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Ukrainian Supreme Court Corrects Deficiencies in the Enforcement of ICSID Awards

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Despite the ongoing Russian full-scale invasion of Ukraine and constant terror, Ukrainian courts continue to function and deliver justice. Recently, the Supreme Court has adopted a landmark judgment regarding the enforcement of ICSID awards in Ukraine, which is set to change judicial practice going forward.

Our colleagues previously highlighted the deficiencies of the Ukrainian court practice on the enforcement of ICSID awards, namely, the erroneous application of the New York Convention. In this blog post we examine the legal framework and previous judicial practice relevant to the enforcement of ICSID awards in Ukraine and examine the consequences of the Supreme Court's most recent judgment on ICSID award enforcement.

Previous Contradictory Framework for the Enforcement of ICSID Awards in Ukraine

The primary acts in Ukraine regulating the enforcement of arbitral awards are the [Civil Procedure Code of Ukraine](#) (the “**CPC of Ukraine**”) and the [Law of Ukraine “On International Commercial Arbitration”](#) (the “**ICA Law**”). They provide for identical grounds for refusal of enforcement of arbitral awards to the ones set out in the New York Convention.

The ICSID Convention, however, establishes different mechanisms. Article 52(1) of the ICSID Convention states that “*either party may request annulment of the award by an application in writing addressed to the Secretary-General*”. Article 53(1) of the ICSID Convention further stipulates that “*the award shall be binding on the parties and shall not be subject to any appeal or to any other remedy except those provided for in this Convention*”. Finally, Article 54(1) of the ICSID Convention provides that “*[e]ach Contracting State shall recognize an award rendered pursuant to this Convention as binding and enforce [it] as if it were a final judgment of a court in that State*”.

The ICSID enforcement landscape is quite distinct to the one under the New York Convention. The ICSID Convention prescribes that annulment requests shall be directed to the Secretary-General and does not allow for any other recourse other than that provided in the ICSID Convention. According to the ICSID Convention, ICSID awards shall be treated as final judgments of a court in a state of enforcement. Thus, the ICSID Convention does not establish any grounds for the local

courts to refuse the enforcement of ICSID awards, unlike the New York Convention.

Ukrainian law does not reflect this difference and does not contain any specific procedural provisions dealing with the enforcement of ICSID awards.

This has previously led to the cases where Ukrainian courts (mistakenly) applied the New York Convention to the enforcement of ICSID awards. For instance, in the case No. 824/138/19 (the enforcement of the award in the *City-State N.V. and others v Ukraine* case) the Kyiv Court of Appeal referred to Article 53 of the ICSID Convention and concluded that “*the arbitral award is final and binding for all the parties*”. At the same time, the court mostly relied on the provisions of the New York Convention, which, luckily, has not influenced the result and the award has been duly recognised and enforced in Ukraine.

This erroneous practice is set to change following the Supreme Court’s judgment dated 2 September 2022 in case No. 824/182/21 related to the award in *Eugene Kazmin v. Republic of Latvia*, ICSID Case No. ARB/17/5.

The Supreme Court Corrects the Approach to Enforcement of ICSID Awards in Ukraine

Latvia applied to Ukrainian courts for recognition and enforcement of the ICSID Case No. ARB/17/5 award dated 17 March 2021 against Eugene Kazmin (a Ukrainian citizen).

The Kyiv Court of Appeal, which was a court of first instance hearing the application, duly granted enforcement on 18 October 2021 and observed that the terms of the ICSID Convention prevail over the terms of the New York Convention. However, the Kyiv Court of Appeal still applied Ukrainian law, namely the CPC of Ukraine and the ICA Law, to assess whether there were any grounds for refusal to recognise the ICSID award.

Appealing the ruling of the Kyiv Court of Appeal, Mr Kazmin claimed that the costs award should be refused recognition and enforcement based on Article V(1)(d) and Article V(2)(b) of the New York Convention. In response to the reliance of Mr Kazmin on the terms of the New York Convention, the Supreme Court reached the following conclusions:

1. The Supreme Court referred to Article VII(1) of the New York Convention, namely that “[t]he provisions of the present Convention shall not affect the validity of multilateral or bilateral agreements concerning the recognition and enforcement of arbitral awards entered into by the Contracting States”. Considering this provision and the fact that Latvia did not rely on the New York Convention in its application but instead relied on the ICSID Convention, the Supreme Court decided that the New York Convention does not apply and that recognition and enforcement of the ICSID award should be governed by the ICSID Convention.
2. The Supreme Court further analysed the applicability of the provisions of Ukrainian law, namely of the CPC of Ukraine and the ICA Law, which establish the grounds to refuse the recognition and enforcement of an award. The Supreme Court highlighted that, within the hierarchy of legal acts in Ukraine, international agreements are placed above domestic laws and below the Constitution of Ukraine. Thus, in respect of the grounds to refuse the recognition and enforcement of an award, the ICSID Convention should apply, but to the extent it is in line with the Constitution of Ukraine.
3. The Supreme Court highlighted that Ukrainian domestic law, including the provisions of the CPC

of Ukraine and the ICA Law, apply to regulate the procedural issues connected to the hearing of a party's application. In turn, these acts are not applicable to establish the grounds to refuse the recognition and enforcement of an ICSID award.

The Supreme Court: ICSID Enforcement Can Still be Refused on Grounds of Public Policy

Given that the Constitution of Ukraine takes precedence over the ICSID Convention, the Supreme Court considered that Ukrainian courts could refuse the recognition and enforcement of ICSID awards if such awards are contrary to the Constitution of Ukraine. By virtue of this reasoning, the Supreme Court reserved a right of Ukrainian courts to review whether an ICSID award contradicts Ukrainian public policy, even though the ICSID Convention does not prescribe such possibility.

The Supreme Court also elaborated on the essence of public policy. It stated that “*public policy means the legal order of the state, defined principles and grounds that form the basis of the existing order (related to its independence, integrity, autonomy and inviolability and basic constitutional rights, freedoms, guarantees, etc.)*”. The Supreme Court further declared that “[t]he category of public order is used not only to protect the state from such international arbitration awards that violate the fundamental principles of fairness and justice in the country of recognition and enforcement of such awards. An obviously incorrect application by the arbitral tribunal of the fundamental rules of national substantive law or a gross violation of the rules of procedural law can also lead to a violation of the public order of Ukraine and is subject to assessment by the national court”.

Hence, the concept of public policy is likely to remain an important issue for Ukrainian courts in cases regarding recognition and enforcement of ICSID awards. At the same time, over the years Ukrainian courts have developed a rather strict interpretation of public policy. The above cited definition by the Supreme Court is an example of such approach. It is therefore unlikely that many ICSID awards might be refused recognition and enforcement on public policy grounds in the future.

Positive Future Impact of the Supreme Court's Judgment

Ukrainian law does not reflect the peculiarities of the status of ICSID awards established in the ICSID Convention. This has led to situations where Ukrainian courts have reviewed such awards through the lens of Article V of the New York Convention and equivalent provisions of domestic Ukrainian law to decide whether to grant or refuse the recognition and enforcement of ICSID awards.

The Supreme Court's judgment should put an end to such practice. The Supreme Court has clearly established that neither the provisions of the New York Convention, nor equivalent provisions of domestic Ukrainian law are applicable to establish grounds for refusal of recognition and enforcement of ICSID award. Still, given that the Constitution of Ukraine has the highest legal force in Ukraine, the Supreme Court allowed the courts to review ICSID awards for conformity with the public policy of Ukraine.

Although the legal position of the Supreme Court is not binding for Ukrainian courts in other


cases, they usually tend to follow the reasoning of the Supreme Court in similar cases. Thus, it is quite likely that Ukrainian courts will not rely on Article V of the New York Convention (or equivalent provisions of Ukrainian domestic law) in future cases of the recognition and enforcement of ICSID awards.

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