RULING
IN THE NAME OF UKRAINE

24 November, 2010 **Kyiv**

The Panel of justices of the Judicial chamber in civil cases of the Supreme Court of Ukraine consisting of:

Chairman: **[…]**
Justices: **[…]**

having considered *in camera* the case under RosUkrEnergo AG motion for recognition and enforcement of foreign court decision being subject to enforcement, interested party-debtor – National joint-stock company "Naftogaz of Ukraine", under the cassation appeal of the president of National joint-stock company (hereinafter - NJSC) "Naftogaz of Ukraine" against the ruling of Shevchenkivskyi district court of the city of Kyiv dated August 13, 2010 and the ruling of Kyiv City Court of Appeal dated September 17, 2010,

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

In July 2010 RosUkrEnergo AG applied to the court with a motion to recognize and to grant permission for enforcement of foreign court decision, in particular – of Separate Award rendered by 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 motion is reasoned by the arguments that RosUkrEnergo AG and NJSC "Naftogaz of Ukraine" entered into chain of contracts, which provided that all controversies between the parties are to be resolved by 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 controversies arose between the parties, 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 binding, NJSC "Naftogaz of Ukraine", which was obliged to pay penalty, fine, and to transfer natural gas to RosUkrEnergo AG, refused to fulfill these awards voluntary.

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 grant permission for enforcement of the above-mentioned awards, to issue a writ of execution.

Ruling of the Shevchenkivskyi district court of the city of Kyiv dated August 13, 2010, that was upheld by the Kyiv City Court of Appeal on September 17, 2010, sustained above-mentioned motion made by RosUkrEnergo. Separate Award rendered by Arbitration Institute of the Stockholm Chamber of Commerce on March 30, 2010 as well as the Second Separate Award of June 8, 2010 were recognized and the permission for their enforcement was granted.

The president of NJSC "Naftogaz of Ukraine" in the cassation appeal requests overruling the judicial decisions, referring to incorrect application of substantial and procedural law by the courts, and to render a new ruling on refusal to recognize and enforce Separate Award rendered by Arbitration Institute of the Stockholm Chamber of Commerce on March 30, 2010, and the Second Separate Award of the same Institute of June 8, 2010.

The cassation 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 prior to entry into force of the Law of July 7, 2010.

According to the art. 324 of the Civil Procedural Code of Ukraine grounds of cassation 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 court proceedings is not the scrutiny of correctness (legality) of the arbitral awards, but examination of existence of procedural reasons for granting or refusing to grant permission for their enforcement.

Sustaining the motion for recognition, made by RosUkrEnergo AG, and granting permission for enforcement of decision of foreign court (international arbitration), the first-instance court, which conclusions were upheld by the court of appeal, acted on the premises that the awards are final and binding for the parties; all the contracts under which the arbitral tribunal rendered awards contain an arbitration agreement; the debtor did not challenge the awards on the grounds of procedural matters; the arguments that enforcement of the awards contradicts public policy of Ukraine are groundless; consequently, there are no legal reasons for refusing to sustain the motion for granting permission to enforce the awards. The court determined the amount to recover in the national currency.

The above-mentioned conclusions of the courts are in conformity with the circumstances of the case, and in compliance with procedural law, that was correctly applied by the court.

Recognition and enforcement of the foreign court decision – means the extension of legal effect of such decision throughout the territory of Ukraine and application of execution 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 decisions of the foreign courts (of the international arbitration) shall be recognized and enforced in Ukraine, if such recognition and enforcement is provided by international treaty, agreed to be binding by Verkhovna Rada 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 controversies between the parties are to be resolved by 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 controversies had arisen, RosUkrEnergo submitted the request for arbitration to this Arbitration Institute in April 2008, and as a 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 grant permission for enforcement of above-mentioned awards, and to issue a writ of execution.

The motion made by RosUkrEnergo has been considered under provisions, provided by art. 395 of the Civil Procedural Code of Ukraine. The Panel of justices of the Supreme Court of Ukraine states that no violations of procedural law have been committed during the consideration of the motion. In particular, the court checked the conformity of the form and content of the motion with law and existence of the grounds for arbitral award's recognition and enforcement. At that, the court correctly did not scrutinize the correctness of arbitral award on the merits, since this would violate the sovereignty of the state, which court rendered the award. Such actions of the court are in conformity with national and international legislation in force, and with clarifications, provided by the Plenum of the Supreme Court of Ukraine in paragraphs 7, 12 of the Resolution of December 24, 1999, No. 12 "On the practice of considering by the courts of the motions for recognition and enforcement of foreign courts decisions and arbitral awards and on setting aside awards, rendered under international commercial 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 8 January, 1961, defines as fundamental principle that each Contracting State 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 for exhaustive list of grounds that could not be interpreted broadly, under which competent court may refuse the recognition and enforcement of arbitral award.

This list is contained in the art. V of the New-York Convention, and they are also enumerated 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, the burden of proof of existence of such grounds lies with the party that objects the recognition and enforcement of arbitral award (paragraph 1, art. V of the New-York Convention).

Therefore, NJSC "Naftogaz of Ukraine" was obliged to prove the existence of grounds for dismissing the motion for recognition and granting permission to enforce the arbitral award. The courts acted on premises that debtor failed to present such proofs.

It was established, that NJSC "Naftogaz of Ukraine" did not challenge the jurisdiction, the competence of the arbitration and arbitrability of the dispute, but actually invokes two grounds, objecting to granting permission for enforcement of arbitral award: arbitral award did not come into force under the law of the country where it was rendered; recognition and enforcement of this award is contrary to the public policy of the state.

The Panel of justices of the Supreme Court of Ukraine considers that the courts held correctly on the groundless of arguments invoked 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. Neither Law of Ukraine "On International Commercial Arbitration" nor the Civil Procedural Code of

Ukraine contain any additional procedures, which would require confirmation of the final character of the arbitral award.

Moreover, Separate Award of March 30, 2010 provides that parties agreed that final award on all claims connected with transactions, concluded in 2009, should be rendered not later than July 30, 2010, and on all other claims – this is a separate award, that would not be enforced until final award is rendered (vol. 1, pages 179-180). The Second Separate Award dated 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, pages. 38, 42, 44). Also the Arbitration Institute of the Stockholm Chamber of Commerce notified the local court on July 16, 2010 that the arbitral awards rendered on March 30, 2010 and on June 8, 2010 are final and binding, and that according to the Swedish legislation, awards may be challenged only on the procedural matters during 3 months (vol. 2, page 154).

During the hearings in the Supreme Court of Ukraine the representatives of NJSC "Naftogaz of Ukraine" explained, that arbitral awards were not challenged because there were no legal grounds in accordance with Swedish legislation, however the enforcement of these awards would be contrary to the public policy of Ukraine.

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

Reference of NJSC "Naftogaz of Ukraine" that recognition and enforcement of arbitral award are contrary to the 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 debtor failed to furnish any proof that transference to RosUkrEnergo of quantity of natural gas, defined in arbitral award, exceeds 50% of the total volume of natural gas extracted in the country annually from country's own resources, and 50% of annual needs of natural gas by the population. Besides, during the arbitral proceedings representatives of NJSC "Naftogaz of Ukraine" admitted completely that there were no legal reasons to acquire disputed quantity of natural gas, thus they admitted the illegality of seizure of natural gas from

RosUkrEnergo, being its property, that was mentioned in the Second Separate Award (vol. 2, pages 34-36). During the hearing in the Supreme Court of Ukraine representatives of NJSC "Naftogaz of Ukraine" confirmed that such explanations were given during the arbitration proceedings.

In addition to the factual admission by NJSC "Naftogaz of Ukraine" of the claims during the arbitral proceedings, the following should be mentioned concerning arguments on violation of the public policy of the state in case of granting permission for enforcement of award. As a rule, public policy means the legal order of the state, decisive principles and fundamentals, which constitute the basis of state's existent regime (concerning state's independence, integrity, sovereignty and inviolability, basic constitutional rights, liberties, guarantees, etc.). Also according to the art. 12 of the Law of Ukraine "On private international law", a rule of foreign state law does not apply if such application leads to the consequences manifestly incompatible with fundamentals of legal order (public policy) of Ukraine. The debtor failed to invoke such arguments; moreover, the parties tothe dispute are legal entities, established according to the legislation in force, 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 the court of cassation shall dismiss the cassation appeal and uphold the ruling, if the court has rendered a ruling in accordance with law.

Being guided by the articles 336, 342 of the Civil Procedural Code of Ukraine, the Panel of justices of the Judicial chamber in civil cases of the Supreme Court of Ukraine

ruled :

To dismiss cassation appeal of the president of National joint-stock company "Naftogaz of Ukraine".

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

This ruling cannot be subject to any appeal.

Chairman: […]

Justices:[…]