

Is There A Place for Arbitrariness in Recognition and Enforcement of International Commercial Arbitration Awards?

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Court practice shows that sometimes while considering applications on recognition and enforcement of foreign arbitration awards, Ukrainian courts apply Ukrainian legislation in an arbitrary manner. In this post we will analyze the legal grounds used by Ukrainian courts in consideration of an application seeking recognition and enforcement of an award issued by the London Court of International Arbitration.

The award at issue was granted in the dispute between Weatherford Oil Tool GmbH ("Weatherford") and LLC Scientific and Production Enterprise Atoll ("Atoll"). Weatherford and Atoll have entered into a commercial contract for supply of equipment and provision of services. This contract provided for arbitration as a means of settlement of contractual disputes.

Atoll breached the contract, and Weatherford submitted the dispute to the London Court of International Arbitration. On 6 January 2012, the arbitral tribunal issued the award (the "Award") by which it ordered Atoll to pay the amounts owed to Weatherford (the "debt") together with compensatory interest for the retention of the funds. The Award did not determine the amount of the compensatory interest to be paid but rather included a formula for its calculation.

Atoll failed to comply with the Award. In July 2012, Weatherford filed an application for recognition and enforcement of the Award with Oktyabrskiy District Court of Poltava City (place of incorporation of the debtor).

The Oktyabrskiy District Court of Poltava City (a trial court) upheld the application in part. It recognized and authorized the enforcement of the main part of the Award regarding the payment of Atoll's debt. However, it refused to recognize the part of the Award related to the payment of the compensatory interest for the retention of the funds.

Atoll challenged the judgment of the Oktyabrskiy District Court of Poltava City and the Appeal Court of Poltava City upheld the judgment of the trial court.

The debtor filed a cassation appeal seeking to reverse the judgments of the lower instance courts. The Higher Specialized Court of Ukraine for Civil and Criminal Matters (the "HSCU", a court of cassation appeal) reversed the judgments of the lower instance courts, referring to the provisions of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the "New York Convention"), the Kyiv Treaty on Settlement of Disputes Related to Commercial Activity (the "Kyiv Treaty"), and the Civil Procedural Code of Ukraine (the "CPC of Ukraine") and ruled that lower instance courts had failed to examine whether Weatherford had presented sufficient evidence to prove that Atoll had not been duly notified of the arbitration proceedings.

We believe that the HSCU's judgment described above is controversial and could be contested arguing that the provisions of the national law and international treaties were applied inappropriately.

For the purposes of recognition and enforcement of international commercial arbitration awards in Ukraine the courts are governed by the Civil Procedural Code of Ukraine (the CPC of Ukraine). The general rule is that foreign court judgments (including international commercial arbitration awards) are subject to recognition and enforcement if international treaty to which Ukraine is a party provides for such recognition and enforcement, and should there be no treaty then foreign court judgments should be recognized and enforced in Ukraine on the reciprocal basis (Article 390 of the CPC of Ukraine).

Given that the Award was issued in London, such applicable treaty in the case of Weatherford v. Atoll should have been the New York Convention.

The application by the HSCU of the Kyiv Treaty rules could be contested. The Kyiv Treaty is an international agreement signed and ratified by Ukraine which regulates, among others, the issues of recognition and enforcement of foreign court judgments. Its provisions shall apply to situations when the place of arbitration is located in the territory of one of the Parties thereto (Parties to the Kyiv Treaty are the CIS countries, namely: Belarus, Armenia, Kazakhstan, Kyrgyzstan, Tadjikistan, Uzbekistan, Ukraine, and Russia). The procedure of recognition and enforcement of the Award issued in the UK is not covered by the scope of regulation of the Kyiv Treaty.

It is also questionable whether it is appropriate to apply the requirements on a list of supporting documents to the application for recognition and enforcement of the Award enshrined in the CPC of Ukraine additionally to rules of the New York Convention. First of all, there is a constitutional rule that provisions of international treaties shall prevail over national legislation. Also, the direct wording of the CPC of Ukraine establishes that its requirements on the list of supporting documents are applicable only in cases when (i) there is no international treaty or (ii) the international treaty lacks such requirements.

It is worth mentioning that the Supreme Court of Ukraine in its Ruling No. 12 dated 24 December 1999 *"On the Practice of Consideration of Applications Seeking Recognition and Enforcement of Foreign Court Judgments and Arbitration Awards, and Annulment of International Commercial Arbitration Awards Issued in Ukraine"* explained to the lower instance courts the rules of supremacy of international treaties over provisions of national law and the order of application of international treaties on the same matters. These guidelines were disregarded by the HSCU.

Given the above, the HSCU should have upheld the judgments of the lower instances courts on partial satisfaction of Weatherford's application. Article IV of the New York Convention sets a rule that in order to obtain the recognition and enforcement the applying party shall, at the time of application, supply: (a) the duly authenticated original award or a duly certified copy thereof; (b) the original agreement referred to in Article II (arbitration agreement) or a duly certified copy thereof. There are no additional requirements to supply separate evidence of due notification of the Respondent in

arbitration proceedings.

Such arbitrariness of the Ukrainian courts in interpretation and application of the rules of the New York Convention is a disregard of the benefits offered by this international treaty. Naturally, creditors are interested in an effective and efficient mechanism of obtaining satisfaction, but additional obstacles encountered on the national level minimise their chances for getting just compensation.