agreement dated 15/05/2009 (hereinafter the "Contract") for supply of cell-phones and accessories.

The parties to the Contract stipulated therein the following dispute resolution provision (clause): "Any dispute arising in connection with this Agreement that cannot be resolved through negotiations is to be finally resolved in accordance with the *Rules of Conciliation and Arbitration of the International Chamber of Commerce*, by three (3) arbitration judges appointed in accordance with the Rules. The place for the arbitration proceedings will be the City of London, the proceedings will be held in the English language. This arbitration clause will continue to remain in effect upon termination of this Agreement and cannot restrict the rights of the Parties to apply to the courts of a competent jurisdiction for enforcement or court injunction measures in the event of a violation or a threat of a violation of provisions of the sections *Sony Ericsson Trademarks, Software Licenses, Export Control, Counteraction against Circulation of Counterfeit Products* and *Confidentiality*. The arbitration clause does not restrict Sony Ericsson's rights to file with a court of a competent jurisdiction a claim for recovery of debts for supplied Products" (clause 21.2 of the Contract).

Having left the claim of the RTC without examination, the courts acted based on the presumption that there is a valid and enforceable dispute resolution (arbitration) agreement between the Parties.

The court of the first instance, acting in accordance with provisions of Paragraph 5 Part 1 Article 148 of the *Arbitrazh Procedure Code* of the Russian Federation, said: Sony Ericsson filed with the court a motion to leave the statement of claim without examination as the Contract contains a clause saying that potential disputes are to be examined by arbitration; the parties have defined the arbitration tribunal authorized to hear the disputes between the parties; the International Court of Arbitration under the International Chamber of Commerce is a functioning institution;

the question, which procedural norms and rules apply to taking a dispute for consideration and its further resolving by an arbitration tribunal, does not fall within the competence of the arbitrazh court; the parties did not eliminate the possibility of application of other procedures besides the *Rules of Conciliation and Arbitration of the International Chamber of Commerce* being currently ineffective to the dispute resolution process. Based on the foregoing the court arrived at the conclusion that the arbitration clause is enforceable.

The court of the appellate instance having agreeing with the conclusions of the court of the first instance also cited the lack of grounds for the arbitration clause set forth in the Contract to be declared invalid, unenforceable or no longer in force, due to the following considerations. Entering into the contract the parties were guided by the civil law principle of contract freedom , based on which the terms of an agreement including provisions concerning the process for resolution of any disputes and the reference of certain disputes for examination by an arbitration tribunal is determined upon the parties' discretion . The wording of this arbitration clause allows establishing the true intention of the parties with respect to the dispute resolution institution and, accordingly, such agreement is enforceable. Furthermore, the issue on validity and enforceability of the arbitration clause in question has been already addressed by the Arbitrazh Court of the City of Moscow, case No. A40-36609/11-56-324. The ruling of the same court that became effective on 25/04/2011 with respect to the aforementioned case has established the validity and enforceability of this arbitration clause, which under Part 2 Article 69 of the *Arbitrazh Procedure Code* of the Russian Federation excludes the need to prove these circumstances within this case.

The court of the cassation instance upheld conclusions of the courts of the lower instances.

However all of these courts failed to take into account the following considerations.

Under Paragraph 5 Part 1 Article 148 of the *Arbitrazh Procedure Code* of the Russian Federation applied by the courts of all instances, an arbitrazh court shall leave a statement of claim without examination if after the statement of claim was taken for consideration, the arbitrazh court establishes that there is an agreement between the parties that the matter in question shall be referred to an arbitration tribunal, provided that any of the parties not later than the date of presentation of its first statement on the merits in the arbitrazh court of first instance submits its

objection against the examination of the case by the arbitrazh court on the said grounds , except for the events when the court establishes that the agreement is not valid or cannot be enforced.

At the same time the text of the dispute resolution clause indicates that it contains the elements of not only an arbitration clause but also a prorogation agreement since it allows the disputes being referred to both an international court of commercial arbitration or a state court.

While having their rulings based on the applicable and enforceable arbitration agreement between the parties, the courts failed to address the validity of such agreement taken as a whole, failed to evaluate the provision in the dispute resolution arrangement that would secure the right of one party to the Contract, Sony Ericsson (the seller), to refer any dispute for resolution by the state court. Combined with the provisions of the dispute resolution agreement set forth in the arbitration clause, such prorogation agreement creates for Sony Ericsson a preference against RTC since it is the only party granted the right to choose the venue for dispute resolution (arbitration or state judicial system) and, as a result, violates the balance of interests of the parties.

At the same time the basic fundamentals of civil law include the principle of equality of civil relations parties' rights . The standards to secure a fair hearing for civil disputes inherent to the state judicial system apply also to the alternative dispute resolution venues and specifically to arbitration tribunal hearings (Judgement of the European Court of Human Rights, Application No. 1643/06 *Suda v. the Czech Republic*, dated 28/10/2010).

The guarantee to the parties to have its rights for judicial protection secured and to have a fair hearing of the case in court is achieved through the real and equal opportunity granted to both parties to have each one's position with respect to all aspects of the case brought to the attention of the court, since only in this case will the court session ensure a party's right to a fair, complete and effective court defence. Principles of adversarial nature and equality of the parties imply that the parties participating in the court hearing will be granted equal procedural opportunities to defend their rights and lawful interests (Resolutions of the Constitutional Court of the Russian Federation: No. 20-П dated 20/07/2011, No. 4-П dated 27/02/2009, No. 18-П dated 08/12/2003, No. 2-П dated 14/02/2000, No. 6-П dated 14/04/1999, No. 27-П dated 10/12/1998, No. 20-П dated 02/07/1998).

Also pursuant to the opinion of the European Court of Human Rights the parties to civil proceedings must be granted with equal procedural rights (Judgment of the European Court of Human Rights, Application No. 3932/02 *Batsanina V. Russia*, dated 26/05/2009). The *European Convention for the Protection of Human Rights and Fundamental Freedoms (1950)* guarantees the right of one of the parties to have an equal standing with respect to the opposing party (Judgments of the European Court of Human Rights: Application No. 68416/01 *Steel and Morris v. United Kingdom*, dated 15/02/2005; Application No. 23243/03 *Sokur V. Russia*, dated 15/10/2009; Application No. 13470/02 *Khuzhin and Others v. Russia*, dated 23/10/2008, etc.)

Therefore based on common principles for the protection of civil rights, the dispute resolution clause cannot give the right to refer to a competent state court to only one party (the seller) under the Contract and deprive the second party (the purchaser) of equal rights. If such a clause is entered into, the clause will be invalid because it violates the balancing of the rights of the parties. Accordingly, the party whose right was violated by such a dispute resolution clause shall also be entitled to refer to the competent government court so that it may enforce its guaranteed right to court protection on terms equal to the terms that exist for its counter-party.

In light of such circumstances, the contested court acts are to be revoked under Paragraphs 1, 2 Part 1 Article 304 of the *Arbitrazh Procedure Code* of the Russian Federation as violating the uniformity in interpretation and application of the norms of the law by the arbitrazh courts.

The acts of the arbitrazh courts on matters similar to the existing circumstances that became effective but had been adopted based on the legal norm in an interpretation different from the interpretation contained herein may be reviewed under paragraph 5 Part 3 Article 311 of the *Arbitrazh Procedure Code* of the Russian Federation, unless other obstacles for such review exist.

Based on the foregoing and in accordance with Article 303 Paragraph 2 Part 1, Article 305, Article 306 of the *Arbitrazh Procedure Code* of the Russian Federation, the Presidium of the Supreme Arbitrazh Court of the Russian Federation

RESOLVED:

To revoke the Ruling of the Arbitrazh Court of the City of Moscow dated 08/07/2011, case No. A40-49223/11-12-401, the Resolution of the Ninth Arbitrazh Appellate Court dated 14/09/2011 and the Resolution of the Federal Arbitrazh Court of Moscow Region dated 05/12/2011 on the same case.

To submit the case for re-examination to the Arbitrazh Court of the City of Moscow.

The Chairperson Ivanov, A.A.

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