

# PJSC "Cherkasagroproect" v. Bonduelle Development S.A.S., Supreme Commercial Court of Ukraine, 15 May 2013

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*The Supreme Commercial Court of Ukraine (the SCCU) ruled on (i) the arbitrability of disputes arising from the agreement on sale of participatory interest in the charter capital of a company; (ii) mandatory application of Ukrainian legislation to such transactions.*

## 1. Facts of the case

On March 26, 2009, PJSC "Cherkasagroproect" (Seller) and Bonduelle Development S.A.S. (Buyer) entered into the sales agreement of 100 % participatory interest in the charter capital of LLC "Mayak-Khydyaki" (hereinafter – Sales Agreement).

Later, PJSC "Cherkasagroproect" argued that its rights as a seller have been breached since Bonduelle Development S.A.S. failed to pay the amounts due under the Sales Agreement. Consequently, PJSC "Cherkasagroproect" filed a claim with the Commercial Court of Cherkassy Region.

## 2. First instance court judgment

The Defendant challenged the jurisdiction of the commercial court and stated that the disputed issues were covered by the arbitration clause and, subsequently, the commercial court did not have jurisdiction to try the case. The Defendant asked the court to turn over the dispute to the International Chamber of Commerce, located in Paris, France.

The first instance court upheld the motion and issued the resolution on termination of the proceedings.

## 3. Court of Appeal judgment

The Plaintiff successfully challenged that decision. The Kyiv Commercial Court of Appeal reversed the first instance judgment noting that:

(i) the dispute was a corporate dispute and thus was subject to commercial courts' exclusive jurisdiction;

(ii) the parties to the Sales Agreement, having negotiated the law applicable to the Agreement, breached the Ukrainian legislation since the shareholders of a company registered under the laws of Ukraine cannot change the law applicable to issues of invalidity of transactions (grounds, procedure, legal consequences) concluded between shareholders, or between shareholders and company. The rules on invalidity are of the mandatory nature.

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### Jurisdiction

Ukraine

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### Court

Supreme Commercial  
Court of Ukraine

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### Case date

15 May 2013

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### Case number

07/5026/1561/2012

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### Parties

Appellant, Bonduelle  
Development S.A.S.  
(France)  
Appellee, PJSC  
"Cherkasagroproect"  
(Ukraine)

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### Key words

agreement on sale of  
participatory interest in the  
charter capital of a  
company.  
arbitrability

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### Applicable legislation

Ukrainian

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### Publication Source

Uniform State Register of  
Court Decisions

#### 4. Court of Cassation judgment

#### Source

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Having considered the Defendant's cassation appeal the SCCU resolved as follows:

(1) Pursuant to Ukrainian legislation the corporate disputes include disputes between (i) company and its shareholders; (ii) shareholders.

In other words, the dispute between the shareholder of LLC "Mayak-Khydyaki" (Defendant) and the company's former shareholder (Plaintiff) was not a corporate dispute and did not fall under the exclusive jurisdiction of the commercial court. Subsequently, the SCCU annulled the judgment of the Kyiv Commercial Court of Appeal and at the same time restored the decision of the first instance court on the termination of proceedings in order to remit the parties to arbitration.

(2) With respect to the choice-of-law clause the SCCU ruled that the Sales Agreement opted for Ukrainian substantive law as the applicable one, hence no breach of imperative provisions took place.

Thus, the court of cassation appeal interpreted the Ukrainian law in such a way that disputes arising under/in connection with the agreement on sale and purchase of participatory interest in the charter capital of a company are not corporate disputes. Therefore, such disputes can be resolved by means of international commercial arbitration.

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The summary of the case file and full text of summarized court decision are available on:

<http://www.kluwerarbitration.com/CommonUI/document.aspx?id=KLI-KA-1326822>