Kluwer Arbitration Blog

The Pro-Arbitration Seed Was Sown in Ukraine, But Violation of Public Policy May Still Lead to a Successful Challenge

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There is still a common misconception among foreign arbitration practitioners that in post-soviet countries the courts often tend to refuse recognition and enforcement of arbitral awards based on public policy. Is this characterisation fair with respect to Ukraine?

There have been five recent cases in Ukraine on violation of public policy, with some landmark decisions coming out in 2020 and early 2021. Thus, the state of affairs in Ukraine when it comes to the public policy exception has crystallised substantially, and as will be shown in this post, it can be said that the Ukrainian courts, with limited exceptions, generally exhibit a pro-enforcement attitude towards arbitral awards.

Ukrainian Approach to Public Policy

Generally, Ukraine demonstrates a pro-arbitration approach, and especially so since December 2017, when Ukrainian arbitration law and applicable procedural rules were largely revised to introduce many long-expected changes in the field of arbitration.

Even before these revisions, Ukraine's Supreme Court has been rather reluctant to deny recognition and enforcement of arbitral awards on the basis of public policy.

Nevertheless, this does not stop debtors from relying on public policy to resist the recognition and enforcement of arbitral awards, even on grounds previously rejected by the Ukrainian courts.

For example, debtors have claimed that the following situations result in the violation of public policy of Ukraine:

- when an arbitral award states the awarded amounts in foreign currency, which allegedly contradicts Ukrainian law;
- when a debtor is a Ukrainian state-owned company and the enforcement of an arbitral award would cause suspension of its operations and insolvency, which in turn would impact the monetary interests of Ukraine and lead to economic or ecological catastrophe in the country;
- when an arbitral award does not state a Ukrainian identification code for the Ukrainian debtor, which allegedly makes impossible the correct identification of such debtor;
- when Ukrainian law does not have a similar legal concept as under the foreign law, applied by

the tribunal in the arbitral award while resolving the dispute on merits, etc.

All the debtors' allegations above on the violation of public policy were held unsubstantiated and, therefore, were not supported by the Supreme Court. The Supreme Court maintained its view with respect to each of such matters in numerous cases. So far so good!

Rare Exceptions of Successful Public Policy Defence

To the best of our knowledge, there are only a few exceptional instances in which the Ukrainian courts refused the enforcement of arbitral awards or arbitral interim decisions on the grounds that they would conflict with Ukrainian public policy. A notable example has involved Ukrainian sanctions against Russia.

First, we are going to compare approaches of the Ukrainian and the foreign courts towards the impact of sanctions on public policy. Then, we will examine the Ukrainian courts' approach with respect to the enforcement of arbitral interim reliefs, another topic that the Ukrainian courts have entertained recently.

Do Sanctions Define Public Policy?

Whether sanctions render an arbitral award unenforceable on the ground of public policy has been a long-standing subject of debate in many national courts. This has led to different approaches being adopted by states with regards to the impact of sanctions on their public policy. In 2020 there were several particularly interesting judgements rendered on this issue in different states, and Ukraine was among them.

1. *International Approach*

On 3 June 2020, the Paris Court of Appeal expressed its view that the UN and EU sanctions may be integrated into the French concept of international public policy. In contrast, unilateral sanctions against Iraq emanating from the US authorities could not define French public policy because the extraterritorial scope of the sanctions imposed by the US authorities is disputed by both the French authorities and the EU.

Other relevant steps in this regard have also been taken by the Russian Federation and its courts. In particular, on 19 June 2020, the Russian Federation enacted amendments to its Commercial Procedure Code and established the exclusive jurisdiction of Russian courts to consider disputes related to foreign sanctions against Russian individuals and entities (as well as their foreign affiliates).

Furthermore, on 12 October 2020, the Supreme Court of the Russian Federation found an ICC arbitration clause unenforceable because of the US sanctions imposed on the Russian claimant. The court found that the imposition of the US sanctions is a fundamental change of circumstances, justifying the adaptation of the arbitration clause to determine the jurisdiction of Russian courts to consider the disputes under the contract.

1. *Ukrainian approach*

It is noteworthy that the Revolution of Dignity and consequent events in 2014 prompted Ukraine to introduce economic sanctions affecting Russian individuals, businesses, and officials. This had a significant impact on the recognition and enforcement of arbitral awards in Ukraine in cases where the creditors were Russian companies under the Ukrainian sanctions.

In 2016 and 2018, there were four ICAC arbitral awards issued in *PJSC "Avia-Fed-Service" v State Joint-Stock Holding Company "Artem"*. Interestingly, in 2020 the Ukrainian courts reached the opposite decisions with regards to recognition and enforcement of these four arbitral awards.

In particular, in the first case No. 761/46285/16-c the Supreme Court held that private legal relations are independent from the political situation and, therefore, the enforcement of an arbitral award in favour of the sanctioned Russian entity does not violate public policy of Ukraine.

As of now, the above view of the Supreme Court has one exception. That is, in later cases Nos. 824/100/19, 824/174/19 and 824/101/19 between the same parties – a Ukrainian debtor and Russian creditor under the Ukrainian individual sanctions – the Supreme Court refused to recognise and enforce arbitral awards with reference to public policy of Ukraine.

What were the reasons for the opposite decisions reached in 2020? As per the Supreme Court's reasoning, sanctions themselves are not sufficient grounds to justify violation of public policy when the enforcement of an arbitral award is sought. But, the nature of contracts (i.e., the sale of dual-use items) and characteristics of the debtor (i.e., Ukrainian strategical defence enterprise) became determinative factors to find that the recognition and enforcement of the arbitral awards in these cases would constitute a violation of public policy of Ukraine.

Impact of public policy on enforcement of interim measures

The recent case law examined the issue of public policy through the lens of enforcement of emergency arbitral awards. In particular, the Ukrainian courts have refused to enforce two emergency arbitral awards on the ground of public policy of Ukraine.

JKX Oil & Gas plc et al v. Ukraine

In September 2018, the Supreme Court rejected the motion for enforcement of the SCC emergency arbitral decision, by which Ukraine was obliged to refrain from imposing royalties exceeding 28%.

The Supreme Court found that this would violate the fundamental principles of the Ukrainian tax legislation, which mandates the imposition of taxes and duties exclusively by Ukrainian laws. Accordingly, the Supreme Court found in this case that the enforcement of such an emergency arbitral award would violate public policy of Ukraine.

Everest Estate LLC et al v the Russian Federation

On 28 August 2019, following the enforcement of the arbitral award in Ukraine, the emergency arbitrator issued an interim relief banning Ukraine from compulsory sale of shares of Prominvestbank PSC, affiliated with a Russian state corporation "VEB.RF".

On 14 January 2021, the Supreme Court blocked the enforcement of the emergency arbitral award. Specifically, the court held that there exists a Ukrainian court decision, addressing the same issue as the emergency award (i.e., the Supreme Court's decision of 25 January 2019), with the former being final and binding under Ukrainian law. For this reason, the enforcement of the emergency arbitral award would contradict the binding effect of the Supreme Court's decision and, accordingly, public policy of Ukraine.

Undeniably, in light of the respective decisions of the Supreme Court, arbitration practitioners should proceed with caution when requesting the arbitral tribunal to impose specific interim measures as they could potentially be found to contradict the public policy of Ukraine. However, the general discussion on this point is far from being concluded as it remains to be seen whether the emergency arbitral award can be recognized and enforced in Ukraine under the New York Convention.

Conclusion

Overall, Ukraine follows a pro?arbitration approach when it comes to invoking public policy argument as a ground to deny recognition and enforcement of a foreign arbitral award, stepping out of it mainly with a view to Ukraine's strategic interests.

There is still, however, some room for improvement until Ukraine becomes fully effective with regards to enforcement of arbitral awards and interim reliefs, although the positive court practice in this respect is actively developing each year.

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