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Arbitration and Dispute Resolution

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Introduction

Disputes, including those that involve a foreign party, can be resolved in Ukraine either in state courts or by arbitral tribunals. Within the system of the state courts specialized state commercial courts (Commercial Courts) have been created (until recently misleadingly referred to as state arbitration courts) which deal with disputes amongst legal entities and those individuals who are registered as being entrepreneurs (sole traders). If one of the parties to a dispute is an individual, then the state common courts (Common Courts) ordinarily have jurisdiction. This chapter focuses principally on the resolution of corporate disputes.

In June 2001 the Ukrainian legal system was reorganized, marking the end of the five-year transition period provided by the Ukrainian constitution as adopted in 1996. During this period over a dozen laws governing the court system and civil and criminal procedure were amended to adapt Ukrainian legislation to more universally recognized principles as developed in Germany, the Netherlands and other Western civil law countries. This process is commonly known in Ukraine as the 'small' judicial reform of 2001.

The first part of this chapter describes, based on these recent reforms, the court system and procedures, including for appellate proceedings, and the means for securing a claim and enforcing judgments, beginning with the Commercial Courts. The second section evaluates arbitration as a practical alternative for state commercial court litigation and discusses the mechanisms for enforcement of domestic and foreign arbitral awards. Enforcement of foreign court judgments is also considered.

Litigation in Ukrainian courts

Overview of the Commercial Court system

The Commercial Court system was substantially modified by the small judicial reform of 2001, as reflected in the revised Ukrainian Code of Commercial Procedure of 4 June 1991 (the Code) and the amended Law of Ukraine 'On Commercial Courts' of 4 June 1991. As a result, the Commercial Court system was made part of the general court system. The Commercial Court system consists of three levels, beginning with the local Commercial Courts. Each administrative region (*oblast*) of Ukraine and each of the cities of Kyiv and Sevastopol (separately from their respective *oblasts*) have one local Commercial Court.

The second level is made up of the Appellate Commercial Courts, each of which covers the territory of several *oblasts* (and, for the relevant *oblasts*, the cities of Kyiv and Sevastopol). They mostly hear appeals of the decisions of the local Commercial Courts that are within their jurisdiction. Currently there are seven Appellate Commercial Courts in Ukraine. The Kyiv Appellate Commercial Court covers the territory of five *oblasts* and the city of Kyiv.

At the top of the Commercial Court hierarchy is the High Commercial Court. It serves as a secondary level of appellate jurisdiction, referred to as 'cassation' (based on the French terminology). In principle, as discussed below, the High Commercial Court generally considers appeals only on issues of law, and it accepts the factual decisions of the local Commercial Courts and Appellate Commercial Courts.

In a limited number of cases, the decisions of the High Commercial Court can also be appealed outside of the Commercial Court system to the Supreme Court of Ukraine, which is the highest court of general jurisdiction. As discussed below, the Supreme Court is principally supposed to hear appeals from the High Commercial Court only when there is a conflict on an issue of law between prior decisions of the Supreme Court and those of the High Commercial Court.

Statutory jurisdiction of the Commercial Courts

The jurisdiction of the Commercial Courts is governed by the Code. The authority of the Commercial Courts is limited to disputes among legal entities and independent entrepreneurs that are registered as such, as well as certain disputes between them and state bodies. In rare cases the Ukrainian Code of Commercial Procedure permits individuals to participate in a Commercial Court trial, such as in bankruptcy cases.

Until the end of 1993 only the High Commercial Court (at that time called the High Arbitration Court) heard cases involving foreign entities. Until 1997 it also heard cases if the disputed amounts exceeded certain sums (from UAH150,000–1,500,000 (approximately US\$75,000–750,000

in 1997) depending on the subject matter of the dispute, except if all the parties to the dispute were situated in the same *oblast* or either in the cities of Kyiv or Sevastopol. This is no longer the case. All parties, including foreign entities, now have to go through the full procedure (irrespective of the amounts involved), beginning with the local Commercial Courts.

A local Commercial Court under the Code has jurisdiction to hear cases involving:

- a foreign entity if the defendant in the case resides in Ukraine;
- a representative or branch office of a foreign company located in Ukraine;
- a foreign entity that has property in Ukraine which is the subject of the case.

Jurisdiction of Ukrainian Commercial Courts can only exist by virtue of a statute and cannot be based on the contractual choice of the parties. The only exception is that the parties may exclude the jurisdiction of the Commercial Courts that would otherwise exist if, and only if, they contractually provide for arbitration by a specified tribunal as the exclusive forum for the resolution of their disputes. The parties may agree on arbitration either before or after the conflict arises.

Commencing litigation in the state Commercial Courts

Commercial Court proceedings are initiated by the filing of a formal written statement of claim (the Statement of Claim) by the plaintiff stating the facts of the dispute and its allegations. The Statement of Claim should be filed not later than three years after the party found out that its rights and interests were violated. For certain types of cases there is a shorter limitation period, such as six months for after-sale product defect or quality claims, claims for visible defects in services (but one year for hidden defects if one of the parties is an individual), and claims for payments of penalties and fines. Special limitation periods are provided for claims regarding the carriage of goods and passengers.

This three-year limitation period cannot be modified by contract and must be applied by the state courts as well as arbitral tribunals irrespective of the parties' will. It may only be extended by the courts in exceptional circumstances, eg if circumstances beyond the plaintiff's reasonable control prevented its filing, such as where a sole entrepreneur was unconscious and therefore unable to act in time.

It should be noted that, in Ukraine, the limitation period is a matter of substantive law, and therefore the courts of Ukraine are supposed to apply the limitation period based on the law that governs a contract. An ambiguity arises if such foreign law considers the statute of limitations to be a matter of procedural law where the courts are located, thereby

raising an issue of 'renvoie'. Ukraine is also a party to the Convention on the Limitation Period in the International Sale of Goods (opened for signature in New York on 14 June 1974 and ratified by Ukraine on 14 July 1993), which provides for a four-year limitation period for claims arising from international contracts of sales of goods.

Prior to the June 2001 judicial reform, a mandatory pre-trial dispute settlement procedure applied for most types of cases, requiring the plaintiff to send its claim to the defendant at least a month before the court proceedings could be initiated. The defendant was required to provide a response within this one-month period. Currently this pre-trial dispute settlement procedure is required only for relatively few types of cases, including those involving the carriage of goods, communication services and state procurement and where the contract at issue so provides.

A copy of the Statement of Claim must be sent to the defendant. A confirmation of this, together with a confirmation of the payment of the statutory filing fee, must be attached to the Statement of Claim that is filed with the court. The filing fee (state duty) is 1 per cent of the value of the claim, provided that it is not less than UAH51 (approximately US\$10) or more than UAH1,700 (approximately US\$330). (This represents a substantial decrease from the 5 per cent filing fee that was in place until a few years ago.) Upon acceptance of the case, the court should send an official notice to the parties of the case.

A Commercial Court is, according to the Code, supposed to resolve a case within two months of the filing of the Statement of Claim, but in practice Ukrainian courts are overloaded and are often unable to meet such deadlines. Within this two-month period, a court may also, at the request of one party, postpone the deadline for completion of judicial proceedings by one month based on a demonstrated inability of the party to adequately prepare its case and represent its interests. Prolongation is also possible if approved by both parties to a lawsuit.

Usually a local Commercial Court case is heard by one judge. However, for an important case, one in which large amounts are involved or that otherwise is particularly significant, a three-judge panel may hear the case (led by one judge who acts as chairman of the panel) if the court so decides at the request of a party or on its own motion.

Appellate proceedings

A decision of a local Commercial Court comes into effect on the tenth day after it is announced in full or signed by the judge upon completion of the court hearing (Article 85 of the Code). If a party believes that the local Commercial Court's decision is wrong, it has only 10 days to lodge an appeal by filing a written Statement of Appeal with this local Commercial Court. The local Commercial Court should then forward

the Statement of Appeal to the Appellate Commercial Court responsible for its jurisdiction within five days.

In practice it may take the judge or judges more than 10 days to document a decision after it is announced in the courtroom at the last hearing. If the decision is dated as of the date of the last hearing, as opposed to when the decision is actually issued and registered by the court's administrative office for delivery to the parties, then assuming the parties wait for the written decision to evaluate the bases for an appeal, the 10-day period for appeal may be missed. This is a frequent problem.

In this situation (or if, for any other reason, this appeals period deadline is missed), the party wishing to appeal the lower Commercial Court decision must file an extension petition describing the reasons for missing the 10-day appeal period. The appeal period may, at the court's discretion, be extended for up to three months after the decision was rendered. In practice, where the 10-day appeal period is missed because the local Commercial Court failed to issue its decision in time, an extension to the appeal period is ordinarily granted, and if it is not, this decision can usually be successfully appealed further.

The Appellate Commercial Court is supposed to re-examine the circumstances of the case and verify the legal grounds for the decision taken by the local Commercial Court. In practice this amounts to a new trial, although in theory the Appellate Commercial Court is only supposed to accept additional evidence for consideration if the party introducing it can prove that it was unable to present such new evidence during the initial hearing of the case.

As a result of the appellate review the Appellate Commercial Court may:

- leave the decision of the local Commercial Court intact;
- partially or fully reverse the decision and render a new decision;
- partially or fully reverse the decision and close the proceedings; or
- amend the decision.

The Code lists four grounds for reversing or amending the decision of a local Commercial Court, which are:

- incomplete analysis of material circumstances;
- lack of proof of circumstances that were material for the case and were accepted by the local Commercial Court;
- the conclusions reached do not correspond to the circumstances of the case;
- violations or improper use of substantive or procedural laws that led to an incorrect decision.

A decision of the Appellate Commercial Court may be appealed to the High Commercial Court for supervision ('cassation'). In certain situations a party that loses in a local Commercial Court may appeal directly to the High Commercial Court, bypassing the Appellate Commercial Court, provided that it does not need to submit any additional evidence.

Such supervisory review of the High Commercial Court is supposed to be limited to issues on the correctness of the application of substantive law to the circumstances of the case, the observance of procedural laws and the general analysis of the case by the lower courts. In principle, the High Commercial Court accepts the lower court's factual decisions. The High Commercial Court has the authority to affirm, reverse or modify the lower court's decision.

The 2001 amendments to the Code have also created an additional limited appeal option for the parties to a commercial dispute. A decision of the High Commercial Court may now be further appealed to the Supreme Court of Ukraine, which is the highest court for the courts of general jurisdiction. Such an appeal to the Supreme Court may be made based on any of the following grounds:

- the High Commercial Court applied legislation or secondary law contrary to the Ukrainian constitution;
- the decision of the High Commercial Court is contrary to a prior decision of the Supreme Court or of another specialized court of the same level;
- the decision is inconsistent with the application of a law or other legal act by the High Commercial Court in other similar cases;
- there is a ruling of an accepted international tribunal finding that the decision contradicts an international obligation of Ukraine.

These multiple levels of judicial review are aimed at increasing the predictability of the judicial system, making it more reliable and less vulnerable to mistakes and corruption. In addition to this appellate review, the parties have the possibility to request re-examination of their case based on any new circumstances that are material and were not known to the party at the time when the decision was rendered, provided that this request is made within two months of the discovery of the new circumstances. A petition for such a re-examination must be filed with the local Commercial Court that rendered the previous decision.

Securing claims during trial and suspending enforcement pending appeals

Ukrainian law provides for several measures to secure a claim pending the decision of a case (hereinafter referred to as interim relief). According to the Code, a Commercial Court at any level has the right to take

measures to secure a claim, if so requested by one of the parties or in its own discretion, but it is not obliged to do so. A Commercial Court may secure a claim at any stage of the proceedings 'if failure to do so may make difficult or impossible the enforcement of a court judgment in the case' (Article 66 of the Code). The Code provides that a claim can be secured by:

- arrest of property or funds of the defendant;
- forbidding the defendant to take certain actions;
- forbidding other persons to take actions with regard to the subject matter of the litigation;
- suspension of the collection of debts by a party to the proceedings (including by a state body, such as the State Tax Administration).

The court has full discretion to determine whether the measures are necessary to secure a claim. To justify requiring security for a claim, there have to be reasonable grounds, proven by the plaintiff, for the judge to believe that the defendant's property or funds existing at the time the proceedings are commenced would cease to exist or would materially diminish in value or in quality before enforcement may be made of any decision. The standard of proof on this point is ordinarily relatively high. (Explanation of Court Practice of the Ukrainian State Supreme Arbitration Court of 23 August 1994, No. 02-5/611). Thus, in a case involving a claim for damages, a court is likely to agree to arrest some or all of the funds in the defendant's bank account only to the extent this appears necessary to ensure satisfaction of the claim.

After a decision is rendered, enforcement of the verdict may be suspended pending appeal upon the request of one of the parties or at its own discretion, by the Appellate Commercial Court or the High Commercial Court, whichever is hearing the case. The High Commercial Court or Appellate Commercial Court in such interim relief may order the parties to return any property previously received as a result of any enforcement process.

Enforcement of decisions of the Commercial Courts

After coming into effect, a Commercial Court decision is subject to mandatory enforcement, subject to any suspension pending the hearing of an appeal as described above. If the decision is not performed voluntarily within the period stipulated for its performance, then the plaintiff (or any other interested party) may apply for enforcement by the State Enforcement Service, a state agency or the Ukrainian Ministry of Justice. The State Enforcement Service enforces court judgments following the procedures primarily established by the Law of Ukraine 'On Enforcement Proceedings' of 21 April 1999 and the Code.

Enforcement of a judgment of a Commercial Court is carried out on the basis of the court's order, which is an enforcement document that supplements the actual decision of the Commercial Court. The Commercial Court should deliver this order to the plaintiff either personally or by mail when the decision comes into force. The order must be presented for execution not later than three months from the date when the decision entered into force. This time deadline for submission of the order for enforcement is suspended by delivery of the enforcement document to the State Enforcement Service or by partial performance of the decision by the defendant.

In principle, enforcement of a decision by any means, other than a sale of the defendant's property, is supposed to be performed by the enforcement officer within two months from the date on which the enforcement document is received. The period for initiation of enforcement may be prolonged if the plaintiff can persuade the Commercial Court that it has good reasons for missing the three-month deadline, such as the absence of the defendant and its assets in the jurisdiction.

In order to enforce a judgment, the State Enforcement Service may, among other measures, seize the defendant's property, including any funds in bank accounts and any salary or other income of the defendant. It may also take from the defendant any items stipulated in the court's decision. When enforcing a monetary claim against a legal entity, the State Enforcement Service should begin by collecting any cash in the defendant's bank accounts.

If such funds are not sufficient, then enforcement can be made against the following property of the defendant, in the stated priority: first, property that is not engaged in actual production processes (eg securities, cars and office furniture); second, final products (eg produced goods); and third, real estate, production equipment and other fixed assets and raw materials. For individuals, enforcement against real estate, such as an apartment, house or land plot, is only allowed if the defendant does not have sufficient moveable property to satisfy the claim. Seized property may be sold either through companies that specialize in this or at specialized auctions.

In connection with such enforcement, the defendant will be charged a fee of 5 per cent, which is supposed to represent the collection expenses. Out of this amount the enforcement officer who successfully enforces the court judgment on a timely basis may personally receive up to 2 per cent of the collected amounts but not more than UAH170 (approximately US\$30). In practice, and this is expressly permitted by law, the plaintiff may need to advance some funds to the State Enforcement Service to cover its collection expenses, which advances are in principle supposed to be reimbursed after enforcement is completed.

General court system

As mentioned above, ordinarily disputes involving at least one individual as a party, including foreign individuals, have to be settled by the state Common Courts. Cases that deal with civil, commercial, family and labour law matters are heard in the Common Courts in accordance with the Code of Civil Procedure of Ukraine. Criminal proceedings in these courts are governed by the Code of Criminal Procedure of Ukraine. In addition, until the proposed administrative courts are organized, as a transitional measure the Common Courts are handling most cases concerning challenges to administrative action.

In Kyiv and other major cities, local Common Courts are located in every administrative district. There is also, for each *oblast* and the cities of Kyiv and Sevastopol, a Common Court of Appeals, to which decisions of the local Common Courts can be appealed. As for the Commercial Court system, such an appeal usually amounts in practice to a new trial. In a few relatively rare instances, these second level courts can also act as courts of first instance. The third and final level is the Supreme Court of Ukraine, which is the highest court within the Ukrainian court system, as observed earlier.

Basically, court proceedings in the Common Courts are similar to those in the Commercial Courts, with a few distinctions. For example, the rules for the territorial jurisdiction of the local courts, including both the local Common Courts and the local Commercial Courts, provide that disputes shall be heard by the local court at the place of location of the defendant. However, in addition, the Code of Civil Procedure provides that, for most civil law and certain other cases before the Common Courts, jurisdiction may also be: (1) at the location of the plaintiff or where the contract was performed, where the damage occurred or where property involved in the case or owned by the defendant is located, at the option of the plaintiff; or (2) at any location in Ukraine as the parties may agree (these criteria may vary depending upon the subject matter of the case, so that labour law cases can only be tried at the location of the plaintiff or the defendant).

Arbitration**Arbitral tribunals**

In Ukraine an arbitral tribunal (called a *treteyskiy*, literally meaning a 'third-party tribunal') may be an institutional arbitral tribunal created to handle some or all types of commercial disputes or an ad hoc tribunal specifically created by the parties to resolve a particular dispute. As discussed below, a number of arbitral tribunals exist in Ukraine for both domestic and international disputes.

The principal international arbitral tribunals cited in Ukraine are the International Court of Arbitration of the International Chamber of Commerce and the Arbitration Institute of the Stockholm Chamber of Commerce applying UNCITRAL (United Nations Commission on International Trade Law) rules. In addition, Ukrainian cases are heard by the London Court of International Arbitration, the American Arbitration Association and the International Centre for Settlement of Investment Disputes (ICSID). In choosing any of these recognized institutions, the parties have a wide selection of well-known professional arbitrators and rules that have been tested and accepted for many years.

Alternatively, the parties to an ad hoc arbitration can establish their own tribunal and rules. Resolution of a dispute by ad hoc arbitration (either for international or purely domestic disputes) is carried out based on principles and rules chosen by the parties at their discretion. Such ad hoc rules can provide for the nomination of any arbitrator, whether a Ukrainian or foreign resident, whom the parties desire to decide a particular dispute. The parties can also determine the location of the tribunal and subject the arbitral proceedings to any rules, including those based on any internationally accepted arbitration rules. Such ad hoc arbitration is not widely used in Ukraine.

The activity of tribunals that resolve disputes involving foreign parties or Ukrainian companies with foreign investment is, as a matter of Ukrainian law, governed by the Law 'On International Commercial Arbitration' of 24 February 1994 (the Arbitration Law). The Arbitration Law lays down general rules on the jurisdiction of the arbitral tribunal, appointment of arbitrators, procedural rules, choice of language and place of arbitration, and how an award is rendered and enforced. The Arbitration Law is based to a large extent on the UNCITRAL model law and generally reflects the principles that private parties should expect to find for commercial arbitration. Many of the Arbitration Law's rules only apply to the extent that the parties to such an international arbitration do not decide on such issues themselves.

Arbitral tribunals that resolve domestic disputes between Ukrainian entities that have no foreign investment are still governed by the Soviet-era Regulation 'On Arbitral Tribunals for the Resolution of Business Disputes between Associations, Enterprises, Organizations and Institutions', approved by the Resolution on State Arbitrage of the Cabinet of Ministers of the USSR of 30 December 1975. On the basis of this regulation such domestic arbitral tribunals are authorized to hear commercial disputes that fall within the jurisdiction of the Commercial Courts.

A party that would like to submit a dispute to a domestic arbitral tribunal should notify the other party and nominate its arbitrator. The other party has to respond to such proposal within 10 days. A failure to respond will be interpreted as a refusal to arbitrate, and the dispute must therefore be resolved by a State Commercial Court according to the

litigation procedures discussed above. A dispute that goes to domestic arbitration is supposed to be resolved within one month after the claim is received by the arbitrators. The decision of such a domestic arbitral tribunal has to be filed with the archives of the Commercial Court having jurisdiction over the place where the arbitration is conducted, and it is immediately enforceable, as discussed below.

Jurisdiction of arbitral tribunals

Under Ukrainian law, the jurisdiction of an international arbitral tribunal is primarily based on the parties' arbitration agreement, subject to certain mandatory legal rules. The form for an arbitration agreement for an international contract is governed by Article 7 of the Arbitration Law.

Article 7 provides that 'an arbitration agreement', which can validly replace the state court jurisdiction that would otherwise apply, is 'an agreement of the parties on submitting to an arbitral tribunal all or certain disputes that have arisen or may arise between them in connection with any definite legal relations, whether or not contractual in nature'. This is ordinarily interpreted to mean that there must be a written agreement to submit certain disputes to arbitration and not a mere agreement on arbitration as one of several non-exclusive dispute resolution procedures.

Furthermore, the submission must be to a specific arbitral tribunal, and not simply reflect an agreement to resolve disputes by 'arbitration'. However, the Geneva European Convention on International Commercial Arbitration of 1961, as ratified by Ukraine (the 'Geneva Convention'), provides a mechanism whereby, if the parties to a contract have merely agreed to arbitration without specifying a tribunal, the chairman of the Chamber of Commerce in the defendant's country can designate the appropriate arbitral tribunal. On this basis, the failure to specify a tribunal in an arbitration clause in a contract governed by Ukrainian law might not render it void, since there is a mechanism for selection of a specific tribunal. The chairman of the Ukrainian Chamber of Commerce is likely to appoint the International Commercial Court at the Chamber of Industry and Commerce of Ukraine (discussed below) as the arbitral tribunal for such disputes.

Where a contract properly refers disputes to arbitration, Article 80(5) of the Code requires the state courts to close any proceedings covering a dispute at the request of any of the parties to the dispute, provided such request is timely made by a party that has not already acquiesced to the state court's jurisdiction. Therefore, great care must be taken, where a party prefers arbitration and has an agreement on this, not to appear or submit any motions on the merits of a case in any state court proceedings for any purpose other than to request that such proceedings be terminated.

An agreement to submit a claim to arbitration may be made in an arbitration clause in a contract on a commercial or other matter or in a separate agreement specifically entered into to provide for arbitration of some or all disputes between the parties to it. In either case the agreement on arbitration should be in writing and can take the form of a single document signed by the parties or an exchange of letters, faxes or other means of communication that provide for the unambiguous choice of arbitration. An arbitration clause that forms a part of a contract between the parties is, under Ukrainian law, considered an independent agreement and will not necessarily be declared invalid if the contract in which it is contained is invalid (Article 16 of the Arbitration Law).

Even if an arbitration clause is defective, for example for being too ambiguous on important points, a party may still try to enforce it. It could, for example, file a statement of claim to the selected arbitral tribunal and send a copy of the claim to the other party. If this other party responds to the merits of the claim, this would ordinarily be a sufficient basis under Ukrainian law for the tribunal to accept the case and for its decision to be binding on the parties.

In the case of ad hoc arbitration, it is advisable to indicate in the arbitration agreement the number of arbitrators, the procedure for appointing the arbitrators, the language and place of the arbitration, and the procedure for sharing the expenses between the parties. The parties should also provide for rules to govern the arbitration, which preferably should be based on a developed system such as that of the International Chamber of Commerce or UNCITRAL.

The leading arbitral tribunals used in Ukraine

As observed above, for resolving disputes concerning large transactions involving Ukrainian and foreign entities, the most frequently cited international arbitral institutions in Ukraine are the International Court of Arbitration of the International Chamber of Commerce (ICC) and the Arbitration Institute of the Stockholm Chamber of Commerce (usually applying UNCITRAL rules). In addition, as described below, the Ukrainian-based international arbitration tribunals, the International Commercial Arbitration Court and the Maritime Arbitration Commission, both part of the Chamber of Industry and Commerce of Ukraine, are increasingly being used. The following discussion begins with a review of the ICC and the Stockholm Chamber of Commerce Arbitration Institute.

ICC

The ICC, which has its head office in Paris, is recommended for major disputes. It has national committees in approximately 60 different countries, including Ukraine. Each national committee keeps a list of

arbitrators with appropriate qualifications who might be chosen for a particular dispute. Unlike some institutions, the ICC does not require that arbitrators be selected from their established list. In order to ensure that the arbitrators properly act within their powers the ICC's headquarters supervises all arbitral proceeding from the beginning until the rendering of a final award. This attention comes at a price, however, so the ICC tends to be used more for important matters.

An ICC arbitral tribunal may be composed of one or more arbitrators, depending on what parties decide. If the parties do not decide on the number of arbitrators, the ICC Rules provide that the ICC may appoint a sole arbitrator 'save where it appears to the Court that the dispute is such as to warrant the appointment of three arbitrators' (Article 8). If the tribunal is to be composed of three arbitrators, then each party (assuming there are only two) nominates an arbitrator and the ICC nominates the third arbitrator who serves as the chairman of the arbitral tribunal (unless parties agree otherwise).

In order to initiate an arbitration with the ICC, a party has to file a Request for Arbitration and pay US\$2,500 to cover the initial administrative expenses. As soon as the arbitral tribunal is composed, the ICC Secretariat transfers the files to it. At the initial stage of the arbitration process, the arbitral tribunal composes its 'Terms of Reference' – a document that contains an overview of the facts and arguments as they are perceived by the arbitrators. Sometimes disputes can be amicably settled on the basis of such Terms of Reference. The plaintiff may be asked to make an advance payment for the arbitrators' time to prepare these Terms of Reference, and periodic advances may be required from the parties thereafter. After studying the parties' written submissions, the tribunal may ask the parties and their experts and other witnesses to appear before it.

In addition to arbitration, the ICC provides other resolution options for the parties to a dispute. For example, the ICC has established a procedure whereby the parties can appoint a pre-arbitral referee, who can evaluate a dispute and grant preliminary measures before the convocation of an arbitral tribunal (although, in Ukraine, enforcement of any such preliminary measures would still require an order from a Commercial Court). It is also possible for parties that have decided to resolve their disputes by ad hoc arbitration to use the ICC as their 'appointing authority' to appoint qualified arbitrators

The Arbitration Institute of the Stockholm Chamber of Commerce

The Arbitration Institute of the Stockholm Chamber of Commerce (the SCC Institute) is an independent entity within the Stockholm Chamber of Commerce. The SCC Institute principally conducts arbitrations on the basis of its own rules (the SCC Rules) and those of UNCITRAL, depending on the choice of the parties. For Ukrainian contracts, UNCITRAL

rules appear to be the most common choice, following the practice adopted during the Soviet era.

To initiate an arbitration before the SCC Institute, a request for arbitration must be submitted to its Secretariat, which will then decide whether the SCC Institute is competent to hear the dispute. A euro 1,000 registration fee must be paid at the outset by the plaintiff. From time to time during the proceedings, the SCC Institute may request the parties to pay advances on costs to cover the fees of the one or more arbitrators, and other arbitration expenses, which are split equally among the parties.

If the parties decide that the arbitral tribunal will be composed of a sole arbitrator, the SCC Institute will appoint such an arbitrator. If the tribunal is composed of three arbitrators, each party (if there are only two) nominates one arbitrator and the third arbitrator, who chairs the tribunal, is appointed by the SCC Institute, unless the parties agree otherwise. The SCC Institute does not require parties to limit their choice of arbitrators to those on its recommended list; the only requirement is that the arbitrators chosen be unbiased and independent from the parties.

As a rule, in addition to exchanges of written statements, an SCC Institute arbitral tribunal will hold hearings. The tribunal's decision should be made not later than one year after the arbitrators are appointed, though this time period may be extended.

Recently the SCC Institute adopted rules for expedited arbitration, which is recommended for disputes involving relatively small amounts. Expedited arbitration should be faster and less expensive because:

- only one arbitrator hears the case;
- verbal hearings are only held if the arbitrator so decides; and
- the parties are allowed to submit only one written explanation in addition to the plaintiff's statement of claim.

ICAC

The International Commercial Arbitration Court at the Chamber of Industry and Commerce of Ukraine (ICAC) is the leading Ukrainian-based arbitration institution. ICAC acts according to its procedural rules, which are based on the UNCITRAL model law. The number of Ukrainian disputes that are heard by ICAC is growing, and it has already rendered more than 2,000 awards.

ICAC may settle a business dispute arising between parties, provided that either the principal place of business of at least one of the parties involved is abroad, or that one of the parties is a Ukrainian company with foreign investment. If the jurisdiction of ICAC in a particular case

is disputed, then the chairman of ICAC decides whether it can accept or must reject the case.

Traditionally ICAC has only accepted proceedings under arbitration clauses that directly specified it as the sole arbitration tribunal. However, a tendency has developed for ICAC to permit arbitration even where the arbitration agreement is somewhat vague. As observed above, based on the Geneva Convention, ICAC may be appointed to resolve a dispute where the arbitration agreement does not specify any particular arbitral tribunal. ICAC has a 'recommended' list of arbitrators, which in theory does not appear to limit the choice of arbitrators under its rules. However, in practice ICAC insists on using its recommended arbitrators and otherwise will refuse to honour the parties' choices.

Under ICAC's rules, the parties are authorized to specify the number of arbitrators, including a sole arbitrator. If parties do not specify a particular number of arbitrators and fail to provide a procedure for their appointment, then under ICAC's rules, each party (assuming there are only two) nominate one arbitrator, and these two arbitrators appoint the third arbitrator, who would be the chairman of the arbitral tribunal. If within the required periods any of the parties fails to nominate its arbitrator or the two nominated arbitrators fail to agree on the third arbitrator, then the chairman of ICAC appoints such an arbitrator. Similarly, the chairman of ICAC appoints a sole arbitrator where a contract provides for the parties to select a single arbitrator, but they fail to agree on a selection.

An arbitration under ICAC rules is initiated when one of the parties to a dispute files a formal statement of claim. Upon receipt of such statement of claim, ICAC notifies this party of the amount of its fees for handling the arbitration. The approximate amounts of fees for its services are listed in the Schedule of Arbitration Fees and Costs and payment details posted on ICAC's Web site (<http://www.ucci.org.ua/arb>). ICAC arbitrations are normally conducted in either Ukrainian or Russian, but they may also be conducted in English or any other language. (It is possible to provide for official translations if the parties so agree.)

Maritime Arbitration Commission

The Maritime Arbitration Commission at the Chamber of Industry and Commerce of Ukraine (the Maritime Commission) is the other leading arbitration institution based in Ukraine that handles disputes involving a foreign party or a Ukrainian company with foreign investment. It operates on the basis of rules and regulations similar to those applied by ICAC, is headed by the same chairman and consists largely of the same arbitrators as ICAC. The Maritime Commission has a limited role, however, as in principle it only handles disputes under contracts concerning maritime transactions.

Enforcement of domestic arbitral awards

An award of ICAC, the Maritime Commission or any other properly convened arbitral tribunal within Ukraine is deemed, according to Article 348 of the Ukrainian Civil Procedure Code, to be directly enforceable by the State Enforcement Service of the Ukrainian Ministry of Justice (which, as observed earlier, is responsible for enforcing state court judgments). Such arbitral awards should not need to go through the usual approval and adoption procedure in Ukrainian courts that applies for enforcement of foreign arbitral awards. (An ambiguity exists as to the enforcement of awards involving foreign arbitral institutions such as the ICC and the SCC Institute, unless the arbitration can be considered under Ukrainian law to be by an ad hoc tribunal situated in Ukraine.)

In the past, however, there have been difficulties with such enforcement, as the State Enforcement Service has often been reluctant, in practice, to directly enforce the decisions of Ukrainian arbitral tribunals as opposed to judgments of Ukrainian state courts. Although in theory awards of all tribunals located in Ukraine should be directly enforceable, currently in fact decisions of ICAC are the most likely arbitral awards to be so enforced. A refusal of the State Enforcement Service to enforce an arbitral award may be appealed to the state court having jurisdiction.

As a matter of policy, legal regulation in this area may be changed in the near future. Because foreign arbitral awards are not directly enforceable, it has been argued that this creates unfair preferential treatment for domestic arbitral awards. We understand that this issue is currently being discussed by the administration of ICAC and the Ministry of Justice with a view to amending the law to require the same procedure for the enforcement of domestic arbitral awards as is required for foreign arbitral awards (discussed below).

According to the Arbitration Law, enforcement of a Ukrainian domestic arbitral award (such as a decision by ICAC) may be appealed to the state Common Courts (the courts that primarily hear cases involving individuals, as discussed above) on grounds similar to those which would apply to prevent a request for enforcement of a foreign arbitral award (described below). The important difference is that, where such direct enforcement is available to the plaintiff through the State Enforcement Service for a domestic award, the burden is then shifted to the defendant which must initiate a state court proceeding if it wishes to prevent or halt such enforcement.

Enforcement of foreign arbitral awards and court decisions

An arbitral award of a foreign arbitration tribunal, as well as a decision of a foreign court, may only be enforced in Ukraine if there is a bilateral or multilateral agreement on their respective enforcement to which both

Ukraine and the country where the award or decision is rendered are parties. On this basis an award by a foreign arbitral tribunal, as well as a foreign court decision, may be enforced through the Ukrainian Common Courts having jurisdiction where the defendant is located, even if it is a company (rather than the Commercial Courts that ordinarily deal with disputes involving companies).

Such enforcement must be carried out within a three-year period running from the date on which the arbitral award or foreign court decision was rendered. The Resolution of the Plenum of the State Supreme Court of 24 December 1999 resolves many of the ambiguities that existed previously concerning such enforcement. It also summarizes the law in this area based on the Civil Procedure Code of Ukraine and the other laws and international treaties ratified by Ukraine on this subject, including, in particular, the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958 (the New York Convention), the European Convention on International Commercial Arbitration, the Law of Ukraine 'On Enforcement Proceedings' of 21 April 1999, the Law of Ukraine 'On International Commercial Arbitration' of 24 February 1994, the Law of Ukraine 'On the Recognition and Enforcement of the Decisions of Foreign Courts' of 29 November 2001, and other treaties, rules and regulations. (The Civil Procedure Code is soon to be amended to follow more closely the practice of other European Union civil law countries.)

Arbitral awards

Under the New York Convention, arbitral awards obtained in Ukraine can be enforced in any of the countries that are signatories to this Convention, and similarly, arbitral awards rendered in any of these foreign countries are enforceable in Ukraine.

To enforce an arbitral award in a foreign country based on the New York Convention, the prevailing party must submit an application to the foreign state court, with a copy of the decision, proof that it has come into force and a copy of the arbitration clause. As observed, in Ukraine such an application must be submitted to a state Common Court. In response to such an application, the court should issue a resolution on mandatory enforcement of the award and an enforcement order.

Under the New York Convention, a Ukrainian court is not supposed to review the substance of the award, but it may refuse enforcement in the following limited cases:

- the parties to the arbitration agreement were, under the law applicable to them, under some incapacity, or the agreement is not valid under the law governing it;
- the party against whom the award is enforced was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings, or it was otherwise unable to present its case;

- the award deals with a dispute or contains decisions on matters not falling within the scope of the arbitration agreement, or the subject matter of the dispute is not capable of settlement by arbitration;
- the composition of the arbitral tribunal or the arbitral procedure applied was in violation of the agreement among the parties or, failing such an agreement, was in violation of applicable law;
- 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 laws of which, the award was made; or
- enforcement of the award would be contrary to the public policy of Ukraine.

Under Article 36 of the Arbitration Law, these bases for refusal of enforcement of an award are repeated, together with the following additional bases: first, the limitation period in accordance with Ukrainian law for the enforcement of the award has expired (in general, a three-year period from the time the decision was rendered, as discussed above); or, second, the subject matter of the dispute is not capable of settlement by arbitration under the laws of Ukraine.

Essentially the same exceptions apply as bases to challenge enforcement of an arbitral award rendered by ICAC or any other arbitral tribunal located in Ukraine, except that, since the award may be directly enforced, the burden is on the losing party to go to court to prevent or suspend enforcement.

Foreign court judgments

In general, foreign court judgments are not enforceable in Ukraine unless this is permitted by a treaty. Because Ukraine is not a party to the Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters of 27 September 1968, the Lugano Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters of 16 September 1988 or the other multinational treaties on reciprocal enforcement, only court judgments from a very limited number of countries can be enforced in Ukraine. Ukraine presently has concluded such bilateral treaties with the CIS (Russia, Kazakhstan, etc), Greece, Italy, Poland, Mongolia, China, Albania, Algeria, Bulgaria, Hungary, Vietnam, Iraq, Yemen, Cyprus, North Korea, Cuba, Romania, Tunisia, Finland, Yugoslavia, Estonia, Lithuania and Latvia.

The Supreme Court of Ukraine has summarized the grounds for refusal of enforcement of foreign court judgments in its resolution of the Plenum of the State Supreme Court of 24 December 1999, which basically repeats the grounds, cited above, for refusing to enforce foreign arbitral awards. Additional bases for refusing enforcement may be stipulated in the particular bilateral treaty on such enforcement.

Conclusion

The increasing integration of Ukraine into the world business community reinforces the need to develop efficient mechanisms for fair dispute resolution. Traditionally, independent (usually foreign) arbitration such as that under the ICC or the SCC Institute has been used by foreign companies doing business in Ukraine, especially for substantial transactions. Increasingly, Ukrainian-based arbitral tribunals like ICAC are also being used to resolve disputes.

State courts may be preferable in some instances, however, due to their lower cost, for example where the amount at issue is not significant, or where the speed with which security over the assets of the defendant and other interim relief may be obtained is critical. The state court system is rapidly improving as a result of the recent reforms and reorganization, and its use for international contract dispute resolution is expected to increase substantially.

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