Kluwer Arbitration Blog

# Enforcement of Worldwide Freezing Orders in Ukraine

Konstantin Pilkov (CAI & Lenard ) · Tuesday, July 29th, 2014

**I. General Aspects of Enforceability**

English Worldwide Freezing Order ("WFO") being called by Matthias Scherer and Simone Nadelhofer one of the "nuclear weapons" of commercial litigation and arbitration, is a preliminary injunction preventing a defendant from disposing of assets pending the resolution of the underlying substantive (arbitration or court) proceedings. Its issue in support of an arbitration proceeding significantly impacts further enforcement of an award. However, as WFOs are often sought without prior notice to the defendant, their recognition and enforcement may become problematic. Ukrainian courts only recently were addressed issues related to enforceability of WFOs.

There is no separate procedure for enforcement of foreign court orders on interim measures, thus formally the English WFO can be recognised and enforced as a foreign court judgement. Generally a foreign court judgment may be recognized and enforced in Ukraine either on the basis of a respective multilateral/bilateral international treaty of Ukraine, or in the absence of such treaty on the basis of the principle of reciprocity which existence is presumed by the domestic rules of civil procedure (the Code of Civil Procedure of Ukraine, the CCP). As there is no international treaty governing issues of recognition and enforcement of court judgments in civil and commercial matters between Ukraine and the United Kingdom, English court judgments are enforceable in Ukraine on the basis of the reciprocity principle.

Upon receiving an application for recognition and enforcement, the court shall notify the debtor against whom the recognition and enforcement is sought and establish a one month term for filing objections by the debtor. Upon receiving objections or upon the expiration of the term for objection, the court appoints the hearing and shall notify the parties of the place and time of the hearing at least 10 days before it takes place. During the hearing, the parties have the right to give statements and provide explanations. The court can hold the hearing and issue a ruling in absence of any of the parties, if that party was properly notified of the hearing. The court is obliged to issue its ruling within two months after the proceedings are instituted, but this term can be prolonged. The approximate time of the proceedings in the court of first instance (district court) is 2-7 months.

The law does not establish any particular terms in which the enforcement can be granted. The court is not entitled to make any changes to the foreign court judgments left to enforcement. As a WFO would be considered as a foreign court judgment, the competent Ukrainian court cannot impose any conditions of its enforcement (e.g. deposit or promise to compensate loss caused by that enforcement). Taking into account that a WFO is an interim relief and its enforcement does not

require any Ukrainian interim measures, we also believe that Ukrainian courts would not grant any additional interim relief. The ruling of the court on recognition and enforcement of foreign court judgment and arbitration award is subject to an appeal following general procedure.

However, the competent Ukrainian court may refuse to recognize and enforce a WFO upon one of the grounds listed in Article 396 of the CCP. Among those grounds there is a situation when a defending party did not have an opportunity to participate in the court proceedings because it was not properly notified of time and place of the hearing. This makes **foreign court judgments issued against individuals and legal entities which were not joined to the proceedings (non-cause of action defendants ("NCADs")), practically unenforceable in Ukraine**.

**II. Enforcement of WFOs against shares**

Even if a WFO has been issued against a cause of action defendant ('CAD') its enforcement against shares in an NCAD-resident of Ukraine, belonging to that CAD may face problems. An application for enforcement of a foreign court judgment is submitted to a general court at the location of the debtor (CAD in foreign proceedings). If the debtor has no location in Ukraine or the debtor's location is unknown, the application shall be filed with the court having jurisdiction over territory of location of the debtor's assets in Ukraine.

As follows from the case law **Ukrainian courts are reluctant to positively rule on their jurisdiction if enforcement is sought against corporate rights** (shares in Ukrainian LLCs and wholly owned subsidiaries) belonging to a foreign debtor. On 7 February 2013 the judge of Pecherskyi District Court of Kyiv City returned the application for granting leave for enforcement of the Judgment of the High Court of Justice, Queen's Bench Division, Commercial Court of London dated 23 November 2012 (claim No. 2009 Folio 1009 d), which was filed by Kazakh BTA Bank.

The application was supported with evidence that the defendant, a foreign company ZRL Beteligungs AG, was a shareholder in Ukrainian subsidiary Yupiter Trade which was located in Pecherskyi District. However, the judge ruled that *'the mere fact that a legal entity being an independent subject of commercial activity is located in administrative territory of Pecherskyi District and has the debtor among its shareholders does not prove that any of the debtor's assets are located in the territory of Ukraine'* (Ruling of Pecherskyi District Court of Kyiv City dated 7 February 2013). Similar opinion was expressed in another case upon the application of BTA Bank for granting leave for enforcement of the same judgment against Interfunding Facilities Limited, a foreign company which was the owner of the Ukrainian subsidiary MP Invest. On 30 January 2013 the judge ruled that the debtor was the subsidiary's shareholder, which however *'does not prove that the territory of Pecherskyi District is the place of location of the debtor's assets'* (Ruling of Pecherskyi District Court of Kyiv City dated 30 January 2013). In its ruling dated 18 April 2013, the Court of Appeal of Kyiv City supported that opinion. However, BTA Bank resubmitted its applications; they were approved by Pecherskyi District Court of Kyiv City. This time the courts came to an opposite opinion and granted the leave for enforcement against Interfunding Facilities Limited (Ruling of 3 June 2013) and ZRL Beteligungs AG (Ruling of 12 June 2013).

The above rulings are not mandatory to other courts and obviously do not show any strong tendency in forming unified court practice. However, they are among the few court decisions which dealt with enforcement of the English judgments against shares in NCADs in Ukraine. Thus, although there is no unified court practice of enforcement of foreign judgments or arbitration

awards against shares in NCADs belonging to foreign CADs and assets belonging to NCADs, I believe that the enforcement of a WFO is possible against the shares of the CADs in the Ukrainian NCADs, if the shares belong to the CAD directly. If the CAD is controlling the NCADs indirectly (through holding companies or nominees) those holding companies or nominees might be considered by Ukrainian courts as independent entities, not responsible for the debts of the CAD. In case a liquidator is appointed by an English Court over the CAD with power to collect in the CAD's assets, and this appointment gives him the power to act on behalf of the CAD, he can use his corporate governance power (as a representative of the shareholder in the Ukrainian holding company) to initiate the convening of the shareholders meeting and pass relevant resolutions on sale of assets of that Ukrainian holding company, but not on the collection and/or sale of assets of the Ukrainian subsidiary company owned by that holding company (unless the charter documents of the subsidiary contain special provisions, which allow the corporate decisions to be passed by the company's owner, but not the special corporate body of the subsidiary (shareholders meeting, or the special status of the subsidiary is established in the law). Normally, the shareholder meeting of the Ukrainian holding company can pass the resolution on granting a mandate to a representative of the holding company to initiate the convening of the shareholders meeting in the Ukrainian subsidiary, which than can pass resolutions on corporate matters of that subsidiary (e.g. dismissal of executive officers, liquidation of assets).

The concept of legal independence of legal entities from their shareholders in civil relations is established in Ukrainian law and strongly supported by Ukrainian courts. Thus, **unless the court judgment is entered against holding companies or nominees, the enforcement in Ukraine against their shares in NCADs can be problematic**. In case any person (liquidator or asset manager) is appointed by an English Court over the CAD and that person is acting on behalf of the CAD, his actions in a shareholders meeting in the NCAD would not be considered in any relation to enforcement, but as exercise of corporate rights.

**III. Enforcement of WFOs against assets**

Similar principles are applied to *assets in Ukraine belonging to an NCAD-resident of Ukraine*. The NCAD is considered as an independent owner of its assets, which is not responsible for any obligations of its shareholders. If statutory documents of the NCAD do not contain any specific provision making it responsible for the debts of its owner or shareholder and no special status is given to that NCAD by law, the judgment (I would remind that a WFO is considered as a foreign judgment) entered against the CAD would not be possible to enforce against the assets of NCAD – resident of Ukraine.

**IV. Case law**

There is no established court practice of enforcement of English WFOs against NCADs (its development actually started in 2012), only a few case law examples of such enforcement by the courts of Ukraine can be provided.

*BTA Bank (first case).* On 1 June 2012, Golosiivskyi District Court of Kyiv City granted recognition of the Order of the High Court of Justice, Queen's Bench Division, Commercial Court (Claim No 2009, Folio 1099) dated 12 November 2009 issued upon the request of Kazakh BTA Bank (Ruling of Golosiivskyi District Court of Kyiv City dated 1 June 2012). Although, none of the defendants had a place of location or residence in Ukraine, the Court found that one of the defendants owned shares in Ukrainian company "Maks-Vell" Medical Centers LLC, and ruled on

its jurisdiction over the case. On 29 November 2012, the ruling of the District Court was set aside by the Court of Appeal of Kyiv City. The Court of Appeal found that the applicant applied for recognition of the foreign court judgment, but not for leave for enforcement, however the District Court issued a ruling on recognition of the judgment that imposed seizure of assets, which obviously required enforcement (Ruling of the Court of Appeal of Kyiv City dated 29 November 2012). After the case had been returned, the District Court considered the application and issued a new ruling on recognition of the freezing order (Ruling of Golosiivskyi District Court of Kyiv City dated 5 August 2013). **The District Court came to a conclusion that the Order was a foreign court judgment that did not require enforcement and needed only to be recognized in Ukraine.**

*BTA Bank (second case).* On 5 August 2013, Golosiivskyi District Court of Kyiv City granted recognition of the Order of the High Court of Justice Queen's Bench Division Commercial Court (Claim No 2009, Folio 2099) dated 6 August 2010 on appointment of directors of KPMG United Kingdom PLC as asset managers of the assets of a defendant in the court case upon the claim of BTA Bank. (Ruling of Golosiivskyi District Court of Kyiv City dated 5 August 2013).

*VAB Bank Case*. Kyiv-Svyatoshynskyi District Court of Kyiv Region also issued a ruling addressing the enforceability of an English WFO in Ukraine. Initially, the claimant had requested the District Court to declare two WFOs of the London High Court of Justice enforceable. However the claimant did not request to order any protective measures against the defendants and NCADs listed in the Order. The District Court approved the request and granted leave for enforcement of the WFO of the London High Court of Justice dated 16 January 2013 in relation to a defendant and the WFO dated 2 May 2013 in relation to 13 Ukrainian companies (Ruling of Kyiv-Svyatoshynskyi District Court of Kyiv Region dated 15 January 2014).

In both BTA Bank cases, applicants applied for and obtained a mere declaration of enforceability without actually seeking to enforce the WFO against specific assets. In VAB case, the ruling only formally granted enforcement, in fact there was only a mere declaration of enforceability. We will follow those and other similar cases to reveal whether the WFOs have any effect. As for now we can see that only few courts of Ukraine are familiar with English WFOs and their enforcement in Ukraine against NCADs was not distinguished from enforcement of foreign court judgments. It is a relatively new and developing practice.

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