Ukraine: Is it easier to avoid enforcement of judgments of CIS countries that are signatories to the ECHR?

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The recent English Commercial Court case of Merchant International Co Ltd v Natsionalna Aktsionerna Kompaniya ‘Naftogaz Ukrayiny’ [2011] EWHC 1820 (Comm) has clarified that the threshold for refusing recognition of court judgments from CIS (and other) countries that are signatories to the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (“the ECHR”) is lower than it is for court judgments from CIS (and other) countries that are not.

Background facts

The Defendant was a Ukrainian state owned company. The Claimant asserted that it was the assignee of a substantial debt originally owned by the Defendant’s legal predecessor.

The Claimant brought proceedings in Ukraine and in 2006 obtained judgment in its favour for a sum in excess of $US24 million.

In 2010 the Claimant brought proceedings in the English Commercial Court to enforce that judgment (by obtaining an English judgment against the Defendant at common law based on the Ukrainian judgment). The Defendant acknowledged service and stated an intention to defend but in the event no defence was served and the English court gave default judgment in 2011 (“the Default Judgment”) in favour of the Claimant.

The Defendant subsequently applied to the Ukrainian Supreme Commercial Court to set aside the original Ukrainian judgment because of ‘newly discovered circumstances’ namely: (1) the Claimant was said to have had no legal standing or capacity to enter into the assignment agreement (“the Status Issue”); and (2) the underlying agreement was said to have not been signed by the purported signatory (“the Signature Issue”). The Supreme Commercial Court set aside the 2006 judgment on the basis of the Status Issue and remitted the case to the lower court for a retrial. In so doing, it ruled that the lower court would be entitled to consider not just the Status Issue but also to reconsider matters that had been argued at the first trial and any other relevant issue.

The Defendant then applied to the English Commercial Court to set aside the Default Judgment and to have the English claim struck out, submitting that since the 2006 judgment had been set aside and a new trial had been ordered, there was no foreign judgment to be recognized or enforced in England. Even if this analysis was erroneous, the Defendant submitted, the non-recognition of the Supreme Commercial Court judgment could only be justified if there had been a flagrant breach of Article 6, and in fact no breach had occurred.

The decision of the English Commercial Court

The English Commercial Court dismissed the application to set aside the Default Judgment on the following bases:

1. The main issue was not the enforcement of the original Ukrainian judgment, but the recognition of the Supreme Commercial Court judgment setting it aside.

2. Recognition of a foreign judgment ought to be refused if recognising it would be contrary to the ECHR. Such an approach was required not just on public policy grounds but also by section 6 of the Human Rights Act 1998 1.

3. The question of whether foreign proceedings fell short of the guarantees of a fair trial had to be approached with considerable caution. The presumption would be that the procedures were compliant (Maronier v Larmer [2002] EWCA Civ 774).

4. A different test applies when assessing whether recognition of a foreign judgment should be refused on fair trial grounds as between court judgments of countries that are signatories of the ECHR and court judgments of countries that are not. In the case of non-signatory courts, it was necessary to show that the judgment involved a flagrant breach of Article 6 (Government of the United States of America v Montgomery [No.2] [2004] 4 All ER 289).

5. The requirements of Article 6 had to be approached with particular ‘sensitivity’ where the outcome of proceedings favoured a state-owned entity (Pravednaya v Russia (App No 69529/01 (30 March 2005)); and Lizanets v Ukraine (App No 6725/03 (31st August 2007)).

6. The presumption of Article 6 compliance was displaced in relation to the Supreme Commercial Court’s decision (and would have been displaced even if it had been assessed under the flagrant breach test) as the order of the court involved a clear disregard of the principles of legal certainty 2 for the following reasons:

1. By which it is unlawful for a public authority (including an English court) to act in a way that is incompatible with an ECHR right.

2. The principle of legal certainty is one of the rights protected by Article 6 and requires that a ruling on an issue should not be called into question where the courts have finally determined that issue. Specifically, it prohibits a party from being entitled to seek a review of a final and binding judgment solely for the purpose of a rehearing and a fresh decision. Review is only possible if the applicant shows that there is evidence not previously available through the exercise of due diligence that would lead to a different outcome. The discretion to allow a review of a final and binding judgment should only be exercised to correct a miscarriage of justice and not to pursue an appeal in disguise (Pravednaya v Russia).
i) it had allowed the entire case (and more) to be reopened by reference solely to the Status Issue;
ii) the effect was to permit the Defendant to raise the Signature Issue even though it had not been mentioned in the court’s judgment and, indeed, any other point could be considered at the new trial whether ‘new’ or not;
iii) in relation to the Status Issue, no findings had been made as to its evidential significance, nor had any finding been made as to the extent to which the material could with reasonable diligence have been available at the earlier hearing and the Supreme Commercial Court had not invited the lower court to consider these issues.

Thirdly, different tests apply when assessing if recognition/enforcement of a foreign judgment should be denied on the basis of a breach of Article 6 as between judgments of the courts of ECHR signatories and judgments of the courts of non-signatories. While it is necessary to demonstrate a flagrant breach in the case of the latter that is not required in the case of the former, in relation to which (by implication) an ordinary breach would suffice for a Defendant seeking to avoid enforcement.

Fourthly, the English courts will be particularly alert to possible breaches of Article 6 in cases which favoured a state-owned entity.

Fifthly, Article 6 will be breached (not just in the ordinary sense but also flagrantly) if a review of a final and binding judgment is permitted on grounds other than the correction of a judicial mistake or a miscarriage of justice or the existence of new evidence which could not have been obtained for the first trial with due diligence that would lead to a different outcome.

There are two possible implications of this decision worth monitoring.

Firstly, it may be interpreted in Ukraine as demonstrating a lack of (full or effective) reciprocity in England as regards the enforcement of Ukrainian court judgments and therefore make it (even) harder to enforce English judgments in Ukraine under the reciprocity principle that was recognised (in theory at least) in February 2010 under the Act of Ukraine No. 1837-VI “On Amending Certain Legislative Acts of Ukraine in respect of Regulating Private International Law Issues” (“Act No. 1837-VI”).

Secondly, it will be interesting to see if it is argued in due course that applying different tests for judgments from ECHR signatory and non-signatory countries is incompatible with Article 14 of the ECHR.

Analysis

There are several interesting points that arise from this decision that are of particular relevance to CIS-related disputes.

Firstly, English Courts are under an obligation under the Human Rights Act to refuse recognition and enforcement of foreign judgments that contravene ECHR rights.

Secondly, this obligation applies to appellate as well as first instance decisions.

LITTLETON NEWS

The Second Littleton CIS Seminar
Following on from the successful joint seminar held in July on a range of legal issues relating to shareholder issues under English and Ukrainian law, The Littleton CIS Group’s next event will be a Kazakh-related seminar to be held on 1st December.

This event will be jointly hosted by Littleton and Grata, a leading Kazakh law firm, and will cover such topics as jurisdiction by the English Courts over Kazakh nationals, avoiding subsoil disputes in Kazakhstan and anti-suit injunctions involving Kazakhstan.

Ukraine seminar 2012 in Kyiv
In early 2012 a delegation from Littleton will be visiting Ukraine to hold a seminar with the British Embassy on a variety of English law themes.

Further details are available from Littleton’s Commercial Director, Nigel McEwen – nmcewen@littletonchambers.co.uk.