

JKX Oil & Gas PLC, Poltava Gas B.V. and Poltava Petroleum Company JV v. The State of Ukraine seeking to grant permission for enforcement of a foreign arbitral award dated 14 January 2015, issued by the Emergency Arbitrator Rudolf Dolzer under the Arbitration Rules of the Stockholm Chamber of Commerce, Supreme Specialized Court of Ukraine for Civil and Criminal Cases, No. 757/5777/15-у, 17 May 2016

A contribution by the ITA Board of Reporters

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Headnote

Kyiv Court of Appeal rejected State of Ukraine appeal petition against the resolution of the Pechersky District Court of the City of Kyiv that had granted permission for enforcement of a foreign arbitral award issued by the Emergency Arbitrator Rudolf Dolzer under the Arbitration Rules of the Stockholm Chamber of Commerce.

Summary

Facts of the case

JKX Oil & Gas PLC, Poltava Gas B.V. and Poltava Petroleum Company JV are engaged in the production of natural gas in Ukraine and such investment is falling under the Energy Charter Treaty (the 'ECT').

JKX Oil & Gas PLC, Poltava Gas B.V. and Poltava Petroleum Company JV are investors within the meaning of Art. 1 of the ECT.

On 28 December 2014 Ukraine issued a Law "Regarding tax reform amendments to the Tax Code of Ukraine and other legislative acts" which provides for increase of royalty payments on gas production from previous 28% up to 55%.

JKX Oil & Gas PLC, Poltava Gas B.V. and Poltava Petroleum Company JV, considering royalty payments increase as a violation of their rights as investors, referred to the Arbitration Institute of the Stockholm Chamber of Commerce seeking recovery of USD 180 million.

On 14 January 2015 the Emergency Arbitrator Rudolf Dolzer under the Arbitration Rules of the Stockholm Chamber of Commerce (the 'Arbitration Rules') rendered the award in arbitration case No. EA/2015/002 under the claim of JKX Oil & Gas PLC, Poltava Gas B.V. and Poltava Petroleum Company JV against the State of Ukraine, according to which the Debtor was ordered to refrain from imposing royalties for subsoil use for extracting natural gas by Poltava Petroleum Company JV at a rate higher than 28% provided for by the Tax Code of Ukraine before 31 July 2014 (the 'Award').

JKX Oil & Gas PLC, Poltava Gas B.V. and Poltava Petroleum Company JV have applied to the Ukrainian court with a motion for granting permission for the enforcement of the Award.

In court proceedings, Ukraine raised such arguments as a defence:

- 1Cooling off period established in ECT`s had not passed.
- 2State was not properly notified about the arbitral proceedings.
- 3Award contains decision on matters beyond the scope of the arbitration agreement (since at the moment of the Energy Charter Treaty ratification by Ukraine, the Arbitration Rules did not provide for emergency arbitrator procedure).
- 4Recognition and enforcement of the Award would violate Ukrainian public policy.

First instance court judgment

By the resolution of the Pechersky District Court of Kyiv City dated 8 June 2015 the motion of the JKX Oil & Gas PLC, Poltava Gas B.V. and Poltava Petroleum Company JV was granted.

As to the objections of Ukraine, the Court:

1Disregarded the argument regarding cooling off period.

2Found that notification via emails should be considered as a proper notification.

3Concluded that the Award contains decision on matters within the scope of the arbitration agreement, since current Arbitration Rules are applicable and provide for emergency arbitrator procedure.

4Opined that the Award does not violate Ukrainian public policy, since it affects only the applicant/investor in the case and does not change the existing royalty system.

Appeal instance court judgment

By the resolution of the Kyiv City Court of Appeal dated 17 September 2015 the resolution of the Pechersky District Court of Kyiv City dated 8 June 2015 was revoked and a new resolution was adopted which dismissed the motion.

Cassation instance court judgment

On 24 February 2016 the High Specialized Court of Ukraine for Civil and Criminal Cases partially satisfied the cassation appeal of JKX Oil & Gas PLC, Poltava Gas B.V. and Poltava Petroleum Company JV; cancelled the resolution of the Kyiv City Court of Appeal dated 17 September 2015 and remitted the case to the court of appeal for a new consideration. High Specialized Court of Ukraine for Civil and Criminal Cases noted that when deciding whether to grant permission for enforcement, the court cannot assess whether the issued decision is lawful.

Appeal instance court judgment (second round)

Kyiv City Court of Appeal by its resolution dated 17 May 2016 upheld the resolution of the Pechersky District Court of Kyiv City dated 8 June 2015 by which the motion had been granted.

The Court stated that the Award does not violate Ukrainian public policy because of the following:

1Public policy shall mean the state's law and order, the defining principles and elements that form the basis of the existing system (relating to its independence, integrity, self-reliance and inviolability, fundamental constitutional rights, freedoms, guarantees, etc.).

2The Award does not change the scope of the rights and obligations of the parties to the dispute, but only temporarily oblige the State of Ukraine to refrain from imposing royalties on gas extraction at the rate exceeding 28%.

3The Award does not change the taxation system of Ukraine, does not replace the provisions of the Tax Code of Ukraine and does not amend the taxation system of Ukraine.

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The summary of the case file and full text of summarized court decision are available on:

<https://www.kluwerarbitration.com/document/kli-ka-16-25-005?jurisdiction=Ukraine&type=Court%20Decisions>