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Recognition and Enforcement of Foreign Arbitral Awards in Ukraine: The Impact of the New Procedural Codes

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On October 3, 2017, the Ukrainian Parliament adopted the *Law on Amendments to Codes of Commercial, Civil and Administrative Procedures of Ukraine*, an 800-pages document aimed at solving the blatant problems of Ukrainian justice by replacing the three existing procedural codes. The Law has been promulgated on November 28, 2017 and the new Procedural Codes entered into force, save for a number of aspects, on December 15, 2017 – simultaneously with the enactment of the new Supreme Court of Ukraine.

The new Procedural Codes aim, among others, at improving the procedure of recognition and enforcement of international arbitral awards. Ukraine is a signatory of the 1958 New York Convention, therefore the grounds for refusing the recognition of an award are clearly stated and in practice, such refusals are relatively rare (less than 20% according to recent data). The difficulty, however, is linked to the applicable procedure: on the one hand, the lack of experience and exposure to arbitration procedures of local judges and on the other hand, the misuse by Ukrainian obligors of the appellate procedure, which leads to two and even three different appeals against recognition decisions, on the same and erroneous grounds.

These two factors led to a relatively lengthy recognition procedure, as it usually involved the review by higher courts of the judgements rendered by lower courts (statistically there are seven court hearings, at different instances). Therefore, the recognition was often delayed for 1 or even 2 years, making the quality of enforcement rather illusory.

The provisions of the new Procedural Codes with respect to the recognition of foreign arbitral awards address some of the above mentioned issues.

Exclusive competence of the Kyiv Appellate Court – The Kyiv Appellate Court has exclusive competence for all the matters related to recognition and enforcement of arbitral awards as well as setting aside procedures on the territory of Ukraine. The Supreme Court will serve as an appellate court.

The reform is expected to enhance the specialisation of the Kyiv Appellate Court judges with arbitration related issues. This change echoes the situation that existed before the previous major judicial reform of 2004. The 2004 reform cancelled the late Soviet rule (in existence since 1988) which reserved the recognition of foreign arbitration awards to the higher *regional courts* of Ukraine (equivalent to the modern appellate courts) to the detriment of local courts. The aim of the

2004 judicial reform was to assimilate the recognition of foreign arbitration awards to that of a regular court procedure, hence attributing this competence to local courts.

Sanction of ungrounded appeals – Misuse of procedural rights is recognized to be a ground for dismissing manifestly ungrounded appeals or otherwise erroneous motions; this provision was long awaited to prevent Ukrainian obligors from multiplying appeals as a way to delay the enforcement.

2 months' term for the ordinary procedure – The maximum term of a recognition and enforcement of an international arbitral award is now limited to 2 months from the date of registration of the application with the court. Under the current procedural law, the maximum duration of such procedure was not clearly defined, leaving room for delays.

An accelerated procedure (10 days) – In the cases where the recognition is requested by the debtor, the new Procedural Codes provide for an accelerated procedure which has to be completed within 10 days.

Failure to appear in court is no longer a barrier to recognition – Provided that the obligor has been duly notified about the hearing, the failure to appear in court will not prevent the court from recognizing the award and initiating the enforcement measures. Indeed, requests for postponement of a hearing due to mere unwillingness to appear in court and without any valid excuse were often used by Ukrainian obligors as a way to delay the proceeding, at least for several months.

Calculation of interests – Any interest payments granted in the arbitral award must be calculated as of the day the enforcement measures take place. This provision is expected to minimize the financial risks for foreign applicants in case the enforcement against a Ukrainian obligor is substantially delayed. Importantly, this provision will enter into force only on January 1, 2019.

Interim measures – The list of interim measures, which can be ordered by the court during the recognition procedure is expanded. Among others, interim measures are made available against third parties and can be ordered at any stage of the procedure, both prior to and after initiating the recognition procedure.

Conclusion

The revised rules introduced by the new Procedural Codes have the potential of rendering the procedure of recognition and enforcement of international arbitral awards more efficient, fair and user-friendly. In 2017, a number of other CEE countries have also revised their arbitration acts or the procedure applicable to arbitration related issues, among them Russia, Hungary and Bulgaria. Most of these reforms are aimed at modernising national legislation to become more supportive of international arbitration but also at increasing the recourse to domestic arbitration (for example, with the creation of new local arbitration institutions and with a broader concept of arbitrability). Although each country maintains its own specificities, the timing of these reforms demonstrates that arbitration in CEE is a reality and that local companies are slowly starting to perceive arbitration as a common mechanism of resolving their disputes.


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