

Dogus Insaat ve Ticaret A.S. v. State Territorial Sectoral Association South Western Railways, Commercial Court of the City of Kiev, 761/22804/15-u, 27 April 2018
A contribution by the ITA Board of Reporters

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Headnote

Refusal to recognise arbitral award based on newly discovered facts about arbitration clause invalidity.

Summary

Facts of the case

On 17 September 2015, Shevchenkivsky District Court of Kyiv rendered a ruling ("ruling") whereby allowed for recognition and enforcement of final award of International Court of Arbitration at International Chamber of Commerce dated 06 September 2013 in case No. 17208/GZ/MHM ("Award"). The ruling provided that Dogus Insaat ve Ticaret A.S. may collect debt from South Western Railways (Ukraine). South Western Railways (Ukraine) unsuccessfully attempted to challenge the Award in all court instances, including before the Supreme Court that upheld decisions of courts of lower instances granting debt collection.

However, on 29 July 2017, South Western Railways filed with Shevchenkivsky District Court of Kyiv a petition requesting to review the ruling based on the newly discovered facts and to refuse Award enforcement.

The above newly discovered facts was that the arbitration clause 13.2. of Construction Agreement No. Д3/ДН-6-0415 dated 14 November 2004 between Dogus and South Western Railways ("arbitration clause"), was rendered invalid by a decision of Kyiv Commercial Court dated 17 May 2017 in a separate case No.910/2589/17.

Shevchenkivsky District Court of Kyiv satisfied the petition, and ruled in favour of South Western Railways by refusing to enforce the Award.

Question in Dispute

Invalidation of an arbitration clause by a court in a separate case served as a ground to refuse the Award recognition and enforcement. Regardless, the court's ruling refusing the recognition, did not even include any reference to applicable provisions of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958.

Arguments of the Parties

South Western Railways submitted that the arbitration clause used in their agreement with Dogus was rendered invalid and hence, the Award made on the basis of the arbitration clause may not be enforced, thus, the ruling of Shevchenkivsky District Court of Kyiv dated 17 September 2015 had to be revoked.

Judgment of the Court

Shevchenkivsky District Court of Kyiv, the first instance court, established that the invalidation of the arbitration clause by a court decision in a separate case between the same parties, sufficed to be deemed as the newly discovered facts. The court ruled that in view of invalidity of the arbitration clause, of which the court had had no knowledge at the time of its first ruling, Dogus

had no right to resolve a dispute before International Court of Arbitration at International Chamber of Commerce.

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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-18-28-011?jurisdiction=Ukraine&type=Court%20Decisions>