

Service of Procedural Documents in Arbitration and Cross-Border Litigation



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Arbitration and cross-border litigation usually entail proceedings involving several jurisdictions with distinct rules of procedure and court practice. This also requires cooperation between lawyers from different countries who know the intricacies of each particular jurisdiction. One of the issues which may require advice from a foreign counsel is the service of procedural documents to a respondent that refuses to take part in proceedings.

Incorrect service of process in such a situation may not always preclude issuance of an arbitral award or a court judgement, but will almost certainly put at risk any subsequent enforcement of such an arbitral award or court judgement. This is because usually both national legislation and relevant international treaties stipulate as ground for refusal of recognition and enforcement of a foreign court judgement or an arbitral award due notification of a respondent on the process. If a respondent is successful in challenging the recognition and enforcement of a relevant judgement or an arbitral award, then all efforts, time and money invested in the respective proceedings could be wasted and a

claimant might be required to start fresh proceedings. In addition, improper service might also result in the setting aside of an arbitral award at the place of arbitration or challenge of a court judgment with a court of higher instance.

Therefore, a party initiating arbitration or litigation shall invest appropriate efforts into making sure that a respondent is duly notified of the proceedings.

SERVICE OF PROCESS IN LITIGATION

Hague Convention

In litigation, the parties are bound by the local procedural rules at the place of a court, which usually provide for a high standard for the service of procedural documents to a respondent. One of the most widely used international instruments dealing with the service of procedural documents is the *Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters of 15 November 1965* (Hague Convention). The Hague Convention will apply if a relevant state where the court is located, and a state where a respondent resides or where it is registered, are parties to this Convention.

The Hague Convention provides for quite a formalistic approach to the service of judicial documents through the official authorities of the relevant states. For example, Ministries of Justice or higher courts, which then arrange for the service of procedural documents based on the procedures established by each particular state.

The Hague Convention also provides for the possibility of the simplified service, including via the direct dispatch of documents by post. However, the simplified service is not available for the majority of countries, which are parties to the Hague Convention, including Ukraine.

In addition, service under the Hague Convention may take a relatively long period of time (in Ukraine, the average time for completion of service is two to four months). For this reason, the parties sometimes try to employ alternative methods of service, as discussed further below.

Other International Mechanisms

In case the Hague Convention does not apply, then the service of procedural documents in litigation shall be made under bilateral international treaties between the respective states, usually mutual legal assistance treaties. Such treaties provide for similar procedures for the service of procedural documents as the Hague Convention through the competent authorities, but may also provide for certain specific conditions under which the relevant court judgment may be recognized and enforced if rendered in the absence of a respondent.

In case there is no bilateral international treaty between the relevant states, then the service of procedural documents shall be made under the procedural rules of the state where the respective court is located, which may or may not require that such service be made under the laws and regulations of the respondent's state.

Alternative Service of Process

In some countries, for example the United Kingdom and Cyprus, local procedural rules permit the service of process under the methods alternative to the methods permitted under the Hague Convention or other bilateral international treaties. In practice, such an alternative service is permitted if service under international instruments was not successful

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Sayenko Kharenko is a leading law firm in Ukraine with an internationally oriented full-service practice. It is currently one of the largest law firms in Kyiv. Most recently, Sayenko Kharenko collected three of the most prestigious professional excellence country awards, more specifically, Law Firm of the Year by each of IFLR European Awards 2017, Who's Who Legal Awards 2017 and Legal Awards 2017. In early 2017, the firm was also shortlisted in Law Firm of the Year category by The Lawyer European Awards 2017 and Chambers Europe Awards 2017.

Sayenko Kharenko – recommended advisor for international arbitration

Sayenko Kharenko boasts a unique team of arbitration lawyers experienced in international commercial and investment arbitration. The team advises clients on all aspects of international arbitration, including the choice of arbitration

forum and applicable law, advising on the risks and possible outcome of the arbitration, representation in the course of the arbitral proceedings before different international arbitration institutions all over the globe, enforcement of arbitral awards and other matters.

Sayenko Kharenko's arbitration lawyers have unprecedented insight into arbitration proceedings in Ukraine and abroad built on their experience of serving as party appointed arbitrators, sole arbitrators, chairmen of the arbitral tribunal, and legal counsel to a party to arbitration. The firm's team handled over 90 arbitrations under a variety of international institutional and ad hoc arbitration rules, covering all major spheres of international business, including relating to contractor agreements; international sales of goods; maintenance and construction of ships; agency and distribution contracts; joint venture agreements; oil & gas supply contracts; and represented clients in corporate, maritime and trade commodities international disputes.

for a substantial period of time and there are prospects that alternative services will effectively bring the claim to the attention of a respondent.

The alternative methods of service may entail various ways to notify the respondent of the proceedings and sometimes the only restriction is express prohibition under the laws of the country where respondents reside as to a particular method of service.

Such methods for service of procedural documents on Ukrainian respondents should, however, be treated with caution, especially if a respondent does not react to the successful alternative service of process and in the end still fails to appear before the court. To ensure a fully enforceable arbitral award or a court judgment, it might still be prudent to await completion of the service under the Hague Convention or other bilateral international treaty.

Service of Process Agent in Litigation in English Courts

In case of litigation in English courts, which is a popular jurisdictional choice in transactions involving Ukrainian parties, it is possible to agree already at the stage of entry in a contract on the appointment of the so-called service of process agent that can facilitate service of procedural documents to those parties, which do not reside in the United Kingdom. This will significantly speed up and simplify English court proceedings involving non-UK respondents.

SERVICE OF PROCESS IN ARBITRATION

Relevant regulations for the arbitration proceedings generally include the *New York Convention on the Recognition and Enforcement of*

Foreign Arbitral Awards of 1958 (New York Convention), local legislation governing arbitration proceedings at the place of arbitration and relevant arbitration rules agreed by the parties.

The *New York Convention* provides that a respondent should be given a "proper" notice of the arbitration proceedings, which shall enable such respondent to present its case. Otherwise, recognition and enforcement of the arbitral award may be refused by a local court. Arbitration rules usually provide for standard rules of delivery of notices to email and postal addresses. For example, as agreed by the parties in the arbitration agreement or in the relevant contract, by email, registered mail or courier.

Therefore, while serving the request for arbitration and other procedural documents, it is necessary to verify the compliance of such service both with the relevant arbitration rules and the agreement of the parties. For example, as confirmed by the Supreme Court of Ukraine, servicing of documents on a defendant in the arbitration by email, that was not agreed by the parties as a permitted method of communication in their contract, will not constitute a proper service although such method of communication is usual for arbitration proceedings.

If a respondent does not appear and defend its case, most arbitration rules provide that the arbitral tribunal may proceed with the arbitration and make the award. In such case, a claimant shall ensure that a respondent was "properly" notified of the arbitration proceedings as required by the *New York Convention*.

Given that the *New York Convention* does not establish the test for a "proper" notice, claimants in the arbitration should be very cautious with simply sending a request for arbitration to the last known address of a re-

spondent or respondent's address indicated in the contract. There are different considerations, which shall be taken into account for different types of respondents, e.g. corporations or individuals.

For corporations, it is advisable to obtain information on the up-to-date registered address of a respondent in the country of its registration. In case the up-to-date registered address is different from the one which is last known to the claimant or which is indicated in the contract, a request for arbitration and other procedural documents shall be sent to both addresses.

For individual respondents, making a "proper" service will be complicated by the need to locate the up-to-date place of residence of such an individual, which is sometimes difficult due to local rules on personal data protection. If the respondent does not cooperate, it might be necessary for a claimant to make enquiries with the competent local authorities in the respective countries to obtain information on the up-to-date address of a respondent or, alternatively, search for his current place of work in order to effect a "proper" service.

SUMMARY

Servicing of process in each particular case depends on the type of proceedings (litigation or arbitration), the level of cooperation of a respondent, as well as the jurisdiction of a respondent's registration or residence. In each case, it is advisable for claimants to devote all the necessary and available efforts to obtain evidence of a proper notification of a respondent of the proceedings so as to make sure that the final arbitral award or court judgment can be effectively enforced against the respondent.