Kluwer Arbitration Blog

Draft Bills on Registration Requirements for Arbitral Institutions: Is Ukraine Joining the Regional Trend?

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Recent draft legislation submitted to the Ukrainian Parliament would introduce new regulations imposing stricter requirements for setting up domestic arbitral institutions ('treteyskyi sud') and, at the same time, introduce a framework for establishing new international arbitral institutions in Ukraine. This appears to be the latest legislative initiative in the line of recent reforms aimed at improving the arbitration landscape in Ukraine.

The proposal is somewhat reminiscent of the 2016 Russian arbitration reform that introduced licencing requirements for arbitral institutions, discussed on the Blog (e.g. here, here and here). It is also in line with similar trends forming in the former Soviet Union states. Unlike in Russia, the draft bills do not intend to impose any licensing requirements on foreign arbitral institutions that administer arbitrations with a Ukrainian seat.

What is Proposed?

Two legislative initiatives are pending before the Ukrainian Parliament:

- Draft Bill No 3411 dated 29 April 2020 on changes to the establishment and functioning of domestic arbitral institutions; and
- Draft Bill No 5347 dated 8 April 2021 on improving arbitration.

Generally, domestic arbitral institutions in the Ukrainian system do not have jurisdiction to deal with disputes that involve a foreign party, whereas international arbitral institutions can deal with disputes that involve foreign parties or parties with foreign investment, etc.

The first bill proposes a new procedure for registration of domestic institutions. The draft states that the suggested amendments are motivated by a lack of trust in domestic institutions, which appears to be a problem similar to that faced in Russia and Latvia with "pocket arbitrations". These "pocket arbitrations" are usually administered by an arbitral institution set up by one of the parties to an arbitration agreement, e.g. a bank setting up an institution to resolve disputes with its debtors.

Going forward, only non-profit organisations that have existed for over 5 years will be allowed to establish a domestic institution. Any application to set one up will be subject to review and

recommendation by an industry self-regulatory organization. All currently existing domestic institutions must re-register to continue their activities. This tightens the requirements and should, presumably, limit the current number of institutions in the country and hopefully improve the quality and independence of domestic arbitral institutions.

The second bill, on the other hand, appears to be aimed at increasing the number of international arbitral institutions in Ukraine. The explanatory note explains that the changes are aimed at amending the legislation to develop alternative resolution of international commercial disputes and to improve investment climate in Ukraine.

Non-profit organisations registered in Ukraine for over 10 years or organisations registered abroad (with a branch in Ukraine) that are founders of international arbitral institutions abroad (functioning for over 5 years) will be allowed to register a new international arbitral institution in Ukraine. In contrast to the procedure for setting up a domestic institution, no prior opinion/recommendation by a governmental or industry body would be required.

What is the Added Value of Specific Rules for Registration of International Arbitral Institutions?

The two international institutions that exist in Ukraine are the International Commercial Arbitration Court (***ICAC***) (set up in 1992) and the Ukrainian Maritime Arbitration Commission (***UMAC***) (set up in 1994). Both are attached to the Ukrainian Chamber of Commerce and Industry.

These institutions are regulated by the International Commercial Arbitration Law (***Arbitration Law***). ICAC was set up already in 1992, before the Arbitration Law that regulates it was passed in 1994. Setting up arbitral institutions with no specific legislative regulation appears to therefore have not been an issue 29 years ago. The question remains why the legislator decided to introduce specific regulation.

One answer to that may be that by introducing a procedure, the legislator hopes to stimulate the establishment of additional international institutions. However, looking at the experiences of other arbitral institutions worldwide suggests that prescribing a specific registration process in the law is not necessary. Major arbitral institutions around the world are attached to chambers of commerce (e.g. ICC, VIAC) or exist within the available legislative framework for registration of legal persons in their jurisdictions, without a specific legal form for arbitral institutions: DIS is registered as a “eingetragener Verein” – a registered association; SIAC is a non-profit organisation; HKIAC is a company limited by guarantee and a non-profit organisation; LCIA is a private not-for-profit company, limited by guarantee.

But, of course, regional differences play an important role. The former Soviet Union and Ukraine-specific background will provide some context. The reality is that Ukraine as a jurisdiction has historically been very formalistic. Often, if a procedure is not specifically set out in the law in detail, it won’t be possible to accomplish something through recourse to the general rules. A good example of this was the problem with court ordered interim measures that arbitration in Ukraine faced for many years. The Arbitration Law set out a general power of the court to order interim measures, but no procedure was detailed for the same in the Ukrainian Code of Civil Procedure (***UCCP***). This led to reluctance of Ukrainian courts to grant interim measures despite having the power to do so. The problem was resolved through the 2017 arbitration reform, which added a

procedure to the UCCP. From this perspective, it is understandable why a legislator that wants to expand the number of international institutions would be considering introducing a detailed registration procedure.

The more important question is, however, whether Ukraine needs more international arbitral institutions in the first place. Would more institutions be likely to achieve the stated goal of developing alternative resolution of international commercial disputes and improving investment climate in Ukraine?

The answer to that is probably "no" – more arbitral institutions are unlikely to bring about the improvement that the draft bill asserts to aim to address. What is likely to increase the attractiveness of Ukraine as a seat of arbitration is "'[g]reater support for arbitration by local courts and judiciary', 'increased neutrality and impartiality of the local legal system', and 'better track record in enforcing agreements to arbitrate and arbitral awards'" (according to the 2021 Queen Mary International Arbitration Survey).

On this front, Ukraine has made encouraging steps forward through the 2017 arbitration reform, but a lot remains to be addressed. It may, therefore, be more useful to focus the legislator's limited time and resources on the above aspects.

A Trend in the Former Soviet Union States

It looks like the former Soviet Union countries are going through similar cycles. First, regulation is introduced liberalising the regime for setting up arbitral institutions. Second, the number of established institutions (predominantly domestic) explodes, leads to "pocket arbitrations" and issues with fairness and neutrality. At the end of the cycle, regulations for establishing arbitral institutions are tightened.

Belarus, for example, appears to be at the second stage with a growing number of institutions, following liberalisation that took place in 2011. Russia, on the other hand, is at the end of that cycle and tightened its regulations in 2016 introducing mandatory licensing of arbitral institutions by the Ministry of Justice subject to recommendation of a government-established advisory council.

In this cycle, Ukraine itself appears to be somewhere in between – it is proposed that regulations are tightened for domestic institutions while establishment of more international institutions appears to be desirable to the legislator.

Will Foreign Arbitral Institutions Need to Get a License?

The Russian reform of 2016 contained a set of much discussed licensing requirements which affected not only institutions registered in Russia but also foreign arbitral institutions administering proceedings with a Russian seat. The Russian rules require foreign arbitral institutions to obtain a governmental license under the new procedure demonstrating that they have a "widely recognized international reputation". This means considering, e.g. whether the institution is on the GAR Whitelist, number of arbitrations administered by the institution annually, variety of geographical

origin of the parties, good track record for recognition and enforcement of the institution's awards. The licence was obtained by, e.g. VIAC, HKIAC, and more recently ICC and SIAC.

Good news for foreign arbitral institutions is that Ukrainian legislative initiative does not go that far. Under the second draft bill pending before the Ukrainian Parliament, foreign arbitral institutions could still administer arbitrations seated in Ukraine with no requirement to set up a "local" international arbitral institution or receive certification in the country. The bill only addresses the formalities of registration of institutions that want to have a presence in Ukraine.

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