

## Arbitration - Ukraine

Challenging international arbitration awards: legislative changes trigger debate

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### Introduction

A number of amendments were recently made to legislation concerning the recognition and enforcement of arbitral awards. Despite being generally positive, some of the changes were partial and incomplete and may lead to the emergence of new obstacles in enforcing arbitral awards. In particular, this applies to amendments (adopted on February 3 2011) to two laws concerning challenging arbitral awards and issuing enforcement orders: the Civil Procedure Code and the Commercial Procedure Code.

These laws aim to restrict the jurisdiction of domestic arbitration courts and introduce the possibility of appealing awards to state courts. Within the Ukrainian arbitration community, it is generally accepted that these laws are necessary because domestic arbitration courts have been misused to circumvent the jurisdiction of state courts and to obtain awards affecting the rights and obligations of third parties extraneous to arbitration proceedings, especially in the real estate sphere.

However, the laws have not been scrutinised enough and their exact wording is debatable in terms of whether certain provisions applying to domestic arbitration courts may also be applied to international arbitration court awards.

### Scope of application

Articles 390 to 401 of the Civil Procedure Code govern the procedure for the recognition and enforcement of international arbitration awards, but there are no specific provisions regarding challenging such awards.<sup>(1)</sup> Consequently, state courts can apply the recently adopted Section VII-1 of the code<sup>(2)</sup> for challenges to international arbitration awards. Given that there is no specific procedure for challenging international arbitration awards, the state courts may rely by analogy on legislation stipulated by Article 8(8).

Furthermore, Articles 389-1(5) and 389-5(4) under Section VII-1 expressly refer to international arbitration awards with the seat of arbitration in Ukraine.

At the same time, Article 2 of the International Commercial Arbitration Law terms a panel of arbitrators an 'arbitration court', which in its Ukrainian equivalent is usually taken to mean domestic arbitration. This causes further confusion for state courts lacking experience in complicated foreign matters.

In this light, it is debatable whether Section VII-1 is equally applicable to awards of both domestic and international arbitration courts.

### New grounds and effect for setting aside?

If Section VII-1 does apply equally, then international arbitration awards issued with Ukraine as the seat of the arbitration may be challenged to state courts by various third parties whose rights and obligations could be influenced by such awards. Given the complexity of many disputes referred to international arbitration and the number of parties involved which were not necessarily parties to arbitration (eg, experts, witnesses, employees), this can cause a situation in which an unsuccessful respondent may file various challenges via such third parties on the grounds that their

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rights and obligations have been influenced by the award. If the recent amendments to the legislation are interpreted in such a manner, this could cause difficulties for the enforcement of international arbitration awards.

Furthermore, if an international arbitration award is set aside, the new legislation disregards the principle of *res judicata* (which prevents a dissatisfied party from trying to litigate the issue a second time) and does not prohibit parties from resubmitting the dispute to arbitration.<sup>(3)</sup>

### Jurisdiction of courts for challenge proceedings

Before the amendments were enacted, it was well-established law that recognition and enforcement proceedings were to be conducted in general courts. However, as the Commercial Procedure Code was also supplemented with provisions on procedures for challenging arbitral awards,<sup>(4)</sup> it is now unclear whether challenges to international arbitration awards should remain within the jurisdiction of general courts.

It would therefore appear that, under the general rule dividing the jurisdiction of general and commercial courts in disputes between legal entities, challenges to arbitration awards will have to be made before the commercial courts and other disputes will be referred to general courts.

### Comment

Detailed analysis of the laws shows that a number of matters related to their application still remain open for discussion. Due to the lack of case law, it is difficult to predict how the newly introduced procedures for challenging arbitration awards will be applied. However, there is a growing consensus that the legislation is unclear and must be clarified by either Parliament or future case law.

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### Endnotes

(1) Article 34 of the International Commercial Arbitration Law lists the grounds for setting aside international arbitration awards by state courts; however, it is silent on the procedure of submitting such challenges.

(2) Introduced by Law 2979-VI on Amendment of the Civil Procedure Code of Ukraine Concerning Challenge of Arbitration Court's Awards and Issuing of Enforcement Orders, February 3 2011.

(3) Article 389-5(3) of the Civil Procedure Code.

(4) Introduced by Law 2980-VI on Amendment of the Commercial Procedure Code of Ukraine Concerning Challenge of Arbitration Court's Awards and Issuing of Enforcement Orders, February 3 2011.

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