

Post-award interest recovery in Ukraine – is it possible?

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Introduction

Post-award interest usually accrues between the date on which an arbitral award is issued and the date on which payment of the awarded amount is made. Ukrainian legislation does not address the concept of post-award or post-judgment interest and difficulties can thus arise during the enforcement of arbitral awards involving such interest.

Ukrainian case law regarding the recovery of post-award interest is controversial. Parties seeking the recognition and enforcement of such an award should therefore be aware of the relevant case law and consider practical advice, in order to recover post-award interest successfully.

Formal approach

In general, when recognising and enforcing an arbitral award, the Ukrainian courts repeat the wording of the operative part of the award almost verbatim, without making any edits or calculations. This approach stems from the widely accepted Supreme Court position that, when granting the enforcement of arbitral awards, the courts cannot review the awards on their merits or amend them.⁽¹⁾

In practice, the courts usually simply repeat the operative part of the award in their orders and further incorporate the same wording in the relevant writ of execution.⁽²⁾ Hence, when an arbitral award involves post-award interest, the award creditor will receive a writ of execution which states that post-award interest is subject to recovery, but not the amount of such interest or guidance regarding its calculation.

An award creditor should submit such a writ of execution with the relevant bailiff office for recovery. However, in accordance with Ukrainian legislation, bailiffs cannot interpret a writ of execution and determine the amount to be recovered. As such, calculation of the precise amount of post-award interest is usually considered to exceed a bailiff's authority.

At the actual recovery stage, a bailiff can apply to the court seeking clarification regarding the precise amount of post-award interest that is recoverable.⁽³⁾ However, the courts do not always remedy this issue and prevent a deadlock in recovering post-award interest. The situation becomes even more complex if the interest is based on a complicated application of Libor or other internationally recognised rates.

Practical approach

Another option for award creditors is to calculate and seek recovery of the post-award interest

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accrued as of the date of filing the motion for the recognition and enforcement of the award. Case law shows that, in practice, some courts have agreed with this approach and ordered the recovery of post-award interest accrued as of the date on which a motion for the recognition and enforcement of an award was filed.⁽⁴⁾ A bailiff's actual recovery under such a court order should be straightforward where:

- the court makes all of the calculations; and
- the bailiff recovers only the stated amounts.

However, in some cases the courts have ordered the recovery of post-award interest accrued as of the date of the court order.⁽⁵⁾ In such cases, award creditors usually provide the court with a new calculation of post-award interest as of the hearing date.

Therefore – in order to avoid spending additional time and money – when filing a motion for the recognition and enforcement of an award, creditors are advised to calculate the amount of post-award interest and seek the recovery of this amount in addition to other awarded sums.

Separate motion approach

On the successful enforcement of an award and the recovery of post-award interest accrued as of the date of filing the motion for the recognition and enforcement of the award, creditors can still try to recover the post-award interest for the period between the date of filing the motion for the recognition and enforcement and the date of actual recovery.

This may be resolved by obtaining recognition and enforcement of part of the award and recovering post-award interest for the relevant period. Ukrainian legislation allows recognition and enforcement of an award to be sought for a certain part of an award (eg, in cases where the award has already been partially enforced).⁽⁶⁾ Hence, in order to recover post-award interest, a new motion for the recognition and enforcement of the relevant part of the award should be filed with the court. While this option is theoretically possible, it has yet to be tested in practice. As such, enforcement may be difficult.

Comment

Despite the controversial court practice, there are options that make the recovery of post-award interest in Ukraine possible.

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Endnotes

(1) Clause 12, Supreme Court Plenum Resolution 12, December 24 1999.

(2) For instance, Order of Mlyniv District Court of Rivne Region, June 2 2016, Case 566/172/15-П, available [here](#).

(3) Article 221, Code of Civil Procedure.

(4) For instance, Order of Pechersk District Court of Kyiv, September 3 2014, Case 757/4233/14-П, available [here](#) and Order of Kyiv District Court of Kharkiv, October 17 2013, Case 2018/18029/2012, available [here](#).

(5) For instance, Order of Kyiv District Court of Kharkiv, October 17 2013, Case 2018/18029/2012, available [here](#).

(6) Article 394.3(4), Code of Civil Procedure.

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