

Case category No. 6-30579ск15: not defined.



R E S O L U T I O N
IN THE NAME OF UKRAINE

February 24, 2016

City of Kyiv

Panel of judges of the civil division of the Specialized Higher Court of Ukraine for Civil and Criminal Cases consisting of:

Presiding Judge O. O. Diomina, judges: M. V. Demianosov, A. V. Maliarenko, I. K. Parinova, O. V. Stupak, having considered the case in the court proceedings 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 a permission for enforcement of a foreign arbitral award of January 14, 2015, issued by the Emergency Arbitrator Rudolf Dolzer under the Arbitration Rules of the Stockholm Chamber of Commerce, under the cassation appeal against the resolution of the Kyiv City Court of Appeal dated September 17, 2015 by Mykola Volodymyrovych Heletii, acting on behalf of JKX OIL & GAS PLC, Poltava Gas B.V. and Poltava Petroleum Company JV,

HAS FOUND AS FOLLOWS:

JKX OIL & GAS PLC, Poltava Gas B.V., Poltava Petroleum Company JV have applied to the court with an application for granting a permission for the enforcement of a foreign arbitral award of January 14, 2015 rendered by the Emergency Arbitrator Rudolf Dolzer under the Arbitration Rules of the Stockholm Chamber of Commerce.

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

By the resolution of the Kyiv City Court of Appeal of September 17, 2015, the resolution of the Pechersk District Court of Kyiv City of June 8, 2015 was revoked and a new resolution was adopted which dismissed the application.

In his cassation appeal, M. V. Heletii, who acts on behalf of JKX OIL & GAS PLC, Poltava Gas B.V. and Poltava Petroleum Company JV, requests the court of cassation to cancel the resolution of the court of appeal and leave the resolution of the court of first instance in force, substantiating his arguments by reference to the violation of provisions of procedural law and incorrect application of substantive law.

Having reviewed the case file and verified the arguments of the cassation appeal, the panel of judges of the civil division of the Specialized Higher Court of Ukraine for Civil and Criminal Cases believes that the cassation appeal should be partially granted due to the following.

According to Part 2 of [Art. 324 of the Civil Procedure Code of Ukraine](#), an incorrect application of substantive law or violations of procedural law by the court constitute grounds for a cassation appeal.

According to [Art. 213 of the Civil Procedure Code of Ukraine](#), a court decision must be lawful and justified. A lawful decision is a decision whereby the court resolved the case in compliance with the law, having met all the

requirements of the civil court proceedings. A justified decision is a decision adopted on the basis of full and comprehensive verification of facts on which the parties rely as the basis for their claims and objections confirmed by evidence examined in the court hearing.

According to [Art. 214 of the Civil Procedure Code of Ukraine](#), when issuing a decision the court resolves the following issues: 1) whether the facts that were the basis for claims and objections took place, and what evidence confirms them; 2) whether there is other factual data (missed limitation period, etc.), which is relevant to the resolution of the case, and evidence confirming it; 3) which legal relationships of the parties arise from the established facts; 4) what legal provision should be applied to these legal relationships.

When granting the motion of JKC OIL & GAS PLC, Poltava Gas B.V., Poltava Petroleum Company JV, the court of first instance has taken into account that there were no grounds for refusal to grant permission for the enforcement of a foreign court judgment foreseen by [Art. 396 of the Civil Procedure Code of Ukraine](#).

When revoking the resolution of the court of first instance and denying the motion, the court of appeal has proceeded on the basis that the arbitral award was rendered in breach of the requirements of [the Tax Code of Ukraine](#) and in fact would change the royalty rates for subsoil use for extracting natural gas from 55 percent to 28 percent. Given the above, the court of appeal concluded that authorizing courts to change the rate of taxes and obligatory payments in contradiction of [the Tax Code of Ukraine](#) would be in breach of the fundamental and defining principles of taxation established in the country, which violated the public policy of Ukraine, and therefore, the motion could not be granted on the grounds provided for in para 7 of Part 2 of [Art. 396 of the Civil Procedure Code of Ukraine](#).

However, these findings of the court of appeal do not comply with substantive and procedural law on the following grounds.

The courts have found that the case concerns the investment dispute between the Applicants and the Debtor that arose from the failure by the Debtor to fulfil its international law obligations under the Energy Charter Treaty (hereinafter – “the ECT”), ratified by [the Verkhovna Rada of Ukraine by the Law of Ukraine “On Ratification of the Energy Charter Treaty and the Energy Charter Protocol on Energy Efficiency and Related Environmental Aspects.”](#)

As set out in the Decision, the Applicants are investors within the meaning of Art. 1 of the ECT. According to Art. 26 (3) of the ECT, Ukraine gave its consent to the submission of disputes with investors to the Arbitration Institute of the Stockholm Chamber of Commerce.

On November 13, 2014, the Applicants sent a letter to the Debtor to settle the mentioned investment dispute amicably in accordance with Art. 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, and (II) Ukraine and the United Kingdom of Great Britain and Northern Ireland.

On January 7, 2015, the Applicants applied to the Arbitration Institute of the Stockholm Chamber of Commerce (hereinafter – “the Chamber”) with an application for the appointment of an Emergency Arbitrator and taking interim measures until the time of formation of the arbitral tribunal pursuant to Art. 32 (4) and Annex II of the Arbitration Rules of the Chamber, 2010 (hereinafter – “the Arbitration Rules”).

On January 7, 2015, the Board of the Stockholm Chamber of Commerce addressed Rudolph Dolzer, a citizen of Germany, with a question whether he would agree to act as the Emergency Arbitrator.

On January 7, 2015, the Chamber informed the Debtor of the Applicants’ Application by sending a message by email and by courier.

On January 8, 2015, the Board of the Chamber of Commerce informed the parties of taking the following

decisions: (i) appointment of Professor Rudolf Dolzer as the Emergency Arbitrator, and (ii) 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 8, 2015, Rudolf Dolzer gave his consent to the Chamber as to his appointment as the Emergency Arbitrator (hereinafter – “the Emergency Arbitrator”), whereof the Chamber informed the parties. The same day, the Chamber also passed the Applicants’ Application to the Emergency Arbitrator in accordance with Annex II, Art. 6 of the Arbitration Rules.

On January 9, 2015, Professor Rudolf Dolzer addressed the parties in writing with the purpose of establishing the procedural timetable:

January 12, 2015 at 17:00 (GMT) – the deadline for submitting a response by Ukraine;

January 13, 2015 at 15:00 (GMT) – a conference call on the parties’ request;

January 14, 2015, 10:00 (GMT) – the deadline for final comments of the parties, if any;

January 14, 2015, COB – the deadline for the issuing an award by the Emergency Arbitrator.

On January 9, 2015, the Applicants informed the Emergency Arbitrator and Ukraine that they found it necessary to hold a conference call on January 13, 2015 at 15:00 (GMT).

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

On January 12, 2015, the Emergency Arbitrator sent a notice to the parties and the Chamber on the following: he was informed by the Chamber that Ukraine had received a notice on the application consideration; he did not receive any response from Ukraine within the specified period until January 12, 2015, 17:00 (GMT); he confirmed that the conference call scheduled for January 13, 2015 at 15:00 (GMT) should take place. On January 13, 2015, the conference call was held, as had been previously agreed.

On January 14, 2015, the Applicants submitted their final comments at the time agreed with the Emergency Arbitrator by 10:00 (GMT). On January 14, 2015 at 17:25 (GMT), the Emergency Arbitrator rendered the Award that is the subject matter of this application. Ukraine did not take any part in the arbitration proceedings.

On January 16, 2015, Mr Anton Yanchuk, Deputy Minister of Justice of Ukraine on European Integration, confirmed in writing that the Ministry of Justice received a notification on the appointment of Professor Rudolf Dolzer as the Emergency Arbitrator, and on submitting the relevant application.

On January 19, 2015, the Applicants addressed the Emergency Arbitrator with a motion to correct several typos in the Award. The Emergency Arbitrator sent a request to Ukraine to provide a statement of defence to the Applicants’ motion for correction of typos by January 21, 2015. Ukraine has never provided any comments.

On January 21, 2015, the Emergency Arbitrator rendered the corrected Award.

It has been established that on January 14, 2015, the Emergency Arbitrator Rudolf Dolzer under the Arbitration Rules of the Stockholm Chamber of Commerce rendered the award in arbitration case No. EA/2015/002 under the claim of JKK OIL & GAS PLC, Poltava Gas B.V. and Poltava Petroleum Company JV against the State of Ukraine, according to which the Debtor was ordered to refrain from imposing royalties for subsoil use for extracting natural gas by Poltava Petroleum Company JV at a rate higher than 28 percent provided for by [the Tax Code of Ukraine](#) before July 31, 2014.

Recognition and enforcement of a foreign court decision is the expansion of the legal force of such a decision

upon the territory of Ukraine and the application of enforcement measures in the manner prescribed by [the Civil Procedure Code of Ukraine](#).

According to Part. 1 of [Art. 390 of the Civil Procedure Code of Ukraine](#), a foreign court decision (international arbitration award) shall be recognized and enforced in Ukraine if its recognition and enforcement is provided for by an international treaty ratified by the Verkhovna Rada of Ukraine, or under the principle of reciprocity.

When deciding whether to grant permission for enforcement of a decision, the court cannot assess whether the issued decision is lawful.

According to Part 6 of [Art. 395 of the Civil Procedure Code of Ukraine](#), having considered the submitted documents and reviewed the explanations of the parties, the court issues a resolution on granting permission to enforce the foreign court decision or to deny the application.

According to Part 1 of [Art. 36 of the Law of Ukraine “On International Commercial Arbitration”](#), recognition or enforcement of the arbitral award, regardless of the country in which it was made, may be refused only: 1) at the request of the party against which it is rendered, if this party submits to the relevant competent court, which it applied to for recognition or enforcement, evidence that one of the parties to the arbitration agreement referred to in Article 7 was to some extent incapable; or the agreement was not valid under the law to which the parties subjected it, and in case of lack of such an indication – under the law of the state where the award was made; or the party against which the award is rendered was not properly notified of the arbitrator’s appointment or the arbitration, or due to any other sound reasons the party could not provide its submissions; or the award was made regarding a dispute, not provided for by the arbitration agreement, or which does not fall under its terms, or contains resolutions on issues beyond the scope of the arbitration agreement; however, if the resolutions on issues within the arbitration agreement can be separated from those beyond the scope of such agreement, the part of the arbitral award which contains the resolutions on issues within the arbitration agreement can be recognized and enforced; or the composition of the arbitral tribunal or the arbitration procedure did not comply with the agreement between the parties or, failing such agreement, did not comply with the law of the country where the arbitration took place; or the award has not yet become binding on the parties, or has been revoked, or its enforcement has been suspended by a court of the state in which, or under the law of which it was made; or 2) if the court finds that the subject matter of the dispute cannot be a subject matter of arbitration under the law of Ukraine; or recognition or enforcement of the arbitral award is contrary to the public policy of Ukraine.

According to the [Plenum Ruling of the Supreme Court of Ukraine No. 12 “On the practice of court consideration of motions for recognition and enforcement of foreign court decisions and arbitral awards and cancellation of decisions issued by way of international commercial arbitration in Ukraine”](#) dated December 24, 1999, it has been explained to the courts that public policy shall mean the state’s law and order, the defining principles and elements that form the basis of the existing system (relating to its independence, integrity, self-reliance and inviolability, fundamental constitutional rights, freedoms, guarantees, etc.).

Refusing to grant the motion on the grounds provided for by para 7 of Part 2 of [Art. 396 of the Civil Procedure Code of Ukraine](#), the court of appeal did not duly take into account the above rules of substantive and procedural law, did not establish whether the arbitral award of January 14, 2015 rendered by the Emergency Arbitrator Rudolf Dolzer would change the taxation system of Ukraine, replace the provisions of [the Tax Code of Ukraine](#) or amend the taxation system of Ukraine.

In addition, the court of appeal did not pay attention to the fact that the arbitral award of January 14, 2015 did not change the scope of the rights and obligations of the parties to the dispute, but only temporarily obliged the State of Ukraine to refrain from imposing royalties on gas extraction at the rate exceeding 28 percent. This provision is valid from its issuance date until the determination of security measures by the main composition of the arbitral tribunal to be constituted in the mentioned case.

The court of appeal has not taken the abovementioned into consideration, has not established the facts affecting the proper resolution of the dispute, has not considered the aforementioned rules of substantive and procedural law; the court decision does not meet the requirements of [Art. 213 of the Civil Procedure Code of Ukraine](#) in terms of legality and validity; the above violations have led to the improper resolution of the dispute, therefore, pursuant to [Art. 338 of the Civil Procedure Code of Ukraine](#), it is a ground for revocation of the decision made by the court with remittance of the case to the court of appeal for reconsideration.

Being guided by Articles [336, 338 of the Civil Procedure Code of Ukraine](#), the panel of judges of the civil division of the Specialized Higher Court of Ukraine for Civil and Criminal Cases

HAS HELD:

To partially satisfy the cassation appeal by Mykola Volodymyrovych Heletii, acting on behalf of JKX OIL & GAS PLC, Poltava Gas B.V. and Poltava Petroleum Company JV.

To cancel the resolution of the Kyiv City Court of Appeal of September 17, 2015.

To remit the case to the court of appeal for a new consideration.

The resolution is not subject to appeal.

Presiding Judge

O. O. Diomina

Judges:

M. V. Demianosov

A. V. Maliarenko

I. K. Parinova

O. V. Stupak