Ukraine's Supreme Court Takes an Unexpected Approach on Sovereign Immunities

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Investment arbitrations with respect to Ukrainian assets in Crimea have been in the spotlight of the international arbitration community for some time now[fn]*E.g.*, *see* here [/fn]. After the Claimants in *Everest Estate LLC et al. v. the Russian Federation* ("*Everest*") obtained the merits award in their favour in May 2018[fn]*See* this post by Mykhaylo Soldatenko.[/fn], the focus started to shift to the enforcement and set aside stages of the Crimean cases.

In July 2018, Claimants applied for recognition and enforcement of the *Everest* award in Ukraine. They have also requested provisional measures to be granted against the shares in three Ukrainian subsidiaries of Russian state banks (VTB Bank, Prominvestbank, and Sberbank, together the "*Banks*"). In September 2018, the Kyiv Appellate Court (acting as the court of first instance) granted both applications.[fn]*See* here and here in Ukrainian.[/fn] Unfortunately, the court mostly overlooked inevitable issues of the Banks' separate legal personality and sovereign immunities of the Russian Federation.

Conversely, the Ukrainian Supreme Court in its recent judgment on the Banks' appeal ("*SC Judgment*") directly addressed these issues.[fn]*See* here in Ukrainian.[/fn] It, among other things, concluded that Russia waived its immunity by means of the Russia-Ukraine BIT.[fn]A brief summary of the judgment may be found here.[/fn] In this post, we focus on the Supreme Court's quite unexpected take on the issue of sovereign immunities. We will start by explaining applicable provisions of Ukrainian law, proceed to the reasoning of the Supreme Court, and then highlight the most thought-provoking takeaways from the SC Judgment.

Foreign States' Sovereign Immunities in Ukraine

Ukraine is not a party to the United Nations Convention on Jurisdictional Immunities of States and their Property, 2004 ("*UNCSI*") or to the European Convention on State Immunity, 1972. Under the Constitution of Ukraine[fn]See here in Ukrainian.[/fn], ratified international treaties are incorporated into the Ukrainian legal system. The Constitution, however, does not establish direct applicability of rules of customary international law. They, thus, cannot be applied directly by Ukrainian courts.

Under the domestic legislation, in particular the *Law of Ukraine on Private International Law* ("*PIL Law*")[fn]*See* here in Ukrainian.[/fn], foreign states enjoy absolute immunity in respect of themselves and their property from 1) suit, 2) provisional measures, and 3) execution of court judgments. There

are only two exceptions to this rule, namely:

1) where the competent authority of a state concerned waives its immunity, or

2) where an applicable international treaty provides otherwise.

Neither the law nor relevant court practice specify the manner in which the waiver of immunity can be made. Thus, in line with applicable Ukrainian legislation, the Russian Federation should have had full immunity with respect to itself and its property in the territory of Ukraine.

Supreme Court's Reasoning

Although the Russian Federation did not participate in the proceedings before the Ukrainian Supreme Court, the court record demonstrates that the Russian Ministry of Justice sent a letter to the Ukrainian Supreme Court, invoking Russian sovereign immunity. The sovereign immunity defence was also mentioned in the appellate claims of some of the Banks.

A separate section of the SC Judgment deals with sovereign immunities.[fn]*See* here, paragraphs 68-78.[/fn] The SC Judgment first acknowledges provisions of the PIL Law on absolute immunity of foreign states. Then it refers to the practice of the European Court of Human Rights ("*ECHR*") in *Cudak v Lithuania* (Application No. 15869/02, "*Cudak*") and *Oleynikov v Russia* (Application No. 36703/04, "*Oleynikov*")[fn]*See* here and here.[/fn], where the ECHR analysed customary nature of certain provisions of the UNCSI. The Supreme Court then stated that although the UNCSI is not ratified by Ukraine, the "*restrictive immunity concept [set out in the UNCSI] is applicable in accordance with customary international law and taking into account the judgment of the ECHR in Oleynikov v Russia*". The Supreme Court further quoted paragraph 68 from *Oleynikov*, where the ECHR found that Russia had breached applicant's right to fair trial by denying court review of his claim against North Korea on the basis of sovereign immunity.

The SC Judgment noted that the European Convention on Human Rights ("*European Convention*") and the jurisprudence of the ECHR are directly applicable sources of Ukrainian law.[fn]Direct applicability is established by the Law of Ukraine "*On Execution of Judgments and Application of Jurisprudence of the European Court of Human Rights*", *see* here in Ukrainian.[/fn] Having done so, the Supreme Court referred to Article 19 of the UNCSI, listing ways in which state immunity from execution may be waived. It concluded that the dispute settlement clause in the Russia-Ukraine BIT (Article 9) constitutes Russian waiver of immunities from "*1) jurisdiction, 2) measures of constraint and 3) execution of court judgments*"[fn]*See* the BIT here.[/fn] for the purposes of the UNCSI and the PIL Law.

Food for Thought in Supreme Court's Reasoning and Implications

The Supreme Court's departure from the (now nearly extinct) rule of absolute sovereign immunity should be welcomed. It has close parallels with Lithuanian Supreme Court's abortion of legislatively prescribed absolute immunity in early 2000s. At the same time, the court's reasoning raises a lot of questions.

First, it is true that the ECHR has tackled the question of sovereign immunities and referred to customary nature of the UNCSI in a number of cases. However, in both *Cudak* and *Oleynikov* it has done so exclusively in the wider context of the right to fair trial under the European Convention. The ECHR recognises that sovereign immunity limitation pursues a "*legitimate aim*" and may, in principle, validly limit right to fair trial. In each *Cudak* and *Oleynikov* the ECHR analysed, whether the limitation of right to fair trial through sovereign immunity was proportionate in light of the relevant customary international law.

On this backdrop, it is debatable whether the jurisprudence of the ECHR indeed may outright 'import' provisions of the UNCSI to national legislation, as the correlation is more nuanced. This question looms over the SC Judgment, as it seems to apply the UNCSI without considering *Everest* Claimants' right to fair trial.

Second, assuming the applicability of the UNCSI, the Supreme Court's reasoning with respect to the waiver of immunity from execution seems hasty. The UNCSI operates on a distinction between immunity form jurisdiction and that from execution. Article 17 of the UNCSI, dealing with arbitration agreements, states that arbitration agreements bar the state from invoking immunity in proceedings relating to "*confirmation … of the award*" (*e.g.*, recognition proceedings). At the same time, Article 19, dealing with immunities from post-judgment measures of constraint (*e.g.*, execution of an award), separately requires an express consent to such measures "*by an arbitration agreement*".

The SC Judgment refers only to the latter Article and generally does not seem to recognise the UNCSI's distinction between two immunities. Furthermore, Article 9 of the Russia-Ukraine BIT, relied on by the Supreme Court, may be viewed as lacking such express consent to execution required by the UNCSI. It refers only to State Parties' obligation to "*execute such [arbitral] award in accordance with its national law.*" For instance, ICSID in its model clauses recommends a much clearer waiver of immunity from execution.[fn]*See* here.[/fn] Meanwhile, the Supreme Court's approach is consistent with that applied by the German Supreme Court in *Werner Schneider v Kingdom of Thailand.*[fn]German court, while analysing Germany-Thailand BIT (with wording very similar to that in the Russia-Ukraine BIT) decided that *it constitutes Thailand's waiver of immunity from execution, see* here, *referred to by* Alexey Vyalkov.[/fn]

Thus, the SC Judgment adds to the wider debate on whether and in which circumstances an arbitration agreement constitutes waiver from state immunity from execution. It should be viewed in the light of evolving national jurisprudence limiting sovereign immunities.[fn]Detailed analysis in Ben JURATOWITCH (2016). *Waiver of State Immunity and Enforcement of Arbitral Awards*. Asian Journal of International Law, 6, pp 199-232 here.[/fn]

Apart from adding to international context, the SC Judgment fundamentally alters Ukrainian legal framework for recognising and enforcing arbitral awards against sovereign states. By using the provisions of the UNCSI on waivers as directly applicable law, the Supreme Court has likely paved the way for application of its other provisions (*e.g.*, those on commercial exception from immunity). It remains to be seen whether and how parties to Ukrainian proceedings and Ukrainian courts will use this significant body of newly applicable law.

The submission is made in my personal capacity. The views contained in this post are not necessarily the views of AVELLUM or its clients.