DOING BUSINESS IN UKRAINE: KEY LEGAL ASPECTS

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DOING BUSINESS IN UKRAINE

KEY LEGAL ASPECTS

Legal System & Legislation
Forms of Incorporation
Corporate Law
Labor & Employment
Antitrust
Taxation
Bank Accounts
Environmental Requirements
IP Law
Dispute Resolution

2015

Doing Business in Ukraine: Key Legal Aspects
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PREFACE

Asters is a full-service independent national law firm that has maintained a strong presence in Ukraine since 1995. The firm provides efficient transactional legal advice and client representation on a broad spectrum of matters arising in the course of doing business in Ukraine. Asters capability is based on one of the largest team of professionals, including 17 partners and more than 60 attorneys.

The firm has extensive industry-specific experience and plays a leading role in advising clients in various market sectors, including agriculture, automotive, banking and finance, energy and utilities, environment, food processing and distribution, information technologies, insurance, media and advertising, natural resources, pharmaceuticals and cosmetics, real estate and construction, shipbuilding and telecommunications.

Asters maintains a full range of practice areas, including mergers and acquisitions, banking and finance, capital markets, corporate and commercial, competition and antitrust, dispute resolution, energy, environmental, family law, intellectual property, international trade, labor and employment, natural resources, real estate, restructuring and insolvency, securities, taxation, and white collar crime.

This guide is written as an introduction to Ukrainian legal system from the view point of foreign investors who used to ask similar legal questions prior to deciding whether to do a deal in Ukraine. Most of these questions are about legal risks associated with doing business and how the Ukrainian legal environment is different comparing to their home countries. It is true, however, that the digest of key legal issues may be found helpful both at the stage of initial investment research and in the course of a particular investment project. Of course, when the matter stops to be generic and relates to a specific practical situation, a separate legal advice should be sought in most cases. The overview of legal issues in the guide is based on our experience in a large number of projects in which Asters acted as Ukrainian counsel to its clients.

This is the third edition of the guide, which was initially published several years ago. The positive comments and feedback from many readers and ongoing significant changes in a good number of Ukrainian laws resulted in this update.

The information included in this guide is current as of December 2014. We will be happy to provide you, upon request, with further updates on the relevant matters or information regarding a specific industry or area of Ukrainian law in which you may have a particular interest.

DOING BUSINESS IN UKRAINE: INTRODUCTION

The main things a company should be aware of when doing business with a Ukrainian company are:

1. Ukrainian contract law is very formalistic. A contract between Ukrainian and foreign parties may be subject to foreign law, but may nevertheless be challenged in Ukraine, if it does not comply with mandatory provisions of Ukrainian law. To avoid practical difficulties, especially in export-import transactions (such as customs procedures), such compliance with Ukrainian law requirements should be secured and local legal advice should always be sought. Under the risk of invalidation in Ukraine, contracts between Ukrainian and foreign parties must be always made in Ukrainian (not Russian, which is often the case) and foreign languages.
2. Most Ukrainian companies, especially in the state sector, are not accustomed to preparing financial reports and accounts in accordance with international standards (IAS or IFRS). Ukrainian accounting standards have been modernized recently, but in many respects still deviate from international practices. Internal financial reporting and compliance systems are often not well-developed. To address these shortcomings in Ukrainian accounting practices, Ukrainian subsidiaries of multinational companies and Ukrainian companies seeking access to international capital markets usually establish two parallel accounting systems: one complying with the Ukrainian requirements, and the second one meeting the international requirements.
3. The authority of a person acting as a representative of a Ukrainian company must be carefully verified regarding both proper appointment and scope of authority. Such verification requires the review of company's charter and relevant corporate minutes, as well as a power of attorney (if one deals with company's representative other than the chief executive) dated as closely to the date at issue as possible. Potential customer companies should also be requested to provide a recent (within a month) excerpt from the State Register of Legal Entities evidencing that the person acting on behalf of the company has no restrictions on his or her authority. Due to the predominant absence of corporate secretaries in Ukrainian companies, incumbency certificates are not commonly issued.
4. Corruption among public servants, especially those at the controlling agencies, and the judiciary, is an undisputed problem. Nevertheless, the universal rule should be "stay legal under all circumstances". Companies that do not deviate from this principle have a much easier task in avoiding corruption.
5. Local controlling agencies (tax, sanitary, fire department, etc.) conduct excessive audits and checks and tend to apply a fine as a must upon each such check.

Ukrainian fiscal authorities are often unreasonable in interpretation of the law, and foreign investors must be prepared to challenge such unfair interpretations in courts.

6. Ukrainian laws and regulations are often contradictory or new and untested in practice. Courts' decisions are often contradictory and ambiguous.

Those doing business in Ukraine should remember to stay legal under all circumstances. Hire or engage a good lawyer, with whom any business decision, whether little or big, should be discussed. If the law is vague, as it often is, follow the most careful interpretation.

Study the background of every person you consider doing business with. Although you should use your experience and expertise, and most importantly, your common business sense when doing business in Ukraine, always make adjustments for the local business tradition and sometimes peculiar understanding of common legal concepts.

Doing business in Ukraine can be challenging and at the same time rewarding for those who are open to participating in a different cultural and business environment. 2014 was a year of fundamental change in Ukraine's strategic goals and statehood's functions. Having ousted its corrupt government Ukraine clearly indicated its willingness to join European Union departing from the post-Soviet realities and aligning its laws and policies with EU's standards. There is a hope that the new course will gradually, but inevitably improve overall investment and doing business climate getting Ukraine to a better economic and political future.

UKRAINIAN LEGAL SYSTEM: KEY RULES

Ukraine is a civil law country. The main sources of law are acts (also known as laws) promulgated by legislative and executive branches of state power. The Constitution is considered as the fundamental source of law.

A unicameral parliament of 450 deputies, the *Verkhovna Rada*, exercises sole legislative authority in Ukraine. The Parliament adopts bills, known as "Laws" or "Acts" (*zakony*).

The President is elected for a five-year term and may be re-elected for one additional term. The President may veto bills passed by the Parliament. The President issues decrees (*ukazy*), which in the 1990s and early 2000s introduced important legislative changes and some of which are still in effect. However, President under the current Constitution no longer has authority to enact generally applicable rules through his decrees. The Cabinet of Ministers adopts acts of delegated law-making, resolutions (*postanovy*), which are important elements of general legislation. The ministries and other governmental agencies are authorized to issue regulations, which become binding upon registration by the Ministry of Justice. As a general rule, legal rules become effective only upon publication in one of the official newspapers.

Acts issued by municipal authorities (also known as bodies of local self-governance) are mandatory within their respective territories. Ukraine is divided into 24 administrative regions, known as *oblasts*, and the Autonomous Republic of Crimea. The administrative regions are divided into districts (*rayon*), villages, towns and cities. The cities of Kyiv, the capital of Ukraine, and Sevastopol (*see* a note above regarding annexation of Crimea by the Russian Federation) are not part of any oblast and are subordinated directly to the central government.

International treaties ratified by the Parliament become a part of national legislation directly applicable as a source of law prevailing where they conflict with domestic law. Many international treaties of the former Soviet Union remain binding on Ukraine.

Business customs are recognized an independent source of law, which is, however, subordinate to statutory law. Certain customary rules operate as part of the law because there is a reference to them in a statute or decree. For example, under Ukrainian banking law, Ukrainian banks can use payment instruments recognized in international banking practice and Ukrainian companies trading with foreign counterparts must refer in sale contracts to INCOTERMS rules issued by the International Chamber of Commerce.

Judicial decisions are not considered a formal source of law, but play a significant role in its interpretation. Decisions of the Constitutional Court are an official interpretation of legislative enactments and mandatory for governmental agencies, legal entities and natural persons. Most judgments of the Supreme Court issued since 2010 have a similar status. Courts of lower instances need to take into account Supreme Court's position as to correct interpretation of specific laws and regulations established in its decisions.

With its independence in 1991 Ukraine inherited a vast body of Soviet law, which is still effective to the extent that it has not been expressly repealed or superseded by new legislation. Each year the area of pre-independence regulations becomes smaller and it is now insignificant.

The new enactments, however, often lack clarity and consistency. The old tradition of Soviet law to include general principles and declaratory statements into statutes, while specific rules of law directly applicable to transactions, are included into implementing regulations and administrative instructions, continues to be a mainstream of Ukrainian law making. It often results in "non-working principles" due to absence of relevant regulations or in a conflict between principles and regulations, when the latter deviate from or "develop" statutory provisions. The legislation is often adopted to introduce specific policy measures in response to the day-to-day needs and political pressures. This results in inconsistencies between different legislative acts, their ambiguity and frequently inefficient application in practice. The most recent example of such uncoordinated law making is the adoption of the Civil and Commercial Codes, which openly conflict with one another in several instances.

Thus, the most common risks associated with the Ukrainian legal system include (i) inconsistencies between the Constitution of Ukraine, statutes, presidential decrees, governmental, ministerial and local regulations, and other administrative acts; (ii) ambiguous provisions in the statutes and regulations resulting in difficulties with their implementation or interpretation; and (iii) inconsistent judicial and administrative review of similar cases.

Under productive criticism from local and international legal and political communities, the Ukraine's legal system slowly, but gradually improves and moves toward international standards. In investment and commercial area, major amendments of Ukraine's legislation have been enacted during the last decade. Ukraine has also signed a significant number of bilateral investment and tax treaties.

The 1996 Constitution (as amended) lays legal ground for a market-based economy. The Constitution contains the following provisions important in business regulation:

- commits Ukraine to the principles of democracy and rule of law;
- recognizes private ownership, including private ownership of land;
- guarantees free disposition of property and submits any expropriation to a procedure prescribed by law and providing for prior full compensation;
- declares entrepreneurial freedom and the protection of competition in business;
- guarantees foreign residents in Ukraine, including foreign investors, equal rights and protections with Ukrainian citizens;
- provides for compensation for losses from illegal action or inaction of state authorities or officials;
- requires publication of all legislation as a condition of its validity;

- outlaws retroactive legislation;
- provides recourse to courts against acts of state authorities and officials; and
- requires the creation of an independent judiciary.

Following the legal tradition of continental European market economies, Ukraine uses a Civil Code at the core of contract and property protection. Effective 1 January 2004, Ukraine substituted its old Soviet Civil Code of 1963 with a new Civil Code and introduced the Commercial Code.

The Civil Code and the Commercial Code

The Civil Code is largely based on Western European civil codes, primarily the German *Bürgerliches Gesetzbuch* and the Dutch Civil Code of 1992. It also incorporates legal principles used in the CIS Model Civil Code and the modern civil codes adopted in the 1990s in Russia and other CIS countries.

The Civil Code consists of six books, or chapters, which include a general first book providing basic definitions and concepts, such as persons and legal capacity, objects of civil rights, legal acts, representation, and statute of limitations; and five books dealing with such specific matters as (i) personal non-property rights of individuals, (ii) property rights, (iii) intellectual property protection, (iv) obligations (security, general law of contracts and their different types, torts, and unjust enrichment), and (v) inheritance law.

The Civil Code expressly provides for the possibility of special regulation of business relations by other statutes. The primary purpose of the Commercial Code is to establish such codified special rules for businesses. The Commercial Code consists of eight substantive chapters dealing with such issues as (i) fundamentals of business activities; (ii) business entities; (iii) property rights; (iv) commercial obligations; (v) liability for business-related violations; (vi) specifics of legal regulation of certain business sectors; (vii) international economic activity; and (viii) special economic statuses.

Unfortunately, in many instances, rules in the two codes directly conflict. For example, while the Civil Code allows the fixing of prices pegged to foreign currencies, the Commercial Code requires that, as a general rule, prices be fixed in Ukrainian currency *hryvnia*. Generally, provisions of the Commercial Code, where they are applicable, should prevail, based on the principle *lex specialis derogat legi generali* (special law trumps general law). The Commercial Code applies only to relations between legal entities and individuals registered as private entrepreneurs (businesses). It does not apply to relations between private individuals or between private individuals and businesses. Even in relations between businesses, where the Commercial Code does apply, matters not regulated by the Commercial Code are still governed by the Civil Code.

LABOR LAW

Ukrainian labor law is still based on the Labor Code of Ukraine of 1971 (as amended), which is very pro-employee, thus reflecting the socialist principles of full and state-coordinated employment. This results in problems for the employer in planning an efficient employment policy in compliance with Ukrainian law.

Ukrainian and foreign individuals are employed under an employment agreement, which is often formalized not as one written agreement, but rather as an exchange of an application signed by the employee and an order issued by the company's executive and appointing the employee to the appropriate position. The employment agreement may not deviate from labor law and reduce protections offered to the employee by the law. Grounds for dismissals are limited and social guarantees for many categories of employees are generous. Certain categories of employees may not be dismissed or laid off at all or without guaranteed subsequent employment. Oral or even factual (i.e., based on actual performance of job functions) employment agreements are permitted.

Only the so-called "*employment contracts*" can modify the default rules of employment law if the parties expressly agree so in writing. However, employment contracts can only be used where they are expressly authorized by law and for this reason they cannot be used with a vast majority of employees. One major exception is the CEO of a company: the Labor and Commercial Codes specifically authorize companies to enter into employment contracts with their top managers (CEOs). The difference between employment agreements and employment contracts is quite important and until recently unless there was a written document signed with the CEO entitled "*employment contract*" with relevant dismissal clauses the employer was not able to dismiss the CEO at will even in case of discovered irregularities, lack of confidence or conflicts. However, in 2014 the Labor Code was amended to allow an employment dismissal (within or without an employment contract) of corporate officers (including CEOs) upon termination of their respective corporate functions. The latter may be terminated on the grounds included in the company's charter.

Ukrainian employees are required to submit a formal employment record (labor books) to employers for proper registration of employment. Labor book information is used for hiring purposes and, along with centralized records of mandatory social security contribution, for calculation of pensions. Trade unions are traditionally strong and have a number of important functions in the termination and dispute resolution procedures.

Employment of foreigners, including executive officers, is generally possible only after obtaining work permits from the Labor Inspectorate. The application fee is 4 minimum wages and a fine for commencing work prior to obtaining a permit is 20 minimum wages

(in 2014 a minimum wage, which is often used in calculation of various financial variables under Ukrainian law, equalled UAH 1,218).

Some of the most common labor and employment issues include employment planning for start-up businesses (drafting employment contracts with company's management and employment agreements with employees, including benefit packages and incentive programs), employment of foreigners, including work permits and management services agreements, reorganizations and redundancies, correlation of corporate elections and employment formalities, wage arrears and compensation plans, payroll tax planning, mandatory preferential treatment for junior and senior employees and women, structure of work time and vacation time, termination and severance payments, workers' compensation and workplace safety, and pensions and unemployment benefits.

A draft new Labor Code purportedly designed to inject more flexibility into employment relations and to better suit Ukraine's market-based economy is under consideration in the Ministry of Social Policy of Ukraine pending its submission to the Parliament. Since the current Code, designed in the Soviet era of a controlled economy, fails in many respects to meet the needs of current times, both employers and many employees would welcome a new, more flexible and up-to-date code.

ANTITRUST

Ukraine's antimonopoly law addresses merger control (concentrations), abuse of a dominant position, concerted practices, restrictive and discriminatory activities of business entities and alliances, and anti-competitive actions of state bodies and bodies of local self-governance.

Concentrations

Under certain conditions M&A transactions may require prior approval (clearance) by the Anti-monopoly Committee of Ukraine (the "AMC"). The clearance procedure is governed by the Law on Protection of Economic Competition (the "Competition Law") and the Procedure for Filing Applications with the AMC for Prior Approval of the Concentration of Business Entities enacted by AMC Resolution.

The following transactions qualify as concentrations that may require clearance:

- merger or consolidation of business entities;
- acquisition of direct or indirect control over a business entity, including through control over a substantial part of its assets or its management;
- establishment of a joint venture by two or more business entities, if the resulting joint venture would be independently engaged in business activities for an extended period of time; or
- direct or indirect acquisition of ownership of or control over the equity interest in a business entity, if the acquisition results in concentration of at least 25 or 50 percent of the voting rights in the target.

If the transaction qualifies as a concentration, the following thresholds triggering the clearance requirement apply:

(i) the combined worldwide value of assets or gross revenue of the parties in the financial year preceding the year of the transaction (the "base year") exceeds EUR 12 million; *and*

(ii) each of any two parties has worldwide assets or gross revenue in excess of EUR 1 million in the base year; *and*

(iii) the value of the Ukrainian assets or Ukrainian gross revenue of either party in the base year exceeds EUR 1 million; *or*

(iv) either individual or aggregate current market share of the parties in the concerned or adjacent market exceeds 35 percent.

Thresholds (i)-(iii) apply cumulatively with each other and alternatively with threshold (iv). A transaction meeting these criteria requires obtainment of an AMC clearance.

To obtain an AMC clearance, the parties need to file an application with the AMC with accompanying documents which normally include participants' incorporation and registration documents, draft contracts and certain financial and corporate information. The filing fee is UAH 5,100.

Unless rejected by the AMC as incomplete, the application is deemed to be accepted for review on the 15th day of filing and is reviewed by the AMC within the following 30 days (45 days *Phase I review*). If the AMC finds reasons for prohibiting the reviewed transaction or for its further in-depth investigation, it can commence "antimonopoly proceedings" (*Phase II review*) with statutory duration of 3 months, which in practice can take much longer – upon the AMC's request of additional documents or information the 3-months term can be suspended or even restarted, in which case a new 3-months period will commence from the date of submission of the additionally requested documents.

The Cabinet of Ministers may overrule the AMC's refusal to grant consent if the positive impact of concentration on the public interests outweighs the negative consequences of the restriction of competition.

Abuse of Dominant Position

A business entity has a dominant market position, if it holds (i) a market share of more than 35 percent (unless it can prove that significant competition exists), or (ii) a market share of 35 percent or less, where no significant competition exists due to the comparatively small market shares held by its competitors.

Each of several business entities has a dominant position within the same market, if (i) the combined market share of three business entities exceeds 50 percent, or (ii) the aggregate market share of five business entities with the largest individual shares in the same market exceeds 70 percent.

The following practices are common abuses of a dominant market position:

- setting prices or other sale-and-purchase terms that could not be established under substantially competitive market conditions;
- applying different prices or terms to identical contracts without objectively justifiable grounds;
- refusal to purchase or sell goods in the absence of other sources for purchasing or selling such goods; and
- hindering market access or exit, ousting sellers, purchasers or other business entities from the market, etc.

Concerted Practices

Under the Competition Law, concerted practices (such as fixing prices or other sale-and-purchase terms, dividing markets or sources of supply, ousting other companies from the market or limiting their market access or exit) leading or that could have led to the prevention, elimination, or restriction of competition are prohibited as anti-competitive.

The AMC may permit certain concerted practices, if (i) the participants can prove that these practices encourage production, consumption of goods, technological or economic development, progress of small or medium-sized enterprises, export or import optimization, application of uniform technical standards, and (ii) they do not lead to a substantial restriction of competition in the market or its significant part.

Unfair Competition

Under the Commercial Code and the Law on Protection Against Unfair Competition (the "Unfair Competition Law"), any actions contradicting rules, trade customs, and other fair practices in business activities fall within the notion of unfair competition. The concept of unfair competition is set out very broadly and includes, inter alia, (i) unlawful use of trade names, trademarks, marketing materials, packaging or other signs of another entity or similar to them, (ii) unlawful use of another entity's product and copying of a product appearance, (iii) defamation, (iv) comparative advertising, (v) inducement to boycott a business, (vi) inducement to discrimination against a customer, (vii) bribing an employee of a supplier or a customer, (viii) unlawful collection, disclosure and use of trade secrets, and (ix) dissemination of misleading information.

It is important that a person whose rights are infringed by unfair competition complains to the AMC within 6 months of the person's learning about the infringement. Otherwise the AMC may refuse accepting a complaint unless a person had a valid reason (e.g. an attempt to amicably settle the matter) for missing the term.

A company committing unfair competition is subject to a fine in the amount of up to five percent of its proceeds from sale of goods (services) in the preceding year or, absent proceeds or information on them filed with AMC, - in an amount of up to UAH 170,000.

TAXATION

Almost all of the key tax rules (except for payroll taxes and employment related charges) are codified in the Tax Code adopted in December 2010. The Law on Single Social Contribution is the most important exception.

The tax system consists of 17 national and 5 local taxes and obligatory payments. However, only a few of the local taxes are actually implemented by each municipality and some of the taxes apply only to specific taxpayers. Consequently, most taxpayers deal with a smaller number of taxes on a day-to-day basis. It is envisaged that Ukrainian government contemplates to decrease the number of national taxes to 9 in 2015.

Corporate Profits Tax ("CPT")

a. General rules

Ukrainian legal entities and permanent establishments of non-resident companies are treated as CPT payers. The tax is charged on the profit determined according to a "worldwide" income concept (i.e., both Ukrainian and foreign-sourced incomes are taxable in Ukraine). The taxable profits are calculated as taxable incomes reduced by tax deductible expenses, including depreciation charges (if any). The current CPT rate is 18%.

The general reporting period for CPT purposes is a calendar quarter. Quarterly tax returns must be filed within 40 days of the last day of the reporting quarter. Such quarterly tax returns are not compulsory in the case of taxpayers required to make advance monthly tax payments. Particularly, taxpayers with annual taxable income for the prior year exceeding UAH 10 million (approx. USD 623,000) file an annual corporate income tax return and are required to make monthly advance payments in the amount equivalent to 1/12 of the previous year's tax liability. Taxpayers with income that does not exceed this threshold, newly formed companies and other qualified taxpayers pay tax on an annual basis, and are not required to make payments of interim tax.

b. Restrictions on Deductible Expenses

Reasonable business expenses are generally tax deductible. However, there are a number of anti-tax avoidance provisions in the tax laws, including:

Limitations on the deductibility of certain expenses. The Tax Code imposes restrictions on tax deductibility of royalties, expenses related to purchase of marketing, advertising and consulting services from non-residents. These payments are generally tax deductible to the extent they do not exceed 4% of the Ukrainian taxpayer's sales (revenue) for the previous calendar year. A similar restriction applies to engineering services purchased from non-residents. In this case the limitation is 5% of customs value of the equipment imported pursuant to the respective contract.

All of the above payments, irrespective their amount, are not deductible, if they are made

to non-residents registered in an offshore jurisdiction included in the list approved by the Ukrainian government.

Transfer pricing rules. Ukraine's transfer pricing law generally follows OECD transfer pricing principles. Transfer pricing rules apply to so-called "controlled" transactions defined as business transactions with one counterparty (such as a non-resident related party, non-resident registered in low-tax jurisdictions, resident related party with tax losses, tax exempt entity, etc.) for an amount exceeding UAH 50 million (approx. USD 3.2 million) per annum. To comply with transfer pricing law, controlled transactions must be conducted at the arm's length basis. Ukrainian taxpayers which are subject to transfer pricing rules are required to submit annual transfer pricing filings.

Limitations on deductibility of interest payments. Under general rule, interest accrued on the loan received by a Ukrainian company from a non-resident are tax deductible. At the same time, if interest payments are made to non-resident shareholders and/or their affiliates controlling more than 50% of the Ukrainian company, the deductible interest may not exceed 50% of the taxable profit plus interest received in a particular tax period (a quarter). The excessive interest, which may not be deducted in a particular tax period (a quarter), may be carried forward and deducted in subsequent periods provided that in these periods the deductible interest (including the carry-forwards) is within the above limitation.

c. Dividends Distribution

Payment of dividends is subject to a 18% CPT advance payment which may be further utilized by a taxpayer in subsequent reporting periods against its CPT payable in particular reporting periods. Exceptions from the CPT advance payment rule include, *inter alia*, payment of dividends to individuals and/or payers of fixed agriculture tax.

d. Special Tax Regimes

A special 10-year CPT exemption is granted to textile industry, aircraft producers, shipbuilders and producers of agricultural machinery. Companies involved in the development and use of energy-efficient technology or alternative energy sources may enjoy special favourable tax regime.

Withholding Tax ("WHT")

The non-resident's Ukrainian sourced income (mostly passive incomes, such as dividends, interest or royalties) is subject to 15% WHT which is withheld by a Ukrainian payer with subsequent remittance to the state budget. Exemptions and reduced WHT rates are possible under one of Ukraine's 70 double tax treaties ("DTT").

There are the following WHT rates under DTTs with Cyprus, The Netherlands and the United Kingdom) often used for structuring foreign investments into Ukraine:

Recipient is a resident of	Execution date	Effective date	Withholding tax rate		
			dividends	interests	royalties
1. Cyprus	08.11.12	07.08.13	5/15	2	5/10
2. United Kingdom	10.02.93	11.08.93	5/10	0	0
3. Netherlands	24.10.95	02.11.96	0/5/15	0*/2/10	0/10

* Rate for transactions with state or local authority

Beneficial Ownership Requirement

Under the Tax Code, the DTT treaty benefits are available only to beneficial owners of Ukrainian-sourced incomes. The concept of beneficial ownership is not well developed in Ukraine and tax authorities are not very experienced in applying this concept in practice. This results in uncertainty with its application towards DTTs and leads to relevant tax risks.

Value Added Tax ("VAT")

Supply of goods and provision of services in Ukraine are subject to Ukrainian VAT. Import and export of goods are also VAT-able transactions. The tax is generally charged by the supplier/seller and is added to the price. The import VAT is charged by Ukrainian customs during the customs clearance.

Starting on 1 January 2015 a company with VAT-able supplies exceeding UAH 1000,000 (approximately USD 62,305) during preceding 12 months is required to register as a VAT payer.

The current VAT rate is 20%. Export of goods from Ukraine is generally subject to 0% VAT. Special 7% VAT rate applies to the domestic supplies and import of pharmaceuticals and medical devices listed by the government.

VAT payable to the state budget is determined as the positive difference between VAT collected from customers (output VAT) and VAT paid to suppliers (input VAT). If input VAT in the respective reporting period (month) exceeds output VAT the tax payer is entitled to VAT recovery. VAT can be recovered either as (i) a credit against output VAT or (ii) cash refund from the state budget. The latter is subject to a set of cumbersome requirements, including strict documentary support. As a practical matter, Ukrainian companies experience severe difficulties in receiving VAT refund in cash from the state budget.

Personal Income Tax ("PIT")

The PIT rate is 15% or 17% and applies irrespective of the individual's tax residency status. PIT is a tax charged on individuals' incomes and does not apply to legal entities/employers normally acting as tax agents withholding PIT from the relevant payments, such as salary, bonuses etc.

Monthly income not exceeding 10 minimum wage amounts (currently, approximately

USD 760) is subject to 15% PIT, the balance (if any) – to 17% PIT. Dividends received by individuals from Ukrainian companies are subject to 5% withholding.

Mandatory Single Social Contribution

In addition to PIT, employers are also required to make payments the tax authority which distributes them further to several state social insurance funds in charge of unemployment, temporary sickness, and workplace accidents insurance. These contributions vary from 36.76% to 49.7% of a company's payroll expenses (the specific rate applicable to each company is determined by the sector of the economy where the company operates and the level of workplace incident risk prevalent in the sector). In addition to its own social contributions the employer is also required to withhold the social contribution charged to the employee in the amount ranging from 2% to 6.1% depending on the industry (the rate applicable to most of the businesses is 3.6%).

A monthly salary exceeding established threshold (currently, approximately USD 1,300) is not subject to the social contribution.

Currency Regulations and Restrictions on Cross-Border Transactions

Resident companies and individuals must sell their products and services only for the national currency, hryvnia, and may exchange it for foreign currencies only for limited purposes including, inter alia, for (i) making a contractual payment to a non-resident, (ii) paying interest on loans to foreign lenders, (iii) placing currency on bank and deposit accounts abroad, (iv) paying dividends abroad and certain other properly documented limited expenses incurred abroad, and (v) investing abroad.

Most transactions with foreign currencies are subject to licensing by the National Bank of Ukraine ("NBU"). For example, Ukrainian residents need a license from the NBU to operate a bank account abroad.

Generally, trade in foreign currency is allowed in Ukraine only through an authorized bank or other licensed financial institution on the regulated Ukrainian interbank currency market.

Foreign currency can be used as a means of payment between residents and non-residents in commercial activities only through an authorized bank, which possesses a license to engage in foreign currency operations. Purchase and sale transactions outside Ukraine are usually executed in foreign currency. Proof of the legitimate business purpose of the transaction (such as a contract and invoice) must be submitted to the bank through which such transfer is made. After recent legislative changes the Ukrainian currency can also be used as a means of payment between residents and non-residents in commercial transactions.

Resident companies and individuals holding currency or other assets outside Ukraine must declare them to the NBU.

The NBU establishes the official exchange rate of the national currency, hryvnia, to foreign currencies, e.g., the official exchange rate of the U.S. dollar to hryvnia (the "Dollar Rate") is established daily. Official exchange rates of freely convertible currencies widely used in international transactions and traded at the major international currency exchanges are tied to (i) the Dollar Rate and (ii) the daily fixing of cross-rates of major currencies to Euro, as established by the European Central Bank. Official exchange rates for other currencies are established through cross-rates based on the Dollar Rate and either (i) the exchange rates of the U.S. dollar established by the National Banks of the CIS countries for their respective national currencies or (ii) the exchange rates of other foreign currencies to the U.S. dollar as published in the Financial Times.

Unless there is an exemption, the Ukrainian borrower needs to register a foreign currency loan from a non-resident with the NBU. The interest payable on such loans is capped. For fixed-rate loans the caps depend on the term of the loan:

- for loans for up to 1 year – 9.8 percent per annum;
- for loans from 1 to 3 years – 10 percent per annum; and
- for loans for more than 3 years – 11 percent per annum.

For loans with floating rates the maximum rate is LIBOR for 3-month deposits in U.S. Dollars plus 750 basis points.

Ukrainian residents wishing to remit foreign currency for services provided to them by non-residents in the amount exceeding the equivalent of EUR 50,000 must provide their bank with a report from the International Market Monitoring Centre affiliated with the Ministry of Economy confirming that the price paid for the services does not exceed the prevailing market prices.

Ukrainian exporters are to be paid within 90 days from the shipment of exported goods, while Ukrainian importers must receive imported goods within 90 days after any pre-payment made to a non-resident. If they do not, they must pay to the State Treasury a penalty equal to 0.3 percent of the debt for each day the payment is overdue. Ukrainian banks and tax authorities are charged with enforcing these rules. There is a statutory provision, which suspends counting a penalty, i.e. by filing a claim against a non-resident to the International Commercial Arbitration Court of the Ukrainian Chamber of Commerce and Industry.

In October 2013, the NBU introduced as a temporary measure the mandatory sale of foreign currency proceeds with the purpose to stabilize the local currency market. The mandatory sale of foreign currency proceeds was has been renewed several times after its introduction. With certain exemptions (e.g., transactions involving international financial institutions with Ukraine as a member), this requirement applies to any foreign currency proceeds of Ukrainian companies. Starting with 50 percent, the amount subject to mandatory sale reached 100 percent in mid-2014 and decreased to 75 percent in September 2014.

BANK ACCOUNTS

Resident companies and their branches may open current and deposit accounts in Ukrainian banks in both *hryvnia* and in foreign currencies.

In establishing a resident company (such as a joint-stock company or a limited liability company) a special temporary account is opened for the purpose of forming the authorized capital fund. Funds from this temporary account are transferred to the company's current account upon the completion of its formation and registration.

Non-resident companies (if they are not foreign investors or participants in international assistance programs) may open current bank accounts in *hryvnia* and in foreign currency only through their representative offices. Representative offices of non-resident companies may open a current account in *hryvnia*, of either the "N" (non-business) type or "P" (business) type.

Foreign investors may open *hryvnia* and foreign currency accounts for investment-type operations without establishing a representative office in Ukraine. Separate accounts (one in *hryvnia* and one in foreign currency) may be opened for joint business activity based on a contract between a foreign investor and a Ukrainian company, without establishing a legal entity.

To open a deposit account a company must enter into a deposit account agreement with the bank. Checking accounts are also opened and operations on them are carried out on the basis of an agreement on settlement and cash services between the company and the bank.

Know-your client procedures have become increasingly diligent in recent years. Normally a legal entity wishing to open an account must disclose individuals who are its beneficial owners or to prove that there are no such beneficial owners. However, the level of stringency of these procedures varies among various commercial banks.

Pledges and Mortgages

Although secured transactions have become more sophisticated and secure following rapidly developing legislation, foreclosures of certain pledges are still a challenge. Especially vague are certain aspects of extra-judicial enforcement mechanisms under pledge of receivables denominated in the local currency, securities, equity interests in limited liability companies and balances in bank accounts, including non-convertibility of local currency enforcement proceeds into foreign currency, mandatory involvement of target companies (their shareholders) in the enforcement proceedings, revocability of securities transfer orders and payment orders. This generally results in excessive drafting efforts and difficult negotiations with servicing banks and custodians.

However, the national legislation and implementing rules provide for workable mechanisms of securing priority of the mortgagees' and pledgees' claims allowing registration of mortgages and pledges with the nation-wide register of proprietary rights to immovable assets and register of encumbrances of movable assets. The immovable assets register is administered by the State Registration Service and functions through the local registration offices. The register of encumbrances of movable assets is administered by a state-owned company established by the Ministry of Justice and functions through the local branches of the administrator. Both registers are also accessible through notaries. To record a pledge a simple application by the mortgagee or pledgee and a nominal fee are generally sufficient.

ENVIRONMENTAL REQUIREMENTS

Under Ukrainian environmental law, companies are required to obtain certain permits and make certain mandatory payments if they intend to engage in (i) special use of natural resources, (ii) emission of polluting substances, and (iii) dumping or storage of industrial, domestic and other waste.

Under Ukrainian environmental law, the use of natural resources is classified as either "general use" (the use of natural resources by individuals for personal needs, no permit or fee required) and, of most interest to business, "special use" (the use of natural resources by individuals and companies for commercial or other purposes, a permit and fee being required). A company can exploit natural resources for its activities in Ukraine only for special use. It must pay a fee and obtain a permit issued by the relevant state authority.

Under the Constitution of Ukraine subsoil and mineral resources located within the territory of Ukraine, its continental shelf and exclusive (economic) zone belong to the people of Ukraine and management of such resources is performed by state and municipal authorities. Mineral resources are classified as mineral resources of state and local importance. Legal and natural persons may be granted with subsoil and mineral resources only for purposes of use.

Subsoil use may be granted to companies, institutions, and organizations, citizens of Ukraine, and foreign citizens and legal entities, which obtained a special permit for subsoil use ("*Special Permit*").

Special Permits are normally granted to winners of auctions, but in exceptional cases they may be granted through a non-auction procedure. Between 2004 and 2010 the Parliament suspended the auction requirement. The issuance of Special Permits through auctions has been resumed in 2014.

Special Permits can be granted for up to 5 years for exploration deposits other than oil and gas, 10 years for exploration of oil and gas fields, 20 years for extraction of minerals and for construction and exploitation of underground facilities not related to extraction, 30 years for offshore oil and gas extraction, and 50 years for construction and exploitation of underground oil or gas storages. The term of Special Permits issued based on production sharing agreements is limited to the duration of such agreements.

Under environmental law, companies may emit polluting substances into the environment only if they obtain special permits. Industrial, domestic and other waste must be stored in special sites. A company may store waste at its own site or may transfer it to another company under a contract. A company exceeding a specified limit on waste production must receive a special permit and must pay a designated fee.

A company or an individual may incur civil and administrative liability for environmental violations. Individuals (including corporate officers) can also be criminally liable for serious violations. Environmental authorities may apply to court to recover environmental damages and require imposition of sanctions on noncompliant individuals and corporations, including the restriction or suspension of the companies' business activities.

Under Ukrainian law, a company or an individual may be held liable for damages caused by violation of environmental law. A company or an individual must provide compensation for any such damage, notwithstanding applied administrative or criminal liability. Damages may include actual damages and lost profits. An operator of the source of environmental hazard is strictly liable for any damage caused by such source, unless it resulted from force majeure or the wilful misconduct of the victim.

IP LAW

The Ukrainian intellectual property laws provide for the protection of various intellectual property objects such as copyright and related rights, trademarks, designs, inventions and utility models, trade name and commercial secret, etc.

Ukraine is a party to many basic international treaties on intellectual property rights such as the Berne Convention for the Protection of Literary and Artistic Works, the Paris Convention for the Protection of Industrial Property, the Madrid Agreement Concerning the International Registration of Marks and Protocol thereto, Patent Cooperation Treaty, etc.

Legal protection of copyright in Ukraine does not require any formal registration, although, voluntary registration of copyright is available. For the enforcement purposes an evidence of title in the copyrights object is normally required.

Legal protection of rights to trademarks, designs, inventions and utility models is granted subject to registration and obtainment of the respective certificate or patent. To obtain such registration the respective application shall be filed with the State Intellectual Property Service of Ukraine (SIPS). For the purposes of representation before SIPS a foreign entity or individual shall appoint a representative certified as a patent attorney of Ukraine.

A trademark registration certificate shall be granted subject to the examination of the application for both absolute and relative (e.g. prior rights) grounds for refusal. The law allows an interested party to file an opposition to a trademark application. However, currently trademark applications are not published for opposition purposes, therefore the opportunities to use the opposition procedure are quite limited.

Ukraine recognizes protection of well-known trademarks. A trademark can be recognized as well-known by either the SIPS' Chamber of Appeal or court. An established well-known trademark receives the same protection as the trademark registered in Ukraine with the exception that such protection also covers goods and services other than those for which the well-known status is recognized.

Registration of a trademark not used in Ukraine for a period of at least three years from the date of registration or any later date may be judicially terminated.

An industrial design defined as the shape, graphics, colouring or combination of the above may be registered in Ukraine upon formal examination of the application materials.

Software is protected by copyright as the work of literature and is not patentable in Ukraine.

The owner of the tangible intellectual property rights shall be entitled to assign such rights in full or in part to any other person or to authorize the use of the respective intellectual property object on the basis of a license agreement. The assignment agreement regarding a trademark, design, invention or utility model needs to be recorded with SIPS. For the copyright assignment or license agreement, as well as for license agreement regarding a trademark, design, invention or utility model, no registration is required, although the procedure for voluntary registration with SIPS is available. Depending on the type of licensed intellectual property the law may require certain specific terms and conditions to be included in the license agreement.

The tangible rights to intellectual property created upon instruction (e.g. by an independent contractor under the services contract) belong to the author/service provider and the customer jointly unless the contract provides otherwise. There are conflicting rules in respect of the intellectual property created by an employee. The Civil Code provides for the joint ownership by the employee and the employer unless otherwise provided by the agreement between them while under the Law on Copyright and Related Rights the respective tangible rights belong to the employer.

Notably, moral rights, also known as *droit d'auteur*, cannot be assigned.

Cancellation of a trademark registration certificate or a patent for design, invention or utility model is possible by a legal action. The courts, however, are not allowed to decide on the issues requiring special knowledge (such as on confusing similarity between trademarks or compliance with patentability criteria) – for this purpose a court obtains an expert opinion from a certified expert.

Infringement of the intellectual property rights may entail civil, administrative and criminal liability. To prevent infringement, the owner of the intellectual property rights may register its intellectual property object in the Customs Register thus alerting customs authorities about possible infringements of such rights. Consequently, customs authorities may apply to customs clearance of counterfeiting goods certain border measures, such as suspension of customs clearance procedures.

POWERS OF ATTORNEY

Generally a power of attorney from an individual needs to be notarized. A power of attorney from a legal entity generally does not require a notarization, unless it is for a transaction, which itself needs to be notarized. A mere signature of the legal entity's CEO is sufficient. For a long time irrevocable powers of attorney were not allowed. Currently they are permitted only when expressly provided by law and such cases are very limited. This restriction often affects the transaction structure, especially in secured financings.

LAND & REAL ESTATE RIGHTS

The title and encumbrances to immovable property (land and on-land structures) are subject to state registration. Starting from 2013 the title to land and buildings is registered in a single State Register of Rights to Real Estate. In November 2014 information from the State Register became publicly available. All transactions involving transfer of title to real estate and long-term (3 years and longer) leases of non-residential property must be certified by a notary.

The State Register of Rights to Real Estate is maintained and registration of title to land and immovable property is carried out by the State Registration Authority of the Ministry of Justice of Ukraine.

OUTLINE OF UKRAINE'S COMPANY LAW

The basic laws covering the issues of foundation and operation of Ukrainian companies are the Civil Code, the Commercial Code, the Business Associations Law and the Joint Stock Companies Law. These laws provide for different forms of legal entities, which can be used to conduct business in Ukraine. Alternatively, a foreign investor may engage in business through a representative office, which is not a separate legal entity.

Types of Companies

The Civil Code provides for six types of commercial legal entities: a joint stock company (*akcionerne tovarystvo*), a limited liability company (*tovarystvo z obmezhenoyu vidpovidalnistyu*), an additional liability company (*tovarytstvo z dodatkovoyu vidpovidalnistyu*), a full partnership (*povne tovarystvo)*, a limited partnership (*komandytne tovarystvo*), and a production cooperative.

Under the Commercial Code, a business entity may have a form, *inter alia*, of a private enterprise, state enterprise, an enterprise based on collective ownership, municipal enterprise and joint municipal enterprise created by local communities. A company established by one founder is a "unitary" enterprise, while a company with several founders is a corporate enterprise.

Forms of businesses *most frequently used by international investors* and, which are reviewed in more detail below are:

- a *joint stock company* ("JSC"), which must issue shares registered by the National Commission on Securities and Stock Market. The shareholders are liable for company debts only to the extent of the par value of their shares. There can be two types of the JSC: public JSC and private JSC;
- a *limited liability company* ("LLC"), in which holders of equity are not liable for the debts of the company beyond the capital they contributed or agreed to contribute; and
- a *representative office* ("RO"), which is similar to a branch office of the investor with the authority to act on behalf of the investor in Ukraine; an RO must be registered with state authorities, but is not a separate legal entity.

Joint Stock Company vs. Limited Liability Company

Incorporation and Members of a Company

One or more founders may create a JSC or an LLC. However, the Civil Code specifies two scenarios when a company cannot have a sole founder/participant:

(i) LLC or JSC may not be created by a sole founder, if such founder, in its turn, is also established by one person; and

(ii) a parent of a wholly-owned Ukrainian LLC may not be a sole participant in another wholly-owned Ukrainian LLC.

LLC can have no more than 100 participants. Public JSCs are not limited in the number of shareholders. Private JSCs can have no more than 100 shareholders and if they have more shareholders they must be converted into a public JSC.

LLC may be incorporated based on a Model Charter, which was adopted by the Cabinet of Ministers of Ukraine in November 2011.

Capital Requirements

The stated or "charter" capital (the "Capital Fund") of a Ukrainian JSC is divided into a specified number of shares, each with a stated nominal value, while in an LLC it is divided into equity interests, and may be increased or decreased. Capital contributions may be made in cash or in kind, including buildings, equipment, securities (except for state owned money, debt financing and bonds, assets of state (municipal) owned companies, which cannot be privatized), licenses, intellectual property, lease rights or rights to use land; however, personal services may not be included as part of a capital contribution. If LLC's net assets drop below the Capital Fund, the latter must be appropriately decreased, or the company is subject to liquidation if its net assets become less than the minimum amount of the Capital Fund. This latter rule does not apply to JSCs.

A JSC is allowed to issue corporate bonds in the amount not exceeding the Capital Fund multiplied by three unless a third party provides security for bonds issued by the JSC.

Currently, the minimum capitalization requirement for the creation of a JSC is 1,250 minimum wages (in December 2014 a minimum wage equalled UAH 1,218, but it is raised each year by the State Budget Law gradually on a nearly quarterly basis). The Capital Fund must be paid in prior to registration of the JSC.

There are no minimum capitalization requirements for LLCs (as well as for less popular types of companies) although some Capital Fund must be stated in the charter at the time of registration and the stated amount, even though it can be minimal, must be paid in within 1 year of registration.

Participation/Ownership

Starting from 2011 shares of JSCs may exist only in electronic form. According to the Law of Ukraine "On the Depository System of Ukraine" the recordation of shares of JSCs is carried out by relevant depository institutions. Normally a shareholder and a custodian enter into a securities account agreement, pursuant to which a custodian keeps records of shares and/or other securities of the shareholder in line with the procedure established by the National Commission on Securities and Stock Market (the "Securities Commission"). However, in 2014 a number of JSCs remain non-compliant with the statutory requirement as to electronic form of the shares with their shares remaining in the documentary form allowed under previously applicable legal regime. Under that regime, the title to the

registered shares of a JSC in the documentary form was registered in a share register maintained either by the company (if the number of the company's shareholders did not exceed 150) or by an outside licensed registrar. JSCs' liability for the failure to comply with the share electronic form requirement may include the Securities Commissions' warning and, if violation remains uncured, a fine in the amount from UAH 17,000 to 170,000 with possible suspension of securities register. There may be no transactions with shares which are not converted into electronic form.

Participation in LLC is evidenced by the company's charter indicating participants' details. The charter and any amendments to it must be registered by the state registrar with relevant information included into the Unified State Register of Legal Entities and Individual Entrepreneurs (see also section *Registration and Company Register* below).

Restrictions on Transfer of Ownership

Shares of a public JSC have free circulation on a stock exchange and their transfer may not be restricted. Shares of a private JSC cannot be traded at an exchange, except for selling such shares *via* auction. The charter of a private JSC may provide for other shareholders' right of first refusal in any share sale.

Under the Business Associations Law, unless LLC's charter provides otherwise an LLC participant can transfer its equity to any other person provided that other participants have the rights of first refusal on any equity sale. Where provided by the charter, however, restrictions on equity transfers in the LLC are possible through (i) prohibition of such transfers to third persons, and (ii) requirement of a prior consent of all members to equity transfer as part of legal succession.

A participant may withdraw from the LLC upon a written statement at any time that results in the participant's receiving a part of the LLC's net assets *pro rata* to such participant's equity interest.

Corporate Governance

a. Joint-Stock Companies

A general meeting of shareholders and an executive body (either an individual CEO or executive board) are the governing bodies of a JSC. Ukrainian law also requires JSC with at least 10 shareholders to have a supervisory board as a check on the management. The highest governing body of a JSC is the general meeting of shareholders, which (among other things) has the authority to: (i) amend the company's charter, (ii) authorize the issuance of shares and repurchase of shares, (iii) approve transactions the value of which exceeds 25 percent of the JSC's assets, (iv) elect the supervisory council and the audit committee, and (v) approve distribution of dividends.

Although approval by a simple majority of shareholders is required for adoption of most decisions, a supermajority (three quarters of all shares present) is required to amend the company's charter, any changes to the Capital Fund or share issues, and reorganization

or liquidation of the company. Votes of more than 50 percent of all outstanding common shares is required to approve a transaction with the value equal to at least 50 percent of the company's assets. These matters, along with approval of annual reports, certain internal regulations, redemption of its shares, election of supervisory board, audit and ballot commissions, approval of deals with value exceeding 25 percent of company's assets, and distribution of shares, constitute an exclusive competence of the general meeting of shareholders that may not be delegated to any other body of the company. The general meeting of shareholders may delegate some of its authority, but not the above-mentioned powers or other powers specifically assigned to GMS jurisdiction by the law, to the supervisory council or to the executive body.

Each JSC must have an executive body in charge of the day-to-day business operation of the company. An executive body may consist of a single-person CEO (such as director or general manager) or an executive board headed by a chairperson. The drawback of an executive board is that all executive decisions must be approved by the decision of the board's meeting. The powers of the board cannot be delegated to any of its members (even the chairperson) and all matters must be decided through collective action of the body in a meeting. This is quite difficult to accomplish in day-to-day operations. For this reason, unless there are other considerations, JSCs often choose a single-person executive (CEO).

The supervisory council organizes general meetings of shareholders, appoints the executive or the executive board, approves material transactions with value between 10 and 25 percent of the company's assets, and performs other specific functions assigned by the charter or by a decision of the general meeting. The supervisory council may consist of both individuals and legal entities provided that an elected legal entity must be a shareholder.

Under the JSC Law, members of the supervisory council are supposed to be elected by cumulative voting, however, in a private JSC they may be alternatively selected based on the number of votes linked to the number of seats in the supervisory council as specified in the JSC's charter.

The supervisory council oversees activities of the executive body. Unless the charter provides otherwise, the supervisory council appoints, dismisses, and suspends the CEO or the executive board and sets the conditions of their employment.

The procedure for calling a general meeting of shareholders is rather complicated and involves a personal notice to every shareholder in the form prescribed by the company's charter and a mandatory publication in a government newspaper at least 30 days prior to the meeting. Notices from public JSCs must be published on the JSC's website and sent to each stock exchange where the JSC is listed. In order for a shareholders meeting to be properly held, owners of at least 60 percent of all ordinary shares must be present. There is no sanction for the failure to appear at the general meeting and the quorum is not reduced even if a shareholder repeatedly fails to appear. The general meeting cannot be held if owners of the minimum 60 percent of shares are not present.

This means that in order to have a meaningful control over a JSC in Ukraine one usually needs to control at least 60 percent of shares rather than 50 percent plus one share. The other important controlling threshold is the owners of 75 percent of shares present at the general meeting of shareholders which is required for approving resolutions approving amendments to the JSC charter, annulment of treasury shares, changes of the company's legal form, placement of shares, increase or decrease of the charter capital, JSC's spin-off, termination, and liquidation and related procedures. As to minority stakes 10 percent shareholding entitles its owner to (i) appoint representatives supervising observation of their rights during the general meeting of shareholders, (ii) initiate convocation of the extraordinary general meeting of shareholders, (iii) initiate audit inspection of the JSC by the internal audit committee or an outside auditor.

In JSCs with 25 or less shareholders voting on certain issues specified in the charter may be carried out in the form of written resolutions circulated among the shareholders.

A sole shareholder of a JSCS may adopt resolutions in lieu of the general meeting. Such resolutions must be sealed by the company or certified by a notary.

JSCs may appoint an internal audit committee (*reviziyna komisiya*) separate from both executive board and supervisory council. Instead of forming an audit committee JSCs with fewer than 100 shareholders can appoint a single auditor who is viewed as the company's officer and is distinct from an outside auditor. Alternatively, JSCs may appoint an outside contractual auditor.

b. Limited Liability Companies

The highest governing body of an LLC is the general meeting of its participants held at least twice a year, unless otherwise specified in the charter. The quorum for the general meeting is presence of participants owning equity interest in more than 60 percent of the Capital Fund. Most decisions require a simple majority vote of the participants present at a meeting. However, a majority of owners of all equity interests in the LLC must vote for approval of (i) amendments to the company's charter, (ii) changes in the Capital Fund, (iii) fundamental principles of the company's activity and reports on their implementation, and (iv) expulsion of a member from the company. Participants holding in aggregate at least 20 percent equity interest in the LLC may demand convocation of an extraordinary general meeting of participants at any time for any reason.

Voting on issues specified in the charter can be organized in the form of written resolutions circulated among the participants.

A single director or an executive board headed by the general director may act as an executive body of the LLC. The executive body reports directly to the general meeting of participants and the general director may act on behalf of the LLC without a power of attorney. For the reasons discussed above in the context of JSCs a single executive officer is in most cases a more flexible option. Participants can generally establish an appropriate management structure and specify the competence of the governing bodies of the LLC in its charter.

A participant who systematically fails to perform or improperly performs its obligations or prevents the company's achievement of business goals can be expelled from the company. This decision requires more than 50 percent of the votes of all LLC's participants. The excluded participant is to be paid the value of the portion of the company's net assets pro rata to its equity interest in the company.

Interested Party Transactions

Under the Civil Code, a participant in an LLC and a shareholder in a JSC may not vote at the general meeting of participants (shareholders) on the matters related to conclusion of a contract or resolution of a dispute between such participant (shareholder) and the company. There is also a rule, pursuant to which officers of the governing bodies of the company bear fiduciary duties to act in the best interests of the company in good faith and reason within the scope of their powers. However, these duties are quite difficult to enforce in practice.

The JSC Law introduces a number of rules regulating interested party transactions defined as transactions (i) involving a JSC and (ii) in which its officer or its shareholder controlling, together with affiliated parties, at least 25 percent of the ordinary shares (either, the "interested party") has interest. An interested party must notify the JSC's executive body and the supervisory council about its interest. The supervisory council is required to approve an interested party transaction. If the majority of the supervisory council has interest in the transaction, it must be approved by the general meeting of shareholders. The interested party rules do not apply to LLCs.

Registration and Company Register

Companies are viewed established as separate legal persons upon their registration in the Company Register. The original registration fee equals 10 non-taxable minimum incomes (UAH 170 in December 2014). The register is nationwide, but is administered by local registration offices of the Ministry of Justice of Ukraine. Beginning from 2011 a legal entity may be incorporated by sending registration documents via Internet. Most registered information, except for corporate charters filed with the state registrar, is public. Public information in the Company Register includes, inter alia, information about company's chief executive acting on behalf of the company and limitations of executive's authority. However, this information cannot be fully relied upon by third parties to ensure that their contracts with the company are duly authorized by the company. In practice a third party intending to enter into a significant contract with any company should request from the counterparty at the very least the following documents: either a power of attorney or the corporate charter, relevant corporate regulation (if any), and corporate resolution appointing the person acting on behalf of the company to verify the signatory's authority.

At the time of registration as legal entities in the Company Register, JSCs and LLCs (as well as other types of legal entities) are registered via a 'single window' procedure with the local tax authority (VAT registration, if required, is separate), the state committee of

statistics, and the state Pension Fund. Every JSC must also register its share issue(s) with the National Commission on Securities and Stock Market. Equity investment by a foreign investor may be registered as a foreign investment with a regional state administration. This registration, while optional, secures certain expanded state guarantees to the investment, including facilitation of its repatriation.

Representative Office

An RO is not a legal entity under Ukrainian law but rather a permanent place of activity, through which a non-resident company carries out a part or all of its business in Ukraine. ROs may exist in the form of a branch office, a plant, a mine, or other production sites.

An RO is required to register with the Ministry of Economic Development and Trade of Ukraine and certain other state agencies (such as the local tax authority and the state committee of statistics). The RO registration takes up to 3 months which is much longer than registration of a subsidiary entity in the form of LLC. It requires submission of a set of application documents (an application letter, extract from the foreign trade register, banking certificate, power of attorney, etc.) and payment of the registration fee in the amount of USD 2,500.

Like a JSC and an LLC, an RO may employ both foreign and Ukrainian employees. The labor books (records) of Ukrainian employees are kept by the Directorate-General for Rendering Services to Diplomatic Missions (known by its Ukrainian acronym as "GDIP") or the regional state administration where a particular RO is located, and such employees must receive their wages in Ukrainian currency. Foreign employees may need a work permit unless such employees are considered to be members of the RO staff, which is evidenced by the respective staff cards issued to them by the Ministry of Economic Development and Trade of Ukraine. A RO has withholding obligations with respect to individual income tax of its Ukrainian employees and the social contribution.

The RO is taxed generally at the same rates as JSCs and LLCs. Its manager or head, acting under a power of attorney from the parent non-resident company (which, normally, needs to be apostilled), manages the RO. The RO is obliged to comply with Ukrainian statutory accounting requirements and must file income tax returns stating its income from Ukrainian sources.

Minority Shareholders' Rights

Inadequate protection of minority shareholders' rights and abuse of dominant position by majority shareholders have long been serious corporate problems in Ukraine. One of the reasons is that many minority shareholders are not investors in companies but rather their employees or former employees who received their shares as a result of a speedily organized and often poorly thought-through privatization. For this reason, minority shareholders lack political clout and economic incentive to protect their rights.

The JSC Law adopted in 2008 evidences some effort to improve the rights of minority shareholders. The rules on cumulative voting and to some extent on interested-party transactions in the JSC Law are aimed at protecting minority shareholders from abuse of power by the majority. Also, minority shareholders have certain tag-along rights under the new Law. Under the JSC Law any person that has acquired a controlling interest in a JSC must make an offer to all remaining shareholders to buy out their shares. The offer is made through the target company's supervisory council (or through the executive of JSCs where the supervisory council is not required), while the National Commission on Securities and Stock Market and the stock exchange where the shares are listed must be notified about the offer.

A person intending to acquire shares in a JSC, if such acquisition would result in the person's owning, alone or together with affiliates, of at least 10 percent of ordinary shares, must at least 30 days prior to the acquisition: (1) notify in writing the JSC and the National Commission on Securities and Stock Market and each stock exchange at which JSC shares are listed about such intent and (2) publish a notice in the government newspaper.

Status of Corporate Officers

Under the Labor Code of Ukraine, an employer may dismiss an employee corporate officer on the ground of removal of such officer from the corporate office. Such dismissal entitles an employee to a severance payment in the amount of at least six monthly wages.

As to the foreign officers, long and cumbersome application procedures regarding a work permit effectively make it not advisable to appoint a non-Ukrainian CEO at the creation of a company.

Pre-Emptive Rights and Rights of First Refusal

The JSC Law provides that the charter of private JSC can grant the right of first refusal. If so granted this right is implemented according to the formalities established by law only in case of a share sale. The implementation procedure applicable to all other types of share disposal must be established in the company's charter.

In LLCs a participant's right of first refusal is expressly granted only in case of an equity sale. This leaves open the question of equity alienations other than sale, which can be used to circumvent the right of first refusal.

The JSC Law does not recognize pre-emptive rights of existing shareholders in public offerings of new shares. Under the law, pre-emptive rights are only recognized in new private placements.

Waivers

The legal nature of a waiver of a corporate right by a shareholder/participant is not

addressed properly by law, resulting in uncertainty as to whether the waiver is generally admissible. The issue becomes especially sensitive when applied to waivers regarding the requirement of a 30-day prior notice and public announcement of a general meeting of shareholders of a JSC and a 30-day prior notice of a meeting of members in an LLC. The courts have explained that a waiver can remedy a defect in personal notification of the shareholder about a meeting. Waivers of notice are also efficient where signed by LLC's all participants. In other contexts waivers are not a perfect remedy for technical violation of the procedure and should be avoided.

DISPUTE RESOLUTION

This section presents an overview of the following issues: dispute settlement in domestic and foreign courts, applicability of foreign law and alternative dispute resolution mechanisms.

Domestic Courts

Court Organization

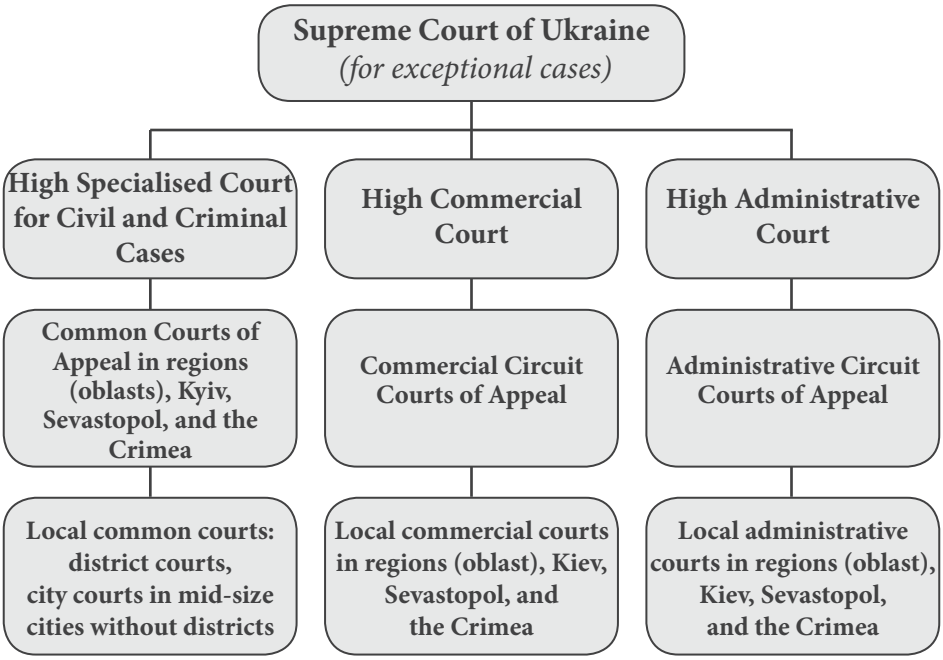
Pursuant to the Constitution and the Law on Judicial Organization and the Status of Judges (the "Court Law") the judicial system of Ukraine consists of (i) the Constitutional Court and (ii) the courts of general jurisdiction.

Under the Law on the Constitutional Court individuals and companies may request an authoritative interpretation of any provision of the Constitution and any law of Ukraine. However, such requests are rarely accepted. The Constitutional Court also rules on constitutionality of laws, international treaties and gives official interpretation of the Constitution and laws at the request of a range of political actors, including the President and at least 45 Members of Parliament.

The system of courts of general jurisdiction encompasses: (i) local courts (trial courts); (ii) appellate courts; (iii) specialized high courts (cassation courts); and (iv) the Supreme Court of Ukraine.

Based on the specialization principle, the courts of general jurisdiction consider the following types of cases: civil, criminal, commercial and administrative, and cases on administrative offences.

The system of Ukrainian courts of general jurisdiction as established by the Court Law is schematically shown in the chart below.



Pursuant to the Code of Civil Procedure common courts hear civil, housing, land, family and labor cases, if at least one of the disputing parties is an individual. Common courts also consider appeals on domestic arbitral awards, applications for enforcement of domestic arbitral awards, applications for recognition and enforcement of foreign court decisions as well as foreign arbitral awards, setting aside of awards of international arbitral tribunal having its seat in Ukraine. These courts may also review certain administrative decisions of state officials. In the latter case they use the procedure prescribed by the Code of Administrative Procedure.

Commercial and administrative cases are subject to jurisdiction of specialized commercial and administrative courts. Commercial courts have jurisdiction over disputes between business entities, as well as over bankruptcy, antimonopoly, corporate matters and disputes related to securities. In practice, commercial courts most often deal with disputes concerning sales contracts, property, bankruptcy, loan contracts, insurance, etc. Commercial courts apply the rules of the Code of Commercial Procedure.

Administrative courts hear claims challenging administrative actions and decrees and their procedure is governed by the Code of Administrative Procedure. Litigation with tax and customs authorities is an important part of their jurisdiction.

In total, there are 27 local commercial courts, 27 local administrative courts (these specialized courts are created in all regions, the cities of Kyiv and Sevastopol, and the Autonomous Republic of Crimea), and more than 700 local common courts. Local

common courts are created in rural districts and districts of large cities and in medium-sized cities, which are not divided into districts. The local courts serve as courts of first instance.

In December 2014 as a result of temporary occupation of the territory of the Crimea and Sevastopol, the courts of the Kyiv region and Kyiv City perform functions of the Crimean and Sevastopol local courts. As a result of military actions in the Donetsk and Lugansk regions local commercial and administrative courts were relocated to certain neighbouring regions while competence of common courts in the Donetsk and Lugansk regions was given to common courts in neighbouring regions under the full control of the Ukrainian government.

The courts of appeal (courts of second instance) review the judgments of the local courts, which have not become effective, upon petition of any interested party. A court of appeal has the authority to (i) uphold the judgment of a local court, (ii) vacate the judgment of the trial court and issue a new judgment; (iii) vacate the judgment of the trial court and terminate the proceedings, or (iv) amend the judgment of the trial court.

The courts of appeal are organized based on the territorial principle: common courts of appeal are created in each region (oblast), Kyiv, Sevastopol, and the Crimea. There are fewer specialized commercial and administrative courts of appeal and their jurisdiction usually extends to several *oblasts*. Special regimes for administration of justice in Donetsk, Lugansk regions, Sevastopol and the Crimea (as described above) provides for relocation of commercial and administrative courts of appeal from Donetsk to Kharkiv and Kramatorsk respectively; functions of Sevastopol commercial and administrative courts of appeal are performed by the Kyiv commercial and administrative courts of appeal; the Kyiv common court of appeal exercises justice instead of the Crimean and Sevastopol common courts of appeal; the Kharkiv and Zaporizhzhya common courts of appeal perform functions of the Lugansk and Donetsk common courts of appeal respectively.

The third level of courts includes the High Specialised Court for Civil and Criminal Cases, the High Administrative Court of Ukraine, and the High Commercial Court of Ukraine. The high courts are authorized to revise the judgments of lower courts. Under the procedural rules, the high court as a court of cassation (second appeal) examines only validity of the decisions of lower courts only on matters of substantive and procedural law and usually not on matters of fact and proof.

The Supreme Court of Ukraine is nominally the highest judicial body in the system of courts of general jurisdiction. However, the ability of the Supreme Court to hear appeals in particular cases is limited and most appeals end at the high court level. Thus, the Supreme Court can review judgments of the high specialized courts on the grounds of (i) different application of law in similar cases and (ii) international forum's (i.e., the European Court's of Human Rights) ruling that Ukraine violated its international obligations during adjudication of a particular dispute by national courts. The opinion of the Supreme Court of Ukraine (made upon revision of the judgments of the courts on cassation appeal based

on non-uniform law application in similar cases) shall be binding not only upon the parties to the particular dispute, but also to all courts and administrative authorities in Ukraine in application of the same legal rules in similar cases.

A case in a local court may be heard by a sole judge or by a panel of judges, depending on the specific case characteristics. The vast majority of cases are heard by a sole judge. The higher instance courts hear cases by panels consisting of at least three professional judges.

The Constitution of Ukraine provides for the creation of a court of jury. However, jury as an element of the judicial system has not yet become commonly used (first criminal case with the participation of a court of jury was considered in May 2013).

Jurisdiction

Jurisdiction is an important legal concept in Ukraine where different systems of courts exist side by side. There are two main types of jurisdiction: subject matter jurisdiction and territorial jurisdiction. Subject matter jurisdiction is jurisdiction over the given type of dispute, while territorial jurisdiction is jurisdiction over persons residing or property located within the court's territory.

The most important principles of subject matter jurisdiction in Ukraine are that (i) commercial courts have jurisdiction over disputes between two legal entities or between legal entities and individuals registered as private entrepreneurs, (ii) administrative courts have jurisdiction over administrative disputes, i.e., disputes where administrative action or decrees of public authorities are challenged, and (iii) common courts have residual jurisdiction over civil disputes where at least one party is an individual and administrative disputes with municipal (village, city or town) authorities.

Where territorial jurisdiction is concerned, in most cases the competent court is a local court with jurisdiction over the territory of defendant's residency. The place of residency is normally understood as the place of incorporation of a legal person or registered place of residence of an individual (general jurisdiction). However, in administrative cases against local authorities the situation is reversed and the competent court is the administrative court at the claimant's place of residence.

In some cases of the so-called alternative jurisdiction, the claimant has a choice of court. For example, in consumer liability cases the claimant may choose to file at the place of his own residence, defendant's residence, at the place where loss was sustained or at the place where the consumer contract was to be performed.

Under the principles of exclusive jurisdiction, an exclusive forum in certain cases is established by law and cannot be changed by contract. For example, lawsuits between shareholders and between shareholders/participants and their respective companies (JSCs, LLCs etc.) in corporate governance matters must be heard by the commercial court of the region where the company is registered.

Under the rules of jurisdiction for related cases, several related lawsuits should generally

be heard in one court. This rule applies to (i) a claim to several defendants or several claims to one defendant, (ii) counterclaims, (iii) civil claims in a criminal case, or (iv) third party's claims in a pending case.

Basic Rules of Procedure

The principal statutes governing court procedure are the Commercial Procedure Code, the Civil Procedure Code, the Code of Administrative Justice, the Criminal Procedure Code and the Law on Enforcement Proceedings. Civil and administrative procedures generally adhere to the same structure, while commercial procedure is somewhat different.

An outline of commercial litigation follows, as well as certain peculiarities of civil and administrative proceedings.

Filing a Lawsuit

The process of filing a lawsuit in a commercial court includes the following steps:

1. *Drafting of a statement of claim against the defendants*. A statement of claim is normally accompanied by a statement of material facts and other documents.
2. *Paying a court fee*. Care must be taken to verify remittance information (purpose of transfer) and proper confirmation of payment must accompany the statement of claim filed.
3. *Filing a statement of claim and appropriate addenda with the court*. In commercial cases the statement of claim and all addenda must be mailed by the claimant to all defendants by registered mail and the evidence of mailing must accompany the statement of claim filed with the court. In civil and administrative cases the claimant must submit copies of the statement of claim for each defendant and it is the court's duty to mail these copies to defendants.

The judge may reject the statement of claim, return it without consideration or commence the court proceedings. The grounds for rejection include lack of jurisdiction and liquidation of defendant. The grounds for return without consideration are primarily formal and procedural violations, such as improper signatory of the statement of claim or no evidence of the paid court fee. A statement of claim returned without consideration can be resubmitted after correction f technical shortcomings.

The judge issues a decree opening proceedings. After proceedings are commenced, the judge makes certain pre-trial arrangements, including order to the parties to submit relevant evidence and consultations with the parties, and may grant injunctive relief.

Defendants will usually file an answer to the claim denying the allegations. Finally, the matter is brought to trial.

Court Proceedings

In local courts most cases are heard by a single judge at both preliminary and trial

stages. Witness statements are not accepted as evidence in commercial litigation, but are accepted in civil and administrative proceedings. At the same time, a commercial court may request explanations from parties' representatives or other participants in commercial proceedings. In practice written documents make up most of the evidence in business-related matters.

The court's judgment must be issued within two months of filing a claim by claimant. In cases heard under the Code of Administrative Justice (by administrative courts and by common courts in some cases) the time limit for hearing a case is 1 month. However, these rules are usually observed only by commercial courts and are more often violated by common and administrative courts.

As a rule, the case trial is completed with the issuance of a judgment. The parties to the case and any third parties, if the court's judgment affects their rights or obligations, may appeal the final judgment in full or in part within 10 days of its issuance. If the period for appeal has lapsed, the judgment becomes effective.

Court hearings on appeal are held in nearly the same form as the hearings at the first instance. The court of appeal verifies legality of a judgment within the scope of relief sought from the local court and may examine new evidence not submitted during the trial only where the court of appeal finds that failure to present this evidence was excusable.

The parties, prosecutor or any third party affected by a judgment of a first-instance or appellate commercial court may make a cassation appeal to the High Commercial Court within twenty days as of the effective date of the judgment. Cassation appeal may invoke only issues of substantive or procedural law. The cassation procedure normally does not involve examination of evidence. The hearings are usually very brief, consisting of short speeches by the parties and questions from the court.

A court may retry a case based on new evidence critical for correct dispute resolution. Importantly, retrial may be granted only if the facts confirmed by evidence existed at the time of the initial trial but could not have been known to the requesting party at that time.

Enforcement of judgments is administered by the state enforcement authority pursuant to the Law on Enforcement Proceedings.

As a general rule, a case trial in lower courts should be completed within two months of receipt of a claim by the court. Appellate proceedings should be carried out within two months for judgments and within 15 days for procedural rulings starting from the day when the court accepts an appeal for consideration. Cassation proceedings should be accomplished within one month for final judgments and within 15 days for procedural rulings starting from the day when the court accepts a cassation appeal for consideration.

At the same time the law provides for an extension or stay of proceedings in certain cases and enables litigants to employ dilatory tactics (e.g., by challenging candidacies of the appointed judges). The claimant may petition the court for an interim injunction (e.g., by attaching the defendant's property or enjoining from certain actions). An injunction may

be granted if the applicant demonstrates that it will be difficult or impossible to enforce the judgment in absence of the injunction.

A simplified *ex parte* procedure is available in the general courts for, *inter alia*, undisputed claims based on a written agreement or deed. In this case the court issues an order regarding the relief sought within a three-day term without holding a hearing.

No Class Actions

Ukrainian procedural law does not provide for class actions. At the same time, some traces of this legal concept can be found in the Law on Consumer Rights Protection authorizing consumer associations to bring lawsuits seeking to recognize as illegal and stop the actions of retailers, manufacturers or contractors affecting an indefinite number of consumers. The judgments in such cases must be taken into account by courts reviewing the claims of individual consumers seeking damages as a result of such illegal actions. However, such claims have not become common in Ukraine so far.

Representation

Litigants, whether individuals or legal entities, are entitled to represent themselves or act through their representatives. At the moment there is no requirement for a representative in a court proceeding to have legal education or to be an attorney (advokat, meaning a person admitted to the bar in Ukraine), except for in criminal proceedings where the defender is required to be an attorney.

Access to Court Files

Generally, only the parties to a case have access to court files in respect of that case. At the same time, a non-party affected by a judgment may be permitted to review and copy the judgment. Under the Law on Access to Court Judgments, the public is entitled to access judgments free of charge through the Unified State Register of Court Judgments available online. The Judges' Council of Ukraine with the consent of the State Judicial Administration of Ukraine approves the list of court judgment to be published in the register. The list includes all substantive judgments and the most important procedural rulings.

Litigation Funding

Ukrainian law does not address the issue of litigation funding by a disinterested third party. Notably, litigation expenses include a court fee. The High Commercial Court clarified that if a third party paid the court fee on behalf of a claimant (appellant) according to the established procedure and in the required amount, a commercial court may not reject the claim (appeal). It should be noted that the court may order the losing party to reimburse court expenses to the winning party. In the context of a commercial proceeding, the Supreme Court and the High Commercial Court clarified that attorney fees may be reimbursed only if these fees have been paid to the attorney by the party benefiting from such services, and there is evidence of their actual payment. Accordingly,

it appears that a court would be reluctant to approve reimbursement of court expenses paid by a third party and not by a litigant.

Production of Documents

As a general requirement, each party must prove the facts it is relying on. Apart from such facts, evidence also includes any other facts important to correct dispute resolution. The court will accept only the evidence relevant to the case and in a form provided for by the law. Documents provided to the court must be originals or certified copies. If a copy of the document is presented to court, any party or the court may request that the original also be submitted.

The court may order an opponent or third party, regardless of its participation in the case, to produce documents or other evidence upon a party's motion (or on the court's own initiative, in commercial litigation). The requesting party should specify the particular evidence requested, reasons for its inability to furnish evidences by its own mean, why it believes that the third party possesses such evidence and facts to be confirmed by such evidence.

Should it be necessary to obtain documents stored abroad, the court may address a foreign court with a relevant request. The request is communicated through diplomatic channels unless a Ukrainian international treaty provides for another procedure.

Parties to a court proceeding have no obligation to produce documents in possession of a third party. Also, as follows from Ukrainian law, the court may request only particular documents or evidence and not all documents held by a litigant or a non-party.

The Law on Electronic Documents and their Circulation provides that the court may not reject a document as evidence only because it is in an electronic form. Electronic documents must be given the same legal effect as their paper equivalents as long as certain requirements envisaged by the law are met. In particular, an electronic digital signature (used for identification of signatory and confirmation of entirety of the document) must be affixed to an electronic document by its signatory. Electronic documents bearing an electronic digital signature with a certified public key must be accepted by the court as written evidence except where electronic document may not be used as an original document (e.g., inheritance certificate). However, neither law nor court practice is clear as to whether documents bearing digital signatures without a certified public key may be accepted as evidence.

Procedural Service Abroad

Ukrainian courts may request foreign courts or other competent authorities to perform certain procedural actions, including service of process, outside of Ukraine. Unless an international treaty of Ukraine provides otherwise, such requests are communicated through diplomatic channels. The procedure applies equally to legal entities and individuals.

Importantly, Ukraine is a party to the 1965 Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, as well as a number of bilateral treaties that may be used for service of process outside Ukraine.

Recovery

Theories of recovery include contractual liability, unjust enrichment, and tort (known as delictum). Person's fault (intention or negligence) is required for recovery in delict and for contractual recovery, unless a contract provides otherwise. However, strict liability is possible where provided by law, the main example being liability of the owners of highly hazardous facilities. Recovery can be achieved through civil action or, in limited circumstances, extra-judicially. For example a mortgagee can sometimes seize the mortgaged property without court proceedings. Under some notarized contracts recovery is possible under a warrant issued by the notary.

Under Ukrainian law, a person intending to defend its violated civil rights may apply to court, to the state regulator, to the notary or, in limited cases, it may perform a self-defense action (such as withholding the debtor's property until the debt is paid) to cure, avoid, or mitigate violation of such person's right.

Depending on a remedy sought by a claimant, a court may:

- affirm the claimants right;
- invalidate the agreement;
- enjoin the act violating the claimants right;
- restore the state, which existed prior to the violation of the claimant's right;
- order the performance of an obligation in kind;
- change or terminate a legal relationship;
- award fine, penalty interest, damages for direct losses or lost profits;
- award damages for the moral distress; and/or
- annul an act of a public authority.

The mentioned list of remedies is not exhaustive. The law provides for a particular category of reliefs in cases involving protection of owner's rights (e.g., vindication). A court may also grant the form of relief stipulated in the contract.

Reform of court system and related institutes

In December 2014 Ukraine is about to launch a reform of court system, which contemplates, inter alia, revision of procedural legislation and enforcement proceedings. Reform aims at ensuring efficiency and proficiency of dispute resolution in Ukraine.

Foreign Courts and Foreign Law

Choice of Law

Under Ukraine's Law on Private International Law the parties to a contract are free to choose the law that will apply to the contract provided that Ukraine's *order public* (public policy) is not offended by the application of foreign law. However, the form of contracts governing disposition of real property located in Ukraine must be governed by Ukrainian law. Under the Law on Private International Law, court's refusal to apply foreign law cannot be based on mere differences in legal, political or economic systems between the foreign state and Ukraine.

The High Commercial Court in its Recommendations of 28 December 2007 opined that the application of foreign law to corporate law matters in Ukrainian companies offends Ukraine's public policy. It advised lower commercial courts to hold null and void any shareholder agreement between shareholders/participants of a Ukrainian company governed by foreign law. For this reason such agreements have sometimes been declared unenforceable in Ukraine, even where their enforceability was confirmed in international commercial arbitration. This position of the High Commercial Court has been strongly criticized by many academics and practitioners, but, notwithstanding this negative reception, the controversial Recommendation remains on the books and in courts' practice.

Recognition and Enforcement of Foreign State Court Judgments

Foreign judgments are recognized and enforced in Ukraine if this is envisaged by an international treaty to which Ukraine is party or under the reciprocity principle. Reciprocity is presumed unless there is evidence to the contrary. Unfortunately, as a matter of practice, presumption on existence of reciprocity often is not easily supported by courts and a party seeking exequatur is sometimes required to prove existence of reciprocity. There is no judicial unanimity on how existence of reciprocity should be established. In practice it is often proved for a particular jurisdiction by analysis of (a) domestic laws on whether they provide for presumption of reciprocity and (b) court practice on whether it recognizes Ukrainian judgments.

A party seeking to enforce a foreign judgment files a motion with the court at the debtor's location or debtor's property location. The motion must be filed within three years of the date the foreign judgment became effective. A foreign judgment may not be enforced if, inter alia, the judgment has not become effective or its enforcement would jeopardize Ukraine's interests (public policy).

Choice of a Foreign State Court as a Forum May Be Unenforceable

If Ukrainian courts have jurisdiction over a dispute, they may refuse to enforce choice of forum agreements, which establish exclusive jurisdiction of foreign state courts (as opposed to foreign commercial arbitration) over the dispute and which purport to limit the ability of a party to bring action in Ukraine.

This means that if the parties to a transaction wish to exclude some or all issues in their relations from the jurisdiction of Ukrainian state courts, they should resort to an arbitration clause or arbitration agreement instead of choosing foreign state courts.

Alternative Dispute Resolution

Arbitration

Two separate statutes govern international and domestic arbitration in Ukraine. International arbitration is governed by the Law on International Commercial Arbitration ("the ICA Law"), which mirrors the UNCITRAL Model Law on International Commercial Arbitration, except for a few minor deviations. Domestic arbitration is governed by the Law on Courts of Arbitration.

The main international arbitration institution in Ukraine is the International Commercial Arbitration Court at the Ukrainian Chamber of Commerce and Industry ("the ICAC"). Disputes arising from foreign trade or other foreign commercial relations may be brought to the ICAC provided that the parties agree in writing to resort to the ICAC and at least one of them is headquartered abroad. The ICAC may also handle disputes involving companies with foreign investment, international associations and organizations established in Ukraine. Ukrainian legislation on international commercial arbitration does not provide for an exhaustive list of non-arbitrable cases. Arbitrability is assessed in every particular case with reference to *lex specialis*.

More than 100 permanent domestic arbitral institutions provide arbitration services for domestic disputes in Ukraine. *Ad hoc* arbitrations, on the contrary, are not common.

An arbitration agreement must be in writing and refer to an arbitral institution selected by the parties or expressly provide for *ad hoc* arbitration. There have been a number of cases in Ukraine where the courts found an arbitration agreement non-enforceable due to the incorrect naming of the arbitral institution.

Ukrainian procedural legislation lacks any provisions in support of arbitration, e.g., collection of evidence, granting of interim measures and others. Consequently, the efficiency of arbitration proceedings may suffer should one of the parties apply obstruction actions.

An interested party may bring a motion seeking to have an international arbitral award issued in Ukraine set aside within three months of receipt of the award by such a party. The grounds for setting aside an international arbitral award are equivalent to Article 34 of the UNCITRAL Model Law and Article V of the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("the New York Convention"). However, Ukrainian procedural legislation does not contain any rules governing consideration of motions for setting aside international arbitral awards.

A domestic arbitral award may also be set aside if the composition of the tribunal did not comply with the Law on Courts of Arbitration or the tribunal decided on rights or obligations of non-parties to the case.

Ukraine is a signatory to the New York Convention. Thus, arbitral awards issued in any of the more than 145 countries that are a party to this Convention are enforceable in Ukraine, making arbitration a vital component of any international contract involving Ukrainian parties.

A foreign arbitral award is binding in Ukraine and shall be enforced upon its recognition by a competent Ukrainian court. Recognition and enforcement of foreign arbitral awards may be denied only in cases stipulated by the New York Convention. Ukrainian courts are generally inclined to grant enforcement of foreign arbitral awards.

Procedural irregularities most often serve as grounds for denying such recognition and enforcement, while Ukrainian courts sometimes also invoke Ukraine's public policy in relevant judgments.

Although the list of grounds for refusing recognition and enforcement is limited by the New York Convention, national legal systems develop divergent interpretation of the same rules. Ukrainian courts also tend to have their own interpretation of the grounds for refusal of recognition and enforcement. Debtors invoke a variety of grounds to prevent the enforcement of arbitral awards, public policy being among the grounds most commonly employed. In Ukraine, courts sometimes interpret the public policy ground for refusal of recognition too broadly. In particular some courts tend to consider that award's or tribunal's failure to comply with the rules of Ukrainian law makes the award offensive to the public policy.

A party seeking to have a foreign arbitral award recognized in Ukraine should file a motion with the first instance general court at the debtor's location or at the place of debtor's property (in instances when the debtor is outside of Ukraine). The motion should be filed within three years of the date the foreign arbitral award became effective.

An appeal from the judgment granting or denying enforcement of the award may be taken to the appellate court and then to the High Specialized Court for Civil and Criminal Cases. If a party does not carry out the judgment granting enforcement of an arbitral award voluntarily, a compulsory enforcement procedure applies.

A creditor may seek provisional remedies through the courts at the stage of recognition and enforcement of an international arbitral award.

Mediation

There are no specific rules governing mediation in Ukraine. Thus mediator or the parties (or both) are free to determine the mediation procedure at their discretion. Although mediation may result in a binding agreement, consented to and signed by the parties, each party preserves the right to bring a court claim because in Ukraine agreements to waive the right to court are generally unenforceable. In Ukraine mediation is rarely used as an alternative to litigation or arbitration.

MEETING THE CLIENT'S NEEDS: WHAT TO EXPECT FROM LEGAL ADVISERS

Clients' assignments vary from a single corporate/commercial or other related legal issue requiring analysis and advice in the form of a short letter or memorandum to a complex project requiring substantial drafting and business planning.

A specific client's problem may also require negotiations and consultations with regulatory authorities and governmental institutions often involving requests for official interpretation of law, clarification letters, and drafting proposals regarding new legislation. Regulatory work also involves administrative and registration filings and license procedures.

Corporate work includes legal advice at the early stage of selection of organizational business form and establishment and incorporation procedures, legal services with respect to convocation of meetings of shareholders/participants, other governing bodies of a company, drafting corporate documents, including corporate minutes and regulations, employment contracts with the management, work permits for foreign employees and collective agreements.

Tax planning and restructuring and representation clients before tax administration is a significant part of legal practice.

M&A work involves due diligence investigation, antimonopoly matters, and transactions with securities and dealings with the State Property Fund in privatization matters.

Financings require thorough local security from the borrower and compliance with strict banking and currency control requirements.

Of course, mediation and representation in litigation are logical extensions of corporate and commercial legal practice. In representing a corporate client, first a full analysis should be given of circumstances and nature of the violation of client's rights. Then a prosecution strategy should be determined, including administrative and judicial remedies. In many cases, such as infringements of IP rights or consumer's rights, the violator may be subject to both administrative penalties and civil liability. Whenever possible, amicable settlement and mediation should be used, including submission of out-of-court claim to a violator.

The filing of an administrative complaint to the relevant state regulator, legal action in court, or submission to the arbitration can generally be accomplished only upon receipt of a power of attorney from the client.

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