Interim Measures in Ukraine Prior to, During and After Arbitration

Pavlo Byelousov is an Attorney at Law with Vasil Kisil & Partners. Pavlo Byelousov regularly handles international arbitration and arbitration-related cases as a party counsel for domestic and foreign companies under different arbitration rules in various jurisdictions

Prior to referring any dispute to a court or an arbitration and initiating any litigation against a debtor, a creditor always considers the issue whether any assets of such debtor would be available to recover a debt after the time-and cost-consuming procedures. To a certain extent the above concern may be covered by the respective insurance, security of obligations (e.g., in form of pledge, mortgage, surety) and/or by interim measures (provisional injunctions). One of the main purposes of provisional or interim measures is rather obvious — to preserve assets out of which a subsequent court decision or arbitral award may be satisfied, but also to conserve or obtain the evidences to support the case.

While issuance the securities of obligations are agreed by the parties prior to or simultaneously with entering into a particular commercial transaction, the availability and the enforceability of the interim measures are provided under the applicable procedure legislation and/or arbitration rules only. Namely the latter is often an important factor for a creditor while choosing between a national court and international arbitration.

Interim Measures by Arbitration in Ukraine

On International Commercial Arbitration Act of Ukraine of 24 February 1994, No. 4002-XII (*ICA Act*), which is based on the 1985 UNCITRAL Model Law on International Commercial Arbitration, enacts the jurisdiction of the arbitral tribunal to order interim measures at the request of a party, unless otherwise agreed by the parties.

Article 4 of Rules of the currently only international commercial arbitration institution in Ukraine — *International Commercial Arbitration Court at the Ukrainian Chamber of Commerce and Industry* (ICAC at UCCI) — provides the powers to the President of the ICAC or the Arbitral Tribunal, if already composed, to determine the amount and the form of the security for the claim. The same provision, but only in respect of the ICAC President is contained in Paragraph 5 of the ICAC Statute which is Annex I to the abovementioned *ICA Act*.

Despite direct provision of Article 4 (2) of the said Rules of ICAC at UCCI that the mentioned ICAC Order for security of the claim shall be binding for the parties and shall be in force until a final arbitral award is made, the enforcement of such ICAC Order in Ukraine is rather doubtful and practically impossible under the current procedure legislation. Articles 391-394 of the *Civil Procedure Code of Ukraine* (Civil PCU) governing the enforcement of foreign court decisions and awards of foreign and international arbitrations refer to the valid arbitral award, not the procedural decisions or orders issued by the arbitral tribunals.

Therefore, on the one hand, the above interim measures issued by the arbitration can be regarded as a certain indicator for a debtor and/or for any third parties involved in disputes (insurance companies, banks, etc.), but on the other hand, currently they cannot be enforced through Ukrainian national courts or enforcement services in order to attach the assets (property, amounts on bank accounts, etc.) of a debtor.

Court Assistance or Measures in Support of Arbitration by National Courts

While assessing the measures and procedural opportunities to obtain some sort of court assistance to international arbitration, Article 9 of the *ICA Act* has been always referred to and analyzed. The said Article 9 provides that "it is not incompatible with an arbitration agreement for a party to request, before or during arbitral proceedings, a court to order interim measures of protection and for a court to take a decision granting such measures".

At first glance the flexibility of the above provision should favor the requesting party while requesting the court to order interim measures in support of arbitration. But, since neither the *Commercial Procedure Code of Ukraine (Commercial PCU)*, nor the *CivPC* sets forth a procedure for granting an attachment in support of a proceeding on merits in another country or defines the

PROfile

Vasil Kisil & Partners

Address:
Leonardo Business Centre,
17/52A Bogdana Khmelnitskogo Street,
Kiev, 01030, Ukraine
Tel.: **+380 44 581 7777**
Fax: **+380 44 581 7770**
E-mail: **vkp@vkp.kiev.ua**
Web-site: **www.kisilandpartners.com**

Vasil Kisil & Partners' dispute resolution practice has been continuously recognized as a leader in this field in Ukraine. Their litigators are well-known for extensive and specific expertise, innovative strategies, as well as individual and efficient approach to every case. Being one of the largest litigation teams (it currently has 28 lawyers), VKP has enough resources to allow them to handle more than 200 disputes in 2011. The spectrum of clients is very wide, from large multinational banks and corporations to medium-size companies and investors across a number of industries ranging from agriculture to telecommunications. So is the spectrum of disputes, with a particular emphasis on high-profile corporate and investment cases, complex commercial, tax and IP disputes. In addition to "traditional" litigation in Ukrainian courts, in 2011 VKP assisted clients in cases considered at courts and international arbitration tribunals in England, France, Cyprus, and Sweden. Their cases have included representing Swedbank

competent court for such matters, Ukrainian courts are reluctant to apply the above provision of the *ICA Act*. Court clarifications are also silent in this regard.

Thus, the above general provision of the *ICA Act* and the issue on granting security for claim in support of foreign arbitral proceedings are considered by Ukrainian courts on an "*ad hoc*" basis providing more questions than answers.

New Trends in Interim Measures

It is worth mentioning that the current trend in international arbitration is to ensure the recognition and enforceability of the interim measures issued by the arbitral tribunals through court mechanisms. In this respect, the amendments introduced to the revised version of the *Model Law on International Commercial Arbitration* adopted by UNCITRAL on 7 July 2006, which provide for a more comprehensive legal regime dealing with interim measures in support of arbitration are worth special mention.

In particular, Article 17 of the *2006 UNCITRAL Model Law on International Commercial Arbitration,* provides that "an interim measure issued by an arbitral tribunal shall be recognized as binding and, unless otherwise provided by the arbitral tribunal, enforced upon application to the competent court, irrespective of the country in which it was issued".

Thus, a modern arbitration act should not only grant an arbitral tribunal jurisdiction to pronounce the interim measures, but also oblige the national court to recognize and enforce such measures. Australia, Hong Kong, Costa Rica, Georgia, Ireland, Mauritius, New Zeeland, Slovenia, Peru and Rwanda bring their legislation into line with the above 2006 UNCITRAL Model Law.

In view of the above, the amendment of respective provisions of the *ICA Act* and *Civil PCU* in terms of enforceability of the interim measures issued by arbitration is current challenge for Ukrainian legislation that will hopefully be realized in the near future.

Another modern trend of international arbitration is to provide the parties with possibilities to apply for urgent interim or conservatory measures that cannot await the constitution of an arbitral tribunal and even filing of a claim. To this end modern arbitral rules (e.g., the 2010 SCC Arbitration Rules, the 2010 SIAC Rules, the 2011 ACICA Arbitration Rules, new 2012 ICC Arbitration Rules, etc.) establish a special position of Emergency Arbitrator, which is generally appointed by the President of the Court/SCC Board on an ad hoc basis.

Interim Measures after the Arbitral Award

The last issue to be discussed in this publication is the possibility to obtain interim measures within the procedure for recognition and enforcement in Ukraine of foreign and international arbitral awards.

Article 36 (2) of the *ICA Act* entitles a party claiming recognition or enforcement of the award to request a state court to order the other party (debtor) to provide appropriate security under certain circumstances. Even though there is a theoretical possibility to obtain the security under the mentioned provision of the *ICA Act*, the latter was ambiguously interpreted and very rarely applied by Ukrainian courts prior to 19 October 2011 due to the absence of rules in procedural codes.

The above situation was improved by the Verkhovna Rada of Ukraine (Parliament) in 2011, when new amendments on interim measures during the recognizing and enforcement of foreign court decisions were introduced to the *Civil PCU* by the Act of Ukraine of 19 September 2011, No.3776-VI.

These new amendments to Chapter VIII of the *Civil PCU* governing the procedure for recognition and enforcement in Ukraine of foreign court decisions and arbitral awards directly provide for a court's power to impose interim measures (provisional injunctions) as provided under this Code to secure enforcement of a foreign or international arbitral award. The respective application for such interim measures is considered by the court in accordance with the general rules of the Civil *PCU* governing interim measures (Articles 151-155).

* * *

Adoption of new amendments to Ukrainian legislation as provided above will certainly facilitate the procedure of foreign and international arbitral award recognition, enforcement and further execution in Ukraine, securing the main purpose of the whole arbitration process.

Furthermore, as our experience shows, these amendments not only provide the judges with procedural tools for ordering such measures, but also prevent the debtor from delaying the enforcement procedure once the interim measures are ordered by the court of first instance.

However, at the same time, there shall be no doubt that regulations of interim measures in support of arbitration need further development in Ukraine. And thus, further amendments providing clear rules allowing parties to enforce in Ukraine the interim measures issued by the arbitral tribunal (whether international arbitration in Ukraine or foreign arbitration) and/or obtain the provisional injunctions prior to initiating the arbitration proceeding are also expected to be reflected in Ukrainian legislation in the foreseeable future.

in a number of disputes with total quantum of more than USD 150 million; acting for BNP Paribas in a corporate dispute for USD 458 million; advising on Ukrainian law a client with regard to a damages claim for around USD 500 million at the High Court of Justice in London, and in a similar case with USD 120 million at stake in a Cypriot court. Other recent high-profile cases have included the dispute between Vanco Prykerchenska and Ukrainian government regarding validity of the special permit to explore and develop hydrocarbon resources in the Black Sea deepwater area, and a contract claim of a major US-based international financial company against a Ukrainian bank for approximately USD 86 million.

Oleksiy Filatov, the partner leading VKP's dispute resolution team, and Oleg Makarov, managing partner of the firm, have been consistently acknowledged as prominent professionals in corporate and commercial disputes. Yaroslav Teklyuk and Andriy Stelmashchuk come highly recommended for bankruptcy and tax disputes, respectively. Vadym Belyanevych gains praise as an experienced litigator and legal scholar specializing in commercial litigation proceedings.