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Favorable Scenarios

by Olexander Droug

UJBL: What are the recent developments that you observed over the past 12 months in cross-border dispute resolution?

Olexander Droug: There are still a substantial number of disputes dating back to the 2008 financial crisis. However, the most recent cases originate from the 2013-2014 crisis in Ukraine. The remaining projects are either new or historic disputes, including disputes between long-standing shareholders or ultimate beneficial owners (UBOs) in joint ventures.

The cases relate to restructurings, M&A deals, fighting for Ukrainian assets or collection of cross-border debts.

The complexity of disputes continuously grows. We are also no longer looking at the arbitration projects involving Ukraine as simple arbitration proceedings as such projects usually generate parallel litigation in Ukraine.

The Ukrainian part of the cross-border dispute resolution becomes very important, if not crucial, in the ability to successfully handle the entire project. In the latest projects, various proceedings in Ukraine actually determined the course of how the main proceedings unfolded in arbitrations seated abroad or in foreign courts. The parties are also trying to establish certain facts in Ukrainian proceedings or obtain evidence, which would otherwise be unavailable to them, and then rely on these facts and evidence in foreign proceedings.

Lately, we have been involved in quite a large number of post-M&A disputes originating from failed transactions after the 2013-2014 crisis in Ukraine, in which the Ukrainian proceedings (including criminal proceedings) played a major part in resolving the overall dispute between the parties.

For a number of reasons, Ukrainian parties are trying to introduce a foreign element into all their disputes. The opposite is also true as purely local Ukrainian matters could become crucial for the entire case.

UJBL: How did these developments influence the projects that you handled?
O. D.: This significantly elevates the status and role of the Ukrainian counsel in any project. You are no longer simply providing a limited advice on issues of Ukrainian substantive law that could arise in the course of the dispute. Instead, the Ukrainian counsel frequently becomes involved in providing advice on strategic matters alongside the lead counsel. In such situation, the Ukrainian part of the dispute would need to be carefully coordinated and aligned with the overall objective that the client wishes to achieve in the case.
We have handled civil, commercial, as well as criminal proceedings in Ukraine in support of arbitration proceedings and cross-border litigation involving Ukrainian parties or Ukrainian assets.

UJBL: Do you observe any new trends in cross-border dispute resolution?

O. D.: We have encountered requests for interim measures in almost every case that we handle now. Increasingly, the parties obtaining interim relief abroad are seeking ways as to how this interim relief can be recognised and enforced in Ukraine.
While there are some positive trends in approach of the Ukrainian courts to dealing with requests for recognition of interim measures granted by foreign courts and arbitral tribunals, including those granted by emergency arbitrators, it is still a matter handled by Ukrainian courts on a case-by-case basis.

The parties, therefore, normally request interim measures from Ukrainian courts simultaneously with filing a request for recognition and enforcement of a foreign court judgment or arbitral award in Ukraine. In practice, this could already be late.

Therefore, one has to be creative and we would sometimes obtain interim measures in support of some different claim pending before the Ukrainian courts. Currently, Ukrainian courts will not grant any interim measures in support of foreign proceedings.

By the way, the Draft Act of Ukraine *On Introduction of Amendments to Certain Legislative Acts of Ukraine in Relation to Judicial Control and Support of International Commercial Arbitration No.*

4351 which is pending before the Parliament of Ukraine addresses the last issue by introducing a procedure for granting interim measures by Ukrainian courts in support of international commercial arbitration. This feature was one of the primary objectives of the working group that prepared the Draft Act.

When advising Ukrainian clients in disputes against their foreign partners, we have also sought to investigate the possibility to obtain interim measures in all relevant foreign jurisdictions, including on an expedited and *ex parte* basis. A timely and strategically obtained freezing order at the outset of proceedings could in practice provide substantial advantages to the claimant, quickly bringing the parties to the negotiating table or even directly resulting in settlement.

UJBL: What other types of work were you involved in recently?

O. D.: Apart from dealing with international commercial arbitration and cross-border litigation, our team has recently been significantly engaged in legislative work.

We participated within a working group that prepared the Draft Act of Ukraine *On Introduction of Amendments to Certain Legislative Acts of Ukraine in Relation to Judicial Control and Support of International Commercial Arbitration No. 4351*, which I just mentioned. Apart from the issue of interim measures, the Draft Act covers numerous other amendments and improvements to Ukrainian procedural legislation with the aim of enhancing the status of Ukraine as an arbitration friendly jurisdiction.

These include simplification of setting aside and recognition and enforcement proceedings, which should be handled by a single court in Ukraine and could also be consolidated and heard together if a seat of arbitration is in Ukraine, court assistance in gathering evidence, various improvements to the enforcement mechanism dealing with currency of payment, collection of post-award interest, voluntary compliance with foreign arbitral awards, issues with interpretation and enforcement of arbitration clauses and other issues.

We were also fortunate enough to be involved at all stages of developing the concept, drafting and passing of the *Act of Ukraine On Financial Restructuring*, advising the World Bank on all Ukrainian law aspects relevant for the restructurings in Ukraine. The Act provides for consensual out-of-court restructurings that could benefit from statutory moratorium effective throughout the course of the restructuring proceedings and tax incentives, which will be effective for three years. Given that the Act, in the version adopted by the Ukrainian Parliament, does not address restructurings with dissenting or holdout creditors, it was possible to provide that all disputes between the creditors and the debtor taking part in the proceedings will be resolved by arbitration.

Now that the Act has been adopted and will enter into force in October 2016, we are currently working on drafting the arbitration rules, which shall govern the arbitration proceedings under the Act.

UJBL: Do you think that the newly adopted Financial Restructuring Act will contribute to the culture of restructurings in Ukraine and actually help Ukrainian business?

O. D.: Yes, even though the *Act of Ukraine On Financial Restructuring* addresses consensual restructurings only, it would be tremendously helpful to deal with SME restructurings by introducing the new procedures of cooperation between creditors and providing tax incentives. The Act, for example, introduces and gives effect to such familiar concept in Western-style restructurings as a standstill agreement, which until now has not been effective under Ukrainian law. The Act also allows group restructurings of several related debtors in joint proceedings. On the tax side, the parties may easily release debt as part of the restructuring without adverse tax consequences (previously, the released part of the debt was treated as the taxable income of the debtor).

In addition to consensual restructuring scenarios, there is currently ongoing legislative work to set up an effective framework for court-approved restructuring plans allowing cram down scenarios (similar to the pre-packaged restructurings in the US or schemes of arrangement in the UK). This would complement the *Financial Restructuring Act* and help deal with large cases with a multitude of creditors of different classes, including dissenting or holdout creditors.

UJBL: How successful was last year for you and your practice?

O. D.: The year was very successful as we won or secured favorable settlement agreements for clients in cross-border disputes with total amounts at stake exceeding USD 1 billion. We continue to be active in all contentious matters in Ukraine involving a foreign element and will cooperate closely with our top-notch banking and finance practice in any upcoming restructuring cases.