



# **ARBITRATION IN CIS COUNTRIES: CURRENT ISSUES**

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# **GENERAL POLICY OF UKRAINE TOWARDS ARBITRATION**

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**Ukrainian legislation provides separate legal regimes for international commercial and domestic arbitration:**

International commercial arbitration in Ukraine is generally governed by:

- the Law of Ukraine No. 4002-XII “On International Commercial Arbitration” of 24 February 1994 (elaborated on the basis of the UNCITRAL Model Law on International Commercial Arbitration of 21 June 1985);
- the Law of Ukraine No. 2709-IV “On Private International Law” of 23 June 2005.

Issues related to domestic arbitration between Ukrainian parties (legal entities or individuals) are generally regulated by:

- the Law of Ukraine No. 1701-IV “On Domestic Arbitration Courts” of 11 May 2004;
- the Code of Civil Procedure of Ukraine No. 1618-IV of 18 March 2004;
- the Code of Commercial Procedure of Ukraine No. 1798-XII of 06 November 1991.

## **Permanent arbitration institutions in Ukraine**

There are 67 domestic and two international commercial arbitration institutions in Ukraine:

- the International Commercial Arbitration Court at the Ukrainian Chamber of Commerce and Industry (ICAC);
- the Maritime Arbitration Commission at the Ukrainian Chamber of Commerce and Industry (MAC).



## **International Commercial Arbitration Court at Ukrainian Chamber of Commerce and Industry**

The ICAC is an independent permanent arbitration institution at the UCCI which is governed by the following legal acts:

- the Law of Ukraine No. 4002-XII "On international commercial arbitration" of 24 February 1994;
- the Rules of the ICAC at the UCCI of 17 April 2007;
- the Statute of the ICAC at the UCCI of 24 February 1994.

**The arbitral tribunal at the ICAC has jurisdiction over disputes, subject to the arbitration clause, and which are:**

- connected with foreign trade and any kind of business where the seat of business of at least one party is located abroad;
- connected to the disputes between enterprises with foreign investment and international associations and organizations established in the territory of Ukraine or between members thereof, or disputes between them and other subjects of law of Ukraine.

In 2011, the ICAC registered 406 cases.



## **The Maritime Arbitration Commission at the Ukrainian Chamber of Commerce and Industry**

The MAC is an independent permanent arbitration institution at the UCCI which is governed by the following legal acts:

- the Merchant Shipping Code of Ukraine of 23 May 1995 No. 176/95-VR;
- the Law of Ukraine No. 4002-XII "On international commercial arbitration" of 24 February 1994;
- the Rules of the ICAC at the UCCI of 17 April 2007;
- the Statute of the ICAC at the UCCI of 24 February 1994.

**Disputes considered by the MAC are related to the disputes related to maritime activities, among which:**

- affreightment of vessels;
- the carriage of goods;
- the maritime towage of vessels;
- marine insurance and reinsurance;
- the sale of floating objects;
- their repairs and maritime liens;
- piloting;
- conducting through ice;
- servicing of seagoing vessels;
- raising property sunk in sea waters;
- collisions, the damage of any gear.

In 2011, the MAC registered 11 cases.



## **Disputes non-arbitrable under Ukrainian law**

Ukrainian legislation does not contain either the definition of non-arbitrability of the dispute or an exhaustive list of disputes which are not capable of settlement by arbitration.

The Law of Ukraine “On Domestic Arbitration Courts” sets forth a general rule allowing parties to refer to domestic arbitration any dispute arising out of civil or commercial relations, except for the several limitations.

Unlike domestic arbitration, the question of what categories of disputes can and what can not be referred to international commercial arbitration remains controversial.

**Article 12 (2) of the Code of Commercial Procedure of Ukraine prohibits, *inter alia*, to submit to arbitration (both international and domestic) the following disputes:**

- on invalidation of public-law acts;
- arising out of execution, amendment, termination and performance of public procurement contracts;
- certain categories of corporate disputes.

**Article 77 of the Law of Ukraine “On Private International Law” contains, *inter alia*, a list of disputes falling within the exclusive jurisdictions of domestic courts:**

- disputes related to the real estate located in Ukraine;
- disputes related to the registration of intellectual property rights requiring registration or certification (patent) in Ukraine;
- bankruptcy cases where the debtor is incorporated under Ukrainian law;
- disputes related to the validity of the records in the state register and state cadastre of Ukraine;
- disputes on issuance or termination of securities, registered in Ukraine.
- other disputes specified by laws of Ukraine.

Despite there is no express ban the said disputes are unlikely to be arbitrable under Ukrainian law.

**Certain categories of corporate disputes which are not capable of being settled by arbitration are defined in:**

- the Code of Commercial Procedure of Ukraine of No. 436-IV of 16 January 2003;
- the Recommendations of the Presidium of the High Commercial Court of Ukraine "On Practice of Legislation application in Disputes arising out of Corporate Relations" No. 04-5/14 of 28 December 2007;
- the Resolution of the Plenum of the Supreme Court of Ukraine on corporate disputes No. 13 of 24 October 2008.

**Corporate disputes which may not be referred to arbitration:**

- between a company and its participants;
- between the participants (founder, shareholder), including former participants;
- between the participants (founder, shareholder) related to the establishment, activity, management and termination of the company.

### **Raiffeisen Property Management GmbH v. Double W LLC**

In November 2010, the Vienna International Arbitral Centre of the Austrian Federal Economic Chamber tribunal rendered an award in favor of Raiffeisen Property Management:

- declared the validity of instruments including: the loan agreement, participation interest sale agreement and participation interest transfer and option agreement;
- confirmed Raiffeisen's title to 99.9 participation interest in the Double W.

The Malynivskiyi District Court of Odesa Region

- partially recognized the award;
- ordered Double W to compensate Raiffeisen Property Management for the arbitration fees;
- held that the rest of the award was not to be recognized as corporate disputes are not arbitrable under Ukrainian legislation.

The Odessa Region Court of Appeal

- amended the order of the court of first instance in respect of the part relating to compensation for the arbitration fees and refused enforcement of the award in full.

The High Specialized Court of Ukraine for Civil and Criminal Cases

- reversed the order of the court of appeal and remanded the case for retrial to the court of first instance;
- found that conclusions of the lower courts that the dispute is a corporate one which is not capable of settlement by arbitration were groundless. Ascertainment of the validity of the agreements and confirmation the Raiffaisen's title to participation interest in Double W and were preconditions for consideration of the Claimant's demands for payment EUR 16.819.496,16.



**Ukrainian legislation provides for the possibility to recognize and enforce foreign arbitral awards based on the following legal sources:**

- the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 10 June 1958;
- the European Convention on International Commercial Arbitration of 21 April 1961;
- the Code of Civil Procedure of Ukraine No. 1618-IV of 18 March 2004;
- the Law of Ukraine "On International Commercial Arbitration" No. 4002-XII of 24 February 1994;
- the Law of Ukraine "On Private International Law" No. 2709-IV of 23 June 2005.

**A party seeking enforcement and recognition of foreign arbitral award in Ukraine shall:**

- file the respective application on recognition and enforcement of foreign arbitral award to the local court which has jurisdiction over the Debtor;
- attach to the application translated into Ukrainian and duly certified documents (in particular, the copy of the arbitral award; official document, which certifies that arbitral award came into force if it is unclear from the text of the award; document which certifies the authority of the representative (if the application is submitted by the representative)).

Based on the above documents and application the court decides whether to grant recognition and enforcement or not.

## **Grounds for refusal in enforcement and recognition of foreign arbitral awards**

The grounds for refusal in enforcement and recognition of foreign arbitral awards are set forth in New York and European Conventions, the Law of Ukraine “On International Commercial Arbitration” as well as in the Code of Civil Procedure of Ukraine.

At the same time, the analysis of court practice in Ukraine evidences that the most frequently used grounds when objecting against enforcement and recognition of foreign arbitral awards are the following:

- non-arbitrability of the dispute;
- improper notification of the party to the arbitral proceeding;
- contradiction of the arbitral award to the public policy.



## **Interim measures in support of arbitration**

Ukrainian legislation provides for the possibility to apply interim measures in support of an ongoing arbitration. The respective provision is included in article 9 of the Law of Ukraine “On International Commercial Arbitration” and it fully recites the similar article of the UNCITRAL Model Law.

In particular, it says that it is not incompatible with an arbitration agreement for a party to request, before or during arbitral proceedings, from a court an interim measure of protection and for a court to grant such measure.

However, notwithstanding the fact that the Law provides for the possibility to apply interim measures in support of arbitration, Ukrainian Codes of Procedure (Civil and Commercial) do not establish procedure for consideration of such applications.

As a result, any application to apply interim measures in support of arbitration filed with Ukrainian court will be dismissed.

## **Interim measures in support of enforcement and recognition of foreign arbitral award**

Prior to September 2011 Ukrainian legislation did not provide for the possibility to apply interim measures in support of enforcement and recognition of foreign arbitral awards.

However, in Autumn 2011 the important amendments were adopted to the Code of Civil Procedure, enabling a party to request interim measures in support of enforcement and recognition of foreign arbitral awards.

Thus, a Party filing an application on enforcement and recognition of foreign arbitral award may request before the court to freeze the assets of the debtor in order to ensure that it will be possible to enforce the court decision in future.



## **Investment arbitration in Ukraine**

Legislative framework for investment legislation in Ukraine:

- the Convention on the Settlement of Investment Disputes between States and Nationals of Other States of 18 March 1965;
- the Energy Charter Treaty of 17 December 1994;
- 72 bilateral investment treaties for the promotion and reciprocal protection of investments.



## **There have been ten claims lodged against Ukraine under the ICSID Convention:**

- four disputes had unfavourable outcome for the claimants:
  - in *Global Trading Resource Corp. and Globex International, Inc. v. Ukraine*, the tribunal held that it had no jurisdiction to hear the case;
  - in *GEA Group Aktiengesellschaft v. Ukraine*, *Tokios Tokeles v. Ukraine* and *Generation Ukraine Inc. v. Ukraine*, Ukraine's jurisdictional objections were rejected, but the tribunals found no substantive violations of the respective BITs.
- two cases were amicably settled:
  - the first *Joseph Charles Lemire v. Ukraine* case;
  - *Western NIS Enterprise Fund v. Ukraine*;
- two awards were rendered against Ukraine:
  - *Alpha Projektholding GmbH v. Ukraine*,
  - *Inmaris et al. v. Ukraine*;
- still pending:
  - *Bosh International, Inc. and B&P, LTD Foreign Investments Enterprise v. Ukraine*;
  - the second *Joseph Charles Lemire v. Ukraine* case.

## **Enforcement of the ICSID awards in Ukraine**

Two applications on recognition and enforcement of the ICSID awards were granted in the procedure for foreign arbitral awards and court judgments which is provided by the Civil Procedure Code of Ukraine:

- the Ruling of the Pechersk District Court of Kyiv of 23 June 2011 in case No. 2-k-7/11;
- the Ruling of the Pechersk District Court of Kyiv of 29 November 2011 in case No. 2-k-18/11.



**Apart from the ICSID, a few arbitrations have taken place pursuant to the 1994 Energy Charter Treaty and the Rules of the Arbitration Institute of the Stockholm Chamber of Commerce:**

- *Amto LLC v. Ukraine* (tribunal dismissed claims brought by Amto as well as Ukraine's counterclaim);
- *Remington Worldwide Limited v. Ukraine* (tribunal ruled in favor of Remington and ordered Ukraine to pay US\$ 4,493,464.74 plus post-award interest).

**Enforcement of the award rendered under the Energy Charter Treaty:**

The Ruling of the Pechersk District Court of Kyiv of 23 November 2011 in case No. 2-k-15/11 (*Remington Worldwide Limited v. Ukraine*).

An application on recognition and enforcement of the award was dismissed. The court reasoned that Remington erroneously specified the respondent: whereas the arbitral award indicated the Ministry of Justice representing Ukraine, the application addressed the Cabinet of Minister of Ukraine.

# Thank you for attention!

Youth faithfully,  
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