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PROCEEDINGS IN THE CASES OF GRANTING PERMISSION FOR THE ENFORCEMENT OF ARBITRATION AWARDS: PROBLEMS AND AREAS OF IMPROVEMENT

Abstract. The ***purpose of the article*** is to study the peculiarities of proceedings in cases of granting permission to enforce arbitration awards in civil cases and find ways to improve the current civil procedural legislation.

Research methods. In the course of the research, both general scientific and special methods of cognition have been used.

Results. The author has clarified the essence of the procedure for appealing to enforce arbitration awards in civil cases; elicited problems of the judicial procedure for granting permission to enforce arbitration awards; made proposals to optimize the current laws in legal relations under concern.

Conclusions. The procedure for enforcing arbitration awards requires improvement. The legal issues that need to be settled within the current legislation include the resolution of the conflict between the norms of the Civil Procedure Code of Ukraine and the Law of Ukraine "On Courts of Arbitration" in terms of determining the competent court authorized to consider the case of the issuance of an executive document. This power should be assigned to the court of appeal, as it is currently enshrined in civil procedural law. In addition, the legal requirement for requesting the case from the arbitration court by the state court is unfounded, given the nature of proceedings in cases of granting permission for the enforcement of arbitration awards. It is argued that legal grounds for a refusal to issue a writ of execution to enforce arbitration awards (arbitral panel, which made the arbitration award, did not meet statutory requirements; the arbitration award contains ways to assert the rights and protected interests not provided by law; the permanent arbitration tribunal did not provide the relevant case at the request of the court) should be excluded from art. 486 of the Civil Procedure Code of Ukraine.

Key words: arbitration award, executive document, powers of competent court.

1. Introduction

The 2004 Law of Ukraine "On Courts of Arbitration" became an essential legal basis for protecting violated property and non-property rights and interests of natural and legal entities in arbitral tribunals, which are independent non-governmental bodies established by agreement or the relevant decision of persons interested in the legal procedure to settle disputes arising in civil and commercial relations. Although arbitral tribunals are separated from the state judiciary, they have broad powers to consider civil and commercial disputes and hence take procedural measures; however, they are not authorized to address legal issues which the legislator attributes to the exclusive jurisdiction of state courts. In particular, it refers to the issuance of a writ of execution for enforcing an arbitration award, which can be realized only by the state court. This procedure has some shortcomings, and thus, the study of granting permission to enforce arbitration awards is relevant from theoretical and practical perspectives.

In legal doctrine, problems of the enforcement of arbitration awards have been covered by the contributions of such scientists as I.O. But, Yu.O. Kotviakovskyi, V.A. Rekun, D.M. Sibilov, N.S. Stasiv et al. The scientists' developments are of great scientific interest and lay a theoretical groundwork for this article.

The purpose of the research is to study the peculiarities of proceedings in cases of grant-

ing permission to enforce arbitration awards in civil cases and find ways to improve the current civil procedural legislation. The research tasks are to clarify the essence of the procedure for appealing to enforce arbitration awards in civil cases; identify problems of the judicial procedure for granting permission to enforce arbitration awards; make proposals to optimize the current laws in legal relations under concern. Research methods: in the course of the research, both general scientific and special methods of cognition have been used.

2. Control functions of the competent court in terms of the enforcement of arbitration awards

In accordance with the procedure provided by the current legislation, arbitral tribunals have powers to consider civil and commercial cases and make the relevant awards, but they are not authorized to decide on their enforcement. Granting permission to enforce arbitration awards and issuing writs of execution are attributed to the courts of general jurisdiction and commercial (state) courts. This article focuses exclusively on the operation of the courts of general jurisdiction in the realm under consideration.

As a rule, the need to enforce the arbitration award may arise in the absence of its voluntary execution by the obligor. However, this is not always about a deliberate failure to comply with the arbitration award. Thus, I.O. But rightly notes that the current legislation of Ukraine does not set a period during which the defendant can comply with the decision voluntarily; therefore, the person, in whose favor the decision was made, is free to demand direct execution and immediately initiate the procedure for acquiring an executive document in the competent state court in the manner prescribed by law (But, 2016, p. 185).

The procedure for issuing a writ of execution for enforcing the arbitration award is established in art. 56 of the Law of Ukraine "On Courts of Arbitration" (hereinafter – the Law) and Chapter 4 of Section IX of the Civil Procedure Code of Ukraine (hereinafter – the CPC of Ukraine). In particular, art. 483 of the CPC of Ukraine statutorily stipulates that the issuance of a writ of execution for enforcing the arbitration award shall be considered by the court at the request of the person in whose favor the arbitration award was made. The application for a writ of execution for enforcing the arbitration award shall be submitted to the appellate court at the place of settlement of a dispute by arbitration within three years from the date of the approval of the arbitration award.

A similar legislative provision is reflected in art. 56 of the Law, which sets that the application for the issuance of an executive document may be submitted to the competent court within three years from the date of the approval of the arbitration award. At the same time, art. 2 of this Law interprets the term "court of competent jurisdiction" as a local general court or a local commercial court at the place of consideration of the case by the arbitral tribunal. Thus, there is a legal inconsistency in determining the court of competent jurisdiction authorized to consider the case of issuing an executive document (writ), which the legislator shall resolve by amending the Law of Ukraine "On Arbitration Courts" and assigning this power to appellate courts, as provided in the CPC of Ukraine.

As Yu.O. Kotviakovskyi notes, when issuing an executive document for an arbitration award, the court of competent jurisdiction actually agrees to enforce the decision it did not take (Kotviakovskyi, 2017, p. 25). In this way, the state apparently exercises indirect control over the compliance of arbitration awards with statutory requirements, as well as the rights and interests of the parties and other interested persons.

Many scholars draw attention to the control functions of the state under the enforcement of arbitration awards. Thus, N.S. Stasiv, studying this issue in the historical context, holds that even though the state has statutorily enshrined the right of a person to take a dispute to arbitration, control over the enforcement of arbitration awards has been assigned to state bodies – courts of general jurisdiction. Today, this type of control is manifested, in particular, when the arbitration award is subject to enforcement within the proceedings on the issuance of a writ of execution for enforcing the arbitration award. Moreover, the author points out that the statutory consolidation of proceedings for issuing a writ of execution for the enforcement of the arbitration award is based on a historically determined desire of the state to reserve control over the enforcement of the relevant decisions (Stasiv, 2020a, p. 84).

In D.M. Sibilov's opinion, the conclusion of an arbitration agreement and consideration of the case by an arbitration court does not deprive official judicial institutions of their control. The scientist rightly remarks that arbitration awards, which are not acts of justice, have an executive force which is realized through the incorporation of their content in the decisions and executive documents of official judicial institutions (Sibilov, 2021, pp. 40, 46).

One should also agree with the standpoint that granting permission to enforce arbitration awards by the competent state courts through issuing an executive document is a practical implementation of their control function

over arbitration proceedings (Kotviakovskyi, 2017, p. 24).

3. Peculiarities of the judicial examination of an application for a writ of execution for enforcing an arbitration award

The legislator enshrines a legal mechanism for settling the issuance of an executive document by the court of competent jurisdiction. As stipulated in art. 485 of the CPC of Ukraine, an application for a writ of execution to enforce the arbitration award shall be unilaterally considered by the judge within fifteen days from the date of its receipt in the courtroom with notice of the parties. Moreover, the non-appearance of the parties or one of the parties duly notified of the date, time, and place of the hearing shall not preclude the judicial examination of the application. A similar provision is available in art. 56 of the Law.

Following the examination of the application for issuing a writ of execution to enforce the arbitration award, the court decides on issuing a writ of execution or a refusal to issue a writ of execution to enforce the arbitration award.

It should be noted that under the above provision of the CPC of Ukraine, in considering an application for a writ of execution to enforce the arbitration award at the request of one of the parties, the court requires a case from the permanent arbitral tribunal which stores it. In this case, there is a legal conflict with the provisions of the Law "On Courts of Arbitration" because under the provisions of p. 2 of art. 56 of the Law, in considering an application for issuing an executive document, the competent court must request the case from the permanent arbitral tribunal which stores it. Thus, the CPC of Ukraine indicates the option of resolving this issue if the parties care, and the case cannot be called on if they have not required it. At the same time, the Law imperatively obliges the court of competent jurisdiction to take action without making it dependent on the parties' will. However, the purpose of such a request is unclear in both cases. Moreover, if the case is requested from the permanent arbitration court, the term of consideration of the application for issuing a writ of execution is significantly increased. The case must be forwarded to the state court within five days from the date of receipt of the request. In this case, the period for consideration of the application for issuing a writ of execution for the enforcement of the arbitration award shall be extended to thirty days from the date of its receipt by the court.

In addition, a lack of the statutory indication of the option of requesting the case, which the arbitration court considered, by the court to resolve a specific dispute catches attention. It seems that the above is due to the fact that the Law does not regulate the storage of such cases at all if a writ of execution has not been issued for them. Part 2 of art. 54 of the Law only deals with the storage of case materials considered by the arbitration court to resolve a specific dispute for which enforcement documents have been issued. They must be kept in the court of competent jurisdiction, at the place of issuance of the executive document.

Noting the legislative inconsistency, the author believes that there is no need for requesting the case from a permanent arbitral tribunal or arbitral tribunal to resolve a particular dispute, given that in deciding on the issuance of a writ of execution to enforce the arbitration award, the state court is not authorized to review arbitration cases as an appellate or cassation authority is.

4. Grounds for a refusal to issue a writ of execution to enforce an arbitration award

Within proceedings in the case of granting permission to enforce the arbitration award, the court must ascertain the absence or existence of grounds for a refusal to issue a writ of execution stipulated in art. 486 of the CPC of Ukraine and synchronized with the provisions of part 6 of art. 56 of the Law. The analysis of these norms contributes to the conclusion that most of the listed grounds for a refusal to issue a writ of execution to enforce the arbitration award are legally justified, but some of them are contradictory.

First of all, the author dwells on the grounds of the first conditionally defined group which, given the essence of the procedure under the study, have an explicit legal and practical focus, so their regulation and preservation in procedural law are necessary. Thus, the court must refuse to issue a writ of execution to enforce the arbitration award if: the arbitration award has been revoked by the court on the date of the approval of the decision upon the application for issuing a writ of execution; the case in which the arbitration award has been made is not under the jurisdiction of the arbitral tribunal by law; the deadline for applying for a writ of execution has been missed, and the court has not recognized reasons for its omission as valid; the arbitration award has been made in a dispute not provided for in the arbitration agreement, or this arbitration award has resolved issues beyond the scope of the arbitration agreement (if the arbitration award has resolved issues that go beyond the arbitration agreement, it may be revoked only in the part which concerns the relevant); the arbitration award is invalidated; the arbitral tribunal decided on the rights and obligations of persons who did not participate in the case.

While exercising such powers, the court fulfills the control function over the arbitration award, which is mentioned above and which must be assigned to the state as represented by judicial authorities as the only authorities executing justice through authorized professional judges. In this context, the author cannot agree with V.A. Rekun who proposed – for the interests of cases, for the interests of enterprises, organizations and in order to relieve state courts of the obligation to issue executive documents in arbitration cases which they did not consider – to allow one or more permanent arbitral tribunals to issue enforcement documents in cases in an experimental fashion (Rekun, 2009, p. 268).

In addition, the author believes that activities of the judicial body cannot be purely formal towards the issuance of an executive document. The state court must assess the arbitration award as to its compliance with the law; however, it is essential to keep in mind that the issuance of a writ of execution enforces the arbitration award and hence has some substantive effects on the interested parties, including debtors. The position of I.O. But is convincing, as follows: given that the interested party appeals to the court with a statement, the purpose of which is to guarantee the state enforcement of the arbitration award, the court of competent jurisdiction must make sure that the arbitration award is indeed lawful. At the same time, the court of competent jurisdiction should be endowed not with audit functions (i. e., not to review the case and the arbitration award, make a new decision, or change it) but control ones, incl. a refusal to issue a writ of execution on the grounds of the arbitration award's non-compliance with the law (But, 2016, p. 190).

Therefore, if the court finds the above circumstances amidst the procedure concerned, it must respond accordingly, i. e., a refuse to issue a writ of execution to enforce the arbitration award. At the same time, it should be noted that the establishment of these grounds by the court is not legally related to requesting the case from the arbitral tribunal. The conclusion on the availability of preconditions for refusing to issue a writ of execution can be made only on the basis of the documents obligatorily attached to the application: the original arbitration award (or a duly certified copy thereof) and the original arbitration agreement (or a duly certified copy thereof), or a valid court decision revoking the arbitration award or declaring the arbitration agreement invalid.

The statutory imposition of an obligation on the state court to establish the potential availability of other grounds for a refusal to issue a writ of execution in proceedings for granting permission to enforce arbitration awards is unjustified and contradicts the essence of this procedure. In particular, para. 8, p. 1 of art. 486 of the CPC of Ukraine entails that the court shall refuse to issue a writ of execution to enforce the arbitration award if the permanent arbitral tribunal has not provided the specific case at the court's request. The author has previously defended the position that requesting the case from the arbitral tribunal does not meet the objectives and competence of the state court in the context of the legal goal to be achieved through a system of procedural actions in the proceedings on the case of granting permission to enforce the arbitration award. It seems that requesting for the arbitration case's materials should take place only in the case of initiating another type of proceedings – proceedings in cases of appeal against arbitration awards, challenging awards of international commercial arbitration. The scientific community has other arguments in favor of the exclusion of such a ground for a refusal to issue a writ of execution for enforcing the arbitration award as failure to provide materials of the arbitration case, which also deserves attention, at the court's request. For example, N.S. Stasiv notes that the refusal to issue a writ of execution on the grounds of the arbitral tribunal's failure to provide the materials of the arbitration case at the request of the court is a sanction applicable to the applicant who does not have objective options to comply with the requirements of the court decision, and, therefore, shall not be liable (Stasiv, 2020b, p. 7).

The legislator regards the cases when the arbitration award contains ways to defend the rights and protected interests not provided by law as grounds to refuse to issue a writ of execution for the arbitration award (item 7, p. 1 of art. 486 of the CPC of Ukraine). This legislative provision is in discord with provisions of other regulations, in particular art. 16 of the Civil Code of Ukraine. I.O. But has studied this issue within his dissertation (But, 2016, pp. 191–193). Today, the current wording of p. 2 of art. 16 of the Civil Code of Ukraine outlines general methods of the protection of civil rights and interests. However, it is also consolidated the norm under which the court may protect a civil right or interest in a different way established by an agreement or law or a court in cases specified by law. That kind of the vision of ways to protect a right is reflected in the procedural rules. In particular, art. 5 of the CPC of Ukraine establishes that when executing justice, the court protects the rights, freedoms and interests of natural persons, the rights and interests of legal entities, state and public interests in the manner prescribed by law or

agreement. If the law or agreement does not determine an effective way to protect the violated, unrecognized or disputed right, freedom, or interest of the person who has appealed to the court, the court may determine a method to protect the right, which is not contrary to law, following the requirement stated by such a person. Arbitration courts also should be authorized to apply such an approach to determining methods to protect rights. Therefore, the ground provided in para. 7, p. 1 of art. 486 of the CPC of Ukraine should be excluded.

Among other things, pursuant to the current procedural law, the court refuses to issue a writ of execution for enforcing the arbitration award if the arbitral panel, which made the arbitration award, did not meet the statutory requirements, i. e., the requirements of Section III of the Law of Ukraine "On Courts of Arbitration". However, the establishment of the relevant circumstances cannot be implemented by the court on the assumption that the court should not request for an arbitration case, as well as go beyond its powers in proceedings of granting permission to enforce arbitration awards, i. e., in deciding on the issuance of a writ of execution, as in order to conclude the arbitral panel's non-compliance with the statutory requirements, it is necessary to conduct a substantive trial with mandatory examination and evaluation of relevant evidence indicating such a circumstance, which cannot occur in the proceedings. In the author's opinion, the consideration of this issue should take place only on the initiative of interested persons, who should apply to the court of competent jurisdiction and provide the necessary evidence to confirm their position. This will ensure the dispositive and adversarial nature of civil proceedings and avoid the acquisition of features of the investigative process. Many scientific contributions are devoted to dispositive and adversarial principles as fundamental categories of civil proceedings and the court's role in such proceedings. In particular, V.A. Kroitor and V.Yu. Mamnytskyi, studying the adversarial principle, note that the law is based on the point that civil proceedings are conducted on an adversarial basis, but with the active assistance of the court, i. e., on the terms of their cooperation, to consider the case effectively (Kroitor, Mamnitskyi, 2019, p. 41). It is essential to support this position as the court can only assist interested parties in exercising their rights, but it cannot undertake such rights.

One should draw attention to the fact that the above ground is available in the list of grounds for revoking the arbitration award, but only within proceedings on the case of appeals against arbitration awards, challenging awards of international commercial arbitration. This type of proceedings is the only possible and optimal procedure for establishing that the arbitral panel, which made the decision, did not meet the statutory requirements. Therefore, to differentiate court competence and avoid duplication of judicial powers in various proceedings, para. 6, part 1 of art. 486 of the CPC of Ukraine also needs to be abolished, but such a ground must be preserved in para. 4 of p. 2 of art. 458 of the CPC of Ukraine.

5. Conclusions

The procedure for applying for the enforcement of arbitration awards requires improvement. The legal issues that need to be resolved in the current legislation include the elimination of the conflict between the norms of the CPC of Ukraine and the Law of Ukraine "On Arbitration Courts" in terms of determining the court of competent jurisdiction authorized to consider the case on the issuance of an executive document. This power should be assigned to the court of appeal, as it is currently enshrined in civil procedural law. In addition, the legal requirement for requesting the case by the state court from the arbitration court is unfounded, given the nature of the proceedings in cases of granting permission to enforce arbitration awards. It is argued that legal grounds for refusing to issue a writ of execution to enforce arbitration awards (arbitral panel, which made the arbitration award, did not meet statutory requirements; arbitration award contains ways to assert the rights and protected interests not provided by law; the permanent arbitration tribunal did not provide the relevant case at the court's request) should be excluded from art. 486 of the CPC of Ukraine. Although the article resolves some controversial issues, the procedure concerned requires further studies in this regard.

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ПРОВАДЖЕННЯ У СПРАВАХ ПРО НАДАННЯ ДОЗВОЛУ НА ПРИМУСОВЕ ВИКОНАННЯ РІШЕНЬ ТРЕТЕЙСЬКИХ СУДІВ: ПРОБЛЕМИ ТА НАПРЯМИ ВДОСКОНАЛЕННЯ

Анотація. ***Мета статті*** полягає в дослідженні особливостей провадження у справах про надання дозволу на примусове виконання рішень третейських судів у цивільних справах, а також у пошуку шляхів удосконалення чинного цивільного процесуального законодавства.

Методи дослідження. У процесі дослідження застосовувалися як загальнонаукові, так і спеціальні методи пізнання.

Результати. З'ясовано сутність процедури звернення до примусового виконання рішень третейських судів у цивільних справах. Встановлено проблематику судового порядку надання дозволу на примусове виконання рішень третейських судів. Вироблено пропозиції щодо оптимізації чинного законодавства в окресленій сфері правовідносин.

Висновки. Встановлено, що процедура звернення рішень третейських судів до примусового виконання потребує свого вдосконалення. До правових питань, які необхідно вирішити в чинному законодавстві, належить усунення колізії між нормами Цивільного процесуального кодексу України та Закону України «Про третейські суди» в аспекті визначення компетентного суду, уповноваженого розглядати справу щодо видачі виконавчого документа. Це повноваження має залишатися за апеляційним судом, як це закріплено на сьогодні в цивільному процесуальному законодавстві. Крім того, необґрунтованою видається законодавча вимога про витребування державним судом справи з третейського суду з огляду на сутність провадження у справах про надання дозволу на примусове виконання рішень третейських судів. Наведено аргументи на користь того, що мають бути виключені зі ст. 486 Цивільного процесуального кодексу України такі правові підстави для відмови у видачі виконавчого листа на примусове виконання рішення третейського суду: а) склад третейського суду, яким прийнято рішення, не відповідав вимогам закону; б) рішення третейського суду містить способи захисту прав та охоронюваних інтересів, не передбачені законом; в) постійно діючий третейський суд не надав на вимогу суду відповідну справу.

Ключові слова: рішення третейського суду, виконавчий документ, повноваження компетентного суду.

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