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Choice of Court Agreements: a Ukrainian Perspective

When entering into a contract with foreign companies Ukrainian entities quite often face the problem of agreeing upon a competent venue to resolve their potential disputes arising out of or connected with such a contract. Naturally, they purport to ensure enforcement of the contract and remedies provided. The latter directly depends on enforceability of the dispute resolution clause finally agreed and of the judgment to be rendered on its basis.

According to the general rule a prorogation clause allows the parties to a contract to exclude jurisdiction of the courts normally competent to resolve their contractual disputes (which, as a rule, are respective courts in the location of the respondent) and, instead to confer such jurisdiction on a selected court (courts) or arbitration on an exclusive or non-exclusive basis.

This article will focus only on the clauses providing choice of a particular state court or courts. The latter are known also as "choice of court" or "forum-selection" or "submission to jurisdiction" clauses (or agreements if respective provisions are set out in a separate document).

General observations

Due to various reasons foreign companies are quite reluctant to submit their disputes to Ukrainian courts and, as an alternative, they insist on choosing a state court or courts of their own or of some "neutral" jurisdiction. This is especially relevant for EU companies, used to choosing a competent state court of any EU-state and being sure of validity and enforceability of such choice of court clauses as well as of enforceability of the respective judgments to be rendered by the chosen court, as the latter is provided by the Council Regulation (EC) No.44/2001 of 22 December 2000 *On Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters,* known also as *EU Brussels I Regulation* or the *Judgments Regulation.* However, outside the EU, and in particular in Ukraine, this Regulation does not apply, and thus, provisions of relevant international treaties and national laws concerning dispute resolution or prorogation clauses should be carefully analyzed prior to making a final decision on the choice of a forum.

Unlike in arbitration agreements and corresponding arbitral awards, whose enforcements are provided for by *New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, 1958, ratified by 144 states, there is no so successful international instrument providing for enforcement of the choice of court agreements and judgments rendered. All the attempts made by international organizations dealing with unification issues and, first of all, the Hague Conference on Private International Law, to create such an instrument at least for commercial matters (*e.g. Convention on the Jurisdiction of the Selected Forum in the Case of International Sales of Goods, 1958, Convention on the Choice of Court, 1965, Convention on the Recognition Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters, 1971, Convention on Choice of Court Agreement*s, *2005*) were in vain and all these conventions were "still-born" and have been ratified by 1-2 states at best. Thus, these issues are currently only regulated at the level of regional and bilateral treaties as well as national law of respective states.

Applicable Ukrainian law

In Ukraine the general rule on the possibility to employ choice of court agreements as well as the rules of such employing are set out by Article 76 (1)(1) of *On Private International Law Act of Ukraine (PIL Act)*. According to the latter such an agreement is allowed when:

(i) the legal relations between the parties contain a so-called “foreign element”, i.e.

a. at least one of the parties thereto is a foreign (not Ukrainian) legal entity or individual, or Ukrainian citizen residing abroad, or stateless person,

b. the subject of their relations is situated within the territory of a foreign state,

c. the legal fact originating, changing or terminating the legal relations, took or takes place within the territory of a foreign state.

(ii) the subject matter of a dispute does not fall within the list of exceptions set out in Article 77 of the *PIL Act* as described below;

(iii) the choice is made in favor of a Ukrainian court or courts.

It is also important to mention that Article 77 of the *PIL Act* sets out the rule on exclusive jurisdiction of Ukrainian courts over commercial disputes involving a foreign element:

(i) if disputed real property is located on the territory of Ukraine;

(ii) if a dispute is related to formalization of intellectual property rights that are subject to registration or issuance of a certificate (patent) in Ukraine;

(iii) if a dispute is related to registration or liquidation of foreign legal entities, individual entrepreneurs on the territory of Ukraine;

(iv) if a dispute is related to validity of records in the state register, the cadastre of Ukraine;

(v) if in a bankruptcy case, a debtor was established under Ukrainian legislation;

(vi) if a case concerns the issue or destruction of securities formalized in Ukraine.

Relevant international treaties to which Ukraine is a party

The international treaties to which Ukraine is a party may provide for a distinct regulation, i.e. allow the parties to choose a court(s) of a foreign state to resolve their contractual disputes. If so, the relevant provisions of the international treaty prevail in virtue of Article 3 of the *PIL Act.* For example, the bilateral legal assistance treaties of Ukraine with such countries as Cuba, Estonia, Georgia, Latvia, Lithuania, Moldova, Poland, Turkey, Uzbekistan, Vietnam, etc. as well the CIS *Convention on Legal Assistance and Legal Relations in Civil, Family and Criminal Matters*, 1993, directly provide for legal possibility and enforceability of such choice of court agreements.

However, a number of bilateral legal assistance treaties involving Ukraine contain no provision on choice of court agreements, e.g. treaties with Bulgaria, Czech Republic, China, Hungary, Greece, Libya, Mongolia, Rumania, Syria, etc.

Thus, foreign companies should be careful while negotiating with Ukrainian commercial partners a choice of court agreement in favor of foreign court(s) and should check the enforceability of such agreements under applicable national legislation and international treaties to which Ukraine is a party.

Approach of Ukrainian courts to choice of court clauses in favor of foreign court(s)

It is important that even if the parties have agreed on the choice of court agreement in favor of foreign court(s), in practice that will not mean that either party to a contract is deprived of the possibility to seize a Ukrainian local court (respective commercial court in B2B and corporate disputes) with a claim there under.

The *PIL Act* (Article 76) sets out among legal grounds for Ukrainian courts to accept and resolve the disputes involving a foreign entity the following:

(i) the location in the territory of Ukraine of the respondent, or its representative office, or its subsidiary, or its immovable or movable property upon which a recovery may be imposed or

(ii) existence of the valid choice of court agreement in favor of a respective Ukrainian court.

The applicable legal assistance treaties to which Ukraine is a party may set out other grounds for establishing the jurisdiction by the court over the dispute.

Thus, should any of the above formal requirements be met, the Ukrainian commercial court may be seized by a claim from any party to a contract, even if the latter contains a choice of court clause in favor of foreign court(s).

The above conclusion is reflected in recent case law, Letter of the Higher Commercial Court of Ukraine *On Unification of the Court Practice in Resolving by the Commercial Courts Certain Disputes Involving Non-Residents of 1 November 2009*, and Clarifications of the Presidium of the Higher Commercial Court of Ukraine *On Some Issues of Practice in Considering Cases Involving Foreign Enterprises and Organizations*, No.04-5/608 of 31 May 2002*,* as amended on 9 November 2009. In these documents the Higher Commercial Court of Ukraine interpreted the provisions of Article 80 of the *Commercial Procedure Code of Ukraine (*Proceedings Termination) as not imposing obligation upon commercial courts to terminate the proceedings in view of existence of the choice of court agreement in favor of a foreign court(s) and, thus, as not precluding the court, if seized, to consider the dispute on the merits. At the same time, the Higher Commercial Court of Ukraine considers that the only exclusion of the commercial courts' jurisdiction in this article is made with regard to arbitration clauses.

However, even if the claim is accepted by the Ukrainian court, its further final resolution on merits will depend on several factors.

The first and most important factor is the position of another party with regard to the jurisdiction of a Ukrainian court. The respondent may agree or disagree with the latter. If the respondent does not oppose the jurisdiction of the Ukrainian court the initial choice of court agreement in favor of a foreign court(s) may be deemed no more valid and the dispute will be resolved by the court actually seized. Alternatively, the respondent may invoke the choice of court agreement and request the Ukrainian court to terminate the proceedings according to the respective provisions of the applicable international treaty to which Ukraine is a party. If so, the Ukrainian court shall decide on the validity and enforceability of the choice of court agreement. The latter is, in fact, the second important factor to determine whether the court may proceed with examination of the claim on the merits and render final judgment thereon.

If the court finds the choice of court agreement invalid or unenforceable, the mere fact of its existence will not preclude the court from resolving the dispute on the merits and will not affect its jurisdiction over it.

Should the court find otherwise, the proceedings may be terminated under a respective provision of applicable legal assistance treaty of Ukraine notwithstanding the "silence" of Article 80 of the C*ivil Procedure Code*. At the same time, as a rule the treaties set out that such termination should be requested by the respondent no later than when submitting his first statement on the substance of the dispute.

Enforcement of the judgments rendered by the chosen court in Ukraine

One more issue to consider is further enforcement of the foreign judgment rendered on the basis of the choice of court agreement, especially if the latter is to be sought within the territory of Ukraine. For quite a long period of time the enforcement of foreign judgments in Ukraine in practice was possible only on the basis of legal assistance treaties. As the number of such treaties was (and still is) quite limited, the enforcement of foreign judgments rendered in the majority of jurisdictions around the world was not possible in Ukraine.

Hopefully, the situation has improved recently. According to the latest amendments to the *Civil Procedure Code of Ukraine*, governing the issues of enforcement of foreign judgments, if no international treaty involving Ukraine provides for recognition and enforcement of a foreign judgment, such recognition and enforcement may be granted on the basis of the reciprocity principle. At the same time, the court considering the case shall act under the assumption that such reciprocity exists unless it is proven otherwise.

But only further court practice could demonstrate whether these new provisions will be applied by Ukrainian courts in line with international standards.

And in any case, it is highly advisable to consider carefully all the “pros” and “cons” of choosing a foreign court for resolving the contractual disputes in order to ensure the predictability of potential dispute resolution under the contract and respective enforcement of the latter.