

Category of case No. 757/5777/15-ц: not defined.

Date of entry into force: 17.05.2016

RESOLUTION

IN THE NAME OF UKRAINE

On May 17, 2016 the panel of judges of the civil division of the Kyiv City Court of Appeal consisting of:

presiding judge	H. V. Kryzhanivska,
judges	V. A. Shebuieva, M. I. Onishchuk,
with secretary	H. H. Zaliska,

having considered in an open court hearing in Kyiv a civil case on the application of JKX Oil&Gas PLC, Poltava Gas B.V., Joint Venture Poltava Petroleum Company to the state of Ukraine, represented by the Ministry of Justice of Ukraine, on granting permission for the enforcement of the foreign arbitral award dated 14.01.2015 issued by the Emergency Arbitrator PERSON_1 under the Arbitration Rules of the Stockholm Chamber of Commerce, under the appeal of the state of Ukraine represented by the Ministry of Justice of Ukraine against the resolution of the Pechersk District Court of Kyiv City dated June 8, 2015,

HAS FOUND AS FOLLOWS:

In February 2015 JKX Oil & Gas PLC and Poltava Gas B.V. applied to the court with an application for granting permission for the enforcement of the award dated 14 January 2015 issued by the Emergency Arbitrator PERSON_1 under the Arbitration Rules of the Stockholm Chamber of Commerce, place of arbitration – Stockholm, Sweden, within Arbitration Proceedings No. EA/2015/002 upon the claim of JKX OIL & GAS PLC, POLTAVA GAS B.V. and Joint Venture Poltava Petroleum Company against the state of Ukraine represented by the Ministry of Justice of Ukraine.

The claims were based on the fact that there was an investment dispute between the Applicants and the Debtor with regard to the Debtor's failure to fulfil its international legal obligations under the Energy Charter Treaty (hereinafter referred to as the "ECT") ratified by the Verkhovna Rada of Ukraine by the Law of Ukraine "On Ratification of the Energy Charter Treaty and Energy Charter Protocol on Energy Efficiency and Related Environmental Aspects" No. 89/98-BP dated 06.02.1998.

On 14 January 2015, the Emergency Arbitrator rendered the given award, with regard to compliance with which the Applicants sent letters to the Ministry of Justice of Ukraine on 20.01.2015 and 06.02.2015, but the Ministry failed to respond.

Case No.757/5777/15-ц of appellate proceedings No.22-ц/796/7514/2016. The presiding judge in the first-instance court: L. I. Tsokol. The judge rapporteur in the court of appeal: H. V. Kryzhanivska. Due to the foregoing, JKX Oil & Gas PLC and Poltava Gas B.V. requested to grant permission for enforcement of the Award dated January 14, 2015 issued by the Emergency Arbitrator PERSON_1 under the Arbitration Rules of the Stockholm Chamber of Commerce,

Sweden, within Arbitration Proceedings No. EA/2015/002 upon the claim of JXX OIL & GAS PLC, POLTAVA GAS B.V. and JV Poltava Petroleum Company against the state of Ukraine represented by the Ministry of Justice of Ukraine, in accordance with which:

1. The state of Ukraine is ordered to refrain from imposing royalties for subsoil use for extracting natural gas by POLTAVA PETROLEUM COMPANY JV at the rate exceeding 28 % provided for by the Tax Code of Ukraine before July 31, 2014.
2. This Order shall be applicable from the date of its issuance until the determination of security measures by the main composition of the arbitral tribunal in this case.
3. The rest of the Applicants' applications shall be dismissed.
4. The order on making a security deposit is not issued.
5. The decision on the expenses for emergency proceedings is not made.

Also, the court was asked to oblige the state of Ukraine to apply the rates effective before July 31, 2014, namely 28 %, when estimating the tax liabilities of JV POLTAVA PETROLEUM COMPANY as to royalties for subsoil use for extracting natural gas.

The application was granted by the resolution of the Pechersk District Court of Kyiv City of June 8, 2015.

Disagreeing with the given court resolution, the representative of the Ministry of Justice of Ukraine filed an appeal on the grounds that the first instance court had violated the procedural law and applied the provisions of substantive law incorrectly.

The representative of the Ministry of Justice of Ukraine stated that on 13.11.2014 the Applicants sent a notice of the dispute to the Administration of the President of Ukraine, which was not an authority responsible for protection of the rights and interests of Ukraine during the resolution of disputes in foreign jurisdictional bodies with the participation of a foreign entity and Ukraine, therefore, the court's reference to the given date as the one from which the three-month term was to be calculated was groundless.

He stated that the court had not referred to any provisions under which the Emergency Arbitrator was to be guided only by the Arbitration Agreement in resolving the dispute, without having regard to the Energy Charter Treaty in the course of considering the case.

He emphasised that the enforcement of the award dated 14.01.2015 would result in the change of the amounts of compulsory payments provided for by the Laws of Ukraine, which contradicts Article 21 of the Energy Charter Treaty. He considered that the court had failed to assess the possibility of negative consequences for the state of Ukraine in the form of significant reduction of budget revenues under the Tax Code of Ukraine.

Moreover, the representative of the Ministry of Justice of Ukraine stated that the court's conclusion that the enforcement of the award of the Emergency Arbitrator does not establish rules other than those applicable within the territory of Ukraine contradicts the facts of the case and facilitates the violation of the public order of the state of Ukraine.

Given the above, the representative of the Ministry of Justice of Ukraine asked to revoke the resolution of the Pechersk District Court of Kyiv City of June 8, 2015 and to issue a new resolution dismissing the application.

The resolution of the Pechersk District Court of Kyiv City of June 8, 2015 was revoked by the resolution of the Kyiv City Court of Appeal dated 17.09.2015, and a new resolution dismissing the application was issued.

The cassation appeal of M. V. Heletii acting on behalf of JKC Oil & Gas PLC, Poltava Gas B.V. and JV Poltava Petroleum Company was satisfied in part by the resolution of the Specialized Higher Court of Ukraine for Civil and Criminal Cases dated 24.02.2016. The resolution of the Kyiv City Court of Appeal dated 17.09.2015 was revoked and the case was remanded for new consideration to the court of appeal.

In the court proceedings, the representative of the Ministry of Justice of Ukraine asked to grant the appeal on the grounds specified therein.

The Applicants' representatives objected to the arguments stated in the appeal and asked to dismiss the appeal as groundless.

Having reviewed the case within the framework of the arguments made in the statement of appeal, having verified the legitimacy and validity of the resolution made in this part, and having heard the explanations of the parties to the court proceedings, the panel of judges comes to the conclusion that the appeal is to be dismissed on the following grounds.

As has been established by the court and follows from the case file, there is an investment dispute between the Applicants and the Debtor with regard to the Debtor's failure to fulfil its international legal obligations under the Energy Charter Treaty ratified by the Verkhovna Rada of Ukraine by the Law of Ukraine "On Ratification of the Energy Charter Treaty and Energy Charter Protocol on Energy Efficiency and Related Environmental Aspects" No. 89/98-BP dated 06.02.1998.

On November 13, 2014, the Applicants sent to the Debtor a letter regarding amicable resolution of the mentioned investment dispute in accordance with Article 26 of the ECT and according to the Agreements on Promotion and Mutual Protection of Investments made by and between (I) Ukraine and the Kingdom of the Netherlands as well as (II) Ukraine and the United Kingdom of Great Britain and Northern Ireland.

On January 07, 2015, the Applicants applied to the Arbitration Institution of the Stockholm Chamber of Commerce with an application for the appointment of an Emergency Arbitrator and the application of interim measures until the time of formation of the arbitral tribunal pursuant to Article 32(4) and Annex II of the 2010 Arbitration Rules of the Chamber.

On January 08, 2015, the Board of the Chamber of Commerce informed the parties of taking the following decisions: (I) the appointment of Professor PERSON_1 as the Emergency Arbitrator and (II) the determination of Stockholm as the place of conducting the proceedings. These decisions were taken in accordance with Articles 4 and 5 of Annex II to the Arbitration Rules respectively.

On January 09, 2015, the Applicants informed the Emergency Arbitrator and Ukraine that they found it necessary to hold a conference call on January 13, 2015 at 03.00 p.m. (GMT).

On January 12, 2015, the Chamber informed the parties of the granting of the request of the Emergency Arbitrator on prolongation of the time limit for the consideration of the application and rendering of the decision until January 14, 2015 in accordance with Annex II, Article 8(1) of the Arbitration Rules.

On January 12, 2015, the Emergency Arbitrator sent a notice to the parties and the Chamber to inform of the following: he was informed by the Chamber that Ukraine had received a notice on consideration of the application; he had received no response from Ukraine within the specified

period until January 12, 2015, 05.00 p.m. (GMT), and he confirmed that the conference call scheduled for January 13, 2015 at 03.00 p.m. would take place.

On January 14, 2015, within the time agreed by the Emergency Arbitrator by 10.00 a.m. (GMT), the Applicants submitted their final comments. On January 14, 2015 at 05.25 p.m. (GMT), the Emergency Arbitrator rendered the award under the Arbitration Rules of the Stockholm Chamber of Commerce, Sweden, within Arbitration Proceedings No. EA/2015/002 upon the claim of JKX OIL & GAS PLC, POLTAVA GAS B.V. and JV Poltava Petroleum Company against the state of Ukraine represented by the Ministry of Justice of Ukraine, according to which the state of Ukraine was ordered to refrain from imposing royalties for subsoil use for extracting natural gas by JV POLTAVA PETROLEUM COMPANY at the rate exceeding 28 % provided for by the Tax Code of Ukraine before July 31, 2014, and this order shall be applicable from the date of its issuance until the determination of security measures by the main composition of the arbitral tribunal in this case. The rest of the Applicants' applications were dismissed. The order on making a security deposit was not issued. The decision on expenses for emergency proceedings was not made.

Ukraine did not participate in the arbitration proceedings. On January 16, 2015 PERSON_2, the Deputy Minister of Justice of Ukraine for European Integration, confirmed in writing that the Ministry of Justice of Ukraine had received a notification on the appointment of Professor PERSON_1 as the Emergency Arbitrator, and on the submission of the relevant application.

JKX Oil & Gas PLC and Poltava Gas B.V., JV Poltava Petroleum Company applied for granting permission for enforcement of the abovementioned award.

When satisfying the application, the court of first instance relied on the fact that the award was rendered in compliance with the Rules applicable at the time of application for the appointment of the Emergency Arbitrator, and the given award was designated for prevention of violation of the Applicants' interests and inevitable consequences with regard thereto, established no rules other than those applicable within the territory of Ukraine and related to the Applicants only.

The panel of judges agrees with the abovementioned conclusion of the court due to the following.

According to Part 1 of Article 390 of the Civil Procedure Code of Ukraine (hereinafter the "CPC of Ukraine"), decisions of a foreign court (court of a foreign state, other competent authorities of foreign states, the powers whereof include proceedings in civil and commercial cases; foreign or international arbitral tribunals) shall be recognised and enforced in Ukraine if their recognition and enforcement is provided for by an international treaty ratified by the Verkhovna Rada of Ukraine, or under the principle of reciprocity.

The provisions of Article 396 of the CPC of Ukraine include grounds for dismissal of the application for granting permission for enforcement of a foreign court decision, in particular, if the foreign court decision has not entered into legal force under the laws of the state where it has been made; if the party with regard to which the foreign court decision had been made has been deprived of the ability to participate in the court proceedings as it has not been duly informed thereof; if the decision was made in a case the consideration of which falls into the exclusive authority of a court or another legally designated body of Ukraine; if the decision on the dispute between the same parties, on the same subject matter and the same grounds has been made by a Ukrainian court and has entered into force, or if before the proceedings were initiated in the foreign court there was a dispute between the same parties, on the same subject matter and on the same grounds being considered by a Ukrainian court; if the time limit for presenting the foreign court decision for execution in Ukraine established by the international treaties ratified by the Verkhovna Rada of Ukraine and by this Law has expired; if the subject matter of the dispute is not subject to court proceedings in accordance with the laws of Ukraine; if enforcement of the decision would threaten the interests of Ukraine; in other cases provided for by the laws of Ukraine.

In accordance with the explanations set out in the Clause 12 the Plenum Resolution of the Supreme Court of Ukraine dated 24.12.1999 No. 12 “On the Practice of Court Consideration of Applications for Recognition and Enforcement of Foreign Court Decisions and Arbitral Awards and Cancellation of Decisions issued by way of International Commercial Arbitration in Ukraine”, courts of general jurisdiction may not assess the decision made on the merits of the dispute and make any amendments thereto when considering an application filed in accordance with the provisions of Articles 390-395 of the CPC of Ukraine.

Therefore, the court of first instance correctly established the absence of grounds for dismissal of the application, and the award of the Emergency Arbitrator was rendered in compliance with the Rules and requirements for notification of the Debtor of the appointment of the Arbitrator.

In addition, having assessed the evidence in the case file as well as taking into account the foregoing legal provisions, the panel of judges comes to the conclusion that the award of the Emergency Arbitrator does not change the scope of rights and obligations of the party in the given dispute and has no impact on changes to the taxation system in Ukraine.

The arguments stated in the appeal as to the fact that the Applicants had sent a notice of the dispute to the Administration of the President of Ukraine which was not an authority responsible for the actual protection of rights and interests of Ukraine during the resolution of disputes in foreign jurisdictional bodies with participation of a foreign entity and Ukraine shall be dismissed by the panel of judges as the Emergency Arbitrator sent a notice via e-mail in accordance with the Arbitration Rules, the requirements whereof have been fully complied with by the Applicants.

Moreover, in accordance with the case file, on January 16, 2015 PERSON_2, the Deputy Minister of Ukraine for European Integration, confirmed in writing that the Ministry of Justice of Ukraine had received a notice of the appointment of Professor PERSON_1 as the Emergency Arbitrator and on submitting the relevant application.

The reference by the representative of the Ministry of Justice of Ukraine to the fact that the court had failed to examine the possibility of negative consequences for the state of Ukraine in the form of significant reduction of budget revenues under the Tax Code of Ukraine is groundless on account of the following.

In accordance with the explanations furnished in Clause 12 of the Plenum Resolution of the Supreme Court of Ukraine dated 24.12.1999 No.12 “On the Practice of Court Consideration of Applications for Recognition and Enforcement of Foreign Court Decisions and Arbitral Awards and Cancellation of Decisions issued by way of International Commercial Arbitration in Ukraine”, in this and other cases when the absence of damage to public policy preconditions the possibility for recognition and enforcement of the decision, public policy shall mean the state’s law and order, the defining principles and foundations that form the basis of the existing legal order (related to its independence, integrity, self-reliance and inviolability, fundamental constitutional rights, freedoms, guarantees etc.).

The representative of the Ministry of Justice of Ukraine has not proved that the arbitral award dated 14.01.2015 violates the public policy of Ukraine, and, if it is recognised in Ukraine, the taxation system in Ukraine will be altered. In addition, it shall be noted that the award does not concern the general rates and the procedure for charging royalties in Ukraine.

Taking into consideration the foregoing, the panel of judges believes that there are no grounds for dismissing the application in accordance with Article 396 of the CPC of Ukraine.

The arguments in the appeal do not dispose of these conclusions, have no impact on the correctness of the resolution adopted and, taking account of Article 312 of the CPC of Ukraine, cannot be recognized as a ground for cancellation thereof, so they shall be dismissed.

Being guided by Articles 218, 303, 307, 312, 313, 315, 317 of the CPC of Ukraine, the panel of judges

HAS HELD:

To dismiss the appeal of the state of Ukraine represented by the Ministry of Justice of Ukraine.

To uphold the resolution of the Pechersk District Court of Kyiv City dated June 8, 2015.

The resolution shall enter into legal force following its announcement, but may be appealed against to the Specialised Higher Court of Ukraine for Civil and Criminal Cases within twenty (20) days.

Presiding judge:

Judges: