

Interpap LLC (Ukraine) v. Roxcel Trading GmbH (Austria), Supreme Court of Ukraine, Case No. 824/227/19, Proceeding No. 61-3378as20, 10 September 2020

A contribution by the ITA Board of Reporters

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Headnote

The Ukrainian Supreme Court found no grounds to set aside an arbitral award issued in ICAC arbitration with the seat in Ukraine. The moving party relied on the following reasons for the annulment: (1) public policy is violated; (2) the award relates to matters not covered by the arbitration agreement; and (3) the constitution of the arbitral tribunal runs contrary to the parties' agreement.

Summary

Facts of the case

On 17 October 2016, Roxcel Handelsqesellschaft m.b.H. ("Roxcel 1") and Interpap concluded contract No. 17/10 on the delivery of paper and cardboard by Roxcel 1 ("Contract 1"). The contract provided jurisdiction of Ukrainian commercial courts over disputes thereunder.

At the same time, on 5 June 2018, following the reorganization and renaming of Roxcel Handelsqesellschaft m.b.H., now Roxcel Trading GmbH ("Roxcel") and Interpap LLC ("Interpap") entered into yet another contract No. 05/06 on the delivery of paper and cardboard by Roxcel ("Contract 2"). This time, the contract provided for arbitration of disputes under the Rules of the International Commercial Arbitration Court at the Ukrainian Chamber of Commerce and Industry (ICAC).

Considering an alleged breach of Contract 2 by Interpap in not accepting and promptly paying for the delivered goods, Roxcel initiated the ICAC arbitration against Interpap, claiming, among other things, damages and contractual penalties. On 7 October 2019, the ICAC partially satisfied Roxcel's claims, awarding USD 62 868,91 in favor of Roxcel ("ICAC award").

Interpap disagreed with the ICAC award and sought its set aside in the Kyiv Court of Appeal, alleging that (1) it contradicts public policy because it does not provide an equivalent of the awarded sum in Ukrainian currency; (2) the formation of the arbitral tribunal runs contrary to the parties' agreement; and (3) the dispute is governed by Contract 1, which provided for jurisdiction of Ukrainian courts.

The Kyiv Court of Appeal rejected Interpap's application, and Interpap appealed the ruling to the Ukrainian Supreme Court.

Question in Dispute

The Supreme Court had to decide whether the ICAC award violated public policy, the formation of the tribunal was contrary to the parties' agreement, and whether the dispute was covered by the arbitration agreement in Contract 2.

Arguments of the Parties

Interpap had the following three arguments to set aside the ICAC award.

First, Interpap alleged that the ICAC award violates public policy since it does not provide an equivalent of the awarded sum in Ukrainian currency established by the National Bank of Ukraine on the date of the award.

Second, Interpap claimed that the parties' disagreements emerged on 12 March 2018 (before the formation of Contract 2), and the order for the production of goods was made based on Contract 1, which provides jurisdiction of Ukrainian commercial courts, not the ICAC.

Third, Interpap argued that the ICAC violated the procedure on the appointment of the arbitrator because on the date when Roxcel filed a motion on the appointment of the sole arbitrator, correspondence between the parties was still pending in this regard.

Roxcel counterargued on all three points as follows: (1) public policy shall be understood as public order of the state, essential principles and tenets constituting the essence of its order, and thus Interpap's assertions do not concern public policy in any way; (2) Interpap did not provide any evidence that the deliveries at hand were subject to Contract 1; (3) the Kyiv court of Appeal properly analyzed the procedure on the appointment of the sole arbitrator and correctly concluded that it was followed in this case.

Judgment of the Court

The court mentioned that Article 459(1) of the Civil Procedure Code of Ukraine ("CPCU") provides an exhaustive list of grounds for setting aside an arbitral award issued in arbitration seated in Ukraine, unless otherwise provided in international treaties of Ukraine or Law of Ukraine on International Commercial Arbitration ("Law on ICA"). This list of grounds (consistent with one contained in Article 34 of the Law on ICA), inter alia, contains grounds relied by Interpap: (1) violations of public policy; (2) the award relates to matters not covered by the arbitration agreement; and (3) the constitution of the arbitral tribunal runs contrary to the parties' agreement.

The Ukrainian Supreme court found no grounds from the above list for setting aside the ICAC award and dismissed Interpap's appeal for reasons mentioned below.

Whether the dispute is within the arbitration clause in Contract 2

The court highlighted the "competence-competence" principle set forth in Article 16 of the Law on ICA (a counterpart to Article 16 of the UNICTRAL Model Law), noting that in practice the arbitral tribunal itself shall interpret the arbitration agreement's content to define whether it has competence to resolve any particular case.

Further, the Supreme Court noted that the arbitration agreement in Contract 2 comports with requirements of the Law on ICA as it is contained in the written document signed by the parties. This agreement, the court stressed, provides for arbitration of disputes under the ICAC Rules by a sole arbitrator.

The court disagreed with Interpap's argument that Roxcel's claims in the arbitration were partially based on Interpap's orders made pursuant to Contract 1, which did not have an arbitration clause. Namely, it found that the content of the ICAC award signifies that the dispute arose as to the delivery of goods under addendums to Contract 2, providing for the resolution of this dispute in arbitration.

Also, the court noted that Contract 1 lost its force on 10 April 2018 following the reorganization of Roxcel 1 into Roxcel, and due to this and since Roxcel was not involved into the conclusion and performance of Contract 1, the parties concluded new Contract 2.

Formation of the arbitral tribunal

As to the tribunal's formation, the Supreme Court noted that pursuant to Contract 2, the respective procedure is set forth in the ICAC Rules. According to Article 31 of the applicable version of the ICAC Rules, the parties can agree on the procedure for appointing the tribunal, absent which the sole arbitrator shall be appointed by the Chairman of the Ukrainian Chamber of Commerce ("UCC") pursuant to Article 11(3) of the Law on ICA. Having said that, the court found that, on

17 April 2019, Roxcel sent a list of proposed arbitrators to Interpap to choose the sole arbitrator. Within 2 months after this, Interpap did not reply, and therefore, on 10 June, Roxcel informed the ICAC that the parties did not agree on the sole arbitrator. On 19 June 2019, the Chairman of the UCC appointed the sole arbitrator.

Consequently, the court rejected Interpap`s argument that the company could not participate in the appointment procedure, and concluded that the latter was in full compliance with the ICAC Rules.

Public Policy

Finally, the court disagreed with Interpap`s reliance on the violation of public policy by the ICAC award. The Supreme Court noted that the definition of public policy is not provided in Article 459 of the CPCU. To define this concept, the court referred to the 2002 International Law Association (ILA) Report on public policy. The court summarized the following points from the report:

- The finality of arbitral awards shall be respected but for exceptional circumstances, and one of those is the violation of international public policy.
- Public policy of any state includes: (1) fundamental principles on justice and morality state wish to protect even if it was not involved in the dispute; (2) rules aimed at protecting the main political, social, and economic interests of the state known as lois de police or “rules of public order”; (3) an obligation of the state to comply with its obligations with other states and international organizations.

The court continued to define the scope of public policy as follows: “The legal concept of public policy exists to protect the state from foreign arbitral awards that violate the existing principles of fairness and justice. These provisions are aimed at setting forth a barrier for decisions issued contrary to the pivotal procedural and substantive principles, forming the public and state order. They are also designed to preclude the possibility of confirmation and enforcement of arbitral awards connected to corruption or unacceptable ignorance of arbitrators.”

Consequently, in the court`s option, Interpap did not prove that the ICAC award on the recovery of sums in foreign currency contradicts the mentioned provisions of public policy.

In this regard, the court cited paragraph 16 of Resolution No. 12 of the Plenum of the Supreme Court of Ukraine dated 24 December 1999, which directly confirms that the arbitral awards shall be enforced in the currency specified therein when the underlying monetary obligations are expressed and shall be performed in foreign currency. Also, the court added that the parties themselves agreed in Contract 2 to express the payments in foreign currency, which is compatible with Article 192 of the Civil Code of Ukraine, allowing to use foreign currency in Ukraine in cases and order set forth by law.

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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-20-44-004>