

# Ukraine Reforms its Arbitration-Related Procedural Legislation



Olena S. PEREPYLYNSKA  
is a partner at Integrites

**A**lthough Ukraine's law on international arbitration is based on the *UNCITRAL Model Law* (1985) and Ukraine is a party to all major international treaties in the field of arbitration, its procedural legislation for arbitration-related matters has always been incomplete. Lack of procedural rules for support of international arbitration made it almost impossible in practice to obtain any judicial assistance from local Ukrainian courts, including interim measures in aid of arbitration or gathering the evidence for arbitral proceedings. The existing rules regarding enforcement of arbitration agreements are contradictory and the respective court practice is not always pro-arbitration.

Such a situation did not allow Ukraine to become more arbitration friendly country and resulted in an outflow of arbitrations involving Ukrainian parties to other jurisdictions. To solve this problem the Ukrainian state authorities and arbitration community launched several task forces to elaborate proposals aimed at improving Ukrainian procedural legislation in the field of judicial control over and support to international commercial arbitration. The latter included the Working Groups of the Ukrainian Arbitration Association, which the author had the honor to chair, ICC Ukraine and those of the Ministry of Economic Development and Trade of Ukraine as well as the Council for the Judicial Reform of Ukraine. Interesting enough, the proposals elaborated by the arbitration community of Ukraine were taken into account and actively used by the working groups launched by the state authorities.

Given the different scope of reforms elaborated by all those groups, their respective drafts are at differ-

Lack of procedural rules for support of international arbitration made it almost impossible in practice to obtain any judicial assistance from local Ukrainian courts, including interim measures in aid of arbitration or gathering the evidence for arbitral proceedings

ent stages of adoption. This article will focus only on the draft law already registered with the Ukrainian Parliament.

## Draft Act No.4351: key changes

On 31 March 2016 the *Draft Act on Introduction of Amendments to Certain Legislative Acts of Ukraine on the Matters of Judicial Control and*

*Support of International Commercial Arbitration* (Draft Act, No.4351) was registered with the Verkhovna Rada of Ukraine. The author of this article is a member of the Draft's team of authors.

The Draft No.4351 is aimed at ensuring conditions for development and effective functioning of international arbitration in Ukraine; eliminating regulatory discrepan-



cies and obstacles to the development of pro-arbitration practice by state courts; creating a positive image of Ukraine as an arbitration-friendly jurisdiction.

In summary, Draft Act No.4351 contemplates two major groups of amendments, purporting to: (1) improving the efficiency of judicial control concerning (a) recognition and enforcement of international arbitration awards and (b) setting aside international arbitration awards and rulings; (2) fill existing gaps in matters of judicial support to international arbitration regarding provision of (a) court-ordered interim measures in support of international arbitration and (b) judicial assistance in taking of evidence for arbitral proceedings.

In addition, it will amend existing arbitrability rules contained in the procedural code of Ukraine and



In order to establish a general approach of the courts to enforcement and interpretation of arbitration agreements, the Draft provides that any defects in the 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 capability of being performed

improve the court approach with regard to the enforcement of arbitration agreements.

### Limited number of court instances

Draft Act No.4351 provides that all matters of judicial control over and support to international arbitration shall be considered by two court instances — the Kiev City Appellate Court and the High Specialised Court of Ukraine for Civil and Criminal Cases.

This will make respective proceedings more time-efficient and cost-efficient, as existing judicial control over arbitration by three (and sometimes even four) court instances eliminates major benefits of arbitration, and sometimes takes even more time than the latter.

### Pro-arbitration approach to arbitration agreements

Draft No.4351 eliminates discrepancies in the current procedural legislation of Ukraine for 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 the 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 of the courts to enforcement and interpretation of arbitration agreements, the Draft provides that any defects in the 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 capability of being performed.

### Improved arbitrability rules

Draft Act No.4351 eliminates discrepancies in Ukrainian legislation related to the arbitrability of disputes and establishes a general rule that the parties may refer to domestic or international commercial arbitration a dispute which falls under jurisdiction of civil or commer-

cial courts and in respect of which the parties may enter into a settlement agreement, unless otherwise provided by the law. So in practice, this will entail application of the special arbitrability rules provided by the *On International Commercial Arbitration Act* and the *On Domestic Arbitration Courts Act of Ukraine*, as well as a few other special laws allowing the referral to arbitration of certain domestic disputes (e.g. laws related to financial restructuring, privatization and Crimea).

### New procedures of judicial control

Draft Act No.4351 sets out specific procedure for recognition and enforcement of arbitral awards in Ukraine irrespective of the place of arbitration, and a procedure for setting aside rulings or awards of arbitral tribunals if the place of arbitration is Ukraine. These matters are currently considered under procedures provided for enforcement of foreign court judgments and setting aside of domestic arbitral awards, respectively.

In particular, Draft No.4351 establishes a procedure for making of court decisions concerning rulings of arbitral tribunals on their jurisdiction (Article 16(3) of the *On International Commercial Arbitration Act*) which is currently not regulated.

This Draft establishes a procedure to implement provisions of Article 34(4) of the *On International Commercial Arbitration Act*, under which the court may, where it finds it 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 as, in the arbitral tribunal's opinion, will eliminate the grounds for setting aside.

In addition, Draft No.4351 solves several practical problems and provides the users with additional possibilities:

#### 1) Possibility to consider the matters of setting aside and enforcement of an arbitral award in the same proceedings

With a view to procedural economy, Draft No.4351 provides for the possibility of considering applications for setting aside and granting

permission for enforcement of an arbitral award jointly in the same proceedings, since the grounds for setting an award aside and refusal of its recognition and enforcement are the same. Draft No.4351 provides for the same time-limit for both proceedings in the Kiev City Appellate Court — two months, which will be suspended in case of need to serve subpoenas and procedural documents abroad under international treaties ratified by Ukraine.

#### 2) **Possibility to waive the right for recourse against arbitral awards**

Under Draft No.4351, as in many developed pro-arbitration jurisdictions, the parties have the possibility to waive their right for recourse against arbitral awards in state courts. In case of such a waiver, judicial control will be limited to the stage of enforcement of the arbitral award.

#### 3) **Possibility to voluntary comply with an arbitral award**

Draft No.4351 solves the problem of voluntary compliance with arbitral awards. Since Draft No.4351 is not aimed at amending currency restrictions, as a compromise it provides for a simplified procedure of issuance of execution writs upon the debtor's application.

#### 4) **Possibility to convert the amount to be paid under arbitral awards**

Draft No.4351 solves the problem of the currency of payment pursuant to an arbitral award. It provides that conversion of the amount to be paid under the arbitral award into national currency of Ukraine or a freely converted currency may be made only pursuant to the creditor's relevant application.

#### 6) **Possibility to recover annual interest on payments due under arbitral awards**

Draft No.4351 regulates the issue of recovery of annual interest on payments due under arbitral awards. Draft No.4351 defines the court's powers and the procedure for calculation of amount of annual interest pursuant to an arbitral award accrued as of the date of the ruling on recognition and enforcement of an arbitral award.

Draft No.4351 provides the parties with the earlier unavailable opportunity to obtain judicial support in matters related to international arbitration irrespective of whether the seat of arbitration is in Ukraine or abroad

## Judicial support irrespective of the seat of arbitration

Draft No.4351 provides the parties with the earlier unavailable opportunity to obtain judicial support in matters related to international arbitration irrespective of whether the seat of arbitration is in Ukraine or abroad.

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

Draft No.4351 provides for the possibility to submit a request for interim measures in support of international arbitration after commencement of arbitral proceedings. In this matter the Draft follows the logic of the procedural legislation of Ukraine, according to which such interim measures may be obtained only after the claim has been submitted.

The exceptions provided under the procedural legislation of Ukraine as to application of interim measures prior to the submission of a claim do not apply to a case in international arbitration.

According to the Draft, application of the above measures is subject to the same standard as established for granting interim measures in course of obtaining a permission to enforce an arbitral award (Article 394 of the *Civil Procedure Code of Ukraine*): whenever failure to apply such measures would complicate or make the enforcement of the future arbitral award impossible.

Draft No.4351 introduces the concept of "cross-undertaking/security" (a security transferred to the deposit account of the court, or a bank guarantee), provision of which by the applicant is a pre-requisite for obtaining interim measures.

The Draft provides that change or discharge of the interim measures in support of international arbitration shall be conducted subject to general procedure established under Article 154 of the *Civil Procedure Code of Ukraine* with certain peculiarities which take into account the specific nature of international arbitration and are determined to prevent any abuse on the part of the applicant after interim measures were granted to the latter.

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

Draft No.4351 establishes the procedure for implementation of the provisions of Article 27 of the *On International Commercial Arbitration Act*, according to which the arbitral tribunal or, upon its instructions, the party to arbitral proceedings, may submit an application to the state court for assistance in taking of evidence for arbitral proceedings.

It provides that the court assistance in taking of evidence in support of international arbitration shall be granted by the same procedure as set out under Article 417 of the *Civil Procedure Code of Ukraine* for execution of rogatory letters of foreign courts with certain peculiarities which take into account the specific nature of international arbitration.

#### **New court fees**

Taking into account the complexity of the issues related to international commercial arbitration, the Draft provides for quite high court fees for this category of cases: for consideration of the application for interim measures in support of international commercial arbitration — 40 statutory established minimum wages (SEMW, which as for 01.09.2016 is UAH 1,450 (approximately USD 55)), for submission of a request for court assistance in taking of evidence — 20 SEMW, for consideration of an application for setting aside of rulings and awards of international commercial arbitral tribunals — 2% of the amount of claim brought to arbitration, but at least 12 SEMW and no more than 120 SEMW. The only exception as to court fees was made for consideration of applications for recognition and enforcement of awards of international commercial arbitral tribunals — 1 SEMW.

#### **Conclusions**

To sum up, the amendments proposed by Draft Act No.4351 will, if adopted, allow many existing problems to be solved and to make Ukraine more arbitration friendly jurisdiction. Those amendments are long-awaited and the Ukrainian arbitration community hopes that they will be adopted soon by the Ukrainian Parliament.

END 