12th
Edition

2018-2019

The Baker McKenzie **International Arbitration Yearbook**

Ukraine

Ukraine

Ihor Siusel,[1] Kseniia Pogruzhalska,[2] Olesya Omelyanovich[3] and Nataliya Lipska[4]

A. Legislation and rules

A.1 Legislation

Ukraine is a civil law country and thus, the issues of international arbitration are governed primarily by (i) international treaties, both multilateral and bilateral, (which, upon their ratification by the Verkhovna Rada of Ukraine (Ukraine's parliament), have priority over domestic legislation), and (ii) domestic legislation. Court precedents are not considered to be the source of binding law in Ukraine, however, the courts of lower instances shall give due regard to the conclusions of law made by the Supreme Court in its decisions.

With regard to the international treaties, Ukraine is a party to the New York Convention, the Geneva Convention, the ICSID Convention and a number of bilateral investment treaties.

In respect of domestic legislation, international arbitration in Ukraine is primarily governed by the Law of Ukraine "On International Commercial Arbitration" ("Arbitration Law"), dated 24 February 1994, which closely follows the UNCITRAL Model Law as of 1985.

---

[1] Ihor Siusel is a partner in Baker McKenzie Kyiv office. He advises and represents clients from various industries in domestic and international arbitration and litigation, recognition and enforcement of arbitral awards, enforcement of court judgments and bankruptcy proceedings. Ihor is a member of the Ukrainian Bar Association and the Ukrainian Arbitration Association.

[2] Kseniia Pogruzhalska is a senior associate in Baker McKenzie Kyiv office and a member of the Firm's Global Dispute Resolution and Energy, Mining and Infrastructure Practice Groups. Kseniia is a member of the Ukrainian Arbitration Association.

[3] Olesya Omelyanovich is a junior associate in Baker McKenzie Kyiv office and a member of the Firm's Global Dispute Resolution Practice Group.

[4] Nataliya Lipska is a legal clerk in Baker McKenzie Kyiv office and a member of the Firm's Global Dispute Resolution Practice Group.

In addition to the Arbitration Law, international arbitration is also regulated by the Civil Procedural Code of Ukraine and the Commercial Procedural Code of Ukraine ("Procedural Codes"). The Procedural Codes, as amended in 2017, provide significant improvements to the arbitration regime in Ukraine.

In particular, the Commercial Procedural Code of Ukraine provides for a broad list of arbitrable matters in Ukraine. For instance, it directly provides for arbitrability of corporate disputes (i.e., disputes between members (shareholders) of the legal entity or between the legal entity and members (shareholders) arising out of or in connection with establishment, activity, management or termination of the legal entity, provided that there is an arbitration agreement between the legal entity and all its members (shareholders)), as well as disputes arising from privatization, public procurement, competition and intellectual property rights (including copyright disputes).

Besides, the Commercial Procedural Code of Ukraine provides for the presumption of validity and enforceability of the arbitration agreement. In particular, any inaccuracies in the text of the arbitration clause (agreement) or doubts about its validity and enforceability shall be interpreted by the national courts in favor of its validity and enforceability.

Moreover, the Civil Procedural Code of Ukraine establishes the legal framework for effective support of international arbitration by the national courts. In this respect, the Civil Procedural Code of Ukraine provides for a number of tools in support of arbitration, namely, (i) application of interim measures in support of arbitral proceedings (which include, among others, freezing of the funds of the counterparty, prohibition against taking certain actions by counterparty or third party and transfer the items in dispute to the third party for storage), (ii) court assistance in taking evidence in support of arbitral proceedings, including examination of witnesses, (iii) inspection of evidence at the place where evidence is located, and (iv) securing evidence in support of arbitral proceedings. The above tools

are applicable either on the motion of the arbitral tribunal or on the initiative of the party to arbitration proceedings after the dispute is referred to arbitration. As a general rule, the procedure for application of the above tools is similar to the procedure applied in the national civil proceedings with due regard to the specificities noted above.

The Civil Procedural Code of Ukraine also provides for detailed regulation of the proceedings on recognition and enforcement of the arbitral awards, as well as the proceedings on setting aside the arbitral awards. In this respect, it is noteworthy that the Civil Procedural Code of Ukraine, as amended in 2017, provides for two levels of proceedings on recognition and enforcement of the arbitral awards, as well as two levels of proceedings on setting aside the arbitral awards. Thus, such cases are considered by the courts of appeal acting as the courts of first instance. The respective decisions of the courts of appeal may be further challenged with the Supreme Court, which renders final decisions on these matters.

With regard to recognition and enforcement, the Civil Procedural Code of Ukraine also establishes the expedient procedure for recognition and enforcement of the arbitral awards in Ukraine on the initiative of the debtor under the award. In that case, the application for recognition and enforcement of the arbitral award shall be considered by the court within 10 days of submission of the respective application. In contrast, the proceedings for recognition and enforcement of the arbitral award under the general procedure, initiated by the party in favor of which the arbitral award was rendered, may take up to two months in the court of first instance only.

Furthermore, the Civil Procedural Code of Ukraine provides for separate regulation of the procedure on recognition of arbitral awards that do not require enforcement (e.g., the arbitral awards regarding invalidation of the agreements).

It is also noteworthy that, at the end of 2017, the Law of Ukraine “On enforcement proceedings” and the Civil Procedural Code of Ukraine

were supplemented with the provisions that explicitly grant the authority to the enforcement officers to calculate under the arbitral award the interest that accrues until the date of the full payment. The respective amendments overcome the material gap in the legal regulation of Ukraine, which was often referred to by the Ukrainian courts as a ground for denial of recognition and enforcement of the arbitral awards that provided for accrual of the interest until the date of the full payment, on the basis that enforcement of such awards violated the public order of Ukraine. The respective amendments became effective on 1 January 2019.

The above recent novelties in Ukrainian legislation not only improve the uniformity and predictability of the proceedings on recognition and enforcement in Ukraine of the arbitral awards rendered outside of Ukraine but also make Ukraine a more attractive forum for arbitration of commercial disputes.

A.2 Institutions, rules and infrastructure

The Arbitration Law provides for two arbitration institutions in Ukraine that function at the Ukrainian Chamber of Commerce and Industry (the "UCCI") — the International Commercial Arbitration Court at the UCCI (the "ICAC") and the Ukrainian Maritime Arbitration Commission at the UCCI (the "UMAC"). The statutes of both institutions are set forth in the annexes to the Arbitration Law.

The ICAC is a permanently functioning arbitral institution acting in accordance with the Arbitration Law, the Statute of the ICAC (dated 24 February 1994), and the Rules of the ICAC (approved on 27 July 2017, effective as of 1 January 2018).

The UMAC is a permanently functioning arbitral institution acting in compliance with the Arbitration Law, the Statute of the UMAC (dated 24 February 1994), and the Rules of the UMAC (approved on 27 July 2017, effective as of 1 January 2018), which resolves the disputes that arise out of, or in connection with, contractual and other civil relations

in the area of merchant shipping, regardless of whether the parties are Ukrainian or foreign entities.

Parties to a dispute may agree to refer the dispute to *ad hoc* arbitration, for which purpose an *ad hoc* arbitral tribunal may be formed. In that case, the ICAC may act as an appointing authority in accordance with the UNCITRAL Rules and provide organizational assistance in arbitral proceedings on the basis of its separate Rules of Assistance approved by the decision of the Presidium of the UCCI, dated 27 October 2011.

The ICAC list of arbitrators includes arbitrators from 34 countries including Austria, Croatia, the Czech Republic, France, Germany, Hungary, Latvia, the Netherlands, Norway, Poland, the Russian Federation, Slovakia, Sweden, the United Kingdom and the United States.

B. Cases

B.1 Enforcement of arbitral awards that provide for accrual of interest until the date of the full payment does not violate the public order of Ukraine

Recent court practice in Ukraine affirmed that the enforcement of the arbitral awards, according to which the prevailing party is entitled to interest that accrues until the date of the full payment under the award, does not violate the public order in Ukraine and, therefore, such awards shall be recognized and enforced by the Ukrainian courts. The above follows from the decision of the Grand Chamber of the Supreme Court rendered on 15 May 2018 in Case No. 759/16206/14-ц.

In this case, in 2010, the companies NIBULON SA ("NIBULON") and PJSC Company Raise ("PJSC) entered into several agreements, which provided for dispute resolution by GAFTA. Due to non-performance of the contractual obligations by PJSC, NIBULON initiated the arbitral proceedings. On 23 May 2014, the board of appeal of GAFTA rendered the final decision, according to which

PJSC was ordered (i) to pay the sum in the amount of USD 17,536,000 as a compensation for damages, and (ii) to pay interest on the above amount calculated quarterly at a rate of 4%, from 11 January 2011 until the date of the full payment. Due to non-compliance of PJSC with the GAFTA award, in September 2014, NIBULON applied to the Ukrainian courts for recognition and enforcement of the respective award.

Following four remittals of the case to the lower courts for reconsideration, on 15 May 2018, the Grand Chamber of the Supreme Court rendered a final decision and granted recognition and enforcement of the respective award in Ukraine.

The main issue in the case was whether enforcement of the arbitral award, which provided for the accrual of interest until the date of the payment, violated the public order of Ukraine considering that the enforcement officers under Ukrainian law are not explicitly authorized to calculate such interest as provided in the award.

In this regard, the Grand Chamber of the Supreme Court held that the respective award shall be enforced and recognized in Ukraine because (i) the award does not contain any ambiguity with respect to the calculation of the interest awarded to the prevailing party (i.e., the award explicitly indicates the amount on which the interest shall accrue, period of interest accrual and interest rate), and (ii) the calculation of interest under the award by the enforcement officers in the course of the enforcement proceedings shall not be construed as exceeding their authority. Additionally, the Supreme Court also took into account that, after the amendments to the Law of Ukraine "On enforcement proceedings" and the Civil Procedural Code of Ukraine will become effective on 1 January 2019, the enforcement officers will be explicitly granted with the authority to calculate the interest that accrues until the date of the full payment under the award.

Therefore, it follows from this decision that the arbitral awards that provide for the accrual of interest until the date of full payment under the award are enforceable in Ukraine.

B.2 Enforcement of arbitral awards that provide for payment of debt for the supplies to the Crimea annexed by the Russian Federation does not violate the public order of Ukraine

Recent court practice in Ukraine affirmed that the Ukrainian courts do not deny enforcement and recognition of the arbitral awards based on the mere fact that the arbitral awards provide for the payment of the debt to Crimea, which has been annexed by the Russian Federation. The above follows from the decision of the Supreme Court dated 23 July 2018 in Case No. 796/3/2018.

On 31 January 2012, the consortium consisting of the companies Posco Daewoo Corporation, an assignee of Daewoo International Corporation ("Daewoo"), Hyosung Corporation ("Hyosung"), Krymelectrovodmontazh LLC ("Krymelectrovodmontazh") and Ukrainian state enterprise NEK Ukrenergo (Ukrenergo) concluded an agreement, which provided for provision of services and supply of equipment to the Crimea. According to the supply agreement, the parties agreed to refer all disputes to VIAC. In pursuance of the respective supply agreement, in the period between August 2013 and February 2014, the consortium supplied the equipment to the Crimea, however, Ukrenergo failed to pay for the respective supplies. In view of the above, Daewoo and Hyosung initiated the debt recovery arbitral proceedings in VIAC. On 19 September 2017, VIAC rendered the final award in the case, according to which Ukrenergo was obliged to repay Daewoo and Hyosung the sum in the amount of USD 2,058,683 for unpaid supplies to the Crimea under the supply agreement.

Due to the non-compliance of Ukrenergo with the award, in January 2018, Daewoo and Hyosung applied to the Ukrainian courts for recognition and enforcement of the VIAC award. The Court of Appeal, acting as the first-instance court, satisfied the application and granted recognition and enforcement of the respective arbitral award in Ukraine.

Ukrenergo appealed the respective decision of the first-instance court to the Supreme Court asserting that recognition and enforcement of the VIAC award violates the public order of Ukraine in view of the following: (i) payment under the supply agreement for equipment that was supplied to the annexed Crimea will *de facto* constitute financing of terrorism, and (ii) enforcement of the arbitral award against Ukrenergo may lead to the financial difficulties of the only energy state enterprise in Ukraine that may result in its inability to ensure reliable operation of the power system of Ukraine, which poses a threat to the national security and economy of Ukraine.

The Supreme Court declined the above arguments of Ukrenergo as ungrounded and upheld the decision of the first-instance court on recognition and enforcement of the VIAC award in Ukraine. In this respect, the Supreme Court noted that the mere fact that the equipment under the supply agreement was supplied to the annexed Crimea does not imply that payment under such agreement will be used for financing terrorism. Therefore, the enforcement of the award that provides for the payment of the debt under such supply agreement does not violate the public order of Ukraine. Additionally, the Supreme Court noted that enforcement of the arbitral award against the state enterprise, as such, does not violate the public order of Ukraine.

The above shows that the Ukrainian courts do not consider that the enforcement of the arbitral awards that provide for the payment of debts to the annexed Crimea violates the public order of Ukraine.

B.3 Arbitration agreement of the parties does not impede bringing a counterclaim by the respondent if the respective right is provided for by the applicable arbitration rules and was not waived by the parties in the arbitration agreement

Recent court practice in Ukraine affirmed that the arbitration agreement of the parties does not impede bringing a counterclaim for joint consideration with the principal claim by the respondent if such a

right is provided for by the applicable arbitration rules and was not waived by the parties in the arbitration agreement. The above follows from the decision of the Supreme Court dated 04 October 2018 in Case No. 796/32/2018.

On 25 October 2010, the companies, CJSC Belarusian Oil Company ("CJSC") of the Republic of Belarus and PJSC Ukrtransnafta ("PJSC") of Ukraine entered into the contract, which provided for dispute resolution by the arbitral tribunal at the location of the respondent. Therefore, the parties agreed that PJSC shall bring its claims against CJSC before the International Arbitration Court at the Belarusian Chamber of Commerce and Industry (the "Belarusian Tribunal"), whereas CJSC shall bring its claims against PJSC before the International Commercial Arbitration Court at the Ukrainian Chamber of Commerce and Industry (the "Ukrainian Tribunal"). Due to non-performance by CJSC of its obligations under the contract, PJSC brought a claim against CJSC Belarusian Oil Company before the Belarusian Tribunal. In its turn, CJSC filed the counterclaim against PJSC with the same arbitral tribunal. In the arbitral award, the tribunal ordered PJSC to repay in favor of CJSC the sum in the amount of USD 7,856,649.92. In February 2018, CJSC applied to the Ukrainian courts for recognition and enforcement of the respective arbitral award.

PJSC objected to recognition and enforcement of the respective award on the basis that composition of the arbitral tribunal and the arbitral proceedings did not comply with the arbitration agreement of the parties (article V(1)(d) of the New York Convention) as CJSC under the arbitration agreement should have referred any claims against PJSC to the Ukrainian Tribunal.

The main issue was whether the counterclaim brought by CJSC was properly considered jointly with the principal claim by the Belarusian Tribunal or it should have been brought separately before the arbitral tribunal at the location of the respondent (i.e., before the Ukrainian Tribunal) as provided by the arbitration agreement of the parties.

Upon consideration of the application for enforcement, the court of appeal, acting as the first instance court, granted recognition and enforcement of the arbitral award. The respective decision was upheld by the Supreme Court.

In this respect, the Supreme Court held that the Belarusian Tribunal was competent to consider the respective counterclaim of CJSC as the Belarusian arbitration rules, under which the principal claim was brought, provide for the right of the respondent to bring a set off counterclaim for compulsory joint consideration with the principal claim and the respective right was not waived by the parties in the arbitration agreement.

This case shows that the Ukrainian courts will uphold the arbitration agreement between the parties to resolve disputes at the location of the respondent does not prevent the bringing of a counterclaim for joint consideration with the principal claim by the respondent, if such a right is provided by the applicable arbitration rules and was not waived by the parties in the arbitration agreement.