

Ukraine—formalities for enforcing arbitral awards (*Ostchem Holding v Odesa Portside Plant*)

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Arbitration analysis: Olena Perepelynska, partner and head of CIS arbitration practice at INTEGRITES and president of the Ukrainian Arbitration Association, explains why the Ukrainian Supreme Court's approach in *Ostchem* establishes a new requirement in relation to certifying copies of arbitral awards for the purposes of their enforcement in Ukraine.

Ostchem Holding Ltd v Odesa Portside Plant Case No 519/15/17

What are the practical implications of the decision?

In this case, Ukraine's Supreme Court interpreted the provisions of Article IV(1)(a) of the New York Convention regarding 'duly certified copy' of an arbitral award. It came to a surprising conclusion that such a copy shall be certified 'by a person authorised by the arbitration rules or other rules to certify the original of the arbitral award, in particular, by the secretary general of the arbitral institution'.

Such an approach, in fact, established a new requirement in relation to certifying copies of arbitral awards for the purposes of their enforcement in Ukraine. For many years Ukrainian courts accepted notarised copies of arbitral awards and this practice was further reflected in Article 476(4)(1) of the restated Code of Civil Procedure of Ukraine, which now expressly allows to file 'a notarised copy of the duly authenticated original arbitral awards'. Thus, the Supreme Court's finding has opened the door to disputing the proper form of awards copies submitted in both pending and future enforcement proceedings. The decision raises questions concerning the potential practical difficulties of obtaining appropriate certification of arbitral awards in both institutional and ad hoc arbitration proceedings.

In addition, the Supreme Court clarified a 'general rule' to be followed by the award creditors when filing their recognition and enforcement applications. According to the latter the creditors shall submit:

- the duly authenticated original award or a duly certified copy thereof (in original language)
- documents containing information on proper notice of the appointment of the tribunal
- documents containing information of proper notice on date, time and venue of the arbitration hearing, which resulted in rendering of the arbitral award

While the situation with the first rule is described above, the two other rules are not reflected either in the previous or the restated edition of the Code of Civil Procedure of Ukraine, not to mention the New York Convention. The court further held that if the award debtor does not raise the issue of proper notice and does not plead that it was unable to present its case, the court should treat the application as compliant with respective requirements of the New York Convention. However, for other cases, such an approach could potentially shift the burden of proof regarding the proper notice of the appointment of the arbitrator and of the arbitral proceedings from the award debtor to the award creditor.

The Supreme Court further clarified the lower court's obligation to check ex officio compliance with public policy and arbitrability rules of the Article V(2) of the New York Convention. Indeed, despite clear provision of this article, the Ukrainian courts were reluctant to apply it if none of the parties invoked public policy or arbitrability exceptions. The Supreme Court findings in this regard should change this approach.

What was the background?

The case concerns the recognition and enforcement of a partial award on agreed terms, No 1 dated 25 July 2016, rendered in an Arbitration Institute of the Stockholm Chamber of Commerce (SCC) arbitration No V 2016/065 (SCC award). According to the award, Odesa Portside Plant was obliged to pay to Ostchem Holding Ltd US\$193,257,811.22

of undisputed outstanding principal debt, as well as US\$57,977,343.37 of undisputed penalty accrued pursuant Article 7.2 of a natural gas sale contract dated 20 January 2013, No 20/CH-36-1. In March 2017 the first instance court granted Ostchem's application on the recognition and enforcement of the SCC award and issued a respective execution writ. The Court of Appeal upheld this judgment in May 2017. Odesa Portside Plant, as well as the State Property Fund of Ukraine, challenged both judgments to the then existing third instance court, which transferred the case to the new Supreme Court in March 2018. Odesa Portside Plant raised three arguments:

- the partial award on agreed terms No 1 dated 25 July 2016 did not become binding, as it challenged the final award in the same case in the seat of arbitration
- the enforcement of the SCC award would violate public policy of Ukraine
- the court of lower instances breached the procedure rules when failed to join the State Property Fund of Ukraine and Ukraine's Cabinet of Ministers to the proceedings

What did court decide?

The Supreme Court first analysed various aspects of the application of the New York Convention, including requirements to the documents to be submitted by the award creditor and respective duties of the court.

It found that Ostchem failed to submit the original arbitral award or its copy certified by a person authorised to such certification by the arbitration rules or other rules, in particular by the secretary general of the arbitral institution. This led the Supreme Court to a conclusion that the application did not meet the established form requirements and should have been left without consideration by the court of first instance.

The Supreme Court also held that the lower instance courts failed to analyse whether the enforcement of the SCC award would not violate public policy of Ukraine, and if the subject matter of the dispute was arbitrable under Ukrainian law.

The Supreme Court partially upheld the cassation appeal of the State Property Fund and found that the court should have analysed the fund's arguments as to violation of its rights and interests by the enforcement of the SCC award.

However, it rejected the fund's and Odessa Portside Plant's main argument that the award had not become binding. The court held that the challenge of the final award in the case did not affect the binding nature of the SCC award, as the former concerned the amounts of penalties not even considered in the latter.

Based on these grounds, the court quashed both lower court judgments and remitted the case for new consideration to the first instance court.

Interviewed by Kate Beaumont.

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