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DECISION
ON BEHALF OF UKRAINE

24 November, 2010 **Kyiv**

The Board of justices of the Judicial chamber in civil cases of the Supreme Court of Ukraine in composition of:

Chairman:	**Humeniuk V.I.,**
Judges:	**Baliuk M.I.,**
	Danchuk V.G.,
	Levchenko E.F.,
	Luspenyk D.D.

considering case *in camera* under the request for recognition and enforcement of foreign judgment that should be enforced, made by RosUkrEnergo AG, interested party-obligor – National joint-stock company "Naftogaz of Ukraine", under the cassational appeal of the president of National joint-stock company ("NJSC") "Naftogaz of Ukraine" against the decision of Shevchenkivskyi district court in Kyiv of August 13, 2010 and the decision of Kyiv Court of Appeal of September 17, 2010,

e s t a b l i s h e d :

In July 2010 RosUkrEnergo AG applied to the court with the request to recognize and to issue order allowing enforcement of foreign award, in particular – Separate Award rendered under the Arbitration Rules of the Arbitration Institute of the Stockholm Chamber of Commerce on March 30, 2010, and also the Second Separate Award of the same Institute of June 8, 2010.

The request is justified by the arguments that RosUkrEnergo AG and NJSC "Naftogaz of Ukraine" entered into chain of contracts, which provided that all disputes between the parties should be resolved under the Arbitration Rules of the Arbitration Institute of the Stockholm Chamber of Commerce, substantive law – Swedish law; and under the article 7 of the Law of Ukraine "On International Commercial Arbitration" it is an arbitration agreement. Since such dispute arose, RosUkrEnergo submitted the request for arbitration to this Arbitration Institute in April 2008, following which both parties appointed co-arbitrators, took part in the proceedings, performing their procedural rights and duties. After the above-mentioned awards were rendered, came into force and became obligatory, NJSC "Naftogaz of Ukraine" dismissed to fulfill these awards voluntary, under which it is obliged to pay fine, vindictive damages and to transfer natural gas to RosUkrEnergo AG.

According to the article IV of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New-York, 1958), to the article 35 of the Law of Ukraine "On International Commercial Arbitration" and to the section VIII of the Civil Procedural Code of Ukraine, RosUkrEnergo requested the court to recognize and to enforce the above-mentioned awards, to issue enforcement writ.

Decision of the Shevchenkivskyi district court in Kyiv of August 13, 2010, that was upheld by the Kyiv Court of Appeal on September 17, 2010, sustained above-mentioned request made by RosUkrEnergo. Separate Award rendered under the Arbitration Institute on March 30, 2010 as well as the Second Separate Award of June 8, 2010 was recognized and the enforcement order was issued.

The president of NJSC "Naftogaz of Ukraine" in the cassational appeal requests to annul the decisions, referring to incorrect application of substantial and procedural law by the courts, and to render a new decision about the dismissing of recognition and enforcement of Separate Award rendered under the Arbitration Institute of the Stockholm Chamber of Commerce on March 30, 2010, and also the Second Separate Award of the same Institute of June 8, 2010.

The cassational appeal shall be dismissed because of the following reasons.

Considering the provision of paragraph 2, section XIII "Transitional provisions" of the Law of Ukraine "On Judicial System and Status of Judges" of July 7, 2010 No.2453-VI, the case shall be decided under the provisions of the Civil Procedural Code of Ukraine of March 18, 2004, in the edition valid before the Law of July 7, 2010 has entered into force.

According to the art. 324 of the Civil Procedural Code of Ukraine grounds of cassational appeal shall be: incorrect application of the substantive law by the court or violation of procedural law.

The Supreme Court of Ukraine established that the subject of the current dispute is not the scrutiny of correctness (validity) of the arbitral awards, but the scrutiny of presence of procedural reasons for issuing or dismissing of issuing enforcement order.

Sustaining the request to recognize and to issue order allowing enforcement of foreign awards of international court (international arbitration) made by RosUkrEnergo AG, the district court, decision of which was upheld by the court of appeal, acted on the premises that awards are final and binding for the parties; all the contracts under which the arbitral tribunal rendered awards contain the arbitration agreement; the obligor did not challenged the awards on the ground of procedural matters; the arguments that enforcement of the awards contradicts public policy of Ukraine are groundless; consequently, reasons to refuse the request of recognition and enforcement of the awards, provided by the law, are absent.

The court determined the amount of compensation in the national currency.

Conclusions of the judges mentioned before conform to the circumstances of the case, and also comply with the procedural law, that was correctly applied by the court.

Recognition and enforcement of the foreign award – means the extension of legal effect of such award throughout the territory of Ukraine and application of enforcement measures according to the rules, provided by the Civil Procedural Code of Ukraine.

Pursuant to the art. 390 (1) of the Civil Procedural Code of Ukraine the foreign awards (of the international arbitration) are recognizable and enforceable in Ukraine, if such recognition and enforcement provided by international agreement, agreed to be binding by the Verkhovna Rada of Ukraine (the highest and sole legislative body of Ukraine), or by the principle of reciprocity.

The Court established, that RosUkrEnergo AG and NJSC "Naftogaz of Ukraine" entered into chain of contracts, which provided that all disputes between the parties should be resolved under the Arbitration Rules of the Arbitration Institute of the Stockholm Chamber of Commerce, substantive law – Swedish law; and under the article 7 of the Law of Ukraine "On International Commercial Arbitration" it is an arbitration agreement. Since such dispute had arisen, RosUkrEnergo submitted the request for arbitration to this Arbitration Institute in April 2008, and as consequence the arbitral tribunal rendered Separate Award on March 30, 2010, and the Second Separate Award on June 8, 2010.

Notwithstanding that parties of contracts agreed to perform arbitral award voluntary, such award has not been performed by the NJSC "Naftogaz of Ukraine", and consequently RosUkrEnergo requested the court to recognize and issue order allowing enforcement of above-mentioned awards, and to issue enforcement writ.

The request made by RosUkrEnergo has been considered under provisions, provided by art. 395 of the Civil Procedural Code of Ukraine. The Board of justices of the Supreme Court of Ukraine states that violations of procedural law during the consideration of the request were absent. In particular, court scrutinized the request on matter of form and content and also on presence of grounds for arbitral award's recognition and enforcement. Moreover, the court correctly did not scrutinize the validity of arbitral award on the merits, since this would violate the sovereignty of the state, court of which rendered the award.

Such actions conform to current legislation, as well as to international one, and also to clarifications, adopted by the Plenum of the Supreme Court of Ukraine in paragraphs 7, 12 of the Resolution of December 24, 1999, No. 12

"About the practice of considering by the courts the requests for recognition and enforcement of awards of foreign courts and arbitrations and about annulment of awards, rendered during the international arbitration proceedings on the territory of Ukraine".

In particular, the New-York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of July 10, 1958 (hereinafter – New-York Convention), to which Ukraine is a party since July 10, 1961, defines the fundamental principle that Party to the Convention is obliged to recognize foreign arbitral awards as binding and to enforce them.

The New-York Convention, presuming the binding character of arbitral award, provides with exhaustive enumeration of circumstances that could not be interpreted broadly, under which competent court may refuse the recognition and enforcement of arbitral award.

These circumstances enumerated in the art. V of the New-York Convention, and also in art. 396 (2) of the Civil Procedural Code of Ukraine. Since the binding character and enforceability of arbitral award is presumed by international and national legislation, burden of proof lies with the party that objects the recognition and enforcement of arbitral award (paragraph 1, art. V of the New-York Convention).

Hereby, NJSC "Naftogaz of Ukraine" was obliged to prove the presence of grounds for dismissing the request for recognition and issuing order allowing enforcement of arbitral award. Courts acted on premises that obligor failed to present such proofs.

It was established, that NJSC "Naftogaz of Ukraine" did not challenge the jurisdiction, scope of arbitration and arbitrability of the dispute, but actually referred to two reasons, objecting the request for issuing order allowing the enforcement of arbitral award: arbitral award did not come into force according to the law of the country where it was rendered; recognition and enforcement of this award contradicts public policy of the state.

The Board of justices of the Supreme Court of Ukraine considers that the courts decided correctly about groundless of proofs presented by NJSC "Naftogaz of Ukraine".

Thus, pursuant to the articles 38-40 of the Arbitration Rules of 2007, there is a possibility to decide a separate issue or part of the dispute in a separate award, and such award shall be final and binding on the parties when rendered and shall be carried out without delay. The Law of Ukraine "On International Commercial Arbitration" as well as the Civil Procedural Code of Ukraine does not contain additional procedures, which should take place in order to approve the final character of the arbitral award.

Moreover, Separate Award of March 30, 2010 provides that parties agreed that final award concerning all claims connected with transactions, concluded in 2009, should be rendered no later than July 30, 2010, and concerning all other claims – this is a separate award, that would not be enforced until final award is rendered (vol. 1, para. 179-180). The Second Separate Award of June 8, 2010 provides that parties agreed that the First Separate Award should be enforced after the date of rendering the Second Separate Award and NJSC "Naftogaz of Ukraine" agreed on this (vol. 2, para. 38, 42, 44). Also the Arbitration Institute of the Stockholm Chamber of Commerce notified the local court on July 16, 2010 that arbitral awards rendered on March 30, 2010 and on June 8, 2010 are final and binding, and also that according to the Swedish legislation awards may be challenged only on the procedural matters during 3 months (vol. 2, para. 154).

During the hearings in the Supreme Court of Ukraine the councils of NJSC "Naftogaz of Ukraine" explained, that arbitral awards were not challenged because legal reasons were absent according to the Swedish legislation, however the enforcement of these awards would contradict the public policy of Ukraine.

Thus, the Supreme Court of Ukraine concludes that arbitral awards have come into force.

Referring of NJSC "Naftogaz of Ukraine" that recognition and enforcement of arbitral award contradicts public policy of the state is groundless and unproved, however as it was mentioned before, it is its procedural obligation to prove such circumstances. In particular, the obligor failed to present any evidences to prove that transference to RosUkrEnergo quantity of natural gas, defined in arbitral award, would exceed 50% of the total volume of

natural gas extracted in the country annually from country's own resources, and 50% of annual necessity of natural gas by the population. Besides, during the arbitral proceedings councils of NJSC "Naftogaz of Ukraine" admitted completely that legal reasons to acquire disputed quantity of natural gas were absent, thus they admitted the illegality of seizure of natural gas from RosUkrEnergo, that was its property, and all this was mentioned in the Second Separate Award (vol. 2, para. 34-36). During the hearing in the Supreme Court of Ukraine councils of NJSC "Naftogaz of Ukraine" confirmed that such explanations were presented during the arbitration proceedings.

Besides the actual admission by NJSC "Naftogaz of Ukraine" of the claims during the arbitral proceedings, the following should be mentioned concerning the proofs of noncompliance with public policy of the state of issuing order allowing enforcement of award. As a rule, public policy means the law and order of the country, fundamental principles and considerations, which constitute the basis of state's existent regime (concerning state's independence, integrity, sovereignty and inviolability, general constitutional rights, freedoms, guarantees, etc.). Also according to the art. 12 of the Law of Ukraine "On international private law", the provision of foreign state does not apply if such application will cause the consequences manifestly incompatible with fundamental law and order (public policy) of Ukraine. The obligor failed to present such proofs; moreover, parties of the dispute are legal persons, established according to the current legislation, and independent participants of commercial activities, endued with full legal personality, and the dispute between them arose under the contractual relations.

According to the para. 1 art. 342 (1) of the Civil Procedural Code of Ukraine cassational court shall dismiss the cassational appeal and uphold the decision, if court has made decision in accordance with law.

Pursuant to the articles 336, 342 of the Civil Procedural Code of Ukraine, the Board of justices of the Judicial chamber in civil cases of the Supreme Court of Ukraine

d e c i d e d :

To dismiss cassational appeal of the president of National joint-stock company “Naftogaz of Ukraine”.

To uphold the decision of Shevchenkivskyi district court in Kyiv of August 13, 2010 and decision of Kyiv Court of Appeal of September 17, 2010.

This decision cannot be subject of appeal.

Chairman:	**V.I. Humenjuk**
Judges:	**M.I. Baliuk**
	V.G. Danchuk
	E.F. Levchenko
	D.D. Luspenyk