



School of International Arbitration

IACL
International Arbitration Case Law

School of International Arbitration, Queen Mary, University of London

International Arbitration Case Law

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Award Name and Date:

Resolution of the Specialised Higher Court of Ukraine for Civil and Criminal Cases of 24 February 2016 on the application of JKX OIL & GAS PLC, Poltava Gas B.V., Joint Venture Poltava Petroleum Company to the State of Ukraine on granting a permission for enforcement of a foreign arbitral award of 14 January 2015 issued by the Emergency Arbitrator Rudolf Dolzer under the Arbitral Rules of the Stockholm Chamber of Commerce.

Case Report by:

Diana Moise**, Editor, Ignacio Torterola***

Summary:

In the Resolution rendered on 24 February 2016, the *Specialised Higher Court of Ukraine* ('the Court') partially granted the cassation appeal, remitting the case to the court of appeal for a new consideration. In doing so, the Court considered that the resolution refusing the enforcement did not properly consider the facts of the dispute, did not justify the public policy ground, and thus did not comply with the validity and legality requirements.

Main issues: Enforcement of Award – Cassation Appeal; Refusal, Enforcement, Grounds; Public Policy; Legality, Validity.

Committee: O. O. Diomina (Presiding Judge), M. V. Demianosov (Judge), A. V. Maliarenko (Judge), I. K. Parinova (Judge), O. V. Stupak (Judge)

Claimants' Counsel: Mykola Volodymyrovych Heletii

Respondent's Counsel: Ministry of Justice of Ukraine

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Digest:

1. Relevant Facts and Procedural Dates

On 7 January 2015, JKX OIL & GAS PLC, Poltava Gas B.V., Joint Venture Poltava Petroleum Company applied to the Arbitration Institute of the Stockholm Chamber of Commerce for an Emergency Arbitration against Ukraine under the ECT.

Following the Award issued on 14 January, the applicant applied for enforcement of the foreign arbitral award. The first instance court, Pechersk District Court of Kyiv City granted the application on 8 June 2015. However, the Kyiv City Court of Appeal revoked the resolution on 17 September 2015, and dismissed the application.

2. The Court's Analysis

As a preliminary matter, the Court referred to the Civil Procedure Code of Ukraine to establish the grounds for a cassation appeal and for refusal to grant permission for enforcement of a foreign court judgment, while complying with the criteria of lawfulness.

First, the Court analysed the Court of Appeal's reasoning when revoking the first instance court resolution. The Court of Appeal considered that the Award changed the royalty rates set by the Tax Code of Ukraine from 55% to 28%, thus breaching fundamental taxation principles, which violates the public policy of Ukraine.

The Court disagreed stating that the underlying dispute consists in a failure of Ukraine to comply with its obligation under the Energy Charter Treaty. Next, it proceeded to analyse the meaning of the public policy ground for refusal of enforcement.

Then, the Court considered that the Court of Appeal did not establish whether the arbitral award would change the taxation system of Ukraine and did not pay attention to the fact that the award did not change the scope of the underlying agreement, but it only obliged Ukraine to temporarily refrain from imposing royalties at a rate exceeding 28%.

Furthermore, the Court considered that the facts of the dispute have not been properly considered, the rules relating to enforcement of international arbitration awards have not been considered and that the Court of Appeal decision does not meet the legality and validity requirements.

3. The Court's Decision

The Specialized Higher Court of Ukraine for Civil and Criminal Cases held that the cassation appeal lodged by Mykola Volodymyrovych Heletii, acting on behalf of JKX OIL must be partially satisfied, that the decision rendered by the Kyiv City Court of Appeals of September 17, 2015 must be reversed and that the case be remanded to court of appeals for a new judgment.