

**Skorzonera v. Plan Team GmbH,
Supreme Specialized Court of Ukraine for Civil and Criminal Cases, Not applicable Case
Date 15 January 2014**

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Headnote

The Higher Specialized Court of Ukraine on Civil and Criminal Matters reversed the decisions of the lower instances courts on refusal to set aside of the arbitral award and remand the case for a new trial to consider arbitration procedural violations.

Summary

Facts of the case

International Commercial Arbitration Court at the Ukrainian Chamber of Commerce and Industry of Ukraine ("Tribunal") rendered an arbitral award in favor of Plan Team GmbH ("Claimant") against "Skorzonera" LLC ("Defendant"), the tribunal partially satisfied the claim on recovery of indebtedness ("Award").

The court of cassation appeal (the Higher Specialized Court of Ukraine on Civil and Criminal Matters) reversed the decisions and remanded the case for a new trial.

Question in Dispute

"Skorzonera" LLC submitted to Shevchenkivskiy District Court of Kyiv City (the court of the first instance) an application on setting aside of the Award.

The court had to assess (1) procedural violation committed by the Tribunal; (2) inadmissibility of claim by the Tribunal.

Arguments of the Parties

"Skorzonera" LLC substantiated its claim on the following grounds:

- (1) Procedural violation committed by the Tribunal:
 - (a) Claimant submitted evidence to the Tribunal during the last hearing. However, the Tribunal, in violation of procedural requirement (i.e. all evidence submitted by one party shall be subject to communication to other party) failed to circulate these evidence to the Defendant. Alongside with that, the Award was motivated, inter alia, with reference to these evidence;
 - (b) In violation of Rules of Procedure, the

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Jurisdiction

- Ukraine

Court

- Supreme Specialized Court of Ukraine for Civil and Criminal Cases

Case date

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Case number

- Not applicable

Parties

- Applicant, Limited Liability Company "Skorzonera"
- Appellee, Plan Team GmbH

Key words

- setting aside of an arbitral award
- due process

Source

- and, **Limited Liability Company "Skorzonera" (Ukraine) v. Plan Team GmbH (Italy) on setting aside an arbitral award of the International Commercial Arbitration Court at the Ukrainian Chamber of Commerce and Industry, Supreme Specialized Court of Ukraine for Civil and Criminal Cases, Not applicable Case Date 15 January 2014**, A contribution by the ITA Board of Reporters, (© Kluwer Law International; Kluwer Law International)

Tribunal did not announce the resolution part of the Award upon completion of oral hearings, but just informed the parties that the Award would be sent within 20-days period. However, the Tribunal sent the Award to the Defendant not on due date (14 December 2011), but later on 21 December 2011.

(2) Inadmissibility of claim

Non-compliance with contractual dispute resolution procedure. Contract between the Claimant and Defendant contains the dispute resolution clause, under which parties shall enter into negotiations and upon failure of negotiations; the parties shall be able to submit the dispute to arbitration under arbitration clause.

The arbitration clause provided that the dispute could be submitted either to the International Commercial Arbitration Court at the Ukrainian Chamber of Commerce and Industry of Ukraine or to the International Commercial Court at the Chamber of Commerce and Industry of Italy at the option of the claimant.

Therefore, the Defendant claimed that absence of prior-to-arbitration negotiations made claim inadmissible.

Judgment of the Court

The first instance court refused to rule in favor of application. The court of appeal (the Kyiv Court of Appeal) upheld the decision of first instance court.

Trial and Appeal courts based their decisions on findings that the Tribunal did not infringe upon Defendant's rights while considering and deciding the dispute between the Claimant and Defendant.

The court of cassation appeal (the Higher Specialized Court of Ukraine on Civil and Criminal Matters) reversed the decisions of the lower instances courts and remand the case for a new trial.

The decision of the court of cassation appeal was based on the findings that:

(i) the fact that the Tribunal gave no opportunity for Defendant to get acquainted with and submit comments regarding evidence submitted by the Claimant during the last hearing of the dispute constitutes the violation of part 2 of Article 34 of the Law of Ukraine "On International Commercial Arbitration" (this law is the reflection of UNCITRAL Model Law);

(ii) the lower instances courts gave no due regard to the procedure of choice of arbitral tribunal under the arbitration clause. Since lower instances courts' decisions contain no reference to consideration of lawfulness of procedure of compliance with the arbitration clause.

Commentary: Despite the fact that the court of cassation appeal did not specify which particular provision of part 2 of Article 34 of the Law of Ukraine "On International Commercial Arbitration" was violated, in the reasoning part of the decision the court examined the principle of equal treatment of the parties and the procedural rule of the Tribunal, namely the obligation of the Tribunal to transmit documents submitted by one party to another party. Therefore, it may be presumed that the decision was based on the non-observance of the due process.

Original source:

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

<http://www.kluwerarbitration.com/CommonUI/print.aspx?ids=KLI-KA-1414002>