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Enforcement of the JKX Oil & Gas Emergency Arbitrator Award: A Sign of Pro-arbitration Stance in Ukraine?

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On June 8, 2015, Pecherskyi District Court of Kyiv ("Pecherskyi Court") upheld an application lodged by JKX Oil & Gas plc, Poltava Gas B.V. and JV Poltava Petroleum Company ("JKX Companies") to enforce an emergency arbitrator award rendered under the Arbitration Rules of the Arbitration Institute of the Stockholm Chamber of Commerce ("SCC Rules") against Ukraine. Apart from being the first enforcement of an award issued by an emergency arbitrator against a state in investment treaty arbitration, the Pecherskyi Court decision in case No 757/5777/15-? also marks the first ever attempt to enforce an emergency arbitrator award in Ukraine.

On February 16, 2015, it was announced that JKX Companies had commenced arbitration proceedings against Ukraine under the Energy Charter Treaty ("ECT") and the Ukraine's bilateral investment treaties ("BITs") with the Netherlands and the United Kingdom. On January 14, 2015, emergency arbitrator ("EA") Rudolf Dolzer issued an emergency decision ordering Ukraine to refrain from imposing royalties on Poltava Petroleum's gas production in excess of the rate of 28% (as the Tax Code of Ukraine provided for until July 31, 2014), as opposed to the currently applicable rate of 55%. Enforcement of this EA decision in Ukraine raised a number of important legal questions.

To begin with, Article 8 of the Appendix II to the SCC Rules governs "emergency decisions on interim measures" ("EA decisions") rather than EA "awards". The form and nature of the EA decision raises certain concerns: it is binding on the parties, but not on the arbitral tribunal, and it ceases to be binding if the arbitral tribunal so decides or renders a final award (Article 9(1), (4) and (5) of the Appendix II to the SCC Rules). This appears to contradict the nature of arbitral awards, which have res judicata effect and are final and binding. Despite "considerable discussion in Sweden and internationally about the nature of decisions relating to provisional measures and whether such decisions may be made in the form of enforceable and binding awards", the question "whether such decisions are subject to enforcement under national arbitration laws and international conventions" remains for the courts to decide (Patricia Shaughnessy, Pre-arbitral Urgent Relief: The New SCC Emergency Arbitrator Rules, 27(4) Journal of International Arbitration, 337, 345 (2010)).

The Pecherskyi Court, without going into greater detail, ruled that enforcement of the EA decision in Ukraine is governed by the Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("New York Convention"), the ECT, and the SCC Rules. In other words, the Pecherskyi Court treated the EA decision no different than any other foreign arbitral award.

Ukraine argued that it had not consented to the EA procedure because, at the moment when Ukraine ratified the ECT in 1998, the SCC Rules did not provide for the possibility to apply for appointment of an EA. The Pecherskyi Court disagreed with the state representative's contention that the EA decision "was issued not in accordance with the arbitration agreement, because the aforementioned decision was issued in accordance with the SCC Rules in force at the time the emergency arbitrator application was filed." Such conclusion is in line with the principles behind the SCC Rules: the parties who agree to the SCC Rules are deemed to have agreed as well to the EA provisions, unless they specifically exclude them ("opt out" approach), and the parties "are deemed to consent to the application of the rules in existence at the time they commence arbitral proceedings" (Shaughnessy, 350-351).

The state also alleged that the EA was not competent to hear the JKX Companies' application because their notice of dispute was not valid and investors had not complied with the three-months cooling-off period required under Article 26(2) of the ECT. On the one hand, several arbitral tribunals concluded that not-compliance with the cooling-off period does not deprive the arbitral tribunal from jurisdiction. For instance:

• "this requirement of a six-month waiting period … is not a jurisdictional provision, i.e. a limit set to the authority of the Arbitral Tribunal to decide on the merits of the dispute, but a procedural rule that must be satisfied by the Claimant" (Ronald S. Lauder v. Czech Republic, Final Award, September 3, 2001, para. 187);

• "[t]ribunals have generally tended to treat consultation periods as directory and procedural rather than as mandatory and jurisdictional in nature. Compliance with such a requirement is, accordingly, not seen as amounting to a condition precedent for the vesting of jurisdiction." (SGS Société Générale de Surveillance S.A. v. Islamic Republic of Pakistan, Decision of the Tribunal on Objections to Jurisdiction, August 6, 2003, para. 184);

• "international tribunals tend to rely on the non-absolute character of notice requirements to conclude that waiting period requirements do not constitute jurisdictional provisions but merely procedural rules that must be satisfied by the Claimant" and "the notice requirement does not constitute a prerequisite to jurisdiction" (Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Pakistan, Decision on Jurisdiction, November 14, 2005, paras 99 and 100); and

• "this six-month period is procedural and directory in nature, rather than jurisdictional and mandatory. … Non-compliance with the six month period, therefore, does not preclude this Arbitral Tribunal from proceeding." (Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania, Award, July 24, 2008, para. 343).

However, in some other cases arbitral tribunals reached the opposite conclusion:

• "Such requirement is in the view of the Tribunal very much a jurisdictional one. A failure to comply with that requirement would result in a determination of lack of jurisdiction." (Enron Corp. and Ponderosa Assets, LP v. Argentine Republic, Decision on Jurisdiction, January 14, 2004, para. 88); and

• in Murphy Exploration and Production Company International v. Republic of Ecuador (Award on Jurisdiction, December 15, 2010, para. 141) the arbitral tribunal did not share the Claimant's view that "the requirements prescribed in certain rules (the 'jurisdictional') are of a category such that its non-compliance leads to the lack of competence of the tribunal hearing the dispute" whereas "the 'procedural requirements,' can be breached without having any consequence whatsoever." It noted that "non-compliance with a purely procedural requirement, such as, for example, the time to appeal a judgment, can have serious consequences for the defaulting party." (para. 142).

The Pecherskyi Court ruled that the investors sent a letter to the Administration of the President of

Ukraine on November 13, 2014, indicating their willingness to settle the dispute amicably, and in any event "the three-months period was fixed not by the arbitration agreement, but by the provisions of the ECT, thus making Article V(1)(b) of the [New York] Convention inapplicable in the present case." It appears that the judge concluded that the cooling-off period is a procedural requirement rather than a precondition to the state's consent to arbitration.

Lastly, the representative of the state said that enforcement of the EA decision "would violate public policy of Ukraine and threaten its interests, because types and rates of taxes could only be determined by the [Tax] Code, and alteration of the applicable tax rate would alter the rate of the subsoil user fee for the production of natural gas and would result in a material deterioration of the state's economy."

Similar public policy defense was also addressed in the Ukrainian Supreme Court's decision of November 24, 2010, on the enforcement of two SCC arbitral awards requiring NJSC Naftogaz of Ukraine to transfer 12.1 billion cubic meters of natural gas to RosUkrEnergo AG. The Supreme Court was not persuaded that enforcement of these awards would run contrary to the "legal order of the state, fundamental principles and framework that constitute the basis of its order (are related to its independence, integrity, autonomy and immunity, fundamental constitutional rights, freedoms, guarantees, etc.)." In particular, Naftogaz "did not furnish any proof to support its allegations that transfer to RosUkrEnergo of the prescribed amount of natural gas exceeds 50% of the overall annual natural gas production in Ukraine and 50% of the annual natural gas consumption," i.e. that enforcement of the awards would threaten energy security of Ukraine. The Supreme Court also noted that in the course of arbitration proceedings Naftogaz acknowledged that it did not have a proper legal basis to acquire natural gas in dispute.

The Pecherskyi Court stated that the EA decision in this case "aims to prevent damage to the applicant's interests and to prevent irreparable harm, does not set any other rules than those in force in Ukraine, and only concerns the applicants," and thus dismissed the state's public policy argument.

Overall, the Pecherskyi Court judgment seems to indicate a pro-arbitration approach towards EA proceedings and awards in Ukraine. Enforcement of the EA decision in JKX Oil & Gas case is currently stayed pending the appeal to the Kyiv City Court of Appeals.

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