ICLG

The International Comparative Legal Guide to:

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1 Arbitration Agreements

1.1 What, if any, are the legal requirements of an arbitration agreement under the laws of your jurisdiction?

Under the Law of Ukraine on International Commercial Arbitration (the "**Arbitration Law**"), an arbitration agreement must be concluded in writing. It may be concluded in the form of a separate agreement, exchange of letters or in the form of a clause in a contract. An arbitration agreement is also deemed to have been validly concluded if the parties exchange a written claim and a written defence in which one of the parties asserts and the other party does not deny the existence of an arbitration agreement.

An arbitration agreement may also be incorporated by reference into the parties' contract. According to the Arbitration Law, a reference in a contract to a document containing an arbitration clause constitutes an arbitration agreement provided that the contract is executed in writing and the reference is such as to make the outstanding clause a part of the contract. In practice, the parties should ensure that the reference is clear and express and thus the respective provisions of, e.g., the general terms and conditions constitute an integral part of the contract. Otherwise, Ukrainian courts may render such arbitration agreement invalid.

1.2 What other elements ought to be incorporated in an arbitration agreement?

Ukrainian law does not establish specific requirements regarding an arbitration agreement other than those outlined above. In general, the common internationally-recognised requirements to arbitration agreements are applicable in Ukraine. In particular, an arbitration agreement must clearly state the name of the arbitration institution or indicate that disputes should be referred to *ad hoc* arbitration. It should also indicate the scope of disputes that are encompassed by the relevant arbitration agreement. Designation of the arbitration seat, applicable law and number of arbitrators are not mandatory but advisable elements of an arbitration agreement.

1.3 What has been the approach of the national courts to the enforcement of arbitration agreements?

In general, Ukrainian courts can be classified as pro-arbitral. Therefore, provided that all the Ukrainian law requirements to an arbitration agreement are met, courts would commonly enforce such an arbitration agreement. However, occasionally courts may refuse to enforce arbitration agreements mainly due to the excessively formalistic approach or just lack of awareness about the international arbitration. The latter mainly concerns the courts located in rural areas where the issues involving international commerce are rare.

One of the most common grounds for refusal of enforcement of arbitration agreements has always been the presence of typos, omissions or other mistakes in spelling of the name of an arbitration institution to which disputes arising out of the relevant contract are referred. There are quite a number of court precedents where Ukrainian courts refused to enforce an arbitration agreement due to a mere typo in the name of an arbitration institution although it was absolutely evident which institutions parties had in mind. However, the recent tendency is rather positive suggesting that courts become less formalistic and more focused on the parties' actual intent. Therefore, nowadays there are fewer cases in which arbitration agreements were not enforced on the totally formalistic grounds.

2 Governing Legislation

2.1 What legislation governs the enforcement of arbitration proceedings in your jurisdiction?

The Arbitration Law, which is fully based on the UNCITRAL Model Law, contains a standard wording that "*a court before which an action is brought in a matter which is the subject of an arbitration agreement shall, if a party so requests not later than when submitting his first statement on the substance of the dispute, refer the parties to arbitration unless it finds that the agreement is null and void, inoperative or incapable of being performed*".

The Commercial Procedure Code of Ukraine (the "**CPoC**") as well as the Civil Procedure Code of Ukraine (the "**CPC**") also contains provisions under which the court must terminate the court proceedings and refer the parties to arbitration if there is an arbitration agreement in place and one of the parties relies on such agreement pleading the court to terminate the proceedings.

2.2 Does the same arbitration law govern both domestic and international arbitration proceedings? If not, how do they differ?

No; in Ukraine, domestic and international arbitration proceedings are governed by two separate laws. International arbitration is governed by the Arbitration Law, whereas domestic arbitration is governed by the Law of Ukraine on Arbitration Courts (the "**Domestic Arbitration Law**").

The Domestic Arbitration Law provides for quite a different regulatory framework of arbitration proceedings than the Arbitration Law. For instance, the rules of arbitrability, formation of arbitral tribunal, arbitration proceedings, and enforcement of arbitral awards are different in many aspects.

The most important aspect to note is that disputes involving at least one foreign party may not be submitted to domestic arbitration in Ukraine.

2.3 Is the law governing international arbitration based on the UNCITRAL Model Law? Are there significant differences between the two?

Yes, the Arbitration Law in most aspects mirrors the UNCITRAL Model Law in 1985 wording. However, there are a few differences.

The key one is that under the Arbitration Law, disputes involving Ukrainian legal entities with foreign investment (with, at least, 10% foreign shareholding) or involving participants of such legal entities can be submitted to international arbitration.

Also, the responsibility for assisting and supervising arbitral proceedings (with the seat of arbitration in Ukraine) is divided between the President of the Ukrainian Chamber of Commerce and Industry (the "**UCCI President**") and the local courts of Ukraine.

2.4 To what extent are there mandatory rules governing international arbitration proceedings sited in your jurisdiction?

Mandatory rules governing arbitration proceedings in Ukraine are established by the Arbitration Law, which is predominantly based on the UNCITRAL Model Law. Thus, all mandatory rules designated by the Model Law are applicable in Ukraine.

In particular, the following rules:

1) an arbitration agreement must be in writing (Article 7(2) of the Arbitration Law);
2) a competence-competence principle and procedure for jurisdictional challenges must be observed (Article 16 of the Arbitration Law);
3) an arbitration tribunal must treat parties equally (Article 18 of the Arbitration Law);
4) an arbitral award must be in writing, reasoned and signed by the arbitration tribunal (Article 31(1-2) of the Arbitration Law); and
5) an arbitral award can be set aside only on the grounds and per the procedure established by Article 34 of the Arbitration Law.

3 Jurisdiction

3.1 Are there any subject matters that may not be referred to arbitration under the governing law of your jurisdiction? What is the general approach used in determining whether or not a dispute is "arbitrable"?

Ukrainian law does not provide a comprehensive list of disputes that can or cannot be submitted to arbitration. Such list can only be drawn by analysis of a number of Ukrainian legislation acts. In particular, those are the CPoC and the Law of Ukraine on Private International Law (the "**PIL Law**").

Under the CPoC, the following types of disputes cannot be submitted to arbitration:

1) disputes arising out of public procurement contracts; and
2) disputes arising out of corporate relations between a company and its participant as well as between participants of a company related to establishment, activities, management, and liquidation of such company (corporate governance).

The PIL Law establishes that *inter alia* the following disputes fall within the exclusive jurisdiction of Ukrainian courts:

1) concerning real estate property located in the territory of Ukraine;
2) relating to the formalisation of intellectual property rights (e.g., registration or certification (patent) issues);
3) relating to the registration or liquidation of foreign legal entities or sole traders in Ukraine;
4) relating to the validity of information contained in state registries in Ukraine;
5) relating to the issuance or cancellation of securities in Ukraine; and
6) arising out of the bankruptcy of an entity that is established in Ukraine.

Designation of disputes as falling within the exclusive jurisdiction of Ukrainian courts is usually interpreted as establishing non-arbitrability of those disputes. However, there is another view according to which the PIL Law merely determines the allocation of jurisdiction between Ukrainian courts and state courts of foreign countries, and therefore has no relation to arbitrability of disputes under Ukrainian law. The jurisprudence of Ukrainian courts on the application of the above provision of the PIL Law is rather inconsistent, i.e. both approaches were taken by Ukrainian courts of various instances.

3.2 Is an arbitral tribunal permitted to rule on the question of its own jurisdiction?

Yes, under the Arbitration Law, the arbitral tribunal is competent to rule on its own jurisdiction, including on any objections as to the existence or validity of the arbitration agreement.

3.3 What is the approach of the national courts in your jurisdiction towards a party who commences court proceedings in apparent breach of an arbitration agreement?

As explained in question 2.1 above, the Arbitration Law, as well as the CPC and CoPC, establish an explicit rule that a court should terminate the proceedings and refer the parties to arbitration if one of the parties relies on the arbitration agreement, pleading the court to terminate the proceedings not later than its first statement on the substance of dispute.

This rule is usually followed by the Ukrainian courts in practice.

3.4 Under what circumstances can a national court address the issue of the jurisdiction and competence of an arbitral tribunal? What is the standard of review in respect of a tribunal's decision as to its own jurisdiction?

In Ukraine, a court may address the issue of the jurisdiction and competence of the arbitral tribunal under the following circumstances:

1) If the arbitral tribunal (with a seat of arbitration in Ukraine) determines the issue of its jurisdiction by way of an interim order, either party may challenge such order before the competent national court, within 30 days of receipt of the interim order.

2) If a party brings the court action in a matter which is the subject of an arbitration agreement, the competent court shall stay the proceedings and refer the parties to arbitration, provided that the agreement is valid and enforceable. The latter includes the existence of the tribunal's competence and jurisdiction.

3) If a party objects to the competence and jurisdiction of the arbitral tribunal in the process of setting aside or refusal of enforcement of the arbitral award.

The courts of Ukraine have not yet developed the particular standard of review of tribunal's decision as to its own jurisdiction. However, in general, courts apply full review rather than *prima facie* review.

3.5 Under what, if any, circumstances does the national law of your jurisdiction allow an arbitral tribunal to assume jurisdiction over individuals or entities which are not themselves party to an agreement to arbitrate?

Neither the legislation of Ukraine, nor practice of the Ukrainian courts contain guidance on this issue. Considering the rather formalistic approach of the Ukrainian courts, it is likely that only arbitration agreements explicitly entered into by the parties will be enforced.

3.6 What laws or rules prescribe limitation periods for the commencement of arbitrations in your jurisdiction and what is the typical length of such periods? Do the national courts of your jurisdiction consider such rules procedural or substantive, i.e., what choice of law rules govern the application of limitation periods?

Under Ukrainian law, limitation period is a substantive law issue governed by the Civil Code of Ukraine. The general limitation period constitutes three years from the date the interested party knew of or should have known about the violation of its rights.

For arbitration proceedings seated in Ukraine, it means that if the underlying transaction is governed by Ukrainian law, and the party commences arbitration after the limitation period elapsed, the tribunal should dismiss the claim and terminate the proceedings provided that the opposite party raises the issue of expiration of the limitation period.

3.7 What is the effect in your jurisdiction of pending insolvency proceedings affecting one or more of the parties to ongoing arbitration proceedings?

There is no particular effect in this regard. Under Ukrainian law, an arbitral tribunal is entitled to consider disputes initiated by the party in insolvency as well as against the party in insolvency. The court considering the insolvency case would not be entitled to issue orders or injunctions to an arbitral tribunal and *vice versa*.

4 Choice of Law Rules

4.1 How is the law applicable to the substance of a dispute determined?

Under the Arbitration Law, an arbitral tribunal shall decide the dispute in accordance with the substantive law agreed by the parties. If the parties fail to choose the applicable substantive law, the tribunal shall determine it in accordance with the applicable conflict of laws' rules.

4.2 In what circumstances will mandatory laws (of the seat or of another jurisdiction) prevail over the law chosen by the parties?

Under the PIL Law, the parties cannot derogate from the mandatory (imperative) laws and rules of Ukraine, even if they subject the relevant transaction to the foreign law. The arbitral tribunal should therefore apply mandatory laws and rules of Ukraine regardless of the principal substantive law chosen by the parties, if one of the parties relies on such laws and rules in its submission.

4.3 What choice of law rules govern the formation, validity, and legality of arbitration agreements?

Unless the parties agree otherwise, the law of the arbitration seat (that is Ukrainian law) applies by default to the arbitration agreement designating Ukraine as the arbitration seat.

5 Selection of Arbitral Tribunal

5.1 Are there any limits to the parties' autonomy to select arbitrators?

Under the Arbitration Law, the parties are free to agree the procedure for appointment of an arbitral tribunal. There are no limits in this regard provided that arbitrators to be appointed are impartial and independent.

5.2 If the parties' chosen method for selecting arbitrators fails, is there a default procedure?

Under the Arbitration Law, if the parties' chosen method for selecting arbitrators fails, any party may request the UCCI President to make the necessary appointments. The decision of the UCCI President in this regard is final and not subject to appeal.

5.3 Can a court intervene in the selection of arbitrators? If so, how?

No, the courts of Ukraine do not have powers to intervene in the selection of arbitrators.

5.4 What are the requirements (if any) imposed by law or issued by arbitration institutions within your jurisdiction as to arbitrator independence, neutrality and/or impartiality and for disclosure of potential conflicts of interest for arbitrators?

Under the Arbitration Law, an arbitrator shall disclose any circumstances likely to give rise to justifiable doubts as to his impartiality or independence before accepting appointment from the party. Parties can challenge an appointed arbitrator on the grounds of lack of impartiality or independence.

6 Procedural Rules

6.1 Are there laws or rules governing the procedure of arbitration in your jurisdiction? If so, do those laws or rules apply to all arbitral proceedings sited in your jurisdiction?

Provisions of the Arbitration Law apply to all arbitrations sited in Ukraine. Under the Arbitration Law, and subject to its mandatory provisions, the parties are free to agree on the procedure to be followed by the tribunal in conducting the arbitration. In the absence of such parties' agreement, the arbitral tribunal may, subject to the mandatory provisions of the Arbitration Law, conduct the arbitration in such manner as it considers appropriate.

The above means that should the parties agree on application of the institutional rules, such rules would prevail over the provisions of the Arbitration Law except its mandatory provisions (see our answer to question 2.4 above).

6.2 In arbitration proceedings conducted in your jurisdiction, are there any particular procedural steps that are required by law?

Under the Arbitration Law, the only mandatory step is the filing of the statement of claim, which should be done within the time agreed by the parties or determined by the arbitral tribunal.

Otherwise, the Arbitration Law provides that the parties can agree on particular procedural steps of the arbitration proceedings. This includes the exchange of written submissions, oral hearings and document production. Those issues are usually regulated by reference to a particular set of arbitration rules.

6.3 Are there any particular rules that govern the conduct of counsel from your jurisdiction in arbitral proceedings sited in your jurisdiction? If so: (i) do those same rules also govern the conduct of counsel from your jurisdiction in arbitral proceedings sited elsewhere; and (ii) do those same rules also govern the conduct of counsel from countries other than your jurisdiction in arbitral proceedings sited in your jurisdiction?

No; neither the Arbitration Law, nor other acts of the Ukrainian legislation contain particular rules governing the conduct of counsel.

6.4 What powers and duties does the national law of your jurisdiction impose upon arbitrators?

Arbitrators must treat the parties equally and give full opportunity to each party to present its case. In addition, throughout the arbitration proceedings arbitrators are under an obligation to disclose any circumstances giving rise to reasonable doubts as to their impartiality and independence.

Arbitrators must also ensure that the arbitration proceedings are conducted and a final award is rendered in accordance with the parties' agreement and requirements of the Arbitration Law.

As regards powers, arbitrators have the power to rule on their own jurisdiction as well as determine the admissibility, relevance, materiality, and weight of any evidence submitted by the parties.

6.5 Are there rules restricting the appearance of lawyers from other jurisdictions in legal matters in your jurisdiction and, if so, is it clear that such restrictions do not apply to arbitration proceedings sited in your jurisdiction?

There are no provisions of Ukrainian law restricting the appearance of foreign lawyers in the arbitration proceedings.

Provisions of the Ukrainian Advocacy Law, which establish rules and limitations for foreign attorneys practising in Ukraine, do not apply to arbitration proceedings in Ukraine.

6.6 To what extent are there laws or rules in your jurisdiction providing for arbitrator immunity?

The law of Ukraine is silent on this matter. There is also no court practice or other guidance on it as of today.

6.7 Do the national courts have jurisdiction to deal with procedural issues arising during an arbitration?

Under the Arbitration Law, the courts of Ukraine have the power to make a final determination on the issue of the tribunal's jurisdiction (see our answer to question 3.4 above). No other courts' powers to intervene in arbitration are established by the Arbitration Law or otherwise.

7 Preliminary Relief and Interim Measures

7.1 Is an arbitral tribunal in your jurisdiction permitted to award preliminary or interim relief? If so, what types of relief? Must an arbitral tribunal seek the assistance of a court to do so?

Under the Arbitration Law, unless otherwise agreed by the parties, the arbitral tribunal may, at the request of a party, order interim measures. Such interim measures may be obtained at any stage of the arbitral proceedings, as well as before the proceedings commence.

The Rules of the International Commercial Arbitration Court at the Ukrainian Chamber of Commerce and Industry (the "**ICAC**"), which is one of the two permanent arbitration institutions in Ukraine, also provide for the powers of the Presidents of the ICAC (prior to the formation of the arbitration tribunal) or the arbitral tribunal (if already constituted) to grant interim measures.

Neither the Arbitration Law nor the ICAC Rules provide for the particular types of interim measures. In practice, those can include asset-freezing orders, anti-suit injunctions, and orders for disclosure of documents.

Although established by the law, interim measures granted in arbitration are impossible to enforce in Ukraine. The reason for this is that the Ukrainian rules of court procedure do not provide for an appropriate procedural framework allowing courts to enforce such measures.

7.2 Is a court entitled to grant preliminary or interim relief in proceedings subject to arbitration? If so, in what circumstances? Can a party's request to a court for relief have any effect on the jurisdiction of the arbitration tribunal?

The Arbitration Law contains a standard wording that it is not

incompatible with an arbitration agreement for a party to request, before or during arbitral proceedings, an interim measure of protection from a court and for a court to grant such measure.

Such request has no effect on the tribunal's jurisdiction.

7.3 In practice, what is the approach of the national courts to requests for interim relief by parties to arbitration agreements?

As in the case of enforcement of interim measures granted by the tribunal, the courts of Ukraine will not grant interim measures in support of the ongoing arbitration proceedings due to the absence of the relevant procedural rules which would regulate such procedure.

7.4 Under what circumstances will a national court of your jurisdiction issue an anti-suit injunction in aid of an arbitration?

The courts of Ukraine do not issue anti-suit injunctions in aid of arbitration due to the reason specified in our answer to question 7.3 above.

7.5 Does the law of your jurisdiction allow for the national court and/or arbitral tribunal to order security for costs?

The Arbitration Law is silent on the issue of granting security for costs. In practice, such measure is likely to be impossible due to the drawbacks of the Ukrainian procedural legislation as described above.

7.6 What is the approach of national courts to the enforcement of preliminary relief and interim measures ordered by arbitral tribunals in your jurisdiction and in other jurisdictions?

As noted in our answer to question 7.1 above, the courts of Ukraine refuse to enforce interim measures granted by arbitrators due to a lack of procedural grounds. Therefore, the absence of an appropriate procedural framework for Ukrainian courts renders the provisions of the Arbitration Law meaningless with regards to interim measures in arbitration.

8 Evidentiary Matters

8.1 What rules of evidence (if any) apply to arbitral proceedings in your jurisdiction?

Under the Arbitration Law, arbitrators are free to determine the admissibility, relevance, materiality, and weight of any evidence. Each party has the burden of adducing evidence sufficient to prove the facts upon which it seeks to rely in support of its claims or defences. The Arbitration Law also requires that any information provided by one party to the arbitral tribunal shall be shared with all other parties to the arbitration proceedings.

8.2 What powers does an arbitral tribunal have to order disclosure/discovery and to require the attendance of witnesses?

The Arbitration Law does not address the issue of disclosure of documents. Therefore, no particular limits are established on the scope of arbitrators' authority in this regard.

8.3 Under what circumstances, if any, can a national court assist arbitral proceedings by ordering disclosure/discovery or requiring the attendance of witnesses?

Under the Arbitration Law, the arbitral tribunal, or a party with the approval of the arbitral tribunal, may request assistance from the competent court of Ukraine in taking evidence. The court, guided by its rules on taking evidence, may execute the request within its competence.

In practice, however, Ukrainian courts are reluctant to grant such requests of a party or arbitral tribunal mainly due to the absence of the relevant procedural rules as in the event of granting of interim measures.

8.4 What, if any, laws, regulations or professional rules apply to the production of written and/or oral witness testimony? For example, must witnesses be sworn in before the tribunal and is cross-examination allowed?

Neither the Arbitration Law, nor other provisions of Ukrainian law contain specific rules governing oral or written witness testimony procedures in arbitration proceedings. Therefore, in practice, this issue is determined by the parties and the arbitral tribunal as they deem appropriate for the purposes of a particular arbitration, provided that parties are treated equally and each party has full opportunity to present its case.

8.5 What is the scope of the privilege rules under the law of your jurisdiction? For example, do all communications with outside counsel and/or in-house counsel attract privilege? In what circumstances is privilege deemed to have been waived?

This issue remains unregulated. Neither the Arbitration Law, nor other acts of the Ukrainian legislation address the questions of privilege and confidentiality.

9 Making an Award

9.1 What, if any, are the legal requirements of an arbitral award? For example, is there any requirement under the law of your jurisdiction that the award contain reasons or that the arbitrators sign every page?

According to the Arbitration Law, the award shall be made in writing and shall be signed by the tribunal. If the tribunal consists of more than one arbitrator, the signatures of the majority of all members of the tribunal shall suffice, provided that the reason for any omitted signature is stated.

The award shall also state the reasons upon which it is based (unless the parties have agreed that no reasons are to be given), its date and the place of arbitration.

9.2 What powers (if any) do arbitral tribunals have to clarify, correct or amend an arbitral award?

The Arbitration Law provides that any party to arbitration, within 30 days of receipt of the award, unless another period of time has been agreed upon by the parties, with notice to the other party, may:

a) request the arbitral tribunal to correct in the award any error in computation, any clerical or typographical errors or any errors of similar nature;

b) request the arbitral tribunal to give an interpretation of a specific point or part of the award; and

c) request the arbitral tribunal to make an additional award as to claims presented in the arbitral proceedings but omitted from the award.

If the arbitral tribunal considers such requests to be justified, it shall make the correction or give the interpretation within 30 days of receipt of the request. The interpretation shall form part of the award. As regards an additional award – it shall be rendered within 60 days if the respective request is considered by the tribunal to be justified.

10 Challenge of an Award

10.1 On what bases, if any, are parties entitled to challenge an arbitral award made in your jurisdiction?

Under Article 34 of the Arbitration Law, which basically mirrors the same article of the UNCITRAL Model Law, the parties are entitled to challenge an arbitral award rendered in Ukraine on the following grounds:

(i) if a party making the application furnishes proof that:

- it was incapacitated at the time of entering into the arbitration agreement; or the said agreement is invalid under the law to which the parties have subjected it or, failing any indication thereon, under the law of Ukraine; or
- the party was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings, or was otherwise unable to present its case having valid excuse; or
- the arbitral award deals with a dispute that was not contemplated by – or not falling within – the terms of the submission to arbitration, or contains decisions on matters beyond the scope of the submission to arbitration; or
- the composition of the arbitral tribunal or the arbitral procedure contradicted to the agreement of the parties, unless such agreement was in conflict with mandatory provisions of the Arbitration Law or, in in the absence of such agreement, was not in accordance with the Arbitration Law; or

(ii) if the court finds that:

- the subject matter of the dispute cannot be settled by arbitration under the Ukrainian law; or
- the award is in conflict with the public policy of Ukraine.

10.2 Can parties agree to exclude any basis of challenge against an arbitral award that would otherwise apply as a matter of law?

The legal grounds for a challenge against an arbitral award in Ukraine are established by the Arbitration Law. It does not allow the parties to exclude any basis for a challenge against an arbitration award by the parties' agreement. Therefore, even if the parties agree on a/an exclusion/amendment/change of any grounds for a challenge against an arbitral award, such agreement would not be enforceable in practice.

10.3 Can parties agree to expand the scope of appeal of an arbitral award beyond the grounds available in relevant national laws?

No, it is not allowed by the Arbitration Law to expand the scope of appeal of an arbitral award. Please also refer to our answer to question 10.2 immediately above.

10.4 What is the procedure for appealing an arbitral award in your jurisdiction?

An application for appealing an arbitral award shall be submitted to the common local court of the first instance having jurisdiction over the seat of arbitration.

Since there are no arbitral institutions in Ukraine, other than the ICAC and the Maritime Arbitration Commission (the "**MAC**"), and since no awards of *ad hoc* arbitral tribunals are reported to have been challenged to date, the Kyiv Shevchenkivskyi District Court, as the common court having jurisdiction over the location of the ICAC and MAC, would be a competent court to decide on setting aside an arbitral award.

An application on appealing an arbitral award should be filed by the challenging party within three months upon receipt of the arbitral award by such a party.

A ruling of the Kyiv Shevchenkivskyi District Court renders, upon consideration of the application on appeal, an arbitral award is subject to further challenge under the appellate and then cassation procedure.

11 Enforcement of an Award

11.1 Has your jurisdiction signed and/or ratified the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards? Has it entered any reservations? What is the relevant national legislation?

Ukraine is a signatory to the New York Convention, and the New York Convention is treated as part of the national legislation having priority over any applicable national laws. While signing, Ukraine made a reciprocity reservation to the effect that Ukraine is only obliged to enforce arbitral awards which originate from countries that have also joined the New York Convention.

Further to the New York Convention and as regards matters which are not regulated by it, the recognition and enforcement of an arbitral award is regulated by the CPC and the Ukrainian Enforcement Proceedings Law.

11.2 Has your jurisdiction signed and/or ratified any regional Conventions concerning the recognition and enforcement of arbitral awards?

Ukraine has signed and ratified the 1961 European Convention on International Commercial Arbitration and the 1992 Kyiv (CIS) Convention on the Settlement of Commercial Disputes.

11.3 What is the approach of the national courts in your jurisdiction towards the recognition and enforcement of arbitration awards in practice? What steps are parties required to take?

During the last few years, the Ukrainian courts have demonstrated a pro-arbitral approach to the recognition and enforcement of foreign arbitral awards by granting the recognition and enforcement of such awards in the majority of cases. The recognition and enforcement of a foreign arbitral award is usually refused only if the opposing party manages to clearly prove to the court the existence of grounds for the refusal of recognition and enforcement of the arbitral award established by the New York Convention.

An application on the recognition and enforcement of a foreign arbitral award is to be submitted to the Ukrainian common court of the first instance at the place of the debtor's domicile or – if the debtor has no domicile in Ukraine or his domicile is unknown – at the location of the debtor's assets. Such application has to include the supportive documents established by the New York Convention and must be submitted within three years from the moment when the arbitral award became effective and binding upon the parties.

Once the application is considered by the Ukrainian court, it then renders the ruling by which recognition and enforcement of the award is granted or refused. Such ruling is subject to further challenge with the court of appeal and then with the Supreme Specialized Court of Ukraine for Civil and Criminal Matters.

11.4 What is the effect of an arbitration award in terms of *res judicata* in your jurisdiction? Does the fact that certain issues have been finally determined by an arbitral tribunal preclude those issues from being re-heard in a national court and, if so, in what circumstances?

The applicable Ukrainian procedural rules do not directly establish a *res judicata* effect of the arbitral award.

At the same time, the CoPC requires termination of the court proceedings by the commercial court in case of existence of an arbitral award issued in the same dispute between the same parties on the same grounds.

11.5 What is the standard for refusing enforcement of an arbitral award on the grounds of public policy?

The Supreme Court of Ukraine in its official guidance defines public policy as "*the legal order of the state, the key principles and basics, which constitute the basis of its existing order (concern independence, integrity, sovereignty and immunity, fundamental constitutional rights, freedoms, guarantees, etc.)*".

The above definition provides for a very narrow and crystal clear understanding of the public policy concept as it should be applied by courts. On this basis, Ukrainian courts have developed a unified standard to the application of public policy defence in practice – enforcement of an arbitral award can be refused due to the violation of public policy in very narrow and exceptional circumstances.

12 Confidentiality

12.1 Are arbitral proceedings sited in your jurisdiction confidential? In what circumstances, if any, are proceedings not protected by confidentiality? What, if any, law governs confidentiality?

The Arbitration Law does not address the issue of confidentiality. However, arbitral proceedings are considered confidential in Ukraine. Therefore, arbitral awards are not published.

The ICAC Rules provide that the ICAC President, his/her deputies, arbitrators and the ICAC Secretariat are bound by the duty of confidentiality relating to information that they have become aware of during the course of arbitration. However, this rule does not apply to the parties. Therefore, it is advisable for the parties to include confidentiality provisions in the arbitration agreement where Ukrainian law governs the arbitration.

12.2 Can information disclosed in arbitral proceedings be referred to and/or relied on in subsequent proceedings?

Ukrainian law does not prohibit referral/use, etc. of the information which was disclosed by any party in the arbitration proceedings during the subsequent proceedings.

13 Remedies / Interests / Costs

13.1 Are there limits on the types of remedies (including damages) that are available in arbitration (e.g., punitive damages)?

The Arbitration Law does not contain any prescriptions and/or limitations in respect of types of remedies that may be sought in an arbitration seated in Ukraine. Thus, the arbitral tribunal may exercise broad discretion in that respect.

13.2 What, if any, interest is available, and how is the rate of interest determined?

Awarding interest on the amount of indebtedness is not regulated by the provisions of the Arbitration Law and thus the general rules of contract law of Ukraine apply. The Civil Code of Ukraine provides for interest on the amount of indebtedness at a rate of 3% *per annum*.

The award-creditor is also free to seek post-award interest, i.e., reimbursement of 3% *per annum* after the award is issued and until the final repayment of debt is made by the debtor. However, enforcement of post-award interest, even if awarded, is doubtful in Ukraine since state bailiffs are prohibited from interpreting a court ruling on the recognition and enforcement of an arbitral award.

13.3 Are parties entitled to recover fees and/or costs and, if so, on what basis? What is the general practice with regard to shifting fees and costs between the parties?

There are no express provisions on the allocation of costs of proceedings in the Arbitration Law. Therefore, an arbitral tribunal is free to order fees and expenses of arbitrators, administrative expenses fixed by the arbitral tribunal, as well as other fees and expenses, as it deems appropriate taking into account respective provisions of the applicable arbitration rules.

For instance, the ICAC Rules provide that, unless the parties have agreed otherwise, the arbitration fee shall be charged to the party against which the award is made. If a claim is granted in part, the arbitration fee shall be charged to the respondent in proportion to the amount of the granted claim, and the claimant shall bear the administration fee relating to the amount of the claim that have been dismissed.

13.4 Is an award subject to tax? If so, in what circumstances and on what basis?

Under Ukrainian law, an arbitral award should not *per se* entail any Ukrainian tax implications. However, funds/assets received as a result of the award's actual enforcement should, in general, be considered taxable income to their recipient.

13.5 Are there any restrictions on third parties, including lawyers, funding claims under the law of your jurisdiction? Are contingency fees legal under the law of your jurisdiction? Are there any "professional" funders active in the market, either for litigation or arbitration?

Ukrainian law contains no express restrictions or limitations as to the ways the case can be funded. Thus, any fee arrangements, including contingency fees, are allowed in Ukraine.

14 Investor State Arbitrations

14.1 Has your jurisdiction signed and ratified the Washington Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (1965) (otherwise known as "ICSID")?

Ukraine is a signatory to the ICSID Convention since 3 April 1998. The Parliament of Ukraine ratified the ICSID Convention on 7 June 2000. It entered into force for Ukraine on 7 July 2000.

14.2 How many Bilateral Investment Treaties (BITs) or other multi-party investment treaties (such as the Energy Charter Treaty) is your jurisdiction party to?

In addition to the ICSID Convention and the Energy Charter Treaty (effective since 27 January 1999), Ukraine is party to 72 bilateral investment treaties for the promotion and reciprocal protection of investments.

14.3 Does your jurisdiction have any noteworthy language that it uses in its investment treaties (for example in relation to "most favoured nation" or exhaustion of local remedies provisions)? If so, what is the intended significance of that language?

Whereas the overwhelming majority of BITs that Ukraine is a party to have a provision that Contracting States have an obligation to treat investments originating from another Contracting State fairly and equitably, only a few of them provide further guidance.

14.4 What is the approach of the national courts in your jurisdiction towards the defence of state immunity regarding jurisdiction and execution?

To our knowledge, Ukrainian courts have not yet considered the argument of immunity against the enforcement of investment treaty awards.

15 General

15.1 Are there noteworthy trends or current issues affecting the use of arbitration in your jurisdiction (such as pending or proposed legislation)? Are there any trends regarding the type of disputes commonly being referred to arbitration?

On 23 March 2017, the President of Ukraine introduced to the Ukrainian Parliament Draft Law No. 6232, which, alongside amendments to other laws, provides for the complete revision of the CPoC and CPC. The proposed draft law, *inter alia*, seeks to increase the effectiveness of arbitration by introducing a much-expected procedural framework allowing a court to exercise powers in support of arbitral proceedings. Such powers will include a great variety of measures in support of arbitration, such as securing appearance of a witness, security for costs and granting of various forms of interim relief. Other amendments to the CPoC and CPC aim to improve the existing procedural rules on the challenge and recognition and enforcement of foreign arbitral awards in Ukraine.

At the same time, the proposed amendments to the CPC broaden the list of disputes designated as non-arbitrable in Ukraine. For instance, the draft CPC provides that disputes related to the state registration of immovable property or intellectual property rights, bankruptcy-related disputes as well as disputes related to public procurements are non-arbitrable. It is, however, not yet known whether the given draft CPC will be adopted into law in its current form. The majority of arbitration practitioners in Ukraine have strongly opposed such unjustified crackdown on arbitration.

15.2 What, if any, recent steps have institutions in your jurisdiction taken to address current issues in arbitration (such as time and costs)?

On 16 March 2016, the Presidium of the ICAC, one of the two international commercial arbitration institutions in Ukraine, has supplemented the List of Recommended Arbitrators (the "**List**") with 35 new arbitrators from Ukraine and 16 other countries. This move is deemed to be a response to the constant criticism from consumers of alternative dispute resolution services over the closed list of arbitrators, which notwithstanding the use of the word 'recommended' in its name is in practice obligatory. Now the List consists of 112 arbitrators, approximately half of whom are not Ukrainian citizens.

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Olexander's practice includes broad experience in advising multi-national and local companies, institutions and organisations on their compliance and business activities in Ukraine, as well as on corporate and competition law, corporate restructuring, and mergers and acquisitions. Olexander has over 25 years of experience representing clients in the Ukrainian system of general and commercial courts, including the Supreme Court of Ukraine and has over 20 years of experience representing clients in international commercial arbitration proceedings, both within and outside Ukraine (including involvement in more than a dozen international commercial arbitration proceedings). He is on lists of recommended arbitrators with the International Arbitral Centre of the Austrian Federal Economic Chamber, Singapore International Arbitration Centre, Hong Kong International Arbitration Centre and South China International Economic, Trade Arbitration Commission/Shenzhen Court of International Arbitration and Kuala Lumpur Regional Centre for Arbitration, and International Commercial Arbitration Court at the Ukrainian Chamber of Commerce and Industry (ICAC). Olexander frequently acts as an expert on matters of Ukrainian law in international commercial and investment arbitration proceedings, and foreign dispute resolution proceedings, submitting Ukrainian expert witness reports, legal opinions, and affidavits.

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