# Assistance of Ukrainian State Courts to International Arbitration: "Enforcement" of the Arbitration Clause

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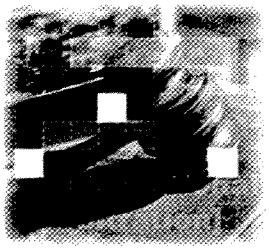

International arbitration, as a form of dispute resolution, does not exist in a vacuum. It will fail completely if there is no system of court support to assist it. Because of the latter, in order to implement operative international arbitration the legislatures of the various states, including Ukraine, have to provide a system of support for arbitration. The provision of such a system is also a consequence of the obligations that Ukraine has undertaken under international treaties, first and foremost under the *1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards.*

The primary task of state courts in regard of their assistance to international arbitration lies in enforcing the arbitration agreement. Thus, it is important that arbitration agreements are given full force and effect (i.e. recognized) by competent state courts. It is easy to assume that any disregard of this principle will disable the functioning of a system of international arbitration.

The duty to recognize an arbitral agreement is provided for in the corresponding Ukrainian legislation. In particular, the *International Commercial Arbitration Act of Ukraine* (*Ukrainian International Arbitration Act*) incorporates Article 8 of the *UNCITRAL Model Law* according to which "a court in which an action is brought in a matter which is the subject of an arbitration agreement shall, if any of the parties so requests, not later than when submitting its first statement on the substance of the dispute, stay its proceedings and refer the parties to arbitration unless it finds that the agreement is null and void, inoperative or incapable of being performed".

The said provisions set out the so-called "negative aspect" in recognition of the arbitration agreement by state courts. The latter means that state courts shall take note of the existence of an arbitration agreement and decline substantive review of any dispute under a contract containing an arbitration clause. The court shall declare itself incompetent if (i) the defendant immediately raises an objection concerning the state court's jurisdiction in view of the existence of an arbitration agreement and (ii) the court is convinced of the enforceability of the said arbitration agreement.

Although Ukrainian legislation on international commercial arbitration (Article 9 of the *Ukrainian International Arbitration Act*) provides for establishing the "positive aspect" of recognition of arbitration clauses, i.e. that the courts shall render assistance to the arbitration procedure (for instance, in respect of interim measures), Ukrainian commercial and/or civil procedural legislation does not envisage a mechanism for its implementation.

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And that is even more important that Ukrainian legislation does not clearly establish that no court examination of the arbitration agreement ex officio is at all admissible.

International arbitration is consensual on dispute resolution. Only the parties have the right to go to court in the presence of an arbitration agreement. If any party does not invoke the agreement it can be reasonably assumed that the parties are prepared to renounce their right to arbitrate in favor of a state court. The court shall not take the arbitration agreement into consideration if the defendant brings it up later than at its first granted opportunity.

However, sometimes the situation is more complicated. For example, when a claimant faced with the defendant's "arbitration defense" argues that the arbitration agreement is, in fact, invalid, inoperative or incapable of being performed. In such a situation, the claimant usually alleges that the contract is invalid because some formal requirement or authorization is missing, or the clause is a pathological one, because it refers to a non-existent institution, etc. In such a situation it is very important for the court to keep in mind that the above allegation regarding invalidity of the contract does not automatically invalidate the arbitration clause in it according to the doctrine of separability of the arbitration clause. As a legal consequence of the above, the court should normally deny its jurisdiction.

Unfortunately, recent court practice demonstrates an alarming trend in rendering "assistance" to international arbitration by state courts. In particular, it concerns Ukrainian Joint Stock Companies (JSC) as parties in arbitration procedure.

## Case "A"

In July 2003 the non-resident JSC "B" filed a claim to the International Commercial Arbitration Court at the Chamber

of Commerce and Industry of Ukraine (ICAC) against the Ukrainian JSC "A" in pursuance of the arbitration clause in the Contract on joint cooperation. JSC "A" has appointed an arbitrator and presented its defence in October 2003 within the course of arbitration proceedings. Later on the respondent had not challenged the jurisdiction of ICAC, being quite active in various procedural actions, including an evaluation of the disputed property. On 22 September 2004, i.e. almost a year after presentation of its statements of defence, JSC "A" informed the Arbitral Tribunal and the claimant about the existence of the District Court Decision according to which the Contract itself and an arbitration clause contained therein were declared null and void. As a result, the Contract was declared null and void in September 2003 under the claim of an individual, a shareholder of JSC "A". The said shareholder alleged that the contract was not in compliance with the requirements of legislation and had violated the property interests of shareholders of JSC "A". JSC "B", being a foreign company, was not properly informed of the said trial and thus was deprived of the possibility to secure its rights by referring to the arbitration procedure which was pending. It is interesting to note that JSC "A" itself kept silent about the latter. JSC "A", by referring to the said judicial decision, requested ICAC to terminate arbitration proceedings.

In the final award the Arbitral Tribunal ruled on its jurisdiction and found itself competent to decide on the dispute pursuant to Article 16 (2) and Article 7 (2) of the *Ukrainian International Arbitration Act* according to which an arbitration agreement is reached in writing if it is contained in "exchange of statements of claim and defence in which the existence of an agreement is alleged by one party and not denied by another" (Articles 1.3 and 1.7 of the Rules of the ICAC contain similar provisions). At the same time, while rendering the final award the Arbitral Tribunal took into account the District Court Decision, and referring to the latter proceeded from the nullity of the Contract, but still found enough grounds to satisfy the claim in part.

JSC "A" applied to the Kiev Appellate Court for setting aside the arbitral award alleging that (i) the latter was in conflict with the public policy of Ukraine and (ii) the arbitration agreement was not valid since it had been found null and void by the District Court Decision. The Kiev Appellate Court set the award aside having found that (i) the conclusions of the Arbitral Tribunal were incorrect, (ii) the Arbitral Tribunal had misapplied the substantive law of Ukraine and (iii) the award, as such, could not be recognized lawful as the Arbitral Tribunal had failed to take into account the District Court Decision and so had violated one of the basic principles of legal proceedings, i.e. the principle of pre-judicial force of judicial decisions.

## Case "B"

The *Civil Procedure Code of Ukraine* sets out the special procedure for establishment of lawful facts. In particular, Article 256 provides that except for the exhaustive list of facts which can be established through the said procedure (contained in paragraph 1), the legal process provided can be used to establish other facts, which are important for originating, changing or terminating the personal or property rights of individuals, if the order of their establishment is not ascertained by the law. The said provision was recently used successfully by a shareholder – an individual — of a Ukrainian JSC in order to declare null and void the arbitration agreement in a shares' sale contract signed between four non-residents. The claimant (shareholder) alleged that the shares sales contract by providing for the sale of the stake of shares in the named JSC vested to one non-resident to another one actually violates the constitutional and civil rights of the shareholder just by establishing international arbitration as a mechanism to settle a dispute. Not being a party to such an arbitration clause, the shareholder was, in his view, deprived of his property rights as guaranteed by Ukrainian legislation on corporations. The shareholder demanded to establish that it be established as a legal fact that the arbitration clause is inoperative. Unfortunately, despite all the principles cited above the District Court at the place of the claimant's location considered itself competent to decide on the "enforceability" of the arbitration clause ex officio upon application of the non-party to arbitration agreement and established its unenforceability.

Upon our firm belief the said examples had to be carefully studied and scarified both by legal professionals and the Supreme Court of Ukraine as fully inadmissible.

Otherwise, Ukraine could gain the reputation of being a state with "ill support" for international arbitration.