Ukraine

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1. EXECUTIVE SUMMARY

1.1.1 What are the advantages and disadvantages relevant to arbitrating or bringing arbitration related proceedings in your jurisdiction?

Advantages

- comparatively low costs (including the arbitration fees of Ukrainian based permanent arbitration institutions, court fees in arbitration-related matters, legal fees of Ukrainian lawyers, etc);
- the possibility to refer to international arbitration disputes involving Ukrainian entities that have been invested in by foreign parties, even if the other party to the dispute is a Ukrainian legal entity or individual (particularly important for Ukrainian subsidiaries of international companies);
- the arbitration law is based on the UNCITRAL Model Law (the 'Model Law') subject to a few deviations;
- support for *ad hoc* arbitration:
  - the International Commercial Arbitration Court at the Ukrainian Chamber of Commerce and Industry (ICAC) may act as an appointing authority in accordance with UNCITRAL Arbitration Rules and provide organisational assistance in arbitral proceedings on the basis of its special Rules of Assistance approved by the Decision of the Presidium of the Ukrainian Chamber of Commerce and Industry dated 27 October 2011, protocol No. 14(1);
  - the Ukrainian Chamber of Commerce and Industry (UCCI) may exercise the functions conferred by virtue of Article IV of the Geneva Convention on Presidents of the competent Chambers of Commerce;
- relatively arbitration-friendly state courts;
- availability of interim measures at the stage of recognition and enforcement of foreign arbitral awards, as well as arbitral awards rendered in international arbitrations seated in Ukraine;
- constantly improving legislative framework in the area of arbitration;
- convenient location in Central Europe with good flight connections.

Disadvantages

- no court-ordered interim measures in support of arbitration proceedings, including recognition and enforcement by courts of tribunal-ordered interim measures;
- in practice, no court assistance in gathering evidence (although in theory, such assistance is available at law);

- a relatively formal approach to setting aside arbitral awards, including with respect to issues regarding court determination of the validity and/or enforceability of an arbitration agreement;
- wide interpretation of public policy. The courts have been known to refuse to recognise and enforce foreign arbitral awards on the basis that such awards were contrary to public policy;
- a three-year limitation period for filing recognition and enforcement of foreign arbitral awards and arbitral awards rendered in international arbitrations seated in Ukraine.

1.1.2 How would you rate the supportiveness of your jurisdiction to arbitration on a scale of 1 to 5, with the number 5 being highly supportive towards arbitration and 1 being unsupportive of arbitration? Where your jurisdiction is in the process of reform, please add a + sign after the number.
3+.

2. GENERAL OVERVIEW AND NEW DEVELOPMENTS

2.1.1 How popular is arbitration as a method of settling disputes? What are the general trends and recent developments in arbitration in your jurisdiction?
International arbitration is a popular method of settling international commercial disputes for Ukrainian parties. Ukraine has implemented all major international instruments in this field, and was one of the signatories (separately from the Union of the Soviet Socialist Republics) to the New York Convention and the Geneva Convention. The process of the development of the national arbitration law and the establishment of permanent arbitral institutions began only in 1991, when Ukraine became an independent state. In 1992, the principal Ukrainian arbitral institution, the ICAC, was established, and it remains a popular choice for Ukrainian parties, with an average caseload for the last five years of over 300 international cases per year. In 1994, Ukraine adopted a special law on international commercial arbitration, which replicated the Model Law, subject to a few deviations. Ukrainian procedural legislation in arbitration related matters has been improving since 2010, including with respect to the recognition and enforcement of foreign arbitral awards and the ability to obtain interim measures in the context of such enforcement. One of the most controversial issues remains arbitrability, including that of corporate disputes.

Domestic arbitration, being regulated separately, is less developed due to the fact that the legislation for domestic arbitration has only developed over the last eight years. Domestic arbitration is most actively used in the banking sector, with over 20,000 cases per year.

2.1.2 Are there any unique jurisdictional attributes or particular aspects of the approach to arbitration in your jurisdiction that bear special mention?
Disputes between Ukrainian entities in which foreign parties have invested and other Ukrainian legal entities and nationals may be referred either to domestic or to international arbitration at the parties' election.

Another unique feature of arbitration in Ukraine arises in respect of the '180 days Rule'. Ukrainian foreign currency regulations require Ukrainian parties to resort to institutional arbitration in Ukraine to suspend application of tax penalties for violation of the so-called '180 days Rule'. The 180 days Rule applies in case of non-performance of a contract by a foreign party, eg non-delivery of goods already paid for by the Ukrainian party or non-payment for goods already delivered by the Ukrainian party, if the goods or money do not cross the Ukrainian border within 180 days following respective payment or export of the goods by the Ukrainian party. In such cases, the commencement of arbitral proceedings before the ICAC or the Maritime Arbitration Commission at the UCCI (MAC), or the commencement of litigation before Ukrainian courts suspends the accrual of tax penalties imposed for violation of the foreign currency regulations. Commencement of proceedings before any other fora does not always result in such suspension.

2.1.3 Principal laws and institutions

2.1.3.1 What are the principal sources of law and regulation relating to international and domestic arbitration in your jurisdiction?

Ukrainian law sets out separate legal regimes for international and domestic arbitration.

International commercial arbitration in Ukraine is governed by the Law of Ukraine on International Commercial Arbitration of 24 February 1994, No. 4002-XII (LICA). It replicates the Model Law (1985) with a few deviations. Under the LICA, the parties may refer to international commercial arbitration any cross-border disputes resulting from contractual and other civil law relationships arising in the course of foreign trade and other forms of international economic relations, and disputes involving Ukrainian enterprises with foreign investment and international associations and organisations established in the territory of Ukraine.

Domestic arbitration in Ukraine is governed by the Law of Ukraine on Arbitration Courts of 11 May 2004, No. 1701-IV (the 'Domestic Arbitration Law') and applies to domestic civil and commercial disputes involving only Ukrainian nationals and entities. Although initially based on the Model Law, the current wording of the Domestic Arbitration Law significantly differs from the Model Law.

Foreign arbitral awards are enforced according to the rules of the Civil Procedure Code of Ukraine of 18 March 2003, No. 1618-IV (CPC) and the conditions set out in the New York Convention and the LICA. The scope of the application of the Geneva Convention is rather limited in practice.

2.1.3.2 What are the principal institutions that are commonly used and/or government agencies that assist in the administration or oversight of international and domestic arbitrations?

There are only two arbitral institutions in Ukraine which administer international arbitration proceedings under the LICA: the ICAC and the MAC.

The number of domestic arbitral institutions exceeds 300. The institutions with the highest caseloads are based in Kiev.

The LICA grants powers to perform the functions of appointment to the President of the UCCI (Articles 6(1), 11(3), 11(4) of the LICA).

In *ad hoc* arbitrations seated in Ukraine, the UCCI provides some assistance to arbitral proceedings in accordance with the Geneva Convention, when applicable.

Subject to the agreement of the parties, the ICAC may act as appointing authority and provide other assistance to *ad hoc* arbitrations under the UNCITRAL Arbitration Rules.

2.1.3.3 Which courts or other bodies have judicial oversight or supervision of the arbitral process?

The President of the UCCI decides on challenges to arbitrators and has the power to terminate their mandates (Articles 6(1), 13(3) and 14 of the LICA). See section 3.1.5.

Ukraine courts located at the seat of arbitration decide finally on the jurisdiction of arbitral tribunals when an arbitral tribunal has ruled on its own jurisdiction as a preliminary question (Article 16(3) of the LICA), and can set aside final arbitral awards rendered in Ukraine (Article 34(2) of the LICA).

The courts located at the debtor's place of residence or location, or that of its assets, are competent to consider motions for the recognition and enforcement of foreign arbitral awards, as well as for the enforcement of arbitral awards rendered in international arbitrations seated in Ukraine.

3. ARBITRATING IN YOUR JURISDICTION – KEY FEATURES

3.1 The appointment of an arbitral tribunal

3.1.1 Are there any restrictions on the parties' freedom to choose arbitrators?

The LICA does not impose any specific restrictions on the parties' freedom to choose arbitrators. Under Articles 11(1) and 11(5) of the LICA, the parties may agree on the qualifications required of arbitrators and their nationality. Under Article 10 of the LICA, the parties are also free to determine the number of arbitrators, failing which the number of arbitrators shall be three.

There is no requirement under the LICA that an arbitrator should be a member of the local Bar.

Although the ICAC Rules do not expressly prohibit appointment by the parties of arbitrators who are not included on a UCCI-approved 'recommended list of arbitrators', in practice this list is treated as closed (ie the ICAC invites the parties to appoint arbitrators from such list and in practice would not confirm the appointment by the parties of arbitrators who are not included on such list).

At the same time, the Domestic Arbitration Law contains detailed regulations regarding the choice of arbitrators. Pursuant to Article 18 of the Domestic Arbitration Law, the following persons may not act as arbitrators in domestic arbitration proceedings:

- minors and persons under guardianship;

- persons that do not meet the qualification requirements agreed by the parties or set forth in the rules of a domestic arbitration institution;
- persons with criminal records;
- persons that were declared legally incapable by a court; and
- acting judges of the general courts and judges of the Constitutional Court of Ukraine.

Furthermore, the Domestic Arbitration Law provides that in the event that a sole arbitrator of the permanent arbitration court hears a case, he or she must have a law degree. In the event that a case is heard by several arbitrators, the requirement to have a law degree extends only to the presiding arbitrator.

Pursuant to Article 16 of the Domestic Arbitration Law, the parties are free to determine the number of arbitrators, provided that such number is odd. Failing such determination, the number of arbitrators shall be three.

3.1.2 Are there specific provisions of law regulating the appointment of arbitrators?

According to Article 11(2) of the LICA, the parties are free to agree on the procedure for appointing the arbitrator or arbitrators, subject to compliance with the provisions of the LICA described below.

Pursuant to Article 11(4) of the LICA, where, under the procedure for appointment agreed upon by the parties, a party fails to act as required under such procedure, or the parties, or two arbitrators, are unable to reach an agreement expected of them under such procedure, or a third party, including an institution, fails to perform any function entrusted to it under such procedure, any party may request the President of the UCCI to make the appointment, unless the agreement on the appointment procedure provides another means for securing the appointment. The other party cannot raise any objections to such a request.

In addition, a decision by the President of the UCCI regarding the appointment of an arbitrator is not subject to appeal. When appointing an arbitrator, the President of the UCCI shall consider the qualifications required of the arbitrator by the agreement and the arbitrator's independence and impartiality. In the case of a sole or third arbitrator, the President of the UCCI shall consider the advisability of appointing an arbitrator of a nationality other than those of the parties.

3.1.3 Are there alternative procedures for appointing an arbitral tribunal in the absence of agreement by the parties?

In the absence of agreement by the parties, the respective provisions of the LICA will apply.

In particular, under Article 11(3) of the LICA in an arbitration with three arbitrators, each party shall appoint one arbitrator, and the two arbitrators thus appointed shall appoint the third arbitrator; if a party fails to appoint the arbitrator within thirty days of receipt of a request to do so from the other party, or if the two arbitrators fail to agree on the third arbitrator within thirty days of their appointment, the appointment shall be made, upon request of a party, by the President of the UCCI.

In an arbitration with a sole arbitrator, if the parties are unable to agree on the arbitrator, he or she shall be appointed, upon request of a party, by the President of the UCCI.

3.1.4 Are there requirements (including disclosure) for 'impartiality' and/or 'independence', and do such requirements differ as between domestic and international arbitrations?

According to Article 12(1) of the LICA, persons approached in connection with their possible appointment as arbitrators must disclose any circumstances likely to give rise to justifiable doubts as to their impartiality or independence. Such obligation continues throughout the arbitral proceedings. There is no established practice as to what circumstances would be considered as giving rise to justifiable doubts as to the impartiality or independence of arbitrators.

Similar requirements in domestic arbitration are more specific. In particular, pursuant to Article 19 of the Domestic Arbitration Law, arbitrators may not take part in arbitration proceedings and, after appointment can be subject to challenge or required to resign if, *inter alia*, (i) they are interested either directly or indirectly in the outcome of the arbitration proceedings; (ii) they are relatives of one of the parties or other persons participating in the arbitration proceedings, or have any other special relations with them; and (iii) they are resolving disputes which are either directly or indirectly related to the performance by such arbitrators of their public duties.

3.1.5 Are there provisions of law governing the challenge or removal of arbitrators?

Pursuant to Article 13(1) of the LICA, in the first instance the parties may agree on a procedure for challenging an arbitrator. At the same time, under Article 13(3) of the LICA, if any such challenge under the procedure agreed by the parties is not successful, within 30 days of receiving notice of the decision rejecting the challenge, the challenging party may request that the President of the UCCI decide on the challenge, from which there shall be no appeal.

In the event that the parties fail to reach agreement on a procedure for challenging an arbitrator, pursuant to Article 13(2) of the LICA, a party which intends to challenge an arbitrator must, within 15 days of becoming aware of the constitution of the arbitral tribunal or of becoming aware of any circumstance that gives rise to justifiable doubts as to the arbitrator's impartiality or independence, send a written statement of the reasons for the challenge to the arbitral tribunal. Unless the challenged arbitrator withdraws from office or the other party agrees to the challenge, the arbitral tribunal shall decide on the challenge. The challenged arbitrator can provide comments with respect to the challenge. Failing that, the challenging party may resort to the procedure available under Article 13(3) of the LICA.

3.1.6 What role do national courts have in any such challenges?

Ukrainian courts do not play any role in the challenge or removal of arbitrators.

3.1.7 What principles of law apply to determine the liability of arbitrators for acts related to their decision-making function?

The LICA does not govern the issue of the liability and/or immunity from liability of arbitrators for acts related to their decision-making function. No other provisions of Ukrainian law provide for the possibility of making arbitrators liable for acts related to their decision-making functions.

Conversely, the Domestic Arbitration Law provides in Article 22 that arbitrators shall be liable, as provided for in the applicable arbitration rules of a permanent arbitration institution or in a contract with a party in *ad hoc* arbitration, for a failure to fulfil their duties without good cause.

3.2 Confidentiality of arbitration proceedings

3.2.1 Is arbitration seated in your jurisdiction confidential? What are the relevant legal or institutional rules which apply?

The LICA does not specifically contain any rules on the confidentiality of arbitration proceedings seated in Ukraine. On the other hand, Article 12 of the ICAC Rules provides that the President and Vice Presidents of the ICAC, arbitrators and the ICAC Secretariat shall refrain from disclosing information about disputes settled by the ICAC. There are no other provisions of Ukrainian law which might result in the arbitration being confidential.

Pursuant to Article 32 of the Domestic Arbitration Law, the arbitral tribunals and arbitrators shall not disclose information of which they become aware in the course of arbitration proceedings without agreement of the parties or their successors. Separately, Article 29 of the Domestic Arbitration Law contains a controversial provision that hearings in domestic arbitration proceedings shall be open to the public, unless any of the parties object.

3.2.2 To what matters does any duty of confidentiality extend (eg does it cover the existence of the arbitration, pleadings, documents produced, the hearing and/or the award)?

The respective provisions of the ICAC Rules and the Domestic Arbitration Law do not set out any specific matters to which the duty of confidentiality extends.

3.2.3 Can documents or evidence disclosed in arbitration be used in other proceedings or contexts?

There are no restrictions under Ukrainian law on the use of documents or evidence disclosed in arbitration in other court proceedings or contexts.

3.2.4 When is confidentiality not available or lost?

Generally, the parties may reach an agreement that particular arbitration proceedings shall not be confidential. However, even confidential materials and information, including if the parties reached an agreement providing for the confidentiality of the arbitration, are subject to disclosure upon the request of the competent Ukrainian state authorities (eg for the purposes of a criminal investigation). In addition, the confidential materials would also lose their confidentiality upon an application to the court in respect of the arbitration.

3.3 Role of (and interference by) the national courts and/or other authorities

3.3.1 Will national courts stay or dismiss court actions in favour of arbitration?

Pursuant to Article II(3) of the New York Convention and Article 8(1) of the LICA, a Ukrainian court shall refer the parties to arbitration and terminate the court proceedings in a matter which is the subject of an arbitration agreement provided that (i) one of the parties requests the same prior to submitting its first statement on the substance of the dispute; and (ii) a court does not find that the respective arbitration agreement is void, inoperative or incapable of being performed.

Ukrainian courts take a rather formal approach in determining the validity of arbitration agreements. In this respect, an arbitration agreement could be deemed invalid or incapable of being performed even if there is a single mistake in the name of the arbitration institution. Furthermore, Ukrainian courts have recently set aside several ICAC awards (where the arbitral tribunals gave effect to pathological arbitration agreements and accepted jurisdiction of ICAC over the matter) on the basis that the respective arbitration agreements did not expressly give power to the arbitral tribunals to 'interpret' such arbitration agreements.

Ukrainian courts will decide on any jurisdictional issues, including the existence of an arbitration agreement, themselves and will not defer this matter to the arbitral tribunal. If a party does not request the court to terminate the court proceedings and refer parties to arbitration prior to submitting its first statement on the substance of the dispute, such party will be deemed to have waived the arbitration agreement.

3.3.2 Are there any grounds on which the national courts will order a stay of arbitral proceedings?

Ukrainian law does not provide for the power of Ukrainian courts to order a stay of arbitration proceedings. However, in the past some Ukrainian courts have granted injunctions in support of Ukrainian court proceedings, in which the validity of an arbitration agreement was in question, prohibiting the parties from taking part in the ongoing arbitration proceedings outside Ukraine.

3.3.3 What is the approach of national courts to parties who commence court proceedings in your jurisdiction or elsewhere in breach of an agreement to arbitrate?

In the event that court proceedings are commenced in Ukraine in breach of an arbitration agreement, a Ukrainian court will apply the test provided under Article II(3) of the New York Convention and Article 8(1) of the LICA to determine whether to terminate such proceedings and refer the parties to arbitration as provided in section 3.3.1 above. Ukrainian law does not provide for any additional relief for breach of an agreement to arbitrate.

In the event that court proceedings in breach of an arbitration agreement are commenced outside Ukraine, Ukrainian courts would most likely have no jurisdiction over such case and/or available relief, including anti-suit injunctions. However, there have been several cases where Ukrainian courts, in proceedings relating to the validity of an arbitration agreement, have

granted injunctions prohibiting parties from taking part in arbitration proceedings outside Ukraine which were commenced pursuant to such disputed arbitration agreement (*Telenor Mobile Communications AS v Storm LLC*, 2007).

3.3.4 Is there a presumption of arbitrability or policy in support of arbitration? Have national courts shown a willingness to interfere with arbitration proceedings on any other basis?

There is no presumption of arbitrability or express policy in support of arbitration in Ukraine. Ukrainian courts tend to resolve arbitration-related matters according to the circumstances of each particular case.

Ukrainian courts do not have the power to interfere with arbitration proceedings other than in cases provided for under the LICA. See section 2.1.3.3 above.

At the same time, there have been several instances where Ukrainian courts permitted proceedings to continue despite the existence of a valid arbitration agreement where the parties to such court proceedings were different to the original parties to the arbitration agreement (eg lawsuits initiated by shareholders or lawsuits involving the interests of third parties not covered by the arbitration agreement). In those cases, the existence of such court proceedings was relied on by one of the parties to both arbitration and court proceedings, with varying degrees of success, to suspend or delay the ongoing arbitral proceedings.

In addition, in several cases Ukrainian courts frustrated the recognition and enforcement of foreign arbitral awards where one of the parties to such arbitration proceedings managed to obtain, prior to recognition and enforcement proceedings, a judgment of the Ukrainian court declaring the arbitration agreement invalid (with or without knowledge of the other party), with such court judgment having res judicata effect.

In addition, complications may arise due to the uncertainty as to the arbitrability of certain types of disputes under Ukrainian law, especially corporate disputes (eg disputes relating to corporate governance in Ukrainian companies). In such a case, Ukrainian courts may proceed to adjudicate on the dispute which they consider to be non-arbitrable despite the existence of an arbitration agreement and ongoing arbitration proceedings on the same matter. The list of non-arbitrable matters under Ukrainian law is provided in section 3.6.4 below.

3.3.5 Are there any other legal requirements for arbitral proceedings to be recognisable and enforceable?

Yes. Such formal requirements include the receipt of the documents by the parties, including summons for hearings and valid powers of attorney granted to parties' representatives, as well as adherence by an arbitral tribunal to the time limits agreed by the parties and/or established by applicable arbitration rules.

3.4 Procedural flexibility and control

3.4.1 Are specific procedures mandated in particular cases, or in general, which govern the procedure of arbitrations or the conduct of an arbitration hearing? To what extent can the parties determine the applicable procedures?

Subject to the provisions of the LICA, the parties are free to agree on the procedure to be followed by the arbitral tribunal in conducting the proceedings. Both the LICA and the ICAC Rules provide for certain default procedures, in the absence of agreement, for example regarding the non-submission of the statement of defence or other documents. The level of party autonomy provided for by the LICA is relatively high.

3.4.2 Are there any requirements governing the place or seat of arbitration, or any requirement for arbitral hearings to be held at the seat?

According to the LICA, the parties are free to agree on the place of arbitration. Failing such agreement, the place of arbitration shall be determined by the arbitral tribunal having regard to the circumstances of the case, including the convenience of the parties. For arbitrations under the ICAC Rules it is directly stated in the Rules that the place of arbitration shall be Kiev. However, the parties may agree to hold hearings outside Kiev at any place the arbitral tribunal considers appropriate for consultation among its members, for hearing witnesses, experts or the parties, or for the inspection of goods, other property or documents.

Pursuant to the Domestic Arbitration Law, the place of arbitration shall be: (i) where the respective arbitration institution is located in an institutional arbitration; and (ii) the place agreed by the parties in an *ad hoc* arbitration. The Domestic Arbitration Law does not provide for any default place of arbitration in the absence of agreement of the parties in an *ad hoc* arbitration.

3.4.3 What procedural powers and obligations does national law give or impose on an arbitral tribunal?

The main obligation of the arbitral tribunal is to treat the parties equally and to ensure that each party is given a full opportunity to present its case. The arbitrators must follow the parties' agreement and the applicable procedural rules. The powers conferred upon the arbitral tribunal include the power to determine the admissibility, relevance, materiality and weight of any evidence.

3.4.4 Evidence

3.4.4.1 What is the general approach to the gathering and tendering of written evidence at the pleading stage and at the hearing stage?

Ukraine is a civil law jurisdiction. The parties must therefore prove the facts they rely upon to support their claims or defence. The arbitrators may require the parties to produce further evidence. Also, the arbitrators may, at their discretion or at the request of either of the parties, order inspection by an expert and also call and hear witnesses. In the latter case, the party requesting witnesses to be called will be responsible for the appearance of those witnesses before the tribunal. The IBA Rules on Evidence are usually not used. Under general practice, evidence is submitted together with written memorials, however additional written evidence could be submitted even at the hearing. Since neither the LICA nor the ICAC

Rules contain special provisions regarding production of documents upon request of the other party, factual witness statements or party-appointed experts, there is no established practice with regard to these types of evidence.

3.4.4.2 Can parties agree the rules on disclosure? How does the disclosure in arbitration typically differ to that in litigation?

The LICA does not provide for disclosure or discovery as part of the evidentiary procedure. However, there is no prohibition on the parties requesting disclosure of documents. Such request will be decided according to the applicable arbitration rules and the parties' agreement, if any. For arbitrations under the ICAC Rules, this is less of a possibility and the arbitrators will most likely deny requests for disclosure. Both disclosure and discovery are not, in principle, common in litigation and arbitration in Ukraine.

3.4.4.3 What are the rules on oral (factual or expert witness) evidence? Is cross-examination used?

During the oral hearings, Ukrainian parties, as a rule, are represented by in-house lawyers or legal representatives (an advocate, CEO of the company, etc) acting on the basis of powers of attorney. Witness testimony is not widely used. Neither the LICA nor the ICAC Rules contain instructions or specific rules regarding the examination of witnesses. For Ukrainian lawyers witness testimony does not constitute an essential part of the evidentiary procedure in commercial disputes, as documentary evidence is of primary importance in disputes between legal entities in Ukrainian proceedings. In the event that witness statements are submitted and witnesses summoned, the arbitrators, unless otherwise agreed by the parties, may determine the way in which witnesses are to be examined. Under the ICAC Rules, cross-examination of witnesses in arbitration proceedings is impractical; within the hearings arbitrators prefer to question witnesses, if any, directly.

Unless otherwise agreed by the parties, the arbitral tribunal may appoint one or more experts to report to it on specific issues to be determined by the arbitral tribunal or may require a party to give to the expert any relevant information or produce, or provide access to, any relevant documents, goods or other property for inspection by the expert.

Unless otherwise agreed by the parties, if a party so requests, or if the arbitrators consider it necessary, the expert shall, after delivery of a written or oral report, participate in a hearing where the parties have the opportunity to put questions to him or her and present other expert witnesses.

3.4.4.4 If there is no express agreement, what powers of compulsion are there for arbitrators to require attendance of witnesses (factual or expert) or production of documents, either prior to or at the substantive hearing? To what extent are national courts willing or able to assist? Are there differences between domestic and international arbitrations or as between orders sought against parties and non-parties?

The arbitrators may require the parties to produce further documents before or at the substantive hearing. The arbitral tribunal has the power to

adjourn the hearing in case it is necessary to require any party to produce new evidence. National courts are not empowered to assist the arbitrators in evidence gathering, as there are no specific procedural rules providing for such assistance. Neither tribunals nor courts have any powers to compel the attendance of a factual witness or expert at the substantive hearing. Therefore, the parties must do their best to produce the evidence.

3.4.4.5 Do special provisions exist for arbitrators appointed pursuant to international treaties (ie bilateral or multilateral investment treaties)?
No.

3.4.5 Are there particular qualification requirements for representatives appearing on behalf of the parties in your jurisdiction?
There are no specific requirements for a foreign lawyer to appear as a party representative in an international arbitration in Ukraine, except for the need for a duly issued power of attorney.

3.5 The award

3.5.1 Are there provisions governing an arbitral tribunal's ability to determine the controversy in the absence of a party who, on appropriate notice, fails to appear at the arbitral proceedings?
If any party that has been properly notified of the time and place of the hearing fails to appear at the hearing or produce documentary evidence, the arbitral tribunal may continue the proceedings and make the award based on the evidence submitted to it.

There are no specific provisions addressing what happens in the event that a party seeks a last minute adjournment of the hearing. As a rule, such request will be granted unless it is a repeated and/or unreasonable one.

3.5.2 Are there limits on arbitrators' powers to fashion appropriate remedies, eg punitive or exemplary damages, specific performance, rectification, injunctions, interest and costs?
Formally, there are no specific limits. The remedies available will be determined according to the applicable substantive law. However, if the applicable law was Ukrainian law, not all of the remedies described above could be granted, for instance, arbitrators cannot award punitive or exemplary damages under Ukrainian law. If the latter remedies were granted according to the applicable law, other than Ukrainian, the risk exists that in any enforcement proceedings the Ukrainian state court would refuse to enforce the award on the basis that such damages are contrary to Ukrainian legal doctrine, and, thus, to the fundamental principles of legal order.

Interest on the principal debt is usually awarded. At the same time, interest as a rule can only be awarded in the form of a lump sum as part of the monetary claim covered by the arbitration fee. The awarding of compound interest is neither clearly permitted nor prohibited. There are also no provisions as to charging interest on unpaid interest. Specific performance or rectification can be granted.

3.5.3 Must an award take any particular form or are there any other legal requirements, eg in writing, signed, dated, place stipulated, the need for reasons, method of delivery, etc?

The award must be in writing and signed by the arbitrators. It must state the reasons, the decision and the amount of the arbitration fee and costs and their apportioning. It must contain the date, the place of arbitration, the names of the parties and the names of the arbitrators. According to the ICAC Rules, the award must also contain a reference to the subject matter and a brief description of the facts of the case.

Arbitral awards, orders or rulings of the arbitral tribunal must be sent to the parties by registered mail or by courier, or may be handed over personally to a party representative against receipt.

3.5.4 Can an arbitral tribunal order the unsuccessful party to pay some or all of the costs of the dispute? Is an arbitral tribunal bound by any prior agreement by the parties as to costs?

The LICA does not regulate the issue of allocation of costs. For ICAC arbitrations the allocation of the arbitration fee is established by the schedule of arbitration fees and costs. In practice, at times the arbitral tribunals adopt different approaches to the allocation of arbitration costs.

In general, the arbitration fee shall be borne by the unsuccessful party, subject to any other rules, including agreement of the parties. The tribunal will be bound by any prior agreement of the parties as to costs. Where the claim is awarded partially, the arbitration fee shall be borne by the parties in relevant proportion per the partial award. Parties are free to agree that the arbitration fee be allocated in a manner different to that provided in the schedule.

3.5.5 What matters are included in the costs of the arbitration?

In accordance with the ICAC Rules and general practice, costs of the arbitration will consist of the costs relating to the arbitral proceedings (ie special expenses of the arbitral tribunal incurred in connection with the examination of a case, expenses of conducting expert examinations and preparing translations, sums to be paid to interpreters, expert fees, including travelling allowances connected with the case examination, etc) and expenses of the parties (ie expenses incurred relating directly to the arbitration, travel allowances, lawyers' fees, etc). As a rule, lawyers' costs are understood exclusively to be the costs of external counsel, while the costs of management and in-house lawyers(except direct travelling expenses of the party representatives) are not recoverable. Notably, the Ukrainian parties usually do not ask for compensation even for said travelling expenses.

3.5.6 Are there any practical or legal limitations on the recovery of costs in arbitration?

The arbitrators' decision on the recovery of the parties' expenses should be based on an evaluation of the grounds and the reasonableness of such expenses. However, ICAC practice in this respect is controversial, namely in the sense that the arbitrators' discretion allows the tribunal to take into

account both particular considerations based on peculiarities of the case and the availability of the evidence to prove the costs, and involves the use of different calculations for splitting the costs.

3.5.7 Are there any rules relating to the payment of taxes (including VAT) by foreign and domestic arbitrators? If taxes are payable, can these be included in the costs of arbitration?

There are no taxes payables in Ukraine for foreign or domestic arbitrations.

3.6 Arbitration agreements and jurisdiction

3.6.1 Are there form and/or content or other legal requirements for an enforceable agreement to arbitrate? How may they be satisfied? What additional elements is it advisable to include in an arbitration agreement?

According to Article 7 of the LICA, the arbitration agreement must be in writing, either in the form of an arbitration clause in a contract or in the form of a separate agreement. An agreement is in writing if it is contained in a document signed by the parties or in an exchange of letters, telex, telegrams or other means of telecommunication which provide a record of the agreement, or in an exchange of statements of claim and defence 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.

In view of court practice regarding the enforcement of arbitration agreements, if the parties agree on institutional arbitration it is advisable to specify in the agreement the name of the arbitral institution and not only its rules. If the respective agreement is in two languages, which is often the case when Ukrainian parties are involved, it is highly recommended to check the correct name of the institution in both languages.

In addition, taking into account recent court practice regarding the scope of the matters referred to arbitration by the parties, it would also appear important to state in the arbitration agreement the principal disputes that are subject to arbitration, ie arising out of or in connection with the contract, including its existence, validity, cancellation, termination or interpretation.

3.6.2 Can an arbitral clause be considered valid even if the rest of the contract in which it is included is determined to be invalid?

According to Article 16(1) of the LICA, 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 the invalidity of the arbitration clause.

3.6.3 Can an arbitral tribunal determine its own jurisdiction ('competence–competence')? When will the national courts deal with the issue of jurisdiction of an arbitral tribunal? Need an arbitral tribunal suspend its proceedings if a party seeks to resolve the issue of jurisdiction before the national courts?

Pursuant to Article 16 of the LICA, the arbitral tribunal may rule on its

own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement.

If the tribunal rules as a preliminary question that it has jurisdiction, any party may request within 30 days after having received notice of that ruling, the general court located at the seat of arbitration to decide the matter; such a decision shall not be subject to appeal. While such a request is pending, the arbitral tribunal may proceed with the arbitral proceedings and make an award.

3.6.4 Is arbitration mandated/prohibited for certain types of dispute?

According to Article 1(2) of the LICA, the following may be referred to international commercial arbitration pursuant to an agreement of the parties:

- 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; and
- disputes arising between enterprises with foreign investment, international associations and organisations established in the territory of Ukraine, disputes between the shareholders of such entities and disputes between such entities and other subjects of the law of Ukraine.

Exemptions from these rules may be established only by law or international treaty.

The Domestic Arbitration Law allows for referral to domestic arbitration of any domestic dispute arising from civil or commercial relations, except for certain cases envisaged by law and provides in Article 6 a rather long, but non-exhaustive, list of non-arbitrable disputes, including:

(a) disputes regarding the invalidation of normative acts;
(b) disputes arising out of the conclusion, amendment, termination and performance of public procurement contracts;
(c) disputes related to state secrets;
(d) disputes arising from family relationships, except cases regarding marital agreements (contracts);
(e) bankruptcy disputes;
(f) disputes involving state or municipal authorities, their officials, state institutions or organisations;
(g) disputes related to immovable property, including land plots;
(h) cases about establishing facts of legal significance;
(i) labour disputes;
(j) disputes arising from corporate relations between a commercial company and its participant (founder or shareholder), including a participant that has withdrawn from the company, as well as between the participants (founders or shareholders) of commercial companies, in connection with the establishment, operation, management or winding up of the company;
(k) disputes involving a foreign party;
(l) disputes related to the protection of consumers' rights (including consumers of banking and credit union services);
(m) other disputes, which in accordance with the law are to be exclusively settled by the courts of general jurisdiction or by the Constitutional

Court of Ukraine (the latter ground applies, eg, to petitions regarding the unconstitutionality of legal acts); and

(n) disputes where the enforcement of the award to be issued by the domestic arbitration court requires certain action from the state or municipal authorities or their officials.

Other restrictions of arbitrability for domestic and/or international arbitration are set forth in the following laws of Ukraine: Article 12 of the Commercial Procedure Code of Ukraine of 6 November 1991, No. 1798-III ('CoPC') sets forth certain exemptions from the arbitrability rules. In particular, it contains restrictions and prohibits disputes as described in items (a), (b) and (j) above from being submitted to arbitration. After reforms made to the CoPC in February 2011 aimed at improving the legal framework for domestic arbitration related cases, Article 12(2) of the CoPC was slightly amended. In particular, as regards international arbitrations, the new wording of Article 12 appears to restrict the non-arbitrability of the matters described above to domestic arbitration only, although initially (prior to the reform) it applied to international arbitration as well. For several years the scope of these restrictions and their correlation with the LICA arbitrability rules and other laws of Ukraine were rather unclear, especially with regard to disputes related to corporate governance. At the same time, certain categories of disputes arising out of share purchase agreements remained arbitrable, eg disputes arising out of share turnover (except for disputes related to realisation of the pre-emptive rights to acquire shares).

Thus, as of today, Ukrainian legislation does not impose direct restrictions of the general arbitrability rules contained in the LICA. At the same time, certain matters are considered non-arbitrable in view of their nature. IP disputes, including validity of registered trademarks and/or patents and establishment of the IP owner, are not arbitrable.

Antitrust or competition issues can be considered arbitrable in relation to their effect on the civil law relationship of the parties. Disputes concerning unfair competition are settled by the Anti-monopoly Committee of Ukraine and its territorial branches.

3.6.5 What, if any, are the rules which prescribe the limitation periods for the commencement of arbitration proceedings and what are such periods?

Ukrainian law does not set out any procedural limitation periods for the commencement of arbitration proceedings. Under Ukrainian law, limitation is a substantive law issue, and thus, will be determined by the law applicable to the substance of the dispute. If the applicable law does not contain provisions on limitation periods, the tribunal will decide the dispute on the merits.

Article 21 of the LICA sets out the default rule that the arbitral proceedings in respect of a particular dispute commence on the date on which a request for that dispute to be referred to arbitration is received by the respondent.

3.6.6 Does national law enable an arbitral tribunal to assume jurisdiction over persons who are not party to the arbitration agreement?

The LICA does not contain any rules on consolidation or joinder, so it

neither expressly prohibits nor permits an arbitral tribunal to assume jurisdiction over persons who are not party to the arbitration agreement. Thus, this issue is to be decided in accordance with applicable arbitration rules and the substantive law (eg articles 43, 19 the ICAC Rules).

However, if an arbitral award is to be enforced in Ukraine, the party applying for such enforcement shall supply to the competent court the duly authenticated original arbitration agreement in writing or a duly certified copy thereof.

As far as we are aware based in the reported cases to date, the courts have never considered the group of companies doctrine.

3.7 Applicable law

3.7.1 How is the substantive law governing the issues in dispute determined?

Pursuant to Article 28 of the LICA, the arbitral tribunal shall decide the dispute in accordance with such rules of law as are chosen by the parties as applicable to the substance of the dispute. Otherwise the arbitral tribunal shall apply the law determined by the conflict of laws rules which it considers applicable.

The parties may authorise the arbitral tribunal to decide *ex aequo et bono* or as *amiable compositeur*.

In all cases, the arbitral tribunal shall decide in accordance with the terms of the contract and shall take into account the usages of the trade applicable to the transaction.

3.7.2 Are there any mandatory laws (of the seat or elsewhere) which will apply?

If the subject matter of the dispute is in any way connected with Ukraine or if one of the parties is incorporated or resides in Ukraine, then mandatory provisions of foreign currency, tax, customs and competition law, as well as certain provisions of the Law of Ukraine On Private International Law of 23 June 2005, No. 2709-IV may apply. Article 14 of the latter provides for application of the mandatory law of other jurisdictions (If it is closely connected with the respective legal relations) and sets forth conditions of its application in Ukraine. In all other cases, public policy restrictions of the seat shall apply.

4. SEEKING INTERIM MEASURES IN SUPPORT OF ARBITRATION CLAIMS

4.1.1 Can an arbitral tribunal order interim relief? What forms of interim relief are available and what are the legal tests for qualifying for such relief?

Under Article 17 of the LICA, an arbitral tribunal may, at the request of a party, award any interim measures against any party as the arbitral tribunal deems necessary in respect of the subject matter of the dispute. The arbitral tribunal may require any party to provide appropriate security in connection with such measures. These default rules can be changed by agreement of the parties. There is no particular test for awarding such interim relief according to the LICA, so it depends on the applicable arbitration rules and the tribunal's discretion

However, Ukrainian procedural legislation does not contain any provisions for the enforcement by the courts of any orders of the arbitral tribunal granting interim relief.

4.1.2 Have national courts recognised and/or limited any power of an arbitral tribunal to grant interim relief?

In view of the absence of particular provisions as described above, the national courts have not dealt with the issue to date.

4.1.3 Will national courts grant interim relief in support of arbitration proceedings and, if so, in what circumstances?

Article 9 of the LICA provides for the possibility to apply to the court for interim measures in support of arbitration, irrespective of the seat of the arbitration. However, neither of the Ukrainian procedural codes contains specific provisions in this regard, nor confers jurisdiction to apply interim measures in support of arbitration to any particular court or courts. At present the Ukrainian procedural codes envisage such measures in the context of litigation (unrelated to arbitration proceedings) and enforcement of arbitral awards only.

4.1.4 Are national courts willing to grant interim relief in support of arbitration proceedings seated elsewhere?

As a rule, the Ukrainian courts rely on the absence of specific rules granting them competence to grant such interim measures, as well as the absence of respective procedural rules so as to preclude them from granting such relief.

5. CHALLENGING ARBITRATION AWARDS

5.1.1 Can an award be appealed to, challenged in or set aside by the national courts? If so, on what grounds?

An award rendered in an international arbitration seated in Ukraine can be set aside by the Ukrainian courts, fully or partially, only on the grounds provided for in Article 34 of the LICA, mirroring the provisions of Article 34 of the Model Law.

According to the LICA, an arbitral award may be set aside by the local general court in the seat of arbitration only if:

- the party making the application for setting aside furnishes proof that:
  - a party to the arbitration agreement referred to in Article 7 of the LICA was under some incapacity, or that the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of Ukraine;
  - it was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present its case;
  - the award was made regarding a dispute 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, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, only that part of the award which contains decisions on matters not submitted to arbitration may be set aside; or
  - the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of the LICA from which

the parties cannot derogate, or, failing such agreement, was not in accordance with the LICA; or

- the court finds that:
  - the subject matter of the dispute is not capable of settlement by arbitration under the law of Ukraine; or
  - the award is in conflict with Ukrainian public policy.

5.1.2 Can the parties exclude rights of appeal or challenge?

The parties cannot exclude rights of appeal or challenge of an award.

5.1.3 What are the provisions governing modification, clarification or correction of an award (if any)?

The provisions governing modification, clarification or correction of an arbitral award are set out in Article 33 of the LICA.

This Article allows any of the parties, with notice to the other party, to request the arbitral tribunal to correct in the award any errors in computation, any clerical or typographical errors or any errors of similar nature within 30 days of receipt of the award, unless another period of time has been agreed upon by the parties. The arbitral tribunal may correct any such error on its own initiative within the same term.

Subject to the parties' agreement, any party, with notice to the other party, may request the arbitral tribunal to give an interpretation of a specific point or part of the award within 30 days of receipt of the award, unless another period of time has been agreed upon by the parties.

If the arbitral tribunal considers the request to be justified, it shall make the correction or give the interpretation, which shall form part of the award.

Unless otherwise agreed by the parties, any of the parties, with notice to the other party, may request, within 30 days of receipt of the award, that the arbitral tribunal makes an additional award as to claims presented in the arbitral proceedings but omitted from the award. If the arbitral tribunal considers the request to be justified, it shall make the additional award.

6. ENFORCEMENT

6.1.1 Has your jurisdiction ratified the New York Convention or any other regional conventions concerning the enforcement of arbitration awards? Has it made any reservations?

Ukraine is a party to the New York Convention by virtue of succession of the Ukrainian Soviet Socialist Republic (the 'Ukrainian SSR'). This Convention was signed by the Ukrainian SSR on 29 December 1958, ratified on 10 October 1960 and came into force on 8 January 1961. According to the reservations and declarations made upon signing, Ukraine shall apply the Convention to the recognition and enforcement of arbitral awards rendered in non-member states only on a reciprocal basis.

Legal succession of Ukraine in respect of the New York Convention is governed by the Law of Ukraine 'On Legal Succession of Ukraine' of 12 September 1991, No. 1543-XII, wherein Ukraine has confirmed its legal

succession in respect of all international treaties of Ukrainian SSR and, conditionally – of the international treaties of the USSR.

By virtue of Article 9 of the Constitution of Ukraine of 28 June 1996, the international treaties Ukraine is a party to, shall be part of the national legislation of Ukraine.

Ukraine is also a party to the Geneva Convention and the CIS Treaty on Settling Disputes Related to Commercial Activity, Kiev, 20 March 1992. The latter is open to CIS member states only and has been ratified by Armenia, Azerbaijan, Belarus, Kazakhstan, Kyrgyzstan, the Russian Federation, Tajikistan, Turkmenistan, Ukraine and Uzbekistan.

6.1.2 What are the procedures and standards for enforcing an award in your jurisdiction?

The procedures for the recognition and enforcement of foreign arbitral awards in Ukraine are governed by Chapter VIII of the CPC. The conditions and standards for such enforcement are set out in the LICA and applicable international treaties, including the New York Convention. Some useful guidelines in this regard are provided for in the Resolution of the Plenum of the Supreme Court of Ukraine, 'On Practice of Consideration by the Courts of Motions for Recognition and Enforcement of Foreign Court Judgments and Arbitral Awards, and on Setting Aside the International Commercial Arbitration Awards Rendered within the Territory of Ukraine', No. 12, of 24 December 1999. In particular, it contains a definition of public order in the context of enforcement of foreign arbitral awards.

The CPC grants jurisdiction over the enforcement of foreign arbitral awards to the general courts located at the place of the debtor's residence or location, or if the debtor does not have a place of residence or location in Ukraine, to the courts where the debtor's assets are located. A foreign arbitral award may be submitted for enforcement in Ukraine only within three years of it becoming effective, unless it provides for payment by instalments. An award providing for payment by instalments can be enforced any time within the general term for payment established in the award. However, the creditor can request only partial enforcement of such an award, namely the overdue payments for three years prior to filing application for enforcement. The court procedure for the motions for enforcement of foreign arbitral awards is set out in Article 395 of the CPC. If the motion for enforcement meets all the formal requirements established by the CPC and the LICA, the court sends it to the debtor and grants it one month for submitting its objections, if any. After that the judge schedules the hearing and informs the parties of its date. At the hearing the judge determines whether any grounds to refuse enforcement exist. The grounds for refusal of enforcement are the same as in the New York Convention. If the New York Convention is applicable, it prevails over the civil procedure code provisions, and in this case there are no other grounds for refusal except those established by the Convention.

The party applying for the recognition and enforcement of the foreign arbitral award may also request interim measures at any stage of the enforcement proceedings, which will be granted if the court establishes that failure to grant such interim relief may complicate or render the

enforcement of the arbitral award impossible. Having considered the motion for enforcement and heard the parties' arguments, the judge will render a ruling granting or denying the recognition and enforcement of the arbitral award. The ruling, after coming into force, serves as a basis for issuing a writ of execution which triggers the execution procedure. Under the CPC, the above-mentioned rulings of local general courts can be appealed at the Appellate Court of the respective region and then, also to the High Specialised Court on Civil and Criminal Matters within a cassation proceeding.

The enforcement proceedings in the first instance court take several months (three to five months on average). The appeal proceedings, if any, take an additional two to three months. The judgement of the Appellate Court comes into effect immediately and, if it grants enforcement, it allows the award creditor to receive the writ of execution notwithstanding any further appeal to the High Specialised Court on Civil and Criminal Matters, if any. In the case of such second appeal, the whole enforcement proceedings in all three instances could take around one year. However, the court fees are negligible and are not contingent on the amount of the award.

If an award is set aside in the seat of arbitration, which is outside Ukraine, as being contrary to the public policy or rules of arbitrability of the seat of the arbitration, it nevertheless might be capable of enforcement in Ukraine under Article IX of the Geneva Convention, when applicable.

6.1.3 Is there a difference between the rules for enforcement of 'domestic' awards and those for 'non–domestic' awards?

As domestic and international arbitration are subject to separate legal regimes in Ukraine, the enforcement of arbitral awards rendered under the Domestic Arbitration Law is governed by a separate set of rules, contained in Chapter VII-1 of the CPC and Chapter XIV-1 of the CoPC. The enforcement of domestic arbitral awards is faster and simpler, although it has some peculiarities when compared to the enforcement of 'non-domestic' awards

The rules for enforcement of arbitral awards rendered under the LICA in arbitrations seated in Ukraine are the same as for foreign arbitral awards.