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Ukraine

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A. Legislation and rules

A.1 Legislation

Ukraine is a civil law country, and issues of international arbitration are governed primarily by international conventions and treaties (which, upon their ratification by the Verkhovna Rada of Ukraine (Parliament), have priority over national legislation) and by applicable national legislation. Court precedents are not considered to be the source of binding law in Ukraine, except for decisions of the Supreme Court rendered in cases regarding different application of the same provisions of law by courts of different specialization, as foreseen by Ukrainian procedural legislation.

Ukraine is a party to the New York Convention and the Geneva Convention, as well as a number of bilateral investment treaties, many of which provide for arbitration under the UNCITRAL Arbitration Rules or before ICSID.

The Verkhovna Rada of Ukraine ratified the ICSID Convention in 2000, and in 2013, the Cabinet of Ministers of Ukraine adopted the Resolution, "On Issues of Choosing Candidates for the Appointment of Representatives from Ukraine to be Included in the Conciliators'

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List and the Arbitrators' List of the International Centre for Settlement of Investment Disputes."

Ukraine has also adopted separate laws on domestic and international arbitration, such as the Law of Ukraine On Domestic Arbitration, dated 11 May 2004, as amended and restated, and the Law of Ukraine On International Commercial Arbitration, dated 24 February 1994, amended and restated as of 6 September 2005 (the "Arbitration Law"). The Arbitration Law closely follows the UNCITRAL Model Law as of 1985, except for the following two peculiarities. First, unlike most Model Law countries, the Arbitration Law provides that the president of the Ukrainian Chamber of Commerce and Industry (the UCCI) shall serve as the appointing authority when there is a failure to appoint an arbitrator. Consequently, the UCCI president is also the authority for challenging arbitrators, as envisaged by the Arbitration Law. Second, the Arbitration Law establishes two arbitration institutions — the International Commercial Arbitration Court at the UCCI (the ICAC) and the Maritime Arbitration Commission at the UCCI (the MAC).

A.2 Institutions, rules and infrastructure

The ICAC and the MAC are the two international commercial arbitration institutions in Ukraine, acting pursuant to the Arbitration Law. The statutes of both institutions are set forth in the annexes to the Arbitration Law.

The ICAC is a permanently functioning arbitral institution acting in accordance with the Arbitration Law, the Statute on the ICAC at the UCCI (dated 24 February 1994), and the Rules of the ICAC at the UCCI (approved on 17 April 2007, amended and restated as of 24 April 2014). The MAC is a permanently functioning arbitral institution acting in compliance with the same legislation and rules.

Parties to a dispute may agree to refer to *ad hoc* arbitration, for which purpose an *ad hoc* arbitral tribunal may be formed. In such a case, the ICAC may act as an appointing authority in accordance with

UNCITRAL Arbitration Rules and provide organizational assistance in arbitral proceedings on the basis of its separate Rules of Assistance approved by the Decision of the Presidium of the UCCI, dated 27 October 2011.

The ICAC arbitrators' list includes arbitrators from Ukraine, Azerbaijan, Austria, Belarus, Bulgaria, Croatia, the Czech Republic, Finland, France, Germany, Hungary, Latvia, FYR Macedonia, Moldova, the Netherlands, Norway, Poland, the Russian Federation, Serbia, Slovakia, Slovenia, Sweden, the United Kingdom and the United States.

According to the ICAC, the average time frame for consideration of a case is 3 to 6 months in approximately 60 to 65% of its cases; 7 to 12 months in 30 to 35% of its cases, and more than 12 months in not more than 5% of its cases.

Mykola Selivon is the current president of the ICAC and the MAC, and was elected on 11 September 2010. He was a former judge of the Constitutional Court of Ukraine and Ambassador Extraordinary and Plenipotentiary of Ukraine in the Republic of Kazakhstan.

B. Cases

B.1 Recognition and enforcement of an emergency arbitration award

Recent court practice shows that Ukraine is moving toward recognition and enforcement of emergency arbitration awards granting interim measures.

Thus, a UK-based energy company, JKX Oil & Gas, and its Dutch and Ukrainian subsidiaries, Poltava Gas B.V. and JV Poltava Petroleum Company, initiated a procedure for recognition and enforcement of an emergency arbitration award against Ukraine in 2015. The award was granted by the SCC Emergency Arbitrator. On 8 June 2015, the first instance court in Ukraine granted enforcement of the emergency arbitration award on the basis of the New York

Convention, which was the first decision on enforcement of such an award in Ukraine.

The case, which has been considered by courts of all instances, was however returned by the cassation court to the appellate court for reconsideration. By its decision in December 2016, the appellate court cancelled the ruling of the first instance court and dismissed the application for recognition and enforcement of the arbitral award on the ground that it violated "public policy."

Notably, the first instance court, in its ruling, made a number of findings that could be of particular interest and importance.

First, the court raised the question of the legal nature of making amicable settlements as a pre-arbitration method of resolving disputes between parties. The court concluded that amicable settlement is not obligatory if prescribed by law and not by the arbitration agreement. Thus, the parties may refer the dispute to arbitration in this case even though the time period for amicable settlement had not expired. Further, the appellate court, when reviewing the case, stated that non-compliance with pre-arbitration dispute settlement procedure is not a ground for refusal of recognition or enforcement of the arbitral award.

Second, the court stated that the lack of reaction of the notification of the arbitral proceedings by the respondent cannot amount to lack of proper notification.

Third, the court outlined that the arbitration rules effective as at the date of submission of the request for arbitration had to be applied to the arbitration proceedings, even if the agreement in which the arbitration clause was set out had been executed before the last version of the arbitration rules came into force. In this case, the respondent objected to the recognition and enforcement of the award on the ground that the previous version of the rules did not provide for the possibility of rendering emergency arbitral awards.

Fourth, the court indicated that there is no breach of "public policy" when the arbitral tribunal or emergency arbitrator grants an interim measure in the form of application of the tax rate that is prescribed by the contract between the parties, but differs from the tax rate determined by law, because such an award concerns the parties only and does not establish any other general rules than those in force in the territory of Ukraine. The case is still pending in the Ukrainian courts.

B.2 Recognition and enforcement of an interim arbitral award

Recent court practice shows that Ukrainian courts have become friendlier to the recognition and enforcement of interim arbitral awards.

In particular, a Germany-based company, Naumann Maschinen und Paletten, obtained an interim arbitral award from the Arbitration Court of the Heilbronn-Franken Chamber of Commerce and Industry (IHK Heilbronn-Franken) and the German Institution of Arbitration (DIS) against Bruma LLC, a company incorporated under the laws of Ukraine. By this award, the arbitral tribunal froze all the assets of Bruma LLC, ordered the latter to refrain from disposing of technical equipment provided by Naumann Maschinen und Paletten as well as from selling/transferring/shipping pallets manufactured by Bruma LLC to any third parties.

The first instance court in Ukraine granted recognition and enforcement of the interim arbitral award by its ruling on 2 October 2015. The appellate court upheld the ruling later that year.

The first instance court found that the type and scope of the interim measures granted by the interim arbitral award were proportionate to the claims of Naumann Maschinen and Paletten filed before the arbitral tribunal. The court also found as sufficient for granting recognition and enforcement the fact that the interim arbitral award included the reasoning on the necessity for the immediate application

of the interim measures based on the claims of Naumann Maschinen and Paletten and the scope of infringed rights.

These interim measures were subsequently canceled by the court due to new findings in the case. Pursuant to these, the court found that the Arbitration Court of IHK Heilbronn-Franken and DIS lacked competence to resolve the dispute between Naumann Maschinen und Paletten and Bruma LLC. There were the disputed amendments to the arbitration agreement, which determined that the ICAC at the UCCI was the only arbitral tribunal competent to resolve disputes between the parties. These amendments were declared valid by conclusion of forensic expertise. Discrepancies in the arbitration agreement were the ground on which the first instance court refused to grant recognition and enforcement of the interim arbitral award, and canceled the interim measures applied earlier under the award.

C. Trends and observations

Although arbitration legislation in Ukraine is still underdeveloped, and the practice of the Ukrainian courts still cannot be considered fully consistent, Ukraine is increasingly becoming an arbitration-friendly jurisdiction.

In particular, there is a positive move to recognize and enforce interim awards and emergency arbitration awards in Ukraine.

As of January 2017, Ukrainian legislation still does not provide for any specific rules regulating the application of interim measures in support of international commercial arbitration, although the general framework exists. The procedural law is also silent on court assistance when taking evidence in support of arbitral proceedings, which in practice still makes it impossible for the courts to provide such assistance or support to arbitral tribunals.

At the same time, there are legislative initiatives which seek to establish a legal mechanism with which the national courts in Ukraine may provide assistance to international arbitration. In particular,

certain draft laws are being considered under which judicial support to international arbitration may be performed by two court instances — the appellate court (acting as a first instance court) and the cassation court (acting as the final instance court).

A separate procedure of obtaining evidence in support of the arbitral proceedings is also included within the draft laws.

Another major step forward in promoting Ukraine as an arbitration-friendly jurisdiction was the establishment of the Ukrainian Arbitration Association in 2012. The key goals of the organization include improvement of Ukrainian legislation in the field of international arbitration, promotion of Ukraine as a country with an arbitration-friendly legal environment, assistance and support to *ad hoc* arbitration, and promotion of Kyiv City as the seat of *ad hoc* arbitration.