Case category No **824/178/19: Civil cases (after 01.01.2019); Special procedure cases; Cases on recognition and enforcement of international commercial arbitral awards, of which:**

Sent by the court: **not specified.** Registered: **24.01.2021.** Published: **25.01.2021.**
Date of entry into force: **14.01.2021**
Proceeding number: **61-15459av20**

[Coat of Arms] Supreme Court

Judgment

in the name of Ukraine

14 January 2021,

Kyiv

case No 824/178/19

proceeding No 61-15459av20

The Supreme Court, comprised of the judicial panel of the First Judicial Chamber of the Civil Court of Cassation:

V.V. Shypovych (judge-rapporteur), E.V. Synelnykov, S.F. Khopta;

with the attendance of Kh.I. Klimkovska, court secretary

parties:

appellant (claimant in the arbitration proceedings) - VEB.RF State Development Corporation,

representative of VEB.RF State Development Corporation - Oleksandr Mykhailovych Denysenko,

respondent in the arbitration proceedings - the State of Ukraine, represented by the Ministry of Justice of Ukraine,

Representative of the State of Ukraine in the person of the

Ministry of Justice of Ukraine, - Inna Oleksandrivna Vasina,

having considered at a public hearing the appeal of VEB.RF State Development Corporation represented by Oleksandr Mykhailovych Denysenko, attorney, against the judgment of the Kyiv Court of Appeal of 7 September 2020, issued by judge S.V. Kulikova in the matter of an application of VEB.RF State Development Corporation for the recognition and enforcement of the award of the Emergency Arbitrator of the Arbitration Institute of the Stockholm Chamber of Commerce dated 28 August 2019 in case No 2019/113 concerning the claim of VEB.RF State Development Corporation against the State of Ukraine (in the person of the Ministry of Justice of Ukraine) ordering interim measures,

FINDS AS FOLLOWS:

Summary of the application for the recognition and enforcement of the international commercial arbitral award

[1] In September 2019, VEB.RF State Development Corporation (hereinafter - "VEB.RF"), represented by Oleksandr Mykhailovych Denysenko, attorney, brought an application before the Kyiv Court of Appeal for the recognition and enforcement of an international commercial arbitral award.

[2] VEB.RF's application is based on the fact that, on 27 November 1998, the Cabinet of Ministers of Ukraine (hereinafter: CMU) and the Government of the Russian Federation (hereinafter: RF) signed the Agreement on the encouragement and mutual protection of investments that was ratified by Law of Ukraine No 1302-XII of 15 December 1999 (hereinafter - "the BIT").

[3] In accordance with Article 9 of the BIT, in case of any dispute between either Contracting Party and an investor of the other Contracting Party that may arise in connection with investments, including disputes concerning the amount, conditions of and procedure for the payment of compensation referred to in Article 5 of this Agreement or the procedure for effecting a transfer of payments referred to in Article 7 of this Agreement, shall be notified in writing accompanied with detailed comments which the investor shall forward to the Contracting Party involved in the dispute. The parties to the dispute shall endeavour to settle such dispute by way of negotiations. If the dispute cannot be resolved through negotiations within six months from the date of the written notification referred to in paragraph 1 of this Article, such dispute shall submitted to: a) a competent court or arbitral tribunal of the Contracting Party

on whose territory the investments were made; b) the Arbitration Institute of the Stockholm Chamber of Commerce, c) an *ad hoc* arbitral tribunal pursuant to the Arbitration Rules of the United Nations Commission for International Trade Law (UNCITRAL).

[4] In the 28 August 2019 award of the Emergency Arbitrator of the Arbitration Institute of the Stockholm Chamber of Commerce, the State of Ukraine (in the person of the Chief Public Bailiff of the execution section of the State Enforcement Service Department of the Ministry of Justice of Ukraine) was ordered to halt the forced sale of the shares of Prominvestbank Public Joint-Stock Company (hereinafter - "PJSC") registered in the name of VEB.RF, including in order to collect the debts owed by the Russian Federation under any arbitral or judicial decision, and to refrain from any equivalent actions with respect to the shares of Prominvestbank PJSC pending the decision by the Arbitral Tribunal in the final arbitral award as to whether such sale is contrary to international law. The State of Ukraine was ordered to pay VEB.RF an application fee of EUR 4,000; the Emergency Arbitrator's fee of EUR 16,000; and the applicant's reasonable costs of legal services in connection with this application, which shall be subject to assessment unless agreed.

[5] Given that the debtor has failed to comply with this decision voluntarily, based on Articles 474-475, 479 of the Civil Procedure Code of Ukraine (hereinafter - the CPC of Ukraine), Articles 35, 81, and 82 of the Law of Ukraine On International Commercial Arbitration and Article 1-4 of the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards (hereinafter - the New York Convention), the applicant requested the court to recognize and enforce the award of the Emergency Arbitrator of the Arbitration Institute of the Stockholm Chamber of Commerce dated 28 August 2019 in case No 2019/113 concerning the claim of VEB.RF State Development Corporation against the State of Ukraine (in the person of the Ministry of Justice of Ukraine) ordering interim measures, and to issue an enforcement order for the enforced execution thereof.

Summary of the court decision under appeal

[6] By judgment of 7 September 2020, the Kyiv Court of Appeal rejected VEB.RF's request for the recognition and enforcement of the award of the Emergency Arbitrator of the Arbitration Institute of the Stockholm Chamber of Commerce of 28 August 2019 in case No 2019/113 concerning the claim of VEB.RF against the state of Ukraine (in the person of the Ministry of Justice of Ukraine) ordering interim measures.

[7] The Kyiv Court of Appeal judgment is based on the reasoning that the Emergency Arbitrator award deals with a dispute that did not fall under the arbitration agreement (lack of jurisdiction of the emergency arbitrator), given that the procedure for appointing an emergency arbitrator of the Arbitration Institute of the Stockholm Chamber of Commerce was first provided in the 2010 version of the Arbitration Rules, to the application of which the State of Ukraine did not consent.

[8] The court also considered that the State of Ukraine (against which the decision was made) was, for good reasons, unable to provide its comments, given that, of the five-day period that the State had available to prepare its legal position, three fell on non-working days in Ukraine, which deprived the respondent of the opportunity to provide its detailed position in the case for reasons that were outside its control and that it could not eliminate.

[9] Furthermore, when considering the application for the recognition and enforcement of the Emergency Arbitrator award, the court established that the recognition and enforcement of this decision would be contrary to the public order of Ukraine, including the provisions of Article 129 of the Constitution of Ukraine on the binding force of judicial decisions, insofar as the recognition and enforcement of the Emergency Arbitrator award would jeopardize the rule of law and legal certainty by preventing the State from executing the award of the Arbitral Tribunal (The Hague, Kingdom of the Netherlands) of 2 May 2018 in PCA case No 2015-36 concerning the claim of Everest Estate LLC and others against the Russian Federation.

Summary of the grounds of the cassation appeal

[10] In the appeal brought before the Supreme Court in October 2020, attorney O.M. Denysenko, acting on behalf of VEB.RF, requested the Court to quash the 7 September 2020 Kyiv Court of Appeal judgment and to render a new judgment granting VEB.RF's application.

Cassation appeal proceedings in the Supreme Court

[11] By order of 27 October 2020, the Supreme Court initiated an appeal proceeding in case No 824/178/19 concerning the appeal of VEB.RF against the 7 September 2020 Kyiv Court of Appeal judgment.

[12] By order of the Supreme Court of 20 November 2020, the case was assigned

for a public hearing with notice to the parties.

The parties' arguments

The arguments of the appellant

[13] In support of its appeal, VEB.RF argues that Article 9 of the BIT contained no directions as to the particular version of the Arbitration Rules to be applied, whereas the Rules of the Arbitration Institute at the Stockholm Chamber of Commerce (Arbitration Rules 2017) provide that unless otherwise agreed by the parties in any arbitration agreement referring to the Arbitration Rules of the Arbitration Institute of the Stockholm Chamber of Commerce, the parties shall be deemed to have agreed to the application of those rules, or such amended rules as may be in force on the date of the filing of the application for the appointment of an Emergency Arbitrator. At the same time, the State of Ukraine did not expressly exclude the applicability to Ukraine of the rules for the appointment of emergency arbitrators pursuant to the Arbitration Rules currently in force. Furthermore, in its answer to the request for arbitration, the State of Ukraine refers to the current version of the Arbitration Rules without any reservations as to the applicability of some of their provisions.

[14] The appellant further asserts that the State of Ukraine has duly exercised its right to provide comments by timely providing a detailed answer to VEB.RF's request for provisional measures in Case No 2019/113 on 11 pages, accompanied by factual and legal exhibits.

[15] Furthermore, in considering the appeal in Case No 757/5777/15, the Supreme Court had not held that the Emergency Arbitrator award was issued in a dispute that was outside the scope of the arbitration agreement as a result of the application of the rules in force at the time the dispute arose, while the circumstance that, in that case, the Emergency Arbitrator granted the State of Ukraine three days to state its position, of which two fell on the weekend, had not been treated as a ground to refuse the recognition of the Emergency Arbitrator award.

[16] He further argues that the Kyiv Court of Appeal was wrong to conclude that the Emergency Arbitrator award jeopardized the rule of law and legal certainty by preventing the State from executing another arbitral award, given that such conclusion contradicts the text of the Emergency Arbitrator award, which merely orders Ukraine to halt the forced sale of Prominvestbank PJSC shares registered in the name of VEB.RF, not to halt execution actions in enforcement

proceedings.

He argues that the Emergency Arbitrator's decision to prohibit the forced sale of shares of Prominvestbank PJSC is temporary in nature and does not interfere with the execution of the 2 May 2018 award of the Arbitral Tribunal in PCA Case No 2015-36, given that that decision can be enforced against other assets of the Russian Federation.

[17] He emphasizes that the unjustified refusal to recognize and enforce an international arbitral award would constitute a breach by Ukraine of international law, violate Article 1(1) of Protocol No 1 to the Convention for the Protection of Human Rights and Fundamental Freedoms, and interfere with the property rights in the Prominvestbank PJSC shares.

The arguments of the appellee

[18] In her response to the appeal filed in November 2020, the authorized representative of the Ministry of Justice of Ukraine N.V. Hryshyna objects to the appeal and asks the court to uphold the 7 September 2020 judgment of the Kyiv Court of Appeal.

[19] In her view, the Emergency Arbitrator lacked jurisdiction to decide against the State of Ukraine, since, by ratifying the BIT in 1999, Ukraine agreed to settle disputes with Russian investors under the Arbitration Rules of the Stockholm Arbitration Institute in force at the time when the BIT was concluded (the 1999 Arbitration Rules). Ukraine did not, however, agree to the application of the 2017 version of the Arbitration Rules in disputes to which it may be party. Ukraine had no reason to believe, in 1999, that the Arbitration Rules may be amended in such a way as to introduce the institution of emergency arbitrator and as well as provisions under which the new version of the Rules would apply automatically.

[20] She points out that the appellant did not refute the court's finding that the State of Ukraine had been deprived of the opportunity to state its position in detail for reasons outside its control which it was unable to eliminate, namely that part of the time-limit for providing comments fell on 24, 25 and 26 August 2019, which were non-working days and public holidays in Ukraine.

[21] She agrees with the conclusion of the Kyiv Court of Appeal that the recognition and enforcement of the Emergency Arbitrator award conflicts with

the public order of Ukraine and entails consequences that are incompatible with the law of Ukraine, which constitutes a clear ground to reject VEB.RF's application.

The facts of the case established by the court

[22] On 27 November 1998, the Cabinet of Ministers of Ukraine and the Government of the Russian Federation signed the Agreement on encouragement and mutual protection of investments, which was ratified by Law of Ukraine No 1302-XIV of 15 December 1999.

[23] On 21 August 2019, VEB.RF brought an application to the Arbitration Institute of the Stockholm Chamber of Commerce for the appointment of an Emergency Arbitrator and a request for provisional measures before the submission of the dispute to an Arbitral Tribunal.

[24] The 28 August 2019 award of the Emergency Arbitrator of the Arbitration Institute of the Stockholm Chamber of Commerce ordered the State of Ukraine (in the person of the Chief Public Bailiff of the execution section of the State Enforcement Service Department of the Ministry of Justice of Ukraine) to halt the forced sale of the shares of Prominvestbank PJSC registered in the name of VEB.RF, including in order to collect the debt owed by the Russian Federation under any arbitral or judicial decision, and to refrain from any equivalent actions with respect to the Prominvestbank PJSC shares pending the decision by the Arbitral Tribunal in the final arbitral award as to whether such sale is contrary to international law. The State of Ukraine was ordered to pay VEB.RF an application fee of EUR 4,000; the Emergency Arbitrator's fee of EUR 16,000; and the applicant's reasonable costs of legal services in connection with this application, which shall be subject to assessment unless agreed.

[25] The State of Ukraine failed to voluntarily comply with this Emergency Arbitrator award.

Comments of the parties' representatives

[26] At the hearing, O.M. Denysenko, attorney acting on behalf of VEB.RF, maintained the arguments of the cassation appeal in full and demanded that the appeal be allowed.

[27] The representatives of the State of Ukraine (in the person of the Ministry of

Justice of Ukraine) N.V. Hryshyna (at the hearing of December 10, 2020) and I.O. Vasina (at the hearing of 14 January 2021) asked the court to reject VEB.RF's cassation appeal on the grounds stated in the response to the cassation appeal.

[28] In the written comments submitted in December 2020, I.O. Vasina, in her capacity as representative of the State of Ukraine (in the person of the Ministry of Justice of Ukraine) additionally stated that, on 4 March 2020, as part of an auction sale of securities on the securities market, 5,080,310,373 ordinary Prominvestbank PJSC shares were sold on the stock exchange and the relevant exchange contract was concluded on 6 March 2020. On 11 March 2020, the deposit account of the Section for the Execution of Decisions of the State Enforcement Service Department of the Ministry of Justice of Ukraine (hereinafter - the Department) received the proceeds of the share sales. On 12 March 2020, the state bailiff of the Department drew up the distribution accounts for the amounts collected from the debtor in proportion to the amounts due to each debtor. On 13 March 2020, in connection with the payment for the purchased assets (securities), a resolution was issued to lift the attachments of the debtor's property; paragraph 2 of the resolution required the depository institution to transfer the securities to the buyer's account. However, the procedure of transferring the sold shares to the buyer is, at present, not yet completed due to the 10 March 2020 judgment of the Kyiv Commercial Court in case No 910/3480/20 adopted in proceedings concerning an application for security, as well as the 27 May 2020 judgment of the Pechersky District Court of the City of Kyiv in case No 757/21587/20 concerning attachment of property and a prohibition to undertake certain actions.

The Supreme Court's Position

[29] Articles 24(2) and 351(2) of the Civil Procedure Code of Ukraine provide that the Supreme Court shall apply the appellate procedure when reviewing decisions of courts of appeal issued in the capacity of first instance courts.

[30] After hearing the report of the judge-rapporteur and the comments of the parties' representatives at the hearing, clarifying the circumstances of the case and verifying them against the available evidence, the court concludes that the cassation appeal must be partially allowed, and the 7 September 2020 Kyiv Court of Appeal judgment must be amended.

The Supreme Court's reasoning and the applicable law

[31] Pursuant to Article 368(3) of the Civil Procedure Code of Ukraine, the matter shall be heard by the appellate instance court applying the simplified claim procedure with the modalities laid down in this chapter. The appellate instance court shall consider matters in a court hearing with notice to the parties, with the exceptions provided in Article 369 of this Code.

[32] Pursuant to Article 367(1) of the Civil Procedure Code of Ukraine, the appellate court shall review the case on the basis of existing as well as additional evidence, and shall verify the legality and the reasoning of the first instance decision within the scope of the arguments and claims of the appeal.

[33] According to Article 263(1)-(2) and (5) of the Civil Procedure Code of Ukraine, a court decision must be lawful and reasoned, and must comply with the principle of the rule of law. A decision is lawful if it is adopted by the court in accordance with the rules of substantive law and in compliance with the rules of procedural law. A decision is reasoned if it is adopted on the basis of a complete and comprehensive examination of the facts invoked by the parties as the basis of their claims and defences and confirmed by the evidence examined at the hearing.

[34] According to Article V of the New York Convention:

1. Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that:

a) The parties to the agreement referred to in article II were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made; or

b) The party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case; or

c) The award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to

arbitration may be recognized and enforced; or

d) The composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or

e) The award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made; or [*sic*]

2. Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that:

a) The subject matter of the difference is not capable of settlement by arbitration under the law of that country; or

b) The recognition or enforcement of the award would be contrary to the public policy of that country.

[35] In accordance with Article 478 of the Civil Procedure Code of Ukraine, the court shall refuse to recognize and enforce an international arbitral award if:

1) at the request of the party against whom the award is issued, if [*sic*] that party furnishes to the court proof that: a) one of the parties to the arbitration agreement was under some incapacity; or such agreement is not valid under the law to which the parties have subjected it or, absent an indication of such law, under the law of the country where the award was made; or b) the party against whom the award was made was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or for other valid reasons was unable to present its position; or c) the award deals with a dispute not contemplated by the arbitration agreement or a dispute not falling within its terms, or contains decisions on matters outside the scope of the arbitration agreement; provided that, if the decisions on matters covered by the arbitration agreement can be separated from those not covered by the agreement, that part of the award which contains decisions on matters covered by the arbitration agreement may be recognized and enforced; or d) the composition of the international commercial arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, or, absent such agreement, was not in accordance with the law of the country where the arbitration took place; or e) the award has not yet become binding on the parties, or has been set aside, or its execution has been suspended by a court of the country in which, or under the law of which, that

award was made; or 2) if the court finds that: a) the law provides that the dispute may not be referred to international commercial arbitration in view of its subject matter; or b) the recognition and enforcement of such award would be contrary to the public order of Ukraine.

[36] In its judgment of 17 April 2019 in case No 761/41709/17, the Supreme Court stated that, in deciding on the recognition and enforcement of an international commercial arbitration award, the court may not assess the correctness of the award on the merits or make any changes to its content, but merely verifies compliance with the application deadlines, compliance with the procedural requirements as to form and content of the application, and the existence of circumstances that may constitute grounds to reject the application.

Whether the recognition and enforcement of the 28 August 2019 Emergency Arbitrator award complies with Ukraine's public order

[37] Article 478 of the Civil Procedure Code of Ukraine does not contain a definition of the term "public order".

[38] According to the explanations set out in paragraph 12 of Resolution No 12 of 24 December 1999 of the Plenum of the Supreme Court of Ukraine on the Judicial Practice with Respect to Applications for Recognition and Enforcement of Foreign Arbitral and Judicial Decisions and annulment of decisions rendered by Way of International Commercial Arbitration in the Territory of Ukraine, public order means the legal order of a State, and the defining principles and foundations which form the basis of the system that exists in the State (concerning its independence, integrity, sovereignty and inviolability, basic constitutional rights, freedoms, guarantees, etc.).

[39] In its judgment of 23 July 2018 in case No 796/3/2018, the Supreme Court held that public order must be understood as the legal order of the State, and the defining principles and foundations which form the basis of the system that exists in it (concerning its independence, integrity, sovereignty and inviolability, basic constitutional rights, freedoms, guarantees, etc.). The international public order of any country includes the fundamental principles and foundations of justice and morals that the State wishes to protect even in cases that do not directly implicate the State itself; rules that secure the fundamental political, social and economic interests of the State (rules of public order); the duty of the State to comply with its obligations towards other States and international organizations. These are the unchanging principles that express the stability of the international system, including State sovereignty, non-interference in States' internal affairs, territorial

integrity, and so on.

[40] The legal notion of public order thus exists to protect the State from foreign arbitral awards that violate the fundamental principles of fairness and justice that are in force in the State. Such provisions are designed to establish a legal barrier to decisions that are made contrary to the fundamental procedural and substantive principles on which public and State order is based.

[41] In its judgment of 5 July 2018 in case No 761/46285/16, the Supreme Court held that the object of the public order reservation are international private law relations, while its subject-matter is the non-application of the foreign law chosen to regulate private law relations with a foreign element where the application of such law would conflict with the State's public order. In this case, the public order reservation will regulate an independent sphere of public relations, which does not depend on the sphere of inter-State relations.

[42] In view of the above, a reference to a breach of public order may only be made in cases where the execution of a foreign arbitral award is incompatible with the foundations of the State's legal order.

[43] Under Article 129(1)(9) of the Constitution of Ukraine, the basic principles of justice in Ukraine include the binding force of judicial decisions.

[44] A court decision is the highest act of justice, and, as such, must be enforced, given that the enforcement of a court decision, which constitutes the final stage of judicial proceedings, forms an integral part of the right to a fair trial secured, *inter alia*, by Article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms.

[45] When the Kyiv Court of Appeal found that allowing the application of VEB.RF for the recognition and enforcement of the 28 August 2019 Emergency Arbitrator award would *de facto* preclude the execution of the award of the Arbitral Tribunal (The Hague, Kingdom of the Netherlands) of 2 May 2018 in PCA case No 2015-36 concerning the claim of Everest Estate LLC and others against the Russian Federation, which had been enforced by the 25 September 2018 judgment of the Kyiv Court of Appeal in case No 796/165/2018 (upheld by the 25 January 2019 judgment of the Supreme Court), it arrived at a reasonable conclusion that the recognition and enforcement of the 28 August 2019 Emergency Arbitrator award was contrary to the public order of Ukraine.

[46] The court also notes that the applicant had brought applications for security in Ukrainian national courts requesting measures similar to those ordered in the Emergency Arbitrator award of 28 August 2019. In particular, in case No 757/36346/19-ts the applicant requested a suspension of the sale of shares of Prominvestbank PJSC, a prohibition for the execution section of the State Enforcement Service Department of the Ministry of Justice of Ukraine to perform any sale of those shares and a prohibition for the PFTS Stock Exchange to carry out any actions related to the preparation and conduct of an auction sale of those shares.

[47] However, by judgment of 27 August 2019 in case No 757/36346/19-ts (upheld by the Supreme Court on 6 November 2019), the Kyiv Court of Appeal rejected this application for security, stating, *inter alia*, that it would be unacceptable to halt the execution of the award of the Arbitral Tribunal (The Hague, Kingdom of the Netherlands) of 2 May 2018 in PCA case No 2015-36, which had been enforced by the judgment of the Kyiv Court of Appeal of 25 September 2018 (upheld by the judgment of the Supreme Court of 25 January 2019), given that such actions would conflict with the principle of the binding nature of judicial decisions that have entered into legal force.

[48] It follows that the court has reached a correct conclusion that there were grounds to reject VEB.RF's application for the recognition and enforcement of the 28 August 2019 Emergency Arbitrator award under Article V(2)(b) of the New York Convention and Article 478(1)(2)(b) of the Civil Procedure Code

[49] The court rejects as unfounded the appellant's arguments that this conclusion of the court of appeal contradicts the text of the Emergency Arbitrator award itself, given that it merely ordered the State of Ukraine to halt the forced sale of the Prominvestbank PJSC shares registered in the name of VEB.RF State Development Corporation rather than to halt the acts of execution in any enforcement proceedings.

[50] According to the 28 August 2019 Emergency Arbitrator award, the obligation to halt the sale of Prominvestbank PJSC shares is imposed on the State of Ukraine in the person of the Chief Public Bailiff of the execution section of the State Enforcement Service Department of the Ministry of Justice of Ukraine, that is, the same person who is charged with executing in enforcement proceedings the award of the Arbitral Tribunal (The Hague, Kingdom of the Netherlands) of 2 May 2018 in PCA case No 2015-36.

[51] The arguments that these measures are temporary do not change the fact that the

recognition and enforcement of the 28 August 2019 Emergency Arbitrator award will *de facto* entail the termination of the execution of the award of the Arbitral Tribunal (The Hague, Kingdom of the Netherlands) of 2 May 2018 which had been enforced by the judgment of the Kyiv Court of Appeal of 25 September 2018 (upheld by the judgment of the Supreme Court of 25 January 2019).

The emergency arbitrator's jurisdiction

[52] On 27 November 1998, the Cabinet of Ministers of Ukraine and the Government of the Russian Federation signed the Agreement on encouragement and mutual protection of investments, which was ratified by Law of Ukraine No 1302-XIV of 15 December 1999.

[53] In accordance with Article 9 of the BIT, in case of any dispute between either Contracting Party and an investor of the other Contracting Party that may arise in connection with investments, including disputes concerning the amount, conditions of and procedure for payment of compensation referred to in Article 5 of this Agreement or the procedure for effecting a transfer of payments referred to in Article 7 of this Agreement, shall be notified in writing accompanied with detailed comments which the investor shall forward to the Contracting Party involved in the dispute. The parties to the dispute shall endeavour to settle such dispute by way of negotiations. If the dispute cannot be resolved through negotiations within six months from the date of the written notification referred to in paragraph 1 of this Article, the dispute shall be submitted, *inter alia*, to the Arbitration Institute of the Stockholm Chamber of Commerce.

[54] The State of Ukraine, in the person of the Ministry of Justice of Ukraine, objected to VEB.RF's application, noting, in particular, that the Emergency Arbitrator award deals with a dispute that is outside the scope of the arbitration agreement (lack of jurisdiction of the emergency arbitrator), arguing for the applicability of the 1999 version of the Arbitration Rules, which does not provide for the emergency arbitrator procedure.

[55] In refusing to recognize and enforce the 28 August 2019 Emergency Arbitrator award, the court of appeal agreed with the respondent's arguments, pointing out, in particular, that the BIT did not provide for the procedure of appointing an Emergency Arbitrator, which was first introduced by the 2010 version of the Arbitration Rules, to the application of which the State of Ukraine did not consent.

[56] However, the Court of Appeal failed to take into account that the BIT and/or Law of Ukraine No 1302-XIV of 15 December 1999 that ratified it contained no reservations as to the applicability of a certain version of the Arbitration Rules of the Stockholm Chamber of Commerce, including the version in force at the time of the signing or ratification of the BIT.

[57] In view of the above, the court considers that there are no grounds under Article V(1)(c) of the New York Convention and Article 478(1)(1)(c) of the Civil Procedure Code of Ukraine to refuse to recognize and enforce the 28 August 2019 Emergency Arbitrator award, and the conclusion of the Kyiv Court of Appeal to the effect that the Emergency Arbitrator award dealt with a dispute that did not fall under the arbitration agreement is erroneous.

Compliance with the Emergency Arbitrator procedure

[58] In considering VEB.RF's application, the Kyiv Court of Appeal also saw a violation of the dispute resolution procedure, given that the State of Ukraine did not have enough time to provide its detailed position in the case for reasons that were outside its control and that it could not eliminate.

[59] Article 8(1) of Appendix II to the Rules of the Arbitration Institute of the Stockholm Chamber of Commerce provides that any emergency decision on interim measures shall be made no later than 5 days from the date the application was referred to the Emergency Arbitrator.

[60] It follows from the 28 August 2019 Emergency Arbitrator award that the claimant made the application for an Emergency Arbitrator appointment on 21 August 2019. On the same day, the Secretariat of the Stockholm Chamber of Commerce confirmed in writing to the applicant the receipt of the application and the payment of the costs of the emergency proceedings. The Secretariat of the Stockholm Chamber of Commerce notified the Respondent of the application. The parties were informed that the Board of the Stockholm Chamber of Commerce will seek to appoint an emergency arbitrator within 24 hours.

[61] By letter dated 22 August 2019, the Board of the Stockholm Chamber of Commerce appointed Mr. Joe Tirado as an emergency arbitrator in the said proceedings.

[62] The court agrees that, in accordance with due legal process, the State of Ukraine is entitled to provide its comments as to the issue brought for decision before the

Emergency Arbitrator and points out that the respondent in the arbitration dispute has duly exercised this right by providing the Emergency Arbitrator with written comments on VEB.RF's application.

In addition, the Emergency Arbitrator award shows that the deadline for the State of Ukraine's response to the VEB.RF's application was extended at the State's request, which indicates that the Emergency Arbitrator has complied with the emergency procedure.

[63] In view of the above, the court considers that there are no grounds under Article V(1)(b) of the New York Convention and Article 478(1)(1)(b) of the Civil Procedure Code of Ukraine to refuse to recognize and enforce the of 28 August 2019 Emergency Arbitrator award, and the conclusion of the Kyiv Court of Appeal that the State of Ukraine was deprived of the opportunity to provide its detailed position in the case is erroneous.

The Supreme Court's conclusions on the appeal

[64] Article 376(1)-(2) and (4) of the Civil Procedure Code of Ukraine provides the following grounds for quashing a court decision in whole or in part and adopting a new decision in the relevant part, or amending a court decision: 1) incomplete determination of the relevant facts; 2) lack of proof of the relevant facts treated by the first instance court as established; 3) inconsistency between the conclusions set out in the first instance court's decision and the facts of the case; 4) violation of procedural law or incorrect application of substantive law.

[65] Incorrect application of substantive law encompasses the misinterpretation of the law, the application of inapplicable law, or the failure to apply the applicable law.

[66] A court decision may be amended by way of supplementation, or by amending the reasoning and/or the dispositif.

[67] The court found that, in its 7 September 2020 judgment, the Kyiv Court of Appeal had arrived at a substantively correct conclusion rejecting VEB.RF's application, and that there is therefore no basis to quash the challenged court decision and to adopt a new decision recognizing and enforcing the 28 August 2019 Emergency Arbitrator award.

[68] However, at the same time, in providing the reasoning for its judgment, the court of first instance has, in addition to the grounds under Article V(2)(b) of the New

York Convention and Article 478(1)(2)(b) of the Civil Procedure Code of Ukraine for a refusal to recognize and enforce the 28 August 2019 Emergency Arbitrator award – which the Supreme Court accepts – also erroneously based its 7 September 2020 judgment on the lack of jurisdiction of the Emergency Arbitrator and the lack of opportunity on the part of the State of Ukraine to provide its comments.

[69] The Supreme Court considers that the grounds provided in Article V(1)(b) and (c) of the New York Convention and Article 478(1)(1)(b) and (c) of the Civil Procedure Code of Ukraine for a refusal to recognize and enforce the Emergency Arbitrator award of 28 August 2019 are not met, and the contested decision of the Kyiv Court of Appeal of 7 September 2020 must therefore be amended as to its reasoning, taking into account the conclusions set out in this Supreme Court judgment.

[70] The Supreme Court found no grounds to supplement or amend the dispositif of the 7 September 2020 Kyiv Court of Appeal judgment.

[71] Based on Articles 24, 351, 367, 368, 374, 376, 381-384, and 478 of the Civil Procedure Code of Ukraine, the Supreme Court comprised of the judicial panel of the First Judicial Chamber of the Civil Court of Cassation

RESOLVES AS FOLLOWS

The appeal of VEB.RF State Development Corporation represented by attorney Oleksandr Mykhailovych Denysenko is partially allowed.

The Kyiv Court of Appeal judgment of 7 September 2020 shall be amended as to its reasoning, taking into account the conclusions set out in this Supreme Court judgment.

The judgment of the court of cassation shall enter into force from the moment it is issued; it shall be final and not subject to appeal.

Judges: V.V. Shypovych E.V. Synelnykov S.F. Khopta