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The International Comparative Legal Guide to: Litigation & Dispute Resolution 2010

A practical cross-border insight
into litigation & dispute resolution

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I. LITIGATION

1 Preliminaries

1.1 What type of legal system has Ukraine got? Are there any rules that govern civil procedure in Ukraine?

Ukraine is a part of the civil law legal system, but it was heavily affected by the Soviet era legal practice. Civil procedure is governed by the Code of Civil Procedure and Code of Commercial Procedure.

1.2 How is the civil court system in Ukraine structured? What are the various levels of appeal and are there any specialist courts?

The court system of Ukraine consists of the Constitutional Court of Ukraine and courts of general jurisdiction, which represent two completely separate systems of jurisdiction in Ukraine.

The courts of general jurisdiction hear civil cases and other types of cases. Courts of general jurisdiction encompass general courts (“civil courts”) and commercial courts, which are specialised courts considering (i) disputes among legal/business entities and (ii) insolvency cases.

Civil courts consist of the network of trial courts, courts of appeal and the Supreme Court of Ukraine.

Commercial courts consist of the network of trial courts, courts of appeal, the High Commercial Court of Ukraine and the Supreme Court of Ukraine, the latter two remaining in charge of cassation hearings of cases.

1.3 What are the main stages in civil proceedings in Ukraine? What is their underlying timeframe?

The main stages in civil proceedings of the courts of general jurisdiction and commercial courts are quite similar.

Basically, they are as follows: (i) filing a statement of claim before a trial court; (ii) initiation of court hearings and appointment of preliminary hearings; (iii) hearing by substance (statement of case, pleadings, presenting of evidences etc.); and (iv) rendering of a judgment.

The length of proceedings in civil courts and commercial courts differ. Normally, it takes a commercial court two to three months from the commencement of proceedings to passing a judgment. At the same time, proceedings before civil court tend to last longer and

normally take six to eighteen months. Complicated cases may appear to be very time consuming, especially when one or several expert examinations are appointed by court. Veiled dilatory exercises by parties may also stretch the normal duration of a case.

1.4 What is Ukraine's local judiciary's approach to exclusive jurisdiction clauses?

Exclusive jurisdiction clauses are allowed in civil courts subject to mandatory jurisdiction exceptions provided by the Code of Civil Procedure and Law of Ukraine On Private International Law. Such mandatory exceptions include disputes over the title to real property, over the validity of a patent or a trademark, over the validity of an entry in a public registry in Ukraine, over issuing and of securities in Ukraine, over the adoption in Ukraine, over registration or liquidation of a legal entity in Ukraine, etc.

No exclusive jurisdiction clauses have been recognised by Ukrainian commercial courts. However, due to recently introduced amendments to the Code of Commercial Procedure, the generally hostile attitude of commercial courts towards jurisdiction agreements may change for the more favourable.

1.5 What are the costs of civil court proceedings in Ukraine? Who bears these costs?

Costs depend on the nature of a claim.

Generally, the tangible nature of a claim (e.g. debt recovery, indemnification etc.) makes the court proceeding costs higher than a claim of a non-tangible nature (e.g. invalidation of an agreement, recognising tax assessment-notification as void etc.).

In terms of figures, the cost of court proceedings related to tangible claims is generally 1% of a claim which is, however, capped at UAH 1,700 [approx. EUR 155] for the proceedings before common and administrative courts and is capped at UAH 25,500 [approx. EUR 2,320] for the proceedings before commercial courts.

The cost of court proceedings related to non tangible claims is insignificant and generally varies between UAH 1.70 [approx. EUR 0.15] and UAH 85 [approx. EUR 7.70] depending on the category of a case.

It is a claimant's obligation to bear the cost of court proceedings. It can be shifted onto the defendant if a court rules a judgment in favour of the claimant.

The cost of appeal at every level constitutes 50% of the cost incurred in the trial court.

1.6 Are there any particular rules about funding litigation in Ukraine? Are contingency fee/conditional fee arrangements permissible? What are the rules pertaining to security for costs?

Litigation funding remains an undeveloped area in Ukraine. Contingency fee arrangements are not prohibited and are quite spread in practice. There are no specific rules established to secure lawyer's costs.

The security costs may be required only in two very specific instances of imposing arrest as an interim relief. For instance, a civil court may request a plaintiff to provide a security as a prerequisite to granting a freezing order against possible losses of a respondent as incurred as a result of such order.

Another instance where security for costs may be required is an arrest of a sea-going ship. The court may request to release a ship in question from the arrest upon provision of adequate security by the ship's owner.

2 Before Commencing Proceedings

2.1 Is there any particular formality with which you must comply before you initiate proceedings?

Payment of court charges is a compulsory pre-condition, in majority of cases, to initiate court proceedings. Also, in commercial disputes, a claimant must serve a copy of a statement of a claim on the defendant before filing the statement of claim in question with the court.

2.2 What limitation periods apply to different classes of claim for the bringing of proceedings before your civil courts? How are they calculated? Are time limits treated as a substantive or procedural law issue?

Ukrainian legislation provides for standard, reduced and extended limitation periods. The standard limitation period is a three-year period which starts running when an injured party learned or should have learned about the violation of his rights or about a violator.

The reduced limitation period, which is a one year period, is stipulated for claims for recovery of penalties, mostly liquidated damages, for defamation via media, protection of consumer rights, etc.

The extended limitation period can be for five or ten years, depending on the category of the case, and even longer where parties specifically agreed upon a longer limitation period for the purpose of settling a dispute which may arise from their agreement.

Failure to file a claim within the limitation period does not deprive an injured party of a right to bring a case and to have a decision on merits. The expiry of the statute of limitations period bars the claim on the merits and is a substantive defence that may only be raised by a defendant. Missing the statute of limitations period may be a ground to dismiss the claim on the merits, unless the court is satisfied that the claimant had a valid excuse to miss the statute of limitations period, in which case the court may extend the statute of limitations.

3 Commencing Proceedings

3.1 How are civil proceedings commenced (issued and served) in Ukraine? What various means of service are there? What is the deemed date of service? How is service effected outside Ukraine? Is there a preferred method of service of foreign proceedings in Ukraine?

Proceedings in both civil and commercial courts are brought by

filing a statement of claim. However, the service of process varies in civil cases and commercial cases. For instance, under the Code of Civil Procedure, a claimant, together with the statement of claim, must file copies of the statement of claim and annexes for each party in the case. The court then serves those documents onto other parties to the dispute.

By contrast, the Code of Commercial Procedure envisages that the claimant himself serves copies of the statement of claim and attached exhibits to all parties to the case and files with the court proof of such service.

In civil courts, a judge makes a decision on the commencement of proceedings within 10 days after filing a statement of claim or upon expiration of a period of time given by the judge to fix defects related to filing the statement of defence. In commercial courts a judge should make such a decision within 5 days upon receiving the statement of claim. A copy of this ruling is served to all participants to the proceedings.

Under the Code of Civil Procedure, procedural documents may be served by registered mail, by a courier, or may be handed over during a court hearing. Moreover, participants to the court proceeding may be notified or invited to the court by telegram, fax, or by other means of communication which provide a record of the notification. Summons should be sent no later than 7 days before a court hearing. Commercial courts usually serve procedural documents by registered mail or hand over against receipt.

The service of process overseas is effected through legal mechanisms established by the Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters (Hague, 1965), the Convention on Civil Procedure (Hague, 1954), the Convention on the Taking of Evidence Abroad in Civil or Commercial Matters (Hague, 1970), and the Convention on Legal Assistance and Legal Relations in Civil, Family and Criminal Cases (Chisinau, 2002). Ukraine is a party to all of the above listed conventions. Service abroad is arranged through the Ministry of Justice of Ukraine.

3.2 Are any pre-action interim remedies available in Ukraine? How do you apply for them? What are the main criteria for obtaining these?

Under the Code of Civil Procedure, pre-action interim remedies are only available in IP disputes. For instance, as a pre-action interim measure it is possible to motion the court to order securing evidence or stop infringement of IP rights before filing a statement of claim.

In commercial cases a claimant may seek for the following pre-action interim remedies from the court: a) discovery of evidence; b) search of documents; and c) attachment of property. The court usually considers a claimant's petition within two days upon filing. The court may request for a security.

Both in civil and commercial courts a claimant shall file a statement of claim no later than 10 days after the court has granted pre-action interim remedies. If the claimant fails to file a formal claim, pre-action remedies will be terminated by the court.

Also an arrest of sea-going ships may be imposed by both civil and commercial courts under the Code of Merchant Navigation as a pre-action interim remedy.

3.3 What are the main elements of the claimant's pleadings?

The main elements of the claimant's statement of claim are: a) description of claims; b) quantum of the claim; c) circumstances; d) evidence supporting circumstances; and e) references to provisions of the law and/or a contract that had been breached. In commercial

courts it is essential to indicate whether parties have gone through pre-action settlement procedure, if such procedure was stipulated for this type of dispute.

3.4 Can the pleadings be amended? If so, are there any restrictions?

The claimant can amend its pleadings by either changing the relief sought or the cause of action at any time before the trial court takes a decision on the merits of the case. Under the commercial procedure if the claimant changes the claim, it should follow pre-action settlement procedures in cases required by procedural rules.

4 Defending a Claim

4.1 What are the main elements of a statement of defence? Can the defendant bring counterclaims/claim or defence of set-off?

The Code of Civil Procedure does not provide for any specific requirements with respect to the statement of defence that is contrary to the Code of Commercial Procedure where it is stipulated that a statement of defence should include *inter alia* reasoning for full or partial rejection of claims with references to legislation and pieces of evidence that support this.

Both in civil and commercial courts the defendant can bring a counterclaim. In civil courts it may be brought before or at the preliminary hearing. However, in commercial courts a counterclaim may be brought any time before the court issues a decision on the merits.

Defence of set-off is not provided for by Ukrainian legislation.

4.2 What is the time-limit within which the statement of defence has to be served?

Neither the Code of Civil Procedure nor Code of Commercial Procedure provide for any specific time-limit, however a defendant has a right to file a statement of defence upon receipt of the court ruling on commencement of court proceedings in the case.

4.3 Is there a mechanism in your civil justice system whereby a defendant can pass on liability by bringing an action against a third party?

There is no mechanism in the Ukrainian legal system whereby a defendant can pass on liability by bringing an action against a third party. However, in civil courts upon a request of the claimant the court may substitute the defendant if the claim is brought against an improper defendant, or joins to the case a co-defendant. In commercial courts an improper defendant may be substituted either upon request of any party or upon the own volition of the court.

4.4 What happens if the defendant does not defend the claim?

If the defendant does not defend the claim by accepting it, the court issues a decision based on the evidence and pleadings before it. A failure to defend is not in itself a ground to find against the defendant.

If the defendant, who has been served in due course, fails to appear at the court hearing, the court considers the case based on materials and evidence on the court file.

4.5 Can the defendant dispute the court's jurisdiction?

Yes, both in civil and commercial courts the defendant can dispute the court's jurisdiction.

5 Joinder & Consolidation

5.1 Is there a mechanism in your civil justice system whereby a third party can be joined into ongoing proceedings in appropriate circumstances? If so, what are those circumstances?

In both commercial and civil courts, third parties are divided into two groups: (i) those having independent claims; and (ii) those having no independent claims.

Third parties having independent claims may join the proceedings by suing at least one of the parties to the ongoing proceedings. In civil courts the case will be tried anew upon the joinder of a third party with independent claims. In commercial cases, the ongoing proceedings are continued after a third party joining the proceedings.

A third party with independent claims participates in the ongoing proceedings enjoying all the procedural rights and obligations of a claimant.

If a third party has no independent claims, but the court's decision, if taken, may affect such third party's rights and obligations, it may join the ongoing proceedings (either on the claimant's or on the defendant's sides). The mentioned third parties may join the proceedings with the court's permission: (i) at their own discretion; (ii) under the petition submitted by a party to the ongoing proceedings; and (iii) if the court deems that appropriate on its own volition. Such parties enjoy a wide scope of the procedural rights and obligations (except for such purely claimant's rights as changing the scope of the claimant's demands, amending the remedies sought and cause of action, etc.).

The parties to the ongoing proceedings may also object to third parties joining the proceedings, in such cases the final decision whether to allow third parties' participation or not is taken by the court.

5.2 Does your civil justice system allow for the consolidation of two sets of proceedings in appropriate circumstances? If so, what are those circumstances?

The Ukrainian law entitles the judge to consolidate several similar proceedings between the same parties. The proceedings may be considered of a similar nature provided that: (i) they appear to represent the similar remedy and relief; and (ii) they arise from the same agreement or a number of agreements of the same type.

The parties are entitled to request the court to consolidate the proceedings. At the same time the parties' consent is not mandatory for consolidation of the proceedings.

A number of cases, reviewed by the Supreme Court, demonstrate that the practical approach of the Supreme Court is to consider consolidation of the proceedings to be a court's obligation rather than a right.

5.3 Do you have split trials/bifurcation of proceedings?

Neither split trials, nor bifurcation of proceedings are applicable in Ukraine.

6 Duties & Powers of the Courts

6.1 Is there any particular case allocation system before the civil courts in Ukraine? How are cases allocated?

At this point, in civil and commercial courts most cases are assigned to particular judges by a chief judge of a given court. However, automatic allocation of cases is going to be introduced over the coming years in civil and commercial courts akin to that introduced in administrative courts from 1 January 2010.

6.2 Do the courts in Ukraine have any particular case management powers? What interim applications can the parties make? What are the cost consequences?

Ukrainian courts have quite broad case management powers, but they are limited with statutory time-frames. A court is allowed to extend or to shorten procedural timeframes, change hearing schedules, stay or terminate the proceedings, decide on the order of hearing, order production of evidence, etc.

In the course of court proceedings, parties may file various interim applications for, *inter alia*, joining third parties, securing the claim, production of evidences, and appointing expert determination, witness reports (in civil courts only), etc. If a party makes interim applications some cost consequences for this party are also possible. For example, a requesting party shall normally bear the costs of obtaining expert and witness reports, a deposit as a pre-requisite to secure a claim may also be requested from the requesting party, etc.

6.3 What sanctions are the courts in Ukraine empowered to impose on a party that disobeys the court's orders or directions?

In civil courts a party who behaves inappropriately during a court hearing may be subjected to a warning. In case of repetitiveness, such a person may be removed from the court room.

In commercial courts a party that disobeys the court orders may be fined for up to UAH 1,700 (approx. EUR 150).

However, if a party's persistent disobedience obstructs the proceedings gravely, a civil or commercial court in question may request the Ministry of Interior to bring criminal proceedings for obstruction of justice.

6.4 Do the courts in Ukraine have the power to strike out part of a statement of case? If so, in what circumstances?

Striking out part of a statement of case is not used by Ukrainian courts. However, courts are allowed not to accept submissions of parties if their form or contents have been obtained with violations and procedural irregularities, for instance, by fraud or other misappropriation or if they otherwise do not comply with the formal requirement established by the law.

6.5 Can the civil courts in Ukraine enter summary judgment?

The concept of summary judgments *stricto sensu* is not known to Ukrainian legislation. However, in civil courts there is a simplified procedure for rendering judgments that may be seen as analogous to summary judgments. Such a judgment is normally rendered by a court at the application of the claimant without conducting a hearing of the parties. Where a respondent disagrees with this

judgment, he may appeal it to the court that has issued the summary judgment, in which event this judgment is annulled and the claims may only be referred for determination under the ordinary adversarial procedure.

6.6 Do the courts in Ukraine have any powers to discontinue or stay the proceedings? If so, in what circumstances?

Ukrainian courts have powers to discontinue and stay the proceedings.

Civil courts **must stay** the proceedings where:

- a person, who was a party to the proceedings dies or is announced dead, provided relations in dispute permit succession;
- a legal entity that is a party to the proceedings is under reorganisation;
- one of the parties is drafted to the military at times of war;
- it is not possible to consider this case before other cases are resolved in the scope of constitutional, civil, commercial, criminal or administrative proceedings; or
- there is an appointment or change of a party's guardian.

Civil courts **may stay** the proceedings, upon request of a party or by its own initiative, where:

- one of the parties is conducting military service outside its normal place of residence;
- a party is ill, which is proven by a medical certificate, and his illness prevents him from attending court hearings;
- a party is on a long-term secondment outside his normal place of residence;
- a defendant is wanted by the law-enforcement authorities, provided consideration of the case without his/her participation is not possible; or
- an expert examination is ordered by the court.

Civil courts **must discontinue** the proceedings where:

- a case is not within the jurisdiction of a civil court;
- a court judgment or a court ruling have entered into force on termination of the case due to withdrawal of a claim or settlement between the parties, in the same dispute and between the same parties;
- the claimant withdraws his claim, provided such withdrawal has been endorsed by the court;
- there is an arbitration award with respect to the same dispute; or
- a party dies or a legal entity, who is a party of the proceedings, is dissolved, provided succession is not possible.

Commercial courts **must stay** the proceedings if the case cannot be considered before a connected case is under consideration by other courts.

Commercial courts **may stay** the proceedings upon request of a party, a state prosecutor, or on its own motion where:

- an expert examination is ordered;
- a court transmits the court docket to law-enforcement agencies upon their request; and
- a party to proceedings is succeeded by another legal entity due to reorganisation.

Commercial courts **must discontinue** proceedings where:

- a case cannot be considered by the commercial courts of Ukraine due to lack of jurisdiction;
- there is no subject of controversy;
- there is a judgment entered into regarding the same dispute

between the same parties and such judgment has a *res judicata* effect;

- the claimant withdraws its claim, provided such withdrawal was approved by the court;
- parties have entered into an agreement to refer the case to arbitration;
- a legal entity, who is a party to the dispute, is liquidated; or
- parties have entered into a settlement agreement and such settlement was approved by the court.

7 Disclosure

7.1 What are the basic rules of disclosure in civil proceedings in Ukraine? Are there any classes of documents that do not require disclosure?

The concept of disclosure, as it is used in common law countries, is not known to the Ukrainian court system. However, if any of the parties have difficulties in receiving certain evidence, the court, upon request of a party, may order an adversary or any third person to produce evidence. It is noteworthy that some statements do not have to be proved, e.g. facts agreed upon by the parties; facts in general knowledge; and facts established by prior court decisions to which the same parties participated or a court decision which is related to one of the parties, etc.

In commercial procedure, facts established in an arbitral award will not have a *res judicata* effect and should be tried anew.

7.2 What are the rules on privilege in civil proceedings in Ukraine?

Protection of privacy and commercially sensitive information are the fundamental principles embedded in the Ukrainian Constitution, therefore the following information defined as “information with limited access” enjoys legal privilege under Ukrainian law:

- classified information of the State (State secrets);
- professional privileged information (notarial privilege, doctor-patient privilege, bank’s non-disclosure obligations, etc.);
- commercially sensitive confidential information (know-how, customs and tax information, information treated as confidential by companies, etc.);
- information pertaining to the private life of an individual (secrecy of adoption, intimate information about private life, etc.); and
- attorney-client privileged information.

The classified information may be disclosed only where a judge hearing the case is granted access to the classified information. Moreover, to safeguard the classified information hearings will be behind closed doors and the resulting judgment will not be made public.

The professional privileged information may be disclosed on the court’s order. However, to safeguard the professional privileged information hearings will be behind closed doors and the resulting judgment will not be made public.

The information/documents that have become known to or were drafted by an advocate in the course of acting under the client’s instruction (attorney-client privilege) may not be disclosed without prior consent of the advocate in question. However, only registered advocates may be entitled to attorney-client privilege.

7.3 What are the rules in Ukraine with respect to disclosure by third parties?

Both civil and commercial courts are vested with the power to order disclosure of evidence by third parties. See detailed information in question 7.1 above.

7.4 What is the court’s role in disclosure in civil proceedings in Ukraine?

Both civil and commercial courts are authorised to request disclosure of evidence upon either a motion of one of the parties, or on their own volition. Courts may either order the parties or third persons to submit disclosed evidence directly to the court, or through one of the parties.

7.5 Are there any restrictions on the use of documents obtained by disclosure in Ukraine?

There are no restrictions on the use of documents obtained by courts, unless they contain privileged information.

8 Evidence

8.1 What are the basic rules of evidence in Ukraine?

As a general observation, the theory of evidence in civil cases is not well developed in Ukraine. Rules on evidence in the Code of Civil Procedure and the Code of Commercial Procedure are not very detailed and are rather rarely addressed by higher courts. The trial of fact remains quite an intuitive process without clear guidance in either statute or case law.

Ukrainian law provides that any actual data, which substantiates the parties’ claims or objections to such claims or other circumstances which are relevant for the court proceedings may serve as a basis for the courts establishing facts or non-existence thereof. However, in practice the trial of facts tends to be rather formalistic and the courts in civil and commercial cases prefer to give more weight to documents than to any other evidence.

The above mentioned actual data are considered to be evidence. In particular, the following types of evidence are recognised by the law: (i) parties’ explanations; (ii) third parties’ explanations; (iii) witness testimony; (iv) documentary proofs; (v) material proof (including video and audio recordings); and (vi) expert reports.

Normally, the fact-finding is limited to the trial courts and appellate courts. However, the Higher Commercial Court and the Supreme Court, contrary to what is provide by the law, very frequently assess evidence and overturn or uphold judgments of lower courts based on their view of the facts of a particular case.

Two basic tests for evidence are: (i) relevance; and (ii) admissibility.

As a general rule, each party shall present such pieces of evidence and proofs which are sufficient for substantiation and support of the respective party’s statements, unless the law provides for specific thresholds. This is known as relevance of evidence test. Pieces of evidence furnished by the parties should be relevant for the case at hand to be accepted as evidence by a court.

The admissibility test is that if a piece of evidence was obtained in violation of the Ukrainian law, e.g. by fraud, it is not considered to be admissible and will not be accepted by the court.

Also the admissibility test provides that certain facts must be

proved only with certain types of evidence specifically provided by the effective Ukrainian laws, e.g. the existence of a contract for which the written form is stipulated by the law may not be proved by the witness statements.

8.2 What types of evidence are admissible, which ones are not? What about expert evidence in particular?

The admissibility of evidence varies in commercial and civil courts. For instance, witness statements are not allowed in the commercial courts.

The courts accept documentary and material evidence, including written explanations regarding the merits of the case submitted by the representatives of the parties and other persons participating in commercial court proceedings, as well as expert evidence.

Witness evidence as such is not allowed in commercial proceedings. However, officials of legal entities, state and municipal bodies may participate in the commercial proceedings with a special status and provide explanations regarding facts of the case.

Moreover, electronic documents are not regarded as admissible evidence unless they are authenticated with the “electronic signature”. Copies of documents have to be certified by the parties to be accepted as documentary proof.

Expert evidence is allowed in both commercial and civil proceedings in the form of a written expert report submitted to the court by the independent experts appointed by court. The report should answer the questions determined by the court. The parties are allowed to submit to the court suggestions regarding the experts to be appointed and the questions to be addressed to the experts.

Moreover, where proving of the facts of the case requires expertise in certain fields of human knowledge that is not readily available to a layman, courts are under a legal obligation to appoint an expert examination.

Courts tend to appoint examination to State Forensic Institutions that serve the administrative unit in which the court in question is located. The expert’s reports furnished by parties are not regarded as expert evidence in the eyes of the court.

8.3 Are there any particular rules regarding the calling of witnesses of fact? The making of witness statements or depositions?

In commercial proceedings, witness evidence is not available. In civil proceedings, a witness is obliged to give evidence and may be forced to appear (except for specific cases provided by the Constitution where a witness may refuse to testify to the court). The cross-examination of witnesses is also possible. In practice, the court would not allow any question to the witness which, in the opinion of the judge, does not relate to the subject of the dispute of the parties. Witnesses may not talk to each other prior to the hearing and may not be present at the examination of other witnesses at the same case.

8.4 What is the court’s role in the parties’ provision of evidence in civil proceedings in Ukraine?

At the request of one of the parties, a court may assist in obtaining the pieces of evidence, provided that the parties to the proceedings cannot provide such evidences. Such court assistance includes: (i) examination of witness; (ii) appointment of the expert examination; (iii) obtaining and examination of the evidence; and (iv) other. The court may assist in obtaining such pieces of evidence even before

the formal claim is filed by the plaintiff by means of pre-trial remedies (see question 3.2 above).

9 Judgments & Orders

9.1 What different types of judgments and orders are the civil courts in Ukraine empowered to issue and in what circumstances?

The civil and commercial courts of the first instance may issue the following types of the court judgments: (i) orders; (ii) rulings; and (iii) decisions.

All the issues relating to the court proceedings, parties’ requests, termination of the proceedings, dismissal of claims, etc. are resolved and approved by the court rulings. Orders are immediately effective, but may be reversed by higher courts.

The rulings are issued by courts of appeal and cassation courts that represent the result of the appeal or cassation respective proceedings. These courts are also entitled to issue orders to decide upon various procedural matters. Rulings are immediately effective, but may be overturned by higher courts.

The decisions are issued usually by the first instance courts in commercial and civil cases and embody the court judgment on the merits of a particular case. Decisions take effect only upon expiry of the time limits for appeal.

9.2 What powers do your local courts have to make rulings on damages/interests/costs of the litigation?

The court determines the amount of damages according to the amount of actual damages and lost profit supported with evidence. To receive compensation, the claimant should prove that the actual damages and the lost profit were directly caused by the defendant’s breach of law and the rights or interests of the claimant.

The claimant/defendant may normally recover the court expenses incurred (including the state duty, technical support fee, travel costs, witness travel costs, expert fees etc.) in both civil and commercial courts from the unsuccessful party. However, the reasonable amount of fees, which may be recovered, very much depends on the discretion of the judge.

For example, according to the general court practice, only actual legal costs rather than contingency fees can be awarded to the winning party to the court proceedings and only the expenses of a party to the case may be compensated in the event of a court decision in favour of such party. If a third party funding the claim is not a party to the case, its expenses would not be compensated.

The courts do not have powers to award post-judgment interest on the awarded damages.

9.3 How can a domestic/foreign judgment be enforced?

The domestic judgments, which became effective in Ukraine, are of a binding nature for the parties and are enforceable in Ukraine in a manner provided by the Law of Ukraine On Enforcement Proceedings, which establishes the detailed procedure for enforcement of the court decisions. As a general rule, any court judgment may be enforced on the basis of a writ of enforcement, issued by the court in question.

According to the Civil Procedure Code, the awards of foreign courts shall be recognised and enforced in Ukraine if provided for by international treaties, to which Ukraine is a party, or by virtue of the reciprocity principle upon *ad hoc* agreement with the foreign

state, the judgment of whose court is to be enforced in Ukraine.

There have been no reported instances of enforcement based on the reciprocity principle. However, on 17 February 2010 the groundbreaking amendments to the Code of Civil Procedure took effect. Henceforth, the reciprocity shall be presumed by Ukrainian courts unless proved otherwise.

Unless otherwise provided by an applicable treaty, foreign judgments will not be recognised and enforced in Ukraine where the Ukrainian court concludes that:

- Ukrainian courts possess exclusive jurisdiction over such disputes or a subject matter of the dispute cannot be adjudicated under Ukrainian law;
- the foreign judgment has not become effective;
- a Ukrainian court has rendered judgment in the same matter or an identical claim is being considered by a Ukrainian court and it has been filed before the commencement of the foreign court proceedings;
- a party to the dispute has not been given an opportunity to participate in the proceedings;
- the 3-year statute of limitations for recognition and enforcement of a foreign judgment has already expired;
- the recognition and enforcement of such judgment will violate public policy; and/or
- in other circumstances provided by the laws of Ukraine.

9.4 What are the rules of appeal against a judgment of a civil court of Ukraine?

Decisions of the courts of first instance may be appealed to an appropriate court of appeal. A party to the commercial proceedings has 10 days to file an appeal, while a party to the civil proceedings is obliged only to file a notice of intention to appeal within 5 days – the appeal itself must be submitted within 20 days after the filing of the notice.

If a party fails to file an appeal within the established time period, it still has three months to apply to the respective court for renewal of the 10-day term. The extension will be granted automatically in commercial courts, whereas civil courts will assess the reasons for missing the procedural deadlines and may decline the appeal.

The court decisions of first instance (those which were not appealed or those which were confirmed by the court of appeal), as well as decisions of the court of appeal, may further be challenged by filing a cassation appeal within one month (for commercial proceedings) or two months (for civil proceedings). If the court of cassation believes that there were valid excuses for filing a claim outside this period, it may find the claim of cassation to be admissible even later.

In addition, the Supreme Court of Ukraine may reconsider the decision of the court of cassation in commercial cases where there are exceptional grounds to do so, such as where the decision is inconsistent with prior decisions of the court of cassation or the Supreme Court in similar cases.

II. DISPUTE RESOLUTION

1 Preliminaries

1.1 What methods of dispute resolution are available and frequently used in Ukraine? Arbitration/Mediation/Tribunals/Ombudsman? (Please provide a brief overview of each available method.)

In Ukraine the following methods of dispute resolution are allowed:

(i) international commercial arbitration; and (ii) third party tribunals (domestic arbitration). The concept of Ombudsman is provided by Ukrainian legislation, but it is not used as a method of ADR. Mediation is becoming more popular in Ukraine. However, it is not stipulated, nor regulated by the law.

International commercial arbitration cases are heard by institutional tribunals or ad hoc tribunals. Civil (commercial) disputes where one party is foreign to Ukraine or is an enterprise with foreign investments may be referred to international commercial arbitration. Ukraine is a party to the following internationally recognised arbitration instruments such as: the UN Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958); European Convention on International Commercial Arbitration (1961); and others.

Third party courts (domestic arbitration). After the enactment of Law of Ukraine On Arbitration Courts in 2004 the comprehensive regulatory framework has been established for domestic arbitration. The disputes may be referred to either permanent institutions or ad hoc tribunals. Such institutions are usually created by a limited number of non-commercial legal entities, *inter alia* associations of legal entities, chambers of commerce and industry, stock exchanges, associations of credit unions, etc. There are limitations on jurisdiction of the courts.

1.2 What are the laws or rules governing the different methods of dispute resolution?

The main laws governing arbitration in Ukraine are: the Law of Ukraine On International Commercial Arbitration; the Law of Ukraine On Arbitration Courts; the Law of Ukraine On Enforcement Proceedings; the Law of Ukraine On Private International Law; the Code of Civil Procedure; and the Code of Commercial Procedure.

1.3 Are there any areas of law in Ukraine that cannot use arbitration/mediation/tribunals/Ombudsman as a means of dispute resolution?

The Ukrainian legislation does not include a clear-cut list of non-arbitrable international commercial disputes. The following disputes are unlikely to be submitted to international commercial arbitration:

- disputes on invalidation of regulatory acts of state bodies;
- disputes arising out of state procurement contracts ; or
- corporate disputes.

By contrast, the domestic arbitration legislation provides for an exhaustive list of non-arbitrable disputes such as:

- disputes on invalidation of regulatory acts of state bodies;
- disputes arising out of state procurement contracts;
- disputes related to state secrets;
- family disputes, except for marriage contract disputes;
- insolvency cases;
- disputes involving a state body or local self-government body when performing its public functions;
- real estate disputes, including land disputes;
- disputes regarding establishment of legal facts;
- labour disputes; corporate disputes; other cases to be considered exclusively by courts or by the Constitutional Court of Ukraine;
- disputes with a non-resident as a party; and
- disputes where enforcement of an arbitral award would require further actions of state, governmental bodies.

2 Dispute Resolution Institutions

2.1 What are the major dispute resolution institutions in Ukraine?

The main ICA institutions in Ukraine are the International Commercial Arbitration Court and the Maritime Arbitration Commission of the Ukrainian Chamber of Commerce and Industry. Since 2004 approximately 300 permanent arbitration courts have been registered.

2.2 Do any of the mentioned dispute resolution mechanisms provide binding and enforceable solutions?

Both ICA awards and domestic arbitration awards provide binding and enforceable solutions.

3 Trends & Developments

3.1 Are there any trends in the use of the different dispute resolution methods?

Ukraine remains a country with a strong prevalence of litigation over alternative dispute resolution methods. Alternative dispute resolution clauses remain more common in international contracts, while contracts by and between Ukrainian companies usually rely on domestic litigation. International arbitration is the most usual dispute resolution method and clause used in the contracts between the foreign and Ukrainian companies, occasionally also preceded by the mediation clause.

In the contracts between Ukrainian companies, use of mediation clause remains even rarer, while negotiations remain the most typical pre-litigation stage. Even though numerous conciliation and mediation bodies are available in Ukraine, their role remains very low. Local business remains reluctant to turn to alternative dispute resolution methods, mostly due to lack of information and understanding of these methods, as well as cultural characteristic of unwillingness to trust their matters to third parties/intermediaries.

However, the number of successful examples of both mediation and local arbitration is slowly growing in certain areas (e.g. mediation in labour, bankruptcy, family; construction disputes; arbitration in debt and other monetary disputes). This facilitates making them more customary in these areas. At the same time, local legal

community has been becoming lately more active in promoting both mediation and arbitration among local business and it may be expected that their role will rise in the near future. At the same time international commercial arbitration raises more and more interest and becomes more common for Ukrainian business, despite the various uncertainties with the arbitral awards enforcement.

3.2 Please provide, in no more than 300 words, a summary of any current issues or proceedings affecting the use of those dispute resolution methods in Ukraine?

The role of the alternative dispute resolution is seriously undermined in Ukraine by the lack of support from local courts. Local courts are usually willing to support any argument against the enforcement of international arbitration clauses. Thus, a slight mistake in the name of an arbitration institution, even where such error does not prevent identification of the intended institution, is the most typical ground for refusing recognition of the arbitration clauses pursuant to Article 2 of the New York Convention, as the reference to a non-existing institution.

One of the latest examples is the decision of the High Commercial Court of Ukraine of 31 March 2009 in case No.30/224 which denied enforcement of an arbitration clause – indicating the incorrect name of the arbitration institution – “International Commercial Arbitration Court of the Chamber of Commerce and Industry of Czech Republic” instead of “Arbitration Court attached to the Economic Chamber of the Czech Republic and Agricultural Chamber of the Czech Republic”. A similar decision was rendered on 30 April 2009 in case No. 32/8-37/331. At the same time the Commercial Court of Donetsk Region in its recent decision dated 13 January 2010, enforced the arbitration clause referring disputes to the Arbitration Court of Stockholm (instead of the Arbitration Institute of the Stockholm Chamber of Commerce).

The lack of trust to the alternative dispute resolution methods is also vivid in the legislation, when the limitations to the applicability of these methods are introduced. An example of this was demonstrated in March 2009 when the Parliament of Ukraine introduced amendments to make corporate disputes non-arbitrable disputes. Disputes arising from share purchase agreements remain fully arbitrable, though. At the same time, the same amendments limited the power of local arbitral tribunals to consider corporate, labour, and real estate disputes and cases on the establishment of legal facts.

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Olexander's practice includes a broad experience in advising multi-national and local companies, institutions and organisations on their business activities in Ukraine, on corporate and competition law, with a particular emphasis on anti-counterfeiting and unfair competition, corporate restructuring, as well as mergers and acquisitions and telecommunications.

Olexander is also heavily involved in a number of upstream and downstream segments of oil and gas practice with respect to international companies' growing interest in Ukraine for joint exploration and further extraction of natural resources.

Olexander was recognised as Band 1 lawyer in Corporate/Commercial by Chambers Europe 2008, and as a leading specialist in Corporate and M&A by PLC Which Lawyer? as well as being recommended in Competition/Antitrust and Dispute Resolution by the same directory. Chambers Europe 2008 says: 'He is known as a seasoned veteran of the Ukrainian market, but don't underestimate the extent of his US education and Western-style knowledge of commercial issues.'

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Sergiy joined the office from Wilmer Cutler Pickering Hale and Dorr LLP in London. He specialises in Dispute Resolution holding an LL.M degree from Queen Mary University of London in International and Comparative Dispute Resolution. He combines the insight of civil service with the private practice experience. His experience includes drafting and filing claims under ICAC and ICC arbitration rules and representing various clients before Ukrainian courts.

C/M/S/ Cameron McKenna

The Kyiv office was established in August 2007 and today has a team of 34 lawyers. Four experienced partners are supported by a strong team of associates.

Our team combines both local and international lawyers, which ensures that our clients receive the benefit of in-depth local knowledge as well as international best practices. Our team has extensive experience in different sectors and has advised Ukrainian and international clients on various areas of law, including corporate, mergers & acquisitions, banking & finance, real estate, energy and projects, competition, etc.

Our dispute resolution team across the firm comprises around 40 partners and 270 associates working across each of our dedicated industry sectors and spread across our 12 offices, making our dispute resolution team one of the largest in Europe, enabling us to dedicate the correct number of associates and partners to each dispute whatever its size. The team has experience of a broad range of commercial, financial and professional disputes and represents clients in all forms of dispute resolution including litigation, arbitration, mediation, adjudication and conciliation, as well as expert determination.

Our Kyiv Dispute Resolution team consists of 10 specialists, headed by Olexander Martinenko, Senior Partner and Head of Commercial. Many of them have graduated from the major international universities such as Harvard University, Queen Mary University of London, Stockholm University, and Wake Forest University of North Carolina.