

Case law analysis on challenging decisions of the International Commercial Arbitration Court at the Ukrainian Chamber of Commerce and Industry and on the recognition and enforcement of international and foreign arbitral awards, Supreme Specialized Court of Ukraine for Civil and Criminal Cases, No. 11, 11 December 2015

A contribution by the ITA Board of Reporters

Yaroslav Petrov; Anna Tkachova

Headnote

The High Specialized Court of Ukraine for Civil and Criminal Cases (hereinafter – HSCU) has issued an analysis of the case law on challenging decisions of the International Commercial Arbitration Court (hereinafter – ICAC) at the Ukrainian Chamber of Commerce and Industry (hereinafter – UCCI) and on the recognition and enforcement of international and foreign arbitral awards.

Summary

Facts of the case

HSCU stresses that Law of Ukraine “On international commercial arbitration” is applicable only with regard to arbitration with its seat in Ukraine except for provisions governing arbitration clause, interim measures, initiation of arbitration proceedings, recognition and enforcement of awards.

HSCU points out that disputes which are non-arbitral under international treaty cannot be resolved by international tribunal. For instance, disputes regarding immovable property are not arbitral among CIS states (Article 4 of CIS Agreement).

HSCU identifies soft law instruments that should be borne in mind by judges while handling setting aside procedures.

HSCU clarifies that provisions on Law of Ukraine “On international commercial arbitration” regarding grounds for setting aside of the award duplicate provisions of New York Convention.

Setting aside procedures are admissible to the courts of general jurisdiction exclusively. The first-instance court in such scenario would be district court due to the location of the arbitration court.

HSCU distinguishes between de facto seat of arbitration and de jure seat of arbitration. De jure seat of arbitration matters for determining what court is authorized to set the award aside and defines the applicable law. According to ICAC Rules de jure seat of arbitration is Kiev and, therefore, Shevchenkivskiy District Court of city of Kiev is authorized to set aside the award. Consequently, neither parties nor Arbitration Court can change de jure seat of arbitration. Thus, even if factual place of hearing differ from chosen arbitration court only Shevchenkivskiy District Court of city of Kiev authorized to set the award aside.

HSCU highlights that third party have no right to address the local courts with applications seeking to set aside an award which is partly of fully shifts amount of rights and obligations of such parties.

An award can be recognized and enforced within three years term which is counted from the moment of the effective date of an award under *lex arbitri*.

Form and substance of the application (motion) on setting the decisions of ICAC and the Maritime Arbitration Commission (MAC) at the UCCI aside regulated by the Civil Procedural Code (hereinafter – CPC). HSCU notes that there is conflict with regard to the title of the documents that should be filed with the court in order to set the award aside. According to the CPC this

document should be titled as application. At the same time courts cannot rule the document out of order on the grounds of its wrong title (i.e. motion instead of application).

HSCU stress that during recognition and enforcement procedures court is not reviewing disputes on merits.

HSCU points out on lack of clarity in court decisions while applying public policy grounds. HSCU highlighted necessity for the courts while setting the award aside to provide additional explanations why recognition and enforcement of the decision contradicts public policy. HSCU call the courts to put exact norms of law and avoid general ones. HSCU, however, does not point out what norms should be used by courts as the grounds for setting the award aside and the problem remains unsolved.

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The summary of the case file and full text of summarized court decision are available on: <https://www.kluwerarbitration.com/document/kli-ka-16-23-007?jurisdiction=Ukraine&type=Court%20Decisions>