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Enforcement in Ukraine of Foreign Court Orders Granting Provisional Measures in Support of Arbitration

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It is widely accepted that successful outcome of international commercial arbitration proceedings often depends on timely obtained provisional measures designed to protect either the lawful interests of the parties or property in dispute until the final arbitral award on the merits is issued. Although provisional measures may be obtained from an arbitral tribunal handling respective proceedings, the subsequent enforceability of a tribunal's order on provisional measures in different jurisdictions is a challenging issue. Therefore, as a matter of practice, parties often prefer to have provisional measures ordered by state courts which may be easily implemented by state bailiff service. Given the ever-increasing cross-border nature of many disputes the need to enforce an order for provisional measures issued by state courts of one jurisdiction in a different state becomes a usual instrument in commercial disputes.

Article 17 of 1994 Law of Ukraine "On International Commercial Arbitration" empowers an arbitral tribunal to grant provisional measures at the request of a party to the proceedings unless otherwise agreed by the parties. However, since Ukrainian procedural law is silent on the enforcement of tribunal-ordered provisional measures, implementation of the latter rests solely on the will of the parties that, obviously, does not prove to be effective at all. Furthermore, despite general declarations set forth in Article 9 of the Law that applications to national courts for provisional measures are not inconsistent with the arbitration agreement, Ukrainian procedural law does not contain sound mechanics of obtaining court-ordered provisional measures in support of international arbitration proceedings conducted in Ukraine or elsewhere. To tackle this problem parties concerned usually apply to foreign state courts for orders on provisional measures and then seek recognition and enforcement of such orders in Ukraine.

In Ukraine the issue of recognition and enforcement of foreign court judgments lies within the territorial jurisdiction of the courts at the debtor's location or at the place of the debtor's property (see, Article 392 of the Code of Civil Procedure of Ukraine).

The principal source of law applicable to recognition and enforcement of foreign court judgments in Ukraine is the Code of Civil Procedure, according to which any foreign court judgment may be recognized and enforced either on the basis of multilateral/bilateral international treaties of Ukraine providing for recognition and enforcement of foreign court judgments, or on the basis of the principle of reciprocity (see, Article 390 of the Code of Civil Procedure of Ukraine).

International treaties as the basis for recognition and enforcement of foreign court-ordered provisional measures in support of arbitration

Ukraine is a party to a number of international treaties on legal assistance in civil matters providing for recognition and enforcement of foreign court judgments. Upon gaining independence in 1991 Ukraine has entered into respective treaties with approximately 25 states, being mainly former members of USSR and socialist camp. Additionally, 8 bilateral treaties on legal assistance in civil matters concluded on behalf of USSR are still binding for Ukraine by virtue of legal succession (see, Articles 6 and 7 of Law of Ukraine "On Legal Succession of Ukraine"). Apart from that, Ukraine is a party to 1992 Treaty "On Procedure of Settling Disputes with Regard to Carrying on Commercial Activities" and 1993 CIS Convention "On Legal Assistance and Legal Relations in Civil, Criminal and Family Matters".

Despite the diversity of international treaties mentioned above they are mostly similar in structure and none of them expressly permit or prohibit recognition and enforcement of foreign court orders on provisional measures. On the other hand, one should distinguish the differences in respective treaties relating to formulation of types of court judgments/orders subject to recognition and enforcement within respective states. Therefore, for the sake of clarity the respective treaties may be divided into three following groups.

I. International treaties containing general term "court judgment"

The Treaty "On Legal Relations and Legal Assistance in Civil and Criminal Matters" between Ukraine and Republic of Cuba dated 27 March 2003 provides that *"Contracting Parties mutually grant recognition and enforcement to decisions of justice agencies in civil matters, entered into legal force, as well as sentences in terms of recovery of damages, caused by crime"* (see, par. 1 Article 39 of the Treaty). Such an obscure formulation is embodied in the majority of the aforementioned treaties concluded, in particular, with Albania, Algeria, Estonia, Georgia, Iraq, Italy, Latvia, Lithuania, Macedonia, Moldavia, North Korea, Poland, Vietnam, Yemen and others.

From the viewpoint of Ukrainian procedural law, "court judgment" is an umbrella term covering court judgments on the merits and various procedural orders and resolutions (see, par. 1 Article 208 of the Code of Civil Procedure of Ukraine). Given that provisional measures are usually granted in the form of a court order it may be supposed that recognition and enforcement of the latter falls within the scope of international treaties of the present group. But, unfortunately, there is no reliable court practice in Ukraine to substantiate this conclusion.

II. International treaties particularizing specific court judgments/orders

The Treaty "On Legal Assistance in Civil and Criminal Matters" between Ukraine and Chinese People's Republic provides in its Article 17 that,

> "2. The term "court judgment", used in the present Treaty, implies:
> in Ukraine – sentence regarding recovery of damages in criminal case, judgment, order, resolution of the court (judge), settlement agreement, approved by the court in a civil matter, award, order of an arbitration court;
> in Chinese People's Republic – judgment, order, resolution, settlement act in a civil matter and sentence regarding recovery of damages passed by the court".

Such a detailed particularization of the term "court judgment" is, in our view, presumed to include

any judicial act issued in the course of civil proceedings, obviously including orders on provisional measures. On the other hand, some Chinese legal practitioners take the view that unless expressly provided in a treaty it is very uncertain whether orders regarding provisional measures issued by the court qualify as "*judgments*". (Zhang Shouzhi, China's Enforceability of Provisional Measures in Offshore Arbitration, available here) Therefore, the issue is still to be decided by the courts.

III. International treaties containing a requirement of finality of court judgments

Article 20 of the Treaty "On Mutual Legal Assistance in Civil and Commercial Matters" between Ukraine and United Arab Emirates provides:

> "The court judgment shall not be granted recognition and enforcement providing that:
> a) it is not final;
> […]".

Finality of court judgments is also required under respective treaties concluded with Cyprus, Greece, Libya, Romania, Syria and Turkey. Although it does not amount to strict prohibition of foreign court orders in support of arbitration, according to G. Born, it will be difficult *"successfully to enforce judgments granting provisional measures, in aid of arbitral proceedings, because they are not "money" judgments and are arguably not "final" for purposes of many national enforcement regimes"* (G. Born, International commercial arbitration, Vol. II, p. 2063.). Therefore, it is highly unlikely that foreign court orders on provisional measures may be capable of being recognized in Ukraine under the above treaties.

It is worth mentioning in this context that the finality requirement in the Treaty between Republic of Cyprus and Ukraine is a stumbling stone for many cross-border disputes involving Ukrainian-origin businesses. Ukrainian businesses have historically been using Cyprus as a convenient jurisdiction for structuring holding companies using local tax advantages. As a result, holding companies frequently reinvest funds back to Ukraine, technically making Cyprus the largest foreign investor in Ukrainian economy. (PM: Our Cyprus losses less than Russia's, Ukrainian Journal, 19 March 2013, available here) When disputes arise and a party obtains court-ordered provisional measures in Cyprus courts, the latter may not be enforced in Ukraine.

Principle of reciprocity as a basis for recognition and enforcement of foreign court-ordered provisional measures in support of arbitration

Application of the principle of reciprocity to recognition and enforcement of foreign judgments in Ukraine is quite new both in terms of legal doctrine and court practice. (A.Y. Astapov, O.A. Beketov, Recognition and Enforcement of Foreign Court Judgments in Ukraine, 16 August 2010, available here) It was introduced in 2010 as a subsidiary rule in cases when there is no international treaty governing issues of recognition and enforcement of court judgments between Ukraine and a particular state. Article 390 of the Code of Civil Procedure envisages:

> "2. In case if recognition and enforcement of foreign court judgment depends on the principle of reciprocity, it shall be deemed existing unless proven otherwise".

Until recently Ukrainian legal practitioners took the view that only final judgments on the merits may be subject to recognition under Ukrainian civil procedural regulation based on the principle of reciprocity, although no relevant court practice existed to substantiate such a conclusion.

However, on 1 June 2012, Golosiivskyi District Court of Kyiv City granted recognition and enforcement of a freezing order of the High Court of Justice issued in a long-lasting multi-jurisdictional dispute between *Kazakh BTA Bank v. Mukhtar Ablyazov et. al*. On 13 August 2009 at the request of BTA Bank the High Court ordered seizure of defendants' assets in support of respective court proceedings, and on 12 November ordered its continuation.

It is unclear whether BTA Bank had ever requested recognition and enforcement in Ukraine of the initial freezing Order dated 13 August 2009. Upon relevant request, Golosiivskyi District Court only granted recognition and enforcement of the High Court Order dated 12 November 2009. (Judgment of Golosiivskii District Court of Kyiv City, case No. 2601/9578/12, 1 June 2012, available here in Ukrainian) Although, none of seven defendants had a place of location or residence in Ukraine the Court found that one of the defendants owned corporate rights in a Ukrainian company "Maks-Vell" Medical Centers LLC, and ruled on its jurisdiction over the case.

Since there had been no international treaty providing for recognition and enforcement of foreign court judgments between Ukraine and the United Kingdom, Golosiivskyi District Court was guided by the reciprocity principle having taken note of the fact that the High Court had previously recognized the judgment of the Highest Commercial Court of Ukraine dated 29 June 2006.

The judgment in *BTA Bank* became a turning point in Ukrainian case law since for the first time the notion "foreign court judgment" had been extended to include a provisional procedural order issued by a foreign court.

On 29 November 2012 the judgment in *BTA Bank* was set aside by Kyiv City Court of Appeal on the grounds of minor procedural violations. The appellate court found that enforcement of the Order did not require involvement of Ukrainian bailiffs, and hence a different procedure for its recognition and enforcement had to be applied. (Judgment of Kyiv City Court of Appeal, case No. 22-?/2690/15210/12 , 29 November 2012, available here in Ukrainian) Thus, notwithstanding that the appellate court did not find general considerations of Golosiivskyi District Court granting recognition and enforcement of a foreign court order on provisional measures to be improper and undue, further reliance on its conclusions may be ineffective.

Conclusion

The issue of recognition and enforcement of foreign court orders on provisional measures remains unresolved in Ukrainian legal environment. Both international treaties on legal assistance and the principle of reciprocity incorporated into Ukrainian procedural law provide quite an extensive scope for Ukrainian courts to make their opinion on the matter. Therefore, unless the paucity in case law is overcome, the predictability of recognition and enforcement of foreign court orders will remain vague.

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