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Arbitration Reform in Ukraine in Action: First Results

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On 15 December 2017, the renewed Supreme Court was launched in Ukraine, which triggered the entry into force of the new amendments of, *inter alia*, Civil and Commercial Procedure Codes. Within this broader judicial reform, a number of long-awaited changes in legal framework for international commercial arbitration have been brought forward, including the following:

- reducing the number of court instances in arbitration-related matters from four to two, by courts of appeal acting now as the first instance courts;
- stipulating the principle of interpretation *in favorem validitatis*;
- empowering the courts to support arbitration through granting the interim measures, preservation and taking of evidence; and
- introducing simplified procedure of voluntary compliance with arbitral awards.

To analyse the efficiency of application of the new rules, this post is overview of the court practice from the past nine months and it will highlight the most noteworthy cases.

The Enforcement of Arbitration Agreements

Ukrainian courts have been renowned for their strict formalism. For instance, from time to time, the courts refused to enforce arbitration agreements due to the non-essential discrepancies in the name of arbitral institution. This issue had become the central one in Vilnohirske sklo LLC v Expobank CZ a.s. case, which was recently considered by the Supreme Court.

The claimant, Ukrainian entity, filed a claim to a Ukrainian commercial court over the invalidity of the mortgage agreement executed in English and Ukrainian. According to the English version of this mortgage agreement, the disputes shall be decided by the “Arbitration Tribunal of the Chamber of Commerce of the Czech Republic and the Agrarian Chamber of the Czech Republic”. Meanwhile, the official name of the institution reads as “the Arbitration Court attached to the Czech Chamber of Commerce and the Agricultural Chamber of the Czech Republic”. Vilnohirske sklo claimed that the discrepancies between the official name of arbitral institution and the one stated in the arbitration agreement are so significant that make the arbitration agreement not capable of being performed.

The first instance court disagreed, referring the parties to arbitration. The court of appeal, however, upheld the claimant’s position and sent the case back to the first instance court for consideration on merits. Expobank CZ a.s. challenged this ruling to the Supreme Court, which ultimately enforced the arbitration agreement.

The Supreme Court found that notwithstanding the existing discrepancies the parties intention to resolve the disputes under the rules of particular arbitral institution is evident. Article 22 (3) of the amended Commercial Procedure Code stipulates that any defects in the arbitration agreement and/or doubts as to its validity, operability and capability of being performed should be interpreted by the court in favour of its validity, operability and capability of being performed. Meanwhile, the court primarily derived *in favorem* presumption from Ukraine's obligation to recognise arbitration agreements under Article 2 of the New York Convention and stated that it is *also* provided in the Article 22 (3) of the Commercial Procedure Code.

Interim Measures

Before 15 December 2017 it was practically impossible to obtain interim measures and any other support of arbitral proceedings from Ukrainian courts. The arbitration reform filled the legislative gap for arbitration proceedings seated both in Ukraine and abroad.

On 9 February 2018, SoftCommodities Trading Company SA filed an application to Odesa region Court of Appeal, acting as the first instance court, for interim measures in support of arbitration initiated under the GAFTA Arbitration Rules against Elan Soft LLP. The dispute arose out of the supply contract for supply of 20 000 tons of Ukrainian wheat by several lots. SoftCommodities claimed that the parties agreed for the supply of the lot in the amount of 2500 tons, of which Elan Soft delivered 1000 tons. The other 1500 tons should have been stored in the warehouse of Ukrainian company – Davos Firm LLC. SoftCommodities, however, figured out that only 1290 tons are available in the warehouse and, therefore, initiated the arbitration claiming damages. Arguing that Elan Soft has been trying to move all wheat remaining in the warehouse out to avoid the enforcement of future arbitral award, the SoftCommodities asked the Ukrainian court for (i) freezing 1290 tons of Ukrainian wheat stored by Davos Firm LLC, and (ii) prohibiting Davos Firm LLC and Maritime Trade Port Ust-Dunaisk, the port at the location of the warehouse, to move 1290 tons of Ukrainian wheat out of the warehouse.

Under the general rule, the court seized with the application for an interim measure should consider the case *ex parte* within two days, while it may order the claimant to appear before the court in certain cases or consider the application *inter partes* in exceptional circumstances. The court decided to hear this case with the participation of all parties, including Davos Firm LLC and Maritime Trade Port Ust-Dunaisk. The court reasoned that the additional evidence as to the amount of wheat stored in the warehouse in February 2018 and its price should be lodged and analysed as well as certain issues regarding counter-security should be decided.

On 22 February 2018, the court upheld the application in full. Regrettably, the court did not provide sound reasoning to offer a clear guidance for future applications. Furthermore, the court secured the possible damages of Elan Soft by the guarantee of another Ukrainian company in the amount equivalent to the price of 1290 tons of Ukrainian wheat. The court decided that the counter-security is obligatory in this case since SoftCommodities is neither registered, nor has its assets in Ukraine sufficient for compensation of possible damages.

Elan Soft applied to Odesa region Court of Appeal for cancellation of the interim measures, however, unsuccessfully. In the meantime, Elan Soft challenged the ruling on granting the interim measures to the Supreme ?ourt. It remains to be seen whether the Supreme Court will uphold this ruling and/or clarify the test for granting the interim measures in support of arbitration.

Voluntary Compliance with an Arbitral Award

Due to foreign currency regulations, debtors encountered practical difficulties in voluntary compliance with arbitral awards. The debtor should furnish the servicing bank with the execution writ, which may be obtained as a result of recognition and enforcement proceedings. The arbitral reform resolved this problem introducing expedited procedure of recognition and voluntary compliance with the arbitral awards. The court shall consider the respective application without the participation of the parties and analyse merely the arbitrability of disputes and public policy issues.

On 4 May 2018, PJSC Centrenergo applied to Kyiv city Court of Appeal, acting as the first instance court, for recognition and voluntary compliance with the LCIA award. In this case, the tribunal dismissed the claims of Centrenergo and in a separate award ordered to repay to Mercuria Energytrading S.A. the arbitration and legal costs. On 21 May 2018, Kyiv city Court of Appeal recognised the LCIA award on costs allowing voluntary compliance therewith.

Conclusions

To streamline Ukrainian court practice in arbitration-related matters with the best international standards all participants should contribute to this process. On the one hand, the above illustrated court practice provides some reasons to hope about the tendency for efficient application of thoroughly drafted new provisions. Meanwhile, we should not undermine the significance of the fresh approach to the interpretation of old (in effect) rules. On the other hand, to build a robust and arbitration-friendly court system, the author calls Ukrainian arbitration practitioners to engage into meaningful arguments, e.g. not the ones that a negligible discrepancy in the name of institution makes the arbitration agreement incapable of being performed.

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