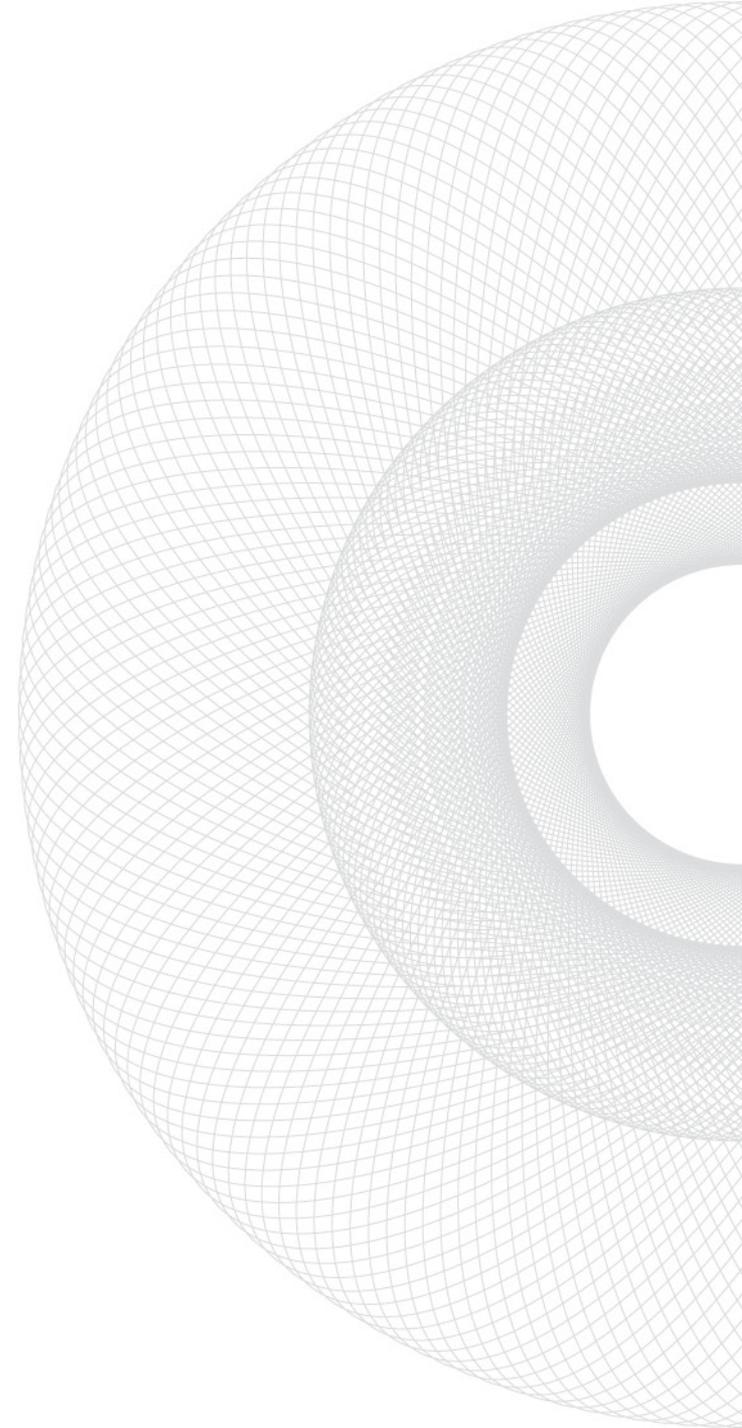


# Show me the money: collection and enforcement options

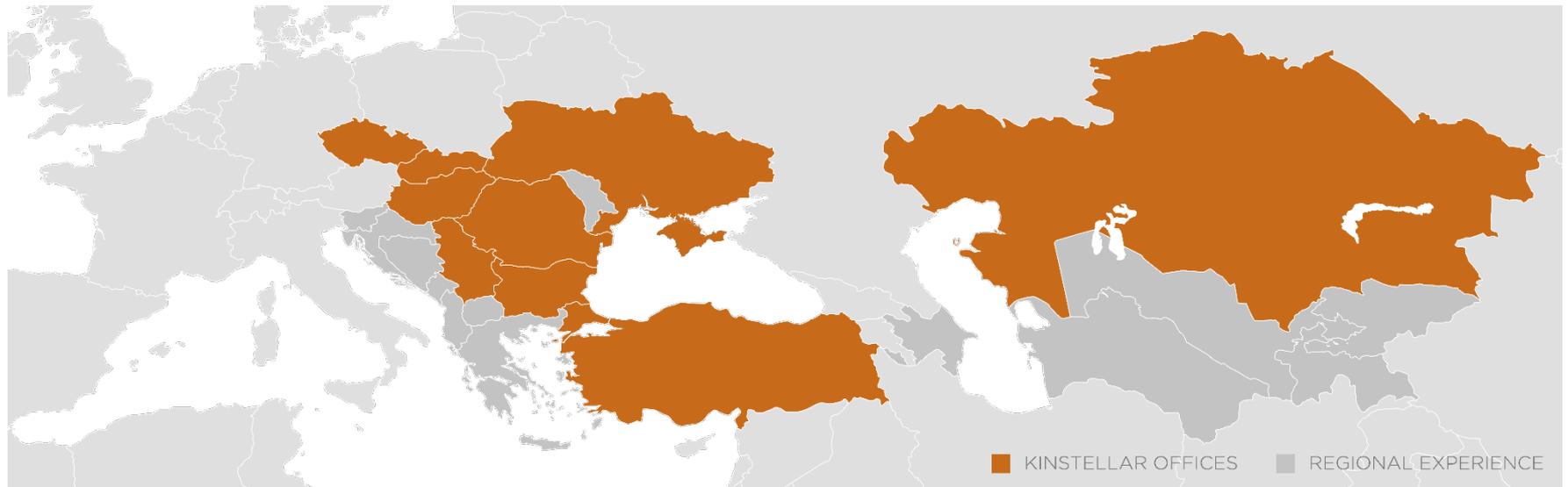
Kostiantyn Likarchuk, Partner

KINSTELLAR



# Enforcement options in Emerging Europe and Central Asia

- Bulgaria, Czech Republic, Hungary, Kazakhstan, Romania, Serbia, Slovakia, Turkey, Ukraine are parties to the New York Convention
- These jurisdictions do not grant absolute protection to foreign state's assets and make distinction between "sovereign" and "commercial" assets of the state
- These jurisdictions give a right to apply for interim relief pending arbitration proceedings
- These jurisdictions can be regarded as enforcement friendly BUT...



# New York Convention

## Declarations and Reservations made by Contracting States

State	Awards made in the territory of Non-Contracting States	Legal Relationships
Bulgaria	reciprocal treatment	-----
Czech Republic	reciprocal treatment	-----
Hungary	shall apply the Convention <b>only</b> to awards made in the territory of Contracting States	a legal relationship considered by the Hungarian law as a commercial relationship
Romania	reciprocal treatment	a legal relationship considered by the Romanian law as a commercial relationship
Serbia	reciprocal treatment	a legal relationship considered by the Serbian law as an economic / a commercial relationship
Turkey	Turkey will apply the Convention on the basis of reciprocity to awards made only in the territory of another Contracting State	a legal relationship considered by the Turkish law as an economic / a commercial relationship

# State Immunity vs Enforcement

## Identification of target assets

### Target Assets:

#### 1. Assets against which State waived its immunity and earmarked property

*(with some exceptions in Turkey: consent to enforcement measures by written agreement may not be possible in the case of the premises of a diplomatic mission, furnishings and other property on such premises (all of which are given special protection by the 1961 Vienna Convention on Diplomatic Relations))*

#### 2. Assets used for commercial purposes

*(e.g. state-owned enterprises with contributed and commercial property are exposed to a high risk of enforcement against commercial property, deposits held by the State (in the name of such State) in overseas accounts, Assets held by the State Banks for their own account)*

#### 3. Embassy assets and accounts, which are not used or not intended for use for the purposes of the diplomatic mission of the State

*(e.g. Sedelmayer v. Russia: February 2014, the Swedish government agency for debt collection, Kronofogden, had sold through auction the 2,800-square-metre building for €2.3 million (\$3.2 million) to a Swedish investor, Billy Uney;  
YUKOS v Russia: recently shareholders of Yukos managed to freeze accounts belonging to the Russian embassy, Russian permanent missions (NATO and EU offices) and Russian businesses registered in Belgium)*

#### 4. Property which is acquired by succession or gift

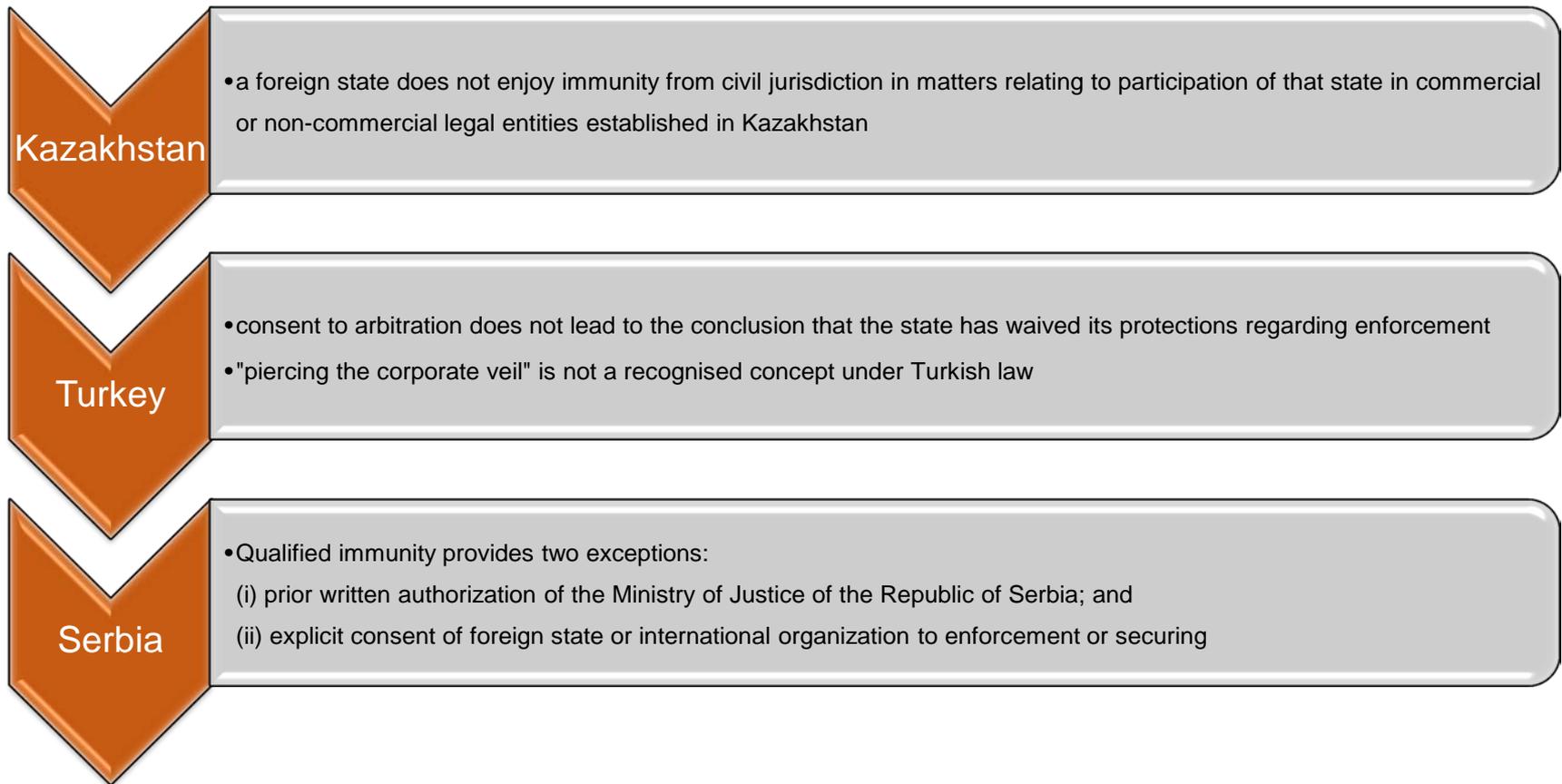
#### 5. Central bank's accounts if used for the purposes distinct from performance of sovereign powers of the foreign state (mixed accounts)

#### 6. Immovable property situated in the state of enforcement used for the commercial purposes

# State immunity vs Enforcement – 1

## State by State

Generally, submission of the State to arbitration does not imply waiver of immunity from execution



# State immunity vs Enforcement – 2

## State by State

### Czech Republic

- Czech courts lack jurisdiction over foreign states in respect of proceedings arising out of their conduct and actions taken in the performance of their state, government and other public powers and functions, including their property, which is used or intended for such performance

### Slovakia

- There is an express prohibition on execution of state's property in the Slovak Execution Code. Enforcement of an award against a state party might, consequently, be prejudiced by this provision. In relation to foreign states' immunity, this issue is not regulated in Slovak law and would be dealt with under general rules of public international law

### Bulgaria

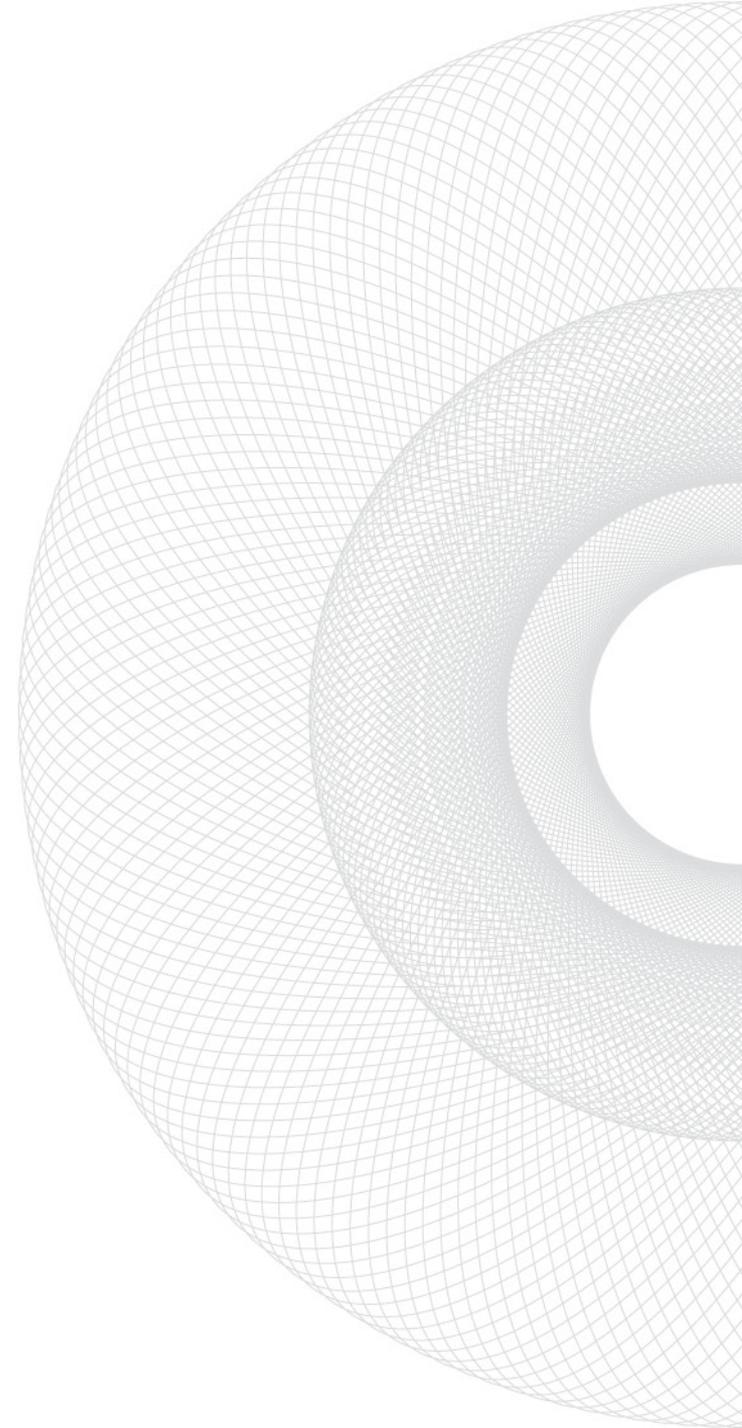
- An arbitration clause which does not mention the issue of immunity is considered a waiver of state immunity in regard to arbitration proceedings and exequatur proceedings (proceedings for recognition and enforcement) but not for proceedings for coercive enforcement (bailiff services). For the latter a specific waiver is necessary

# Enforcement of arbitral award set aside by the court of the place of arbitration

- **Bulgaria:** the only case when an award set aside in the country of the seat of arbitration could be enforced is where the parties to the award are from states that are signatories to both the New York Convention and European Convention. Pursuant to article VII of the New York Convention, the applicant may rely on more favourable international convention. The European Convention permits enforcement of awards set aside in the country of the seat of arbitration provided that it was not done on one of the grounds in article IX of the same convention
- **Turkey:** if the setting-aside procedure has started in the country where the award was made, the Turkish courts will suspend the proceedings until the decision on setting aside the award becomes final in that country's courts because it constitutes a "prejudicial issue" under Turkish Law. The granting of a stay of legal proceedings for recognition and enforcement is neither conditional nor dependent upon the provision of security
- **Slovakia:** the Arbitration Act transposed provisions of the New York Convention in their entirety and accordingly a general court may, but is not obliged to, refuse the enforcement of an award that has been set aside at the seat. It is further stated that if an award has been challenged in the country of origin, a Slovak court may upon motion of a party stay the enforcement of such award in Slovakia

# **Availability of other enforcement options. Interim measures**

Emerging Europe and Central Asia region



# Interim relief

## Czech Republic

- the arbitral tribunal does not have a power to order preliminary measures or to grant injunctions
- state courts can order preliminary measures to provide assistance in obtaining or preserving evidence, or when the enforcement of the award is threatened
- state courts can also order injunctive relief (an order to preserve assets or an order that the relevant party deposits a certain amount of money with the court)
- anti-suit injunctions are not issued

## Slovakia

- arbitral tribunals may grant interim measures (including ex parte), inter alia: (i) prohibiting the disposal of some assets or funds; (ii) ordering a party to perform an action or refrain from doing so; (iii) ordering the disclosure of evidence; or (iv) depositing financial security with the arbitral tribunal
- interim measures issued by arbitral tribunals with prior notice having been given to the affected party are capable of court enforcement
- a party to arbitration may only request an interim measure from the general court before the commencement of arbitral proceedings, or before the appointment of the arbitral tribunal
- state courts are unlikely to issue anti-suit injunctions

## Bulgaria

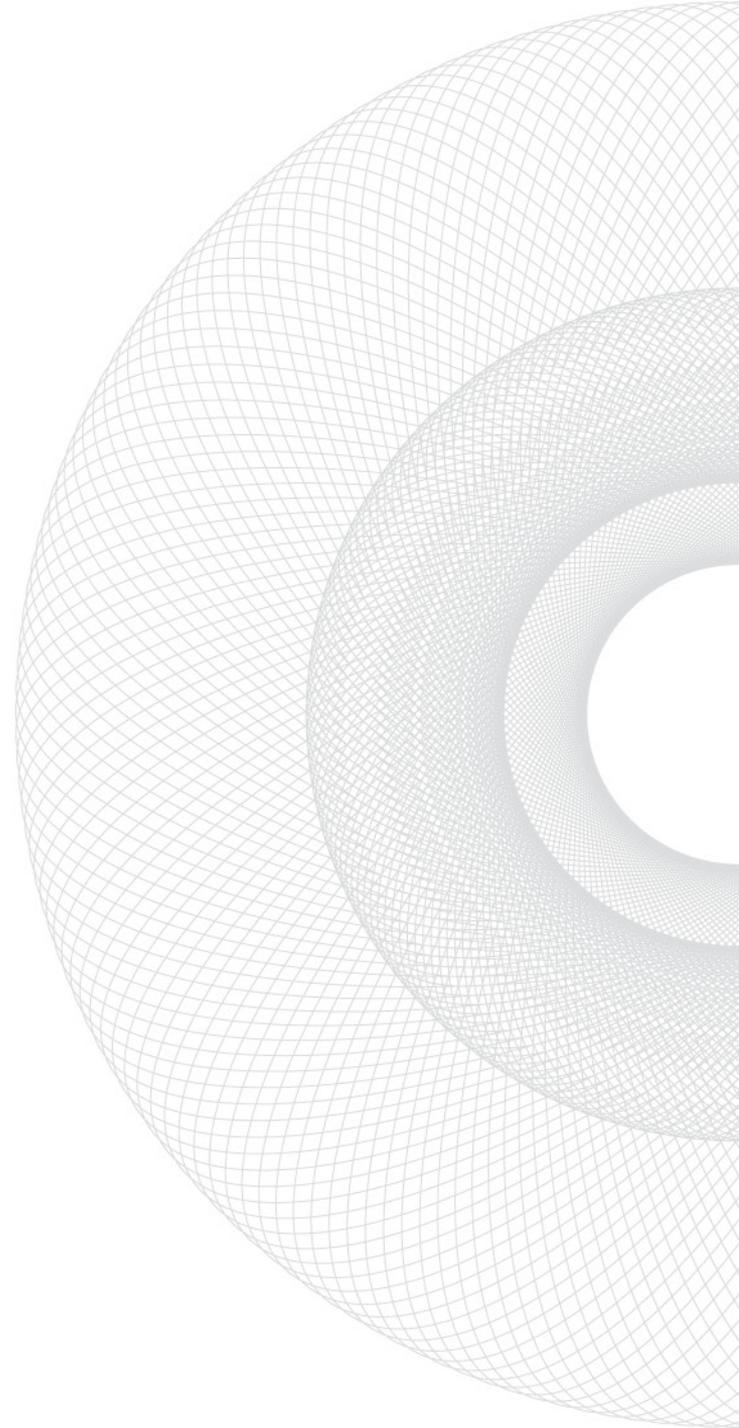
- the arbitral tribunal has wide discretion to grant measures directed at preservation of evidence, preservation of status quo, or facilitation of the enforcement of the award. An interim award related to such measures may be enforced through the court system
- each party may request the court to grant interim measures to secure the claim or evidence
- Bulgarian law does not recognise anti-suit injunctions

## Turkey

- the arbitral tribunal may order an interim measure of protection or an interim attachment
- the arbitral tribunal shall not grant interim measures or interim attachments (i) that are required to be enforced through execution offices or to be executed through other official authorities or (ii) that bind third parties
- any decision of a court, with respect to interim measures of protection or interim attachments, that is given upon a request of a party prior to commencement of arbitration or during arbitral proceedings, shall automatically cease to have effect where the decision of the arbitral tribunal becomes enforceable or where the arbitral tribunal denies [to hear] the case in its decision

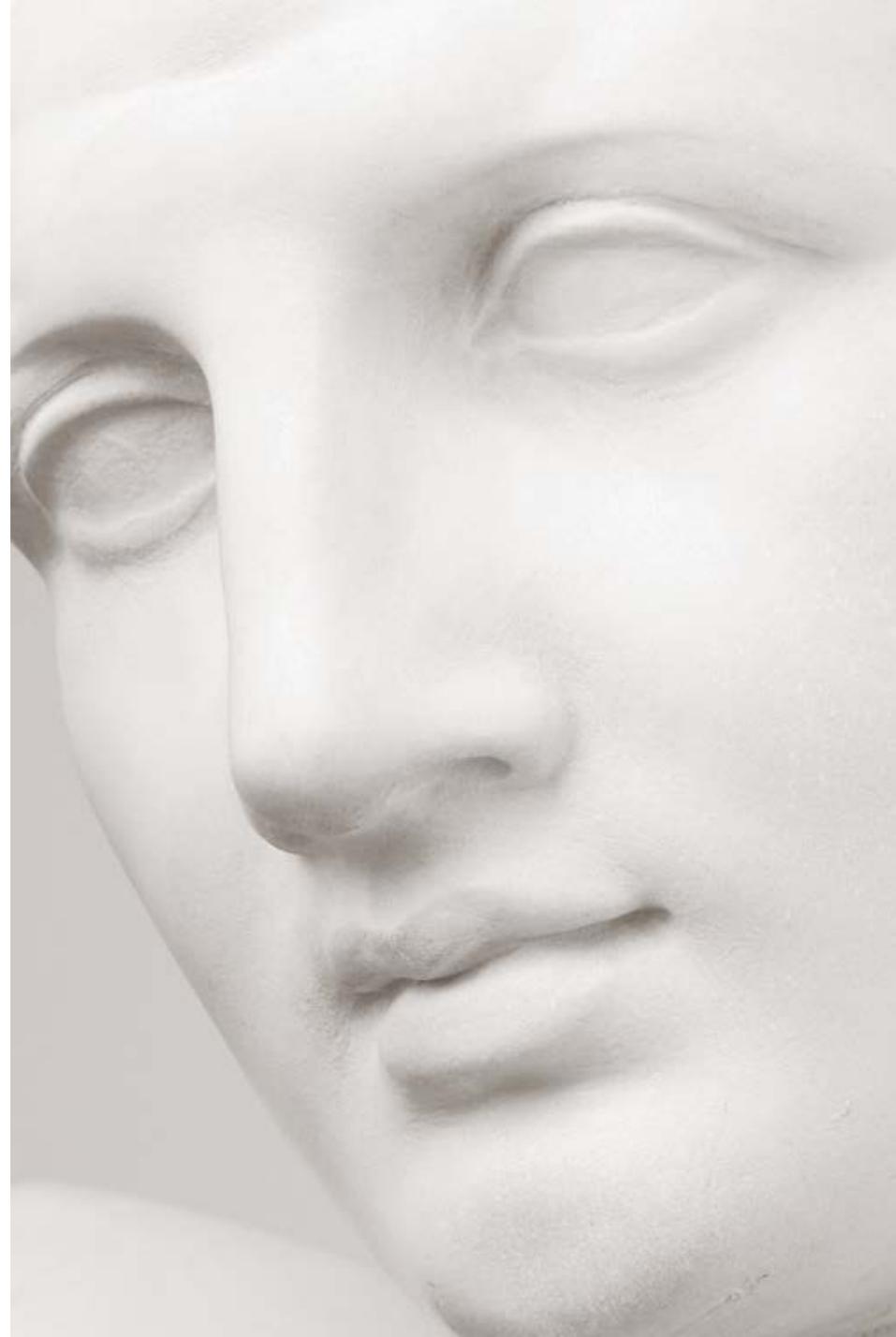
# Enforcement Options in Ukraine

Current issues and prospects



# **NB!** New York Convention application in the territory of Ukraine

- With regard to awards made in the territory of non-contracting states, Ukraine will apply the Convention only to the extent to which those states grant reciprocal treatment
- On 20 October 2015, the government of Ukraine made a communication to the depositary of the Convention stating that implementation by Ukraine of the obligations under the Convention, as applied to the occupied and uncontrolled territory of Ukraine (Crimean peninsula and certain districts of Luhansk and Donetsk regions), is limited and is not guaranteed



# Enforceability of Emergency Arbitrator Awards in Ukraine

## **JKX OIL&GAS PLC and POLTAVA GAS B.V.**

- On 14 January 2015, the emergency arbitrator rendered an award ordering Ukraine to refrain from collecting gas production royalties from JKX at the rate exceeding the previously applicable 28% fee
- On 17 May 2016, after second round of review the Kyiv City Court of Appeal upheld the decision of the Pecherskyi District Court of Kyiv City by granting the motion for enforcement, and dismissing the appeal of the Ministry of Justice of Ukraine
- The Ministry of Justice of Ukraine filed cassation appeal. The proceedings are pending

## **Ostchem Holding Limited vs Odesa Port Plant PJSC**

- On 31 March 2016, the emergency arbitrator (Stockholm Arbitration) rendered an award ordering Odesa Port Plant PJSC to refrain from alienation and encumbrance (mortgage, pledge, etc.) of its property
- On 25 July 2016, the court of first instance left motion on enforcement of emergency arbitrator award without consideration (due to non-provision of the original contract, which contains arbitration agreement). The Court of Appeal upheld decision of the court of first instance

***In both cases the court did not refer to the argument that emergency arbitrator's award is not enforceable because it is not a "final" award or an emergency arbitrator does not have standing as an "arbitrator" or "tribunal" under national arbitration laws***

# Enforcement against state assets in Ukraine



## Enforcement of arbitral award set aside in the place of arbitration

- article V of the New York Convention provides the courts with certain discretion in deciding whether to refuse to enforce the award
- article IX of the European Convention on International Commercial Arbitration provides that arbitral awards can be enforced in Ukraine notwithstanding setting aside in the country of the seat

## State immunity vs Enforcement

- absolute immunity
- express consent of the foreign state's competent authorities is needed

# Post-award interest

- Ukrainian law does not recognise the concept of post-award interest
- enforcement of post-award interest, even if awarded, is doubtful in Ukraine since state bailiffs are prohibited from interpreting a court ruling on recognition and enforcement of an arbitral award
- the courts refuse to calculate the post-award interest for the period between the arbitral award and the court judgment on recognition & enforcement of the arbitral award

*E.g. Decision of the High Specialized Court of Ukraine for Civil and Criminal Cases dated 23 September 2015 (award in GAFTA arbitration) in case Nibulon vs Raiz, Decision of the High Specialized Court of Ukraine for Civil and Criminal Cases dated 30 September 2015 (LCIA arbitration) under motion of Bank of Cyprus Public Ltd.*



# Ongoing reform in Ukraine

## The Draft law No 4351 regarding provision of judicial support to international arbitration by the Ukrainian courts

- The Draft law, inter alia, provides for the possibility to submit a request for interim measures in support of international arbitration after commencement of arbitral proceedings

*Current status of the Draft Law: consideration in committees of Verkhovna Rada of Ukraine*

## Current reform of enforcement system in Ukraine

- According to **World Bank's Ease of Doing Business ranking**, Ukraine scores 81 in category of enforcing contracts and 150 in resolving insolvency because about **80 PERCENT** of judicial decision **remain unenforced**.
- Initial stage: the Law of Ukraine On Bodies and Individuals that Carry out Enforcement of Judgements and Decisions of Other Bodies was passed 2 June 2016 (**New Enforcement Law**)
- On 30 September 2016, New Enforcement Law came into force
- Major novelties:
  - a) introduction of **single register of debtors**
  - b) introduction of **private enforcement officers (bailiffs)**

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We would be pleased to provide you with any further information that you might require about any of our offices, lawyers or practice areas and expertise. We remain ready to provide explanatory information, discuss your specific needs and requirements. Should you have any questions, all contact information is available on: [www.kinstellar.com](http://www.kinstellar.com)

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