Irreparable or Near-Irreparable Harm that Can Result from Non-Enforceability of Judgments

Kluwer Arbitration Blog
June 8, 2018

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Please refer to this post as: Maja Stanivukovic, 'Irreparable or Near-Irreparable Harm that Can Result from Non-Enforceability of Judgments', Kluwer Arbitration Blog, June 8 2018, http://arbitrationblog.kluwerarbitration.com/2018/06/08/irreparable-or-near-irreparable-harm-that-can-result-from-non-enforceability-of-judgments/

Enforcement for some may be a chimera, an overrated factor in choosing the dispute resolution methods.[fn]Cameron Ford, The Enforcement Chimera, Kluwer Arbitration Blog, May 10. 2018.[/fn] Yet, efforts that have been invested in enforcement of judgments within the Hague Conference on Private International Law[fn]See the Draft Judgments Convention[/fn] and of international commercial settlement agreements reached in mediation within UNCITRAL[fn]See materials of the UNCITRAL Working Group II[/fn] suggest that enforcement is not an entirely fictional animal. The topic of this post is how enforceability of judgments can indirectly affect enforcement of a domestic arbitral award in Serbia.

Efforts to improve efficiency of enforcement in Serbia

On 1 July 2016, the 2015 Enforcement and Security Act (ESA) came into force in Serbia.[fn]Zakon o izvršenju i obezbeđenju, "Official Journal," 106/2015. This is the fourth Enforcement and Security Act in row since 2000.[/fn] It introduces significant changes in the enforcement procedure.[fn]One of the major changes introduced by the 2015 ESA is that most enforcement procedures including those based on arbitral awards are now conducted by public enforcement agents, under the supervision of the court. Public enforcement agents are graduated lawyers appointed by the Minister of Justice to exercise public powers entrusted to them under the law, in particular enforcement of judgments. They were introduced as a new legal profession by the 2011 Enforcement and Security Act.[/fn] The most important reasons for its adoption are: low efficiency in enforcement procedures,[fn]The European Court of Human Rights has found on numerous occasions that Serbia has committed violations of Art. 6(1) of the Convention and Art. 1 of Protocol no. 1 due to the failure to timely enforce final judgments. See one of the latest cases *Vukosavljević v. Serbia*, Application no. 23496/13, Judgment dated 27 September 2016.[/fn] a large backlog of enforcement cases pending in courts, and general dissatisfaction of creditors.

Article 15(1) of the ESA provides that enforcement proceedings are urgent. Articles 41 and 42(1) expressly recognize domestic arbitral awards as valid legal bases for the institution of enforcement proceedings.[fn]Article 64(1) of the Arbitration Act provides that a domestic arbitral award shall have the force of a final domestic judgment. This means domestic arbitral awards may be enforced in accordance with the provisions of the statute regulating enforcement procedure, which is currently the 2015 ESA.[/fn]

A final domestic arbitral award is enforceable after the time for voluntary execution has expired, or other conditions specified in the award have been fulfilled. If no time is specified, the time for voluntary execution is eight days (ESA, Art. 47(1)).

The public enforcement agent has a duty to rule on the request for enforcement of a domestic arbitral award within eight days from the date of lodging of the request for enforcement in ex parte proceedings (ESA, Art. 15(4)). The debtor then has eight days to appeal the decision to the court (Art. 25(1)).

As a rule, lodging of the appeal does not suspend enforcement (ESA, Art. 25(3)). Execution against assets may be obtained as soon as the decision granting enforcement is rendered.

Suspension of enforcement

The sole remedy against the domestic arbitral awards is the action for annulment (setting aside) which must be filed within three months of the receipt of the award (Arbitration Act, Art. 59(1)). It may happen that an enforcement proceeding has been initiated while the action for setting aside is pending. The debtor in such case may wish to request suspension of the enforcement proceedings until the decision on the setting aside is made.

The Arbitration Act does not provide for suspension of enforcement proceedings because an action for setting aside of the domestic award has been filed. Furthermore, the 2015 ESA does not envisage it, either.

Nevertheless, the 2015 ESA provides that the enforcement proceedings may be suspended at the request of the debtor if the debtor establishes likelihood that enforcement would cause him irreparable or near-irreparable harm exceeding the harm caused to the creditor due to suspension (Article 122).[fn]It should be noted that the possibility of suspension of enforcement proceedings at the request of the debtor was not provided by the previous 2011 Enforcement and Security Act.[/fn] Additionally, the debtor is required to show that the suspension is justified by special reasons which the debtor can substantiate with an authentic or duly certified document. Further, suspension may be conditioned upon deposit of security by the debtor.

The proposal for suspension may be filed only once during the enforcement proceedings (Article 122(1)). The public enforcement agent must decide on the proposal within five days of receipt (Article 124(1)). This decision is subject to a review by the court upon the debtor's objection (Article 124(2)). The time for which enforcement is suspended is determined by the public enforcement agent, following the request of the debtor.

How it works in practice

Although suspension is envisaged as an exceptional remedy, the practice confirms a case where the suspension was granted.[fn]*Rešenje Privrednog suda u Beogradu*, Posl. br. 8 IPV (I) 375/17 Ii 639/17 Veza 8 Ipv (I) 255/17 dated 22 January 2018. The case, unpublished, has been reported by Nikola Bodiroga, *Odlaganje izvršenja domaće arbitražne odluke*, Privreda i pravo no. 4-6/2018, pp. 277-281. See also, Nenad Tešić, *Odlaganje izvršenja arbitražne odluke – Periculum in Mora ili Ultima ratio u odbrani dužnika od neopravdanog osigromašenja*, soon to be published.[/fn] In this case, an Austrian creditor sought enforcement of a domestic award against a Serbian debtor. The creditor sought enforcement by blocking the debtor's business account and by attaching debtor's real estate for sale. The debtor requested suspension for at least two years or until the setting aside proceedings initiated before the Commercial Court in Belgrade were finalized.

The public enforcement agent initially rejected the debtor's request. The debtor then filed an objection to the Commercial Court in Belgrade.

The grounds for the objection were that the attached property was of considerably higher value compared to the amount of the debt, that the blocking of the debtor's business account prevented the debtor's operation and could eventually lead to its bankruptcy, and that the creditor was domiciled in Austria and had no property in Serbia or abroad from which the collected amount could be recuperated in case the award was eventually set aside.

The court found that the debtor's objection was well-founded. In the opinion of the court, the debtor had established likelihood that enforcement would cause him irreparable harm, and that such damage would exceed the harm that would be caused to the creditor due to suspension.

The court attributed particular importance to the fact that there was no treaty on enforcement of judgments between Serbia and Austria, Austria being known as a country requiring a treaty with the judgment country. Therefore, the debtor would not be able to recover the collected amount from the creditor if the award was subsequently annulled. On the other hand, the creditor's claim was secured by an entry of the decision on enforcement in the real property cadastre. By making an entry, the creditor obtained priority over any other creditor that might later acquire claims against the same debtor. The court therefore quashed the decision that rejected the request of the debtor for suspension and ordered the public enforcement agent to reconsider the grounds for suspension taking into account the holding of the court. Acting upon the court's decision, the public enforcement agent then granted the request for suspension.

Conclusion

The fact that judgments of Serbian commercial courts are not enforceable in Austria has been critical to the court's decision to suspend the enforcement proceedings based upon the domestic award. The irony of it is that the prime motive for selecting arbitration in commercial contracts between Austrian and Serbian partners may often be to circumvent the non-enforceability of judgments.

The case indicates that under the 2015 ESA there may be a greater risk than before of delay in enforcement of domestic awards rendered in international cases if the award debtor is established abroad, in a country with which reciprocity in enforcement of judgments is lacking.

The potential duration of the suspension is considerable. The setting-aside proceedings can last up to a year and appeal proceedings for another year and a half. The procedure for setting aside, although usually unsuccessful, can thus indirectly affect the efficiency of the domestic arbitration proceedings, and undermine one of the goals set by 2015 ESA, as well as the 2006 Arbitration Act: efficient enforcement of domestic arbitral awards.[fn]In 2010 Serbia has been held liable for a violation of Article 1 of Protocol No. 1 of the European Convention on Human Rights due to the partial non-enforcement of a domestic arbitration award. Kin-Stib and Majkić v. Serbia, no. 12312/05, ECtHR (Second Section), Judgment (Merits and Just Satisfaction) 24 April 2010.[/fn] For this reason alone, courts should administer this remedy sparingly.

Professor Stanivukovic is the author of the ICCA Handbook National Report on Serbia, recently completely revised and updated, and now available here. With thanks to prof. Milena Đorđević for helpful comments.