

JSC "Avia-Fed-Service" v. SJSHC "Artem", Supreme Court of Ukraine, 824/101/2019, 02 July 2020

A contribution by the ITA Board of Reporters

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Headnote

The court rejected recognition and enforcement of a Russian ICAC Award, finding that the fact that the Russian petitioner was subject to Ukrainian sanctions that constituted a public policy ground.

Summary

Facts of the case

Joint-Stock Company "Avia-Fed-Service" ("Avia-Fed-Service") and State Joint-Stock Holding Company "Artem" ("Artem") entered into the goods supply agreement No. 2012-02-01 dated 7 February 2020 subject to the agreed additional agreement dated 24 December 2014 No.13 (the "Agreement") executed in the framework of the Intergovernmental Agreement dated 18 November 1993 between the Government of the Russian Federation and the Government of Ukraine "On Production and Research and Technical Cooperation of Enterprises of Defense Industries".

The Agreement contained the arbitration clause, stipulating the rules applied to dispute resolution shall be the Rules of the International Commercial Arbitration Court at the Chamber of Commerce and Industry at the location of a claimant and the applicable law shall be the international law; the place of the arbitration court of hearings shall be the location of a claimant; the language of the arbitration proceedings shall be Russian. The decision of the International Commercial Arbitration Court at the Chamber of Commerce shall be final and binding for both parties.

Avia-Fed-Service made an advance payment however, the goods were not delivered due to aggression of the Russian Federation.

Avia-Fed-Service submitted a claim against Artem to the International Commercial Arbitration Court at the Chamber of Commerce and Industry of the Russian Federation ("Russian ICAC") and the arbitral tribunal supported the position of Avia-Fed-Service. According to the International Commercial Arbitration Court at the Chamber of Commerce and Industry of the Russian Federation award ("Russian ICAC award") dated 3 April 2018, Artem should repay to Avia-Fed-Service (i) the amount of the principal debt under the Agreement, (ii) the interest for the use of the funds, (iii) the interest for the use of funds subject to further accrual in the amount of prepayment from Artem in favor of Avia-FED-Service and (iv) the costs for legal services provided by Avia-Fed-Service representatives.

On 16 September 2019 Kyiv Court of Appeal (court of first instance) rendered a resolution for recognition and enforcement of the Russian ICAC award. The resolution was based on the reasoning that Artem did not confirm the existence of grounds for refusal to recognize and grant permission to enforce the Russian ICAC award. Also, Kyiv Court of Appeal of Ukraine noted that the unfounded refusal to grant permission to enforce the Russian ICAC award would be a kind of blocking of the award and would constitute an artificial regulatory barrier, which from the point of view of international law was absolutely inadmissible.

Differences in the name of the Artem legal entity, to which Artem referred in its objections as a ground to recognize and enforce the Russian ICAC award was eliminated by Russian ICAC

resolution as of 27 August 2019 supplementing the name of Artem by adding the "joint stock" phrase.

Artem appealed the Kyiv Court of Appeal resolution. On 2 July 2020, the Supreme Court of Ukraine reviewed the materials of case and rejected the recognition and enforcement of the Russian ICAC award in Ukraine.

Question in Dispute

The court should review the award affected by sanctions and test the public policy exception.

Arguments of the Parties

At the Supreme Court of Ukraine Artem had the following position:

- The recognition and enforcement of the Russian ICAC award violates the public order of Ukraine, as it threatens the security and economy of Ukraine, it will mean granting permission to finance the armed aggression of the Russian Federation against Ukraine.
- Debt obligations arising in connection with the Russian ICAC award and the funds to be paid under this award, are the assets of Avia-Fed-Service and fall under the Law of Ukraine "On Sanctions".
- The Russian ICAC did not eliminate the discrepancies in the name of the debtor, in particular State Joint-Stock Holding Company "ARTEM", not the State Holding Company "ARTEM".

At the same time, Avia-Fed-Service supported the following position:

- Artem did not prove that the recognition and enforcement of the Russian ICAC award contradicted the public order of Ukraine.
- The blocking of the implementation of the Russian ICAC award is not provided by the Law of Ukraine "On Sanctions".
- The circumstances referred to by Artem, under certain conditions may be recognized as grounds only for the suspension of enforcement actions after the Russian ICAC award enforcement.

Judgment of the Court

The Supreme Court of Ukraine reviewed the materials of the case and rendered to reject the recognition and enforcement of the Russian ICAC award based on the following reasons:

- The provisions of the New York Convention are binding for Ukraine, are a priority and have the highest legal force in relation to the national legislation of Ukraine (except for the Constitution of Ukraine), governing the disputed legal relationship;
- The fact that Avia-Fed-Service is a company of the Russian Federation, which, in turn, is recognized in Ukraine as an aggressor state, cannot serve as a basis for non-performance of contractual obligations, as Avia-Fed-Service and Artem have developed the private-law relations on the basis of an agreement and on their obligations.
- One of the new aspects of public order in Ukraine is the sanction regulation, which appeared with the adoption of the Law of Ukraine "On Sanctions" as a result of armed aggression against Ukraine.
- The case file contains sufficient evidence that in the case of recognition and enforcement of the Russian ICAC award in favor of a state enterprise that is of strategic importance for the defense of the state, there will be a recovery of funds in favor of a legal entity registered in the aggressor state, which orders military goods and whose rights in relation to its property, trade activity and financial obligations on the basis of the Law of Ukraine "On Sanctions" is temporarily limited due to the need of Ukraine to protect the interests of society and the state from threats to national security, in particular, the security of people living in Ukraine.

The Supreme Court of Ukraine also determined that the continuous application of urgent special economic and other restrictive measures against Avia-Fed-Service on the basis of the Law of Ukraine "On Sanctions" indicates that the actions of this legal entity created the threats, as a result of which the implementation of the Russian ICAC award would violate the rules of Ukraine on public order, namely the fundamental political interests of the state in ensuring national security, including the safety of people living in its territory.

Importantly the Supreme Court highlighted that the refusal to recognize and grant permission to enforce the Russian ICAC award did not terminate the civil relations that had arisen between the parties. However, during the aggression against Ukraine refusal to recognize and enforce the Russian ICAC award in Ukraine on the recovery of funds from an enterprise engaged in defense activities and of strategic importance for the security of Ukraine, were part of the measures aimed at implementing control over the use of property in accordance with the general public interests.

The Supreme Court concluded that the restrictive measures (sanctions) applied by Ukraine against Avia-Fed-Service neither terminated the Avia-Fed-Service obligations, nor made it impossible for Avia-Fed-Service to recognize and enforce the Russian ICAC award after removal of sanctions from Avia-Fed-Service.

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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-ons-20-38-001?jurisdiction=Ukraine&type=Court%20Decisions>