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Arbitrability of Corporate and Public Procurement Disputes in Ukraine

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Introduction

The question of arbitrability of corporate and public procurement disputes is a topic constantly evolving due to new cutting-edge precedents. Ukraine does not constitute an exception, and continues to develop its jurisprudence. Despite being far from corporate in its nature, the recent dispute between reputable Austrian company (*VAMED Engineering GmbH & CO KG*) and Ukrainian state enterprise (*Ukrmedpostach*) both operating in healthcare industry and pro-arbitration approach of Ukrainian courts sheds some light to arbitrability of not only public procurement disputes, but corporate disputes as well.

Background: Ukrainian Law Arbitrability Provisions

Ukrainian *International Commercial Arbitration Law* does not provide for any specific restrictions to arbitrability of disputes. However, Article 12 of the Code of Commercial Procedure leaves place for controversy over arbitrability of disputes arising out of public procurement contracts and corporate relations between a company and its participants (founders, shareholders, members), including a former participant, and between the participants (founders, shareholders, members) related to the establishment, activity, management and termination of the company.

The issue is that in 2011 Ukraine had carried out domestic arbitration reform and certain changes into legislation were made. In particular, since 2011 it is more or less clear that certain public procurement disputes and disputes arising out of corporate relations may not be subject to consideration by domestic arbitration courts (*treteyski sudy*) under Article 12 of the Code of Commercial Procedure. However, in practice, it remains vague and uncertain whether the same concerns international commercial arbitration, since earlier reference to arbitration in the law provision was excluded.

Ukrainian courts on different levels continuously face this issue. However, in case *VAMED Engineering GmbH & CO KG vs Ukrmedpostach*, which details are given below, Ukrainian justice system has not shown – at least not in a straightforward way – that restrictions to arbitrability of disputes imposed by Article 12 do not relate to international commercial arbitration.

Dispute Details

In 2009, well before the legislation reform, *VAMED Engineering GmbH & CO KG*, a private

entity registered in Austria, was contracted to supply medical equipment, i.e 85 incubators for premature babies to Ukrainian state enterprise Ukrmedpostach. After the shipment of the medical equipment to Ukraine, the dispute arose between the companies in relation to product quality and liability.

On 4 April 2013, the International Commercial Arbitration Court of Ukraine at the Ukrainian Chamber of Commerce and Industry (*ICAC at the UCCI*), which jurisdiction was primarily chosen by the companies in the arbitration clause of the supply contract, decided the dispute in favour of Ukrmedpostach, who initially brought the dispute to arbitration. The arbitral tribunal ordered VAMED Engineering GmbH & CO KG to replace the already supplied medical equipment in question by medical equipment that would conform to the requirements of the laws of Ukraine, and that could be intended for use in Ukraine. In case of failure to replace the defective medical equipment, VAMED Engineering GmbH & CO KG was ordered to reconstitute the payment for the medical equipment in question in the amount of approx. EUR 5 million.

VAMED Engineering GmbH & CO KG contested arbitral award and launched setting aside proceedings.

State Court Findings

As it follows from the court decisions, VAMED Engineering GmbH & CO KG alleged, *inter alia*, the invalidity of the arbitration clause of the supply agreement due to non-arbitrability of disputes arising under public procurement contracts and contended to apply Article 12 of the Code of Commercial Procedure as existed in September 2009, setting restrictions to authority of arbitrators to rule on certain disputes within domestic arbitration (arbitration).

The first instance court, the appellate body and the Higher Specialized Court for Civil and Criminal Cases displayed agreement with the argument of VAMED Engineering GmbH & CO KG.

The Higher Specialized Court for Civil and Criminal Cases in its decision dated 30 July 2014 clearly and in a blunt way stated:

“Pursuant to Part 4 of Article 1 of International Commercial Arbitration Law, the present Law does not affect any other law of Ukraine by virtue of which certain disputes may not be submitted to arbitration or may be submitted to arbitration only according to provisions other than those of the present Law.

In turn, in Part 4 of Article 12 of the Code of Commercial Procedure of Ukraine (as amended on 5 March 2009) established **prohibition on referral of certain categories of disputes for resolution to domestic arbitration [treteyskyi] court**, including disputes arising of entry into, amendment, termination or performance of commercial contracts related to satisfaction of the state’s needs.”

Therefore, even if not in an upfront and evident way, the Higher Specialized Court for Civil and Criminal Cases established pro-arbitration approach to arbitrability of disputes within international commercial arbitration, in particular highly debated corporate and public procurement disputes.

Remarkably, the case went further to the Supreme Court of Ukraine that proves conformity of

application of law by courts. However, in its decision of 11 March 2015 the Supreme Court of Ukraine didn't find any unconformities of application of law and rejected the appeal.

Thus, the decision of the Higher Specialized Court for Civil and Criminal Cases may be considered as a milestone for developments in arbitration practice in Ukraine.

Additional Remarks

Notwithstanding the duration of the arbitral and setting aside proceedings for about three years, the dispute is not over. Deputy Public Prosecutor of Kyi, v in the interest of Ukrmedpostach, filed a claim against VAMED Engineering GmbH & CO KG with Ukrainian commercial court for recovery of approx. EUR 5 million. The details of the new claim are not publicly available, however, the story is to be continued...


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