Case Summary of Vioans Ltd. v. The Ukraine Ministry of Material Provisions

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On 15 April 2012, the Central Magistrate Court revoked ICAC arbitration awards obtained by the Ukrainian Ministry of Internal Affairs and declared them unenforceable due to what the court considered to be unjust arbitration procedures under Section 5 of the New York Convention on Recognition and Enforcement of Foreign Arbitral Awards.

Vioans Ltd. ("Vioans") is an Israeli company which contracted in April 2002 with The Ukraine Ministry of Internal Affairs department of Material Provisions (the "Ukraine Ministry") to supply and install advanced equipment for the production of passports in Ukraine. Vioans had been selected by the Ukranian authorities in September 1999 as the winning bidder within the context of Ukraine's Unified State Automated Passport System initiative.

Two years after the contract had been signed, during which time Vioans supplied equipment and services valued at $4,000,000.00, the Ukraine Ministry initiated arbitration proceedings under the ICAC to obtain a declaration that the contract had been improperly executed. The Ukraine ministry claimed that the individual who signed the contract on behalf of the Ukraine Ministry lacked the proper authority to do so, thereby rendering the contract void.

In 2004, Vioans and the Ukraine ministry each appointed an arbitrator to sit on the tribunal, and the chairman – a Ukranian citizen – was appointed by the ICAC despite strenuous objections raised by Vioans. The arbitrator appointed by Vioans also noted the numerous flaws relating to the chairman's appointment. In July 2004, the arbitral tribunal ruled in favor of the Ukraine Ministry, declaring the parties' contract void. Vioans appealed to the appellate court in Kiev, Ukraine to revoke the ICAC award. (Later, Vioans again appealed to the Supreme Court of Ukraine, which was denied in 2006.) Vioans also took other actions to protect its interests, including filing a lawsuit in September 2004 in Ukraine alleging $20,000,000.00 in damages. All of its efforts in this regard were unsuccessful.

In October 2004, the Ukraine Ministry initiated another round of arbitration proceedings in the ICAC to recover the $1,047,740.00 which it had spent on the (now voided) contract. Vioans refused to participate in this round of proceedings due to its lack of faith in the ICAC. Shortly thereafter, the ICAC tribunal – which this time was completely comprised of Ukranian citizens – issued an award for the aforesaid amount against Vioans (the "Second Award").

Then, the Ukraine Ministry applied to the Israeli District court for enforcement of the Second Award under the New York Convention. Vioans submitted its response objecting to enforcement, as well as a separate motion to the Israeli court seeking to void the Second Award.

Among the issues examined by the Israeli court was whether an impropriety in the original ICAC award would necessarily affect the Second Award. (The court indeed found this to be the case.) The court agreed with Vioans that the appointment of the Chairman was improper, violated Ukrainian law, and even ran counter to the ICAC's own guidelines requiring impartial appointments. The court also found that two out of the three members (both Ukrainians) of the tribunal were improperly influenced as a result of the ICAC Secretariat's personal (and highly peculiar) involvement in the case.

The Israeli court stated that it appeared from the testimony of the arbitrator that his life was threatened and this fact coerced him into agreeing to sign the judgment based on the demand of the secretariat of the ICAC, although he himself assumed the case was not yet ready for a ruling by the Tribunal. (Section 65, p. 26 of the Israeli Court Decision.) The court found that the numerous severe flaws in the arbitration constituted a grave breach of the basic and widely accepted

principles of fairness and equity on whose basis any worthy legal system must act, “and this includes the legal system of Ukraine”. Because this breach contravened the ICAC’s own guidelines, enforcement should be refused Article V(1)(d) of the New York Convention, which the court found to be applicable in Israel in general and in this case in particular. Enforcement should also be refused on grounds of public policy under Article V(2)(b) of the Convention.

In our view, courts in all jurisdictions should follow the Israeli court’s ratio in this judgment and its approach, when faced with similar circumstances, inter alia, to maintain and continue to build international trust in the arbitration world. This trust must be built in a way that ensures that arbitrators and arbitration institutions follow principles of due process, transparency and fairness. Only then can orders and awards issued by said arbitrators and institutions be valid and enforceable. Such a regime would send a clear message that there is no benefit whatsoever to spend significant resources on an unjust arbitration procedure.

Side note: reviewing the said judgment, it should be mentioned however, that from a procedural point of view, it is quite questionable why in fact the Israeli court decided, it should allow the Israeli supplier to submit a motion to revoke the second arbitral award, given and despite the great delay of a few years, and after the motion to revoke the first award was submitted in Ukraine and denied by final judgment, including by the Supreme Court of Ukraine. This issue was somewhat dealt with by a previous interim holding of the court applying interpretation to the NY convention and its application, but the reasoning there still seems peculiar.

In our firm’s analysis of the Israeli Court’s decision, it is our view that given the circumstances of the case as provided in the decision, the Israeli court could have reached the same outcome by simply denying enforcement of the award. This would have allowed Vioans to advance all the arguments discussed in the case (especially given the Ukrainian Ministry’s failure to submit its closing arguments at the Israeli court proceedings. Yet, for reasons that are not entirely clear, the Israeli court also took the extra step of awarding the Israeli party the relief sought in its motion to actually revoke the arbitral award.

(An English translation of this decision will appear in the 2012 Volume of ICCA’s Yearbook Commercial Arbitration, due to come out in December 2012.)

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