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Telenor Mobile Communications AS v. Storm LLC

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One of the benefits of international commercial arbitration is the ability to resolve disputes between the parties in a single, neutral forum that gives neither party a "home court advantage." After a dispute arises, however, litigious parties sometimes engage in tactical maneuvering aimed at circumventing the parties' agreement to arbitrate.

A recent US case gives a clear example of this sort of conduct, as well as potential avenues for resisting it. *Telenor Mobile Communications AS v. Storm LLC*, Case No. 07 Civ. 6929 (GEL), (S.D.N.Y. Nov. 19, 2008) is a contempt proceeding in US courts, arising from enforcement of an arbitration award in arbitral proceedings seated in New York under UNCITRAL rules brought by a Norwegian company (Telenor) against its Ukrainian joint venture partner (Storm) over a Ukrainian mobile telecoms joint venture (Kyivstar) which went awry. All the facts set forth below come from the US court record.

After a dispute arose between Telenor and Storm in connection with Kyivstar, Telenor brought arbitral proceedings against Storm in 2006 pursuant to the arbitration agreement in their Shareholders Agreement. What followed was a series of proceedings in multiple jurisdictions that have not yet concluded. After Telenor initiated arbitration, Storm's parent company began litigation against Storm in Ukrainian court seeking to invalidate the Shareholders Agreement. Storm did not retain counsel or oppose the Ukrainian action and Telenor was not named as a defendant. On appeal, the Ukrainian appellate court held that the arbitration clause in the Shareholders Agreement was invalid.

Storm obtained a ruling from the Ukrainian court that, should the arbitrators render a decision in connection with the dispute, its Award would constitute a violation of the Ukrainian court decision. When the Tribunal declined to postpone the arbitral proceedings, Storm filed suit in New York state court to enjoin the arbitration, which suit was removed to federal court. Relief was denied, and Storm obtained a Ukrainian court injunction prohibiting the parties from participating in the arbitration. Telenor then brought suit in U.S. federal court to compel arbitration and obtain an anti-suit injunction against Storm and its parents to enjoin further litigation in the Ukraine.

The Tribunal rendered a Final Award in August 2007, finding Storm in breach of the Shareholders Agreement. Storm personnel then commenced another action in Ukrainian court, while Telenor brought suit in US federal court to confirm the Award. The US court confirmed the Award and ordered Storm to comply with the directives of the Award. Storm appealed and obtained a temporary stay of the order, later vacated. After the Award was confirmed, another action was begun in Ukrainian court, resulting in an ex parte order attaching all of Storm's assets, which prevented Storm from undertaking the actions ordered in the Award. In January 2008 Telenor moved in the US court proceedings for contempt sanctions against Storm and its parent companies for failure to comply with the court's order.

The court found that Storm failed to comply with the Award. The court made a contempt finding and pierced the corporate veil of Storm's affiliates based on, among other things, complete domination and control of Storm by its parent entities and lack of independent operations, the fact that Storm's sole director was an employee of the ultimate parent company, that only some of Storm's corporate formalities were respected, the intermingling of financial obligations, including the use of Storm's assets to secure loans to its corporate parents and the fact that Storm's parent company paid its legal fees. The court further found that the domination of Storm and affiliates by their parent company facilitated ongoing collusive litigation that prevented enforcement of the Award in Ukraine. The court found that because all of Storm's operations and assets were in Ukraine, the collusive litigation resulted in making Storm "judgment proof," which was a wrong sufficient to allow piercing the corporate veil.

The court imposed substantial fees on Storm as well as its affiliated entities. After further appeals and another contempt order in March of this year, the defendants were found to be in substantial compliance with the court's order in April 2009. The parties are currently litigating the issue of attorney's fees (not ordinarily available in US litigations).

The resolution of this dispute has been far from efficient – over three years of litigation in multiple fora. At the same time, the developments in Ukrainian courts underscore the reasons parties frequently choose arbitration to resolve international commercial disputes, while the contempt and other sanctions adopted by US courts reflect sensible and necessary steps to ensure that agreements to arbitrate are respected. The decision also underscores the value of selecting an arbitral seat which will effectively enforce the agreement to arbitrate when one party takes steps to circumvent its provisions.

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