

Reshaping the Ukrainian arbitration landscape

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Arbitration analysis: At the end of June 2017 the Draft Law No 6232 of 23 March 2017, which amends three procedural codes of Ukraine as well as a number of laws including the Law of Ukraine on International Commercial Arbitration (ICA Law), passed the first reading in the Ukrainian Parliament. Olena Perepelynska, partner and head of CIS arbitration at Integrites and president of the Ukrainian Arbitration Association, explains how, if adopted, this new law will change the arbitration landscape of Ukraine and make it a more arbitration-friendly jurisdiction.

What is the background to the proposed reforms of Ukraine arbitration law?

Ukraine is a United Nations Commission on International Trade Law (UNCITRAL) Model Law (1985) jurisdiction and its ICA Law corresponds to the world's best standards. Ukraine is also one of the signatories to the New York Convention 1958 and Geneva Convention 1961. However, the Ukrainian procedural law on arbitration-related matters has always been incomplete and heavily criticised by arbitration practitioners. The major gap is the absence of procedural rules for judicial assistance in support of arbitration. In practice, this means that it is impossible to obtain court-ordered interim measures in support of arbitration or to obtain court assistance for the taking of evidence in arbitral proceedings.

The existing rules for judicial control are not perfect either and allow rather lengthy post-award proceedings (of up to four court instances), regarding the setting aside or enforcement of the arbitral award. The arbitration community in Ukraine has applied significant efforts to improve the situation. For instance, the working group created by the Ukrainian Arbitration Association has elaborated proposals for improvement of procedural legislation in arbitration-related matters in Ukraine. Those proposals were later used as a basis for several draft laws, including the Draft Law No 4351 of 31 March 2016 and, to a certain extent, the Draft Law No 6232 of 23 March 2017 and Draft Law No 6232-1 of 10 April 2017.

What changes are being made?

In the international arbitration context the Draft Law No 6232 contemplates four major groups of amendments.

Improving the efficiency of judicial control

Draft Law No 6232 seeks to improve the efficiency of judicial control concerning:

- the recognition and enforcement of arbitral awards, and
- the setting aside of arbitral awards and rulings

For arbitration seated in Ukraine, an application for setting aside of the arbitral award and application for enforcement of the same could now be considered in the same court proceedings, thus avoiding parallel proceedings or suspension of enforcement of arbitral awards.

The important changes in enforcement of arbitral awards include rules allowing the debtor to comply voluntarily with the arbitral award (which was previously impossible in view of the current foreign currency regulation in Ukraine). There are also new rules on the currency of the awarded amount (which was previously subject to compulsory conversion into Ukrainian currency by the court), as well as new rules regarding calculation of interest awarded by the arbitral tribunal (this issue was not expressly regulated which caused practical difficulties in recovery of such interests by the foreign creditors in Ukraine).

Improve judicial support of international arbitration

Draft Law No 6232 fills existing gaps in matters of judicial support of international arbitration regarding the provision of:

- court-ordered interim measures in support of international arbitration, and
- judicial assistance in taking of evidence for arbitral proceedings

Arbitration users will finally have the opportunity to secure the enforcement of future arbitral awards in Ukraine, to preserve and to collect evidence they need in arbitral proceeding, including via court-ordered document production and examination of a witness.

Amend existing rules of arbitrability

The Draft Law amends and clarifies existing rules of arbitrability contained in the procedural codes of Ukraine and improves the court approach with regard to the enforcement of arbitration agreements.

After many years of prohibition and uncertainty with regard to the arbitrability of corporate disputes, new rules allow for the arbitration of corporate disputes arising out of contracts, based on arbitration agreements concluded by respective legal entities and all its shareholders. New rules of arbitrability expressly allow the referral of arbitration civil law aspects of competition disputes, and disputes arising out of public procurement or privatisation contracts. All other aspects of such disputes as well as disputes regarding records in the register of real estate property, intellectual property rights, title to security instruments as well as bankruptcy disputes and disputes against a debtor being in bankruptcy proceedings, are now declared as non-arbitrable.

Amend the ICA Law

The proposed changes to the ICA Law are not revolutionary, they slightly amend the rules governing the form of arbitral agreement, some issues of arbitral procedure, court functions related to control and support of arbitration and some other issues.

What impact will the changes have on international arbitration practitioners and those arbitrating in Ukraine?

Draft Law No 6232 aims to solve many existing problems and to make Ukraine a more arbitration-friendly jurisdiction. In the context of the arbitration-related court proceedings, the changes are significant in many aspects.

New rules of arbitrability will certainly have a significant effect on both international arbitration practitioners and those arbitrating in Ukraine. If adopted, they will provide for time efficient judicial control and support of international arbitration. For this purpose, the judicial intervention into arbitration-related matters will be limited to two types of court: competent appellate courts and the Supreme Court of Ukraine.

The new rules will make the enforcement of arbitral awards in Ukraine more effective and predictable. In particular, they will provide foreign creditors with new tools to prevent dissipation of assets or similar actions by Ukrainian debtors during arbitral proceeding.

Interviewed by Alex Heshmaty.

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