

**BAUER v. Company Raiz,
Supreme Court of Ukraine, 6-39ц14 Case Date 23 April 2014**

Yaroslav Petrov, Anna Tkachova

Headnote

The Supreme Court of Ukraine overturned lower instances courts decision denying recognition and enforcement of a foreign arbitral award. The Court clarified that international treaties prevail over domestic law. It emphasized that the party resisting recognition and enforcement of an arbitral award has the burden of proof on the existence of grounds for the refusal. Conclusions of the Supreme Court of Ukraine shall be binding upon lower instances courts while considering similar cases.

Summary

Facts of the case

The Arbitral Tribunal of the International Arbitration Center of the Austrian Federal Economic Chamber (hereinafter – VIAC) upon consideration of dispute between Röhren- und Pumpenwerk BAUER (hereinafter – Bauer) and PJSC "Company Raiz" (hereinafter – Raiz) on 1 September 2011 rendered an award in favor of Bauer (hereinafter – Award).

Raiz has partially paid the awarded sum to Bauer. In order to obtain the full payment, Bauer filed with the Holosiivskiy District Court of Kyiv City (court of first instance) the request for recognition and enforcement of the Award in Ukraine.

The first instance court dismissed the application. Bauer appealed the decision of the Holosiivskiy District Court of Kyiv City and the Kyiv City Court of Appeal upheld the first instance court's decision. Further Bauer's cassation appeal to the Higher Specialized Court of Ukraine in Civil and Criminal Matters was also ineffective.

Eventually Bauer applied to the Supreme Court of Ukraine seeking the revision of the decision under the procedure of supervision over consistency of law application.

The Supreme Court of Ukraine allowed the application, reversed the decision of the court of cassation appeal and returned the case to the Higher Specialized Court of Ukraine in Civil and Criminal Matters for a new consideration.

Question in Dispute

The court of cassation appeal stated that Bauer failed to furnish the court with evidence of due notification of the debtor regarding the date and time of arbitral hearing. This conclusion served as a ground for the court's refusal to recognize and enforce the Award.

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Jurisdiction

- Ukraine

Court

Supreme Court of Ukraine

Arbitrators/Judges

- A.G. Yarema, Chair
- L.I. Grigorieva, Judge
- V.I. Humeniuk, Judge
- L.I. Okhrimchuk, Judge
- M.V. Patryuk, Judge
- J.M. Romaniuk, Judge
- Y.L. Senin, Judge
- V.M. Simonenko, Judge

Case date

- 23 April 2014

Case number

- 6-39ц14

Parties

- Appellant, Röhren- und Pumpenwerk BAUER (Germany)
- Defendant, PJSC "Company Raiz" (Ukraine)

Key words

- Recognition and enforcement
- New York Convention
- Burden of proof
- Attendance at arbitral hearing

Applicable legislation

- Ukrainian

Source

- and, Röhren- und Pumpenwerk BAUER v. PJSC "Company Raiz", Supreme Court of Ukraine, 6-39ц14 Case Date 23 April 2014, A contribution by the ITA Board of Reporters, Kluwer Law International

Facts surrounding notification of Raiz:

The Award and Protocol of Hearing provide that Raiz received the copy of statement of claim, by 3 June 2011. Raiz also submitted statement of defense to the Tribunal.

On 3 June 2011, the representative of Raiz informed the Tribunal that he ceased to represent Raiz in the dispute. On 6 June 2011 the Tribunal reminded Raiz its obligation to attend the hearing scheduled for 14 June 2011. This notification was communicated to Raiz on 7 June 2011.

Judgment of the Court

In case there is an international treaty governing the matter, the provisions of the international treaty shall prevail over provisions of domestic laws and regulations.

The Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention) in Article V provides for that 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 a proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case.

Provision of Article 396 of the Civil Procedural Code of Ukraine states that the recognition and enforcement may be refused if the party against whom the award is invoked was not able to participate in the tribunal's proceedings since it was not given proper notice on case consideration.

The Supreme Court of Ukraine concluded that the provision of Article 396 of the Civil Procedural Code of Ukraine should not have been applied by the court of cassation appeal in light of the New York Convention.

Furthermore the Supreme Court of Ukraine opined that New York Convention provides that burden of proof of absence of proper notification shall be borne by Raiz as a party against whom the Award was rendered.

Original source:
Kluwer Arbitration
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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-1429001>