

Company "Dow Agrosciences Switzerland S.A." (Switzerland) v. Public Joint Stock Company "Company "Rise" (Ukraine), Supreme Court of Ukraine, 759/6378/15-u, 20 March 2019
A contribution by the ITA Board of Reporters

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Headnote

The court appointed expert cured the pathological arbitration clause.

Summary

Facts of the case

Swiss Chambers' Arbitration Institution: On 16 February 2015, the Swiss Chambers' Arbitration Institution ("SCAI") rendered an arbitral award in case between Dow Agrosciences and Rise No.600373-2014 ("Award"). The arbitration agreement did not mention a name of the arbitral tribunal, except the fact that all disputes should be resolved in Zurich, Switzerland.

The Award required Rise to pay the debt, interest based on the concluded contracts, and arbitral expenses to Dow Agrosciences.

Ukrainian courts: On 16 August 2016, Dow Agrosciences applied to the Sviatoshynskiy District Court of Kyiv City (court of first instance) seeking recognition and enforcement of the Award. By its resolution, the Sviatoshynskiy District Court of Kyiv City satisfied the petition and rendered the writ for collection of debt, interest, arbitral expenses, and court fee.

On 6 October 2016, the Appeal Court of Kyiv City partially satisfied the appeal petition of Rise. The Appeal Court granted the recognition and enforcement of the Award, however, the granted amount was reviewed.

On 20 March 2019, the Supreme Court of Ukraine reviewed the previous resolutions and agreed with the resolution of the Appeal Court.

Question in Dispute

The courts reviewed the discrepancies between the texts of Russian and English versions of the contracts concluded between the parties.

The Ukrainian court of first instance in its resolution stipulated the amounts to be collected from the Debtor other than defined in the Award.

Arguments of the Parties

The arguments of Rise were focused on the following:

- the Award could not be recognized and enforced on the territory of Ukraine because the claim was reviewed by the institution not foreseen by the arbitration clause;
- the sole arbitrator reviewed the case however the number of arbitral tribunal was not foreseen by the arbitral clause;
- the Russian text of the arbitration clause differed from the English version.

Judgment of the Court

The Supreme Court of Ukraine i.e. cassation court confirmed the due process in the case review. In particular, the Appeal Court, for clarification on Russian and English versions of the arbitration

clause, invited an independent expert in international law. This expert confirmed that the arbitration clause is enforceable, and the Award was duly rendered.

The Supreme Court of Ukraine agreed with the Court of Appeal. The cassation court also confirmed that the Court of Appeal properly adjusted the collected amount aligning with the amount stipulated in the Award.

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The summary of the case file and full text of summarized court decision are available on: <https://www.kluwerarbitration.com/document/kli-ka-ons-19-26-001>