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When there is liberalization of economic policies, opening doors to foreign investments, disputes and differences are bound to arise in such international contracts. In a binding arbitration agreement where one of the contracting parties is non-Indian, substantive law is non-Indian, and India is the seat and/or venue of arbitration, it is natural for the non-Indian party to seek assistance of its own solicitors or lawyers to advise it on the impact of the laws of its country. Consequently, foreign lawyers may accompany their clients to visit India for the purpose of such arbitration. If a party to an international commercial arbitration engages a foreign lawyer and if such lawyer comes to India to advise its clients on foreign law, such a foreign lawyer would not be prohibited to advise its clients while being physically present in India in the course of an international commercial transaction or arbitration.

The Supreme Court's decision seems just and fair in view of the absence of any legislation with regards to foreign lawyers practising or acting in India. In fact, the same has been recognized by the Supreme Court as it has directed the Bar Council of India, which is the rule making body on the present subject-matter, to formulate rules and regulations in this regard.[19]

19 Ibid. paras. 42, 44

EUROPE

Ukraine

Arbitration Reform: Overview of Key Changes

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At the end of 2017, Ukraine reformed its arbitration law and arbitration-related procedural legislation. This new law, in force since 15 December 2017, has filled many gaps, improved the existing procedures and provided arbitration users with new procedural tools.

The reform

The arbitration reform was a part of larger judicial reform in Ukraine, as introduced by the Law No.2147-VIII (the 'Procedural Reform Law'). Save for several provisions, the Procedural Reform Law has entered into force on 15 December 2017 and has restated the Code of Commercial Procedure, Code of Civil Procedure, Code for Administrative Court Proceedings, and amended other laws such as the International Commercial Arbitration law (the 'ICA Law').

The reform finally enables arbitration users to receive Ukrainian courts' assistance in obtaining interim measures, preserving and collecting evidence necessary for arbitral proceedings. It allows electronic execution of arbitration agreements, clarifies the scope of arbitrability with regards to several areas of disputes, and improves rules on judicial control over international arbitration.

The reform also aims to improve time efficiency in arbitration-related court proceedings and allocates international arbitration-related matters to two (previously four) court instances: the competent civil Appellate Court (designated for certain type of proceedings) and the Supreme Court of Ukraine, which started functioning on the date the Procedural Reform Law entered into force.

Arbitrability

For many years, conflicting provisions existed in the Code of Commercial Procedure (previous Article 12) and the ICA law. While the first prohibited referral of disputes arising out of public procurement contracts and certain corporate relations to arbitration, the ICA law allowed referral of any international commercial dispute to international arbitration, regardless of whether the dispute arose out of a contract, provided that (i) the place of business of at least one of the

parties was seated abroad, or (ii) at least one of the parties was qualified as an 'enterprise with foreign investment' under Ukrainian law.

The unclear scope of application of this prohibition with regard to international arbitration, as well as the lack of arbitrability rules for specific categories of dispute (such as competition, IP, security instruments, real estate, or bankruptcy disputes), led to many practical issues and uncertainty. The Procedural Reform Law has solved part of these problems and, most notably, has confirmed arbitrability of the following disputes:

- Corporate disputes arising out of contracts concluded between a legal entity and its shareholders. The wording and scope of application of this rule remains somewhat unclear, but it at least lifts the restrictions on disputes under usual share purchase agreements, previously in a grey zone;
- Civil law aspects of competition disputes. These would potentially include stand-alone contractual claims based on the breach of competition law applicable to certain contractual provisions, or follow-on damages claims caused by the infringement of competition law established by the competent anti-monopoly authority;
- Civil law aspects of disputes arising out of public procurement or privatization contracts.

All other aspects of the types of disputes listed above are now declared non-arbitrable, along with disputes regarding records in the register of real estate, IP rights, titles to security instruments and bankruptcy disputes, as well as disputes against a debtor being in bankruptcy proceedings.

Enforcement of arbitration agreements

Following the Procedural Reform Law, the Code of Civil Procedure, the Code of Commercial Procedure and the ICA Law now have identical rules on the effect of arbitration agreements on substantive claims filed before state courts.

Prior to the Procedural Reform Law, previous Article 8 of the ICA Law obliged state courts to terminate the proceedings and refer the parties to arbitration. Although this was followed by commercial courts (albeit on a different basis), civil courts simply left such claims without consideration in accordance with the respective provisions of the Code of Civil Procedure. These outcomes had a different bearing on claimant, as a termination of proceedings effectively banned it from filing the same claim again, whereas Claimant did not lose this right otherwise (i.e. in case the tribunal ultimately decided that it lacked jurisdiction). In addition, the deadline for jurisdictional objections was articulated in a different manner in all three acts. It is now clear that the substantive claim must be left by the court without consideration if the defendant raises a plea of lack of jurisdiction no later than at the time of its first submission on the merits, unless the court finds that the arbitration agreement is null and void, inoperative or incapable of being performed.

The reform encourages the courts to take a pro-arbitration approach with regard to enforcement of arbitration agreements. New express rules in codes of procedure oblige the judges to interpret any defects in an arbitration agreement, and/or doubts as to its validity, operability and capability of being performed, in favour of its validity, operability and such capability. These new rules aim to put an end to the excessive formalism of some Ukrainian judges as well as debtors' bad faith practices with regard to allegations of defect or ambiguity of an arbitration agreement.

New tools for judicial support to arbitration

The amendments to the Code of Civil Procedure and the ICA Law provide parties with new tools, which are available after the commencement of arbitral proceedings, and in particular possible requests for:

- interim measures in support of international arbitration (irrespective of the seat);
- a court order regarding the preservation of evidence necessary for arbitral proceedings (irrespective of the seat);
- judicial assistance for witness examination, evidence production, or inspection of evidence at its location (for arbitrations seated in Ukraine).

The procedure itself and all applicable standards for each of these tools are those established in civil litigation.

Improvement of judicial control over the arbitration

The Procedural Reform Law has improved and filled many gaps in the Code of Civil Procedure regarding the control of state courts over the arbitration. The Code of Civil Procedure sets out a new procedure for the recognition and enforcement of arbitral awards in

Ukraine, irrespective of the place of arbitration. It also established a new procedure for setting aside arbitral awards, including those on jurisdiction, for international arbitrations seated in Ukraine.

The grounds listed for setting aside and refusal to enforce an arbitral award set out in the Code of Civil Procedure replicates, with minor deviations, the grounds set out in Articles 34 and 36 of the ICA Law. The Procedural Reform Law strictly follows the New York Convention and UNCITRAL Model Law standards in this regard, thereby further extending their application to all foreign arbitral awards, including those not covered by the New York Convention.

New tools and opportunities

The amended Code of Civil Procedure creates a number of new possibilities for arbitration users within the judicial control over arbitration proceedings in Ukraine.

- Possibility to suspend **the setting aside proceedings and remit the award** to the arbitral tribunal in order to eliminate grounds for setting aside of the award. Prior to the Procedural Reform Law, the provisions of Article 34(4) of the ICA Law (identical to Article 34(4) of the UNCITRAL Model Law) on such remittance were not supported by corresponding procedural rules, which made their application impossible in practice;
- Applications for enforcement or setting aside of an arbitral award can be submitted to **a single court proceeding**;
- Voluntarily complying with the award. This was practically impossible prior to the reform, as Ukraine's foreign currency regulations required the debtor to provide an execution writ to its servicing bank in addition to the arbitral award itself. In order to receive such execution writ, both parties had to go through the complete recognition and enforcement proceedings before a state court. The debtor now has the option to go through a simplified judicial procedure, without the involvement of its creditor. The court control in such cases is limited to public policy and arbitrability issues. Some Ukrainian debtors have already used this opportunity to voluntarily pay awarded amounts.
- **Conversion of amounts** due under an award into Ukrainian currency only upon the creditor's application. Previously, such conversion was mandatory, which shifted all the currency risks upon the creditor.
- Possibility to **recover interest/penalties** on payments due under an arbitral award in the amount accrued until full payment. Provisions of Article 479 (4) and (5) of the Code of Civil Procedure governing this issue will however only enter into force on 1 January 2019. Prior to the reform, the lack of regulation of this issue has created an inconsistent court practice and made it rather difficult, if at all possible, for creditors to collect interest or penalties not fixed in the arbitral award as a liquidated amount. Some judges simply denied applications to collect interest, others allowed collection of interest accrued as of the date of the court ruling on enforcement of an arbitral award.

  The most extreme example of such practice is the case *Nibulon SA vs Company Rise PJSC* concerning enforcement of a GAFTA arbitral award in Ukraine. The award ordered for the payment of the principal amount of debt and interests accrued until the payment of the amount of debt. After several rounds of consideration, the Supreme Court of Ukraine in place at the time ruled that an enforcement of an award with interest, not quantified as a 'lump sum' in the text of the award, would violate Ukrainian public policy (as a state bailiff would be forced to act *ultra vires* when calculating the interest to be paid by the debtor). In June 2018, the 'new' Supreme Court came to a different conclusion and confirmed enforcement of this arbitral award in Ukraine. Interestingly, in its analysis, the Supreme Court also mentioned the not yet effective rules at Article 479 (4) and (5) of the Code of Civil Procedure, noting that the Ukrainian legislator gave a clear direction on how to approach this issue.

Other updates of the ICA Law

The ICA Law was adopted in 1994 as a *verbatim replica* of the UNCITRAL Model Law 1985, with minor deviations. The Procedural Reform Law amended several articles of the ICA Law in order to reconcile it with the new editions of the codes of procedure and to implement certain new provisions of the UNCITRAL Model Law 2006.

- **Electronic form of arbitration agreement.** Article 7 of the ICA Law now expressly allows

entering into arbitration agreement by way of exchange of electronic communications if the information contained therein is accessible so as to be usable for subsequent reference. This amendment resembles the wording of Article 7(4) (Option I) of the UNCITRAL Model Law 2006 and is generally in line with Ukrainian civil law rules on written (electronic) form of agreements as introduced in the Ukrainian Civil Code in 2015.

- **'Security for arbitration costs' for interim measures.** Now pursuant to Article 17(2) of the ICA Law, an arbitral tribunal may require an appropriate security from the party requesting an interim measure upon such application by the opposing party. If so, the arbitral tribunal may order to place the respective amount into a deposit account. This amendment has been inspired by Article 17 E of the UNCITRAL Model Law 2006 as well as by new procedural rules on 'cross-undertaking/security' that the state court may order to an applicant as a pre-requisite for obtaining interim measures.
- **Adverse inference.** Article 25 of the ICA Law now expressly allows an arbitral tribunal to draw adverse inference in case any party fails to produce (documentary) evidence upon the tribunal's order. This amendment has come as a surprise for many Ukrainian arbitration practitioners, as this issue was not widely discussed in the arbitration community. The reasons for incorporating it into the ICA Law remain unclear, but are most probably aimed at providing the arbitrators with clear legislative basis for drawing such inferences. Adverse inference is an alien concept for Ukrainian procedural law and many Ukrainian arbitrators are rather reluctant to apply it, which resulted in toothless tribunal's orders on (documentary) evidence production and granted advantage to the bad faith party in evidentiary matters.
- Clear provision on the **language of submissions** supporting an application for arbitral award enforcement. Earlier, this rule allowed an applicant to submit the arbitral award and arbitration agreement in either Ukrainian or Russian. This was particularly important for arbitral awards of the local institutions that were rendered in Russian. After the amendment, this rule prescribes submission of the documents in Ukrainian only. Despite its restrictive character, the amendment will definitely increase certainty for the applicants and avoid disputes on formal issues. Some Ukrainian judges interpreted the previous rule allowing Russian language as non-compliant with the 'official language' requirement of Article IV (2) of the New York Convention. Based on that interpretation, judges simply left respective applications without consideration and returned them to applicants as non-compliant with formal requirement rules.

Conclusion

The components of the Procedural Reform Law has solved a number of striking issues, partly by harmonizing the different legal regimes in Ukraine that interacted with arbitration (primarily civil and commercial procedures) and by introducing new procedural possibilities for users. By clarifying many uncertainties, the reform establishes an encouraging basis towards making Ukraine a more arbitration-friendly jurisdiction and an attractive place for international arbitration.