

Kluwer Arbitration Blog

JKX vs. Ukraine: An Update on the Enforcement of Emergency Arbitrator's Award

Yaroslav Petrov (Asters) · Friday, August 12th, 2016

The [Ukrainian “saga” on the enforcement of the SCC emergency arbitrator’s award](#) continues – the case is pending the second round of cassation review.

The arbitration proceedings were initiated by the Dutch and English investors OIL&GAS PLC and POLTAVA GAS B.V. (“JKX” or “Claimants”) on January 7, 2015. The case concerns the alleged Ukraine’s failure to comply with its obligations under the Energy Charter Treaty, the UK-Ukraine BIT (1993), and the Netherlands-Ukraine BIT (1994). On December 28, 2014, Ukraine enacted the Law on Tax Reform Amendments to the Tax Code of Ukraine and Other Legislative Acts. This law provides for the increase of royalty payments on gas production from previously applicable 28 per cent to 55 per cent. According to JKX, these provisions conflict with Ukraine’s obligations to ensure fair and equitable treatment of investments. JKX claims to suffer losses resulting from these violations and demands compensation in the amount of 270 million USD.

The Claimants requested the appointment of emergency arbitrator in accordance with the SCC Arbitration Rules. On January 8, 2015, the parties were informed of the appointment of an emergency arbitrator and that the seat of arbitration will be Stockholm.

On January 12, 2015, the parties were informed that the request of the emergency arbitrator to extend the period for the consideration of the application had been accepted by the SCC. Ukraine submitted a written confirmation that the Ministry of Justice had received the notice on the appointment of the emergency arbitrator. However, in the end, Ukraine did not participate in these proceedings.

On January 14, 2015, the emergency arbitrator rendered an award ordering Ukraine to refrain from collecting gas production royalties from JKX at the rate exceeding the previously applicable 28 per cent fee.

JKX filed a motion for recognition and enforcement of the emergency arbitrator’s award in Ukraine. The government of Ukraine argued that the decision of the emergency arbitrator was not enforceable, based on the following:

1. Ukraine was not properly notified about the emergency arbitration proceedings,
2. the Claimant failed to comply with the three-month cooling-off period,
3. referral of the case to an emergency arbitrator had fallen outside the party’s agreement to

arbitrate, and

4. enforcement of the emergency arbitrator's award would violate public policy of Ukraine.

The Pechersky District Court of Kyiv City granted the motion for enforcement on June 8, 2015, rejecting all objections raised by Ukraine. The court disregarded the argument on cooling-off period. The court found that notification through emails should qualify as a proper notification, and held that the award was rendered within the scope of the arbitration agreement, as the appointment of emergency arbitrator was provided for by the applicable arbitration rules. The court further stated that the award did not violate Ukrainian public policy, as it did not change the existing hydrocarbon production royalty system of Ukraine.

The Ukrainian Ministry of Justice filed an appeal to the Kyiv City Court of Appeal relying on the same arguments as before the first instance court. However, the Court of Appeal took into consideration only the argument regarding the violation of public policy. The court stated that the relations concerning taxes and fees are regulated by the Tax Code of Ukraine. In the court's view, since the tax rate is a matter governed exclusively by the Tax Code, the enforcement of the award would violate the fundamental principles of taxation, and therefore would violate the public policy of Ukraine. The court also highlighted the losses that the Ukrainian budget would incur as a result of changing the established tax rates. The Court of Appeal reversed the decision of the Pechersky District Court of Kyiv City and refused the recognition and enforcement of emergency arbitrator's award on September 17, 2015.

JKX filed a cassation appeal before the High Specialized Court of Ukraine for Civil and Criminal Cases. The High Specialized Court remitted the case to the Kyiv City Court of Appeal on February 24, 2016. It held that the Court of Appeal failed to consider that the award does not change the scope of rights and obligations of the parties, but only temporarily obliges Ukraine to refrain from imposing the royalty on gas production exceeding 28 per cent.

On May 17, 2016, the Kyiv City Court of Appeal upheld the decision of the Pechersky District Court of Kyiv City by granting the motion for enforcement, and dismissing the appeal of the Ministry of Justice ("Ministry").

The Kyiv City Court of Appeal held that the award does not change the scope of the rights and obligations of the parties to the dispute, but that it rather temporarily obliges Ukraine to refrain from imposing gas production royalty exceeding 28 per cent. Furthermore, the court established that the award neither changes the taxation system of Ukraine, nor replaces the provisions of the Tax Code of Ukraine. The decision of the Kyiv City Court of Appeal provides for an adequate reasoning with respect to public policy and the proper notification of a party. In that regard, the court construed the notion of public policy to encompass "*the state's legal order, the defining principles and basic elements that form the fundamentals of the state's system (relating to the state's independence, integrity, self-sustainability and inviolability, fundamental constitutional rights, freedoms, guarantees etc.)*". The court further elaborated on the Ministry's failure to demonstrate an actual infringement of public policy of Ukraine, i.e. the change in the taxation system in Ukraine, which would take place when the award would be enforced. The court added that the award did not affect the general rates and conditions of rental payments.

The Ministry of Justice filed a cassation appeal against the decision of the Kyiv City Court of Appeal of May 17, 2016. On June 29, 2016, the High Specialized Court of Ukraine for Civil and Criminal Cases decided to commence another cycle of judicial review. Pursuant to the Civil

Procedure Code of Ukraine decision and resolution of the cassation court come into effect upon announcement. Furthermore, upon the announcement of the relevant cassation court decision, the reversed decisions and resolutions of the first instance court or the appeal instance court lose their force. It is important to note that in some exceptional circumstances cases may be reviewed by the Supreme Court of Ukraine.

The case is pending another cassation review and the future decision of the High Specialized Court is expected to be a probe of the enforceability of emergency arbitrators' awards in Ukraine, and at this moment it is difficult to predict when the Ukrainian "saga" on the enforcement of emergency arbitrator's award will end.


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