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A Review of Arbitration Proceedings in Ukraine

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In recent times, Ukraine has enjoyed an increase in bilateral trade with Singapore, [1] as well as with other countries. As a natural consequence, there is a distinct increase in international contracts with a Ukrainian party that stipulate in their dispute resolution contracts Ukrainian arbitral institutions. In this article, we provide a brief review of the arbitration norms and approaches which are being used today in Ukraine.

Based on the 2017 amendments to the Law of Ukraine on International Commercial Arbitration [2] (**ICA**) and the Civil Procedure Code of Ukraine (**CPC**), as well as the 2020 amendments to the Rules of International Commercial Arbitration Court at the Ukrainian Chamber of Commerce and Industry (**ICAC Rules**), it is justified to conclude that Ukraine is clearly an environment where arbitration is embraced as a significant component of dispute resolution.

Arbitration Laws in Ukraine

The ICA is considered to be the main piece of Ukrainian legislation governing arbitration of an international nature. It has adopted most of the provisions of the UNCITRAL Model Law on International Commercial Arbitration (**UNCITRAL Model Law**). However, there are still some minor differences. An important one is that the ICA and the UNCITRAL Model Law have different approaches regarding identifying the scope of their application. To clarify, the ICA itemises specific types of disputes which qualify for referral to international commercial arbitration subject to an agreement between the parties (e.g. disputes resulting from contractual and other civil law relationships arising in the course of foreign trade [3]), whilst the UNCITRAL Model Law defines the term “international” arbitration (e.g. the parties to an arbitration agreement have, at the time of the conclusion of that agreement, their places of business in different states [4]). The specific types of disputes which are itemised by the ICA are divided into two respective categories:

1. Disputes resulting from contractual and other civil law relationships arising in the course of foreign trade and other forms of international economic relations, provided that the place of business of at least one of the parties is situated abroad;
2. Disputes arising between enterprises with foreign investment, international associations and organisations established in the territory of Ukraine; disputes between the participants of such entities; as well as their disputes with other subjects of the law of Ukraine. [5]

Other major statutory requirements related to arbitration in Ukraine are provided by the CPC (e.g. provisions on recognition and enforcement, setting aside of arbitral awards etc.). There are also some references to other legislation, such as the Commercial Procedure Code of Ukraine (**ComPC**), the Law of Ukraine on Private International Law and the Law of Ukraine on Enforcement Proceedings.

The 2017 judicial reform has amended arbitration legislation in Ukraine and, thus, has further improved the arbitration environment in this jurisdiction, mainly by introducing a substantial court support to international arbitrations (e.g. authorising courts to order interim measures; to order provision, inspection, preservation of evidence, or examination of witness in support of international arbitration, apart from many other novelties).

Ukraine's Accession to International Conventions

Ukraine has been a signatory to the New York Convention, 1958. There are two reservations of Ukraine to this convention:

1. For non-signatories, Ukraine will apply the convention only to the extent to which those states grant reciprocal treatment.
2. Declarations regarding the Crimea, the Donetsk and Luhansk regions of Ukraine (which are temporarily not under control of Ukraine): application and implementation by Ukraine of this convention is limited and not guaranteed. [6]

Ukraine is also a signatory to the following international treaties:

1. The European Convention on International Commercial Arbitration, 1961;
2. The Convention on the Settlement of Investment Disputes between States and Nationals of Other States, 1965;
3. The Convention on Conciliation and Arbitration within OSCE, 1992; and
4. The Agreement on Settlement of Disputes Related to Commercial Activity, 1992.

Arbitration institutions in Ukraine

At present, Ukraine is home to the following two competent permanent international commercial arbitration bodies:

1. The International Commercial Arbitration Court (**ICAC**) at the Ukrainian Chamber of Commerce and Industry (**the UCCI**);
2. The Maritime Arbitration Commission (**MAC**) at the UCCI.

In Ukraine, the authority in the field of international commercial arbitration is shared between the President of the UCCI (e.g. in case of termination of mandate of an arbitrator under specific circumstances), and the Ukrainian appellate courts (e.g. in the event of setting aside an arbitral award).

In addition to the above, in Ukraine, there is also an arbitration body which acts under the Law of Ukraine on Financial Restructuring.

The ICAC

As the ICAC characterizes itself on its official website, [7] it is a flagship institution among the arbitration institutions in Central and Eastern Europe and a recognised arbitration institution worldwide.

In fact, the ICAC has made a significant progress improving its rules and overall standing on the global market. The ICAC is an arbitration forum definitely worth recommending due to a number of reasons.

Firstly, the ICAC has a solid reputation and experience, considering from 300 to 600 cases yearly. The respective awards are enforced across 110 countries worldwide. The proportion of the ICAC's arbitral awards which were set aside is very low – in average one award per year.

Secondly, the ICAC provides services for reasonable and very competitive fees (e.g. the registration fee is USD 600; the arbitration fee depends on the amount of the claim – e.g. if the claim is USD 50,000, the arbitration fee is USD 4,200).

Thirdly, the average duration of cases is from three to six months.

Last but not least, the ICAC has been constantly expanding its list of arbitrators and now the list features 122 arbitrators (60 per cent of whom are foreign arbitrators) from 35 countries who are leading practitioners and most respected arbitration scholars recommended in arbitration by international directories like Chambers & Partners, Legal 500 and Who's Who Legal. [8]

Basis: The Arbitration Agreement

According to Ukrainian law, an arbitration agreement may be either an arbitration clause in a contract or some form of a separate agreement. At the same time, it is required that an arbitration agreement be made in writing. The following qualify as being in writing:

1. A document signed by the parties;
2. An exchange of letters or electronic communication if the information contained therein is accessible so as to be useable for subsequent reference, telex, telegrams or other means of telecommunication which provide a record of the agreement;
3. An exchange of statements of claim and defence in which the existence of an agreement is alleged by one party and not denied by another;
4. The reference in a contract to a document containing an arbitration clause constitutes an arbitration agreement provided that the contract is in writing and the reference is such as to make that clause part of the contract. [9]

Whilst there is no specific guidance with respect to the nature of the content of an arbitration agreement, such an agreement is still subject to general interpretation in accordance with the substantive law of Ukraine. According to the CPC and the ComPC, at the same time, any doubts regarding the validity, operability, and/or enforceability of an arbitration agreement are subject to the interpretation of the courts in favour of this agreement. Moreover, Ukrainian courts in fact have recognised this principle (e.g. the Decision of the Supreme Court of 2 December 2020, case No. 910/13570/19 [10]), as they have also recognised the concept of

its separability from the main contract (e.g. the Decision of the Supreme Court of 29 April 2021, case No. 910/9841/20 [11]).

Appointment of the Tribunal and Dealing with Challenges to its Jurisdiction

Under Ukrainian law, the parties are free to select arbitrators to decide their dispute. The only proviso is that, if the dispute is referred to the ICAC, arbitrators must be selected from its closed list of arbitrators.

Whilst Ukrainian law does not provide any specific requirements for qualification, skills and languages an arbitrator shall possess, it does require however that an arbitrator shall be impartial and independent. If an arbitrator does not fulfil these requirements, or lacks the qualifications deemed necessary by the parties, this arbitrator may be challenged. In the event where such challenge is rejected by an arbitrator, the aggrieved party as a final resort, may apply to the President of the UCCI to decide the issue. This decision is final and cannot be appealed.

Furthermore, the parties may also challenge the jurisdiction of the arbitration tribunal. In this event, the legitimacy of such jurisdiction is considered and established by the tribunal itself (doctrine of “competence-competence”). Following this, the tribunal rules on the challenge (either as a preliminary issue, or as a part of a final award on the merits). In both cases, the issue then may be referred to the national courts.

Statute of Limitations

The parties to the dispute may choose the law of Ukraine as their governing law. If so, they should ensure that arbitration proceedings are initiated in a timely manner. Failure to act within the statutory period may result in peremptory dismissal of the claims, albeit upon request of the other party only.

In Ukraine, the statutory period of limitation is generally three years. Some claims may be subject to specific limitation periods: longer or shorter (e.g. one-year limitation period for claims arising out of carriage of the goods etc.). Limitation periods can be extended by the parties, albeit not shortened.

Some Arbitration Procedural Rules and Principles in Ukraine

The parties have equal rights of participation in arbitration proceedings. The parties may also agree on the procedure of such proceedings, which the tribunal must follow principle of “party autonomy”). In the event the parties fail to do so, the proceedings may be conducted by the arbitration tribunal in the manner which it sees fit. In both cases, the core broad principles must be observed.

In accordance with the ICAC Rules, a third party to the dispute may join the arbitral proceedings, but only where either all parties, including the third party, are bound by an arbitration agreement; or the joinder of the third party is approved by all other parties.

This set of rules does not recognise the power of a tribunal to consolidate multiple proceedings, albeit it does provide an indirect reference allowing such consolidation in the Schedules of Arbitration Fees and Costs, where the following provision is found: "*When the arbitral proceedings in several cases are consolidated into one arbitral proceeding, the total amount of the arbitration fee is determined by […]".* [12]

The ICAC Rules provide for confidentiality in relation to the consideration of cases. Unless the parties decide otherwise, all documents provided to the case file shall be treated as confidential.

Evidence Under the Law of Ukraine

Each party must put forth enough evidence to prove its own case. However, it may be necessary for the tribunal to apply to local courts in order to force the parties and/or others to produce certain evidence. Pursuant to the 2020 amendments to the ICAC Rules, the tribunal has been empowered, under specific circumstances, to draw a negative inference (e.g. to establish facts or refuse to do so), if the party avoids submitting evidence at the request of the tribunal.

Court Participation in Arbitral Proceedings

The general principle of court intervention in international arbitration in Ukraine is as follows – no court shall intervene in matters governed by the ICA, except where expressly so provided.

In addition to matters pertaining to evidence (e.g. providing assistance in collecting evidence for arbitral proceedings, examination of a witness etc.), there are other scenarios in which the courts may become engaged in arbitration proceedings: e.g. when ordering interim remedies in support of arbitration proceedings; in the event the action is brought to the Court, and the latter finds that the agreement is null and void, inoperative or incapable of being performed; when a court decides on the jurisdiction of a tribunal (after the latter rules that it has jurisdiction as a preliminary issue); during the set-aside proceedings and in the course of recognition and enforcement proceedings.

The 2017 judicial reform in Ukraine has now made it possible for a party to request from a court an interim measure in support of arbitration proceedings, on one side, and for a court to grant such measure, on the other side. Ukrainian courts, in practice, implement respective provisions regarding interim remedies (e.g. the Decision of the Supreme Court of 21 January 2021, proceeding No. 61-15925av20 [13]).

Costs

The claimant shall advance 100 per cent of the arbitration fee. Afterwards, in the final award, the total costs, including the fee for arbitration and additional arbitration costs, are specified by the tribunal, as well as the manner in which they are allocated. The ICAC Rules provide that, unless the parties have agreed otherwise, it is the losing party which usually should bear the burden of paying for the costs of the arbitration. In a situation where the claim is partially granted, the total costs mentioned above are typically allocated to the parties on a pro-rata basis.

At the same time, a tribunal possesses some discretion regarding the allocation of the arbitration fees, additional arbitration costs, and expenses of the parties. I.e., the ICAC might order a different allocation of costs. For instance, it may order a party to reimburse any additional expenses of the other party following bad faith acts of such party which caused unjustified delay in the arbitral proceedings.

In addition to the above, a tribunal may also order that security for the costs of the arbitration, pertaining to either the conduct of the case or to a specific procedural matter, be paid by the parties. This procedure is also applied in practice (please see the Decision of the Kyiv Court of Appeal of 2 June 2020, case No. 824/30/20).

Enforcement Rules

In order to be enforceable in the future, an award shall meet some formal requirements regarding its content. In the award, the following items are to be specified: name of arbitration institution and composition of the tribunal, case number record, date of the award, place of arbitration, names of parties and other people involved in a case, whether the claim is satisfied or rejected, grounds on which the award is based, allocation of the arbitration fee and costs etc.). The award must be issued in writing, signed by the arbitration tribunal and delivered to each party.

Applications for recognition and enforcement of arbitral awards shall be referred either to appellate courts of general jurisdiction in the place of arbitration (in the event the place of arbitration is Ukraine), or to the Kyiv Court of Appeal (in case the place of arbitration is outside Ukraine). In both cases, they act as courts of first instance. The respective decisions of these courts might be subject to appeal to the Supreme Court – as to the final instance.

The CPC provides for the procedure of a debtor's voluntary compliance with an arbitral award. In fact, this is a simplified version of the ordinary recognition and enforcement proceeding, which has two main advantages. Firstly, it is expedited – the Court shall, ideally, issue a judgement within a 10-day period from the date the request is submitted by the award debtor. Secondly, the Court reviews the respective application without notification of the parties, in fact reviewing whether the dispute may be arbitrated and whether it does comply with public policy of Ukraine.

There is a timeframe of three years within which the party shall apply for a recognition and enforcement order in Ukraine. Once the respective Court grants such order, enforcement should be sought within a three-year period.

Statistics on Enforcement Proceedings in Ukraine

The Ukrainian Arbitration Association has recently conducted a research on court practice in cases related to recognition and enforcement of arbitral awards in Ukraine. The respective results were presented at the Ukrainian Arbitration Association's 2021 Arbitration Conference. [14] The research includes an overview of about 600 court proceedings (judgements adopted upon judicial review of applications for recognition and enforcement of arbitral awards only), for fifteen consecutive years (from 2006 to 2020).

The report indicates a continuing growth in the number of respective applications (with some fluctuations in 2014 and 2017). For instance, whereas in 2010 there were only 34 applications submitted to Ukrainian courts,

their number increased significantly in 2020 to a number of 81. The percentage of granted applications had been changing withing the period under review, but it had never gone lower than 82-83 per cent. For example, whilst in 2010 there were almost 100 per cent applications granted, in 2019 this figure was about 92 per cent, in 2020 – 82 per cent. The research shows that, over the last five years explored, the average duration of recognition and enforcement proceedings had been one year. The duration of cases decided and cases contested had decreased dramatically (almost by a factor of two). This trend, most likely, reflects a positive impact of the 2017 judicial reform in Ukraine.

In addition to the above, the report identifies the most popular arbitration centres to which Ukrainian users opt to refer their disputes (following the analysis of court cases on recognition and enforcement of arbitral awards). So far, these are: the ICAC (56 per cent), the Russian International Commercial Arbitration Court (12 per cent), the Stockholm Chamber of Commerce (3 per cent), The International Court of Arbitration of the International Chamber of Commerce (2 per cent), the London Court of International Arbitration (2 per cent), The Grain and Feed Trade Association and the Federation of Oils, Seeds and Fats Associations (2 per cent), the Vienna International Arbitral Centre (1 per cent), among others.

Setting Aside Proceedings

The applications for setting aside of arbitral awards shall be referred to the appellate court of general jurisdiction in the place of arbitration; and may thereafter be appealed to the Supreme Court, whose decision is final.

The party shall apply for the setting aside proceedings within a time limit of three months.

In Ukraine, as also envisaged by the UNCITRAL Model Law, an arbitral award can be set aside for the following grounds: incapacity of a party to an arbitration agreement; invalidity of an arbitration agreement; improper notice of a party on the appointment of the tribunal or the proceedings; the dispute falls out of the scope of arbitration agreement; the composition of the tribunal or the arbitration proceedings do not comply with the arbitration agreement; the dispute cannot be settled by international arbitration under the law; and the arbitral award is contrary to public policy of Ukraine.

Conclusion

Even though Ukraine may look a bit chaotic to outsiders due to the conflict in the eastern part of the country, the rest of Ukraine keeps on marching on and develops nicely and steadily. In view of the above short overview of the arbitration in Ukraine, one may conclude that Ukraine is definitely an arbitration friendly jurisdiction, which observes international standards.

Endnotes

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