

Arbitration - Ukraine

Aspects of recognition and enforcement: lessons from case law

Contributed by [Astapov Lawyers International Law Group](#)

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[Background](#)
[Guidance from case law](#)

Background

When ratifying the New York Convention, Ukraine made the reservation that "with regard to awards made in the territory of non-contracting states, it will apply the convention only to the extent to which those states grant reciprocal treatment". The same approach towards reciprocity was incorporated into several instruments of Ukrainian legislation, in particular the Code of Civil Procedural Code.

Articles 390 to 398 of the code govern the procedure for the recognition and enforcement of foreign court judgments. Notwithstanding that these articles concern foreign court judgments, Article 81 of the Law on Private International Law (2709-IV) may be interpreted in such a way that the term 'foreign court judgments' includes foreign arbitral awards; thus, these articles of the code apply additionally to the recognition and enforcement of such awards.

Ukrainian law on the enforcement of foreign arbitral awards has changed little in the past two years, but there has been one significant change. Law 1837-VI, dated January 21 2010, amended the code to the effect that where recognition and enforcement of a foreign arbitration award are sought, reciprocity is presumed unless proof is adduced to the contrary. Thus, a respondent that wishes to prevent recognition and enforcement must show that the courts in the state which was the seat of the arbitration do not recognise or enforce the judgments of Ukrainian national courts or arbitral awards issued by the International Commercial Arbitration Court of Ukraine at the Chamber of Commerce of Ukraine.

Guidance from case law

District court recognises ICC award against companies based in Ukraine and Cyprus

A Swiss company applied to the Zavodskyy District Court of Zaporizhzhya for recognition and enforcement of an arbitration award issued by the International Court of Arbitration of the International Chamber of Commerce (ICC).(1) The ICC had awarded two co-claimants over \$426,000 in damages, arbitration costs of \$3,000 and expenses of over Sfr47,000 against two corporate respondents registered in Ukraine and Cyprus, respectively. The respondents were held to be jointly and severally liable for the above amounts.

The court found that the arbitration award could be recognised in the Ukrainian territory, and directed that the amounts awarded be recalculated in hryvnia, as required by the code.

Appellate court rejects non-arbitrability and public policy defences

A trial court granted the claimant permission to enforce an arbitration award issued by the International Commercial Arbitration Court at the Russian Chamber of Commerce and Industry.(2) The respondent appealed this judgment to the Appellate Court of Donetsk Oblast. On appeal, the defendant asked the appellate court to reverse the judgment and reject the recognition and enforcement of the award based on Articles 5 (2)(a) and 2(b) of the convention. The appellate court held that the appellant's argument concerning arbitrability failed on the grounds that:

- the contract had been concluded between two parties, one of which was a foreign entity (as required by the Law on International Commercial Arbitration); and
- the contract contained a valid arbitration clause.

Authors

[Eugene Blinov](#)



[Andrey Y Astapov](#)



The court also rejected the appellant's argument that recognition and enforcement of the award would be contrary to the public policy of Ukraine.

Foreign arbitral award enforced against Ukrainian state-owned port

A French company sought enforcement of an arbitral award from the Suvorovskyy District Court of Kherson.⁽³⁾ The award, which had been issued by a tribunal of the Arbitration Institute of the Stockholm Chamber of Commerce, concerned the recovery of certain sums owed to the claimant by State Enterprise Sea Trade Port of Kherson (Ukraine). The defendant contested the application, arguing that the award was contrary to public policy and that the applicant company had been liquidated.

The court found that the award:

- complied with both Ukrainian law and the convention (which was part of national legislation, as it had been ratified by Ukraine);
- had been issued in compliance with the principles of the rule of law and the parties' respective rights and obligations; and
- did not violate Ukrainian public policy.

The court also held that since the respondent's liquidation procedure was not yet complete, that process did not prevent enforcement.

Award issued in favour of Belarussian company

A decision by the Zarichnyy District Court of Sumy,⁽⁴⁾ in favour of a company based in Belarus, is noteworthy for two reasons. First, it shows that Ukrainian courts recognise and enforce settlement agreements approved in arbitration awards. Second, the court rejected the claimant's request for legal costs on the grounds that the code does not provide for payment of costs incurred in seeking recognition and enforcement of foreign awards. However, the court held that the applicant was free to claim these costs by way of a separate proceeding.

Recognition of interim awards

In a widely discussed and politically charged matter involving RosUkrEnerg AG and National Stock Company NaftoGaz, the Kiev Appeal Court held that interim awards issued by the Arbitration Institute of the Stockholm Chamber of Commerce shall be enforced in the same way as final awards and in accordance with the convention and the national legislation of Ukraine.⁽⁵⁾

For further information on this topic please contact [Eugene Blinov](#) or [Andrey Astapov](#) at [Astapov Lawyers International Law Group](#) by (+38 044 490 7001), fax (+38 044 490 7002) or email (blinov@astapovlawyers.com or astapov@astapovlawyers.com).

Endnotes

(1) *Hefko Minerals and Metals Shipping AG v Pivdenna Factoring Company Ltd* (2k-1/09).

(2) *StalUkrSnab Ltd v Promeksim Ltd*, (22ц-2125).

(3) *Evertrade v State Enterprise Sea Trade Port of Kherson*, (N2-1628/10).

(4) *CJSC Belaruska Potash Company v OJSC Sumykhimprom*, (2-k-4/2010).

(5) *RosUkrEnerg AG v NJSC Naftogaz of Ukraine*, (22-22616/10).

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