« Green Light for Enforcement of a High Court Judgment in Russia

Ukrainian Court Recognises English Court Freezing Order

On 1 June 2012 the Ukrainian general court of first instance granted the request of JSC BTA Bank for the recognition of the Freezing Order of the English Court issued in the *BTA Bank v Ablyazov and others* proceedings (the "**Order**" and the "**BTA Bank case**" respectively).

The ruling of the Ukrainian court in the BTA Bank case is a rare example of the application of the principle of reciprocity as the basis for the recognition of foreign court decisions in Ukraine. It established jurisdiction in a case where the debtor, who is not a Ukrainian resident, has some assets in Ukraine. Its procedural implications may also be relevant to the recognition and enforcement of foreign court orders issued in relation to international arbitrations seated outside Ukraine.

The case

The Order granted the continuation of the Freezing Order of 13 August 2009 against all seven defendants in *JSC BTA Bank v Mukhtar Ablyazov, Roman Solodchenko, Zhaksylyk Zharimbetov, Drey Associates Limited, Anthony Edward Thomas Stroud, John Dominic Wilson and Sarah Juliet Wilson [2009] EWHC 2840 (Comm)*.

In this case the bank brought claims against the defendants in respect of their involvement in what the Bank described as a huge misappropriation of funds belonging to it during the course of 2008, which totalled in excess of US$295m.

The bank alleged that:

D1 was the chairman of the Bank at the time, D2 was a fellow main board director and chairman of the Bank's management board and D3 was a director of the management board. D4 – an English company – was secretly established and controlled by or for Ds 1-3 (or one or more of them) and received the $295m. Ds 5-7, English resident individuals, were or had been nominee directors of D4 and other companies which secretly held valuable assets of Ds 1-3 (or one or more of them).

According to the bank, the Order has already been recognised in Austria, Latvia, Lithuania, Luxembourg, the Netherlands, Switzerland and Saint Vincent and the Grenadines.

Procedural Rules

Ukrainian law does not provide specific rules for the recognition or enforcement of such orders. At the same time, Chapter VIII of the Civil Procedure Code of Ukraine (the "**CPC**"), which sets out general rules for recognition and enforcement proceedings, operates with the rather broad term "*decision of a foreign court*". The latter includes decisions of the courts of foreign states;

other competent authorities of foreign states which are competent to consider civil or commercial matters; and foreign or international arbitral tribunals.

In the BTA Bank case the court applied the rules of Chapter VIII of the CPC and treated the Order as a kind of "*decision of a foreign court*".

The Principle of Reciprocity

According to Ukrainian law the recognition and enforcement of a foreign court decision could be granted either under the applicable international treaty or on the basis of the principle of reciprocity. Since 2010, the CPC has expressly provided that, for the purposes of the application of this principle, it shall be presumed that reciprocity exists unless it is proved otherwise. However, in over two years the court practice with respect to the application of this principle has not yet been established.

In the BTA Bank case the court recognised the Order on the basis of the principle of reciprocity, since Ukrainian court judgments are also recognised and enforced in the UK. The evidence of such recognition and enforcement was provided by the bank together with the request.

Jurisdiction of the Court at the Place of Location of the Debtor's Assets

According to the general rule, the courts located at the debtor's place of residence or location, or that of its assets, are competent to consider requests for the recognition and enforcement of foreign court decisions. However, the court practice is established only with regard to the first jurisdictional criterion, i.e. when the recognition and enforcement is sought against a Ukrainian debtor.

The application of the second criterion may be rather challenging in practice, as the CPC does not specify how the court should establish jurisdiction in such cases. In practice, the burden is on the creditor (i) first to find the assets and then (ii) to persuade the court that these assets belong to the debtor.

But even if the latter is achieved there is no guarantee that the court will confirm its jurisdiction and grant the creditor's request. For instance, in 2010 a Ukrainian court of first instance refused the recognition and enforcement of an ICC award in *Sport Financiera s.a. v Olympic Gold Holdings Limited*, as the BVI debtor did not have any material assets located in Ukraine. In this case the court came to the rather controversial conclusion that, since the corporate rights of the BVI debtor in the Ukrainian entity were subjective rights only and by their nature were not material objects of civil rights, they could not have any location for the purposes of the recognition and enforcement proceedings. The findings of the court in this case were highly criticised by Ukrainian arbitration practitioners.

In the BTA Bank case none of the seven defendants had a place of location or residence in Ukraine. However, the court held that one of them was the beneficiary owner of corporate rights in the Ukrainian company located in its circuit, and, based on this, confirmed its jurisdiction to consider the request.

No Grounds to Deny Recognition of the Order

In the absence of an applicable international treaty, recognition and enforcement can be denied on the grounds set out in the CPC:

- if a foreign court decision has not entered into force according to the law of the state where it was rendered;
- if the party against which the foreign court decision is rendered was deprived of the possibility to participate in the court proceedings as it was not given proper notice of those court proceedings;
- if the decision rendered in the case is made subject to the exclusive jurisdiction of the court or other competent authority of Ukraine;
- in case of *lis pendens* or *res judicata*;
- if the deadline for submitting the decision for the enforcement in Ukraine is missed;
- if the subject matter of the dispute is not capable of resolution by courts according to the law of Ukraine;
- if the enforcement of the decision jeopardises the interests of Ukraine; or
- in other cases established by the laws of Ukraine.

As these grounds are applicable only when the recognition and enforcement depends on reciprocity, Ukrainian court practice has not yet provided clear guidelines in this respect.

In the BTA Bank case the court analysed the grounds listed in the CPC, found that the Order had met all the CPC requirements and granted the request for the recognition of the Order in Ukraine.

As such the Ukrainian court assumed a rather progressive position by deciding to consider the request and to apply the respective provisions of the CPC, despite the lack of any established court practice in such cases, as well as any guidelines as to e.g. recognition on the basis of reciprocity or interpretation of the term "*decision of a foreign court*".

Although the ruling was rendered by a first instance court only and the court's findings pose more questions than answers, it may still be quite useful for parties wishing to recognise and enforce decisions of foreign state courts in Ukraine, especially when there is no applicable international treaty or when the debtor is not a Ukrainian resident.

Olena Perepelynska, MCIArb
Counsel at Sayenko Kharenko
Kyiv, Ukraine