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THE  
INTERNATIONAL  
ARBITRATION  
REVIEW

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SEVENTH EDITION

EDITOR  
JAMES H CARTER

LAW BUSINESS RESEARCH

# THE INTERNATIONAL ARBITRATION REVIEW

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# EDITOR'S PREFACE

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International arbitration is a fast-moving express train, with new awards and court decisions of significance somewhere in the world rushing past every week. Legislatures, too, constantly tinker with or entirely revamp arbitration statutes in one jurisdiction or another. The international arbitration community has created a number of electronic and other publications that follow these developments regularly, requiring many more hours of reading from lawyers than was the case a few years ago.

Scholarly arbitration literature follows behind, at a more leisurely pace. However, there is a niche to be filled by an analytical review of what has occurred in each of the important arbitration jurisdictions during the past year, capturing recent developments but putting them in the context of the jurisdiction's legal arbitration structure and selecting the most important matters for comment. This volume, to which leading arbitration practitioners around the world have made valuable contributions, seeks to fill that space.

The arbitration world is consumed with debate over whether relevant distinctions should be drawn between general international commercial arbitration and international investment arbitration, the procedures and subjects of which are similar but not identical. This volume seeks to provide current information on both of these precincts of international arbitration, treating important investor–state dispute developments in each jurisdiction as a separate but closely related topic.

I thank all of the contributors for their fine work in compiling this volume.

**James H Carter**

Wilmer Cutler Pickering Hale and Dorr LLP

New York

June 2016

## Chapter 44

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# UKRAINE

*Artem Lukyanov*<sup>1</sup>

## I INTRODUCTION

### i International commercial arbitration

Ukraine is a civil law country. The key sources of Ukrainian law are national legislative acts (statutes and codes) adopted by the parliament and international treaties ratified by Ukraine.<sup>2</sup> Under Ukraine's Constitution, international treaties, when ratified, become an integral part of the country's legal system and take precedence over conflicting domestic laws (except for Ukraine's Constitution).<sup>3</sup> This hierarchical rule is equally applicable in the arbitration context; therefore, international arbitration treaties take precedence over Ukraine's national laws governing international arbitration.

Ukraine is a signatory to the key international arbitration instruments, such as the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958 (New York Convention) and the European Convention on International Commercial Arbitration of 1961 (European Convention), and is also a party to important regional treaties such as the Commonwealth of Independent States (CIS)-wide Kiev Convention on the Procedure for Settling Disputes Connected with Economic Activity of 1992 (Kiev Convention).<sup>4</sup>

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1 Artem Lukyanov is an associate at Dentons.

2 Resolutions of the Supreme Court of Ukraine provide guidance on some important substantive and procedural law issues. The legal positions specified in resolutions of the Supreme Court of Ukraine are mandatory and binding on all state bodies. Such legal positions should also be taken into account by Ukrainian courts while adjudicating disputes, but the resolutions are not binding on said courts.

3 Constitution of Ukraine, Article 9.

4 Another important regional treaty, the Kishinev Treaty on Mutual Legal Assistance in Civil, Family and Criminal Matters of 2002, has not yet been ratified by Ukraine; therefore, the Kiev Convention remains the only regional arbitration-related treaty currently effective in Ukraine. The Kiev Convention creates a legal framework within the CIS for the resolution

Ukraine's Law on International Commercial Arbitration (ICAL) was adopted in February 1994. Prior to that date, international commercial legislation in Ukraine was virtually non-existent. The ICAL is entirely based on the UNCITRAL Model Law on International Commercial Arbitration of 1985 (Model Law).<sup>5</sup> The ICAL applies to international commercial arbitration proceedings seated in Ukraine.

Ukraine's two major permanent commercial arbitration institutions are the International Commercial Arbitration Court (ICAC) and the Maritime Arbitration Commission (MAC), both established 20 years ago under the auspices of the Chamber of Commerce and Industry of Ukraine (CCIU). Both the ICAC and the MAC operate based on the regulations incorporated into the ICAL and the rules of procedure drafted and approved by the ICAC and the MAC, respectively.

The ICAL makes a distinction between domestic<sup>6</sup> and international arbitration proceedings. Pursuant to the ICAL, the following disputes may be referred to international commercial arbitration:

- a* disputes resulting from contractual and non-contractual civil relationships arising in the course of foreign trade and other forms of international business relations, provided that the place of business of at least one of the parties is located outside of Ukraine; and
- b* disputes arising between or among enterprises with foreign investments or international associations, on the one hand, and organisations established in the territory of Ukraine, on the other;
- c* disputes between or among the shareholders of the above entities; and
- d* disputes between such entities and other persons or entities that are subject to Ukrainian law.<sup>7</sup>

The scope of arbitrability is relatively broad in Ukraine. With a few notable exceptions, Ukrainian law allows arbitration of civil and commercial disputes, both contractual and non-contractual.<sup>8</sup> The exceptions pertain to disputes that are within the exclusive jurisdiction of the Ukrainian courts, which include, *inter alia*:

- a* disputes connected with the registration or liquidation of legal entities or private entrepreneurs in Ukraine;

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of business disputes in the national courts of the CIS states. While the Kiev Convention concerns primarily the jurisdiction of national courts, it also contains an important provision pertaining to the reference of disputes to arbitration.

5 A few minor deviations, Articles 1(3)(b) and 1(3)(c) of the Model Law, were not included in the ICAL. It should also be noted that the ICAL remains intact since its adoption in 1994 (except for provisions relating to courts entrusted with controlling powers envisaged by Clause 2 of Article 6). It should also be noted that unlike some other countries, Ukraine has not as yet implemented the UNCITRAL amendments to the Model Law adopted in 2006.

6 Currently, there are 69 permanent domestic arbitration institutions in Ukraine that handle domestic arbitration cases (searchable at [ddr.minjust.gov.ua](http://ddr.minjust.gov.ua) (available in Ukrainian only)).

7 ICAL, Article 1(2). Although the text of the ICAL is based almost entirely on the Model Law, the wording of Article 1(2) of the ICAL differs from that of Article 1(2) of the Model Law.

8 ICAL, Article 2.

- b* disputes concerning entries in Ukraine's State or Land Registries;
- c* disputes concerning inheritance, if the testator was a Ukrainian citizen who lived in Ukraine;
- d* disputes concerning real property, including land located in Ukraine;<sup>9</sup>
- e* disputes concerning intellectual property requiring registration or issuance of a certificate (e.g., a patent) in Ukraine;<sup>10</sup>
- f* disputes concerning the issuance or cancellation of securities in Ukraine;<sup>11</sup>
- g* bankruptcy, financial restructuring or other insolvency proceedings in which the debtor is a Ukrainian entity;<sup>12</sup>
- h* setting aside of acts of governmental agencies;<sup>13</sup>
- i* disputes arising in connection with government procurement agreements;<sup>14</sup>
- j* corporate disputes between a corporate entity and its shareholder (e.g., a founder or shareholder) as well as disputes between shareholders of corporate entities – provided that these disputes arise in connection with the creation, operation, management or termination of activities of those entities;<sup>15</sup>
- k* disputes arising from labour law relations;
- l* matters pertaining to government secrets;
- m* disputes between a private party and a state or municipal body (or its officers), including state institutions and organisations;
- n* disputes relating to protection of consumer rights, including those in the banking sphere; and
- o* other disputes expressly designated by Ukrainian law as non-arbitrable.

The ICAL recognises such widely accepted arbitration concepts as separability of the arbitration clause from the main agreement<sup>16</sup> and the principle of *Kompetenz-Kompetenz*.<sup>17</sup> Clause 1 of Article 8 of the ICAL states that reference to arbitration is a right, rather than an obligation. Therefore, to preserve its right to arbitration, the party that is being brought to

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9 Law on International Private Law (IPL), Article 77; see also Law on Arbitration Courts (ACL), Article 6.

10 Ibid.

11 Ibid.

12 Ibid.

13 ACL, Article 6.

14 Ibid.

15 Ibid.

16 ICAL, Article 16(1).

17 Ibid. In this regard, it is worth noting that the arbitral tribunal may either bifurcate the proceeding into the 'jurisdiction' and 'merits' stages or, alternatively, may consider jurisdictional and substantive issues concurrently. If the arbitral tribunal rules on its jurisdiction as a preliminary matter, that ruling can be challenged in the national court. The decision of the national court will be final. Notably, if the tribunal's jurisdictional ruling is so challenged, the tribunal may nevertheless proceed to hearing the merits of the case while the challenge is pending with the national court.

court (despite the existence of a valid and applicable arbitration agreement) should submit its request to terminate the court proceedings and refer the parties to arbitration as soon as possible, but, in any event, no later than its first substantive submission to the court.

Importantly, a legal issue settled in an arbitration proceeding that results in a final arbitral award is considered *res judicata*, and subsequent attempts to refer the same dispute between the same parties to a court will be denied, unless the arbitral award has been set aside on the grounds set forth in Article 34 of the ICAL.<sup>18</sup>

Mandatory rules of Ukrainian law pertaining to arbitration are relatively straightforward. They include the requirements that the arbitration agreement needs to be in writing<sup>19</sup>; and that the arbitration award should be in writing, signed by the arbitrator (or arbitrators),<sup>20</sup> reasoned,<sup>21</sup> and contain references to the date of its issue, place of arbitration, the final decision on satisfying or dismissal of claims, the amounts of arbitration fees, costs borne by the parties to the arbitration as well as their distribution between those parties.<sup>22</sup> The parties may not derogate from the procedures available under Ukrainian law for the setting aside of an arbitral award or refusal of its recognition and enforcement.<sup>23</sup>

In addition, certain mandatory provisions of Ukrainian laws may not be avoided by subjecting the agreement to a foreign law. By way of example, except as otherwise provided in an applicable international treaty or Ukrainian law, a foreign economic agreement (i.e., an agreement concluded between a Ukrainian enterprise or entrepreneur and a foreign counterparty concerning a commercial activity that has a foreign component)<sup>24</sup> must be made in writing, regardless of the place of its execution.<sup>25</sup> Similarly, an agreement concerning real property located in Ukraine must strictly follow the requirements of Ukrainian law.<sup>26</sup> Furthermore, a foreign law provision may not apply to a contractual relationship if such application would result in a violation of the fundamental 'legal order' (i.e., public policy) of Ukraine.<sup>27</sup>

The ICAL sets forth two key requirements for an arbitration clause: it must be in writing, and it must provide that the parties agreed to refer to arbitration all or some of the disputes arising out of their contractual or non-contractual relationship.<sup>28</sup> In addition, an arbitration clause may not cover disputes that are not arbitrable under Ukrainian law. Any clause that does not comply with these requirements will be declared invalid by a Ukrainian court.

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18 Commercial Procedure Code of Ukraine, Article 80; Civil Procedure Code, Article 205.

19 ICAL, Article 7(2).

20 ICAL, Article 31(1). In arbitration proceedings with more than one arbitrator, the signatures of the majority of all members of the arbitration tribunal shall suffice, provided that the reason for any omitted signature is stated.

21 ICAL, Article 31(2).

22 ICAL, Article 31.

23 ICAL, Articles 34 and 36.

24 Law of Ukraine on Foreign Economic Activity, Article 1.

25 IPL, Article 31(3).

26 IPL, Article 31(2).

27 IPL, Article 12.

28 ICAL, Article 7.

As a practical matter, it is advisable that the parties set forth in their arbitration clause further provisions, such as:

- a* the correct name of the institution that will administer the proceeding<sup>29</sup> or, alternatively, a reference to an *ad hoc* arbitration (in which case the parties should agree on the rules that would govern their proceeding and on the method for constituting the arbitral tribunal);
- b* the seat of the arbitration and place of the hearings (if different);
- c* the language of the arbitration; and
- d* the applicable law (unless provided elsewhere in the agreement).

In the absence of the parties' agreement as to items (b) through (d), the arbitral tribunal is authorised to conduct the proceeding as it deems appropriate,<sup>30</sup> set the language of the proceeding<sup>31</sup> and determine the substantive law based on the conflict-of-law rules that the tribunal deems appropriate to apply.<sup>32</sup>

The ICAL is silent on the issues of consolidation of arbitral proceedings and joinder of third parties; therefore, parties should expressly provide for these in their agreement, if they wish to address these issues.<sup>33</sup>

Pursuant to the ICAL, the arbitral tribunal shall be constituted in accordance with the parties' agreement. In the event that the parties have not reached an agreement, the tribunal will be constituted with the assistance of the president of the CCIU, serving as the appointing authority. Ukrainian law does not authorise national courts to partake in the appointment process, and the CCIU's president's appointment decisions are not subject to appeal.<sup>34</sup> Nevertheless, to provide an additional layer of protection, Ukrainian law permits court review of the adequacy of the appointment procedure at the set-aside or enforcement stages.<sup>35</sup>

When choosing an arbitrator for a CCIU proceeding, one should bear in mind that, as a practical matter, only the persons included on the List of Recommended Arbitrators approved by the Presidium of the CCIU may be appointed as arbitrators.<sup>36</sup> The only requirements

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29 The Clarification issued by the High Commercial Court of Ukraine No. 04/5/608 of 31 May 2002 provided that in the event that the arbitration agreement fails to refer the dispute to an existing arbitration institution, it would be impossible to ascertain the parties' intent as regards such a key procedural matter, and therefore the court may find that it is impossible to refer the dispute to arbitration in accordance with the parties' agreement. Ukrainian courts may also set aside a domestic or international award where the name of the arbitration institution was not indicated with sufficient precision.

30 ICAL, Article 19(2).

31 ICAL, Article 22(1).

32 ICAL, Article 28(2).

33 According to the Rules of the ICAC and MAC, the joinder of a third person (not a party to the arbitration agreement) to the arbitration proceedings is possible upon mutual consent of the parties to the arbitration and that third person. Such consent should be made in writing.

34 ICAL, Article 11(5).

35 ICAL, Articles 34(2) (1) and 36(1).

36 Although that list is entitled List of Recommended Arbitrators, selection of an arbitrator among the candidates on that list is, in fact, mandatory. The List of Recommended Arbitrators of the ICAC is available at [arb.ucci.org.ua/icac/en/arb\\_list.html](http://arb.ucci.org.ua/icac/en/arb_list.html).

expressly applicable to an arbitrator sitting in an ICAL proceeding are independence and impartiality.<sup>37</sup> If there are any circumstances giving rise to justifiable doubt as to the arbitrator's independence or impartiality, the arbitrator could be subject to challenge.<sup>38</sup> Likewise, an arbitrator can be challenged if he or she does not have the qualifications required by the relevant arbitration agreement. A party can challenge the arbitrator appointed by it only for reasons of which it became aware after the appointment.

There are no special arbitration courts in Ukraine. Under Article 6.2 of the ICAL, local courts of general jurisdiction provide support and supervision to arbitration proceedings conducted in Ukraine. General (also known as civil) courts serve in this role in connection with international arbitration proceedings, and commercial courts (and, in some instances, general courts) serve that function in connection with domestic arbitration proceedings.<sup>39</sup>

The ICAL does not permit any court interference into arbitration matters except as expressly provided by relevant provisions of the ICAL. At the same time, the ICAL recognises the supporting and supervising role of national courts. One important aspect of this role is the ability of the participants to an arbitration proceeding to seek, in domestic court, interim relief in support of arbitration.<sup>40</sup> As a practical matter, however, the mechanics for obtaining court-ordered interim relief are still not firmly established. However, amendments to the Civil Procedure Code, in effect as of 19 October 2011, introduced provisions for obtaining security measures at the stage of enforcement of arbitral awards in Ukrainian courts.<sup>41</sup> A party seeking enforcement of an arbitral award at any point in the enforcement proceeding can make an application for the security measures necessary to preclude rendering the arbitral award and its enforcement meaningless. Available types of security measures include, *inter alia* attachment of property; injunction; an order to perform certain actions; and deposit of the property at issue with a third party.<sup>42</sup>

While the Civil Procedure Code expressly provides that, if necessary, the court shall be entitled to apply other security measures, Ukrainian courts remain reluctant to impose any measures that are not directly provided for under Ukrainian law. As a result, it would not appear possible to appoint a receiver to manage corporate assets, especially in light of the guidelines on security measures issued by the Supreme Court, which expressly prohibit the imposition of any measures that may interfere with the internal affairs of a corporation or its shareholders' decision-making processes.<sup>43</sup> In addition, the court cannot attach salaries, scholarships, alimony payments, pensions and other social benefits, or impose measures interfering with procedures for the administration or liquidation of a bank as ordered by the Deposit Guarantee Fund.

37 ICAL, Article 12; ICAL Rules, Article 28.

38 ICAL, Article 12(2); ICAL Rules, 28(1).

39 As their title suggests, general courts are courts of general jurisdiction. Commercial courts are specialised courts that hear cases arising out of commercial contracts, insolvency matters and matters pertaining to competition law.

40 ICAL, Article 9.

41 Civil Procedure Code, Articles 394(1) and 395(9).

42 Civil Procedure Code, Article 152.

43 Clause 5 of Resolution No. 9 of the Supreme Court Plenum of 22 December 2006.

Ukrainian courts hear motions for security measures in camera. If a security measure is imposed, it takes effect immediately and is enforced in accordance with the rules for enforcement of court judgments. A security measure can also be appealed to a higher court, but that appeal will not suspend its execution.<sup>44</sup> Likewise, the appeal will not stay any further court proceeding in the enforcement case.

In addition, a party may seek interim measures from the arbitral tribunal (unless the parties' agreement contains a provision to the contrary). Pursuant to the ICAL, the arbitral tribunal is authorised to grant interim relief as it deems appropriate.<sup>45</sup> The arbitral tribunal may require the party seeking interim measures to provide security for costs. The enforceability of interim relief issued by the arbitral tribunal is subject to debate as procedural orders, as opposed to a final award, are currently not enforceable in Ukraine. Nonetheless, even if the interim order is unenforceable, the recalcitrant party would seemingly be inclined to obey it, given that the same tribunal will be deciding the merits of the case.

Ukrainian law also provides for a relatively straightforward process of enforcement of arbitral awards. However, since Ukraine made a 'reciprocity' reservation to the New York Convention, it will only enforce arbitral awards that were made in the territory of another signatory to that Convention.

The enforcement process starts with the filing of an application with a relevant local court of general jurisdiction in the district of the debtor's domicile or location. If the debtor's domicile or location is outside Ukraine, or if it is unknown, the application has to be made to the court located in the district where the debtor's property is found. The application has to be made within three years of the date the award became enforceable.

In addition to the documents required to be submitted with the application pursuant to the New York Convention (i.e., the original or duly certified copies of the arbitral award and the arbitration agreement), the enforcing party would be well advised to submit additional documents envisaged by the Civil Procedure Code of Ukraine, such as proof that the arbitral award is final and binding, and that the adverse party was duly notified of the arbitral proceedings, as well as documents identifying the portion of the award to be enforced (in the event that the award was partially enforced previously) and a power of attorney issued to the representative of the enforcing party.<sup>46</sup>

The applicable law requires that the court rule on an enforcement application within two months of its submission. However, in practice this period may be much longer. In addition, if the enforcement order is appealed, the enforcement of the award will be stayed until the ruling of the appellate court. However, subsequent appeals to higher courts do not prevent the party from seeking enforcement from obtaining a writ of execution and proceeding with the enforcement of the award. Typically, a contested award can be heard at all appellate levels and enforced, if appropriate, within 12 months.

The grounds for setting aside an arbitral award are identical to the grounds set forth in the Model Law. An arbitral award will be set aside if it is established that:

- a* a party to the arbitration agreement was under some incapacity or the agreement is invalid under the law to which the parties subjected it or, in the absence thereof, under the law of Ukraine;

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44 Civil Procedure Code, Article 153(10).

45 ICAL, Article 17.

46 Civil Procedure Code, Article 394.

- b* the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings, or was otherwise unable to present its case;
- c* the award settles a dispute not contemplated by or not falling within the terms of the submission to arbitration, or contains decisions on matters beyond the scope of the submission to arbitration;<sup>47</sup>
- d* the constitution of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties (unless such agreement was in conflict with a provision of the ICAL from which the parties cannot derogate) or, where there was no such agreement, was not in accordance with the ICAL;
- e* the court determines that the subject matter of the dispute is not capable of settlement by arbitration under the applicable laws of Ukraine; or
- f* the award is in conflict with the public policy of Ukraine.<sup>48</sup>

The likelihood of an arbitral award being set aside based on public policy considerations is not easy to assess, as Ukrainian law does not delineate expressly the parameters of this concept. The Supreme Court has shed some light on the meaning of public policy by indicating that it is to be understood as the legal order of Ukraine, comprising such fundamental principles as the independence of Ukraine, its constitutional freedoms, as well as the rights and guarantees of its citizens. Accordingly, national courts enjoy wide discretion in determining what constitutes the public policy of Ukraine.

For example, the Supreme Court of Ukraine held that the relations among founders or shareholders of a commercial enterprise regarding the formation of the entity's governing bodies and determination of the scope of their competence are governed by laws that are 'imperative by their nature'.<sup>49</sup> According to the Supreme Court, any failure to observe imperative legal provisions results in a violation of public policy.<sup>50</sup> In light of this judicial clarification, the recognition and enforcement of a foreign arbitration award is likely to be denied in Ukraine if the award contravenes any provisions of Ukrainian law that are deemed to be 'imperative'.

While the process of enforcement of foreign arbitral awards in Ukraine is governed by the New York Convention, the European Convention and the ICAL, the execution of court decisions ordering such enforcement is governed by the Law on Enforcement Procedure (LEP). In addition, as of 1 January 2013, another relevant legislative act came in force: the Law on Guarantees Regarding the Execution of the Court Judgments (GRECJ Law). The main purpose of the GRECJ Law is to establish state guarantees to secure a more efficient enforcement of the LEP. The GRECJ Law improves the process of execution of judgments

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47 However, to the extent that the decisions on matters duly submitted by the parties to arbitration can be separated from those that were not within the scope of their arbitration agreement, then only that part of the award that contains decisions on matters not submitted to arbitration can be set aside.

48 ICAL, Article 34.

49 See Resolution of the Plenum of the Supreme Court of Ukraine No. 13, 24 October 2008 'On Court Practice of Adjudication of Corporate Disputes'.

50 Ibid.

against governmental agencies and state enterprises.<sup>51</sup> The GRECJ provides that if the central executive authority that implements governmental policy in the area of Treasury servicing of budgetary funds does not pay the amount awarded, the party enforcing the award shall receive compensation from the Ukrainian State Budget at a yearly rate of 3 per cent of the amount due.

## ii Investor–state arbitration

Ukraine is also an active participant in the investor–state arbitration system. Ukraine has been involved in investment disputes with, *inter alia*, Western NIS Enterprise Fund, Generation Ukraine, Tokios Tokelés, Alpha ProjektHolding GmbH, Windjammer Beteiligungsgesellschaft mbH & Co KG and Inmaris Perestroika Sailing Maritime Services GmbH, Bosch International Inc and B&P Ltd Foreign Investment Enterprise, GEA Group Aktiengesellschaft and Global Trading Resources Corp. It is a signatory to the Convention on the Settlement of Investment Disputes between the States and Nationals of Other States of 1965. Ukraine is also a signatory to the Energy Charter Treaty and over 70 bilateral investment treaties (BITs), among which 55 BITs are in force and 18 BITs are signed but not yet effective.<sup>52</sup>

## II THE YEAR IN REVIEW

### i Developments affecting international arbitration

The year 2015 was marked by the work of the professional arbitration community of Ukraine on improving certain provisions of Ukrainian law that affects international arbitration. In particular, the Ukrainian Arbitration Association<sup>53</sup> in collaboration with the Ukrainian National Committee of the International Chamber of Commerce has finished drafting a bill on amendments to certain Ukraine laws that concern certain international arbitration procedures. The provisions of the above bill are aimed at clarifying certain inconsistencies in Ukrainian law and introduce the following important amendments, in particular:

- a the imposition of a general rule that any commercial or civil disputes, with respect to which the parties can reach an amicable settlement agreement, can be settled in international arbitration courts or domestic arbitration courts, except for cases set forth by Ukrainian law;

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51 The GRECJ Law was enacted as a result of the 15 October 2009 decision of the European Court of Human Rights that, through the exercise of its pilot judgment in *Yuriy Nikolayevich Ivanov v. Ukraine*, ordered Ukraine to rectify numerous deficiencies in its legal systems pertaining to the execution of court and arbitral awards by January 2011 (which deadline was later extended to 15 July 2011). See Correspondence from the Registry of the European Court of Human Rights concerning a pilot judgment delivered in the case of *Yuriy Nikolayevich Ivanov v. Ukraine*, available at [wcd.coe.int/com.instranet.InstraServlet?command=com.instranet.CmdBlobGet&InstranetImage=1805662&SecMode=1&DocId=1690454&Usage=2](http://wcd.coe.int/com.instranet.InstraServlet?command=com.instranet.CmdBlobGet&InstranetImage=1805662&SecMode=1&DocId=1690454&Usage=2).

52 [investmentpolicyhub.unctad.org/IIA/CountryBits/219#iiaInnerMenu](http://investmentpolicyhub.unctad.org/IIA/CountryBits/219#iiaInnerMenu).

53 [arbitration.kiev.ua/en-US/UAA-News/UAA-Working-Group-has-elaborated-a-draft-law-regarding-exercise-of-judicial-control-over-internatio.aspx?ID=193](http://arbitration.kiev.ua/en-US/UAA-News/UAA-Working-Group-has-elaborated-a-draft-law-regarding-exercise-of-judicial-control-over-internatio.aspx?ID=193).

- b* the parties to the arbitration will be able to apply to the Ukrainian courts for interim measures in support of arbitration proceedings;
- c* the implementation of the 'cross security' concept, whereby the party seeking interim relief should provide cross security for the adverse party (in the form of depositing money into the deposit account of the court or a bank guarantee) for the compensation of potential damages that may be caused by the requested interim relief. The amount of the cross security will be determined by the court, but in any case should not exceed 20 per cent of the injunction requested by the applicant, and, if such amount is not indicated, no more than 20 per cent of the amount of claim in the arbitral proceedings;
- d* the implementation of rules on the granting of judicial assistance on collecting evidence for commercial arbitrations per the request of an arbitration court; and
- e* cases on the recognition and enforcement of international arbitral awards, imposing interim measures in support of arbitration proceedings as well as on granting judicial assistance in Ukraine, will be carried out only by the Kiev Court of Appeal and the High Specialised Court (as an appeal court).

The above-mentioned bill was recently registered in the parliament under No. 4351,<sup>54</sup> and is pending before the parliament's committees. It is expected that the adoption of the bill will facilitate an improvement of the reputation of Ukraine as an arbitration-friendly country.

## ii Arbitration developments in local courts

Recent enforcement-related decisions demonstrate that Ukraine continues to make measurable progress toward becoming an arbitration-friendly jurisdiction. In 2014 and 2015, there were a couple of interesting court precedents that clarify certain questions on the application of the New York Convention in Ukraine.

In the case of *Röhren und Pumpenwerk Bauer GmbH (Bauer) v. PrJSC 'Rise' (Rise)*,<sup>55</sup> the Supreme Court of Ukraine issued an important legal position concerning the burden of proof regarding a lack of notice of an arbitration. In this case, Bauer commenced the recognition in Ukraine of the award of the International Arbitration Centre of the Austrian Federal Economic Chamber against Rise. Rise objected, arguing that it was not properly notified about the arbitration, which violates the New York Convention. Previous courts<sup>56</sup> had dismissed Bauer's motion on the premise that Bauer did not provide any evidence confirming that Rise was duly notified about the arbitration against it. The Supreme Court of Ukraine observed that pursuant to the provisions of Article V of the New York Convention, the recognition and enforcement of the arbitral award may be refused if the adverse party furnishes to the competent court evidence confirming that that party was not given proper notice on the appointment of the arbitrator or of the arbitration proceedings, or was otherwise

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54 [w1.c1.rada.gov.ua/pls/zweb2/webproc4\\_1?pf3511=58601](http://w1.c1.rada.gov.ua/pls/zweb2/webproc4_1?pf3511=58601).

55 Decision of the Supreme Court of Ukraine in the case of *Röhren und Pumpenwerk Bauer GmbH v. PrJSC 'Rise'* of 23 April 2014.

56 Decision of the Holosiivskyi District Court of Kiev of 30 April 2013, upheld by the Decision of Kiev Court of Appeal of 25 July 2013 and by the Decision of the High Specialised Court of 9 October 2013 in the case of *Röhren und Pumpenwerk Bauer GmbH v. PrJSC 'Rise'*.

unable to present its case. That said, the Supreme Court of Ukraine noted that the burden of proof that Rise was not duly notified about the arbitration against it should be carried by Rise.

In the case of *Sea Emerald SA (SE) v. Shipbuilding Company 61 Komunar (SBC 61 Komunar)*, upon which we reported in the previous edition of this publication, the Supreme Court of Ukraine has issued another important legal position concerning the provisions of Article V(1)(b) of the New York Convention. To recall, petitioner SE made an application to enforce an award issued in a London-seated arbitration. Respondent SBC 61 Komunar opposed the application, claiming a lack of proper notice of the arbitration proceedings. Notice was given, but was sent via e-mail, and the underlying contract called for facsimile or hand-delivered notices.

In holding that the arbitration award was nonetheless enforceable, the High Specialised Court reasoned that the grounds for refusing enforcement are limited to those set forth in the New York Convention (as restated in Article 396 of the Civil Procedure Code of Ukraine) and noted that the Court lacked authority to review the merits of the dispute. The English Arbitration Act 1996 allows notices to be sent by any means that ensure their receipt by the addressee. Petitioner SE submitted evidence that respondent SBC 61 Komunar received correspondence concerning the arbitration proceeding and that, furthermore, SBC 61 Komunar itself sent correspondence to the arbitrator concerning the arbitration proceeding. Accordingly, the High Specialised Court concluded that respondent received sufficient notice of the arbitration and had an opportunity to participate in it. The award was thus held enforceable.<sup>57</sup> However, on 26 December 2014, SBC 61 Komunar made an application seeking review by the highest court, the Supreme Court of Ukraine, of the High Specialised Court's decision. The Supreme Court of Ukraine observed<sup>58</sup> that courts, when considering whether the respondent was duly notified about arbitration proceedings, should take into account the procedures set forth by the parties in the arbitration agreement or arbitration clause in the respective contract, or the procedures to which the parties to the arbitration have mutually agreed. Given that SE and SBC 61 Komunar did not agree to receive arbitration notices via e-mails, but clearly prescribed in the agreement that such notices should be made by facsimile or courier, the Supreme Court of Ukraine decided to overrule the decision of the High Specialised Court. The case is pending.

### iii Investor–state disputes

2015 saw the landmark case of *JKX Oil and Gas PLC (JKX), Poltava Gas BV (PG) and JV 'Poltavska Gazonaftova Kompania' (PGK) v. Ukraine* regarding the recognition and enforcement of the award of the emergency arbitrator under the Arbitration Rules of the Arbitration Institute of the Stockholm Chamber of Commerce (SCC Arbitration Rules). That award temporarily prohibited Ukraine from applying to PGK a regulatory gas production royalty rate of more than 28 per cent, which royalty rate was established by amendments to the Tax Code of Ukraine on 31 July 2014. Ukraine objected against the recognition of that award.

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57 Decision of the High Specialised Court in the case of *Sea Emerald SA v. Shipbuilding Company 61 Komunar* of 19 March 2014.

58 Decision of the Supreme Court of Ukraine in the case of *Sea Emerald SA v. Shipbuilding Company 61 Komunar* of 30 September 2015.

The key arguments of Ukraine were as follows:

- a* Ukraine argued that it had not been properly notified of the emergency arbitrator's appointment and had been denied an opportunity to present its case;
- b* the emergency arbitrator could not issue the award because the three-month cooling-off period prescribed by the Energy Charter Treaty had not expired;
- c* Ukraine did not agree to the emergency arbitrator procedure, because such procedure was not prescribed by the SCC Arbitration Rules as on the date of ratification of the Energy Charter Treaty by Ukraine; and
- d* the recognition of the award would violate the public order of Ukraine, because the royalty rates can only be changed by amendments to the Tax Code of Ukraine.

The Pecherskyi District Court of Kiev<sup>59</sup> recognised the award on the premises that Ukraine was duly notified about the emergency arbitrator's appointment and that the arbitration was carried out in accordance with the SCC Arbitration Rules. The Court also dismissed Ukraine's allegation concerning public policy, arguing that the award was aimed at the protection of the rights of investors in Ukraine and did not change any taxation rules in Ukraine.

The Kiev Court of Appeal<sup>60</sup> quashed the ruling of the Pecherskyi District Court on the ground that the recognition of the award would violate the public order of Ukraine. The Court of Appeal embraced the position of the Ukrainian Ministry of Justice's representatives that the temporary application of the reduced gas production royalty rate to PGK would contradict the provisions of the Tax Code of Ukraine.

The High Specialised Court<sup>61</sup> disagreed with the Kiev Court of Appeal. The High Specialised Court observed that the Court of Appeal did not properly assess the rules of public order of Ukraine, which might be violated if the award at issue was to be recognised. Therefore, the Court of Appeal had to analyse whether the award changes the taxation system of Ukraine and whether the award 'substitutes' the provisions of the Tax Code of Ukraine. Although the Court did not expressly note whether the award contradicts the public order of Ukraine, it observed that the award did not change the rights and duties of the parties to the arbitration, and temporarily obliged Ukraine to refrain from applying a gas production royalty rate that exceeded 28 per cent to PGK.

The case is pending before the Kiev Court of Appeal. This is the first case in Ukraine on the recognition of temporary relief granted by an arbitration court. Its outcome will definitely have an impact on the development of the legal tools for protection of rights of investors in Ukraine. It is also not excluded that, upon hearing of this case, Ukrainian courts may reconsider their long-standing legal position with respect to the rules of public order in Ukraine and issue clarifications on cases when the public order of Ukraine is violated by the enforcement of arbitral awards.

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59 Decision of Pecherskyi District Court of Kiev in the case of *KX Oil and Gas PLC, Poltava Gas BV and JV 'Poltavska Gazonaftova Kompania' v. Ukraine* of 8 June 2015.

60 Decision of Kiev Court of Appeal in the case of *KX Oil and Gas PLC, Poltava Gas BV and JV 'Poltavska Gazonaftova Kompania' v. Ukraine* of 17 September 2015.

61 Decision of the High Specialised Court in the case of *KX Oil and Gas PLC, Poltava Gas BV and JV 'Poltavska Gazonaftova Kompania' v. Ukraine* of 24 February 2016.

### **III OUTLOOK AND CONCLUSIONS**

The year 2015 has been marked by the continuity of Ukraine's extensive efforts to revamp its legal system and eradicate corruption. While many of the resulting changes are expected to bring further stability and predictability, some will pose additional challenges. That said, Ukraine's renewed efforts to amend its national legislation and strengthen its judicial and political systems are expected to have a positive effect on the business environment within the country.

## Appendix 1

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# ABOUT THE AUTHORS

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Artem Lukyanov is an associate in Dentons' (formerly Salans) Kiev office. Mr Lukyanov primarily focuses on litigation and debt recovery as well as restructuring and insolvency matters. He has extensive experience in dispute resolution, and focuses on representing international and Ukrainian clients' interests in the civil, administrative and commercial courts of Ukraine as well as in enforcement proceedings. Mr Lukyanov holds a degree in law from Taras Shevchenko University of Kyiv as well as a degree in finance from Kyiv National Economic University named after Vadym Hetman.

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