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Guidance from Ukraine: Are Emergency Arbitration Decisions in Investment Treaty Disputes Enforceable?

Alexey Pirozhkin · Sunday, July 25th, 2021

The institution of emergency arbitration (EA), in general, and its usage in investment treaty-based disputes, in particular, is a relatively new procedural tool. In investment disputes, EA has reportedly been carried out in practice only under the Rules of the Arbitration Institute of the Stockholm Chamber of Commerce (the "SCC Rules"). Conducting EA proceedings in investment disputes is usually associated with some procedural questions, including issues related to the jurisdiction of an EA, fairness of the proceedings given the very tight time limits, etc. Another question of major importance is whether EA decisions are enforceable at the seat and in foreign jurisdictions. This is the question I deal with here, focusing on the enforceability of EA decisions from the SCC in the Ukraine, as Ukraine is the first known jurisdiction in which attempts have been made to enforce EA decisions in investment treaty disputes. In this post I will briefly review what the law says, then how it was applied by Ukrainian courts, and finally what conclusions could be drawn from the analyzed cases.

The Law

According to Section 27 of the Swedish Arbitration Act, EA decisions are not awards on substance, and therefore could not be recognized as enforceable in Sweden. Paradoxically, SCC EA decisions may perhaps be enforced abroad. For example, under part 3A of Hong Kong Arbitration Ordinance, the award of relief through EA, whether in or outside Hong Kong, is enforceable in the same manner as orders or directions of the local court, but only with the leave of the local court. Yet, many jurisdictions' arbitration laws remain silent on the question of EA awards' enforceability.

One more debatable issue which may impact enforceability relates to terminology. Depending on the applicable arbitral rules, the EA decision could be coined as a "decision", "order", or "award". For example, almost all EA decisions in investment disputes under the SCC Rules were coined "awards". Notwithstanding this, whether terminology renders the product enforceable under the New York Convention ("NY Convention") ultimately depends on the position of the local court at the place of enforcement.

Whether EA decisions will be treated as "awards" under the NY Convention has not yet produced a uniform view amongst domestic courts. The debate boils down to whether an EA decision has

"binding effect" and should be treated with "finality". It follows from the wording of the NY Convention that once the award becomes binding, but not necessarily final, it could be recognized and enforced. It is clear that the EA awards, as any interim awards, are not final, as they could be set aside or amended by the arbitral tribunal. At the same time, they are binding for the parties when rendered (e.g. see art. 9 of the Appendix II of the SCC Rules). Binding effect of the EA awards leads to the conclusion that they should be enforceable under NY Convention.

At the end of the day, in absence of express provisions in the domestic law, it is the court at the place of enforcement that decides whether the EA decision is enforceable.

The Legal Position in Ukraine

Attempts to enforce EA decisions in investment treaty disputes have been made in two cases. In *JKX Oil & Gas plc et al. v. Ukraine* (*JKX case*) in 2018 and in *VEB.RF v. Ukraine* (*VEB case*) in early 2021, the Supreme Court rejected recognition and enforcement of two EA awards rendered under the SCC Rules on public policy grounds under the NY Convention. The bottom line is this: the court treated the EA awards as binding and final, moving ahead to hear the grounds under which such awards can be refused enforcement as outlined under Article V. Conversely, the court did not engage with an exclusionary plea, i.e. that the award cannot be enforced *per se*.

JKX case

In the *JKX case*, the EA ordered Ukraine to refrain from imposing rental payments on the production of gas by JKX's Ukrainian subsidiary in excess of the rate of 28% (applicable until 21 July 2014), as opposed to the 55% rate that was established under Ukrainian tax law afterwards.

The Supreme Court found that the EA award in fact changed the rates prescribed by the Ukrainian tax law. In view of the court it was not acceptable since according to the Ukrainian tax code taxation issues were regulated by the code and could not be established or amended by other acts. In such situation the court concluded that the EA award contradicted to Ukrainian public policy, and could not be recognized and enforced based on art. V(2)(b) NYC.

VEB case

Before VEB's application for recognition and enforcement of the EA award in Ukraine, the Ukrainian Supreme Court had already recognized and enforced in Ukraine a PCA arbitral award in another investment treaty arbitration case, *Everest Estate LLC et al. v. The Russian Federation* (*Everest Estate case*). According to the PCA award in the *Everest Estate case*, the Russian Federation as the respondent state was obliged to pay compensation for illegal expropriation of assets of the Ukrainian investors in Crimea. When applying for recognition and enforcement of PCA award the claimants requested the Ukrainian court to grant interim measures. Namely they requested the attachment of Prominvestbank PJSC shares (the Ukrainian subsidiary of the Russian state bank, VEB) as those shares were allegedly owned by the Russian Federation. The request was granted.

EA proceedings in the *VEB case* related to the mentioned decision of the Ukrainian court to attach Prominvestbank PJSC shares. The claimant – the Russian state bank VEB – requested the SCC EA, and the request was granted, to temporarily seize Ukraine from attaching shares of Prominvestbank PJSC and selling them on the auction.

Considering the background of the *Everest Estate case*, in the *VEB case* the Supreme Court found that recognition and enforcement of the EA award would *de facto* preclude the execution of the PCA award in *Everest Estate case*, which had already been enforced by the Ukrainian court. The cornerstone of the reasoning of the Supreme Court was reference to the Ukrainian Constitution, under which the basic principles of justice in Ukraine included the binding force of judicial decisions. Thus, if VEB's application to recognize and enforce the EA award was upheld, it would have undermined the binding force of the other decision of the Ukrainian Supreme Court, enforcing the PCA award, which is contrary to public policy.

On this background recognition and enforcement of the EA award was denied with reference to art. V.2(b) NY Convention.

Conclusion

The described cases illustrate that in Ukraine foreign EA decisions are considered as awards for the purposes of enforcement and therefore, NY Convention is applicable in such cases *ipso facto*. In both cases the EA decisions were designated as 'awards'. Although these awards – as all EA awards – did not decide the disputes on substance and provided only for interim relief, the courts of all instances without express analysis of the issue consistently treated the EA decisions as awards in terms of the NY Convention and directly proceeded with analysis of its provisions. In a situation when practice of enforcement of EA decisions is only emerging and there is no consistent approach as to whether EA decisions are covered by the NY Convention, any positive example, such as these Ukrainian examples, is welcomed and adds to the "arbitration friendly" status of the respective jurisdiction.

When recognition and enforcement of the EA decision in an investment treaty-based dispute is sought under the NY Convention, public policy under art. V(2)(b) may become the central ground to deny recognition and enforcement. Since the boundaries of national public policy are not fixed, a respondent state may base its objections to recognition and enforcement on a wide range of arguments. Herewith, while reviewing the arbitral awards granting monetary compensation for infringement of international investment law, more sophisticated reasoning might be required from local courts to refuse recognition and enforcement of such awards based on local public policy. EA decisions as a rule order specific performance from a respondent state which is to be implemented within its national legal framework. Hence, when it comes to reviewing such decisions, more doors are open for the local courts to explain why the EA decision and the performance it prescribes to the respondent state offends the public policy of the latter.

At the same time, one should keep in mind that the above Ukrainian cases are based on very specific circumstances. Thus, the recognition and enforcement of the EA decision in investment treaty-based dispute under the NY Convention will depend on the interpretation of the notion of public policy by courts at the enforcement jurisdiction and the nature of the relief granted by the EA. Nevertheless, the practice of conducting EA proceedings in investment disputes and

subsequently seeking the enforcement of the EA decisions is at its inception. The Ukrainian guidance may contribute to the debate on enforceability of EA decisions and the overall efficiency of using EA mechanisms in investment treaty disputes.

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