2017: A turning point in the reform of the Ukrainian judiciary

Volodymyr Yaremko
Sayenko Kharenko, Kiev
vyaremko@sk.ua

Background

The Ukrainian Parliament's adoption of the Law on the Judicial System and the Status of Judges (the 'Law on Judicial System') on 2 June 2016 laid the groundwork for all subsequent changes to the Ukrainian judicial system within the framework of the highly anticipated Judicial Reform. This Law determines the basis for the Ukrainian court system (including court jurisdiction, number of courts and specialisation of courts). The Law also regulates the requirements for judges, their rights and duties, the procedure governing the appointment of judges and termination of mandates. It changes the Ukrainian judicial system from four-instances to three-instances and provides the Supreme Court of Ukraine with stronger powers as the court of last resort. Two new specialised courts, namely the Superior Court on Intellectual Property and the Superior Anti-Corruption Court, have been introduced by the Law.

On 2 June 2016, the Ukrainian Parliament adopted two other bills addressing the reform of the Ukrainian judiciary. The Law on Amendment to the Constitution of Ukraine, among other changes, establishes an attorney's 'monopoly'. Previously, any individual, including foreigners, could be entitled to represent a party to litigation in the Courts of Ukraine. Following the amendments, only attorneys can represent clients in the Supreme Court of Ukraine, starting from 1 January 2017, while in the Courts of Appeal from 1 January 2018, and in the first instance courts from 1 January 2019.

Finally, the Law on Bodies and Individuals that Carry Out Enforcement of Judgements and Decisions of other Bodies (the 'Law on Enforcement of Judgement'), also adopted on 2 June 2016, states that enforcement of court decisions and other authorities may be performed, in addition to the State Enforcement Service, by 'private enforcement officers'.[1]

This article provides further updates on Judicial Reform in Ukraine, the apex of which will be reached this year in 2017. At the beginning of the year, lobbyists and supporters were not optimistic about the Judicial Reform. Despite being highly anticipated by the international community, the Law on Superior Anti-Corruption Court was not even considered by Parliament, while the Law on Constitutional Court of Ukraine (which was expected to be adopted immediately after the Amendment to the Constitution of Ukraine) was only adopted on 13 July 2017. However, the real threshold for reform in 2017, in order to win the confidence of the public and practitioners, focuses on a number of events. These include the election of judges to the Supreme Court of Ukraine, from which point the work of this newly formed highest court in Ukraine will begin and the appointment of the first 'private enforcement officers', which are expected to increase the efficiency of enforcement of court judgments in Ukraine. Lastly, the adoption of new procedural codes will provide for much more effective standards and rules for protection of rights in administrative, commercial and civil proceedings in Ukraine.

New judges for the Supreme Court of Ukraine

The Ukrainian court system used to be widely criticised for injustice and corruption. The results of a public survey held in 2015 show that distrust in the judiciary stood at 79 per cent.[2] In this regard, bringing trust to the highest general court of Ukraine – the Supreme Court of Ukraine – was one of the key tasks of the Judicial Reform. Also, 120 open positions for judges to form the Supreme Court of Ukraine, comprising administrative, commercial, criminal and civil 'court of cassation' (30 judges each), have been announced. Not only judges, but also experienced attorneys and scholars, have been provided with an opportunity to take

part in the selection process. The candidates have to pass various assessment rounds, including examination of their 'dossier', written assessments, practical assignments on writing a court verdict, psychological tests and interviews. The procedure is managed by the High Qualification Commission of Judges, which shall recommend to the High Council of Justice selected candidates for appointment, which subsequently shall recommend the final list of candidates to the President of Ukraine, who ultimately appoints the new judges for the newly formed Supreme Court of Ukraine. While this process is ongoing, the media, together with local and international organisations, will watch the process with great interest. The Public Council of Honesty, drawn from public figures, is also involved in the assessment of candidates by way of reviewing their files and drawing conclusions as to whether or not a candidate passes the 'threshold of honesty' in the eyes of the Council.

The assessment process has not yet been finalised. The first stage of the selection of written theoretical and practical assignments has been successfully completed by 382 candidates. Of these, 73 per cent are judges, ten per cent are scholars, ten per cent are attorneys, and seven per cent have a combined background. The competition for the final stage of the selection process remains quite high, with more than three people per vacancy.

First 'private enforcement offices'

Another major problem of the Ukrainian judiciary is the inefficient system for the enforcement of court judgements. The European Court of Human Rights (ECtHR) underlined this problem in a pilot decision in *Yuriy Nikolayevich Ivanov v Ukraine* in 2009.[3] The ECtHR requested the Ukrainian government to introduce, within one year from the date on which the judgment became final, one or more effective remedies capable of affording adequate and sufficient redress for non-enforcement or delayed enforcement of domestic judgments. Ukraine took some measures to reform the procedure of enforcement of court judgements, but such measures cannot be characterised as entirely effective or capable of solving the problem.

There is a hope that making enforcement of court judgements not only a government activity, but also providing private practitioners with the same opportunity, will make Ukrainian enforcement procedures more effective. It must be noted, however, that if an attorney wishes to become a 'private enforcement officer', they must suspend attorney practice. The first 'private enforcement officers' have already passed the required assessment for 2017 and are expected to commence their work soon. Time will tell whether private enforcement officers will improve enforcement of judgments in Ukraine, much as it will tell whether the newly formed Supreme Court of Ukraine will be able to increase trust in the Ukrainian judiciary.

New procedural rules

Ukrainian general procedural law is divided into four types of proceedings: criminal, administrative, civil and commercial. Each type of proceeding is arranged into respective Codes. A new Criminal Procedural Code was adopted in 2012 and is not part of the current Judicial Reform. Substantial revision of the three other procedural codes (administrative, civil and commercial) is expected in 2017. New procedural rules include a number of changes, such as new rules for interim measures. There are plans to introduce an electronic case management documentary system. There will be measures providing the possibility for the winning party to receive reimbursement for incurred attorney's fees and other litigation costs from the losing party. New rules are expected for taking evidence, including the introduction of witness evidence into the commercial procedure. We can expect the establishment of a fast-track procedure for smaller cases. We will witness the introduction of rules of court assistance to domestic and foreign commercial arbitration proceedings, and a number of changes for combating bad faith and delaying tactics.

Conclusion

Judicial Reform, which began in Ukraine in 2014, enters its crucial period in 2017. The newly formed Supreme Court of Ukraine is expected to become as an example of the rule of law and guarantor of the justice system. Furthermore, empowering 'private enforcement officers' will ensure proper enforcement of court verdicts and new procedural codes are anticipated to make litigation in the Courts of Ukraine more balanced and efficient. This Judicial Reform

is not the first in the modern history of Ukraine. Previous efforts were guided by similar aims. Ukrainian practitioners have long since learned that new legislation is not even half of the actual reform task. Only time will tell whether these new rules bring about real changes to the litigation environment in Ukraine.

Notes

1 A more detailed overview of the laws adopted by the Ukrainian Parliament on 2 June 2016 for reforming the judiciary was published in the IBA Litigation Newsletter, September 2016, pp27–29.

2 A survey held in 2015 by company GFK to order of the USAID FAIR Justice Project, available at: www.fair.org.ua/content/library_doc/2015_FAIR_July_Public_Survey_Lustration_UKR.pdf.

3 Decision of the ECtHR *Yuriy Nikolayevich Ivanov v Ukraine*, 15 October 2009, available at hudoc.echr.coe.

Recent legislative developments in Brazil expected to improve the effectiveness of proceedings for the recognition and enforcement of foreign judgments in the country

Renato Stephan Grion
Pinheiro Neto, São Paulo
rgrion@pn.com.br

Guilherme Piccardi de Andrade Silva
Pinheiro Neto, São Paulo
gpsilva@pn.com.br

Thiago Del Pozzo Zanelato
Pinheiro Neto, São Paulo
tzanelato@pn.com.br

Over the past two decades, Brazil has taken several significant measures to improve and modernise its dispute resolution legal framework. This process has been focused not only on the revision of certain aspects of its judicial proceedings, but also on encouraging further development of alternative dispute resolution methods and enhancing the effectiveness of judgments and awards rendered within and outside the country.

The most recent example of this process occurred in March 2016, when a new Code of Civil Procedure (Law No 13, 105/2015) came into force, with specific sections related to international judicial cooperation (Articles 26 to 41) and, more importantly to the purposes of this article, to the recognition and enforcement of foreign decisions and judgments (Articles 960 to 965).

Such recent developments aim to improve the effectiveness of judicial proceedings necessary for the recognition and enforcement of foreign judgments and arbitral awards in the country, providing parties – especially foreign creditors – with a new set of procedural tools to ensure a successful enforcement of their credits.

Recognition of foreign judgments in Brazil

Since the constitutional amendment No 45/2004, the Brazilian Superior Court of Justice (STJ) – Brazil's highest court for non-constitutional matters – holds the competence to recognise foreign judgments. This means that for an award (or decision) to be considered effective – and, therefore, enforceable – in Brazil, the STJ must first grant the necessary exequatur.

According to a new study published in Brazil, recognition proceedings in Brazil last, on average, 30 months.[1] In this scenario, as one may imagine, the effectiveness of the recognition proceedings could be significantly jeopardised by the passage of time, considering the fact that, in certain cases, the long period needed for recognition and subsequent enforcement (which shall be accomplished in different proceedings before a federal first instance judge) is used by debtors as an opportunity to dissipate their assets. Also, the financial situation of the debtor may deteriorate significantly.

Under these circumstances, the possibility of interim measures being granted at the beginning or during the course of the recognition proceedings may be a crucial solution for preserving the effectiveness of such proceedings, since they may enable the creditor to freeze (or, at least, obtain knowledge as to the existence of) debtor's assets until the final recognition decision is rendered.