Recognition and Enforcement of Foreign Arbitral Awards in Russia and Former USSR States

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Edited by

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Published by:
Kluwer Law International B.V.
PO Box 316
2400 AH Alphen aan den Rijn
The Netherlands
E-mail: international-sales@wolterskluwer.com
Website: lrus.wolterskluwer.com

Sold and distributed by:
Wolters Kluwer Legal & Regulatory U.S.
7201 McKinney Circle
Frederick, MD 21704
United States of America
Email: customer.service@wolterskluwer.com

Printed on acid-free paper.

ISBN 978-94-035-3290-5

e-Book: ISBN 978-94-035-3291-2
web-PDF: ISBN 978-94-035-3292-9

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Printed in the United Kingdom.

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4.14

Ukraine: Recognition and Enforcement of Foreign Arbitral Awards

Olena Perepelynska

On 29 December 1958, the Ukrainian SSR signed, independently from the Soviet Union, the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, having declared, under Article I(3) and Article X(1) of the Convention, that the Ukrainian SSR would apply the provisions of the Convention in respect of arbitral awards made in the territories of non-contracting States only to the extent to which they grant reciprocal treatment.

According to UNCITRAL official website,[1] the Convention was ratified by USSR on 10 October 1960 and became effective on 8 January 1961.

After Ukraine had declared itself independent on 24 August 1991, the issue of succession of Ukraine with respect to the treaties was regulated by the Law of Ukraine 'On Legal Succession of Ukraine', in Article 6 of which Ukraine unequivocally affirmed 'its obligations under the treaties, concluded by the Ukrainian SSR, before Ukraine declared itself independent'.[2]

Though UNCITRAL official website makes no additional reference to the peculiarities of applying the Convention in the territory of Ukraine, such specificities, nonetheless, exist.

On October 2015, Ukraine forwarded to UN Secretary General, as depositary of the Convention, communication, in which it specified, *inter alia*, that 'from 20 February 2014 and for the period of temporary occupation of … the Autonomous Republic of Crimea and the city of Sevastopol … as well as over certain districts of the Donetsk and Luhansk oblasts of Ukraine, which are temporarily not under control of Ukraine … the application and implementation by Ukraine of the obligations [under

1. http://www.uncitral.org/uncitral/ru/uncitral_texts/arbitration/NYConvention_status.html.
2. *Ibid.*

the Convention – O. P.], as applied to the aforementioned occupied and uncontrolled territory of Ukraine, is limited and is not guaranteed'.[3]

Arbitration Agreement

The main legal act, regulating arbitration agreement, is the Law of Ukraine 'On International Commercial Arbitration' ('ICA Law').[4] ICA Law is based on UNCITRAL Model Law on International Commercial Arbitration (the 'Model Law') dated 1985, with some amendments drawn from the Model Law of 2006.

Article 16 of ICA Law, verbatim incorporating the provisions of Article 16 of UNCITRAL Model Law, establishes the principle of separability of arbitration agreement from the principal obligation:

> The arbitral tribunal may rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement. For that purpose, an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract. A decision by the arbitral tribunal that the contract is null and void shall not entail ipso jure invalidity of the arbitration clause.

This principle was reaffirmed by the Supreme Court in *'Norbert Schaller Gesellschaft m.b.H.' Company v. 'First Investment Bank' PJSC*. The court's resolution[5] was included in the recent review of court practice in cases on enforcement and challenge of awards in international commercial arbitration, as the one reflecting the position of the Supreme Court in this regard.[6]

The laws of Ukraine do not systematically regulate the requirements for validity of the arbitration agreement; thus conclusions may be drawn solely on the basis of complex interpretation of the rules of international legal instruments in international arbitration.[7]

In Ukrainian law, the general rule on validity of the transactions is set forth in Article 203 of the CC of Ukraine. However, the above rules cannot be applied automatically to the validity of arbitration agreement due to a mixed legal nature of the latter.

3. The full text of the communication by Ukraine addressed to UN Secretary General with regard to the limitations on application of the Convention by Ukraine is published in the United Nations Treaty Collection. https://treaties.un.org/doc/Publication/CN/2015/CN.597.2015-Eng.pdf. When forwarding the communication, Ukraine asked UN Secretary General to transmit it to all the Contracting States.
4. Law of Ukraine dated 24 February 1994 No. 4002-XII 'On International Commercial Arbitration'. http://zakon2.rada.gov.ua/laws/show/4002-12.
5. Resolution of the Supreme Court dated 27 March 2019 in Case No. 756/618/14-Ц ('*Norbert Schaller Gesellschaft m.b.H.' Company v. 'First Investment Bank' PJSC*). http://reyestr.court.gov.ua/Review/82034501.
6. Review of the court practice of the Cassation Civil Court within the Supreme Court in cases on enforcement and challenge of awards in international commercial arbitration, p. 23. https://supreme.court.gov.ua/userfiles/media/Oglyad_Mkas.pdf.
7. Malsky M. Arbitration Agreement as a Precondition for the Disputes to Be Considered in International Commercial Arbitration, Litopys, 2013, p. 88. http://www.ligazakon.ua/content/files/Arbitration_Agreement.pdf.

Validity of the arbitration agreement depends on meeting requirements to: (1) the form of the arbitration agreement, (2) legal capacity of the parties to arbitration agreement, (3) contents of the arbitration agreement.[8]

Ukrainian courts are more inclined to conduct full, rather than prima facie, examination of the validity of the arbitration agreement. According to M. Malsky,[9] who refers to B. Korabelnikov,[10] one of the reasons for this is the difference between Russian and English versions of Article II(3) of the Convention. While the latter sets forth the term 'null and void', which should have been translated into Russian as '*ничтожный*', the Russian version of the Convention uses the term '*недействительный*', covering both 'void' and 'voidable' transactions. The same terminology is used in the Russian version of UNCITRAL Model Law, in line with which ICA Law in Article 8 uses the term 'invalid' ('*недійсний*'), instead of 'void' ('*нікчемний*'). In addition, the fact that Ukrainian procedural law does not have prima facie standard of examination should be considered.

Since 15 December 2017, the restated versions of CPC of Ukraine[11] and CoPC[12] impose direct obligation on the courts of Ukraine to interpret any defects in the text of arbitration agreement and (or) any doubts as to its validity, operability and capability of being performed in favour of such validity, operability and such capability.[13] The courts of Ukraine have already actively applied the above provisions. In one of the landmark cases – *Pelagia AS v. 'Laran-07' LLC* – the new Supreme Court reaffirmed[14] validity and capability of being performed of the arbitration agreement, printed version of which was further modified with handwritten corrections. It appears from the text of court decisions that the printed version of the arbitration agreement provided for 'the International Commercial Arbitration Court at the Chamber of Commerce and Industry of Ukraine' as an arbitration forum. Further, before the contract was signed, the parties had crossed out the word 'Ukraine' and included the handwritten word 'Oslo'. Likewise, the place of arbitration 'Kyiv, Ukraine' was substituted by 'Oslo, Norway'. The dispute was henceforth considered by the arbitration institution in Norway – the Arbitration and Dispute Resolution Institute of the Oslo Chamber of Commerce, the award of which was enforced in the territory of Ukraine by the Supreme Court.

8. *Ibid.*, p. 90.
9. *Ibid.*, p. 96.
10. Karabelnikov B.R. Enforcement and Challenge of International Commercial Arbitration Awards: Commentary to the New York Convention of 1958 and Chapters 30 and 31 of the Arbitrazh Procedure Code of RF of 2002, 3rd ed. (Moscow, Statut, 2008), p. 78.
11. Civil Procedure Code of Ukraine dated 18 March 2004 No. 1618-IV. http://zakon3.rada.gov.ua/laws/show/1618-15.
12. Commercial Procedure Code of Ukraine dated 6 November 1991 No. 1798-XII. http://zakon2.rada.gov.ua/laws/show/1798-12.
13. *See* Art. 22(3) of CoPC and Art. 21(2) of CPC. Previously the court practice in this regard was rather controversial.
14. Resolution of the Supreme Court dated 14 February 2019 in Case No. 796/41/2018 (*Pelagia AS v. 'Laran-07' LLC*). http://reyestr.court.gov.ua/ Review/80330633.

Form of Arbitration Agreement

Arbitration agreement must be concluded in writing, either in the form of arbitration clause or as a separate agreement.

Within the comprehensive procedural reform in 2017,[15] the provisions of Article 7 of ICA Law about mandatory written form of the arbitration agreement were extended, and now provide for exchange of electronic communication as a form of the arbitration agreement:

> The arbitration agreement shall be in writing. An agreement is in writing if it is contained in a document signed by the parties or in an exchange of letters or **electronic communications, if the information contained therein is accessible so as to be useable for subsequent reference** [emphasis added. – O. P.]; telex, telegrams or other means of telecommunication which provide a record of the agreement, or in an exchange of statements of claim and defense in which the existence of an agreement is alleged by one party and not denied by another. The reference in a contract to a document containing an arbitration clause constitutes an arbitration agreement provided that the contract is in writing and the reference is such as to make that clause part of the contract.

Such an approach corresponds to the requirement to conclude any transaction in writing,[16] as set forth in Article 207 of CC, which was supplemented in 2015.

Legal Capacity of Parties to Arbitration Agreement

Arbitration agreement must be entered into by the parties appropriately authorized thereto. According to M. Malsky, notwithstanding the statutory principle of separability of arbitration agreement, generally, if the parties were authorized to conclude a contract, they were henceforth authorized to enter into the arbitration agreement contained therein. However, it is recommended to provide for a separate proxy to conclude an arbitration agreement; otherwise there is a risk that the arbitration agreement will be recognized invalid.[17] Such cases appeared in Ukrainian court practice.[18] At the same time, recent judgment of the Supreme Court in *Moston Properties Limited v. 'Ukrgazdobycha' PJSC* gives a hope that the court practice will be

15. *See* the Law of Ukraine of 3 October 2017 No. 2147-VIII 'On the Amendments to the Commercial Procedure Code of Ukraine, Civil Procedure Code of Ukraine, Code of Administrative Procedure and Other Legal Acts' (became effective on the day when the new Supreme Court started its operation – on 15 December 2017). http://zakon2.rada.gov.ua/laws/show/2147-19. Adoption of this Law is one of the stages of a large judicial reform in Ukraine.
16. *See* Art. 207(1) of the Civil Code of Ukraine dated 16 January 2003 No. 435-IV. http://zakon5.rada.gov.ua/laws/show/435-15/paran1173#n1173: 'A transaction shall be considered concluded in writing, if its content is fixed in one or several documents (including electronic ones), letters, or telegrams exchanged by the parties. A transaction shall be considered concluded in writing, if the will of the parties is expressed by teletype, electronic or any other technical communication facilities.'
17. Malsky M. Arbitration Agreement as a Precondition for the Disputes to Be Considered in International Commercial Arbitration, Litopys, 2013, p. 90. http://www.ligazakon.ua/content/files/Arbitration_Agreement.pdf.
18. *See* Judgment of the Supreme Court of Ukraine, Case No. 6-13Цс11, dated 30 May 2011. http://www.reyestr.court.gov.ua/Review/16062867, in which the judgments of the previous

altered. In the above case, the Supreme Court considered the issue through the principles of good faith, reasonableness and justice and stated that: 'civil legislation contains no definition of the above principles, having left this matter to the discretion of the parties to the transaction. Therefore, the parties, entering into any transaction, must be guided by internal criteria of good faith with respect to their counterparties (to perform no actions which may harm; to make it impossible to conclude transaction based on fraud, violence, breach of trust; to comply with legal behaviour of an entity under obligation; to carry out all actions under control of a party to a transaction, regarding due performance of the obligation and non-violation of the rights of other persons), as well as to comply with the external factors of justice and reasonableness, reflected in equal legal scale of behaviour and proportionality between the committed offence and liability for it. In other words, each party, when performing its civil obligations, must abide by such procedural behaviour, which would exclude biased (unjust) actions of the parties to a transaction towards one another.

The Supreme Court reached the conclusion, that the first-instance courts and the courts of appeal, when considering the case, had taken the contract terms into account, as established by law. Under Article 11 of the CC of Ukraine, compliance with the provisions of law, shall be a ground for the particular rights and obligations to accrue between the parties, exercise and observance of which is in line with Article 526 of the CC of Ukraine. The contract terms agreed by the parties excluded any biased (unjust) actions of the parties towards one another.

At the same time, "Ukrgazdobycha" PJSC as a claimant, contrary to the provisions of Article 204 of the CC of Ukraine, failed to provide relevant and admissible evidence, that Shlenchak V.O., Deputy Chairman of the Board of "Ukrgazdobycha" PJSC, acting pursuant to the proxy dated 19 December 2014 No. 2-2д, was not authorized to conclude an arbitration agreement'.[19]

Contents of Arbitration Agreement

ICA Law provides no precise answer to the question regarding compulsory elements/terms of the arbitration agreement.

According to Ukrainian doctrine, the following essential terms must be included into an arbitration agreement: (1) consent to submit the dispute to arbitration; (2) defining the scope of legal relations, which may be referred to arbitration; (3) type and

instance courts on recognition of the arbitration clause in the sales contract are invalid on the ground that the text of the proxy did not explicitly provide for the authority to conclude arbitration agreement.

See also Podtserkovnyi O. Limits to Autonomy and Validity of Arbitration Agreement, Materials of the II International Readings in Memory of Academician Pobirchenko I.G. Kyiv, 2015, pp. 79-85. https://icac.org.ua/wp-content/uploads/Materials-of-the-II-International-Arbitration-Readings-in-memory-of-Academician-Igor-Pobirchenko-2014.pdf.

19. Resolution of the Supreme Court, Case No. 761/41709/17, dated 19 April 2019 (*Moston Properties Limited v. 'Ukrgazdobycha' PJS*. http://www.reyestr.court.gov.ua/Review/82001379).

name of arbitration, competent to consider the dispute: ad hoc or institutional – specifying the name of appropriate arbitral institution.[20]

It is noteworthy that the Law of Ukraine 'On Domestic Courts of Arbitration'[21] establishes additional requirements for the content of an arbitration agreement: it must contain the names of the parties, their location, subject matter of the dispute, place and time of its conclusion.[22] However, application of this Law to the issues, falling under ICA Law, is explicitly excluded. Therefore, the above-mentioned additional requirements for the arbitration agreement apply solely to the agreements in favour of Ukrainian domestic courts of arbitration.

Assignment in Arbitration Agreement

The Laws of Ukraine do not specifically regulate assignment in arbitration agreement. The relevant court practice is rather ambiguous. While in relation to universal succession the court practice predominantly affirms transfer of the rights under the arbitration agreement, the one in relation to singular succession remains controversial.

Euler Hermes Services Schweiz AG v. 'Odessa Oil and Fat Plant' PJSC

For instance, in the case on recognition and enforcement of FOSFA award in arbitration, initiated by Euler Hermes Services Schweiz AG against 'Odessa Oil and Fat Plant' PJSC, the courts of all instances repeatedly examined the issue of transfer of the arbitration agreement, contained in the contract of assignment, concluded between the claimant and 'Pontus Trade S.A' (as a creditor under the arbitral award). First, the courts denied any transfer of rights under the arbitration agreement. Later, they nevertheless agreed that transfer of the rights did have place. However, the arbitral award was not recognized and enforced, since a new creditor, under the assignment agreement, was not the applicant, but Euler Hermes Services AG.[23]

Joint Ukrainian and American Foreign Investment Enterprise 'Ukrelektrovat' CJSC v. National Power Generating Company 'Energoatom' State Enterprise

In another dispute between Joint Ukrainian and American Foreign Investment Enterprise 'Ukrelektrovat' CJSC and the State Enterprise 'Energoatom', the Commercial Court of Ukraine in its judgment dated 8 September 2010[24] recognized that transfer of

20. Malsky M. Arbitration Agreement as a Precondition for the Disputes to be Considered in International Commercial Arbitration, Litopys, 2013, p. 90. http://www.ligazakon.ua/content/files/Arbitration_Agreement.pdf.
21. Law of Ukraine dated 11 May 2004 No. 1701-IV 'On Domestic Courts of Arbitration'. http://zakon5.rada.gov.ua/laws/show/1701-15.
22. *See* Art. 12(5) of the Law of Ukraine dated 11 May 2004 No. 1701-IV 'On Domestic Courts of Arbitration'. http://zakon5.rada.gov.ua/laws/show/1701-15.
23. Decision of the High Commercial Court of Ukraine dated 8 April 2015 in Case No. 6-3583СВ15 (*Euler Hermes Services Schweiz AG v. 'Odessa Oil and Fat Plant' PJSC*). http://www.reyestr.court.gov.ua/Review/43626208.
24. Judgment of the Kyiv Commercial Court dated 8 September 2010 in Case No. 18/113 (*Joint Ukrainian and American Foreign Investment Enterprise 'Ukrelektrovat' CJSC v. National Power Generating Company 'Energoatom' SE*). http://www.reyestr.court.gov.ua/Review/11111659.

rights under the contract covered, *inter alia*, the transfer of rights under the arbitration agreement contained therein. Thus, the court proceedings were terminated. However, this judgment was reversed[25] by the courts of higher instances, due to the reasons not relevant to the assignment itself.

Arbitrability

The general rules on arbitrability are laid down in Article 1 of ICA Law:

> 2. Pursuant to an agreement of the parties, the following may be referred to international commercial arbitration:
> – disputes resulting from contractual and other civil law relationships arising in the course of foreign trade and other forms of international economic relations, provided that the place of business of at least one of the parties is situated abroad; as well as
> – disputes arising between enterprises with foreign investment, international associations and organizations established in the territory of Ukraine; disputes between the participants of such entities; as well as disputes between such entities and other subjects of the law of Ukraine.

According to Article 1(4) of ICA Law,[26] exceptions to the above rules can be established only by the law or the treaty. However, it should be borne in mind that the above Article relates to the arbitration seated in Ukraine.[27]

Specific rules on arbitrability are set forth in CoPC, as well as in several laws of Ukraine.

One of them is the Law of Ukraine 'On Creation of the Free Economic Zone "Crimea" and on Peculiarities of Exercising Economic Activity in the Temporarily Occupied Territory of Ukraine'.[28] Article 12(12.11)(b) expands the scope of arbitrable disputes and provides for the possibility to submit to ICAC or MAC[29] at the Ukrainian Chamber of Commerce and Industry de facto domestic Ukrainian disputes if one of the Ukrainian parties is located in Crimea.[30] This Law was adopted pursuant to Article 13

25. Resolution of the High Commercial Court of Ukraine dated 12 January 2011 in Case No. 18/113 (*Joint Ukrainian and American Foreign Investment Enterprise 'Ukrelektrovat' CJSC v. National Power Generating Company 'Energoatom'* SE). http://www.reyestr.court.gov.ua/Review/13651641.
26. Under Art. 1(4) of ICA, 'The present Law shall not affect any other law of Ukraine by virtue of which certain disputes may not be submitted to arbitration or may be submitted to arbitration only according to the provisions other than those of the present Law.'
27. The conclusion is drawn from Art. 1(1) of ICA Law, which provides that 'the present Law shall apply to international commercial arbitration if the place of arbitration is in the territory of Ukraine. However, the provisions of Articles 8, 9, 35 and 36 of the present Law shall also apply if the place of arbitration is abroad'.
28. Law of Ukraine dated 12 August 2014 No. 1636-VII 'On Creation of the Free Economic Zone "Crimea" and on Peculiarities of Exercising Economic Activity in the Temporarily Occupied Territory of Ukraine'. http://zakon0.rada.gov.ua/laws/show/1636-18.
29. Maritime Arbitration Commission at the Ukrainian Chamber of Commerce and Industry.
30. According to Art. 12(12.11)(b) of the Law of Ukraine 'On Creation of the Free Economic Zone "Crimea" and on Peculiarities of Exercising Economic Activity in the Temporarily Occupied Territory of Ukraine', 'Disputes between the business entities located (residing) in the territory of the FEZ "Crimea" and business entities located (residing) in the other territory of Ukraine, which failed to be settled by negotiations, shall be referred to the courts of Ukraine, or if the

of the Law of Ukraine 'On Ensuring the Rights and Freedoms of the Nationals and the Legal Regime in the Temporarily Occupied Territory of Ukraine',[31] the effect of which is of limited duration.[32]

Another law which extends the list of arbitrable disputes is the Law of Ukraine 'On Financial Restructuring'. Article 3(3) of which provides as follows:

> Regardless of composition of the parties to a dispute, the procedure of dispute settlement by arbitration, set forth in the present Law, shall be regulated by the Law of Ukraine 'On International Commercial Arbitration' with due regard for the provisions of the present Law.[33]

According to Article 16(2), Article 1(1)(2) of the Law, the scope of disputes falling under the Law relates to 'any dispute, arising out during the process of financial restructuring'. The effect of this Law is also of limited duration – three years from the date when the law became effective.[34] During this period, the transitional provisions of ICA Law, identical to those mentioned above, shall apply.

Further example of arbitrable disputes is provided in Article 26(12) of the new Law of Ukraine 'On Privatization of State and Municipal Property', which largely repeats the provisions of Article 27(10) of the former Law of Ukraine 'On Privatization of State Property',[35] as amended in February 2016. The bottom line of such an exception is that both laws allow the parties to a sales contract of the privatization object to submit the disputes, arising out of it, to international arbitration, setting forth no further requirements as regards the parties to such an agreement:

> 12. The parties to a sales contract of the privatization object shall have the right to agree to settle the disputes, arising between the seller and the buyer under or in connection with the sales contract of the privatization object, in international commercial arbitration. However, if in the sales contract the privatization authority provides for the disputes arising out of or in connection with the contract to be settled in international commercial arbitration, and the parties failed to agree on the arbitration institution, in which the dispute is to be considered, any dispute, controversy or claim arising out of or in connection with the contract, or the

parties so agree, to the International Commercial Court at the Ukrainian Chamber of Commerce and Industry and Maritime Arbitration Commission at the Ukrainian Chamber of Commerce and Industry.'

31. Law of Ukraine 'On Ensuring the Rights and Freedoms of the Nationals and the Legal Regime in the Temporarily Occupied Territory of Ukraine'. http://zakon0.rada.gov.ua/laws/show/1207-18/paran81#n81.
32. Under para. 1 of the Final Provisions of the Law of Ukraine 'On Ensuring the Rights and Freedoms of the Nationals and the Legal Regime in the Temporarily Occupied Territory of Ukraine', 'the present Law shall be effective until the temporarily occupied territory is restored back under the jurisdiction of Ukraine, provided that the losses incurred due to the occupation, in particular, moral losses of the forcibly displaced persons, are provisionally compensated in full, or until the Verkhovna Rada of Ukraine adopts the decision to recognize the present Law as the one that is no longer valid'.
33. Law of Ukraine dated 14 June 2016 No. 1414-VIII 'On Financial Restructuring'. http://zakon2.rada.gov.ua/laws/show/1414-19.
34. *See* Art. 31(2) of the Law of Ukraine dated 14 June 2016 No. 1414-VIII 'On Financial Restructuring'.
35. Law of Ukraine dated 4 March 1992 No. 2163-XII 'On Privatization of State Property'. http://zakon5.rada.gov.ua/laws/show/2163-12.

> breach, termination or invalidity thereof, shall be finally settled by arbitration administered by the Arbitration Institute of the Stockholm Chamber of Commerce.[36]

However, this exception shall apply within the arbitrability rules under CoPC, what will be discussed below.

Furthermore, since late 2015, the Law of Ukraine 'On Concessions'[37] and the Law of Ukraine 'On Public and Private Partnership'[38] provide for arbitrability of the disputes, arising out of the public-private partnership and concession agreements, concluded with non-residents. The latter, in addition, regulates the issue of state immunity.[39]

Finally, a wide range of exceptions to the arbitrability rule are enshrined in Articles 20 and 22 of CoPC,[40] as amended within the comprehensive procedural reform in 2017.

After the years of non-arbitrability of corporate disputes and controversial court practice[41] in this regard, the new rules are currently providing for a possibility to

36. Law of Ukraine dated 18 January 2018 No. 2269-VIII 'On Privatization of State and Municipal Property'. http://zakon5.rada.gov.ua/laws/ show/2269-19.
37. Article 16 of the Law of Ukraine dated 16 July 1999 No. 997-XIV 'On Concessions'. http://zakon0.rada.gov.ua/laws/show/997-14.
38. Article 19 of the Law of Ukraine dated 1 July 2010 No. 2404-VI 'On Public and Private Partnership'. http://zakon0.rada.gov.ua/laws/show/2404-17.
39. According to Art. 19(3) of the Law of Ukraine dated 1 July 2010 'On Public and Private Partnership', 'If the public-private partnership contract is concluded by the Cabinet of Ministers of Ukraine, the state, upon request of the foreign private partner (partners), shall have the right to waive its immunity in the contract. The immunity shall be waived by the decision of the Verkhovna Rada of Ukraine. The waiver shall apply to all court judgments, arbitral awards, rulings within the interim measures proceedings, as well as enforcement of court judgments and arbitral awards.'
40. Commercial Procedure Code of Ukraine, dated 6 November 1991 No. 1798-X. http://zakon2.rada.gov.ua/laws/show/1798-12.
41. *See* the discussion on arbitrability of corporate disputes: Perepelynska O. Arbitrability under Ukrainian Law: Problematic Issues, Materials of the II International Readings in Memory of Academician I.G. Kyiv, 2015, pp. 32-44; Kravchuk G. Arbitrability of Disputes in the Context of Article 12 of the Commercial Procedure Code of Ukraine, Materials of the II International Readings in Memory of Academician Pobirchenko I.G. Kyiv, 2015, pp. 15-21. https://icac.org.ua/wp-content/uploads/Materials-of-the-II-International-Arbitration-Readings-in-memory-ofAcademician-Igor-Pobirchenko-2014.pdf; Yaremko V., Karel O. Arbitrability of Corporate and Public Procurement Disputes in Ukraine. In: Kluwer Arbitration Blog (2015). http://kluwerarbitrationblog.com/2015/07/24/arbitrability-of-corporate-and-public-procurement-disputes-in-ukraine/; Perepelynska O. Everything Is Clear: Clarity of the Arbitrability Issue Is an Important Factor for Foreign Investors to Assess the Risks of Concluding the Contract, Yurydychna Praktyka, 2014. No. 18 (864-865), pp. 28-29; Perepelynska O., Gontar O. Arbitrability of Disputes under Public Procurement Contracts in Ukraine: Recent Court Practice, CIS Arbitration Forum (2014). http://www.cis-arbitration.com/2014/08/25/arbitrability-of-disputes-under-public-procurement-contracts-in-ukraine-recent-court-practice/; Wietzorek M. Arbitrability of Corporate Disputes in Ukraine – No News Is Good News? CIS Arbitration Forum (2013). http://www.cisarbitration.com/2013/08/23/arbitrability-of-corporate-disputes-in-ukraine-no-news-is-good-news/; Perepelynska O. Ukrainian Courts Review Arbitrability of Corporate Disputes.
    CIS Arbitration Forum (2012). http://www.cisarbitration.com/2012/01/15/ukrainian-courts-review-arbitrability-of-corporate-disputes/; Slipachuk T. Arbitrability of International

submit the disputes, arising out of arbitration agreement between a legal entity and its participants to international arbitration (Article 20(1)(3) and Article 22(2) of CoPC).

The new arbitrability rules of CoPC explicitly enshrine possibility to submit civil law aspects of the disputes as follows:

- property privatization disputes (Article 20(1)(2) and Article 22(2) of CoPC);
- competition disputes (Article 20(1)(7), Article 20(2)(6) and Article 22(2) of CoPC);
- disputes, arising out of conclusion, modification, termination and enforcement of public procurement contracts (Article 22(2) of CoPC).

All other aspects of the above disputes, likewise the disputes relating to state registration of real estate rights, intellectual property rights, the rights on securities, as well as the disputes on bankruptcy and property claims against the debtor, in respect of which the bankruptcy proceedings are commenced (including recognition of the debtor's transactions null and void), are non-arbitrable (Article 22(1-2) of the Commercial Procedure Code).

'Kherson Shipyard' PJSC v. Shipping Company 'Ukrrechflot' PJSC

Apart from the substantive aspect of arbitrability, the courts of Ukraine examine its subjective aspect, which is enshrined in Article 1 of ICA Law. This rule, as indicated above, sets forth the possibility to submit to international arbitration the disputes between Ukrainian parties, provided that at least one of them is a foreign investment enterprise, i.e. the one with no less than 10% of foreign investments in its charter capital.[42] In one of the cases, described in the Statistical and Analytical Report 'Ukraine. Arbitration-Friendly Jurisdiction: 2013-2014', the court recognized arbitration agreement in favour of ICAC at the Ukrainian CCI, concluded between Ukrainian companies,[43] invalid, since 'they were established by the competent authorities representing the state, did not have foreign investments in the charter capital and could not considered as foreign investment enterprises within the meaning of Article 116 of the Commercial Code of Ukraine'.[44,45]

In 2015, the case was re-examined 'on newly established facts'. As respondent learned from another court proceedings, in 2010 (when the contract, containing the

Commercial Disputes in Ukraine, International Commercial Arbitration Journal, 2010, No. 1, pp. 133-142.

42. Article 116 of the Commercial Code of Ukraine dated 16 January 2013 No. 436-IV. http://zakon5.rada.gov.ua/laws/show/436-15.
43. *See* Statistical and Analytical Report 'Ukraine. Arbitration-friendly Jurisdiction: 2013-2014' p. 20. http://c-n-l.eu/assets/files/ENFORCEMENT_OF_ARBITRATION_AWARDS_IN_UKRAINE_2013-2014%20(RU).pdf.
44. Commercial Code of Ukraine dated 16 January 2013 No. 436-IV.
45. Judgment of the Kyiv Commercial Court dated 13 March 2014 in Case No. 910/12147/13 (*'Kherson Shipyard' PJSC v. Shipping Company 'Ukrrechflot' PJSC*). http://www.reyestr.court.gov.ua/ Review/37677174. The judgment was upheld by Resolution of the Kyiv City Court of Appeal dated 19 June 2014. http://www.reyestr. court.gov.ua/Review/39408661, and Resolution of the High Commercial Court dated 29 September 2014. http://www.reyestr.court.gov.ua/Review/40726347.

arbitration agreement, was concluded) that '34,8174% of the claimant's total shares were owned by foreign investment company ENERGEES INVESTMENTS LIMITED, Cyprus'.[46] As a result, the court recognized the arbitration agreement valid and dismissed the claim.

Refusal to Refer a Dispute to the State Court

For quite a long time the procedural laws of Ukraine and the court practice had been rather controversial regarding the effect of the arbitration agreement on the jurisdiction of state courts.

Previously, Article 8 of ICA Law provided for the state court's obligation to 'terminate the proceedings' and refer the parties to arbitration. Article 80 of CoPC (in the previous version) set forth the same obligation, but on the different grounds and without any limitation of time to submit objections to jurisdiction of the state court. In contrast, the provisions of CPC laid down obligation of the court to leave the claim without consideration and return it to the claimant.

Termination of proceedings and leaving the claim without consideration have different procedural effects: in second case the claimant has the right to resubmit the claim (for instance, if the arbitral tribunal decided that it lacks jurisdiction to consider the dispute), while in the first case claimant has no such right.

Within the comprehensive procedural reform in 2017, the above discrepancy was removed. Currently, CoPC, CPC, as well as ICA Law enshrine identical requirements: the court to which an action was brought in a matter which is the subject of an arbitration agreement shall, if any of the parties so requests, not later than submitting its first statement on merits, leave the claim without consideration and refer the parties to arbitration, unless it finds that the agreement is null and void, inoperative or incapable of being performed.[47] Such an approach integrates the original text of the Model Law, which, like Article II(3) of the Convention, does not provide for 'termination of proceedings',[48] while other treaties, e.g. European Convention,[49] require the state court to 'stay their ruling … until the arbitral award is made'.

Legislation on Recognition and Enforcement of Foreign Arbitral Awards

The primary legislative acts in Ukraine governing the procedure of recognition and enforcement of arbitral awards are ICA Law (Articles 35, 36) and CPC (Articles 474-482).

Both acts adopted the approach, set forth in UNCITRAL Model Law, to the grounds for refusing enforcement, as well as to the obligation to recognize the arbitral

46. Judgment of the Kyiv Commercial Court dated 30 March 2015 in Case No. 910/12147/13 (*'Kherson Shipyard' PJSC v. Shipping Company 'Ukrrechflot' PJSC*), in which the claim on recognition of the arbitration agreement invalid was dismissed. http://www.reyestr.court.gov.ua/ Review/43412047.
47. *See* Art. 8 ICA Law, Art. 226(1)(7) CoPC, Art. 257(1)(6) CPC.
48. Apparently, this wording in the initial version of ICA Law, was taken from the Law of RF, dated 7 June 1993 No. 5338-I 'On International Commercial Arbitration'.
49. European Convention on International Commercial Arbitration, Geneva, 1961.

awards mandatory, regardless of the country where they were rendered, and to enforce them in the territory of Ukraine, under ICA Law/CPC.

Articles 35 and 36 of ICA Law are almost a verbatim adoption of Articles 35 and 36 of the Model Law: the only difference is that, instead of the term 'official', the word 'Ukrainian' [language] was used. Until 15 December 2017, Article 35 of ICA Law laid down the possibility to submit to the court an arbitral award and (or) arbitration agreement in Russian, as well. For quite a long time, under the above rule, the awards of ICAC at the Ukrainian CCI laid down in Russian could have been enforced in the territory of Ukraine without translation. However, during some years preceding the procedural reform, the courts had been inclined to dismiss the claims on recognition and enforcement of arbitral awards, considering the arbitral awards/agreements enclosed to the claims as violating the provisions of CPC and the Convention. One of such examples is the case *Ostchem Holding Limited v. 'Odessa Port Plant' PJSC* on recognition and enforcement of a SCC emergency arbitral award dated 31 March 2016 in Case No. EA 2016/046. Three court instances, including the HSCU,[50] operating at that time, concluded that claimant violated legislation, due to the 'failure to enclose to the claim a duly certified translation of the arbitration agreement into Ukrainian'.[51]

Article 474 of CPC provides for recognition and enforcement in the territory of Ukraine of arbitral awards not only under the treaties, to which Ukraine is a party, but also according to the principle of reciprocity. As regards the latter, reciprocity is considered to exist, absence of evidence to the contrary.

Jurisdiction and Time Limits for Recourse to a Court

The general issues regarding jurisdiction of Ukrainian courts as well as the time limits for filing appropriate applications are governed by Article 475 of CPC.

The application for recognition and enforcement of foreign arbitral award shall be considered by the competent court in accordance with Chapter 3, section IX of CPC, provided that:

- the debtor's place of residence (temporal residence) or location is in the territory of Ukraine;
- the debtor's property is in the territory of Ukraine (if the debtor's place of residence (temporal residence) or location is outside the territory of Ukraine or unknown).

Application 'for recognition and granting leave for enforcement of international arbitration award' in the territory of Ukraine can be filed within three years from the date 'when the international arbitration award was rendered'. The application filed on expiry of the above period shall be returned to the claimant without consideration.

50. The High Specialized Court of Ukraine for Civil and Criminal Cases – the court of cassation, which had operated, before the Supreme Court was founded on 15 December 2017.
51. Ruling of HSCU dated 31 May 2017 in Case No. 519/459/16-Ц (*Ostchem Holding Limited v. 'Odessa Port Plant' PJSC*). http://www.reyestr.court.gov.ua/Review/66870283.

However, upon the motion of the claimant, the court can restore the missed deadline, if it considers the excuses for missing it as valid.

As a result of comprehensive procedural reform in 2017, the number of court instances to consider the applications for enforcement of arbitral awards was reduced from 4 to 2: appropriate Court of Appeal and the Supreme Court.[52]

Under Article 23(3) of CPC, cases on recognition and enforcement of international commercial arbitration awards shall be considered in the first instance by:

- the general courts of appeal at the place of arbitration, if the place of arbitration is in the territory of Ukraine;
- the general Court of Appeal exercising its jurisdiction over the City of Kyiv if the place of arbitration is beyond the territory of Ukraine.

According to Article 24(2) of CPC, a Court of Appeal competent to consider the cases on recognition and enforcement of international commercial arbitration awards shall be the Supreme Court. The judgments rendered by the Supreme Court shall not be subject to challenge.

However, it is noteworthy that the above new rules apply solely to the court proceedings, commenced after 15 December 2017, while the court proceedings, initiated previously, are subject to consideration by three court instances (the general first-instance court, the Court of Appeal, the Supreme Court).

Form and Content of an Application

Article 476 specifies the requirements to the form and content of an application for recognition and enforcement of the international commercial arbitration award.

The application shall be filed to the competent court in writing and be signed either by the person, in whose favour the arbitral award was rendered, or by its representative.

The application shall contain:

(1) the name of the court, to which it is filed;
(2) the name (if any) and composition of the arbitral tribunal, which has rendered the award, under which the enforcement order shall be issued;
(3) the names of the parties to arbitral proceedings (their representatives), their place of residence (place of temporal residence) or location;
(4) the date and place of rendering international commercial arbitration award;
(5) date of receiving arbitral award by the applicant;
(6) the applicant's request for issuing an order for enforcement of arbitral award.

The application can contain further information essential for its consideration (contact details, fax numbers, etc.).

52. The Supreme Court is the highest court within the court system of Ukraine. The Supreme Court was established during the judicial reform and began its operation on 15 December 2017.

The following shall be enclosed to the application for recognition and enforcement of arbitral award:

(1) original or notarized copy of duly certified arbitral award;
(2) original or notarized copy of the arbitration agreement;
(3) document confirming the payment of the arbitration feet;
(4) copies of the application for recognition and enforcement of arbitral award in the amount which corresponds to the number of persons, involved in the trial;
(5) power of attorney or other documents, confirming full powers for signing of the application;
(6) translation (certified in accordance with the laws of Ukraine) of the documents, mentioned in previous paragraphs, into Ukrainian or other languages, provided for in a treaty of Ukraine, if the documents are set out in other languages.

If the above requirements are not complied with, the application shall be left without motion until the deficiencies, specified in the relevant ruling of the court, are corrected. In case of failure to correct the deficiencies within the time limit set by the court, the application and all the documents enclosed thereto shall be returned to the applicant.

In addition, Article 476 contains provisions (not yet operative) on filing the application in electronic form. It provides that the applicant shall file to the court documents no. 1 and 2 from the list above, before the court commences consideration of the application in question. Failure to file these documents will lead to return of application without its consideration.

Procedure

In accordance with Article 477 of CPC, the application shall be considered by a single judge within two months following the date of its receipt by the court in the court hearing with notification of the parties.

The application accepted for further consideration shall be transferred by the court to the debtor, along with the proposition to file possible statement of reply within one month.

Upon receipt of the debtor's statement of reply, or in case of the debtor's failure to file the statement – upon expiration of one-month term – the court shall schedule the hearing. The parties shall be notified thereof no later than ten days before the hearing.

Failure of the parties duly notified of the hearing to appear shall not prevent the case consideration. Upon application of any party or for a valid excuse, the court can adjourn the case consideration.

In addition, the court can suspend proceedings in the case on recognition and enforcement of arbitral award, if the relevant court is handling the application for setting aside the arbitral award in question, before the judgment of the court with regard to such an application becomes effective. The above provision is generally in line with Article 36(2) of ICA Law and Article VI of the Convention.

However, the Supreme Court had repeatedly emphasized the exclusive character of this ground for suspension of the proceedings in the case on recognition and enforcement of arbitral award.[53] This fact was also indicated in the recent review of the Supreme Court.[54]

Upon the application of the creditor, the court shall, at any stage of the proceedings in the case on recognition and enforcement of the arbitral award, take interim measures, if the failure to take such measures can impede or make enforcement of the arbitral award impossible, in case the enforcement is granted.

Grounds for Refusing the Recognition and Enforcement

The grounds for refusing recognition and enforcement of arbitral award are laid down in Article 36 of ICA Law and Article 478 of CPC, which are almost a verbatim adoption of Article 36 of UNCITRAL Model Law and Article V of the Convention.

Court Rulings

On the results of consideration of the case on recognition and enforcement of arbitral award, the court shall render a ruling according to the rules applicable to rendering court judgments. Appropriately, such ruling can be challenged on appeal in the order established for challenging court judgments.

The ruling shall contain, *inter alia*, the name of the arbitral institution and composition of the arbitral tribunal, the names of the parties to arbitration proceedings, information on the arbitral award and instruction for issuing enforcement writ (or instruction to refuse its issuing).

If an arbitral award has been previously enforced, the court shall indicate in what part and from which moment the award is subject for enforcement.

Article 479 of CPC addresses the issue of in what currency the funds shall be recovered, under the arbitral award. Formerly, the currency conversion was mandatorily conducted, when the court rendered the ruling on granting leave for enforcement of arbitral award. It means that the foreign exchange risks rested with the creditor and substantially impeded actual receipt of the sums recovered from the debtor. Currently, the currency conversion of the sum, subject to recovery under the arbitral award, into the national currency of Ukraine shall take place solely upon the creditor's application.

In addition, the above Article addresses the matter of interest and penalty recovery under the arbitral award, if they are not indicated in a fixed amount and are to be calculated according to the terms, laid down in the award. Previously, the powers of the court in this regard were not clearly defined. That led to inconsistent court practice, including to the refusal in enforcement of arbitral award in part of interest/penalty recovery.

53. Resolution of the Supreme Court dated 28 March 2019 in Case No. 824/239/2018 (*International Transit S.A.L. (Offshore) v. 'Dniprovskyi Iron and Steel Works' PSJC, Corporation 'Industrial Union of Donbas'*). http://reyestr.court.gov.ua/Review/81013018.
54. Review of the court practice of the Cassation Civil Court within the Supreme Court in cases on enforcement and challenge of awards in international commercial arbitration, p. 17. https://supreme.court.gov.ua/userfiles/media/Oglyad_Mkas.pdf.

One of the most remarkable cases in this regard was *Nibulon S.A. v. Company 'Rise' PJSC*.[55] Following several rounds of case consideration, the Supreme Court of Ukraine,[56] having referred to the public policy ground, reversed[57] the rulings of the lower courts on enforcement of GAFTA award, under which the principal along with the compound interest was subject to payment. The court's reasoning was based on the argument that enforcement of the arbitral award, in which the compound interest was not indicated in a fixed sum, would be contrary to public policy of Ukraine since the state enforcement agent would have to exceed his powers when calculating the interest under the arbitral award.

Fortunately, the new Supreme Court reached another conclusion[58] in this case, having referred to the provisions of Article 479(4) and Article 479(5) of CPC, though at that time they had not been in force yet,[59] as Ukrainian legislator had already determined its position in this regard. According to the provisions of the above Article, the court, in its ruling on recognition and enforcement of an arbitral award, shall specify calculation of the interest and (or) the penalty until the moment of factual enforcement of the award, under the relevant effective legislation, governing such calculation. Final amount of interest (penalty) shall be calculated under the rules, set in the ruling of the court, by the authority (person), conducting enforcement.

Voluntary Compliance with Arbitral Awards

Within the comprehensive procedural reform in 2017, the issue of voluntary compliance with arbitral awards was resolved, though in a compromising manner.

Previously, Ukrainian debtors could not voluntarily comply with an arbitral award, setting the sum to be recovered in a foreign currency, due to specific features of currency regulation. To make the payment, an enforcement writ was required, which could be obtained solely after completion of the entire procedure of recognition and enforcement of arbitral award in the courts of Ukraine.

Article 480 of CPC does not alter the existing currency regulation, but rather establishes a simplified procedure to obtain the court's leave for compliance with arbitral award upon application of the debtor, on the basis of which the enforcement writ can be issued. The court shall consider such an application within 10 days in the court hearing without notification of the parties. The judicial control shall be limited to the issues of arbitrability and public policy. Upon the results of the case consideration, the court shall render the ruling on recognition and granting leave for voluntary compliance with award or the one on refusing to grant it, which can be challenged on appeal.

55. Further information is provided below in Chapter 4.8.
56. The Supreme Court of Ukraine was the highest judicial authority in the court system of Ukraine, which had operated before the new Supreme Court was established and started operating on 15 December 2017.
57. Resolution of the Supreme Court of Ukraine dated 26 October 2016 in Case No. 759/16206/14-Ц (*Nibulon S.A. v. Company 'Rise' PJSC*). http://www.reyestr.court.gov.ua/Review/63793441.
58. Ruling of the Supreme Court dated 15 May 2018 in Case No. 759/16206/14-Ц (*Nibulon S.A. v. Company 'Rise' PJSC*). http://www.reyestr.court.gov.ua/Review/74630452.
59. The provisions of Art. 479(4) and Art. 479(5) became effective on 1 January 2019.

If the application for recognition and voluntary compliance with arbitral award is granted, the court shall issue the enforcement writ, upon the application of the creditor.

It is noteworthy that some Ukrainian debtors have already taken such opportunity. One of the first cases was initiated upon application of 'Centrenergo' PJSC for recognition and granting leave for voluntary compliance with arbitral award on recovery of funds, rendered by LCIA on 8 April 2018 in favour of Mercuria Energy Trading S.A. The application (with some deficiencies) was filed on 4 May 2018. After the deficiencies had been corrected, the application was considered in written proceedings. On 21 May 2018, the Kyiv City Court of Appeal rendered the ruling on granting the application for recognition and granting leave for voluntary compliance with arbitral award.[60]

Recognition of Arbitral Awards Not Subject to Enforcement

Article 481 of CPC, intended to resolve the issue in question, contains solely general reference rules. Recognition of arbitral awards, which are not subject to enforcement, shall be done in the same manner, as established for the arbitral awards subject to enforcement, however, with due regard to peculiarities, set forth in section 2 of Chapter IX of CPC 'Recognition of Foreign Courts Judgments Not Subject to Enforcement'. Yet it is unclear, how the courts shall reconcile application of two different chapters. There is no court practice in this regard, so far.

Enforcement of International Commercial Arbitration Awards Made in Ukraine

To the enforcement of arbitral awards, rendered under ICA Law, applies the same procedure, as the one set for enforcement of foreign arbitral awards. However, bearing in mind that the application for setting the award aside can also be filed to the courts of Ukraine, Article 482 of CPC establishes a range of specific rules.

For the purpose of procedural economy, the Article provides for opportunity of simultaneous consideration of the application for enforcement of arbitral award and the one for setting it aside within the same court proceedings, due to the fact that, first, the grounds for setting aside the arbitral award and those for refusing its enforcement are almost identical, and second, the competent court for considering both applications is the same – the general Court of Appeal at the place of arbitration. Such a novelty prevents from parallel proceedings essentially on the same issues, as well as from suspension of one of the proceedings until the other one is over.

This opportunity can be taken, until the ruling on the merits of the application for enforcement of an arbitral award is rendered, and solely, if a party to arbitration proceedings so requests within the time limits, established by law.

60. Ruling of the Kyiv City Court of Appeal dated 21 May 2018 in Case No. 796/111/2018 (*MERCURIA ENERGY TRADING S.A. v. 'Centrenergo' PJSC*). http://www.reyestr.court.gov.ua/Review/74121260.

Application of Article V of the Convention

The courts of Ukraine generally recognize and enforce the arbitral awards in the territory of Ukraine. The statistics on refusals in recognition and enforcement is rather low; for instance, the share of such refusals was around 10% in 2011, 6% in 2012,[61] 10% in 2013 and 18% in 2014.[62] Though there are no appropriate figures for 2015-2018, it can be stated that the practice of Ukrainian courts remained substantively unchanged. However, the procedural reform, mentioned above, has already shown its results, the new Supreme Court in its judgments, rendered within the period from 2017 to 2019, demonstrates more pro-arbitration approach. According to the author's estimates, based on the research of the relevant court practice in the Unified State Register of Court Judgments, the overall statistics of refusals in recognition and enforcement declined and is less than 3%-5%.

More detailed practice of the courts of Ukraine regarding application of the provisions of Article V of the Convention is provided below.

Article V(1)(a) (Incapacity of the Parties and Invalidity of Arbitration Agreement)

Ukrainian debtors, in their objections against recognition and enforcement of arbitral awards in the territory of Ukraine, refer to Article V(1)(a) of the Convention rather rarely. This is largely due to the fact that the courts of Ukraine are quite critical of such arguments.

Dogus Insaat ve Ticaret A.S. v. 'South East Railway' State Territorial and Industry Association

Sometimes, Ukrainian debtors, in order to increase their chances to rely on invalidity of an arbitration agreement within the proceedings on enforcement of arbitral award, initiate parallel proceedings to obtain the court judgment, which, in particular, establishes invalidity of the arbitration clause.

One of the most remarkable cases in this regard was *Dogus Insaat ve Ticaret A.S. v. 'South East Railway' State Territorial and Industry Association*, the case on recognition of the award rendered by the International Court of Arbitration of ICC on 6 September 2013 in Case No. 17208/GZ/MHM. The dispute arose out of the contract on construction of the railroad bridge across Dnipro River in Kyiv.

Dogus, having obtained an arbitral award in its favour, referred to the courts of Ukraine with the application on recognition and granting leave for enforcement of ICC award. The Shevchenkivskyi District Court of Kyiv City in its ruling dated 17 September

61. Statistical and Analytical Report 'Ukraine. Arbitration-Friendly Jurisdiction: 2011–2012'. http://c-n-l.eu/assets/files/jurisdiction_statistical_report_ru.pdf.
62. Statistical and Analytical Report 'Ukraine. Arbitration-friendly Jurisdiction: 2013–2014'. http://c-n-l.eu/assets/files/ENFORCEMENT_OF_ARBITRATION_AWARDS_IN_UKRAINE_2013-2014%20(RU).pdf.

2015 granted the application.[63] The ruling itself was upheld by two higher court instances. The Supreme Court of Ukraine in its ruling dated 28 December 2016 refused to admit the case to its proceedings at all.[64]

However, in 2017, the debtor applied to the Shevchenkivskyi District Court of Kyiv City to revise the ruling of 2015 due to the newly established facts.

Such a newly established fact was the judgment of the Kyiv Commercial Court dated 17 May 2017 in Case No. 910/2589/17,[65] which had already entered into force, as of that date. According to the judgment, clause 13.2 of the construction contract, containing the arbitration clause, under which the dispute had been previously referred to arbitration, was recognized invalid. On 27 April 2018, the Shevchenkivskyi District Court of Kyiv City granted the debtor's application, reversed its previous ruling of 17 September 2018 and rendered the new ruling, under which enforcement of ICC award was refused.[66]

However, the Kyiv Court of Appeal reached a different conclusion, stating:

> The facts, which, as the court considers, were known (or should have been known) to the applicant at the moment of case consideration, in particular, if such facts were referred to by a party to the case in its statements, appeal or cassation claims, or could have been established by the court within the particular procedural actions, examination of the case files, etc., cannot be considered as newly established.
>
> Given the above, the panel of judges concludes, that the facts of the case concerning possible grounds for invalidity of the arbitration agreement were already examined by the courts, which assessed the arbitration agreement, established arbitrability of the dispute, in view of composition of the parties to it and its subject-matter, as well as the fact that arbitration agreement was in accordance with legislation in force, at the moment of case consideration.
>
> Thus, the panel of judges comes to the conclusion that judgment of the Kyiv Commercial Court dated 17 May 2017 cannot be considered as a newly established fact, since the facts, which were examined by the Kyiv Commercial Court, existed at the moment of considering application for enforcement of arbitral award, the debtor was aware of the facts, according to which the arbitration agreement, provided in Clause 13.2 of the construction contract dated 14 November 2004, could have been recognized invalid, and this would have been the ground for refusal in recognition and enforcement of arbitral award.

63. Ruling of the Shevchenkivskyi District Court of Kyiv City dated 17 September 2015 in Case No. 761/22804/15-Ц (*Dogus Insaat ve Ticaret A.S. v. 'South East Railway' State Territorial and Industry Association*). http://www.reyestr.court.gov.ua/Review/50702877.
64. Ruling of the Supreme Court of Ukraine dated 28 December 2016 in Case No. 761/22804/15-Ц (*Dogus Insaat ve Ticaret A.S. v. 'South East Railway' State Territorial and Industry Association*). http://www.reyestr.court.gov.ua/Review/63839835.
65. Judgment of the Commercial Court of Kyiv City dated 17 May 2017 in Case No. 910/2589/17, initiated by the Ministry of Infrastructure of Ukraine against Dogus Insaat ve Ticaret A.S. and 'South East Railway' State Territorial and Industry Association, Third Persons: The Cabinet of Ministers of Ukraine, 'BMK Planeta-Most' LLC. http://www.reyestr.court.gov.ua/Review/66712946.
66. Ruling of the Shevchenkivskyi District Court of Kyiv City dated 27 April 2018 in Case No. 761/22804/15-Ц (*Dogus Insaat ve Ticaret A.S. v. 'South East Railway' State Territorial and Industry Association*). http://www.reyestr.court.gov.ua/Review/73724663.

> Besides, the Supreme Court in its ruling dated 30 October 2018 in case No. 910/2589/17 reversed the judgment of the Kyiv Commercial Court dated 17 May 2017 in part of recognizing the arbitration clause of the construction contract No. П 3/ дН-6-0415 dated 14 November 2004 invalid. The case in this part was remitted for revision to the North Commercial Court of Appeal. It means, that the arbitration clause, provided for in the construction contract of 14 November 2004, shall be considered as valid.[67]

Thus, the Kyiv Court of Appeal rendered to reverse the ruling of the Shevchenkivskyi District Court of Kyiv City dated 27 April 2018 and to uphold the ruling of the Shevchenkivskyi District Court of Kyiv City dated 17 September 2015.

The cassation appeal was based on the fact that the Court of Appeal exceeded its powers, laid down in Article 374 of CPC, since it is not entitled to consider the application for revision of the court judgment due to the newly established facts. This is the competence of the court, the judgment of which is revised.

The Supreme Court in its ruling dated 27 March 2019 granted the cassation appeal, reversed the ruling of the Court of Appeal and referred the case for new revision to the Kyiv Court of Appeal.

The Kyiv Court of Appeal commenced the court proceedings.[68]

The Supreme Court, in the parallel proceedings on recognition of arbitration agreement invalid, did not put an end to the case, as was expected. In its resolutions dated 30 October 2018[69] and 24 April 2019,[70] the Supreme Court twice referred the case for new revision. Within the first round of case consideration, the lower courts recognized the arbitration clause invalid, under Article 6(2)(2) of the European Convention, empowering the court not to recognize the arbitration agreement pertaining to non-arbitrable disputes, according to the law of the court, as well as under Article 12(2) of CoPC in version, effective at the moment of the contract conclusion, which established non-arbitrability of the disputes 'arising out of conclusion, termination and performance of commercial contracts, related to meeting the state needs'. The courts reached the conclusion that 'construction of the railroad bridge across Dnipro River in Kyiv was triggered by the need for implementation of a range of related public interests in transport, defined on the basis of recognition of the particular vital needs of a human and a national, meeting of which facilitates strengthening the national security and sustainable development of Ukraine. Therefore, construction of the bridge shall be

67. Ruling of the Kyiv Court of Appeal dated 5 December 2018 in Case No. 761/22804/15- Ц (*Dogus Insaat ve Ticaret A.S. v. 'South East Railway' State Territorial and Industry Association*). http://www.reyestr.court.gov.ua/Review/78376079.
68. Ruling of the Kyiv Court of Appeal dated 8 April 2019 No. 761/22804/15- Ц (*Dogus Insaat ve Ticaret A.S. v. 'South East Railway' State Territorial and Industry Association*). http://www.reyestr.court.gov.ua/Review/81011977.
69. Resolution of the Supreme Court dated 30 October 2018 in Case No. 910/2589/17 initiated by the Ministry of Infrastructure of Ukraine against Dogus Insaat ve Ticaret A.S. and 'South East Railway' State Territorial and Industry Association, Third Persons: The Cabinet of Ministers of Ukraine, 'BMK Planeta-Most' LLC. http://www.reyestr.court.gov.ua/Review/77528244.
70. Resolution of the Supreme Court dated 26 April 2019 in Case No. 910/2589/17 initiated by the Ministry of Infrastructure of Ukraine against Dogus Insaat ve Ticaret A.S. and 'South East Railway' State Territorial and Industry Association, Third Persons: The Cabinet of Ministers of Ukraine, 'BMK Planeta-Most' LLC. http://www.reyestr.court.gov.ua/Review/81436412.

considered one of the state needs, both at the moment of contract conclusion and at the moment of case consideration'.[71]

It is noteworthy that in 2015, within the proceedings on recognition and enforcement of arbitral award, the Shevchenkivskyi District Court of Kyiv City examined the same issue, as well. However, at that time the court concluded that the construction contract shall not be considered a public procurement contract with the meaning of the Law of Ukraine 'On Public Procurement for Meeting Priority State Needs', since the construction was funded by the investors and, accordingly, this 'enables and entitles the parties to refer the dispute to the foreign court of arbitration, and does not provide for exclusive jurisdiction of Ukrainian courts'.[72] This was the fact that, *inter alia*, was emphasized by the Supreme Court, which reversed the judgments of lower courts on recognizing the arbitration clause invalid, and referred it to the North Commercial Court of Appeal for the second round of proceedings.[73] The appeal court changed its position and dismissed the claim.[74]

However, the judgment rendered by the appeal court was reversed by the Supreme Court, which concluded that the Court of Appeal 'failed to assess all the facts of the case, evidence, arguments and instructions of the Supreme Court, laid down in its resolution dated 30 October 2018, and thus violated the procedural rules, as well as failed to examine existence or lack of legal grounds for recognizing Clause 13.2 of the Construction Contract invalid, in light of all the circumstances'.[75] As a result, the case was referred for revision to the Court of Appeal, where it is currently pending.

Carlton Trading Limited, 'Carlton Trading Ukraine' LLC v. Hotel 'Kozatskyi' State Enterprise of the Ministry of Defense of Ukraine

The case mentioned above, particularly its unexpected turn pertaining to revision and reversal of the judgment of the Shevchenkivskyi District Court of Kyiv City due to newly established facts, encouraged other Ukrainian debtors, mainly the state-owned companies, to repeat such 'success'.

71. Judgment of the Kyiv Commercial Court dated 17 May 2017 in Case No. 910/2589/17 initiated by the Ministry of Infrastructure of Ukraine against Dogus Insaat ve Ticaret A.S. and 'South East Railway' State Territorial and Industry Association, Third Persons: The Cabinet of Ministers of Ukraine, 'BMK Planeta-Most' LLC. http://www.reyestr.court.gov.ua/ Review/66712946.
72. Ruling of the Shevchenkivskyi District Court of Kyiv City dated 17 September 2015 in Case No. 761/22804/15-Ц (*Dogus Insaat ve Ticaret A.S. v. 'South East Railway' State Territorial and Industry Association*). http://www.reyestr.court.gov.ua/Review/50702877.
73. Resolution of the Supreme Court dated 30 October 2018 in Case No. 910/2589/17 initiated by the Ministry of Infrastructure of Ukraine against Dogus Insaat ve Ticaret A.S. and 'South East Railway' State Territorial and Industry Association, Third Persons: The Cabinet of Ministers of Ukraine, 'BMK Planeta-Most' LLC. http://www.reyestr.court.gov.ua/Review/77528244.
74. Resolution of the North Commercial Court of Appeal dated 28 January 2019 in Case No. 910/2589/17 initiated by the Ministry of Infrastructure of Ukraine against Dogus Insaat ve Ticaret A.S. and 'South East Railway' State Territorial and Industry Association, Third Persons: The Cabinet of Ministers of Ukraine, 'BMK Planeta-Most' LLC.
75. Resolution of the Supreme Court dated 26 April 2019 in Case No. 910/2589/17 initiated by the Ministry of Infrastructure of Ukraine against Dogus Insaat ve Ticaret A.S. and 'South East Railway' State Territorial and Industry Association, Third Persons: The Cabinet of Ministers of Ukraine, 'BMK Planeta-Most' LLC. http://www.reyestr.court.gov.ua/Review/81436412.

In June 2018, representative of the 'Hotel Kozatskyi' State Enterprise of the Ministry of Defence of Ukraine applied to the Shevchenkivskyi District Court of Kyiv City to revise, due to newly established facts, its ruling dated 8 May 2014 in Case No. 761/7764/14-ц, according to which the final award, rendered by the Arbitration Institute of SCC on 30 September 2011 (as amended under Resolution No. 3 dated 20 October 2011) in Case No. V 001/2011, initiated by Carlton Trading Ltd, 'Carlton Trading Ukraine' LLC against 'Hotel 'Kozatskyi' SE of the Ministry of Defense of Ukraine, was recognized and allowed for enforcement in the territory of Ukraine.

The dispute, submitted to arbitration, arose out of the joint venture agreement with a foreign investor dated 3 October 2000, concluded between Carlton Trading Ltd, 'Carlton Trading Ukraine' LLC against 'Hotel 'Kozatskyi' SE of the Ministry of Defence of Ukraine, additional agreement to which contained an arbitration clause in favour of SCC.

The court in its ruling dated 8 May 2014 found no grounds for refusal in recognition and enforcement of SCC award.[76] Neither of the appeal claims was granted. The ruling became effective, and the enforcement writ was issued to the creditor.

Further, the debtor, as a ground for revision of the case, alluded to the fact that the additional agreement, containing an arbitration clause, was signed by the person not authorized thereto (on behalf of Carlton). The debtor 'became aware of that fact from the letter of the senior investigator of the department of the Military Prosecutor's Office … dated 26 May 2017'. According to the debtor, it appears from the documents, provided by the investigator, that the signatory of the additional agreement on behalf of Carlton (the President of Carlton Trading Ltd) resigned a day prior to signing that agreement. The same day, the board of directors of the company approved the resignation and appointed a new president.

However, the court disagreed with the debtor's arguments, having stated, that: (1) within the arbitration proceedings the tribunal properly assessed all the agreements, and in particular, the additional agreement; (2) all the case participants were aware of the additional agreement, both within the arbitral proceedings and within the proceedings in the Shevchenkivskyi District Court of Kyiv City in 2014; (3) Carlton Trading Ltd did not raise the issue of the signatory's lack of authority to sign the agreement; (4) the matter of validity of the additional agreement was examined and confirmed within the arbitration proceedings; (5) 'the debtor failed to provide the court with relevant and admissible evidence, proving invalidity of the additional agreement at the moment of court proceedings; thus, there is no ground to reverse the ruling dated 8 May 2014 due to the newly established facts'; (6) it appears from the legal relations between the parties that under the above agreements they 'approved the bargain and realized contractual obligations under the relevant terms'; (7) the letter, provided by the debtor as a key evidence, 'was essentially, a cover letter, to which appropriate documents were enclosed together with the request to translate them'; (8) 'the letter

76. Ruling of the Shevchenkivskyi District Court of Kyiv City dated 8 May 2014 in Case No. 761/7764/14-Ц (*Carlton Trading Limited, 'Carlton Trading Ukraine' LLC v. Hotel 'Kozatskyi' State Enterprise of the Ministry of Defense of Ukraine*). http://www.reyestr.court.gov.ua/Review/38591264.

contains no authorization by the investigator to use these documents in the present civil proceedings, and enclosure thereto is essentially a non-certified translation of the copies of the documents from English, which have no signs of the official ones'.[77]

As a result, the Shevchenkivskyi District Court of Kyiv City in its ruling dated 17 July 2018 dismissed the debtor's application, having stated:

> The court shall not take into consideration the documents in question, under Articles 78, 95 of the CPC of Ukraine … there is no ground for granting the debtor's application, and the facts provided by its representative cannot be considered as newly established within the meaning of Article 423 of the CPC of Ukraine.
>
> The debtor's representative failed to provide any other grounds to reverse the ruling of the Shevchenkivskyi District Court of Kyiv City dated 8 May 2014 due to newly established facts.
>
> Furthermore, the debtor failed to provide the court with the relevant and admissible evidence to support the facts in question.

On 6 December 2018, the Kyiv Court of Appeal upheld the ruling of the Shevchenkivskyi District Court of Kyiv City dated 17 July 2018.[78]

Article V(1)(b) of the Convention (The Party Was Not Given Proper Notice or Was Otherwise Unable to Present His Case)

This ground is frequently referred by the parties, who either failed to participate in the arbitration proceedings or terminated the powers of their representatives within the pre-award stage. A different reaction of the courts to such argument is illustrated below.

JKX Oil & Gas PLC et al v. the State of Ukraine

The case concerned recognition and enforcement of the emergency arbitrator's (Rudolf Dolzer's) award No. EA/2015/002 dated 14 January 2015, rendered under the Energy Charter Treaty,[79] in accordance with SCC Arbitration Rules.

The case is remarkable in many respects,[80] in particular, as the first award on interim measures, rendered by emergency arbitrator, which was further recognized and enforced by some courts of Ukraine under the Convention. In addition, the case raised the issue of application of several grounds for refusal to recognize and enforce

77. Ruling of the Shevchenkivskyi District Court of Kyiv City of 17 July 2018 in Case No. 761/7764/14-Ц (*Carlton Trading Limited, 'Carlton Trading Ukraine' LLC v. Hotel 'Kozatskyi' State Enterprise of the Ministry of Defense of Ukraine*). http://www.reyestr.court.gov.ua/Review/75418511.
78. Ruling of the Kyiv Court of Appeal dated 6 December 2018 in Case No. 761/7764/14-Ц (*Carlton Trading Limited, 'Carlton Trading Ukraine' LLC v. Hotel 'Kozatskyi' State Enterprise of the Ministry of Defense of Ukraine*). http://www. reyestr.court.gov.ua/Review/78482472.
79. The Energy Charter Treaty (Lisbon), 17 December 1994.
80. Perepelynska O., Ivasechko V. Enforceability of Emergency Arbitrator Awards in Ukraine. CIS Arbitration Forum, 7 December 2015. http://www.cisarbitration.com/2015/12/07/enforceability-of-emergency-arbitrator-awards-in-ukraine/.

arbitral award in accordance with the Convention, as will be discussed in other sections below.

As regards the application of Article V(1)(b) of the Convention, the dates of the emergency arbitration proceedings are of great importance.

Application for appointing an emergency arbitrator and taking interim measures, prior to composition of the arbitral tribunal, was filed by JKX Oil & Gas PLC, Poltava Gas B.V and 'Poltava Gas and Oil Company' to SCC on the Orthodox Christmas (7 January 2015). The same day, SCC notified the State of Ukraine, by courier as well as by e-mail, of the commencement of the emergency arbitration proceedings. In a week (on 14 January 2015), the emergency arbitrator rendered the award on interim measures.

Ukraine failed to participate in the proceedings, though, according to the procedural timetable, the time limit for filing its statement expired on 12 January 2015. By 14 January 2015, the parties should have filed their final comments, and on 13 January 2015 the conference call could have been held, if the parties so requested.

On 16 January 2015, the Deputy Minister of Justice of Ukraine confirmed in writing that the Ministry of Justice of Ukraine did receive the notice of filing an application for appointing Rudolf Dolzer as an emergency arbitrator and the one of the fact of appointment itself.

The applicants applied to the Pecherskyi District Court of Kyiv City to recognize and enforce the emergency arbitrator award in the territory of Ukraine.

The Ministry of Justice of Ukraine filed its objections thereto referring to Article V(1)(b) of the Convention (failure to give proper notice of the appointment of arbitrator or of the arbitration proceedings and inability to present the case).[81]

However, the Pecherskyi District Court of Kyiv City in its ruling dated 8 June 2015 dismissed the arguments of the debtor, having concluded as follows:

> The court dismisses the argument of the representatives of the Ministry of Justice of Ukraine, that the debtor was not given proper notice of the appointment of the emergency arbitrator, since it appears from the documents, provided by the parties, that the emergency arbitrator appropriately notified the debtor by e-mail. Therefore, failure to respond to such notice cannot be a ground to recognize the debtor as the one not given proper notice, since the established procedural timetable provided the debtor with an opportunity to file its statements, before the award had been rendered.[82]

The Kyiv City Court of Appeal concurred with this finding in its ruling dated 17 September 2015: 'The panel of judges dismisses the appeal claim and considers that there are no grounds to consider that the debtor was not given proper notice of the

81. Ruling of the Pecherskyi District Court of Kyiv City dated 8 June 2015 in Case No. 757/5777/15-Ц (*JKX OIL & GAS PLC, POLTAVA GAS B.V. and 'Poltava Gas and Oil Company' JV v. the State of Ukraine represented by the Ministry of Justice of Ukraine*). http://www.reyestr.court.gov.ua /Re- view/45009594.
82. Ruling of the Pecherskyi District Court of Kyiv City dated 8 June 2015 in Case No. 757/5777/15-Ц (*JKX OIL & GAS PLC, POLTAVA GAS B.V. and 'Poltava Gas and Oil Company' JV v. the State of Ukraine represented by the Ministry of Justice of Ukraine*). http://www.reyestr.court.gov.ua /Review/45009594.

appointment of arbitrator or of the arbitration proceedings and was unable to present the case.

It appears from the case, that the emergency arbitrator appropriately notified the Ministry of Justice of Ukraine by e-mail. The fact is confirmed by the letter of the Minister of Justice of Ukraine … dated 16 January 2015, according to which on 12 January 2015, i.e. after the holidays and rest days, the Ministry of Justice of Ukraine received the notice of appointing … as an emergency arbitrator and the one of the fact of appointment itself. At the time of receiving the notice in question, the timetable set by the arbitrator for Ukraine to file its statements and final commentaries did not expire; upon request of the parties, the conference call should have been held. Pursuant to Article 8(1) of Appendix II to the SCC Arbitration Rules, on 12 January 2015, the parties were notified of granting the emergency arbitrator's request to extend the time period for case consideration and rendering the relevant award by 14 January 2015.

Thus, under the procedural timetable, the debtor was able to present the case, before the award had been rendered.

Moreover, in accordance with Article 7 of Appendix II to the SCC Arbitration Rules, the Ministry of Justice of Ukraine could have filed the motion to the emergency arbitrator to extend the procedural time limits, should it be impossible for it to present the case. However, failure of the Ministry to respond to the notices of the emergency arbitrator shall not be considered as a failure to give the debtor proper notice of the appointment of arbitrator or of the arbitration proceedings.'[83]

Nevertheless, at the second round of case consideration, HSCU stated that the courts of lower instances failed to appropriately respond to the debtor's arguments and to draw respective conclusions. In particular, it pertains to the fact that the application was filed on 7 January 2015; the total duration of emergency arbitration proceedings was five days, i.e. from 7 to 11 January. All five days were holidays in Ukraine, according to the rules of labour law and resolution of the Cabinet of Ministers of Ukraine dated 12 November 2014 No. 1084 'On Relocation of Working Days in 2015'.

In view of the above, HSCU concluded that the notice of SCC 'received by the Ministry of Justice of Ukraine on holiday, 7 January 2015 by email, was registered and forwarded to the administration on the first working day, 12 January 2015, i.e. when the emergency arbitration proceedings were already over'.[84]

83. Ruling of the Kyiv City Court of Appeal dated 17 September 2015 in Case No. 757/5777/15-Ц (*JKX OIL & GAS PLC, POLTAVA GAS B.V. and 'Poltava Gas and Oil Company' JV v. the State of Ukraine represented by the Ministry of Justice of Ukraine*). http://www.reyestr.court.gov.ua/Review/51814205.
84. Ruling of HSCU dated 2 November 2016 in Case No. 757/5777/15-Ц (*JKX OIL & GAS PLC, POLTAVA GAS B.V. and 'Poltava Gas and Oil Company' JV v. the State of Ukraine represented by the Ministry of Justice of Ukraine*). http://www.reyestr.court.gov.ua/Review/62524805.

On 21 December 2016, the above conclusion was almost verbatim replicated in the ruling of the Kyiv City Court of Appeal, to which the case was remitted for new appellate revision by HSCU, which reversed the previous ruling of the appeal court.[85]

Undoubtedly, the above argument of the court was not a decisive one to dismiss the application for recognition and enforcement of the emergency arbitrator award. Though, the conclusions of the courts, laid down in the last two rulings, would probably be a deterrent for the claimants to file applications for emergency arbitration proceedings and interim measures against Ukrainian debtors on holidays and rest days.

Röhren- und Pumpenwerk Bauer Gesellschaft m.b.H. v. Company 'Rise' PJSC

The case pertained to recognition and enforcement in the territory of Ukraine of VIAC (Vienna International Arbitral Centre of the Federal Economic Chamber of Austria) award dated 1 September 2011.

On 30 April 2013, the Holosiivskyi District Court of Kyiv City dismissed the application for recognition and enforcement of the award on the grounds of public policy and failure to give proper notice to the debtor:

> It follows from the arbitral award (clauses 18-26) that 'Company 'Rise' PJSC failed to participate in the arbitration proceedings. Under clause 17 thereof, on 3 June 2011, the debtor's representative informed the sole arbitrator of the fact that he would no longer represent his client's interests. The fact in question was not contested and denied by the parties. Therefore, the court does not take into consideration the claimant's statement, that both parties filed their written comments, applications and objections etc. in the course of the proceedings.[86]

Eventually, that ruling was reversed. On 24 June 2015, the Holosiivskyi District Court of Kyiv City rendered a new ruling, which was further upheld by the ruling of the Kyiv City Court of Appeal dated 6 October 2015 and the one of HSCU dated 23 December 2015, according to which the application for recognition and enforcement of VIAC award was granted.[87]

At the second round of case consideration, the courts established:

> it appears from the arbitral award and the records of the hearing dated 14 June 2011, the debtor received the text of the statement of claim, was appropriately represented by an authorized person until 3 June 2011 and filed its objections, which were further taken into account when considering the case, as specified in paragraph 35 of the arbitral award.
>
> On 3 June 2011, representative of the 'Company 'Rise' CJSC notified the arbitrator of the fact, that he would no longer represent his client's interests. On 6 June 2011,

85. Ruling of the Kyiv City Court of Appeal dated 21 December 2016 in Case No. 757/5777/15-Ц (*JKX OIL & GAS PLC, POLTAVA GAS B.V. and 'Poltava Gas and Oil Company' JV v. the State of Ukraine represented by the Ministry of Justice of Ukraine*). http://www.reyestr.court.gov.ua/Review/63837890.
86. Ruling of the Holosiivskyi District Court of Kyiv City dated 30 April 2013 in Case No. 2601/22356/12 (*Röhren- und Pumpenwerk Bauer GmbH. v. Company 'Rise' PJSC*). http://www.reyestr.court.gov.ua/Review/31011322.
87. Ruling of HSCU dated 23 December 2015 in Case No. 6-31147ск15 (*Röhren- und Pumpenwerk Bauer GmbH. v. Company 'Rise' PJSC*). http://www.reyestr.court.gov.ua/Review/54763178#.

> in resolution No. 7, the arbitrator drew the debtor's attention to the latter's obligation to participate in the proceedings, scheduled for 14 June 2011. The given resolution was received by the debtor on 7 June 2011.

When dismissing the debtor's arguments, the courts grounded their position on the fact that Company 'Rise' did not provide the relevant evidence of failure to give proper notice of the arbitration proceedings and of the appointment of arbitrator.

Article V(1)(c) of the Convention (The Award Contains Decisions on Matters Beyond the Scope of the Submission to Arbitration)

The debtors rather rarely apply this ground to object against recognition and enforcement of foreign arbitral award.

JKX Oil & Gas PLC et al v. the State of Ukraine

One of the few cases in this regard is *JKX Oil & Gas PLC et al v. the State of Ukraine*, already described above in part of failure to give a proper notice to a debtor and his inability to present his case.

In that case, the claimant also referred to Article V(1)(c) of the Convention. In particular, it alleged that the award rendered by the emergency arbitrator dealt with a difference not contemplated by or not falling within the terms of the submission to arbitration, due to the fact that at the time when Ukraine ratified the Energy Charter Treaty in 1998, SCC Arbitration Rules contained no provisions on emergency arbitration proceedings and on interim measures against the debtor within such proceedings.

The Pecherskyi District Court of Kyiv City in its ruling dated 8 June 2015 dismissed the claimant's argument, having concluded: 'The court rejects the arguments of representative of the Ministry of Justice of Ukraine, who alleged that the emergency arbitrator award was rendered in violation of the arbitration agreement; rather, the award was rendered in accordance with the Arbitration Rules, effective at the moment, when the application for appointment of the emergency arbitrator was filed.'[88]

The Court of Appeal has not rebutted this conclusion; however, HSCU did not concur with the latter and in its ruling dated 2 November 2016 stated: 'The court of appeal failed to take into consideration the fact, that the rules of international legal instruments shall be applied in the versions effective at the moment of their ratification and recognition by Ukraine. However, within the emergency arbitration proceedings and appointment of emergency arbitrator the SCC Arbitration Rules of 2010 were applied in part of resolving the investment disputes, while the Law of Ukraine No.

88. Ruling of the Pecherskyi District Court of Kyiv City dates 8 June 2015 in Case No. 757/5777/15-Ц (*JKX OIL & GAS PLC, POLTAVA GAS B.V. and 'Poltava Gas and Oil Company' JV v. the State of Ukraine represented by the Ministry of Justice of Ukraine*). http://www.reyestr.court.gov.ua/Review/45009594.

89/98-BP "On Ratification of the Energy Charter Treaty and the Protocol on Energy Efficiency and Related Environmental Aspects" was adopted on 2 February 1998.'[89]

The above conclusion was almost verbatim replicated by the Kyiv City Court of Appeal on 21 December 2016,[90] to which the case was remitted for a new appellate revision by HSCU.

Article V(1)(d) of the Convention (Composition of the Arbitral Tribunal or the Arbitral Procedure Was Not in Accordance with the Agreement of the Parties)

The courts of Ukraine are generally rather reluctant to upheld the debtor's objections against recognition and enforcement of arbitral award on the grounds of violation of arbitration procedure and, in particular, of the rules of a foreign arbitration institute.

SES Astra AB v. 'Ukrkosmos' SE

In that case company SES Astra AB applied to the court of Ukraine for recognition and enforcement of award No. 19315/GFG, rendered by ICC International Court of Arbitration on 4 August 2014.

At the first round of case consideration, the courts of first and appeal instances granted the creditor's application. However, HSCU in its ruling dated 18 November 2015 reversed previous court decisions and remitted the case for a new revision.

At the second round of case consideration, on 26 February 2016, the Pecherskyi District Court of Kyiv City dismissed the application for recognition and enforcement of arbitral award on the ground of Article V(1)(d) of the Convention – the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties – since the case was considered by the sole arbitrator, rather than by three arbitrators, as enshrined in the arbitration agreement.

On 24 May 2016, the Kyiv City Court of Appeal reversed the above ruling, and granted the application for enforcement of ICC award, having established that the debtor in its letter gave its express consent to the claimant's proposal to consider the dispute by a sole arbitrator. Moreover, the debtor raised no objections regarding composition of the arbitral tribunal and appointment of the latter within the arbitration proceedings:

> Given that the debtor gave its consent in writing to the creditor's proposal to appoint a sole arbitrator, rather than three arbitrators, as was envisaged in arbitration agreement, the parties have changed (modified) the arbitration clause in a way, determined by law, and thus the tribunal consisting of the sole arbitrator was in compliance with the agreement of the parties. Henceforth, the manner and

89. Ruling of HSCU dated 2 November 2016 in Case No. 757/5777/15-Ц (*JKX OIL & GAS PLC, POLTAVA GAS B.V. and 'Poltava Gas and Oil Company' JV v. the State of Ukraine represented by the Ministry of Justice of Ukraine*). http://www.reyestr.court.gov.ua/Review/62524805.
90. Ruling of the Kyiv City Court of Appeal dated 21 December 2016 in Case No. 757/5777/15-Ц (*JKX OIL & GAS PLC, POLTAVA GAS B.V. and 'Poltava Gas and Oil Company' JV v. the State of Ukraine represented by the Ministry of Justice of Ukraine*). http://www.reyestr.court.gov.ua/Review/63837890.

> procedure of appointing the sole arbitrator should have been in accordance with the ICC Arbitration Rules.[91]

Though, HSCU reversed the ruling of the Kyiv City Court of Appeal and upheld the one of the Pecherskyi District Court dated 26 February 2016, pursuant to which the application for recognition and enforcement of the arbitral award was dismissed.

Finally, on 22 March 2017, SCU put an end to that case, having rendered the ruling, which reversed the ruling of HSCU and upheld the one of the Kyiv City Court of Appeal of 24 May 2016, under which the application for recognition and enforcement of ICC award was granted.[92]

JKX Oil & Gas PLC et al v. the State of Ukraine

In that case, already referred to in the section on failure to give a proper notice to a debtor and his inability to present the case, the debtor referred to Article V(1)(d) of the Convention, as well.

The representatives of the Ministry of Justice of Ukraine claimed that the arbitration proceedings were contrary to the agreement of the parties, since the creditor should not have applied for emergency arbitration, while the emergency arbitrator should have neither accepted such application nor granted it, due to failure of the creditor to comply with a three-month period, established in Article 26(2) of the Energy Charter Treaty and the Final Act thereto. The creditor's letter dated 13 November 2014, by which the notice of commencement of the arbitration proceedings was forwarded to the Administration of the President of Ukraine, shall not be considered as notice of commencement of negotiations within the pre-arbitration settlement procedure.

The Pecherskyi District Court of Kyiv City dismissed the debtor's arguments: 'The court is critical of the position of the Ministry of Justice of Ukraine as regards the failure to comply with a three-month period of negotiations within the pre-arbitration settlement procedure. As it appears from the documents, provided both by the debtor and the creditor, the possibility of pre-arbitration settlement arose as far back as on 13 November 2014. Three-month period established for pre-arbitration settlement was set not in the arbitration agreement, but in the Energy Charter Treaty, what in its turn excludes application of Article V(1)(b) [sic! – O. P.] of the Convention in this case.'[93]

Upon decision of HSCU,[94] the case was remitted for a new revision. At the second round of case consideration, the Kyiv City Court of Appeal in its ruling dated 21 December 2016 reached a different conclusion:

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91. Ruling of the Kyiv City Court of Appeal dated 24 May 2016 in Case No. 757/34281/14 (*SES ASTRA AB v. 'Ukrkosmos' SE*). http://reyestr.court.gov.ua/Review/57952744.
92. Ruling of SCU dated 22 March 2017 in Case No. 757/3481/14-Ц (*SES ASTRA AB v. 'Ukrkosmos' SE*). http://reyestr.court.gov.ua/Review/65680357.
93. Ruling of the Pecherskyi District Court of Kyiv City dated 8 June 2015 in Case No. 757/5777/15-Ц (*JKX OIL & GAS PLC, POLTAVA GAS B.V. and 'Poltava Gas and Oil Company' JV v. the State of Ukraine represented by the Ministry of Justice of Ukraine*). http://www.reyestr.court.gov.ua/Review/45009594.
94. Ruling of HSCU dated 2 November 2016 in Case No. 757/5777/15-Ц (*JKX OIL & GAS PLC, POLTAVA GAS B.V. and 'Poltava Gas and Oil Company' JV v. the State of Ukraine represented by the Ministry of Justice of Ukraine*). http://www.reyestr.court.gov.ua/Review/62524805.

> The given rule of international law [Article 26(2) of the Energy Charter Treaty – O. P.] sets forth a three-month period for pre-arbitration settlement.
>
> Appropriate notice was sent by claimants to the Administration of the President of Ukraine – a governmental agency, not authorized to protect the rights and interest of Ukraine within a dispute settlement procedure or within consideration of the cases, to which Ukraine and a foreign entity are the parties, in the foreign jurisdictional bodies. To the contrary, such an agency is the Ministry of Justice of Ukraine.
>
> It means, that the creditor violated the time-period, established by law, to apply to the SCC Arbitration Institute for the appointment of the emergency arbitrator.[95]

Article V(1)(e) of the Convention (The Award Has Not Yet Become Binding on the Parties or Has Been Set Aside)

Ukraine is one of the signatories to the Convention; however, at the time when it was ratified and further succeeded to by Ukraine, there was no need in the Ukrainian version of its text. In fact, during all this time, the arbitration professionals and the judges have been using Russian translation of the Convention in the relevant proceedings on recognition and enforcement of foreign arbitral awards in Ukraine.

Though, there is substantial difference in the text of Article V(1)(e) in different languages. In particular, according to the official translation of the Convention into the English, French, and Spanish languages, refusal in recognition and enforcement of arbitral award depends upon the fact whether the arbitral award 'became binding'[96] on the parties, while the Russian version of Convention lays down the concept of 'final'[97] arbitral award.

The courts of Ukraine have not considered such a discrepancy, so far. However, taking into account that there is no official translation of the Convention into Ukrainian, in any case the court of Ukraine will not be bound solely by the official text of the Convention in Russian.

Above all, Ukrainian debtors rarely refer to Article V(1)(e) of the Convention as a ground to oppose recognition and enforcement of foreign arbitral award in the territory of Ukraine.

F.F. Engels Investments Ltd v. Pacific Inter-Link Son BHD

One of the interesting cases with regard to application of Article V(1)(e) is the case on enforcement in the territory of Ukraine of 12 FOSFA arbitral awards through the assets

95. Ruling of the Kyiv City Court of Appeal dated 21 December 2016 in Case No. 757/5777/15-Ц (*JKX OIL & GAS PLC, POLTAVA GAS B.V. and 'Poltava Gas and Oil Company' JV v. the State of Ukraine represented by the Ministry of Justice of Ukraine*). http://www.reyestr.court.gov.ua/Review/63837890.
96. English version of the Convention: 'The award has not yet become binding', French version of the Convention: 'Que la sentence n'est pas encore devenue obligatoire', Spanish version of the Convention: 'Que la sentencia no es aún obligatoria'.
97. Perepelynska O., Ivasechko V. Enforceability of Emergency Arbitrator Awards in Ukraine. CIS Arbitration Forum (2015). http://www.cisarbitration.com/2015/12/07/enforceability-of-emergency-arbitrator-awards-in-ukraine.

of a foreign debtor, Pacific Inter-Link Son BHD, allegedly located in the territory of Ukraine.

The case is remarkable in many respects: joint consideration of applications for recognition and enforcement of 12 arbitral awards in one court proceeding; assignment under the arbitral awards; recognition and enforcement in the territory of Ukraine of arbitral awards, set aside at the place of arbitration; establishing the fact of location of the foreign debtor's assets, through which the funds can be recovered.[98]

The case pertained to recognition and enforcement in the territory of Ukraine of arbitral awards, rendered by FOSFA Appeal Panel No. 981 dated 28 September 2010, No. 982 dated 28 September 2010, No. 981 dated 28 September 2010, No. 986 dated 19 March 2010, No. 989 dated 5 November 2010, No. 990 dated 5 November 2010, No. 1002 dated 22 October 2010, No. 1035 dated 16 May 2011, No. 1041 dated 18 January 2011, and the awards of FOSFA Arbitration Tribunal No. 4170 dated 12 January 2011, No. 4171 dated 12 January 2011, No. 4220 dated 12 September 2011, No. 4221 dated 21 September 2011, rendered against Pacific Inter-Link Son BHD.

According to the arbitral awards, 'EFKO Food Ingredients' LLC (six arbitral awards), 'Food Ingredients' LLC (four awards) and Agrovenus LLP, the company registered in England (two awards) were the original creditors.

On 10 April 2012, the above companies entered into the assignment agreements with F.F. Engels Investments LTD, in favour of which 'the right to claim due performance of all the debtor's obligations under the arbitral award' was transferred.

On 20 April 2011, half of the arbitral awards was set aside by the High Court of Justice in England.

However, on 16 May 2012, F.F. Engels Investments LTD applied to Illichivsk Municipal Court of Odessa Region to recognize and enforce the arbitral awards in the territory of Ukraine, arguing that tank vessel MT Miss Marilena delivered the cargo (palm oil and palm stearin), owned by the debtor, to the Sea Commercial Port of Illichivsk and offloaded it to customs-licensed warehouse '"Ilyichevsk Oil and Fat Industrial Complex" PJSC'. The courts considered this case several times.

Initially, the Illichivsk Municipal Court of Odessa Region in its ruling dated 16 July 2012[99] granted the creditor's application. Further, however, the ruling was reversed by the appeal court.[100] At the second round of case consideration, the Illichivsk Municipal Court of Odessa Region reached a different conclusion, and in its

98. Perepelynska O. Ukrainian Court Enforces Arbitral Awards Set Aside in the UK. CIS Arbitration Forum, 17 September 2012. http://www.cisarbitration.com/2012/09/17/ukrainian-court-enforces-arbitral-awards-set-aside-in-the-uk/.
99. Ruling of the Illichivsk Municipal Court of Odessa Region dated 16 July 2012 in Case No. 1511/2458/2012 (*F.F. ENGELS INVESTMENTS LTD v. PACIFIC INTER-LINK SON BHD*). http://reyestr.court.gov.ua/Review/25273828#.
100. Ruling of the Appeal Court of Odessa Region dated 11 September 2012 in Case No. 22 Ц-1590\9143\2012 (*F.F. ENGELS INVESTMENTS LTD v. PACIFIC INTER-LINK SON BHD*). http://www.reyestr.court.gov.ua/Review/27869375#.

ruling dated 30 October 2012 dismissed the application for recognition and enforcement of 12 arbitral awards. The position of the Illichivsk Municipal Court of Odessa Region was further upheld by the courts of appeal and cassation.[101]

Unfortunately, according to the data available in the register of court judgments, it is impossible to establish how thorough the court has analysed the issue of enforcing arbitral awards, set aside at the place of arbitration. It appears from the ruling of HSCU that the issue in question was raised by the court: 'in addition, as established by the court and refuted neither by the debtor, nor by the creditor, the High Court of Justice in its ruling dated 20 April 20122 set aside the FOSFA arbitral awards No. 986, No. 981, No. 982, No. 989, No. 990, No. 1002'.

Nevertheless, for the courts of Ukraine, the decisive factor was the issue of jurisdiction, since the fact of location of the foreign debtor's assets in the territory of Ukraine was not established:

> When dismissing the application, the first instance court (the position of which was upheld by the court of appeal) reached a reasonable conclusion that the bills of lading contained no inscriptions (endorsements), providing for transfer of title to the cargo to any entity, including Pacific Inter-Link Son BHD, and hence the creditor failed to prove the fact, that the cargo is owned by the debtor.[102]

Article V(2)(a) of the Convention (Arbitrability)

The issue of non-arbitrability is often raised by Ukrainian debtors in their objections to recognition and enforcement of foreign arbitral awards in the territory of Ukraine.[103]

Raiffeisen Property Management GmbH v. 'Double W' LLC

The case pertained to recognition and enforcement in the territory of Ukraine of VIAC arbitral award dated 23 February 2010 (with amendments of 10 June 2010) in Case No. SCH-5093 between Raiffeisen Property Management GmbH and 'Double W' LLC, under which:

(a) loan agreement dated 14 October 1998, SPA dated 4 May 2001, as well as share transfer and option agreement dated 4 May 2001 were recognized as duly concluded; they were not terminated, and, hence, were valid, effective

101. Ruling of HSCU dated 11 September in Case No. 6-3176cb13 (*F.F. ENGELS INVESTMENTS LTD v. PACIFIC INTER-LINK SON BHD*). http://www.reyestr.court.gov.ua/Review/33803208.
102. Ruling of HSCU dated 11 September 2013 in Case No. 6-3176cb13 (*F.F. ENGELS INVESTMENTS LTD v. PACIFIC INTER-LINK SON BHD*). http://www.reyestr.court.gov.ua/Review/33803208.
103. Perepelynska O. Arbitrability under Ukrainian Law: Problematic Issues, Materials of the II International Readings in Memory of Academician Pobirchenko I.G, 2015, pp. 40-44. http://arb.ucci.org.ua/publ/rept2014reading.pdf; Marchukov D. Refusing Recognition and Enforcement of Foreign Arbitral Awards in Ukraine (Procedural Issues and Application of Non-arbitrability and Public Policy Grounds), TDM 1 (2009). http://www.transnational-dispute-management.com/article.asp?key = 1368; Kravchuk G. Arbitrability of Disputes in the Context of Article 12 of the Commercial Procedure Code of Ukraine, Materials of the II International Readings in Memory of Academician Pobirchenko I.G, 2015, pp. 15-21. http://arb.ucci.org.ua/publ/rept2014reading.pdf.

and of full legal force; they confirmed the creditor's additional title (at the moment of concluding share transfer agreement dated 4 May 2001) to the share in 'Double W Kyiv' LLC amounting to 1%, and totally, as of 4 May 2001, amounting to 99.90217%;

(b) the debtor should compensate the creditor for arbitration costs, including the legal costs.

At the first round of case consideration, the Malynovskyi District Court of Odessa City in its ruling dated 31 March 2011 partially recognized VIAC award (in part of compensation for arbitration costs, without compensation for the legal costs), and refused to recognize the award in part a), since:

> 1) the arbitral award contains decisions on matters beyond the scope of the submission to arbitration (establishment of facts); 2) the subject-matter of the dispute (title to share in the charter capital) is not subject to arbitration under the laws of Ukraine, since the title is contested by the former participant of the company, in particular, according to the laws of Ukraine.[104]

On 6 June 2011, the Odessa Court of Appeal reversed the ruling of the Malynovskyi District Court and dismissed the application in part a) of the award.[105]

On 9 November 2011, HSCU reversed the ruling of the Odessa Court of Appeal and remitted the case for a new revision to the first-instance court,[106] having stated that 'in such circumstances the conclusion of the first-instance court, which found the dispute in question as a corporate one, that, along with the requirement to establish the facts, is not subject to arbitration under the laws of Ukraine, is unreasonable'.

At the second round of case consideration, the Malynovskyi District Court of Odessa City in its ruling dated 30 November 2012 dismissed the application for recognition of VIAC award in whole, referring to Article V(2)(a) of the Convention. The court stated: 'the dispute, which arose between the parties, is a corporate one, and thus, it shall fall solely under the jurisdiction of the commercial courts of Ukraine and not be subject to arbitration'.[107]

On 6 June 2013, the Odessa Court of Appeal reversed the ruling of the Malynovskyi District Court[108] and recognized VIAC award, referring to the resolution of

104. Ruling of the Malynovskyi District Court of Odessa City dated 31 March 2011 in Case No. 1519/6-1/11 (*Raiffeisen Property Management Limited GmbH v. 'Double W' LLC*). http://www.reyestr.court.gov.ua/Review/14865026.
105. Ruling of the Odessa Court of Appeal dated 6 July 2011 in Case No. 22 Ц-4425/11 (*Raiffeisen Property Management GmbH v. 'Double W' LLC*). http://www.reyestr.court.gov.ua/Review/21827088.
106. Ruling of HSCU dated 9 November 2011 in Case No. 6-28841СВ11 (*Raiffeisen Property Management GmbH v. 'Double W' LLC*). http://www.reyestr.court.gov.ua/Review/19514260.
107. Ruling of the Malynovskyi District Court of Odessa City dated 30 November 2012 (*Raiffeisen Property Management GmbH v. 'Double W' LLC*). http://www.reyestr.court.gov.ua/Review/28635729.
108. Ruling of the Odessa Court of Appeal dated 6 June 2013 (*Raiffeisen Property Management GmbH v. 'Double W' LLC*). http://www.reyestr.court.gov.ua/Review/32043568.

HSCU dated 23 August 2012, which concluded that the dispute 'has no features of a corporate dispute'[109] and shall be subject to arbitration.

On 2 April 2014, HSCU upheld the ruling of the Odessa Court of Appeal.[110]

Article V(2)(b) of the Convention (Public Policy)

Public policy is perhaps the most frequently referred ground. However, despite 'popularity' of this argument, the courts of Ukraine are reluctant to and rather rarely refuse recognition and enforcement on the ground of public policy.[111]

One of the reasons for this is the definition of 'public policy' (in the context of refusal to recognize and enforce the arbitral awards by the Supreme Court of Ukraine), which has already been used by the courts of Ukraine for almost 20 years. The definition in question is laid down in the Resolution of the Plenum of the Supreme Court of Ukraine 'On Court Practice in Considering Applications for Recognition and Enforcement of Foreign Court Judgments and Arbitral Awards and in Setting Aside the Awards Rendered Pursuant to the Procedure of International Commercial Arbitration in the Territory of Ukraine' (hereinafter referred to as 'the SCU Resolution No. 12'), which reads as follows:

> In this particular and other cases, public policy, when recognition and enforcement of judgment is not detrimental to it, shall imply the legal order of the state, determining the principles and fundamentals, forming the basis of the existing constitutional order, encompassing independence of the state, integrity of its territory, autonomy, inviolability of its borders, fundamental constitutional rights, freedoms, safeguards, etc.[112]

Given that enforcement of the majority of arbitral awards, by the very nature, cannot infringe the above-mentioned pillars, the court of Ukraine is rather critical of raising such argument by the debtors of Ukraine.

In addition, clause 12 of SCU Resolution directly instructed the courts of lower instances 'to consider the applications for recognition and enforcement of foreign courts judgments (arbitral awards) within the particular limits and not to exceed their powers through analyzing the accuracy of the judgments (awards) on merits or making any changes thereto'.

109. Resolution of HCCU dated 23 August 2012 in Case No. 18/17 (initiated by *'Double W' LLC against Raiffeisen Property Management GmbH and 'SASSK' LLC*). http://www.reyestr.court.gov.ua/Review/25744558.
110. Ruling of HSCU dated 2 April 2014 in Case No. 6-33399св13 (*Raiffeisen Property Management GmbH v. 'Double W' LLC*). http://www.reyestr.court.gov.ua/Review/38115131.
111. Perepelynska O.S. Public Policy in the Ukrainian Legislation and Court Practice on Recognition and Enforcement of Foreign Arbitral Award, Arbitration and Regulation of International Trade: Russian, Foreign and Cross-Border Approaches. Liber Amicorum in Honour of the 70th Anniversary of A.S. Komarov, Edited by: N.G. Markalov, A.I. Muranov (Moscow: Statut, Naukaprava.ru, 2019), pp. 471-516.
112. Resolution of the Plenum of the Supreme Court of Ukraine dated 24 December 1999 No. 12 'On Court Practice in Considering Applications for Recognition and Enforcement of Foreign Court Judgments and Arbitral Awards and in Setting Aside the Awards Rendered Within International Commercial Arbitration in the Territory of Ukraine'. http://zakon2.rada.gov.ua/laws/show/v0012700-99.

Nibulon S.A. v. Company 'Rise' PJSC

One of the most remarkable cases regarding public policy as a ground for refusal in recognition and enforcement of arbitral awards is *Nibulon S.A. v. Company 'Rise' PJSC*.

The case dealt with recognition and enforcement in the territory of Ukraine of award No. 4323 A(i), rendered by the Appeal Board of GAFTA on 23 May 2014, according to which Ukrainian debtor had to compensate for the damage incurred by Swiss creditor in the amount of over USD 17 million, along with compound interest, accrued until the principal debt is repaid in full.

After several rounds of case consideration, HSCU seemed to put an end to the case,[113] having upheld the ruling of the Kyiv City Court of Appeal dated 14 January 2016,[114] under which application of the Nibulon S.A. was partially granted and GAFTA award was enforced in the territory of Ukraine. According to the procedural laws effective at that time, the ruling of HSCU as a third-instance (cassation) court was final and not subject to challenge, except if it concerns inconsistent practice of the courts of cassation in application of the same rules of procedural or substantive law.

Though, in May 2016, the debtor applied to SCU to reverse the ruling of HSCU alluding to inconsistent application of the provisions of CPC by the courts of cassation within the proceedings for recognition and enforcement of foreign arbitral awards.

To the surprise of arbitration community, SCU not only commenced the proceedings but also granted the debtor's application in its ruling dated 26 October 2016. In this regard two judges (out of five) have submitted their dissenting opinions, expressing their disagreement both with commencement of the proceedings initiated by the debtor and with granting the relevant application. Notably, submission of any dissenting opinions was very uncommon for the former SCU.

In the context of public order, SCU concluded as follows:

> Having enforced the award, which does not specify exact amount of compound interest to be recovered, the court failed to establish, whether recognition and enforcement of the award would be contrary to public policy of Ukraine, taking into account that, under Article 19 of the Constitution of Ukraine, public authorities shall act within the powers, provided by the laws of Ukraine, in addition, the Law of Ukraine 'On Enforcement Proceedings' does not entitle the state enforcement agent to independently calculate the amount to be recovered, thus the latter will be forced to exceed his powers.[115]

SCU Judges, Gumeniuk V.I. and Symonenko V.M., dissented that the court practice in relation to public policy ground is consistent, as well as that 'the issue of public policy violation was not examined by the courts and was not raised by the debtor, i.e. was not a subject-matter of consideration by the court. Further, remission

113. Ruling of HSCU dated 27 April 2016 in Case No. 759/16206/14-Ц (*Nibulon S.A. v. Company 'Rise' PJSC*). http://www.reyestr.court.gov.ua/Review/57732150.
114. Ruling of the Kyiv City Court of Appeal dated 14 January 2016 in Case No. 759/16206/14-Ц (*Nibulon S.A. v. Company 'Rise' PJSC*). http://www.reyestr.court.gov.ua/Review/55904077.
115. Resolution of the Supreme Court of Ukraine dated 26 October 2016 in Case No. 759/16206/14-Ц (*Nibulon S.A. v. Company 'Rise' PJSC*). http://www.reyestr.court.gov.ua/Review/63793441.

of the case for re-examination, in practice, blocks the foreign court judgment on recovery of funds, which is final and shall not be subject to appeal'.[116]

Given that conclusion of SCU posed real risks for further enforcement of any other foreign arbitral awards in Ukraine, the Ukrainian Arbitration Association decided to submit its first Amicus Curiae Brief in respect of that particular case.[117]

After SCU reversed the ruling of HSCU, the case was remitted to the Kyiv City Court of Appeal for a new appellate revision. Following the position of SCU, the Kyiv City Court of Appeal in its ruling dated 23 February 2017 refused recognition and enforcement of GAFTA award on the ground of Article V(1)(b) of the Convention.

The primary reasoning of the court is provided below:

> The foreign arbitral awards, enforcement of which may be in conflict with the imperative rules of the national public law of the state, where their enforcement is sought, shall be considered as the ones which are contrary to the public policy and not subject to enforcement …
>
> Hence, if one of the parties objects to the amount of compound interest, this would lead to a substantive dispute in this regard. The place of dispute resolution and the applicable law are governed by the Contract in question and shall be modified solely by mutual agreement of the Parties.
>
> Given the above, these powers shall not be transferred to any local courts or other competent authorities of Ukraine, where enforcement of the award is sought.
>
> Delegation of the right to calculate compound interest in favour of the creditor or the state enforcement agent is contrary to the fundamentals of justice in Ukraine, which exists on the basis of the rule of law and guarantees the right to a fair trial. Therefore, amount of compound interest, not specified in the award of the GAFTA Appeal Board dated 23 May 2014 No. 4323 A(i) shall not authorize the competent authority of the state, where enforcement of the award will be sought, since it will be considered as an infringement to the relationship of the parties, governed by the arbitration clause. Hence, enforcement of foreign arbitral award, which does not specify the amounts to be recovered, has the features of the one that is contrary to public policy of Ukraine.[118]

Nibulon S.A. applied to HSCU to reverse the above ruling. On 25 October 2017, HSCU granted the application of Nibulon S.A. and submitted the case to the Kyiv City Court of Appeal for revision,[119] which on 6 December 2017 reached a diametrically different conclusion and granted application for recognition and enforcement of GAFTA award in Ukraine.[120] Further, the debtor challenged the ruling of the Kyiv City

116. Dissenting opinion of the Judges of the Supreme Court of Ukraine, Gumeniuk V.I. and Symonenko V.M. in Case No. 759/16206/14-Ц (*Nibulon S.A. v. Company 'Rise' PJSC*). http://www.reyestr.court.gov.ua/Review/63793444.
117. Amicus Curiae Brief of the Ukrainian Arbitration Association in case *Nibulon S.A. v. Company 'Rise' PJSC*. http://arbitration.kiev.ua/Uploads/Admin/AMICUS%20CURIAE%20BRIEF%20(2017%2004%2024%20).pdf.
118. Ruling of the Kyiv City Court of Appeal dated 23 February 2017 in Case No. 759/16206/14-Ц (*Nibulon S.A. v. Company 'Rise' PJSC*). http://www.reyestr.court.gov.ua/Review/65040970.
119. Ruling of HSCU dated 25 October 2017 in Case No. 759/16206/14-Ц (*Nibulon S.A. v. Company 'Rise' PJSC*). http://www.reyestr.court.gov.ua/Review/69862361.
120. Ruling of the Kyiv City Court of Appeal dated 6 December 2017 in Case No. 759/16206/14-Ц (*Nibulon S.A. v. Company 'Rise' PJSC*). http://www.reyestr.court.gov.ua/Review/70760519.

Court of Appeal to HSCU. However, due to the fact that, on 15 December 2017, a new procedural legislation entered into force, the case was referred to the newly established Supreme Court.

As a result, on 15 May 2018, the case was considered by the Grand Chamber of the Supreme Court, which dismissed the debtor's application and upheld the ruling of the Kyiv City Court of Appeal dated 6 December 2017.[121]

As regards other arguments of the debtor regarding SCU position on public policy, the new Supreme Court stated that previous court practice in similar cases was rather inconsistent. In addition:

> 57. The Grand Chamber of the Supreme Court emphasizes that the current CPC of Ukraine, as restated by the Law of Ukraine 'On Amendments to the Commercial Procedure Code of Ukraine, the Civil Procedure Code of Ukraine, the Code of Administrative Court Procedure and Other Legislative Acts' of 3 October 2017, enshrined the powers of the enforcement agent to calculate the interest and (or) penalty prior to enforcement of the arbitral award.
>
> 58. In Particular, according to Article 479 (4) and Article 479 (5) of the CPC, if the international commercial arbitration award provides for repayment of interest and (or) penalty, which are calculated in a manner, specified in the award, the court shall, in its ruling on recognition and enforcement of the given award, indicate accrual of such interest (penalty) until the moment of enforcement of the award, according to the relevant legislation in force. Final amount of interest (penalty) shall be calculated in a manner, specified in the award, by an authority (person), which (who) carries out enforcement of the award, and whose actions can be contested, under Chapter VII of the present Code (becomes effective from 1 January 2019, according to paragraph 2 Section XII 'Final Provisions' of the CPC of Ukraine).
>
> 59. Thus, the lawmaker set the direction of the development of such relationship with regard to enforcement of international commercial arbitration award in part of calculating the interest and/or penalty in a manner, specified in the award.
>
> 60. In addition, the fact, that public policy of Ukraine does not preclude calculation by the enforcement agent of indebtedness to be further recovered, is implicitly reflected in the Article 71(3) and Article 71(4) of the Law of Ukraine 'On Enforcement Proceedings', according to which an enforcement agent shall, on a monthly basis, calculate the amount of arrears of alimony to be paid, awarded as a share of earnings (profit).
>
> 61. The regulatory gap of relationship between the participants of this particular case results from the absence of precise statutory empowerment of an enforcement agent to calculate the interest on the amount of incurred losses, specified in the arbitral award, until 1 January 2019. However, bearing in mind the fact of long-lasting failure to enforce the given award in the territory of Ukraine, as well as the goals of the civil proceedings aimed at effective protection of the violated, non-recognized and contested rights, freedoms or interest of, inter alia, the legal entities (Article 2(1) of the CPC of Ukraine), as well as the principle of proportionality (Article 11 of the CPC of Ukraine), the Grand Chamber of the Supreme Court considers that the Kyiv City Court of Appeal established in its ruling dated 6 December 2017 a reasonable balance between private interest of the creditor to

121. Ruling of the Supreme Court dated 15 May 2018 in Case No. 759/16206/14- Ц (*Nibulon S.A. v. Company 'Rise' PJSC*). http://www.reyestr.court.gov.ua/Review/74630452.

> recover the funds, specified in the arbitral award, and public interest in enforcing the given award, in line with the laws of Ukraine.

Moston Properties Limited v. 'Ukrgazvydobuvannya' JSC

Eventually, in *Nibulon S.A. v. Company 'Rise' PJSC* the courts of Ukraine granted recognition and enforcement of GAFTA award. Though, such an odious ruling of SCU inspired the debtors in other cases, absolutely unrelated to the above one, to refer to the ruling of SCU in their applications for refusal in recognition and enforcement of arbitral awards due to failure to specify the liquidated amount of the interest to be recovered.

'Ukrgazvydobuvannya' PJSC was among those debtors, it filed application for refusal in recognition and enforcement in the territory of Ukraine of LCIA award, rendered in favour of English company Moston Properties Limited. However, the Shevchenkivskyi District Court of Kyiv City in its ruling dated 5 April 2018 dismissed the objections of 'Ukrgazvydobuvannya' PJSC, having concluded, that referral to the public policy ground 'was ungrounded and unsubstantiated'.[122]

At the appeal stage, 'Ukrgazvydobuvannya' PJSC referred to *JKX Oil & Gas PLC et al v. the State of Ukraine*, claiming public policy as a ground for refusal in recognition and enforcement. In addition, the debtor referred to the commercial proceedings, initiated by prosecutor's office, on recognition of the contract at issue as invalid, in spite of the fact that the debtor's counterclaim has been already examined and dismissed in arbitration.

The Kyiv Court of Appeal was critical of the arguments of 'Ukrgazvydobuvannya' PJSC and, thus, dismissed its appeal, having concluded as follows:[123]

> Therefore, given that the contentious legal relations are based on the agreement of the parties, public policy of Ukraine is not violated in this case; thus, the award, rendered by the London Court of International Arbitration on 22 September 2017, shall not be set aside [sic! – O. P.] on the grounds, referred to by the debtor.

The Supreme Court in its ruling dated 17 April 2019 upheld the judgments of the lower courts.[124]

It is noteworthy that the reasoning of the higher instance courts was almost a verbatim adoption of the resolution of the Supreme Court in *'Avia FED Service' JSC v. 'Artem' State Joint Stock Holding Company*[125] in part of public policy, in particular international public policy.

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122. Ruling of the Shevchenkivskyi District Court of Kyiv City dated 5 April 2018 in Case No. 761/41709/17 (*Moston Properties Limited v. 'Ukrgazdobycha' PJSC*). http://www.reyestr.court.gov.ua/Review/73439685#.
123. Ruling of the Kyiv Court of Appeal dated 21 November 2018 in Case No. 761/41709/17 (*Moston Properties Limited v. 'Ukrgazdobycha' PJSC*). http://www.reyestr.court.gov.ua/Review/82001379.
124. Resolution of the Supreme Court dated 19 April 2019 in Case No. 761/41709/17 (*Moston Properties Limited v. 'Ukrgazdobycha' PJSC*). http://www.reyestr.court.gov.ua/Review/82001379.
125. Resolution of the Supreme Court dated 5 September 2018 in Case No. 761/46285/16-Ц ('*Avia-FED-Service' JSC v. 'Artem' State Joint Stock Holding Company*). http://www.reyestr.court.gov.ua/Review/76502952.

'Avia FED Service' JSC v. 'Artem' State Joint Stock Holding Company

One of the new issues in the application of public policy ground is sanctions regulation, recently introduced in Ukraine.[126] The types of such sanctions often encompass freezing of assets, prohibition of capital outflows from Ukraine, as well as suspension of performing economic and financial obligations.

Russian companies in defence industry are a considerable part of enterprises included in the sanction lists. The number of disputes with such companies significantly increased, due to failure of their counterparties from Ukraine to perform obligation under the contracts, concluded before 2014, because of the ban on export of defence and dual-use goods[127] from RF, introduced by Ukraine in 2014, and termination of the Agreement between the Government of Ukraine and the Government of the Russian Federation on Industrial, Scientific and Technical Cooperation of Defense Enterprises in 2015.[128]

Under a range of contracts, Ukrainian companies received advance payments for the goods, which could not have been delivered to their Russian counterparties. Therefore, the latter began to apply to arbitration institutions, envisaged in the contracts (mostly, to ICAC at the Ukrainian CCI or to ICAC at CCI RF). Having obtained the arbitral awards on recovery of appropriate advance payments, Russian companies sought to recognize and enforce them in the territory of Ukraine.

In one of such cases, '*Avia FED Service' JSC v. 'Artem' State Joint Stock Holding Company*, the lower courts of Ukraine,[129] at the first stage of proceedings, refused to recognize and enforce in the territory of Ukraine the award, rendered by ICAC at CCI RF in Case No. 300/2015 on 3 October 2016.

126. For instance, the Law of Ukraine dated 14 August 2014 No. 1644-VII 'On Sanctions'. http://zakon2.rada.gov.ua/laws/show/1644-18; Order of the President of Ukraine No. 133/2017 dated 15 May 2017, under which the Decision of the National Security and Defense Council dated 28 April 2017 'On Application of Personal Special Economic and Other Restrictions (Sanctions)' was enacted. http://zakon2.rada.gov.ua/laws/show/n0004525-17/paran2#n2; Order of the President of Ukraine dated 14 May 2018 No. 126/2018, under which the Decision of the National Security and Defense Council dated 2 May 2018 'On Application and Lifting of Personal Special Economic and Other Restrictions (Sanctions)' was enacted. http://zakon2.rada.gov.ua/laws/show/n0006525-18.
127. According to para. 7 of the Decision of the National Security and Defense Council dated 27 August 2014 'On Measures for Improving State Military and Technical Policy', enacted by the Order of the President of Ukraine dated 27 August 2014 No. 691/2014. https://www.president.gov.ua/documents/6912014-17592, 'to take measures aimed at termination of export of military and dual-use goods to the Russian Federation for their further military use by the Russian Federation, except as concerns space-related technologies, exploited for research and peaceful usage of space within international space projects'.
128. Resolution of the Cabinet of Ministers of Ukraine dated 26 August 2015 No. 632 'On Termination of the Agreement Between the Government of Ukraine and the Government of the Russian Federation on Industrial, Scientific and Technical Cooperation of Defense Enterprises'. http://zakon5.rada.gov.ua/laws/show/632-2015-%D0%BF.
129. Ruling of the District Court of Kyiv City dated 31 May 2017 in Case No. 761/46285/16-Ц ('*Avia FED Service' JSC v. 'Artem' State Joint Stock Holding Company*). http://www.reyestr.court.gov.ua/Review/67114116, upheld by the ruling of the Kyiv City Court of Appeal dated 8 November 2017. http://www.reyestr.court.gov.ua/Review/70158103.

At the second round of case consideration, the Shevchenkivskyi District Court of Kyiv City analysed the definition of public policy, cited above, and concluded as follows:

> Given the above, an award can be considered as the one which is contrary to public policy, provided that, as a result of its enforcement, the following actions are taken: the ones, which are explicitly prohibited by law or are detrimental to sovereignty and security of the state; actions affecting the interest of large social groups and are incompatible with the principles of economic, political and legal order of the state; as well as the actions contrary to the fundamental constitutional rights of a human and a citizen.[130]

Further, the court established that the creditor entered into contract with the debtor to fulfil its obligations before the Russian defence enterprises, included in the sanction list. The contract itself was concluded under the Agreement between the Government of Ukraine and the Government of the Russian Federation on Industrial, Scientific and Technical Cooperation of Defense Enterprises.

In addition, the court stressed, 'in accordance with Resolution of the Verkhovna Rada of Ukraine No. 129-VII dated 27 January 2015, the Russian Federation was recognized as an aggressor state, in view of its support of massive terrorist attacks in the territory of Ukraine'. Given the above, Ukraine ceased all types of military and technical cooperation and cooperation in security with RF.

Furthermore, the court noted that sanctions applied against Russian counterparties under the arbitral award attributed to 'real and (or) potential threat to the national interest, national security, sovereignty and territorial integrity of Ukraine, as well as facilitation and support of terrorist activities, leading to occupation of the territory of Ukraine'.

Thus, the court concluded, that 'economic and financial relationship, resulting from y enforcement of the award, shall be considered contrary to the sanctions policy of Ukraine and set restrictions – prevention of capital outflows from Ukraine, as Article 4(4) of the Law of Ukraine "On Sanctions" provides. In addition, it is noteworthy, that under Article 3(1)(1) of the Law of Ukraine "On Sanctions" founding of the above companies through enforcement of the ICAC award on recovery of funds will be contrary to the sanctions policy of Ukraine aimed at prevention of capital outflows from Ukraine, facilitate terrorist activities and violate the interests of society and the state …

Hence, given the facts of the case, character of appropriate restrictions, freezing of assets and limitations of financial transactions in respect of "Russian Helicopters" OJSC, "Rostvertol" JSC, "Kazan Helicopter Plant" JSC and "Rosoboronproekt" JSC, the court concludes, that enforcement of the award of the ICAC at the CCI RF dated 3 October 2016 will be contrary to public policy of Ukraine in view of the sanctions

130. Ruling of the Shevchenkivskyi District Court of Kyiv City dated 31 May 2017 in Case No. 761/46285/16-Ц (*'Avia FED Service' JSC v. 'Artem' State Joint Stock Holding Company*). http://www.reyestr.court.gov.ua/ Review/67114116.

regime in respect of particular Russian defense enterprises and defense sector of the aggressor state'.[131]

On 8 November 2017, the above ruling of the Shevchenkivskyi District Court of Kyiv City dated 31 May 2017 was upheld by the Kyiv City Court of Appeal.[132] Further, 'Avia FED Service' JSC applied to the Supreme Court, claiming, in particular, that sanctions shall not be considered as measures aimed at defence of the rights and interests of the entities, engaged in foreign economic activities, the manner and the grounds for application of which are governed by a specific law; that the debtor failed to perform its obligations under the contract and to return advance payment for the goods; in addition, the debtor, in defence of its failure to return the funds, unreasonably referred to the Law of Ukraine 'On Sanctions' and claimed that case dealt with no financing of entities, included in sanctions list, rather with mere enforcement of the award on recovery of funds solely in favour of 'Avia FED Service' JSC.

On 5 September 2018, the Supreme Court partially granted the cassation appeal of 'Avia FED Service' JSC, reversed the rulings of lower courts and remitted the case for revision to the Shevchenkivskyi District Court of Kyiv City. Notably, the Supreme Court not only cited the definition of public policy, laid down in SCU Resolution No. 12, but also referred to the definition of international public policy, provided in the scientific and practical commentary to the Law of Ukraine 'On Private International Law', as well as to the Recommendations of the International Law Association of 2002[133] and to the thesis of S.M. Tepliuk, dedicated to public policy issue as a ground for refusal in recognition and enforcement of arbitral awards.[134] In addition, the court cited ECHR practice:

> International public policy of any state includes the fundamental principles of justice, morality, which a state intends to protect, even when it has no direct relation to the state itself; the rules, which secure the fundamental political, social and economic interests of a state (public policy rules); obligations of a state to fulfill its obligations before other states and international organizations. These are inalterable principles, demonstrating stability of international order: in particular, sovereignty of a state, non-interference into the domestic in internal affairs of a state, inviolability of its borders and non-violation of its integrity, etc. (…)
>
> Legal concept of public policy exists for the purpose of protecting the state from foreign arbitral awards, violating its effective fundamental principles of justice. These provisions are called for to establish legal barrier against the awards, rendered in violation of key procedural and substantive law principles, underlying

131. Ruling of the Shevchenkivskyi District Court of Kyiv City dated 31 May 2017 in Case No. 761/46285/16-Ц ('*Avia FED Service' JSC v. 'Artem' State Joint Stock Holding Company*). http://www.reyestr.court.gov.ua/ Review/67114116.
132. Ruling of the Kyiv City Court of Appeal dated 8 November 2017 in Case No. 761/46285/16-Ц ('*Avia FED Service' JSC v. 'Artem' State Joint Stock Holding Company*). http://www.reyestr.court.gov.ua/ Review/70158103.
133. Private International Law. Scientific and Practical Commentary to the Law (Dovger. Ed. Kh.: 'Odissei' LLC. 2008). p. 101.
134. Tepliuk S.M. Public Policy Reservation as a Ground for Refusal in Recognition and Enforcement of Foreign Arbitral Awards, Thesis, p. 140. http://idpnan.org.ua/files/2018/teplyuk-s.m.-zasterejennya-pro-publichniy-poryadok-yak-pidstava-dlya-vidmovi-u-viznanni-i-vikonanni-inozemnih- arbitrajnih-rishen-_d_.pdf.

> the public policy of a state. In addition, they are intended to prevent from the possibility of recognition and enforcement of awards arising from corruption or intolerable ignorance of the arbitrators.
>
> Ungrounded refusal in enforcement of the award, rendered by the International Commercial Arbitration Court, is equivalent to its blocking and will imply artificial regulatory barrier, which is unacceptable under international law. Blocking of enforcement will be contrary to the rules of international arbitration and will violate the legal rights of the creditors, granted in the arbitral award.
>
> Refusal in recognition and enforcement of arbitral award in the territory of Ukraine will be in violation of Article 1(1) of the First Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms, will infringe the creditor's right to the funds awarded (judgment in case Stran Greek Refineries and Stratis Andreadis v. Greece dated 9 December 1994, series A, No. 301-B) … .[135]

In light of the above, the Supreme Court reached a conclusion that violation of public policy can occur solely in cases when enforcement of foreign arbitral award is incompatible with public policy of Ukraine. Thus, 'the fact, that the creditor, "Avia FED Service" JSC, is a company established in the Russian Federation, recognized in Ukraine as an aggressor state, shall not justify failure to fulfill obligations under the contract'.[136]

In that case, the Supreme Court concluded that the debtor – 'Artem' State Joint Stock Holding Company – failed to provide the court with the relevant and admissible evidence to support the argument that enforcement of the award, rendered by ICAC at CCI RF, will threaten national security and economy of the state. In addition, the court stated that the contract at issue was concluded on 24 December 2014, i.e. 'after intervention of the Russian Federation in Crimea and after the outbreak of war in the East of Ukraine (April 2014)'. Therefore, the events, which occurred in Ukraine from February to March 2014, and recognition of RF as an aggressor state did not affect private law relations between 'Avia FED Service' JSC and 'Artem' State Joint Stock Holding Company and their obligations, under the contract.

The Supreme Court, having examined the facts of the case, concluded:

> The arbitral award shall not be considered contrary to public policy of Ukraine, its independence, integrity, sovereignty, inviolability, to the constitutional rights, freedoms, safeguards, since the award was rendered solely in relation to the debtor, as a separate legal entity and independent actor of economic relations, and shall affect solely the debtor.[137]

It is noteworthy that the above resolution of SC was included in the recent review of the court practice in cases on enforcement and challenge of international commercial

135. Resolution of the Supreme Court dated 5 September 2018 in Case No. 761/46285/16-Ц ('*Avia FED Service' JSC v. 'Artem' State Joint Stock Holding Company*). http://www.reyestr.court.gov.ua/ Review/76502952.
136. *Ibid.*
137. Resolution of the Supreme Court dated 5 September 2018 in Case No. 761/46285/16-Ц ('*Avia FED Service' JSC v. 'Artem' State Joint Stock Holding Company*). http://www.reyestr.court.gov.ua/ Review/76502952.

awards dated 10 June 2019,[138] as the one reflecting the position of the Supreme Court, that the mere fact of establishment of the creditor in RF 'shall not be a ground to grant application for refusal in recognition and enforcement of the ICAC award in Ukraine'.[139]

The Shevchenkivskyi District Court of Kyiv City, having revised the case, diametrically changed its positions and rendered the ruling dated 6 December 2018, according to which the creditor's application for enforcement of the award of ICAC at CCI RF was granted.[140]

Moreover, the Shevchenkivskyi District Court of Kyiv City not only replicated the above conclusions of the Supreme Court but also dismissed the new arguments of the debtor that at the moment of case consideration[141] 'Avia FED Service' JSC was included in the sanctions list and imposed to the following three-year restriction: (1) freezing of assets; (2) restrictions of commercial transactions; (3) prevention of capital outflows from the territory of Ukraine; (4) suspensions of performing economic and financial obligations.

The court stated that the debtor's arguments cannot be taken into consideration, since 'the funds to be repaid are recovered under the arbitral award, which is subject to enforcement. These funds shall not be considered as the creditor's assets. Suspension of financial obligations can be applied at the stage of enforcement of the award and shall not be a ground for refusal in enforcement'.[142]

'Artem' State Joint Stock Holding Company challenged the ruling of the Shevchenkivskyi District Court of Kyiv City in the Kyiv Court of Appeal,[143] which dismissed the debtor's appeal in its ruling dated 12 June 2019.[144] As of the moment, when the present book was drafted, in the Unified State Register of Court Judgments there was no information as regards further appeals in this case.

Noteworthy, the Kyiv Court of Appeal analysed the new provisions of the Law of Ukraine 'On Some Issues of Indebtedness of the Defense Industry Enterprises –

138. Review of the court practice of the Cassation Civil Court within the Supreme Court in cases on enforcement and challenge of awards in international commercial arbitration, p. 19. https://supreme.court.gov.ua/userfiles/media/Oglyad_Mkas.pdf.
139. *Ibid.*, p. 19.
140. Ruling of the Shevchenkivskyi District Court of Kyiv City dated 6 December 2018 in Case No. 761/46285/16-Ц ('*Avia FED Service' JSC v. 'Artem' State Joint Stock Holding Company*). http://www.reyestr.court.gov.ua/Review/78568152.
141. Paragraph 746 of Appendix No. to the Decision of the National Security and Defense Council dated 2 May 2018 'On Application and Lifting of Personal Special Economic and Other Restrictions (Sanctions)'. http://zakon2.rada.gov.ua/laws/ show/n0006525-18, enacted by the Order of the President of Ukraine dated 14 May 2018, No. 126/2018. https://ips.ligazakon .net/document/view/ U126_18?ed = 2018_05_14.
142. Ruling of the Shevchenkivskyi District Court of Kyiv City dated 6 December 2018 in Case No. 761/46285/16-Ц ('*Avia FED Service' JSC v. 'Artem' State Joint Stock Holding Company*). http://www.reyestr.court.gov.ua/Review/78568152.
143. The new court established in 2018 within the large judicial reform. http://www.apcourtkiev.gov.ua/?p = 4381&lang = ru.
144. Resolution of the Kyiv Court of Appeal dated 12 June 2019 in Case No. 761/46285/16-Ц ('*Avia FED Service' JSC v. 'Artem' State Joint Stock Holding Company*). http://www.reyestr.court.gov .ua/ Review/82444874.

Members of "Ukroboronprom" State Concern and Ensuring Their Stable Development',[145] which lay down prohibition to enforce the judgments on debt recovery from the enterprises of military and industrial complex, included in the list of state-owned companies of strategic importance for the economy and security of the state, in favour of any legal entity established in the aggressor state and/or occupying state, or any legal entity with foreign investments, or foreign company of the aggressor state and/or occupying state.[146]

The list of such companies was approved in the Resolution of the Cabinet of Ministers of Ukraine in June 2015,[147] and 'Artem' State Joint Stock Holding Company initially was among those companies.

As a result of comprehensive interpretation of the above provisions and the rules of the Law of Ukraine 'On Enforcement Proceedings', the Kyiv Court of Appeal concluded that the facts of the case can be 'a ground solely for suspension of enforcement actions after the award … was granted leave for enforcement'. Thus, the court found no justification to refuse recognition and enforcement of the award, rendered by ICAC at CCI RF, in the territory of Ukraine.

It is worth mentioning that the court did not raise the question of applying the new provisions of Article 81 of the Law of Ukraine 'On Private International Law', introduced on 12 July 2018, pursuant to Law No. 2508-VIII, which for some reason gone unnoticed by the arbitration community of Ukraine:[148]

> The foreign courts' judgments, rendered in cases on recovery of indebtedness from the enterprises of military and industrial complex, included in the list of state-owned companies of strategic importance for the economy and security of the state, in favour of any legal entity established in the aggressor state and/or occupying State, or any legal entity with foreign investments, or foreign company of the aggressor state and/or occupying state, shall not be recognized and enforced in Ukraine.[149]

145. Amendments to the Law of Ukraine 'On Some Issues of Indebtedness of the Enterprises of Military and Defense Complex – Members of "Ukroboronprom" State Concern Before the Aggressor State and/or Occupying State and Ensuring Their Stable Development', introduced with the Law of Ukraine 'On Amendments to the Laws of Ukraine as Regards Addressing Some Issues of Indebtedness of the Enterprises of Military and Defense Complex – Members of "Ukroboronprom" State Concern Before the Aggressor State and/or Occupying State and Ensuring Their Stable Development' No. 2508 – VIII dated 12 July 2018. https://zakon.rada.gov.ua/laws/show/2508-19.
146. Article 21(1) of the Law of Ukraine 'On Some Issues of Indebtedness of the Defence Industry Enterprises – Members of 'Ukroboronprom' State Concern and Ensuring Their Stable Development' dated 6 September 2012 No. 5213-VI. https://zakon.rada.gov.ua/laws/show/5213-17.
147. Resolution of the Cabinet of Ministers of Ukraine No. 83 dated 4 March 2015 'On Approval of the List of State-Owned Companies of Strategic Importance for Economy and Security of State' dated 4 March 2015. https://zakon.rada.gov.ua/laws/show/83-2015-%D0%BF.
148. Law of Ukraine dated 12 July 2018 No. 2508-VIII 'On Amendments to the Laws of Ukraine as Regards Addressing Some Issues of Indebtedness of the Enterprises of Military and Defense Complex – Members of "Ukroboronprom" State Concern Before the Aggressor State and/or Occupying State and Ensuring Their Stable Development'. https://zakon.rada.gov.ua/laws/show/2508-19.
149. Article 81(2) of the Law of Ukraine 'On Private International Law'.

JKX Oil & Gas PLC at al v. the State of Ukraine

In *JKX Oil & Gas PLC at al v. the State of Ukraine*, the debtor referred, *inter alia*, to public policy as a ground for refusal in recognition and enforcement of the arbitral award. Eventually, this case negatively affected the long-term practice of the courts of Ukraine in applying Article V(1)(b) of the Convention.

The dispute with foreign investors arose due to the fact that Ukraine raised the rent rates for use of subsoil for natural gas production by the legal entities from 28% to 55%. Under the emergency arbitrator award, Ukraine was bound, *inter alia*, 'to apply to "Poltava Gas and Oil Plant" JV the rent rates for use of subsoil for natural gas production, effective until 31 July 2014, i. e. 28%'.

In addition to the creditor's violations of arbitration procedure and failure to give to the debtor proper notice of the appointment of arbitrator, the debtor referred to the fact that enforcement of the arbitral award 'would be contrary to the public policy of Ukraine and threaten its interests, since the types and amounts of taxes can be established solely by the Code, while alterations of the amount of payments will lead to changes in the rent rates for use of subsoil for natural gas production, what in its turn will result in deterioration of the economic status of the state'.[150]

The above arguments of the debtor were dismissed by the Pecherskyi District Court of Kyiv City in its ruling dated 8 June 2015:

> The court dismisses the arguments of the Ministry of Justice of Ukraine that the emergency arbitrator award violates the public policy and threatens the interests of Ukraine, since in this particular case the award is aimed at prevention of the violations of the claimants' interests, as well as prevention of irreversible effects, establishes no other rules, except as those already effective in the territory of Ukraine and relating to the claimants.

However, the Kyiv City Court of Appeal in its ruling dated 17 September 2015[151] reached a diametrically different conclusion, reversed the ruling of the first-instance court and dismissed the application for recognition and enforcement of the award, rendered by emergency arbitrator:

> The rendered award, contrary to the rules of the Tax Code of Ukraine, will lead to changes in the rent rates for use of subsoil for natural gas production by legal entity – 'Poltava Gas and Oil Plant' JV – from 28% to 55%.
>
> Thus, empowering the courts to alter the taxes / mandatory payments, in breach of the rules, laid down in the Code, would constitute a violation of the fundamental principles of imposition of taxes, therefore recognition and enforcement of the arbitral award is contrary to the public policy of Ukraine.

150. Ruling of the Pecherskyi District Court of Appeal dated 8 June 2015 in Case No. 757/5777/15-Ц (*JKX OIL & GAS PLC, POLTAVA GAS B.V. and 'Poltava Gas and Oil Company' JV v. the State of Ukraine represented by the Ministry of Justice of Ukraine*). http://www.reyestr.court.gov.ua/Review/45009594.

151. Ruling of the Kyiv City Court of Appeal dated 17 September 2015 in Case No. 757/5777/15-Ц (*JKX OIL & GAS PLC, POLTAVA GAS B.V. and 'Poltava Gas and Oil Company' JV v. the State of Ukraine represented by the Ministry of Justice of Ukraine*). http://www.reyestr.court.gov.ua/Review/51814205.

> Moreover, as a result of the given changes in the rent rates, in 2015 the state budget of Ukraine will suffer losses.

On 24 February 2016, HSCU reversed the ruling of the Court of Appeal and remitted the case for revision.

On 17 May 2016, the Kyiv City Court of Appeal rendered the new ruling, in which it upheld the conclusion of the first-instance court:

> Therefore, the first-instance court properly established, that there were no grounds to refuse in granting the application … the panel of judges concludes, that … the emergency arbitrator award affects neither the rights and obligations of the parties to the dispute in question, nor the changes in the tax system in Ukraine.
>
> Representatives of the Ministry of Justice of Ukraine failed to prove the fact, that the arbitral award dated 14 January 2015 violates the public policy of Ukraine, as well as the fact, that recognition of the award in the territory of Ukraine will alter the tax system of Ukraine.
>
> Moreover, it is worth mentioning, that the merits of the case relate neither to the rates, nor to the order of charging the rent in the territory of Ukraine.
>
> Given the above, the panel of judges considers, that there are no grounds, specified in Article 396 of the CPC of Ukraine, to dismiss the application.[152]

However, HSCU in its ruling dated 2 November 2016 reversed the ruling of the appeal court, having stated that 'it cannot consent with the conclusion of the court of appeal in whole',[153] and remitted the case to the Kyiv City Court of Appeal for revision.

At the third and last round of case consideration, the Kyiv City Court of Appeal reached its previous conclusion, i.e., that the public policy of Ukraine was violated. In its ruling dated 21 December 2016, the court established:

> Relations, arising out imposition of taxes and duties, are governed by the Tax Code of Ukraine; paragraph 1.1 of Article 1 of the present Code establishes an exhaustive list of taxes and duties charged in Ukraine, the manner of their administration, the taxpayers, their rights and obligations, the competence of supervisory authorities, the powers and obligations of the officials during the conduct of tax control, as well as liability for violation of tax legislation.
>
> Under paragraph 7.3 of the Tax Code of Ukraine, any issues relating to imposition of taxes, shall be governed by the present Code and cannot be set or altered with other laws of Ukraine, except as concerns the laws, laying down exceptional provisions on amending the present Code and (or) provisions, establishing liability for violation of tax legislation.
>
> The grounds for granting tax privileges and the manner of their application are established solely by the Tax Code of Ukraine.

152. Ruling of the Kyiv City Court of Appeal dated 17 May 2016 in Case No. 757/5777/15-Ц (*JKX OIL & GAS PLC, POLTAVA GAS B.V. and 'Poltava Gas and Oil Company' JV v. the State of Ukraine represented by the Ministry of Justice of Ukraine*). http://www.reyestr.court.gov.ua/Review/57985816.
153. Ruling of the Supreme Court of Ukraine dated 2 November 2016 in Case No. 757/5777/15-Ц (*JKX OIL & GAS PLC, POLTAVA GAS B.V. and 'Poltava Gas and Oil Company' JV v. the State of Ukraine represented by the Ministry of Justice of Ukraine*). http://www.reyestr.court.gov.ua/Review/62524805.

> The arbitral award, rendered in violation of the Tax Code of Ukraine will essentially lead to alteration of the rent rates for use of subsoil for natural gas production by legal entity – 'Poltava Gas and Oil Plant' JV – from 55% to 28%.
>
> In light of the above, empowering the courts to alter the taxes / mandatory payments, in breach of the rules, laid down in the Code, would constitute a violation of the fundamental principles of imposition of taxes, therefore recognition and enforcement of the arbitral award is contrary to the public policy of Ukraine.[154]

There was no sense to further challenge the above ruling, since in February 2017 final arbitral award was rendered in the case.[155]

Röhren- und Pumpenwerk Bauer Gesellschaft m.b.H. v. Company 'Rise' PJSC

The case pertained to recognition and enforcement of VIAC award dated 1 September 2011 in the territory of Ukraine.

The Holosiivskyi District Court of Kyiv City in its ruling dated 30 April 2013 dismissed the application for recognition and enforcement of arbitral award on the public policy ground: 'It follows from the award, rendered by the Vienna International Arbitral Centre of the Federal Economic Chamber of Austria, that the arbitrator applied the law, which was contrary to the terms of the arbitration agreement laid down in clause 11.1 of the Contract.'[156]

Having analysed the rules of Article V(2)(b) of the Convention along with the definition of public policy set in SCU Resolution No. 12, the court concluded as follows: '… recognition and enforcement of arbitral award is contrary to the public policy, since the Contract explicitly provides for the law which is subject to application'.[157]

Ultimately, the above ruling was reversed. Under the ruling of the Holosiivskyi District Court of Kyiv City dated 24 June 2015, upheld by the Kyiv City Court of Appeal on 6 October 2015 and by HSCU on 23 December 2015, recognition and enforcement of VIAC award was granted.[158]

Setting Aside the Arbitral Awards

Setting aside of international commercial arbitration awards, rendered in the territory of Ukraine, is regulated by Article 34 of ICA Law and section VIII of CPC. Both legal acts are in line with the approach, established in UNCITRAL Model Law.

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154. Ruling of the Kyiv City Court of Appeal dated 21 December 2016 in Case No. 757/5777/15-Ц (*JKX OIL & GAS PLC, POLTAVA GAS B.V. and 'Poltava Gas and Oil Company' JV v. the State of Ukraine represented by the Ministry of Justice of Ukraine*). http://www.reyestr.court.gov.ua/Review/63837890.
155. Press release of JKX Oil & Gas plc dated 7 February 2017. http://www.jkx.co.uk/~/media/Files/J/JKX/press-release/2017/International%20Arbitration%20FINAL.pdf.
156. Ruling of the Holosiivskyi District Court of Kyiv City dated 30 April 2013 in Case No. 2601/22356/12 (*Röhren- und Pumpenwerk Bauer Gesellschaft m.b.H. v. Company 'Rise' PJSC*). http://www.reyestr.court.gov.ua/Review/31011322.
157. *Ibid.*
158. Ruling of HSCU dated 23 December 2015 in Case No. 6-31147ск15 (*Röhren- und Pumpenwerk Bauer Gesellschaft m.b.H. v. Company 'Rise' PJSC*). http://www.reyestr.court.gov.ua/Review/54763178#.

As regards international rules governing the issue in question, Ukraine is a party to the European Convention.

As a result of the comprehensive procedural reform of 2017, the number of court instances competent to consider the applications for setting the arbitral awards aside decreased from four to two: the Court of Appeal at the place of arbitration and the Supreme Court.

The application for setting an arbitral award aside can be filed solely by a party to the arbitration proceedings within three months from the date, when it received the arbitral award in question (Article 454 of CPC and Article 34 of ICA Law).

The application, filed on expiry of the above time limit, shall be returned.

If the application refers to such grounds for setting the arbitral award aside, which are not provided for in the Ukrainian legislation and appropriate treaties, the court shall refuse in commencement of the court proceedings and render the relevant ruling.

The application shall be filed in writing and considered by a sole judge, in the court hearing with notification of the parties, within 30 days from the date, when the court received the application in question.

The court can, prior to considering the case upon application by the parties, or ex officio, request from arbitration institution necessary case files pertaining to the grounds for setting the arbitral award aside. Following consideration of the case, the case files shall be returned to the arbitration institution.

Article 457(7) of CPC establishes the procedure for implementing the provisions of Article 34(4) of ICA Law, under which, upon the motion of one of the parties to arbitration proceedings, and if the motion in question is recognized as justified by the court, the latter can suspend setting aside proceedings for the established period, in order to recommence arbitration proceedings or to take other actions.

The provisions of Article 457(8) of CPC find their mirror reflection in Article 482(3) of CPC. The above provisions provide that within the proceedings on setting aside the arbitral award any party shall have the right to request the court to consider the application for enforcement of the given award in a joint trial.

Grounds for Setting Aside

The grounds for setting aside arbitral awards, rendered in accordance with ICA Law, are established in Article 34 of ICA Law and Article 459 of CPC, which are a verbatim adoption of Article 34 of UNCITRAL Model Law and, hence, of Article V of the Convention.

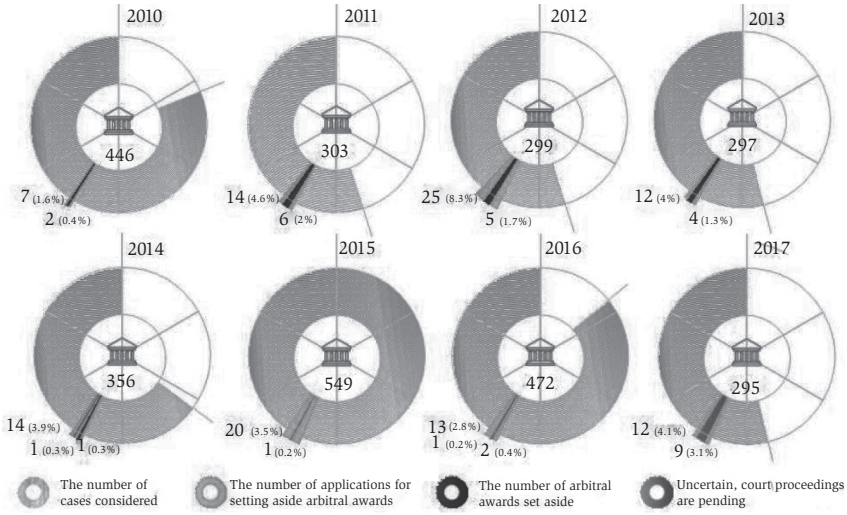
The mere difference which is laid down in the Model Law is that there are different approaches to the application of public policy ground: recognition and enforcement of arbitral award can be refused, if such recognition and enforcement would be contrary to public policy, at the same time setting aside of arbitral award can take place, if the award itself is contrary to the public policy.

The grounds for setting aside of domestic arbitral awards, rendered in accordance with the Law on Domestic Arbitration Courts, substantially differ from those established in the Model Law, and would not be further analysed in this book.

Statistics

The statistics of setting aside of arbitral awards, rendered in accordance with ICA Law, is rather positive. One of the reasons is that challenge of arbitral awards is quite rare.

According to the statistics, provided by ICAC at the Ukrainian CCI, in 2017 'on average 4% of the awards, rendered by the ICAC at the Ukrainian CCI, were challenged, of which only 1% were set aside'.[159] In general, the relevant statistics of ICAC for the period 2010-2017 is as follows:[160]



Given, that ICAC is the sole arbitration institution in Ukraine (except as concerns the maritime disputes, and the disputes relating to financial restructuring), which is entitled to administrate the disputes in accordance with ICA Law, the above statistics reflects the entire situation in Ukraine.

As of the moment, when the present book was drafted, according to the Unified Register of Court Judgments, within 2017-2018 the Supreme Court set aside only one arbitral award, rendered by ICAC at the Ukrainian CCI on 15 November 2016 in *'LG Electronics Ukraine' Foreign Investment Enterprise v. Ant Yapi Sanayi ve Ticaret Anonim Shirketi*. In addition, according to the Register, there are currently 12 applications for setting aside, pending before the courts of Ukraine.

The approaches of Ukrainian courts in applying particular grounds for setting aside, established in Article 34 of ICA Law and Article 459 of CPC, are described in further detail.

159. Statistical report *'Operation of the International Commercial Arbitration Court at the Ukrainian CCI in 2017'*. p. 11. https://icac.org.ua/wp-content/uploads/Otchet-2017.pdf.
160. Statistical report *'Operation of the International Commercial Arbitration Court at the Ukrainian CCI in 2017'*. p. 12. https://icac.org.ua/wp-content/uploads/Otchet-2017.pdf.

Incapacity of a Party and Invalidity of Arbitration Agreement

This ground for setting aside of arbitral awards is established in Article 34(2)(1)(1) of ICA Law and Article 459(2)(1)(a) of CPC.

'LG Electronics Ukraine' Foreign Investment Enterprise v. Ant Yapi Sanayi ve Ticaret Anonim Shirketi

One of the most remarkable cases in this regard (especially amidst the comprehensive procedural reform) was the one on setting aside of arbitral award, rendered by ICAC at the Ukrainian CCI dated 15 November 2016 in Case No. 271ут/2016, initiated by 'LG Electronics Ukraine' Foreign Investment Enterprise against Ant Yapi Sanayi ve Ticaret Anonim Shirketi. Arbitration agreement, under which the case was submitted to arbitration, was incorporated into the main contract through signing an additional agreement. The contract was concluded in two languages; however, the Russian version of the agreement was not signed. Within the arbitration proceedings, respondent raised no objections in this regard and filed a counterclaim.

Having lost the arbitration, Ant Yapi applied to the Shevchenkivskyi District Court of Kyiv City to set aside the arbitral award. However, its application, based on the public policy ground, was dismissed.[161]

Afterwards, Ant Yapi filed the appeal claim, this time referring to invalidity of arbitration agreement. The new argument was supported by the Kyiv City Court of Appeal, which in its ruling dated 10 August 2017 reversed the ruling of the Shevchenkivskyi District Court of Kyiv City and set aside the award, rendered by ICAC.[162]

Taking into account the potential effect of such an approach on other cases, the Ukrainian Arbitration Association filed its Amicus Curiae Brief to HSCU,[163] in which it presented the doctrine and foreign courts practice, in particular, in relation to waiver of the right to objection (including objection to validity of the arbitration agreement and, accordingly, to the lack of jurisdiction of the arbitral tribunal), if the relevant objections were not promptly raised within the arbitration proceedings, as well as in relation to conclusion of arbitration agreement through exchange of the statement of claim and defence.

Unfortunately, HSCU failed to heed any of the presented arguments, as well as failed to follow the world practice, having upheld the position of the appeal court. In its ruling dated 9 November 2017, HSCU stated:

161. Ruling of the Shevchenkivskyi District Court of Kyiv City dated 8 May 2017 in Case No. 761/605/17 (*'LG Electronics Ukraine' Foreign Investment Enterprise v. Ant Yapi Sanayi ve Ticaret Anonim Shirketi*). http://reyestr.court.gov.ua/Review/66731789.
162. Ruling of the Kyiv City Court of Appeal dated 10 August 2017 in Case No. 761/605/17 (*'LG Electronics Ukraine' Foreign Investment Enterprise v. Ant Yapi Sanayi ve Ticaret Anonim Shirketi*). http://reyestr.court.gov.ua/Review/68364323.
163. Full text of the Amicus Curiae Brief of the Ukrainian Arbitration Association of 26 October 2017 is published on the website of the Association. http://arbitration.kiev.ua/Uploads/Admin/20171026%20-%20LG%20Ant%20Yapi%20Amici%20 Curiae%20Brief.pdf.

> The additional agreement dated 7 October 2015 contains no signatures of the parties in its Russian version, which, according to the terms of the agreement, shall prevail over the version in English.
>
> Given the above, the panel of judges upholds the position of the court of appeal on invalidity of the arbitration clause, laid down in the additional agreement dated 7 October 2015, what in its turn is a ground for setting the award aside, under Article 34(2)(1) of the Law of Ukraine 'On International Commercial Arbitration'.[164]

The new Supreme Court was the last hope for the arbitration community.[165] To disappointment, the Grand Chamber of the Supreme Court in its ruling dated 8 May 2018 upheld the position of the lower courts.[166] In addition, the Supreme Court concluded that claimant failed to present controversial practice of the cassation courts in this regard and dismissed its application. As a result, the Supreme Court put an end to the case and set ICAC award aside.

'Jals Energy AB' LLC v. 'Pivdenagropererobka' Agricultural LLC

The case pertained to setting aside of arbitral award, rendered by ICAC at the Ukrainian CCI on 13 June 2017 in Case No. 462y/2016, initiated upon Jals Energy AB against 'Pivdenagropererobka' Agricultural LLC.

Having lost the arbitration, Ukrainian debtor applied to the Shevchenkivskyi District Court of Kyiv City to set aside the arbitral award, referring to the fact that the contract was signed by the person (director) not authorized thereto, without consent of the General Members' Meeting, as well as to the invalidity of the arbitration clause and the contract as a whole.

On 22 December 2017, the court granted the debtor's application and set ICAC award aside,[167] referring to the judgment of the Beliayevskyi District Court of Odessa Region dated 12 December 2017, according to which 'the legal fact, that as of the moment when the contract No. 40/05/15 was concluded between "Pivdenagropererobka" Agricultural LLC and Jals Energy AB on 10 May 2015, executive body – Director – … lacked authority to represent the legal entity, and such authority was limited'.

The creditor under the arbitral award applied to the appeal court, grounding its claim on the fact that according to Article 92 of CPC limitation of authority to represent legal entity in relations with third persons has no legal effect, except in cases, where the legal entity proves the fact that a third person was or could not have been aware of such limitations.

164. Ruling of HSCU dated 9 November 2017 in Case No. 761/605/17 ('*LG Electronics Ukraine' Foreign Investment Enterprise v. Ant Yapi Sanayi ve Ticaret Anonim Shirketi*). http://reyestr.court.gov.ua/Review/70416292.
165. The Supreme Court is the highest court within the court system of Ukraine. The Supreme Court was established during the judicial reform and began its operation on 15 December 2017.
166. Ruling of the Supreme Court dated 8 May 2018 in Case No. 761/605/17('*LG Electronics Ukraine' Foreign Investment Enterprise v. Ant Yapi Sanayi ve Ticaret Anonim Shirketi*). http://reyestr.court.gov.ua/Review/74022051.
167. Ruling of the Shevchenkivskyi District Court of Kyiv City dated 22 December 2017 in Case No. 761/28906/17 ('*Jals Energy AB' LLC v. 'Pivdenagropererobka' Agricultural LLC*). http://reyestr.court.gov.ua/Review/71480156.

On 24 October 2018, the Kyiv Court of Appeal, having established, that at the moment of contract conclusion 'Jals Energy AB' LLC could not have been aware of the limitations of the director's authority to sign the contracts, since the latter failed to inform of this fact (in fact, within the course of negotiations, he stressed that he is the founder and the owner of the company and has decisive influence on the operation of the company), reversed the ruling of the first-instance court, and dismissed the application for setting the arbitral award aside.[168]

A Party Was Not Given Proper Notice or Was Otherwise Unable to Present the Case

This ground for setting aside of arbitral awards is established in Article 34(2)(1)(2) of ICA Law and Article 459(2)(1)(b) of CPC.

Widrig Finanz & Beteiliguns-Aktiengesellschaft v. 'K.O.T.' SPE

The case pertained to setting aside the award, rendered by ICAC at the Ukrainian CCI on 16 February 2017 in Case No. 385y/2016, initiated by Widrig Finanz & Beteiliguns-Aktiengesellschaft against 'K.O.T.' SPE.

The debtor filed an application for setting aside the arbitral award to the Shevchenkivskyi District Court of Kyiv City, alleging that he did not receive the documents sent by the arbitral tribunal, and thus was unable to present his case. However, the tribunal considered the case, without participation of the debtor, in violation of Article 34 of ICA Law. In light of the above, the debtor requested to set aside the award, rendered in relation to the party, which was not given proper notice. On 15 January 2018, the court dismissed the application, having concluded:

> The court established, that the ICAC at the Ukrainian CCI gave proper notice of the date and time of the hearing to 'K. O. T.' SPE, as specified in the arbitral award. The debtor's awareness of the arbitration proceedings is evidenced by the fact, that the latter filed a plea regarding jurisdiction of the ICAC at the Ukrainian CCI to consider the dispute in question, as well as by the fact that it received and was served the letters dated 3 January 2017 and 30 January 2017.
>
> The above facts refute the debtor's position on failure to give proper notice of the arbitration proceedings, and thus, there are no grounds to set aside the arbitral award, since the ICAC at the Ukrainian CCI complied with the provisions of Article 34(2)(2) of the Law of Ukraine 'On International Commercial Arbitration'.[169]

However, on 12 April 2018, the Kyiv City Court of Appeal reversed the ruling of the first-instance court and set ICAC award aside.

The court stressed that all the correspondence on the case was sent to the debtor's legal address, albeit the fact that its representative filed appropriate request to make

168. Ruling of the Kyiv Court of Appeal dated 24 October 2018 in Case No. 761/28906/17 (*'Jals Energy AB' LLC v. 'Pivdenagropererobka' Agricultural LLC*). http://reyestr.court.gov.ua/Review/77413779.
169. Ruling of the Shevchenkivskyi District Court of Kyiv City dated 15 January 2018 in Case No. 761/19354/17 (*Widrig Finanz & Beteiliguns-Aktiengesellschaft v. 'K.O.T.' SPE*). http://reyestr.court.gov.ua/Review/71851218.

dispatches to his own address. Given the above, the court reached the following conclusion:

> The court considers, that the ICAC neglected the request of representative of 'K. O. T.' SPE … to dispatch the correspondence at the address … and thus deprived the debtor of the opportunity to promptly file its statement of defense to the arbitral tribunal, taking into account the time for dispatch and preparation of the statement.
>
> Therefore, it is wrong to assume that 'K. O. T.' SPE was aware of the arbitration proceedings, and accordingly, that there are no grounds to set aside the arbitral award, which violates the right of 'K. O. T.' SPE to present its case.[170]

Widrig Finanz & Beteiliguns-Aktiengesellschaft filed a cassation appeal to the Supreme Court, claiming, *inter alia*, that the debtor was duly notified of all the stages of arbitration proceedings and of the appointment of arbitrators; the documents were served to the debtor in advance, as confirmed by the case files. The Supreme Court in its ruling dated 13 March 2019 granted the cassation appeal, reversed the ruling of the Kyiv City Court of Appeal dated 12 April 2018 and upheld the ruling of the Shevchenkivskyi District Court of Kyiv City dated 15 January 2018. The reasoning of the court was as follows:

> The debtor's awareness of the date and time of the hearing and of the requirement to be present there is evidenced by the fact, that the debtor was served additional clarifications and filed respective objections against jurisdiction of the ICAC to consider the dispute.[171]

The ruling of the Supreme Court was included in SC review of the court practice in cases on enforcement and challenge of awards in international commercial arbitration.[172]

The Award Contains Decisions on Matters Beyond the Scope of the Submission to Arbitration

This ground for setting aside of arbitral awards is established in Article 34(2)(1)(3) of ICA Law and Article 459(2)(1)(c) of CPC.

Setting aside of arbitral awards on the ground in question is rather rare, and sometimes it is referred to in such cases, where it seems to be impossible.

170. Ruling of the Kyiv City Court of Appeal dated 12 April 2018 in Case No. 761/19354/17 (*Widrig Finanz & Beteiliguns-Aktiengesellschaft v. 'K.O.T.' SPE*). http://reyestr.court.gov.ua/Review/73517648.
171. Ruling of the Supreme Court dated 13 March 2019 in Case No. 761/19354/17 (*Widrig Finanz & Beteiliguns-Aktiengesellschaft v. 'K.O.T.' SPE*). http://reyestr.court.gov.ua/Review/80487649.
172. Review of the court practice of the Cassation Civil Court within the Supreme Court in cases on enforcement and challenge of awards in international commercial arbitration, p. 23. https://supreme.court.gov.ua/userfiles/media/Oglyad_Mkas.pdf.

Arcelormittal Ambalaj Celigi Sanayi ve Ticaret Anonim Sirketi v. Manufacturing-Commercial Enterprise 'Argo' LLC

On of such cases is the one on setting aside the award, rendered by ICAC at the Ukrainian CCI on 20 September 2009 in Case AC No. 201y/2008, initiated by Turkish company Arcelormittal Ambalaj Celigi Sanayi ve Ticaret Anonim Sirketi against Ukrainian Manufacturing-Commercial Enterprise 'Argo' LLC, as well as on setting aside ICAC resolution dated 15 February 2011 in Case AC No. 202y/2011 between the same parties and on the same subject matter.

The contract at issue had defective arbitration clause, which contained different discrepancies in English and Ukrainian versions relating to the name of arbitration institution and the arbitration rules:

8. Arbitration	*8. Арбітраж*
8.1 All disputes arisen out of the present Contract or in connection with the present Contract shall be settled through negotiations between the Parties.	*8.1. Всі спірні питання, що виникають з даного Контракту або у зв'язку з ним, повинні вирішуватись шляхом переговорів між Сторонами.*
8.2 If no agreement is reached, such disagreement will be submitted for consideration by ***the International Commercial Arbitration Court of the Chamber of Commerce and Industry of Ukraine****. The decision of the Court of Arbitration shall be final and binding upon both Parties.*	*8.2 Якщо Сторони не можуть прийти до згоди, то розбіжності підлягають розгляду в* ***Міжнародному Комерційному арбітражному Суді при Торгово-промисловій палаті м. Київ****. Рішення Арбітражного суду є обов'язковим для обох Сторін*
8.3 The parties have agreed that during consideration and resolution of dispute the Rules of the ***International Commercial Arbitration Court*** *will be applied* ***at Chamber of Commerce and Industry of Ukraine, Kiev****.*	*8.3. Сторони погодились, що в процесі розгляду та вирішення спірних питань буде застосовуватись Регламент* ***Міжнародного Комерційного суду при Торгово-Промисловій палаті України, м. Київ****.*

As described above, the Ukrainian version of the contract, which was further analysed by the courts of Ukraine, contained the following name of the arbitration institution 'Chamber of Commerce and Industry *Kyiv City*' instead of 'Chamber of Commerce and Industry of Ukraine'. Though there are no words 'Kyiv City' contained in the official name of the chamber, it is in fact situated in Kyiv.

Within the arbitration proceedings in Case AC No. 201y/2008, respondent made no statements in this regard, though contested the competence of arbitral tribunal, referring to failure to comply with the established time limits, as well as with the procedure of pre-arbitration settlement of the dispute.

After the first arbitration had terminated, Ukrainian debtor applied to the Shevchenkivskyi District Court of Kyiv City to set aside the arbitral award, arguing that the dispute was considered by the wrong arbitration institute and that the arbitral tribunal lacked powers to interpret the arbitration agreement. The court granted the

debtor's application and set ICAC award aside, having concluded that the award contained decisions on matters beyond the scope of the submission to arbitration, since: (1) in clause 8.2 of the Ukrainian version of the contract, reference was made to the arbitration institution, which did not exist; (2) arbitration clause did not contain agreement of the parties in relation to interpretation of the contract (i.e., the disputes relating to interpretation of the contract did not fall within the scope of arbitration agreement); (3) the arbitral tribunal interpreted the arbitration clause without being authorized thereto by the parties.

The Kyiv City Court of Appeal and the Supreme Court of Ukraine upheld the ruling of the Shevchenkivskyi District Court of Kyiv City.[173]

Given that the arbitration clause war recognized invalid, Arcelormittal Ambalaj Celigi Sanayi ve Ticaret Anonim Sirketin applied to ICAC at the Ukrainian CCI to set aside the arbitral award. This time, the debtor claimed that the tribunal lacked jurisdiction to consider the dispute. Both parties requested the tribunal to resolve the jurisdictional issue on a preliminary basis. As a result, on 15 February 2011 the tribunal rendered resolution in Case AC No. 202y/2011, having reached the conclusion that it did have jurisdiction to consider the dispute.

The debtor challenged the above resolution,[174] and despite other procedural specificities of the second arbitration, the Shevchenkivskyi District Court of Kyiv City reversed the resolution, having just copied the reasoning of the courts in the first case. In view of Article 16(3) of ICA Law, the ruling of the Shevchenkivskyi District Court of Kyiv City was not subject to appeal.

As a result, the arbitral tribunal terminated the proceedings without rendering any award on merits.

Such negative results of this case were one of the reasons for ICAC to change its model arbitration clause through covering the disputes relating to the contract interpretation.

In addition, such an approach of the courts of Ukraine was the cause for the Ukrainian Arbitration Association to propose improvement of Ukrainian legislation on arbitration to interpret any deficiencies in arbitration clause in favour of its validity, operability and capability of being performed.[175] Eventually, the proposal was accepted, and the relevant provisions were incorporated in Article 22(3) of CoPC and Article 21(2) of CPC.

173. Ruling of SCU dated 13 October 2010 in Case No. 6-5668св10 (*Arcelormittal Ambalaj Celigi Sanayi ve Ticaret Anonim Sirketi v. Manufacturing-Commercial Enterprise 'Argo' LLC*). http://reyestr.court.gov.ua/Review/11754022.
174. Ruling of the Shevchenkiskyi District Court of Kyiv City dated 7 March 2012 in Case No. 2610/2760/2012 (*Arcelormittal Ambalaj Celigi Sanayi ve Ticaret Anonim Sirketi v. Manufacturing-Commercial Enterprise 'Argo' LLC*). http://www.reyestr.court.gov.ua/Review/21331381#.
175. Proposals of the Ukrainian Arbitration Association (Part I). http://arbitration.kiev.ua/Uploads/kucher/UAA%20Draft%20Law_10102014_final.pdf.

Widrig Finanz & Beteiliguns-Aktiengesellschaft v. 'K.O.T.' SPE

The case was already considered in the context of failure to give proper notice of the arbitration proceedings. Despite the negative outcome (setting aside of award, rendered by ICAC at the Ukrainian CCI), the case is interesting in the context of altered approach of the courts of Ukraine to the deficiencies in arbitration agreement since 2018.

'K.O.T.' SPE, apparently inspired by the above case *Arcelormittal Ambalaj Celigi Sanayi ve Ticaret Anonim Sirketi v. Manufacturing-Commercial Enterprise 'Argo' LLC*, requested the court to set aside the award, rendered by ICAC at the Ukrainian CCI on 16 February 2017 in Case AC No. 385y/2016, in particular, on the ground of the fact that in the arbitration clause reference was made to the arbitration institution, which did not exist: '*Commercial* Arbitration Court at the Chamber of Commerce and Industry of Ukraine'.

All the court instances, namely the Shevchenkivskyi District Court of Kyiv City,[176] the Kyiv City Court of Appeal[177] and the Supreme Court,[178] refused the above argument, having stated, *inter alia*:

> The sole arbitration institution operating at the Ukrainian CCI, which has jurisdiction to consider commercial disputes, is the ICAC at the Ukrainian CCI.
>
> Any discrepancies in the name of the arbitration institution ('Commercial Arbitration Court at the Chamber of Commerce and Industry of Ukraine', instead of 'International Commercial Arbitration Court at the Chamber of Commerce and Industry of Ukraine') shall not affect the contents and substance of the arbitration clause; therefore there are no grounds to assume that the ICAC at the Ukrainian CCI lacked jurisdiction to consider the dispute.

Composition of Arbitral Tribunal or Arbitral Procedure Was Not in Accordance with the Agreement of the Parties

This ground for setting aside the arbitral awards is established in Article 34(2)(1)(4) of ICA Law and Article 459(2)(1)(d) of CPC.

While incompatibility of composition of arbitral tribunal is rather rarely referred to as the ground for setting aside the arbitral award, non-conformity of arbitration procedure is instead an immensely popular ground. However, the courts are reluctant to set aside the arbitral awards on the above grounds and refer to them solely in exceptional cases.

176. Ruling of the Shevchenkivskyi District Court of Kyiv City dated 15 January 2018 in Case No. 761/19354/17 (*Widrig Finanz & Beteiliguns-Aktiengesellschaft v. 'K.O.T.' SPE*). http://reyestr.court.gov.ua/Review/71851218.
177. Ruling of the Kyiv City Court of Appeal dated 12 April 2018 in Case No. 761/19354/17 (*Widrig Finanz & Beteiliguns-Aktiengesellschaft v. 'K.O.T.' SPE*). http://reyestr.court.gov.ua/Review/73517648.
178. Ruling of the Supreme Court dated 13 March 2019 in Case No. 761/19354/17 (*Widrig Finanz & Beteiliguns-Aktiengesellschaft v. 'K.O.T.' SPE*). http://reyestr.court.gov.ua/Review/80487649.

Nuseed Serbia D.O.O. v. Company 'Rise' PJSC

One of such exceptions was the case on setting aside the award, rendered by ICAC at the Ukrainian CCI dated 12 November 2015 in Case AC 218y/2015, initiated by Nuseed Serbia D.O.O. against 'Company 'Rise' PJSC.

The case is interesting because in arbitration agreement the parties agreed for *two* arbitrators to consider the dispute. When it came to the appointments, the parties independently chose the same arbitrator from the list of ICAC at the Ukrainian CCI – Vynokurova L.F. For that reason, pursuant to the resolution of the President of ICAC at the Ukrainian CCI, it was decided that the case was to be considered by a sole arbitrator.

'Company 'Rise' PJSC applied to the courts to set aside ICAC award, claiming that composition of the arbitral tribunal was not in accordance with the agreement of the parties.

At the first round of case consideration, the first-instance court and the Court of Appeal dismissed the application and upheld ICAC award. However, later HSCU reversed the rulings of the lower court and remitted the case to the Shevchenkivskyi District Court of Kyiv City for revision.

Within the second round of consideration, the first-instance court and the Court of Appeal granted the application of 'Company 'Rise' PJSC, and set ICAC award aside, having stated:

> Conclusion of the court regarding the fact, that the parties, having notified of the arbitrators, appointed by them, did not change the terms of the agreement, which provided for the appointment of two arbitrators, and merely proposed such arbitrators, as well as regarding the fact that President of the ICAC at the Ukrainian CCI is not authorized to change, ex officio, the number of arbitrators, in violation of the arbitration agreement, is lawful and reasonable.
>
> The parties failed to amend the arbitration clause in a manner, established by law, while the President of the ICAC at the Ukrainian CCI had to negotiate with the parties appointment of the second arbitrator, rather than to change the number of arbitrators in the resolution dated 9 July 2015 …
>
> Hence, given the fact, that composition of the arbitral tribunal in case AC No. 218y/2015 was not in accordance with the agreement of the parties, the first-instance court lawfully concluded to set aside the ICAC award.[179]

The Supreme Court, having considered the cassation claim, dismissed the application for setting the arbitral award aside and stated as follows:

> The first-instance court, as well as the appeal court, having concluded that there are grounds for setting aside the award, rendered by the ICAC at the International Commercial Arbitration Court at the Ukrainian CCI dated 12 November 2015 in case AC No. 218e/2015, failed to assess the procedural behaviour of respondent during the arbitration proceedings, lack of objections of 'Company "Rise"' PJSC to the composition of arbitral tribunal, to the authority of the sole arbitrator, in

179. Ruling of the Kyiv City Court of Appeal dated 10 January 2018 in Case No. 761/5425/16-Ц (*Nuseed Serbia D.O.O. v. Company 'Rise' PJSC*). http://reyestr.court.gov.ua/Review/71534619#.

> particular to complying with the procedure of appointment by the parties, which exercised their right pursuant to the arbitration agreement, of the same arbitrator, as well as failed to take into consideration the facts, according to which the President of the ICAC at the Ukrainian CCI set out the composition of arbitral tribunal. In addition, the courts failed to take into account, that the arbitration proceedings was conducted by the arbitrator, appointed by respondent (after she had been appointed by claimant).
>
> Further, the courts failed to assess procedural behaviour of respondent during the arbitration proceedings in the context of good faith principle. Lack of objections of 'Company "Rise"' PJSC to the composition of arbitral tribunal within the arbitration proceedings demonstrates that respondent gave its consent to the competence of the sole arbitrator to consider the dispute between the parties.
>
> The panel of judges believes, that procedural behavior of 'Company "Rise"' PJSC, which exercised its right to appoint an arbitrator, raised its objections on the merits of the dispute within the arbitration proceedings, however did not refer to the deficiencies of composition of the arbitration tribunal. Then, having lost the arbitration, respondent referred to the grounds kept in reserve to set aside the award, rendered by the International Commercial Arbitration Court at the Chamber of Commerce and Industry of Ukraine, in the state court. The above behaviour demonstrates abuse of right and is in violation of the good faith principle.[180]

In addition, it is noteworthy that respondent enclosed to the cassation appeal, filed to the Supreme Court, Amicus Curiae Brief of the Ukrainian Arbitration Association in '*LG Electronics Ukraine' Foreign Investment Enterprise v. Ant Yapi Sanayi ve Ticaret Anonim Shirketi*, already mentioned above.[181] In one of the cases, described therein, – case of a Brazilian football player – the Federal Supreme Court of Switzerland pointed out that a party to arbitration proceedings cannot keep a ground for appeal 'in reserve' only to postpone it in case of a disadvantageous outcome in the proceedings. Deliberately late objections to the composition of arbitral tribunal or its competence are inconsistent with the principle of good faith.

The Supreme Court of Switzerland dismissed the application for setting the award aside, having stated, *inter alia*:

> 3.1. The party seeking the removal of an arbitrator (see Art 180(2)(ii) PILA) or a finding of lack of jurisdiction (see Art. 186(2) PILA) or which considers itself harmed by a relevant procedural violation according to Art. 190(2) PILA) forfeits its claims when it does not raise them in a timely manner in the arbitral proceedings and does not undertake all reasonable steps to remedy the violation to the extent possible … It is a violation of good faith to raise a procedural violation only in the framework of an appeal where the opportunity could have been given to the arbitral tribunal to remedy the alleged deficiency … In particular, it is contrary to good faith and an abuse of rights for a party to keep a ground for appeal in reserve, only to postpone it in case of a disadvantageous outcome in the proceedings or a foreseeable loss of the case … When a party participates in an arbitration without questioning the composition or jurisdiction of the arbitral

180. Ruling of the Supreme Court dated 6 February 2019 in Case No. 761/5425/16-Ц (*Nuseed Serbia D.O.O. v. Company 'Rise' PJSC*). http://reyestr.court.gov.ua/Review/79805738.
181. Full text of the Amicus Curiae Brief of the Ukrainian Arbitration Association of 26 October 2017 is published on the website of the Association. http://arbitration.kiev.ua/Uploads/Admin/20171026%20-%20LG%20Ant%20Yapi%20Amici%20 Curiae%20Brief.pdf.

> tribunal – although it had the opportunity to clear the issue before the award is issued – it forfeits the right to raise the corresponding grievances before the Federal Tribunal [in the proceedings on setting the award aside].

Though the Supreme Court made no reference to the above conclusion of the Federal Supreme Court of Switzerland, application of an approach, adopted in the pro-arbitration jurisdictions, is welcome. Moreover, the Supreme Court included this case into the recent review of court practice in cases on enforcement and challenge of awards in international commercial arbitration, as the one reflecting the position of the Supreme Court in this regard.[182]

'Ukrmedpak' LLC v. Vatan Makina Sanayi ve Ticaret A.S.

In this case on setting aside the award, rendered by ICAC at the Ukrainian CCI on 12 March 2012 in Case No. 357т/2011, Turkish respondent referred to several violations of the composition of arbitral tribunal.

The arbitration clause, contained in the contract, provided for three arbitrators. Since respondent failed to appoint an arbitrator in a timely manner, the President of the Ukrainian CCI appointed the arbitrator, Pobirchenko I.G., for respondent. This was one of his last cases as arbitrator. On the day of the hearing, 12 April 2012, Pobirchenko I.G. submitted an application, in which he stated that he could no longer act as an arbitrator due to serious illness. The same day, the President of the Ukrainian CCI appointed another arbitrator for respondent. As a result, the case was considered by an altered panel of arbitrators (three Ukrainian arbitrators), which rendered the award in favour of Ukrainian claimant. During the hearing, respondent raised no objections regarding the composition of the arbitral tribunal.

Within the court proceedings on setting the arbitral award aside, respondent alleged that appointment of Pobirchenko I.G. and his further replacement were in violation of the arbitration procedure. First, no one applied to the President of the Ukrainian CCI to appoint an arbitrator and, subsequently, the latter was not authorized to do so ex officio. Second, replacement of arbitrators, pursuant to the decision of the President of the Ukrainian CCI, was in violation of the arbitration procedure, as well. Third, the arbitral tribunal, consisting solely of the Ukrainian arbitrators, was contrary to the agreement of the parties and to the principle of independence and impartiality.

The courts of Ukraine, when analysing the above arguments, had to analyse the Rules of the International Commercial Court at the Ukrainian CCI along with ICA Law of Ukraine in part of the composition of arbitral tribunal.

182. Review of the court practice of the Cassation Civil Court within the Supreme Court in cases on enforcement and challenge of awards in international commercial arbitration, p. 23. https://supreme.court.gov.ua/userfiles/media/Oglyad_Mkas.pdf.

As a result, the Shevchenkivskyi District Court of Kyiv City[183] and the Kyiv City Court of Appeal[184] concluded that composition of the arbitral tribunal was in accordance with the agreement of the parties. Respondent was given proper notice of all the stages of tribunal composition, its representatives participated in the hearing on 12 April 2012 and 'raised no objections to the composition of arbitral authority and did not challenge the arbitrators, what in its turn, under Article 4 of the Law of Ukraine "On International Commercial Arbitration" implies a waiver of the right to object'.[185]

> Ukrainian nationality of the arbitrators shall in no case be a ground to doubt their impartiality.[186]

Non-arbitrability of Disputes

This ground for setting aside of arbitral awards is established in Article 34(2)(2)(1) of ICA Law and Article 459(2)(2)(a) of CPC.

Following the comprehensive procedural reform, regulation of arbitrability issue sufficiently altered. Though, a new court practice has not formed yet.

At the same time, approaches of the courts of Ukraine to the issue of arbitrability within the previous period can shed some light on what to expect from Ukrainian courts in the nearest future.

Prior to the reform, the issue of setting ICAC awards aside on the given ground arose due to a long-standing disparity between arbitrability rules, established in Article 1 of ICA Law and those laid down in Article 12 of CoPC, as well as inconsistent court practice in the application of the latter. Article 12 concerned two categories of disputes: corporate disputes and disputes arising out of contracts related to meeting the state needs. Definition of both categories led to heated debates in theory and practice, especially after CoPC reform in 2011, when the question arose as to whether this article applies to international commercial arbitration.[187]

183. Ruling of the Shevchenkivskyi District Court of Kyiv City dated 18 July 2012 in Case No. 2610/11743/2012 (*'Ukrmedpak' LLC v. Vatan Makina Sanayi ve Ticaret A.S.*). http://reyestr.court.gov.ua/Review/25319106.
184. Ruling of the Kyiv City Court of Appeal dated 18 October 2012 in Case No. 22-Ц/2690/13326/12 (*'Ukrmedpak' LLC v. Vatan Makina Sanayi ve Ticaret A.S.*). http://reyestr.court.gov.ua/Review/27547770.
185. Ruling of the Kyiv City Court of Appeal dated 18 October 2012 in Case No. 22-Ц/2690/13326/12 (*'Ukrmedpak' LLC v. Vatan Makina Sanayi ve Ticaret A.S.*). http://reyestr.court.gov.ua/Review/27547770.
186. Ruling of the Shevchenkivskyi District Court of Kyiv City dated 18 July 2012 in Case No. 2610/11743/2012 (*'Ukrmedpak' LLC v. Vatan Makina Sanayi ve Ticaret A.S.)*. http://reyestr.court.gov.ua/Review/25319106.
187. Perepelynska O. Arbitrability under Ukrainian Law: Problematic Issues, Materials of the II International Readings in Memory of Academician Pobirchenko I.G. 2015. pp. 40-44. http://arb.ucci.org.ua/publ/rept2014reading.pdf; Marchukov D. Refusing Recognition and Enforcement of Foreign Arbitral Awards in Ukraine (Procedural issues and application of non-arbitrability and public policy grounds). TDM 1 (2009). http://www.transnational-dispute-management.com/article.asp?key = 1368; Kravchuk G. Arbitrability of Disputes in the Context of Article 12 of the Commercial Procedure Code of Ukraine, Materials of the II International Readings in Memory of Academician Pobirchenko I.G. 2015. pp. 15-21. http://arb.ucci.org.ua/publ/rept2014reading.pdf.

Vamed Engineering GmbH & CO KG v. 'Ukrmedpostach' SE for Supply of Medical Equipment

One of the most discussed cases in this regard was a series of cases on setting aside the awards, rendered by ICAC at the Ukrainian CCI, under the same supply agreement dated 14 September 2009 between Vamed Engineering GmbH & CO KG, Austria, and 'Ukrmedpostach' SE.

According to the supply agreement, at least three cases were considered by ICAC in 2012-2013: Cases AC No. 195a/2012; AC No. 209a/2012; No. 210a/2012.

All three awards, rendered by ICAC, were further challenged in the courts of Ukraine:

Case No. 1 (on setting aside ICAC award dated 4 April 2013 in Case AC No. 195a/2012):

- on 3 September 2013, the Shevchenkivskyi District Court of Kyiv City set ICAC award aside;[188]
- on 7 November 2013, the Kyiv City Court of Appeal reversed the ruling of the Shevchenkivskyi District Court of Kyiv City and remitted the case to the first-instance court for revision;
- on 5 February 2014, HSCU reversed the ruling of the Kyiv City Court of Appeal dated 7 November 2013 and remitted the case to the Court of Appeal;[189]
- on 8 March 2014, the Kyiv City Court of Appeal upheld the ruling of the first-instance court;[190]
- on 30 July 2014, HSCU upheld the rulings of the Shevchenkivskyi District Court of Kyiv City dated 3 September 2013 and of the Kyiv City Court of Appeal dated 18 March 2014;[191]
- on 11 March 2015, the Supreme Court refused to re-examine the case.[192]

Case No. 2 (on setting aside ICAC award dated 6 June 2013 in Case AC No. 209a/2012):

- on 2 December 2013, the Shevchenkivskyi District Court of Kyiv City set ICAC award aside;

188. Ruling of the Shevchenkivskyi District Court of Kyiv City dated 3 September 2013 in Case No. 761/20746/13-Ц (*VAMED Engineering GmbH & CO KG v. 'Ukrmedpostach' SE for Supply of Medical Equipment*). http://www.reyestr.court.gov.ua/Review/33418016.
189. Ruling of HSCU dated 5 February 2014 in Case No. 6-50842св13(*VAMED Engineering GmbH & CO KG v. 'Ukrmedpostach' SE for Supply of Medical Equipment*). http://www.reyestr.court.gov.ua/Review/37018815.
190. Ruling of the Kyiv City Court of Appeal dated 18 March 2014 22-Ц/796/4127/2014 (*VAMED Engineering GmbH & CO KG v. 'Ukrmedpostach' SE for Supply of Medical Equipment*). http://www.reyestr.court.gov.ua/Review/37967994.
191. Ruling of HSCU dated 30 July 2014 in Case No. 6-20383св14 (*VAMED Engineering GmbH & CO KG v. 'Ukrmedpostach' SE for Supply of Medical Equipment*). http://www.reyestr.court.gov.ua/Review/40098048.
192. Ruling of SCU dated 11 March 2015 in Case No. 6-241 Цс14 (*VAMED Engineering GmbH & CO KG v. 'Ukrmedpostach' SE for Supply of Medical Equipment*). http://www.reyestr.court.gov.ua/Review/43203779.

- on 19 February 2014, the Kyiv City Court of Appeal upheld the ruling of the first-instance court;[193]
- on 4 June 2014, HSCU ruled to consider the cassation appeal as the one which was not filed, and returned it to the applicant.[194]

Case No. 3 (on setting aside ICAC award dated 6 June 2013 in Case AC No. 210a/2012):

- on 25 November 2013, the Shevchenkivskyi District Court of Kyiv City dismissed the application for setting aside the award, rendered by ICAC;[195]
- on 11 September 2014, the Kyiv City Court of Appeal reversed the ruling of the first-instance court and set aside ICAC award;[196]
- on 17 December 2014, HSCU upheld the ruling of the Kyiv City Court of Appeal dated 11 September 2014.[197]

Despite the fact that all three cases were considered by the same courts (the Shevchenkivskyi District Court of Kyiv City and the Kyiv Court of Appeal), these courts reached different conclusions on arbitrability of the disputes, arising out of the same supply agreement, likewise on application of Article 12(2) of CoPC.

In addition, it is worth noting that the civil courts applied Commercial Procedure Code, i.e. not 'their' CPC. Moreover, on several occasions, they applied non-effective versions of the code, in violation of the general rule on application of the procedural law, effective at the moment, when the case was considered.

The excerpts from the rulings of the Kyiv City Court of Appeal are provided below for comparison:

Case No. 1, the Kyiv City Court of Appeal:

> The fact, that medical equipment was supplied by 'VAMED ENGINEERING' for the funds received on credit under a state guarantee, was correctly established by the court and is not contested by the parties.
> Given that legislation effective at the moment, when the supply agreement was concluded on 14 September 2009, prohibited to submit the disputes arising out of contracts related to meeting the state needs to arbitration, the

193. Ruling of the Kyiv Commercial Court dated 19 February 2014 in Case No. 22-Ц/796/1465/2014 (*VAMED Engineering GmbH & CO KG v. 'Ukrmedpostach' SE for Supply of Medical Equipment*). http://www.reyestr.court.gov.ua/Review/37397137.
194. Ruling of HSCU dated 4 June 2014 in Case No. 6-12731ск14 (*VAMED Engineering GmbH & CO KG v. 'Ukrmedpostach' SE for Supply of Medical Equipment*). http://www.reyestr.court.gov.ua/Review/39085740.
195. Ruling of the Shevchenkivskyi District Court of Kyiv City dated 25 November 2013 in Case No. 761/26004/13-Ц (*VAMED Engineering GmbH & CO KG v. 'Ukrmedpostach' SE for Supply of Medical Equipment*). http://www.reyestr.court.gov.ua/Review/36007301.
196. Ruling of the Kyiv City Court of Appeal dated 11 September 2014 in Case No. 22-Ц/796/4165/2014 (*VAMED Engineering GmbH & CO KG v. 'Ukrmedpostach' SE for Supply of Medical Equipment*). http://www.reyestr.court.gov.ua/Review/40663692.
197. Ruling of HSCU dated 17 December 2014 in Case No. 6-37893св14 (*VAMED Engineering GmbH & CO KG v. 'Ukrmedpostach' SE for Supply of Medical Equipment*). http://www.reyestr.court.gov.ua/Review/41993352.

> first-instance court correctly concluded, that the arbitration clause (clause 13 of the supply agreement) was in violation of Ukrainian legislation.

Case No. 2, the Kyiv City Court of Appeal:

> The panel of judges believes, that the appeal claim do not refute the conclusion, reached by the first-instance court, since the given rule [Article 12(2) of the CoPC – O. P.] applies solely to the domestic courts of arbitration, operation of which is regulated by the Law of Ukraine 'On Domestic Courts of Arbitration'.

Case No. 3, the Kyiv City Court of Appeal:

> Given the above, at the time when the supply agreement was concluded, Ukrainian legislation prohibited to submit the disputes arising out of contracts related to meeting the state needs to domestic arbitration court (arbitration). Therefore, conclusion of the first-instance court, that the arbitration agreement was in compliance with the laws of Ukraine, is wrong.

Without commenting obviously contradictory conclusions of the Kyiv City Court of Appeal on arbitrability of the disputes, arising out of the same supply agreement, which were submitted to ICAC in 2012, nevertheless, it should be noted that in all three cases the court reached the same conclusion that Article 12(2) of CoPC, effective as of 2014, contained no prohibition to submit to arbitration the disputes, arising out of conclusion, modification, termination and execution of commercial contracts related to meeting the state needs.

Public Policy

The provisions on setting aside of arbitral awards on public policy ground are laid down in Article 34(2)(2)(2) of ICA Law and Article 459(2)(2)(b) of CPC.

Widrig Finanz & Beteiliguns-Aktiengesellschaft v. 'K.O.T.' SPE

The case was already described above in the context of failure to give a proper notice of the arbitration procedure and in the context of awards containing decisions on matters beyond the scope of submission to arbitration. Despite a negative outcome of the case (setting ICAC award aside), the case is worth mentioning also in the context of public policy.

'K.O.T.' SPE in order to substantiate setting aside of the award, rendered by ICAC at the Ukrainian CCI on 16 February 2017 in Case AC No 385y/2016, referred, *inter alia*, to the public policy ground, alleging that the arbitral tribunal wrongfully applied the provisions of Ukrainian legislation on limitation period.

The courts of all three instances dismissed the above argument, stating that they lack jurisdiction to re-examine the dispute on merits:

> In addition, under paragraph 19 of the Resolution of the Plenum of the Supreme Court of Ukraine No. 12 'On Court Practice in Considering Applications for

> Recognition and Enforcement of Foreign Court Judgments and Arbitral Awards and in Setting Aside the Awards Rendered within International Commercial Arbitration in the Territory of Ukraine' dated 24 December 1999, as well as under Article 5 of the Law of Ukraine 'On International Commercial Arbitration', as concerns the issues, covered by the present Law, the court shall have no right to assess, whether the award on merits, was rendered correctly …
>
> Given the above, the court of appeal had no right to analyze, whether the International Commercial Arbitration Court, when resolving the dispute, correctly applied the rules of substantive law of Ukraine … .[198]

198. Ruling of the Kyiv City Court of Appeal dated 12 April 2018 in Case No. 761/19354/17 (*Widrig Finanz & Beteiliguns-Aktiengesellschaft v. 'K.O.T.' SPE*). http://reyestr.court.gov.ua/Review/73517648.