

State Prosecutor v. Alpha Projektholding GmbH, Commercial Court of the City of Kiev, Case No. 17/434, 6 August 2012

Yaroslav Petrov , Asters; Yuriy Radko , Asters

The Commercial Court of the City of Kyiv invalidated an agreement on joint investment activities based on the claim of the deputy State Prosecutor of the City of Kyiv, despite the fact that in the ICSID case Alpha Projektholding GmbH v. State of Ukraine that agreement was recognized as legitimate.

The initial case was brought before the International Centre for Settlement of Investment Disputes (the "ICSID") by Alpha Projektholding GmbH (the "Claimant") against the State of Ukraine under the Agreement for the Promotion and Reciprocal Protection of Investments between the Republic of Austria and Ukraine (the "UABIT") in 2007.

The Claimant claimed violations by the State of Ukraine of its obligations under the UABIT and certain provisions of the Ukrainian Law on Foreign Investments.

The dispute concerned the Claimant's investment into renovation of the Hotel Dnipro in Kyiv, which was carried out under several agreements including the Agreement on Joint Investment Activities (the "Agreement") executed between the Claimant, a Cyprus company "Pakova Investment LTD" and State Enterprise "Hotel Dnipro" (the "Hotel Dnipro").

In the arbitration proceedings, the Claimant argued that the State of Ukraine violated its investment obligations by ordering Hotel Dnipro to cease making payments and performing other contract obligations owed to the Claimant.

In its award of 20 October 2010 the ICSID arbitral tribunal found that (i) the Claimant had been deprived of all remaining value of the Agreement; (ii) generally, the Agreement is a legitimate joint activity agreement, however, (iii) some of the Agreement's provisions are invalid. The tribunal concluded that the State of Ukraine expropriated the Claimant's rights and interests under the Agreements and violated the fair and equitable treatment guarantee provided by the UABIT. The arbitral tribunal ordered the State of Ukraine to pay USD 2,979,232 with additional interest accruing from 1 July 2004, at a rate of 9.11 percent compounded annually.

On 23 June 2011 the Pecherkyi District Court of the City Kyiv recognized and enforced the said ICSID arbitral award in Ukraine. Although the ICSID tribunal already considered the Agreement and held it to be legitimate, on 23 May 2012 the Commercial Court of the City of Kyiv, based on the claim of the deputy State Prosecutor of the City of Kyiv, invalidated the Agreement based on the following arguments: (i) the Agreement was a sham deal; (ii) the terms and conditions of the Agreement contradicted the provisions of the Civil Code of USSR and the Law of Ukraine on Investment Activities (effective as of the date of execution of the Agreement).

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Jurisdiction

- **Ukraine**

Court

Commercial Court of the City of
Kiev

Arbitrators/Judges

- B.O. Tkachenko, Chair
- O.I. Loban, Judge
- R.B. Fedorchuk, Chair

Case date

- 6 August 2012

Case number

- 17/434

Parties

- Claimant, State Prosecutor (Ukraine)
- Defendant, Alpha Projektholding GmbH (Austria)

Key words

- ICSID
- Invalid agreement
- Joint activity

Applicable legislation

- Ukrainian law

The Commercial Court of the City of Kyiv rejected the Claimant's argument that the Agreement was recognized as legitimate joint activity agreement being in full compliance with the Ukrainian law by the ICSID tribunal.

The Ukrainian court reasoned that the tribunal did not consider the validity of the Agreements as a whole. On 6 August 2012 the Commercial Court of Appeal of the City of Kyiv dismissed the appeal of the Claimant reasoning that the Agreement violated mandatory provisions of Ukrainian law effective as of the date of conclusion of such agreement. Moreover, the court of appeal confirmed the ruling of the Commercial Court of the City of Kyiv on the basis that the ICSID tribunal did not consider the validity of the Agreements as a whole.

Full text

The full text of this decision is not available in English.

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