

Kiev Appellate Court refuses to recognise and enforce SCC emergency arbitrator award in investment dispute against Ukraine

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In *JKX Oil & Gas PLC and another v Ukraine, Case No. 757/5777/15-ц*, the Kiev Appellate Court considered whether to recognise and enforce an Arbitration Institute of the Stockholm Chamber of Commerce (SCC) emergency arbitrator award.

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Speedread

On 21 December 2016, the Kiev Appellate Court upheld an appeal by Ukraine's Ministry of Justice (MOJ). It refused to recognise and enforce an Arbitration Institute of the Stockholm Chamber of Commerce (SCC) emergency arbitrator award issued against Ukraine on the basis, among other things, of public policy grounds and a failure to give proper notice.

It is notable that all courts considering the case were in agreement that the SCC emergency arbitrator's award against the state could, in principle, be enforced under the New York Convention.

However, the decision should serve as a reminder to parties needing to serve proceedings on parties in Ukraine over public holidays that they should ensure all notices and documents are sent or received, when the public authorities are fully operational. In other cases, the courts may consider the giving of short notice as guerilla tactics aimed at limiting the capacity of public authorities to properly present their case due to internal bureaucracy. (*JKX Oil & Gas PLC and another v Ukraine, Case No. 757/5777/15-ц*.)

Background

Recognition and enforcement defences

Ukrainian respondents in recognition and enforcement of foreign arbitral award proceedings frequently rely on a defence of a lack of proper notification about the arbitral proceedings and public policy grounds. Such rules are stipulated in the Article 396(2) of the Civil Procedure Code of Ukraine, as well as in Article V(1)(b) and Article V(2)(b) of the New York Convention on Recognition and Enforcement of Foreign Arbitral Awards 1958 (***New York Convention*** (www.practicallaw.com/6-205-5196)):

"Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that 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."

"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."

Proper notification defence

Ukrainian courts determine a proper notification on a case by case basis, particularly looking at whether the parties have an obligation to serve documents under a specific contractual terms or agreed arbitration rules.

Article 8, Annex II of the Stockholm Chamber of Commerce (SCC) Arbitration Rules 2010 provides:

"Any emergency decision on interim measures shall be made not later than 5 days from the date upon which the application was referred to the Emergency Arbitrator pursuant to Article 6 of this Appendix."

In any event, the court analyses whether the party factually received a notice and whether it had sufficient capacity to present its case.

Taxation principles and public policy defence

The Ukrainian courts under the public order recognise a legal order of the state and various fundamental principles and grounds relating to its independence, unity, self-governance, and inviolability, fundamental constitutional right, freedoms, guarantees, and the like) (see paragraph 12 of the Resolution No. 12 of the Plenum of the Supreme Court of Ukraine dated 24 Dec 1999).

Article 92 of the Ukrainian Constitution (CU) mandates the imposition of taxes and duties exclusively by the laws, which are delivered by Verkhovna Rada of Ukraine (Parliament). According to Article 1.1 of the Tax Code of Ukraine, Ukrainian law imposes an exhaustive list of taxes and duties and the order of administration thereof. Only the Tax Code of Ukraine specifies specific grounds for tax privileges and procedure for their application. No authority other than the Parliament may pass laws, and therefore amend the imposed taxes and duties.

Facts

In November 2014, JKX Oil & Gas PLC (JKX) and its wholly owned subsidiaries Poltava Gas BV (Poltava Gas) and JV Poltava Petroleum Co notified Ukraine of a dispute under the **Energy Charter Treaty** (www.practicallaw.com/7-502-5544) (ECT), and the **bilateral investment treaties** (www.practicallaw.com/4-502-2491) (BIT) between Ukraine and the UK, and Ukraine and the Netherlands, and requested amicable settlement.

On 7 January 2015, no amicable resolution having been reached, JKX and Poltava Gas requested the SCC to appoint an emergency arbitrator and render a decision on interim measures against Ukraine. Various documents and communications relating to the appointment of an emergency arbitrator were sent to the Ministry of Justice of Ukraine between 7-11 January 2015. On 14 January 2015, the SCC-appointed emergency arbitrator, Professor Rudolf Dolzer, delivered an emergency arbitrator award (Emergency Award). He ordered Ukraine to refrain from imposing royalties exceeding 28% on natural gas extraction which had been in effect before 31 July 2014.

JKX and Poltava Gas filed for recognition and enforcement of the Emergency Award in Ukraine under the New York Convention. On 8 June 2015, the judge of the Pechersk District Court, Larysa Tsokol, granted the request, recognising and enforcing the Emergency Award against Ukraine, finding that the Emergency Award complied with the requirements set by the New York Convention. The Ministry of Justice of Ukraine appealed this decision. On 17 September 2015, the Appellate Court of the City of Kiev (Appellate Court) upheld the appeal. However on 24 February 2016, the High Specialised Court of Ukraine for Civil and Commercial Matters overturned the decision and remanded the case back to the appellate court. The court determined that the MOJ factually received and registered information about the SCC emergency arbitration after the expiration of the time set by the SCC Rules.

Decision

The Appellate Court again upheld the appeal based on public policy grounds (*Article V(2)(b), New York Convention*). It refused to recognise and enforce the foreign arbitral award because it impaired Ukraine's right to regulate the sphere of taxation and apply its tax policy. It reasoned that giving competence to courts or tribunals to change the amounts of taxes or mandatory payments in violation of Ukraine's Tax Code breached the fundamental and basic principles of taxation established in Ukraine, and Ukraine's public policy.

In addition, the Appellate Court established that, while the various documents and communications had been sent to the Ministry of Justice of Ukraine between 7-11 January 2015, the Ministry only received them on 12 January 2015, the first day following the end of the official Christmas holidays in Ukraine, during which the Ministry of Justice, along with other state entities, was closed. Therefore, the court concluded that the Ministry of Justice of Ukraine was unable to timely present its case within the emergency arbitrator procedures (*Article V(1)(b), New York Convention*).

Comment

It is notable that all courts considering the case were in agreement that the SCC emergency arbitrator's award against the state could, in principle, be enforced under the New York Convention.

However, in upholding the appeal in favour of Ukraine, the case should serve as a reminder to parties serving proceedings on parties in Ukraine over public holidays, that they should ensure all notices and documents are sent or received, when the public authorities are fully operational. In other cases, the courts may consider the giving of short notice as guerilla tactics aimed at limiting the capacity of public authorities to properly present their case due to internal bureaucracy. Furthermore, a party appearing in an investment dispute against any state should be cautious in how it frames the temporary relief it seeks from the emergency arbitrator. A similar emergency arbitrator award limiting the right of the state to pass general tax measures that target a particular foreign investor, may be refused recognition and enforcement due to public policy considerations.

Case

JKX Oil & Gas PLC and another v Ukraine, Case No. 757/5777/15-ц (www.practicallaw.com/w-005-6784) (Kiev Appellate Court).

Resource information