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Commentary

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By
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On 3 October 2017, the Ukrainian Parliament adopted the law No.2147-VIII (the "**Law No.2147**") amending the Code of Commercial Procedure, the Code of Civil Procedure, the Code for Administrative Court Proceedings of Ukraine and other laws. Published officially on 28 November 2017, the Law No.2147 will enter into force on 15 December 2017, same day the new Supreme Court of Ukraine will start functioning. The Law No. 2147 is a part of the ongoing judicial reform in Ukraine. It introduces important changes to the court procedures in arbitration-related matters. The Law as well adopts a number of amendments to the Law of Ukraine on International Commercial Arbitration (the "**ICA Law**").¹

These changes will fill many gaps in Ukrainian procedural legislation governing arbitration-related matters. One of them is a lack of procedural rules regulating judicial assistance to arbitration. Prior to the reform, it was impossible to obtain court-ordered interim measures in support of arbitration, or to obtain court assistance in taking evidence for arbitral proceedings. The rules on judicial control were not perfect either. They

allowed rather lengthy post-award proceedings with respect to setting aside or enforcement of an arbitral award in Ukraine. Sometimes, up to four court instances could have considered a case on setting aside or enforcement of an arbitral award, while such a case could have been remanded for reconsideration.

Furthermore, voluntary compliance with foreign arbitral awards was not possible in view of the strict foreign currency regulation. The rules governing enforcement of arbitration agreements and arbitrability were contradictory, and respective court practice was not always arbitration friendly.

Needless to say, such situation generated a number of practical problems, *inter alia* proper application of Ukraine's ICA Law (based on the UNCITRAL Model Law (1985)) and major international treaties of Ukraine, including the New York Convention 1958² and Geneva Convention 1961³ (signed and ratified by Ukraine over half-century ago).

Main Changes Related to Arbitration

In international arbitration context, the Law No. 2147 **reduces the number of court instances for all arbitration-related matters**, and introduces four major groups of amendments, purporting to:

- (I) improve the efficiency of **judicial control** over:
 - (a) recognition and enforcement of arbitral awards (including voluntary compliance with arbitral awards), and
 - (b) setting aside of arbitral awards and rulings;

- (II) fill existing gaps in matters of **judicial support** to arbitration regarding provision of
 - (a) court-ordered interim measures in support of international arbitration, and
 - (b) judicial assistance in taking and preserving evidence for arbitral proceedings.
- (III) amend and clarify existing **arbitrability** rules and improve established court approach with regard to **enforcement of arbitration agreements**.
- (IV) amend the ICA Law to reconcile it with changes introduced to the codes of procedure, as well as the rules governing the **form of arbitration agreement and some aspects of arbitration procedure**.

These rules will certainly change the arbitration landscape in Ukraine, and provide new possibilities for arbitration users. A number of changes with a particular focus on international arbitration are analyzed against their background in more detail below.

Limited Number of Court Instances

The Law No.2147 provides that only two court instances – the competent Appellate Court and the Supreme Court of Ukraine – shall exercise judicial control over and provide support to international arbitration.

The Code of Civil Procedure delegates different functions in arbitration related matters to various Appellate Courts depending on the type of proceedings (see Chart 1).

Chart 1

| Type of the proceedings | Competent Appellate Court |
|---|---|
| Proceedings on setting aside and enforcement of arbitral awards rendered in Ukraine | An Appellate Court at the seat of arbitration |
| Recognition and enforcement of foreign arbitral awards | Kyiv Appellate Court |
| Obtaining interim measures from the state court in support of arbitration | An Appellate Court at the place of arbitration or at the location of the respondent or its assets – at the claimant’s option |
| Court assistance in preserving the evidence for arbitral proceedings | An Appellate Court at the place of residence / place of business of the respondent, or at the location of evidence to be preserved, or the respondent’s assets, or the place of arbitration |
| Court assistance in taking of evidence (examination of a witness, production or inspection of evidence) by the court in aid of arbitral proceedings | An Appellate Court at the place of location of evidence (residence of the witness) |

Delegation of all arbitration-related matters to the Appellate Courts and to the Supreme Court of Ukraine will make respective proceedings more time- and cost-efficient when compared to existing judicial control over arbitration that is exercised by three (and sometimes even four) court instances, which eliminates major benefits of arbitration, and sometimes takes even more time than the arbitration itself.

The reform will partially reinstate the situation that existed before 2005, when only Appellate Courts and the Supreme Court of Ukraine considered all

arbitration-related matters. Introduction of an additional court instance for this type of cases in 2005 (first instance courts of general jurisdiction) substantially dropped the efficiency of judicial control over arbitration in terms of quality and time spent by the state courts.

However, in the context of recognition and enforcement of foreign arbitral awards the new approach will be even more efficient in a situation when the respondent is not incorporated / does not reside in Ukraine. It will allow to get rid of jurisdictional uncertainty,

which has become a common issue for enforcement of arbitral awards at the location of the debtor's assets. This was especially the case when the only asset was corporate rights in commercial companies registered in Ukraine.

I. New Procedures of Judicial Control

The Law No.2147 sets out a specific procedure for recognition and enforcement of arbitral awards in Ukraine irrespective of the place of arbitration (Chapter 3 of the Section IX of the Code of Civil Procedure), and a procedure for setting aside rulings or awards of arbitral tribunals if the place of arbitration is Ukraine (Section VIII of the Code of Civil Procedure). Prior to the reform, these matters have been considered under the procedures provided for enforcement of foreign court judgments and setting aside of domestic arbitral awards respectively.

The amended Code of Civil Procedure of Ukraine sets out the list of grounds for setting aside (Article 459) and refusal to enforce the arbitral award (Article 478) in Ukraine, which replicates (with minor deviations) the wording of Articles 34 and 36 of the ICA Law (and UNCITRAL Model Law) respectively.

The Law No.2147 establishes a procedure aiming to implement provisions of Article 34(4) of the ICA Law. Under this procedure, the court may, wherever finds this appropriate, suspend the setting aside proceedings for a period of time determined by it in order to give the arbitral tribunal an opportunity to resume the arbitral proceedings or to take such other action which, in the arbitral tribunal's opinion, will eliminate the grounds for setting aside.

In addition, the Law No.2147 solves several practical problems and provides users with additional possibilities:

Possibility of considering an application for setting aside and granting permission for enforcement of an arbitral award in a single proceeding

As regards arbitrations seated in Ukraine, an application for setting aside an arbitral award and application for enforcement of the same can now be considered in a single court proceeding, thus allowing to avoid both, parallel proceedings and suspension of enforcement of an arbitral award.

This will ensure procedural efficiency for resolving issues that are the same in essence, since the grounds for setting an award aside and refusing to recognize and enforce it are the same, and since – according to the new jurisdictional rules – both cases shall be resolved by the same Appellate Court at the place of arbitration.

The Law No.2147 provides for 30-days time-limit for setting aside proceedings, and 2-months time-limit for enforcement proceedings in the Appellate Court that may be suspended in case of need to serve subpoenas and procedural documents abroad under the international treaties ratified by Ukraine.

Possibility to comply voluntarily with an arbitral award

The Law No.2147 solves the problem of a voluntary compliance with arbitral awards, which has been a serious obstacle for Ukraine to become a pro-arbitration jurisdiction. In view of applicable currency restrictions, it is not possible to comply voluntarily with an arbitral award if the amount awarded therein is indicated in a foreign currency, since the designated payer must provide to its servicing bank an execution writ in addition to the arbitral award itself. Prior to the reform, in order to receive such execution writ both parties had to go through the complete recognition and enforcement proceedings before a state court.

The Law No.2147 has not lifted the currency restrictions, but as a compromise, has provided for a simplified procedure of issuance of execution writs upon the debtor's application. The court shall consider the debtor's application within 10-days terms in camera. The judicial control in such cases will be limited to arbitrability and public policy issues.

Possibility to convert the amount to be paid under arbitral awards

The Law No.2147 solves the currency problem in award enforcement proceedings. It provides that a conversion of the amount due under the arbitral award into a national currency of Ukraine may be granted only upon the creditor's application.

Prior to the reform, the court had to determine in its ruling on granting permission for enforcement of an

arbitral award the amount payable in the national currency of Ukraine calculated in accordance with the National Bank of Ukraine exchange rate as of the date of the ruling. The same amount in the Ukrainian national currency was also stipulated in the execution writ, and the Enforcement (bailiff) Service was entitled to recover the debtor's funds in the national currency (UAH) only. However, in the majority of cases foreign creditors did not keep an account in UAH in a Ukrainian bank, so this rendered impossible to get the awarded money from the Enforcement Service whenever the money is collected. In addition, this shifted all currency risks associated with conversion of a debt into the national currency of Ukraine upon foreign creditors.

Possibility to recover interest/penalty on payments due under arbitral awards

The Law No.2147 regulates the issue of recovery of interest/penalties on payments due under arbitral awards. It allows a domestic court to indicate in its ruling on enforcement of an arbitral award that respective interest/penalty shall accrue until a full payment of the awarded amount. Besides, the Law delegates the function of calculating such interest/penalty to the Enforcement (bailiff) Service. 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 the creditors to collect interest or penalties not fixed in the arbitral award as a liquidated amount. Some judges simply denied applications to collect the interest, others allowed collection of interest accrued as of the date of the court ruling on enforcement of an arbitral award. Even if the judge granted enforcement of the arbitral award, including the interest, as indicated in the award itself, the creditor faced practical problems with their calculation and collection by the Enforcement (bailiff) Service in view of the lack of express provisions regulating this procedure. New rules are designated to fill in these gaps and to motivate the debtors to comply voluntarily with an arbitral award, and not to defer payments or delay the enforcement proceedings.

II. New Rules for Judicial Support to Arbitration

The Law No.2147 provides parties with the opportunity that has not been available earlier: to obtain judicial

support in matters related to international arbitration to secure enforcement of a future arbitral award in Ukraine, and to preserve and collect evidence they need in arbitral proceedings, including by means of a court-ordered document production and examination of witnesses.

Possibility to obtain court-ordered interim measures in support of international arbitration

The reform introduces a long awaited amendment allowing parties to obtain interim measures in support of international arbitration. The party to arbitration may seek such measures after commencement of arbitral proceedings according to general rules governing the interim measures in civil litigation. In addition to a standard package of documents, an applicant should enclose a copy of statement of claim or a similar document triggering commencement of arbitral proceedings altogether with the proof that such document has been submitted in arbitration, and a copy of the respective arbitration agreement. The court shall consider such application within 2 days without giving notice to the parties to arbitral proceedings.

According to the amended Code of Civil Procedure, application of the above measures is subject to the same standard set forth in civil litigation: an application for interim measures shall not be granted unless non-application of such measures would complicate or make impossible the enforcement of a future judgement (an arbitral award), or effective protection of disputed or violated rights or interests of the claimant, protection of which is sought before the court.

The tentative list of possible interim measures is set out in Article 150 of the Code of Civil Procedure. However, the court is not entitled to grant interim measures, which are in substance tantamount to the subject matter of the claim.

The amended Code of Civil Procedure provides that the court can change or cancel the interim measures in support of international arbitration following the general procedure. The grounds for cancelling interim measures in aid of arbitration include the situations when the arbitral tribunal denied jurisdiction, terminated the arbitral proceedings, declined the claim, or when the applicant abandoned the arbitral

proceedings, or failed to participate in the arbitral proceedings, or any other grounds when the interim measures became unnecessary.

The applicant remains liable for any damages suffered by the respondent in connection with interim measures granted.

To ensure the respondent's right to compensation of such damages, the amended Code of Civil Procedure sets forth the concept of "cross-undertaking/security" that the court may order to an applicant as a prerequisite for obtaining interim measures. The court is obliged to order a cross-undertaking if (i) the applicant neither has a registered place of residence or business in the territory of Ukraine nor has enough assets in Ukraine to compensate for respective damages; or (ii) the court obtains evidence that the financial standing of the applicant, or its actions aimed at dissipating assets, or other actions may complicate or make impossible the enforcement of the future court decision on compensation for the respondent's damages resulting from the interim measures, in case the claim is declined.

A party can file an application for interim measures in support of arbitration before a Ukrainian court irrespective of whether the seat of arbitration is in Ukraine or abroad.

Possibility to obtain judicial assistance in preserving of evidence for arbitral proceedings

The Law No.2147 provides the arbitration-users with a new tool – preservation of evidence, necessary for arbitral proceedings, by state courts. Such procedural tool is generally available for litigants if there are grounds to believe that the respective evidence could be lost or its taking and filing could become impossible or complicated.

Articles 116-118 of the amended Code of Civil Procedure now offers this tool for arbitral tribunals and parties to arbitration. At the same time, these provisions do not expressly restrict the availability of this tool for arbitrations seated in Ukraine.

The procedure itself and all applicable standards are the same as established in civil litigation. However,

for applications in aid of arbitration it is necessary to provide the state court with a copy of the statement of claim filed in arbitral proceedings in accordance with applicable arbitration rules, and a copy of the respective arbitration agreement.

The state court shall send protocols and other materials related to preservation of evidence to the applicant for further submission to the arbitral tribunal.

Possibility to obtain judicial assistance in taking of evidence for arbitral proceedings

The Law No.2147 amends Article 27 of the ICA Law and establishes the procedure allowing to apply its provisions by the state courts.

According to the new wording of the Article 27 of the ICA Law, an arbitral tribunal or, upon its consent, a party to the arbitral proceedings may apply to the competent Appellate Court for judicial assistance in examination of a witness, evidence production or evidence inspection at its location.

In view of the ICA Law's scope of application, such assistance will be available only for arbitrations seated in Ukraine.

A national court will consider respective applications under general procedural rules pertinent to similar applications made in civil cases before a state court, but subject to certain special rules related to international arbitration and to a costs issue.

According to Article 84 of the Code of Civil Procedure, if the court grants an application for evidence production in aid of pending international arbitration, it can oblige the person possessing the evidence to produce it directly to the arbitral tribunal or to a party, which has applied to the court, for its further transfer to the arbitral tribunal. The court shall decide in its ruling on evidence production how the related costs are to be covered or advanced.

Pursuant to Article 85 of the Code of Civil Procedure, if the court grants an application for evidence inspection at the place of its location, the court shall send the protocol of inspection directly to the arbitral tribunal, or to a party that has applied to the court for its further

transfer to the arbitral tribunal. The court shall decide in its ruling on evidence inspection how the related costs are to be covered or advanced. Article 94 of the Code of Civil Procedure sets out the rules for examination of witnesses upon an application of the arbitral tribunal or, upon its consent, of the party to the arbitral proceedings. If the court grants such application, it will examine the witness following the list of questions provided by the arbitral tribunal. The parties (participants) to the arbitral proceedings may take part in the witness examination and pose questions to the witness to clarify his/her responses. The court shall decide in its ruling on summoning the witness how the witness's costs are to be covered or advanced.

III. New Arbitrability Rules and Enforcement of Arbitration Agreements

The Law No.2147 has amended and clarified existing arbitrability rules contained in the Code of Commercial Procedure of Ukraine. After many years of prohibition and uncertainty with regard to arbitrability of corporate disputes, new rules allow to arbitrate corporate disputes arising out of contracts based on an arbitration agreement concluded by respective legal entity and all of its shareholders. New arbitrability rules expressly allow referring civil law aspects of competition disputes, as well as disputes arising out of public procurement or privatization contracts to arbitration. All other aspects of such disputes along with disputes regarding records in the register of real estate, IP rights, a title to security instruments and bankruptcy disputes, as well as disputes against a debtor being in bankruptcy proceedings, are now declared non-arbitrable.

The reform also aims to improve established court approach with regard to enforcement of arbitration agreements.

The Law No.2147 eliminates discrepancies in the current procedural legislation of Ukraine and the ICA Law in situations when a party commences litigation in Ukraine in breach of arbitration agreement. According to the proposed amendment, the court must leave the claim without consideration if the defendant raises a plea that the court does not have jurisdiction not later than when submitting his first statement on substance of the dispute, unless the court finds that the arbitration agreement is null and void, inoperative or incapable of being performed.

In order to establish a general approach to enforcement and interpretation of arbitration agreements by the courts, both Code of Civil Procedure and the Code of Commercial Procedure of Ukraine now set forth that any defects in an arbitration agreement and/or doubts as to its validity, operability and capability of being performed should be interpreted by the court in favour of its validity, operability and such capability.

IV. Amendments to the ICA Law

The Law No.2147 introduces several amendments to the ICA Law. Adopted in 1994 as a verbatim replica of the UNCITRAL Model Law 1985 with minor deviations, the ICA Law remained almost unchanged up until the reform.

This time, the Ukrainian Parliament decided to add some new provisions to reconcile the ICA law with amendments to the codes of procedure, and in addition to implement some new provisions of the UNCITRAL Model Law 2006.

In particular, the Law No.2147 changes the rules of Article 7 of the ICA Law about the form of arbitration agreement. Now it expressly allows to enter into such agreement by way of exchange of electronic communications if the information contained therein is accessible so as to be useable for subsequent reference.

Article 17 of the ICA Law (interim measures of the arbitral tribunal) is supplemented by new provisions on an appropriate security that the tribunal may require from the party requesting an interim measure upon respective application of the opposing party. If so, the arbitral tribunal may order to place respective amount into a deposit account ("security for arbitration costs")

The Law No.2147 has added to Article 25 of the ICA Law a new paragraph, expressly allowing an arbitral tribunal to draw adverse inference in case any party fails to produce (documentary) evidence upon the tribunal's order.

In enforcement context, the reform has changed a requirement of the language rule in Article 35 of the ICA Law. 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.

To sum up, the Law No.2147 has solved a number of striking problems, and provided a basis for making Ukraine a more arbitration-friendly jurisdiction and an attractive place for international arbitration.

Endnotes

1. The Law of Ukraine on International Commercial Arbitration No. 4002-XII dated 24 February 1994.
2. Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958 (the "New York Convention 1958").
3. European Convention on International Commercial Arbitration (the "Geneva Convention 1961"). ■

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