

Arbitration - Ukraine

ECHR and Ukraine: state responsibility and approaches to enforcement

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March 17 2011

Until recently it was widely held that human rights had little or no relevance to international arbitration. Arbitration was regarded as being used by international business to resolve disputes in cross-border transactions, whereas issues of human rights and the related legal mechanisms were considered to be limited to matters relating directly to the wellbeing of an individual.

However, recent case law of the European Court of Human Rights (ECHR) has shed new light on the link between international arbitration and human rights. A considerable part of this jurisprudence relates to Ukraine. In *Regent Company v Ukraine*⁽¹⁾ the ECHR found that Ukraine's failure to secure the enforcement of an arbitral award issued by the International Commercial Arbitration Court at the Chamber of Commerce and Industry of Ukraine against OJSC Oriana (a 99.9% state-controlled company) constituted a violation of Article 6 of the European Convention on Human Rights (which protects the right to a fair trial) and Article 1 of Protocol 1 to the convention (on the protection of property). This judgment was based on a number of significant concepts that the ECHR has developed in recent years, of which some are particularly relevant to the enforcement of an arbitral award in Ukraine.

The *Regent Company* judgment embodies certain key concepts concerning the court's delivery of a fair trial. According to the ECHR, a "tribunal" before which state parties undertake to provide a fair trial is not necessarily a traditional state court, but may comprise a body established to determine a limited number of specific issues, provided that it offers the appropriate guarantees.⁽²⁾ In several judgments regarding Ukraine, the ECHR has extended the scope of protection to the decisions of labour dispute commissions, which are Ukrainian arbitral bodies with competence to consider certain types of dispute between employers and employees. As the final decisions of such commissions are treated as equivalent to court judgments under Ukrainian law, and are enforced under the same procedure, the ECHR found that the non-enforcement of such decisions violated Article 6 of the convention.⁽³⁾

In *Regent Company* the ECHR addressed the issue of the legitimacy of an international arbitral tribunal for the first time. Having examined the relevant provisions of Ukraine's International Commercial Arbitration Act,⁽⁴⁾ the ECHR established that the International Commercial Arbitration Court at the Chamber of Commerce and Industry of Ukraine was a "tribunal established by law", its proceedings being similar to those before an ordinary state court. Moreover, at the relevant time the arbitral award was treated as equivalent to an enforceable court judgment under the Arbitration Act.

The third important aspect of the *Regent Company* judgment concerns the right to property, guaranteed by Article 1 of Protocol 1. The ECHR considers that 'possessions', the peaceful enjoyment of which is protected under the convention, may be existing possessions or assets, including claims in respect of which the applicant can argue that it has at least a legitimate expectation of obtaining effective enjoyment of a property right. Thus, according to other jurisprudence 'property' extends to "sufficiently established claims", which may be established by way of the final and binding court decisions. Therefore, in *Regent Company* the ECHR regarded the arbitral award and a final court decision as possessions protected by the convention.⁽⁵⁾

The fourth feature of the judgment in *Regent Company* is the issue of state responsibility. The respondents in ECHR proceedings are always convention states; the violation of rights in respect of which the complaint is brought must have been caused or tolerated by the relevant state. This automatically excludes the state from responsibility for non-enforcement of a judgment caused by a private entity's lack of funds.⁽⁶⁾ However, failure to enforce a judgment rendered against a state body or an organisation that is fully financed from the state budget (eg, a military installation, a hospital or a school) implies full state responsibility - a lack of budgetary funds does

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not excuse the state from honouring its obligations under the convention.(7)

Nevertheless, a problem may arise where the debtor is a state company which holds separate property and conducts independent business activity. The ECHR clearly treats the non-enforcement of arbitral judgments against Ukrainian state-owned companies as the state's responsibility. This view is based on several protective measures adopted by the Ukrainian government, such as the Law on a Moratorium on Forced Sale of Assets,(8) which prohibits the compulsory enforcement of judgments against the property of companies in which the state owns a stake of 25% or more. This law played its part in *Regent Company*.(9) In other cases against Ukraine the ECHR noted that the salary debts of state companies engaged in particular industries (eg, coal mining) were partly financed from the state budget.(10) It also indicated another government measure in this field - the Law on Measures to Ensure the Stable Operation of Fuel and Energy Sector Enterprises introduced a special register of companies involved in the energy industry, suspending enforcement proceedings against them.(11)

The *Regent Company* judgment identifies the ECHR as a new remedy for a successful party in arbitration that seeks the enforcement of an award, albeit subject to certain conditions.(12) It is likely to help overcome the problems of enforcing foreign arbitral awards in Ukraine, and new cases are expected to encourage changes in practice in Ukraine.

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Endnotes

(1) 773/03, April 3 2008.

(2) *Campbell and Fell* judgment of June 28 1984.

(3) See, for example, *Rudenko v Ukraine* (11412/02), November 29 2005.

(4) The act is modelled on the UN Commission on International Trade Law Model Law.

(5) In this respect the ECHR's approach towards the protection of the right to enforce an arbitral award differs from that of the investment tribunals.

(6) *Glavcheva v Ukraine* (26291/02), July 3 2007.

(7) *Kechko v Ukraine* (63134/00), November 8 2005.

(8) November 29 2001.

(9) See Section 34 of the judgment.

(10) *Romashov v Ukraine* (67534/01), July 27 2004.

(11) *Kryshchuk v Ukraine* (1811/06), February 19 2009.

(12) Notably, where enforcement is sought in a convention state, recognition of arbitral awards has a basis in domestic law, the award is final and binding under domestic legislation and the state bears responsibility for non-enforcement.

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