



Ukrainian Arbitration  
Association

# Newsletter 1/2014



## Arbitration Conference on the Role of Law Stockholm May 22, 2014

**On May 22, 2014** a conference dedicated to the Role of Law took place in Stockholm. The event was attended by experienced arbitrators, legal advisors and corporate lawyers, who discussed the procedure for determining the applicable law in cases where the parties have not agreed it contractually, the possible implications of mandatory provisions of national law as well to what extent substantive national law may affect the resolution of a case.

**The conference agenda included the following issues related to applica-**



## **ble substantive law:**

- Which law is applicable?
- Should the arbitral tribunal be governed by mandatory provisions of national law when resolving a case?
- Which law is applied by national courts in international disputes?
- Is the choice of law of great importance in international arbitration?
- What is the opinion of corporate lawyers regarding this matter?
- May arbitration be called a market? Is it functioning properly in this status? What are the projections?



## Helsinki International Arbitration Day

**On June 5, 2014** the Helsinki International Arbitration Day focused on the subject “Demystifying the Role of the Arbitrator” will be held in Helsinki. The event participants will address topics such as the appropriate role of arbitrators in the conduct of proceedings, meeting the parties’ expectations and how to arrive at a healthy award. The effective conduct of arbitration proceedings and the work of arbitrators will also be addressed in the light of the new Arbitration Rules of the Finland Chamber of Commerce.

**The seminar will include a keynote speech and three panels:**

- Keynote Speech: “Nordic Arbitration in the 21st Century”
- First Panel: “Practical Experiences with the New Arbitration Rules of 2013”
- Second Panel: “The Arbitrator at the Service of the Parties”
- Third Panel: “How to Arrive at a Healthy Award”.

The seminar is intended for arbitrators, attorneys-at-law and corporate counsel interested or involved in national and international arbitrations.





## II Arbitration School

On May 7-11, 2014 the II Arbitration School organized jointly by the Ukrainian Arbitration Association and the Students' League of the Bar Association of Ukraine was successfully held in the offices of the leading law firms Baker & McKenzie and Asters.

The intensive five-day program included basic and specialized courses in international arbitration in form of lectures, interactive workshops and mock case. The working language was English. Among the nearly 30 participants this year were representatives from Ukraine, Germany, and Georgia.

The grand opening of the event began with a welcoming speech of the speaker and coordinator of the II Arbitration School Olena Perepelynska. Also, Partner of the Kiev office of Baker&McKenzie Igor Siusel; Executive Director of the Ukrainian Bar Association Alexandra Egert, and the retired Chairman of the League of Students of the Ukrainian Bar Association Anna Gluschenko were invited to present their speeches.

During the first three days, participants were also given the opportunity to enhance their skills through working in various teams over the mock case

under the guidance of qualified coaches Alexander Droug, lawyer of Sayenko Kharenko law firm, and Volodymyr Yaremko, lawyer of the West Ukrainian branch of Arzinger Law Office.

At the end of the intensive training, organizers initiated the Round Table on career opportunities in the sphere of international arbitration, where participants were given the unique opportunity to talk with experienced arbitrators and lawyers, in particular AstapovLawyers' Partner Oleh Beketov, attorney-at-law; Partner of the AGA Partners law firm Ivan Kasynyuk; Sayenko Kharenko law firm's Partner, President of the Ukrainian Arbitration Association, Tatiana Slipachuk, as well as James Clifford and Olga Troschenovich. The roundtable moderator was Elena Makarenko, Head of "International education, international relations" Department of the League of Students of the Ukrainian Bar Association.

After the School, representatives of the Ukrainian Arbitration Association and the League of Students of the Ukrainian Bar Association congratulated the participants with personal certificates. With the support of the Law Firm "Muranov, Chernyakov and partners" participants of the School will also be given free access to the electronic library "Science of Law".





## 1<sup>st</sup> All-Ukraine Writing Competition on International Commercial Arbitration

**On April 4, 2014** the winners and finalists of the 1<sup>st</sup> All-Ukraine Writing Competition on International Commercial Arbitration were handed their awards. Participants and winners of the competition were congratulated by President of the UAA, Sayenko Kharenko's Partner and Head of International Arbitration and International Trade Tetyana Slipachuk; Asters' Senior Associate, Secretary General of the UAA Yaroslav Petrov; and Sayenko Kharenko's Counsel and Board member of the UAA Olena Perepelynska.

The winners were determined by decision of the Scholarship Committee consisting of Tetyana Slipachuk, Yaroslav Petrov, Olena Perepelynska and Markian Malskyy. The competition was won by Oksana Matyash, student of the Institute of International Relations of Kyiv National Taras Shevchenko University, who was given a cash prize, the right to become a candidate member of Ukrainian Arbitration Association and the opportunity to complete a paid internship at the law firm Sayenko Kharenko.

The silver prize winner was Andriy Onys'ko, student of the Institute of International Relations of Kyiv National Taras Shevchenko University. He received a cash prize, the right to be a candidate member of the Ukrainian

Arbitration Association and the opportunity to complete an internship at the law firm Asters.

The third place was shared by Viktoria Martynkova, student of the Institute of International Relations of Kyiv National Taras Shevchenko University, Anastasia Nguyen, student of Odessa I.I. Mechnikov National University, and Andriy Shostatsky, student of Yaroslav the Wise National Law University. The bronze prize winners were entitled to become candidate members of the Ukrainian Arbitration Association and were handed useful books.

### Reference:

*The I All-Ukraine Writing Competition on International Commercial Arbitration was co-organized by the Students' League of the NGO "Bar Association of Ukraine" and the NGO "Ukrainian Arbitration Association." To participate in the competition, students prepared written papers on "Arbitrability of Disputes: Importance and Impact on the Development of International arbitration."*





## Webinar on International Arbitration: Myths and Modern Technology

**On February 17, 2014** a webinar entitled “International Arbitration: Myths and Modern Technologies” was held on the Webportal Zakon.ru. The event was supported by Muranov, Chernyakov and Partners law firm, Baker & Mckenzie CIS, Limited and Ukrainian Arbitration Association.

The speakers, Oleksander Muranov, Managing Partner at "Muranov, Chernyakov and Partners" and Volodymyr Khvaley, Partner at Baker & Mckenzie CIS, Limited, discussed some topical issues of international commercial arbitration.

Mr. Muranov addressed the use of modern information technology in international commercial arbitration cases. In particular, he focused on the following issues:

1. Internet as a source of information for the parties to proceedings and arbitrators.
2. Secret audio recording, iPad video recording, the use of laptop and Skype.
3. Using law firms rankings and databases on the Internet.
4. The risks of social networks and the use of gadgets during the





hearings.

5. Internet as a powerful PR tool.
6. Risks differences between versions of a text editor and risks of automatic Check Spelling.

Mr. Volodymyr Khvaley presented ten myths about international arbitration, some of them:

1. Arbitration is a quick way to resolve disputes.
2. Arbitration is an inexpensive way of resolving disputes.
3. Arbitration is confidential.
4. Arbitrators are not subject to outside influence.





## Study of Ukraine by Legal Insight

The law magazine Legal Insight, jointly with the Russian Arbitration Association and CIS Arbitration Forum, conducted a study of one of the most closed practices at law firms – international commercial arbitration, with a focus on the CIS market. Information partners were the Ukrainian Bar Association and the Ukrainian Arbitration Association.

According to the study, Ukraine ranks second among CIS countries by the number of disputes that are considered in international arbitration (40.7 % of cases). In 2012, ICAC at the Chamber of the Russian Federation and Ukraine ICAC at the UCCI considered four times more cases involving companies from the CIS than ICC, LCIA and SCC taken together. That is why a number of law firms in Russia and Ukraine have established teams of lawyers dealing mainly with international arbitration, while in other CIS countries international arbitration is often practiced by lawyers specializing mostly or mainly in other law areas. Ukrainian law firms have the largest ICA practices. The ranking of leading law firms in the field of international arbitration in the CIS includes 2 Ukrainian companies - AstapovLawyers and Saeynko Kharenko. Of the 22 most known professionals in the field of international arbitration in Russia recognized two representatives, Tetyana Slipachuk and Andriy Astapov, are from Ukraine.

The results of the study are based on expert surveys and interviews on international commercial arbitration in the CIS and on the statistics available. The study considered the quantitative and qualitative indicators of the CIS Arbitration Market, the strategic and tactical advantages of business entities, the interaction between consultants and clients as well as similarities



and differences between the legal services markets in different CIS countries.





## National Court's Decision in the Case of Euler Hermes Services Schweiz AG on the Lapse of Right under an Arbitration Clause

The decision of the Odesa Region Court of Appeal dated 22.01.2014 in the Case of Euler Hermes Services Schweiz AG on the recognition of an arbitral award in Ukraine demonstrate that the case law on the lapse of right under an arbitration clause is rather confusing and formalistic.

Thus, Euler Hermes Services Schweiz AG sought the National Court to permit the recognition and enforcement of a FOSFA award in Ukraine regarding the recovery of debt from the PJSC "Odesa Oil and Fat Factory." The contract in dispute was concluded between Pontus Trade S.A. and the debtor. The contract contained provisions on the prohibition to transfer the rights thereunder. However, the initial creditor transferred the right of claim against the debtor to Euler Hermes Services Schweiz AG before the arbitration proceedings were completed. Moreover, the creditor specified in the arbitral award was the initial creditor. During the examination of the claim in the Ukrainian court, Euler Hermes Services Schweiz AG noted that the assignment contract involved the transfer of claims not from the contract proper, but from the arbitral award.

The trial and appellate courts refused to recognize the arbitral award and to permit its enforcement on the ground that only the creditor may apply for recognition and enforcement of arbitral awards, while Euler Hermes Ser-



vices Schweiz AG is not specified as the creditor in the arbitral award. Also, the appellate court further justified that the recognition and enforcement of the award would be contrary to the public policy of Ukraine.

The cassation court admitted that the additional arguments on violations of public order given by the appellate court were contrary to substantive law, and therefore quashed the decision of the appellate court and remitted the case for a new trial. At the same time, in its decision the appellate court did not examine the interpretation of the notion of "creditor."

Upon the remittal of the case for a new trial, the appellate court, pursuant to Part 1 of Article 393 of the Civil Procedure Code of Ukraine, under which the creditor itself (or its representative) shall seek a court permit for enforcement of a foreign judgment, noted that in the case considered the term "creditor" might not be subject to broad interpretation, being correlated with the term "foreign judgment" and with the provisions on the immediacy of filing such a petition under the same Article of the Civil Procedure Code of Ukraine.

Therefore, the appellate court concluded that the right to file such petitions to the court under the effective Civil Procedure Code of Ukraine is vested only in the company Pontus Trade S.A. as a creditor under the arbitral award. Thus the petition filed by Euler Hermes Services Schweiz AG had no legal grounds under Ukrainian legislation. Accordingly, the court refused to permit the enforcement of the arbitral award in Ukraine.

## National Court's Decision in the Cases of VAMED Engineering GmbH & CO KG on arbitrability of disputes

In its decision dated 19.02.2014 the Kyiv Court of Appeals made a pro-arbitration conclusion in a case relating to arbitrability of disputes.

VAMED Engineering GmbH & CO KG applied for cancellation of the award by ICAC at the UCCI Ukraine on the claim filed by the State Enterprise for Supplying Medical Facilities "Ukrmedpostach" against VAMED Engineering GmbH & CO KG. The award was grounded by the invalidity of the arbitration clause, under which the ICAC at the UCCI Ukraine considered and ruled in the dispute between the parties.

The standpoint of VAMED Engineering GmbH & CO KG was that at the time the arbitration clause was concluded (14.09.2009), Part 2 of Article 12 of the Commercial Procedure Code of Ukraine stipulated that the parties may refer a dispute belonging to the jurisdiction of commercial courts to an arbitral tribunal (arbitration), except for disputes arising from the conclusion, modification, termination and performance under commercial agreements related to the satisfaction of public needs. Accordingly, in the opinion of VAMED Engineering GmbH & CO KG, the current Commercial Procedure Code of Ukraine prohibited to refer disputes arising from agreements entered into in connection with the satisfaction of public needs to international commercial arbitration.

The trial and appellate courts disagreed with the above reasoning and stated that the mentioned rule of the Commercial Procedure Code of Ukraine applied only to arbitral tribunals governed by the Law of Ukraine "On Arbitral Tribunals." According to its Part 4 of Article 1, the Law does not extend to international commercial arbitration. Therefore, the courts concluded that Part 2 of Article 12 of the Commercial Procedure Code of Ukraine does not apply to international commercial arbitration.

## National Court's Decision in the Case of HUAWEI TECH. INVESTMENT CO., LTD on invalidity of an arbitration clause

In its decision dated 27.11.2013 the Higher Commercial Court of Ukraine arrived at the conclusion that the lack of a precise name of an arbitration court in an arbitration clause is a ground for its invalidation.

Telesystems of Ukraine LLC filed a lawsuit against HUAWEI TECH. INVESTMENT CO., LTD and the private form "ARSLAN" to invalidate arbitration clauses. The plaintiff alleged that the arbitration clauses in contracts concluded between Telesystems of Ukraine LLC and HUAWEI TECH. INVESTMENT CO., LTD contained no precise name of the dispute resolution authority.

Thus, the Arbitration Clause of the contracts stipulated that any disputes, controversies or claims arising from or in connection with the contract or breach, termination or invalidity thereof will be considered by arbitration in accordance with the Arbitration Rules of the German Institution for Arbitration in Berlin. The number of arbitrators in case of dispute will be three. The place of arbitration shall be Berlin, Germany. The language of arbitration shall be English.

The panel of judges of a cassation court agreed with the findings of previous courts that the lacking name of the court the parties shall refer their disputes to in the arbitration clauses was contrary to Ukrainian legislation and upheld the decision of the previous courts on recognizing the arbitration clauses invalid.

**International Commercial Arbitration Court  
at the Ukrainian Chamber of Commerce and  
Industry published its report for 2013**

## **1. Cases considered by ICAC at UCCI Ukraine in 2013**

Within the period from January 1 through December 31, 2013 the ICAC at the UCCI Ukraine took up 428 cases, i.e. 122 cases more than in 2012. In 2013, the ICAC at the UCCI Ukraine considered and passed awards in 297 cases, of which 152 cases (51.18 %) were considered by panels of arbitrators and 145 cases (48.82 %) by sole arbitrators.

Foreign arbitrators from Austria, Belarus, Germany, Kazakhstan, Moldova, Norway, Poland, Russia, Serbia, Slovakia, and Switzerland were often involved in the proceedings.

## **2. Parties geography**

Parties to cases were individuals from 55 countries, including from 46 non-CIS countries, 8 CIS countries and Ukraine. Residents were defendants in 55 cases, which is 12.85 % of the total number of cases, and plaintiffs in 366 cases (85.51 %).

## **3. Types of disputed contracts**

As in previous years, most disputes referred to the ICAC at the UCCI Ukraine in 2013 were associated with supply contracts and international sale of goods and related to breach of contractual obligations regarding payments or delivery of goods. A large number of disputes related to the quality of delivered goods, the provision of services (including banking) and different kinds of work performed. Disputes relating to construction, freight forwarding services, transportation of goods, leasing, lease contracts, and loans.

## **4. Terms of arbitration proceedings**

In 2013 the ICAC at the UCCI Ukraine considered and passed awards in 297 cases. In most cases the period of consideration was from three to six months, 9 cases were considered for more than 12 months.



## Second Edition of "International Commercial Arbitration" by Gary Born

The second edition of Gary Born's International Commercial Arbitration is an authoritative 4,000 page treatise, in three volumes, providing the most comprehensive commentary and analysis, on all aspects of the international commercial arbitration process.

The first edition of International Commercial Arbitration is widely acknowledged as the preeminent commentary in the field of international arbitration. It was awarded the 2011 Certificate of Merit by the American Society of International Law and was voted the "International Dispute Resolution Book of the Year" by the Oil, Gas, Mining and Infrastructure Dispute Management list serve in 2010.

The treatise comprehensively examines the law and practice of contemporary international commercial arbitration, thoroughly explicating all relevant international conventions, national arbitration statutes and institutional arbitration rules. It focuses on both international instruments and national law provisions in all leading jurisdictions.

The second edition has been extensively revised, expanded and updated, to include all legislative, judicial and arbitral authorities' material in the field of international arbitration prior to January 2014. It also includes expanded treatment of annulment, recognition of awards, counsel ethics, arbitrator independence and impartiality and applicable law. The revised text contains references to more than 20,000 cases, awards and other authorities.