

Telenor Mobile Communications AS v. Storm LLC, Pechersk District Court of the City of Kyiv, 5 October 2007

Yaroslav Petrov, CMS Cameron McKenna LLC; Oleksandr Gudko, CMS Cameron McKenna LLC

The District court refused to enforce a foreign arbitral award rendered in New York finding that the award violates Ukraine public policy.

Telenor Mobile Communications AS (“Telenor”) and Storm LLC (“Storm”) have been disputing over the control of a Ukrainian mobile-phone company, Kyivstar, jointly owned by Russian and Norwegian groups since 2002. Telenor (the “Claimant”) has accused Storm (whose parent company is Alfa Group) of using underhanded tactics to try to gain control over Kyivstar.

The Claimant and the Respondent each signed a Shareholders Agreement covering their Ukrainian joint venture. The Arbitration Clause, contained in the Shareholders Agreement, provided that disputes between parties shall be settled by a panel of three arbitrators under the UNCITRAL Arbitration Rules and determined New York as the place of arbitration.

In February 2006 Claimant commenced arbitration in New York. In August 2007 after a lengthy arbitration process and numerous efforts of Storm (the “Respondent”) to terminate the procedure through Ukrainian courts, the arbitral tribunal rendered its final and binding award.

The award stated that the Respondent had violated the provisions of the Shareholders Agreement with the Claimant and had wrongly tried to wriggle out of an agreement under which disputes should be resolved by arbitration in New York. The award also pointed out that the Respondent had violated a number of points in the Shareholders Agreement. One of the violations concerned with the non-competition provisions of the Shareholders agreement. According to the provisions, the Respondent or its affiliates (e.g its parent Alfa Group) shall not own or control, directly or indirectly, more than 5% of the voting capital stock in any other entity engaged in the wireless mobile telecommunication business. Alfa Group, however, as the affiliate of the Respondent, was found in control of more than 5% of the voting capital stock in two other wireless mobile companies in Ukraine. Therefore, the arbitral tribunal ordered the Respondent to sell its shares in Kyivstar to a person other than its affiliate within 120 days unless prior to that time the Respondent and any affiliated entities divests its holdings above 5 percent in two rival Ukrainian wireless operators.

The tribunal found that the Respondent breached the Shareholders Agreement by (1) refusing to appoint candidates for the Kyivstar Board and by not attending the board and shareholder meetings, (2) owning or controlling more than 5 percent of two competing wireless telecom operators in Ukraine, and (3) failing to settle any of the disputes through arbitration.

The tribunal ordered the Respondent to organize itself so it can nominate four candidates for the Kyivstar Board and to ensure

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Jurisdiction

- **Ukraine**

Court

- Pechersk District Court of the City of Kyiv

Case date

- 5 October 2007

Parties

- Telenor Mobile Communications AS (Ukraine)
 - Storm LLC (Ukraine)

Key words

- enforcement
 - award
 - SPA
- public policy

Applicable legislation

- UNCITRAL Model Law
 - Ukrainian

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that those elected persons attend all future meetings of the company. The tribunal also ruled that all future Kyivstar Shareholders Meetings should be attended and ordered the Respondent to amend Kyivstar's Charter so it is in line with the Ukrainian law. It also ordered the Respondent to stop interfering with Kyivstar's ability to have its financial statements audited by accounting and consultant firm.

The Respondent argued that in accordance with the Ukrainian law it is impossible to recognize and enforce the arbitration award in Ukraine. According to the procedural legislation of Ukraine, a foreign arbitral award has to be recognized by a state court in order to be enforced.

On 5 October 2007 and despite that Ukraine is a signatory to the New York Convention on Recognition and Enforcement of Foreign Arbitral Awards, the District Court ruled that enforcing the arbitration award would contradict the public policy of Ukraine. The court held that the arbitration award contradicts the public policy of Ukraine because it prevented the Respondent to address the courts and to proceed with litigation. The court also found that the award directly contradicts the decisions of the Ukrainian courts on the same dispute and violates the principle of inviolability of the property, encroaching on the shares of Kyivstar belonging to the Respondent.

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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/document.aspx?id=ipn91019>

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