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Quo Vadis Supreme Court of Ukraine?

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On 9 October 2019 the Supreme Court of Ukraine [1)] (Supreme Court) rendered a decision in a case on setting aside an arbitral award that goes completely against Article 3 of the UNCITRAL Model Law on International Commercial Arbitration.

Background

All began when a US company, Altum Air Inc. (Altum Air), initiated proceedings against a Ukrainian company, Windrose Aviation Company (WINDROSE), with the International Commercial Arbitration Court at the Ukrainian Chamber of Commerce and Industry (ICAC) in accordance with the arbitration agreement contained in the contract between the two companies. The ICAC ruled in favor of Altum Air. WINDROSE did not appear in the arbitration proceedings, though they were notified according to the ICAC Rules and the Law of Ukraine on International Commercial Arbitration (Law on ICA) that in its totality reiterates the respective provisions of the UNCITRAL Model Law on International Commercial Arbitration (UNCITRAL Model Law), although it's worth to remark that Ukraine did not adopt the 2006 revised version.

Expect the Unexpected: Local Court Sets Aside the Award

WINDROSE applied to a local court for setting aside of the ICAC award, claiming they did not receive any single ICAC notification of the arbitration proceedings and that the company found out about arbitration proceedings only after receipt of the ICAC award (case No 761/17236/17).

WINDROSE alleged that all the ICAC communications, except the very last one, the ICAC's award, were not delivered in a due manner. WINDROSE claimed the ICAC communications were received by an employee who was unauthorised to collect mail. As a result, WINDROSE was not duly notified.

The WINDROSE employee authorised to receive the mail claimed he never saw any ICAC written communications. Meanwhile, WINDROSE denied that a first ICAC notification containing the statement of claim, the ICAC Rules and the recommendatory list of arbitrators had been serviced to their CEO's secretary by a DHL courier.

In turn, Altum Air referred to Article 3 of the Law on ICA stating that "any written communication is deemed to have been received if it is delivered to the addressee personally or if it is delivered at his place of business, habitual residence or mailing address", and it is completely irrelevant what employee of the addressee physically accepts the communications.

The local court took into consideration the handwriting examination of the authorised employee of WINDROSE, subpoenas (although the secretary of WINDROSE's CEO did not appear before the court), cross-examination, etc. A year and a half after the process was initiated, the local court finally decided in favour of WINDROSE and set aside the ICAC award on the basis of Article 34(2)(1)(ii) of the Law on ICA.

Turn of Events: Court of Appeal Upholds the Award

Altum Air appealed whereas WINDROSE submitted its secretary's affidavit stating the secretary had never received any ICAC notices.

The appellate court upheld the ICAC award because "WINDROSE's local acts regarding persons authorised to receive communications cannot be decisive in resolving the issue of whether a party has been duly notified of the arbitration proceedings". Furthermore, the appellate court found that,

> [a]s a proper notification the ICAC Rules and the Law on ICA do not provide for international commercial arbitration or any of the parties to submit any evidence that a written notice has been served on a party in accordance with its internal procedures, as any attempt to follow such procedures would inevitably result in impossibility of giving any written notice of the arbitration proceedings to a party that does not actually wish to participate in the arbitration proceedings. Thus, no matter which exact WINDROSE employee received a communication, the fact of delivery of a written communication to the company's place of business is a proper notification of the party, and that party shall be deemed to be duly notified of the arbitration proceedings.

Nobody Saw It Coming: The Supreme Court Sets Aside the Award

WINDROSE appealed to the Supreme Court which, in turn, decided in favour of WINDROSE for no good reason.

The Supreme Court reached two conclusions. Firstly, a delivery to an address other than the address where a company's CEO is seated, even if that address is not the official (registered) place of the company's business, does not constitute a due notification of that company. Secondly, a company shall be deemed to be duly notified if a communication is received by a person who is duly authorised by that company to receive the mail.

The Supreme Court completely ignored Article 3 of the Law on ICA that makes no reference to any authorised employee of a company or verification of seat of that company.

Moreover, the Supreme Court heeded some evidence that WINDROSE presented. This included, namely, a printout from the DHL website with a tracking code dated January 2019 matching a tracking code of the first written communication to WINDROSE sent by the ICAC, dated October 2016. It is generally known that DHL updates its database every 90 days, so one should assume that tracking codes once used are reused in course of time. But it is really striking that the Supreme Court based its ruling on the printout showing a communication with a matching tracking code that was purely national, *i.e*. it circulated only within the borders of Mexico, from *Los Mochis* to *Uruapan*, so that communication was not even sent from the territory of Ukraine. Despite these manifest discrepancies, the Supreme Court agreed with WINDROSE's assertion that the ICAC had sent its first written communication to Mexico.

In Search of Lost Reason

It is hardly understandable why the Supreme Court decided to examine some facts of the case. According to Article 400(1) of the Civil Procedure Code of Ukraine, the Supreme Court cannot establish facts or consider facts as proven if such facts were not examined by lower courts. If necessary, the case must be referred to lower courts for reconsideration.

The Court of Appeal took an approach recommended in *UNCITRAL Secretariat Guide on the Convention on the Recognition and Enforcement of Foreign Arbitral Awards* and, literally, for the first time ever in Ukrainian judicial practice explained clearly why a requirement of an authorised employee cannot be applied in consideration of issue of service of notice. In contrast, the Supreme Court reiterated a relatively new and bogus concept of due notification of a party in arbitration proceedings reflected in some judicial decisions. And in the present case, the Supreme Court not only imposed the formal requirements for service of notice, but established even more rigorous requirements than those for service of process in civil procedure in state courts.

Previous similar cases decided by the Supreme Court do not offer a satisfactory explanation for why the Ukraine's apex court took a rather inadequate approach. In case No 761/20762/15-? on recognition and enforcement of arbitral award, the circumstances of the case were quite similar. State Enterprise Scientific Research Institute Orion against whom the award was invoked claimed that security personnel authorised to receive the mail had never received any of the arbitration communications. Although the Supreme Court confirmed in its decision of 21 August 2019 that the issues of service of notice shall be governed by the rules of arbitration chosen by the parties and finally rejected to refuse recognition and enforcement of the arbitral award, the Court, nevertheless, based its decision mainly on affidavit of some employees of Orion asserting the issue of arbitration proceedings against Orion was repeatedly discussed during staff meetings, and CEO of Orion was aware of the arbitration proceedings.

In its decision of 19 June 2019 in case No 761/31470/17, the Supreme Court upheld the lower courts' position that a debtor was duly informed of the arbitration proceedings as all notifications were received by the debtor's authorised employee (the exact name of the employee figured in the case) and refused to set aside the arbitral award.

Generally speaking, judicial practice indicates that courts pay no attention to the personality of a company's employee receiving notifications from arbitrations and usually consider that the delivery to a company's place of business is in itself a due notification of that company (cases No

761/5894/17, No 796/109/2018). Unlike the viewpoint taken by the Supreme Court, the general approach of the judiciary is to refuse to carry out handwriting examination or interrogation of witnesses as not necessary for such type of cases that imply a summary procedure.

Another reason for the dramatic decision of the Supreme Court could be a peculiarity that the Supreme Court's position sometimes differs depending on the judges comprising the panel. And it happens occasionally that the Supreme Court changes its approach and renders a different decision in a similar case, this being not only a peculiarity for cases on international commercial arbitration.

Conclusion

In sum, the Supreme Court, contrary to Ukrainian and as well as international law, potentially created a legal environment for unwanted situations to occur where any debtor who does not wish to participate in arbitration proceedings simply will not receive notifications delivered to its place of business. Such debtor will always be able to say that the notification was received by an unauthorised employee. And as a result, the arbitral award should be set aside, or, if it is a foreign arbitral award, recognition and enforcement of that arbitral award should be refused due to a failure to give proper notice of the appointment of an arbitrator or of the arbitral proceedings to such debtor.

References

?1 This article refers to the Supreme Court created in the course of the judicial reform of 2016 in Ukraine.

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