

to dismiss the application within twenty days from the date of receipt of the notice of the application:

- a. the arbitration agreement is invalid as a result of the incapacity of a party according to the applicable laws;
- b. the arbitration agreement is null and void according to the law chosen to govern the said agreement or, in the absence of choice of law, the law of the country where the arbitral award was made;
- c. a party is not given proper notice either of the appointment of an arbitrator or of any other matter required in the arbitral proceedings, or any other situations that give rise to lack of due process;
- d. the arbitral award is not relevant to the subject matter of the dispute covered by the arbitral agreement or exceeds the scope of the arbitration agreement, unless the offending portion can be severed from and that will not affect the remainder of the arbitral award;
- e. the composition of the arbitral tribunal or the arbitration procedure contravenes the arbitration agreement or, in the absence of an arbitration agreement, the law of the place of the arbitration; or
- f. the arbitral award is not yet binding upon the parties or has been suspended or revoked by a competent court.

Article 50 of the Arbitration Act, *reprinted in* 1 CAA ARB. J. 34 (2002).

Thus, under Article 50 of the Arbitration Act, the court is under an obligation to consider whether to dismiss an application if, and only if, the opposite party has so requested based upon various conditions set forth in Article 50.

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UKRAINE

Statutory Developments

When ratifying the New York Convention, Ukraine made a reservation stating 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 fixed in several Ukrainian national

acts, in particular in the Civil Procedural Code of Ukraine (“Code”).

Articles 390-398 of the Code govern the procedure for the recognition and enforcement of foreign court judgments. Notwithstanding the fact that these articles concern foreign court judgments, as opposed to foreign arbitral awards, Article 81 of the Law of Ukraine “On Private International Law” No. 2709-IV, dated June 23, 2005, may be interpreted to mean that the words “foreign court judgments” include foreign arbitral awards and hence that these articles of the Code apply to the recognition and enforcement of foreign arbitral awards as well.¹

Ukrainian law has not changed much in the last year with regard to the enforcement of foreign arbitral awards. However, there has been one significant change. Law No. 1837-VI, dated January 21, 2010, amended the Code such that, when recognition and enforcement of a foreign arbitration award is sought, reciprocity is presumed unless the contrary is proven. Thus, to avoid recognition and enforcement, the respondent must now demonstrate that courts in the state which is the seat of the arbitration do not recognize and enforce arbitral awards issued by the International Commercial Arbitration Court of Ukraine at the Chamber of Commerce of Ukraine and/or judgments of Ukrainian national courts. The impact of this amendment remains to be seen.

Case Law Developments

A. ICC Arbitration Award Against Companies Based in Ukraine and Cyprus Recognized by District Court (*Hefko Minerals and Metals Shipping AG v. Pivdenna Factoring Company Ltd.*, Case No. 2k-1/09)

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”). The ICC awarded two co-claimants \$426,625.36 U.S. dollars in damages, arbitration costs of \$3,000 and expenses amounting to 47,617.20 in Swiss Francs 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 recognized on the territory of Ukraine and directed that the awarded amounts must be recalculated in Ukrainian currency as required by the Code.

B. Defenses of Non-Arbitrability and Public Policy Rejected by Appellate Court (*StalUkrSnab Ltd. v. Promeksim Ltd.*, Case No. 22u-2125)

A trial court granted the claimant permission to enforce an arbitration award issued by the International Commercial Arbitration Court at the Russian Federation

Chamber of Commerce and Industry. 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 recognition and enforcement of the award based on Articles 5(2)(a) and 2(b) of the New York Convention. The appellate court held that the appellant's argument concerning arbitrability failed on the grounds that the contract was concluded between two parties, one of which was a foreign entity as required by the Ukrainian Law "On International Commercial Arbitration," and the contract contained a valid arbitration clause. The appellate court also rejected appellant's argument that recognition and enforcement of the award was contrary to the public policy of Ukraine.

C. Foreign Arbitral Award Enforced Against a Ukrainian State-Owned Port (*Evertrade v. State Enterprise Sea Trade Port of Kherison*, Case No. N2-1628/10)

A French company sought enforcement of an arbitral award from the Suvorovskyy District Court of Kherison. 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 Kherison (Ukraine). The defendant contested the application, arguing that the award was contrary to the public policy of Ukraine and that the applicant had been liquidated.

The court found that the award complied with both national law and the New York Convention, which was part of national legislation, since it was ratified by Ukraine; had been issued in compliance with the principles of rule of law and the parties' respective rights and obligations; and the award 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 of the award.

D. Award Issued in Favor of Belarusian Potash Company (*CJSC Belaruska Potash Company v. OJSC Sumykhimprom*, Case No. 2-k-4/2010)

This decision by the Zarichnyy District Court of Sumy is noteworthy for two reasons. First, it shows that Ukrainian courts recognize and enforce settlement agreements approved in arbitration awards. Second, the court rejected claimant's request for legal costs on the ground that the Code does not provide for compensation of legal costs incurred in the course of 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.

E. Interim Awards May Be Recognized in the Same Manner as Final Awards (*RosUkrEnergo AG v. NJSC Naftogaz of Ukraine*, Case No. 22-22616/10)

In a widely discussed and politically charged matter involving RosUkrEnergo AG and National Stock

Company NaftoGaz, the Kyiv Appeal Court held that interim awards of the Tribunal of Arbitration Institute of the Stockholm Chamber of Commerce shall be enforced in the same way as final awards and in accordance with the New York Convention and national legislation of Ukraine.

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Endnote

1. See also Resolution of the Plenum of the Supreme Court of Ukraine No. 12, paragraph 10 of adopted on December 24, 1999.

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UNITED KINGDOM

Case Law Developments

English courts have long been supportive of arbitration, both domestic and international. It is rare for an English court to refuse to enforce arbitration awards, and even more rare when the award is a foreign arbitration award covered by the New York Convention. In fact, there have been only three such cases in the 35 years since the New York Convention became part of English law. That statistic means that, on the rare occasion that an English court does refuse to enforce an international arbitration award, it is worth paying close attention to the reasons for that refusal.

The third of the three cases in the past 35 years in which enforcement was refused is the very recent case of *Dallah Real Estate and Tourism Company ("Dallah") v. The Government of Pakistan* [2010] UKSC 46. Aside from being a rarity, *Dallah* is also the first time the highest court in England has refused to enforce a foreign arbitral award.

Dallah, part of a Saudi conglomerate, concluded a Memorandum of Understanding with the Government of Pakistan in 1995 for the provision of housing for pilgrims in Mecca. In January 1996, the Government of Pakistan established a special purpose vehicle, the Awami Hajj Trust ("the Trust"), to perform its part of the bargain, and the Trust signed an agreement with *Dallah* (which agreement was subject to an arbitration clause). Following a change in political power in Pakistan a few months later, the Trust ceased to exist as a legal entity. As a result, *Dallah* suffered substantial losses as it had already expended sizable sums of money in acquiring land for the housing project.

Dallah commenced arbitral proceedings against the Government of Pakistan relying on the arbitration clause in its agreement with the Trust. An ICC tribunal (the "Tribunal") sitting in Paris determined that it had jurisdiction over the Government of Pakistan and awarded *Dallah* damages in excess of U.S. \$20 million. *Dallah* brought its