FEDERAL COMMERCIAL (‘*ARBITRAZHNY*’) COURT FOR THE NORTH-WESTERN DISTRICT

190000 Saint Petersburg, ulitsa Yakubovicha, 4
http://fasszo.arbitr.ru

RULING

10 March 2011 Case No. A05-10560/2010

The Federal Commercial (‘*Arbitrazhn*y’) Court for the North-Western District represented by: presiding judge Afanasiev S.V., judges Korobov K.Yu. and Nefedova O.Yu.,

with participation of: on behalf of the company “Odfjell SE”– Erigo L.G., power of attorney dated 02 September 2010, Selezneva I.Ye., power of attorney dated 02 September 2010; on behalf of the Open Joint-Stock Company “Proizvodstvennoye obyedineniye “Severnoye mashinostroitelnoye predpriyatiye” – Tsvetkov V.A., power of attorney dated 10 December 2010 No. 80.56, Raschevskiy Ye.S., power of attorney dated 01 December 2010, No. 80.57, Nekhoroshkova L.N., power of attorney dated 30 December 2010 No. 80/17, Kovaleva I.N., power of attorney dated 26 October No. 53 and Usoskin S.V., power of attorney dated 10 December 2010 No.80/66,

having considered in the open court hearing on 03 -10 March 2011 the cassation claim of the Open Joint-Stock Company “Proizvodstvennoye obyedineniye “Severnoye mashinostroitelnoye predpriyatiye” against the Order of the Commercial (‘*Arbitrazhny*’) Court for the Arkhangelskaya Oblast’ dated 10 December 2010, case No. A05-10560/2010 (judge Bunkova Ye.V.),

FOUND:

The company “Odfjell SE”, Norway (hereinafter referred to as the “Company”) filed with the State Commercial (‘*Arbitrazhny*’) Court for the Arkhangelskaya Oblast’ an application for the recognition and enforcement of the Award of the Arbitration Institute of the Stockholm Chamber of Commerce (hereinafter referred to as the “Arbitration Institute”) dated 30 December 2009 rendered in case No. V (032/2008) on recovery from the Open Joint-Stock Company “Proizvodstvennoye obyedineniye “Severnoye mashinostroitelnoye predpriyatiye” (hereinafter referred to as “Sevmash”) in favour of the applicant of USD 43,760,000 as damages, of EUR 175,750 as compensation for the costs of the arbitration and of USD 1,313,888 as compensation for legal and other costs, with interest on these amounts computed at the reference rate of interest applied by Sveriges Riksbank plus eight percent from the date of the Award until payment.

Sevmash was enlisted to participate in the case as an interested party.

The application was granted by the Order dated 10 December 2010.

In its cassation claim and addition thereto Sevmash asks the court to reverse the Order dated 10 December 2010 and to refuse the application for the recognition and enforcement of the Award of the Arbitration Institute dated 30 December 2009.

In support of its claim Sevmash refers to the following:

- The Arbitration Institute lacked jurisdiction to consider the issue regarding recovery of damages incurred in connection with the termination of the contract for construction and sale of 4 chemical tankers (hereinafter referred to as “tankers”) with building Nos. 98091, 98092, 98094 and 98094 dated 05 November 2004 (hereinafter referred to as “Contract No. 2”) and the contract for construction and sale of 4 chemical tankers dated 31 March

2006 (hereinafter referred to as "Contract No. 3"). Thus, the Award was rendered in a dispute not covered by the arbitration agreement;

- The State Commercial ('*Arbitrazhny*') Court failed to take into account that Sevmash had had no opportunity to present to the Arbitration Institute its objections regarding the damages incurred in connection with Contract No. 2, as Sevmash objected to the jurisdiction of the Arbitration Institute to consider this dispute;
- As Sevmash in the absence of any evidence that the Company had incurred any actual loss was ordered by the Award to pay damages that is ten times the amount of contractual liability and as thus Sevmash has been imposed double liability for one and the same breach, this liability leading in fact to undue enrichment of the Company, the enforcement of the Award of the Arbitration Institute is contrary to the public policy of the Russian Federation and violates the principle of adequacy and fairness of civil liability.

In its statement of defense the Company states that the arguments in the cassation claim are unfounded and asks the court to uphold the Order dated 10 December 2010.

At the court hearing held on 03 March 2011 the representatives of Sevmash supported the cassation claim, the representatives of the Company objected to its being satisfied.

The Federal Commercial ('*Arbitrazhn*y') Court for the North-Western District by its Order dated 03 March 2011 announced an interruption in the court hearing until 10 March 2011, 10:30 a.m.

After the interruption the court hearing was resumed.

The representatives of the parties presented their written explanations on the merits of the case.

The cassation court has verified the compliance of the challenged Order with law.

Pursuant to the contract for construction and sale of 4 chemical tankers dated 05 November 2004 (hereinafter referred to as "Contract No. 1") Sevmash (the builder) agreed to design and build within the stipulated terms 4 chemical tankers with building Nos. 98087, 98088, 98089 and 98090, and the Company (the buyer) agreed to accept delivery of and to pay for the said tankers the price of USD 152,140,000.

The first tanker in the series was to be delivered to the buyer by 30 September 2007 (clause 1 of Article VII of Contract No. 1).

Pursuant to Contract No. 2 Sevmash (the builder) agreed to design and build within the stipulated terms 4 chemical tankers with building Nos. 98091, 98092, 98094 and 98094, and the Company (the buyer) agreed to accept delivery of and to pay for the said tankers the price of USD 168,200,000.

Pursuant to Contract No. 3 Sevmash (the builder) agreed to design and build within the stipulated terms 4 chemical tankers with building Nos. 98098, 98099, 98100 and 98101, and the Company (the buyer) agreed to accept delivery of and to pay for the said tankers the price of USD 200,000,000.

It is set forth in clauses "c" and "f" of Article III of Contracts Nos. 1, 2 and 3 that if the delay in delivery of the tankers should continue for the period of 180 days from the delivery date, the buyer may at its option rescind these Contracts and rescind any and all other shipbuilding contract(s) with the builder as the builder fully appreciates and understands that the tankers are sister tankers in a series of tankers all being considered en bloc.

It follows from clause 2 of Article XVIII of Contracts Nos. 1, 2 and 3 that in the event of any other dispute of any kind whatsoever between the parties and relating to these Contracts or their rescission or any stipulation therein, such dispute shall be submitted to the Arbitration Institute. The arbitration shall be in accordance with and subject to the rules of the Arbitration Institute of the Stockholm Chamber of Commerce (hereinafter referred to as the "Rules"). The award of the arbitrators shall be final and binding on both parties.

Under clause 1 of Article XXI of Contracts Nos. 1, 2 and 3 the parties agreed that the validity and interpretation of the Contracts and each Article and part thereof shall be governed by the laws of Sweden.

The Company, referring to the fact that the construction of the first tanker would be delayed for more than 270 days, on 21 February 2008 notified Sevmash about the termination of all contracts concluded with it and demanded to refund the advance payments, including stipulated interest.

In connection with this demand Sevmash refunded to the Company the advance payments in the amount of USD 30,800,000 under Contract No. 1 and paid USD 4,447,440 as interest on this amount.

In March 2008 the Company filed with the Arbitration Institute a request for arbitration against Sevmash asking for compensation for the loss caused by the termination of Contracts Nos. 1, 2 and 3 due to the Respondent's fault, this compensation not exceeding USD 303,860,000.

Sevmash filed with the Arbitration Institute a counterclaim against the Company on invalidation of the termination of Contract No. 1.

The Arbitration Institute composed of arbitrators Michael E. Schneider, Alexander S. Komarov and Jan Ramberg on 30 December 2009 by their Award (with the Additional Award dated 01 March 2010) dismissed the counterclaim, satisfied the initial claim in part and ordered recovery from Sevmash in favour of the Company of USD 43,760,000 as damages incurred by the termination of Contracts Nos. 1, 2 and 3, of EUR 175,750 as compensation for the costs of the arbitration and of USD 1,313,888 as compensation for legal and other costs, with interest on these amounts at the reference rate of interest applied by Sveriges Riksbank plus eight percent from the date of the Award until payment.

The Arbitration Institute considered the request of the Company and established the following.

The termination of Contracts 1, 2 and 3 by the Company was lawful (clause 174 of the Award).

Sevmash had no justification when it consciously and deliberately disregarded its contractual obligations and reduced the rate of progress in the work by failing to provide the necessary resources for the performance of the Contracts. Such deliberate disregard for and willful breach of important contractual obligations, in Swedish law, precludes a party from relying on limitation of liability clauses as that in Article III (5) of Contract No. 1 (clauses 449, 450 of the Award).

The termination of Contract No. 1 was the cause for the termination of Contracts Nos. 2 and 3. The damage caused by breach by Sevmash of Contract No. 1 is the loss of the purchase of the tankers under Contracts 1, 2 and 3 (clause 484 of the Award).

The difference between the price for the tankers under Contracts 1, 2 and 3 and that which the Company will have to pay once it buys the replacement ships is a loss of the Company for which it can seek compensation pursuant to Section 67 of the Sale of Goods Act (clause 501 of the Award).

The Company's loss is the sum of the difference between the price for one tanker proposed by Sevmash in Addendum No. 3 to Contract No. 1 (USD 50,000,000) and original prices for each of the tankers plus expenses on repeated supervision over construction of tankers minus discount of 7% (clauses 505, 507, 537, 538, 543 of the Award).

The Company filed with the state commercial ('*arbitrazhny*') court the above said application stating that Sevmash failed to voluntarily comply with the Award.

Pursuant to part 3 of Article 6 of the Federal Constitutional Law dated 31 December 1996 No. 1-FKZ "On court system of the Russian Federation" the obligatory power of acts rendered by courts of foreign states, international courts and arbitration courts shall be recognized on the territory of the Russian Federation in accordance with international treaties of the Russian Federation.

It follows from part 1 of Article 241 of the Arbitration Procedure Code of the Russian Federation (hereinafter referred to as "APK RF") that the awards of arbitration courts and international arbitration courts rendered on the territory of foreign states in disputes and other cases arisen in connection with conduction of entrepreneurial and other economic activity (foreign arbitral

awards) shall be recognized and enforced in the Russian Federation by state commercial (‘*arbitrazhny*’) courts if their recognition and enforcement are envisaged by international treaties of the Russian Federation and federal laws.

The procedure for the recognition and enforcement of foreign arbitral awards is set forth in the UN Convention on the recognition and enforcement of foreign arbitral awards (New York, 10 June 1958) (hereinafter referred to as the “Convention”), to which both the Russian Federation and the Kingdom of Sweden are parties.

Pursuant to Article III of the Convention the Russian Federation recognizes arbitral awards as binding and enforces them in accordance with the national rules of procedure, under the conditions laid down in the Convention.

Pursuant to Article V of the Convention the recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that:

(a) The parties to the agreement were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made; or

(b) The party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case; or

(c) The award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration; or

(d) The composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or

(e) 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 (part 1).

The 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: (a) the subject matter of the difference is not capable of settlement by arbitration under the law of that country; or (b) the recognition or enforcement of the award would be contrary to the public policy of that country (part 2).

Similar rules are set forth in part 1 of Article 36 of Federal Law “On international commercial arbitration” dated 07 July 1993 N 5338-1.

According to part 2 of Article 244 of APK RF state commercial (‘*arbitrazhny*’) courts refuse to recognize and enforce foreign arbitral awards in whole or in part on the grounds for refusal to issue enforcement order for enforcement of awards of international commercial arbitration courts envisaged by item 7 of part 1 of this Article and part 4 of Article 239 of APK RF, unless international treaty of the Russian Federation provides otherwise.

Pursuant to part 4 of Article 243 of APK RF state commercial (‘*arbitrazhny*’) courts when considering relevant cases may not reconsider the essence of foreign awards.

Sevmash objects to the recognition and enforcement of the Award dated 30 December 2009 and argues that the Arbitration Institute lacked jurisdiction to consider the issue regarding compensation for the loss incurred in connection with the termination of Contracts Nos. 2 and 3 and that so the Award in this part was rendered in a dispute not covered by the arbitration agreement. Sevmash believes that the Arbitration Institute failed to consider the possibility to join the disputes under each of the three Contracts by way of their consolidation when accepting the request for arbitration, as provided for in Article 11 of the Rules.

It follows from the materials of the case that Contracts Nos. 1, 2 and 3 have arbitration clauses which provide for transfer to the Arbitration Institute of any disputes of any kind whatsoever relating to relevant Contracts or their rescission or any stipulation therein.

The grounds for the claim for recovery of damages presented by the Company before the Arbitration Institute were the termination of Contracts Nos. 1, 2 and 3 in connection with Sevmash' failure to fulfill its obligations under Contract No. 1.

The Arbitration Institute considered the objections of Sevmash regarding the jurisdiction and found that there is a direct causal link between the termination of Contract No. 1 and the loss incurred in connection with the termination of Contracts Nos. 2 and 3. Thus, it came to the correct conclusion that it had jurisdiction to consider the claim of the Company in whole (clauses 105, 478-484 of the Award).

Pursuant to part 4 of Article 243 of APK RF state commercial ('arbitrazhny') courts may not reconsider the said conclusion of the Arbitration Institute.

Having considered the aforesaid, the court of the first instance lawfully dismissed the argument of Sevmash that the Award was rendered in a dispute not provided for or not covered by the arbitration agreement.

It is clarified in item 23 of the Information letter of the Presidium of the Supreme Commercial ('*Arbitrazhny*') Court of the Russian Federation dated 22 December 2005 N 96 "On court practice on consideration by state commercial ('*arbitrazhny*') courts of cases on the recognition and enforcement of decisions of foreign courts, on challenge of awards of arbitration courts and on issuance of enforcement orders for enforcement of awards of arbitration courts" (hereinafter referred to as "Information letter No. 96") that a state commercial ('*arbitrazhny*') court may not reverse an award of an arbitration court if a party involved in the arbitration was duly notified about the date of the hearing, presented its explanations and if there are no other grounds for reversal.

As Sevmash was duly notified about the essence of the claim that the Company had filed against it, participated in the hearings held by the Arbitration Institute and objected to satisfaction of the initial claim (clauses 86-88 of the Award), the cassation court finds that the applicant's argument that it had no opportunity to present to the Arbitration Institute its objections regarding the damages incurred in connection with the termination of Contract No. 2 is unfounded.

Believing that the enforcement of the Award is contrary to the public policy of the Russian Federation, Sevmash in its objections to the Company's application and in its cassation claim refers to violation of the principle of fairness and adequacy of civil liability and of the principle of prohibition of double liability.

The court of the first instance considered this argument of Sevmash and correctly pointed out that an award of an international commercial arbitration court may be considered as being contrary to the public policy of the Russian Federation if its enforcement will result in actions that are either directly prohibited by the law, or may cause harm to the sovereignty or safety of the state, or impair interests of large social groups, or are incompatible with the principles of economic, political, legal systems of states, or impair constitutional rights and freedoms of citizens, or are contrary to the fundamental principles of civil legislation, such as equal treatment of participants, inviolability of property, freedom of contract.

Pursuant to item 29 of Information letter No. 96 a state commercial ('*arbitrazhny*') court shall refuse to recognize and enforce an arbitral award if the consequences of enforcement of such award are contrary to the public policy of the Russian Federation which is based on the principle of equal treatment of participants to civil relationships, presumption of their good faith, principle of adequacy of civil liability and its correspondence to the consequences of breach and the degree of guilt.

It follows from the Award dated 30 December 2009 that the Arbitration Institute established the amount of damages incurred by the Company on the basis of Swedish law applicable to the relationships of the parties after it had considered all evidence presented by the parties.

The legal system of the Russian Federation also includes regulation regarding recovery of damages.

For example, pursuant to part 1 of Article 1 of the Civil Code of the Russian Federation (hereinafter referred to as the "RF Civil Code") the civil legislation of the Russia Federation is based on guarantees of equal treatment of participants to civil relationships, inviolability of property, freedom of contract, prohibition of intrusion into private matters, guarantees of unimpeded exercise of civil rights, guarantees of restoration of violated rights and their judicial protection.

Under Article 393 of the RF Civil Code the debtor must compensate the creditor for the loss incurred in connection with non-performance or undue performance of obligations (part 1). The amount of loss shall be determined pursuant to the rules set forth in Article 15 of the RF Civil Code (part 2).

According to Article 524 of the RF Civil Code if upon termination of contract on the grounds envisaged by clauses 1 and 2 of this Article no agreement was concluded to replace the terminated contract and if there is a current price for such goods, a party may claim damages determined as difference between the contract price and the current price as of the date of termination of the contract. The current price is deemed to be the price that was customarily charged in similar circumstances for similar goods in the place where the delivery should have been made. If there is no current price in this place, the current price applied in another place may be used, if such place may be considered as reasonable substitution, with due regard to the difference in expenses for transportation of goods (part 3). The satisfaction of the claims described in parts 1, 2 and 3 of this Article does not release the breaching party from obligation to compensate other losses caused to the innocent party in accordance with the rules set forth in Article 15 of the RF Civil Code (part 4).

Determination by the Arbitration Institute of the amount of damages in the absence of concluded agreements replacing the terminated Contracts No. 1, 2 and 3 and establishment by it of correspondence between the loss and the consequences of the breach and the degree of guilt of Sevmash are not contrary to the procedure envisaged by the civil legislation of the Russian Federation.

Sevmash' arguments that when the amount of damages was being established no due regard was given to the interest computed on the advance payments (USD 4,477,440), which had been refunded to the Company and which constitute liability envisaged by clause 2 of Article X of Contract No. 1, and that the enforcement of the Award thus will lead to double liability for one and the same breach were duly dismissed by the court of the first instance.

In fact, the said amount is payment for use of monetary funds belonging to a third person (it is payment for use of advance payments) that had to be refunded in connection with the termination of Contract No. 1.

The possibility to compute such interest is also provided by the Russian civil legislation (Articles 395, part 2 of Article 1107 of the RF Civil Code). Imposing such liability for non-fulfillment of a monetary obligation does not preclude the creditor from claiming damages caused by other unlawful actions of the debtor.

The claim of the Company for recovery of damages considered by the Arbitration Institute is not connected with unlawful retention of monetary funds by Sevmash. This claim has other legal grounds, namely, infliction of damages by non-fulfillment of obligation under Contract No. 1 to transfer into the buyer's ownership the tankers by agreed dates and subsequent termination of Contracts Nos.1, 2 and 3.

In these circumstances there were no legal grounds for the Arbitration Institute to set off the damages to be recovered in favour of the Company against the amount of USD 4,447,440 refunded to the Company by Sevmash.

Considering the above and taking into account that the objections of Sevmash are in fact aimed at revision of the essence of the Award of the Arbitration Institute, the court of the first instance lawfully granted the Company's application for the recognition and enforcement of the Award.

As the challenged Order was rendered in compliance with the rules of the material and procedural law, there are no grounds for its reversal.

When Sevmash filed its cassation claim, it paid the state duty in the amount of RUB 2,000 by payment order dated 08 December 2010 No. 447379.

However, pursuant to item 12 of clause 1 of Article 333.21 of the Tax Code of the Russian Federation (hereinafter referred to as the "RF Tax Code"), cassation claims against court orders on the recognition and enforcement of foreign arbitral awards is not subject to state duty.

Accordingly, the state duty in the amount of RUB 2,000 shall be refunded to Sevmash from the federal budget as overpaid, on the basis of clause 1 of Article 333.40 of the RF Tax Code.

As the cassation claim of Sevmash is dismissed, the suspension of the enforcement of the Order of the State Commercial ('*Arbitrazhny*') Court for the Arkhangelskaya Oblast' dated 10 December 2010 imposed by the Order of the Federal Commercial ('*Arbitrazhny*') Court for the North-Western District dated 28 December 2010 shall be repealed.

On the basis of Articles 286, 287, 289, 290 of the Arbitration Procedure Code of the Russian Federation, the Federal Commercial ('*Arbitrazhny*') Court for the North-Western District

RULED:

That the Order the State Commercial ('*Arbitrazhny*') Court for the Arkhangelskaya Oblast' dated 10 December 2010 in case No. A05-10560/2010 shall be upheld, the cassation claim of the Open Joint-Stock Company "Proizvodstvennoye obyedineniye "Severnoye mashinostroitelnoye predpriyatiye" shall be dismissed.

That the suspension of the enforcement of the Order of the State Commercial ('*Arbitrazhny*') Court for the Arkhangelskaya Oblast' dated 10 December 2010 imposed by the Order of the Federal Commercial ('*Arbitrazhny*') Court for the North-Western District dated 28 December 2010 shall be repealed.

That the state duty paid by payment order dated 08 December 2010 No. 447379 in the amount of RUB 2,000 shall be refunded to the Open Joint-Stock Company "Proizvodstvennoye obyedineniye "Severnoye mashinostroitelnoye predpriyatiye" from the federal budget.

Presiding judge	S.V. Afanasiev
Judges	K.Yu. Korobov
	O.Yu. Nefedova