DELOS
dispute resolution

UKRAINE

DELOS GUIDE TO ARBITRATION PLACES (GAP)

CHAPTER PREPARED BY

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There have not been any material changes requiring an update to this chapter (including the traffic lights) since the date of the latest version. Nonetheless, please note that this chapter does not constitute legal advice and its authors, the contributing law firm and Delos Dispute Resolution decline all responsibility in this regard.

IN-HOUSE AND CORPORATE COUNSEL SUMMARY

Ukraine is an arbitration-friendly jurisdiction with detailed regulation of courts' control over and support to international commercial arbitration. International and domestic arbitration are regulated in separate statutes: international commercial arbitration is regulated in the Law of Ukraine On International Commercial Arbitration (the "**ICA Law**") while domestic arbitration is subject to the Law on Domestic Arbitration Courts. In practice, the only international commercial arbitration institution in Ukraine that administers international commercial arbitration disputes is the International Commercial Arbitration Court at the Ukrainian Chamber of Commerce and Industry (the "**ICAC**"), however there is no legal restriction to set up an institution for administering international commercial arbitrations.

Key places of arbitration in the jurisdiction	Kyiv.
Civil law / Common law environment?	Civil law.
Confidentiality of arbitrations?	The ICA Law does not address confidentiality and it is therefore advisable to insert confidentiality provisions into the arbitration agreement.
Requirement to retain (local) counsel?	No.
Ability to present party employee witness testimony?	Yes.
Ability to hold meetings and/or hearings outside of the seat?	Yes.
Availability of interest as a remedy?	Interest as a remedy is considered to be a substantive rather than a procedural matter and an award of interest is therefore determined in accordance with the applicable substantive law. If Ukrainian substantive law applies, (i) pre-award interest shall be determined on the basis of the agreement of the parties; absent such agreement, the defaulting party, in case of breach of a monetary obligation, shall pay 3% statutory interest plus interest linked to the official inflation rate; (ii) post-award interest is not envisaged. The law expressly authorises Ukrainian courts to recognise awards with post-award interest that shall continue to accrue until the award is fully enforced. At the same time, the ICA Law does not authorise Ukraine-seated arbitral tribunals to order post-award interest.
Ability to claim for reasonable costs incurred for the arbitration?	Yes.
Restrictions regarding contingency fee arrangements and/or third-party funding?	No.
Party to the New York Convention?	Yes. Ukraine is a party to the New York Convention subject to the reciprocity reservation, and the communication dated 20

	October 2015 that application and implementation by Ukraine of the obligations under the Convention, as applied to the occupied and uncontrolled territory of Ukraine, is limited and is not guaranteed, due to acts of illegal occupation and aggression by the Russian Federation.
Other key points to note	Disputes between Ukrainian entities with foreign investments and Ukrainian parties may be referred either to international arbitration, or to domestic arbitration. The restrictions of arbitrability of certain categories of disputes can be found in the Commercial Procedural Code of Ukraine. The legal framework for arbitration has undergone serious overhaul that (i) allowed court-awarded interim measures and taking of evidence in support of international arbitration, (ii) expanded the scope of arbitrable disputes, (iii) relaxed formal validity requirements for arbitration agreement, (iv) granted the possibility of consolidation of annulment and enforcement proceedings, and (v) introduced regulation of enforcement in foreign currencies.
WJP Civil Justice score (2017-2018)	0.51

ARBITRATION PRACTITIONER SUMMARY

Ukraine is an arbitration-friendly jurisdiction with detailed regulation of courts' control over and support to international commercial arbitration. International and domestic arbitration are regulated in separate statutes: international commercial arbitration is regulated in the Law of Ukraine On International Commercial Arbitration (the "**ICA Law**") while domestic arbitration is subject to the Law on Domestic Arbitration Courts. In practice, the only international commercial arbitration institution in Ukraine that administers international commercial arbitration disputes is the International Commercial Arbitration Court at the Ukrainian Chamber of Commerce and Industry (the "**ICAC**"), however there is no legal restriction to set up an institution for administering international commercial arbitrations.

The Ukrainian parliament has recently adopted a major law restating a number of the procedural codes and amending statutes of Ukraine governing the court procedure and arbitration (the "**Court Procedures Reform Law**"). It entered into force on 15 December 2017.

Date of arbitration law?	The ICA Law was adopted on 24 February 1994 and entered into force on 20 April 1994. The latest amendments were introduced on 15 December 2017.
UNCITRAL Model Law? If so, any key changes thereto?	The ICA Law is based on the UNCITRAL Model Law dated 1985 without the 2006 amendments and with certain deviations regarding: • the “international” nature of the disputes (Art. 1); • the “commercial” nature of disputes (Art. 1); and • the indication that the President of the Ukrainian Chamber of Commerce and Industry shall perform the functions of the appointing authority referred to in articles 11(3), 11(4), 13(3). The Court Procedures Reform Law also provides for: • negative inferences based on a party's failure to provide evidence; and • additional regulation of interim measures.
Availability of specialised courts or judges at the key seat(s) in the jurisdiction for handling arbitration-related matters?	No. The cases for annulment of arbitral awards rendered in international arbitration seated in Ukraine will be considered by the appeal court of the region where such arbitration was seated, while the Kyiv City Court of Appeal is in charge of the applications for recognition and enforcement of arbitral awards. However, given the fact that ICAC seated in Kyiv is the only arbitral institution that administers international commercial disputes in Ukraine, the Kyiv City Court of Appeal alone will hear the annulment and recognition cases in Ukraine.
Availability of *ex parte* pre-arbitration interim measures?	Yes.
Courts’ attitude towards the competence-competence principle?	Ukrainian courts generally recognize the competence-competence principle.
Grounds for annulment of awards additional to those based on the	No.

criteria for the recognition and enforcement of awards under the New York Convention?	
Courts' attitude towards the recognition and enforcement of foreign awards annulled at the seat of the arbitration?	Under the ICA Law, a court may refuse to recognise and enforce a foreign award if the foreign award has been annulled at its seat. There have been no precedents of attempts to enforce annulled awards in Ukraine. However, in our view, the annulment of the award at the jurisdiction of its seat would likely be regarded by Ukrainian courts as a bar to recognition and enforcement.
Other key points to note?	The arbitration agreement should expressly indicate the full name of an arbitral institution and the types of disputes that the parties have agreed to refer to the arbitration. Ukrainian courts tend to invalidate the arbitration agreement or deny enforcement of the arbitral award in case of misspelling of the name of an arbitral institution. While the amendments to the ICA Law introduced by the Court Procedures Reform Law provide that any inaccuracies in the text of the arbitration agreement or doubts regarding its validity, effect and enforceability shall be interpreted by the court in favour of its validity, effect and enforceability, it remains to be seen whether the overly strict and formalistic approach of Ukrainian courts will change as a result of these changes.

JURISDICTION DETAILED ANALYSIS

1. The legal framework of the jurisdiction

1.1 Is the arbitration law based on the UNCITRAL Model Law? If yes, what key modifications if any have been made to it?

In Ukraine, international commercial arbitration is governed by the "Law on International Commercial Arbitration" (1994) (the "**ICA Law**"). The ICA Law specifically regulates international arbitration seated in Ukraine.[1] It is essentially based on the UNCITRAL Model Law 1985 (the "**Model Law**"). However, it also includes several important deviations, such as:

(i) Unlike the Model Law, the ICA Law allows arbitration of domestic disputes between Ukrainian companies, where at least one of them has foreign investment in its charter capital in the amount not less than 10%;[2]

(ii) Unlike the Model Law, the ICA Law defines "commercial" disputes in the broadest possible terms to include those arising out of any relationship of trade nature, whether contractual or non-contractual, e.g. sale of goods; provision of services, execution of works; factoring; agency; construction and engineering; leasing; investment; insurance; banking, etc. Although the ICA Law does not explicitly exempt any disputes from its scope, as a matter of practice, disputes between consumers and traders are not deemed to be commercial;

(iii) Unlike the Model Law, the ICA Law vests in the President of the Ukrainian Chamber of Commerce and Industry certain functions of:

- the appointing authority, when parties have failed to agree on appointment of arbitrators, either in one or three arbitrator(s) proceedings, or if two arbitrators have failed to agree on the third one;
- authority of a final instance to decide on challenge of arbitrators, if the previous challenge procedure was not successful for the challenging party.[3]

In practice, the only institution in Ukraine which administers international commercial arbitration is the International Commercial Arbitration Court at the Ukrainian Chamber of Commerce and Industry (the "**ICAC**"), the charter of which is enshrined into the ICA Law. In practice, the ICAC is the only arbitral institution that administers international commercial arbitration disputes in Ukraine. However, there is no legal restriction to set up an institution for administering international commercial arbitrations.

1.2 When was the arbitration law last revised?

The ICA Law has not seen significant changes since its adoption. However, over the past years the ICA Law has been amended twice.

The first revision of the ICA Law came into force on 19 October 2016 and extended the ICA Law to disputes between banks and borrowers arising out of financial restructuring schemes.

The second revision of the ICA Law came into force on 15 December 2017 after the Ukrainian parliament adopted a major law which amended a number of the procedural codes and statutes of Ukraine governing the court procedure (the "**Court Procedures Reform Law**"). The Court Procedures Reform Law brought about several significant modification to the ICA Law which are explained in more detail in Section 7 below.

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1 Domestic arbitration in Ukraine is regulated in the law on Domestic Arbitration Courts, the so-called Treteyski Courts.

2 ICA Law, Part 2, Article 1.

3 ICA Law, Article 6.

2. The arbitration agreement

2.1 How do the courts in your jurisdiction determine the law governing the arbitration agreement?

Under the prevailing practice of Ukrainian courts, where the parties have failed to choose the law applicable to the arbitration agreement, it is the law of the country where the award was/ is going to be issued, i.e. the law of the legal seat of arbitration, which governs such arbitration agreement.

Ukraine is a Contracting State to the European Convention on International Commercial Arbitration. Thus, Ukrainian courts must give effect to Article 6 thereof which provides that in taking a decision on the existence or the validity of an arbitration agreement, courts shall examine the validity of such agreement with reference to the law to which the parties have subjected their arbitration agreement or, failing any indication thereon, applying the law of the country in which the award is to be made, unless the applicable law can be determined by virtue of the Ukrainian rules of conflict of laws.

However, a solid legal test for the determination of law applicable to the arbitration agreement has not been fully developed yet and, in some instances, courts rather opaquely suggested that the choice of law of the main contract also applied to the arbitration agreement in such a contract.

2.2 Is the arbitration agreement considered to be independent from the rest of the contract in which it is set forth?

The ICA Law provides that an arbitration agreement which forms part of a contract shall be independent of the other terms of the contract. Therefore, invalidity of the main contract does not invalidate the arbitration agreement.[4]

2.3 What are the formal requirements (if any) for an enforceable arbitration agreement?

The only formal requirement set out in the ICA Law is that the arbitration agreement must be in writing. It may be concluded in the form of a separate agreement, exchange of letters or in the form of a clause in a contract. An arbitration agreement is also deemed to have been validly concluded if the parties exchange a written claim and a written defence in which one of the parties asserts and the other party does not deny the existence of an arbitration agreement.[5]

Ukrainian case law suggests that the arbitration agreement should expressly indicate the full name of an arbitral institution or the choice of *ad hoc* arbitration and the types of disputes that the parties have agreed to refer to the arbitration. As a matter of practice, the Ukrainian courts tend to adopt a strict and formalistic approach and invalidate the arbitration agreement in case of misspelling of the name of an arbitral institution. The same risk exists for *ad hoc* arbitration in a case of misspelling the applicable arbitration rules, e.g. PUNCITRAL rather than UNCITRAL. Therefore, it is important to ensure the clear and unambiguous wording of the arbitration clause.

2.4 To what extent, if at all, can a third party to the contract containing the arbitration agreement be bound by said arbitration agreement?

Under the ICA Law as interpreted by the courts, a third party to the contract containing the arbitration agreement may not be bound by it.[6]

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4 ICA Law, Part 1, Article 16.

5 ICA Law, Part 2, Article 7.

6 See, *e.g.*, ruling of the Supreme Court of 16 February 2018 in case court docket No. 910/13318/16.

2.5 Are there any restrictions to arbitrability? If the affirmative:

2.5.1 Do these restrictions relate to specific domains (such as IP, corporate law, etc.)?

2.5.2 Do these restrictions relate to specific persons (i.e., state entities, consumers, etc)?

The ICA Law restricts eligibility of disputes to be submitted to arbitration by both eligible persons (subjective arbitrability) and the subject matter of the disputes (subject matter arbitrability). In particular, a dispute is deemed subjectively arbitrable where it involves at least:

(i) one foreign party; or

(ii) a Ukrainian party which has at least 10% of direct foreign shareholding.[7]

The ICA Law further provides that where a dispute in question involves a foreign party only foreign trade and other foreign economic disputes can be arbitrable.[8] At the same time, the ICA Law explicitly provides that this is without prejudice to the arbitrability provisions in other statutes[9] which include the Commercial Procedure Code as revised by Court Procedures Reform Law, in force from 15 December 2017. The Commercial Procedure Code provides that the following subject matters are not capable of being submitted to international arbitration:

(i) public law disputes, including protection of economic competition and anti-trust, public procurement, unfair competition, privatisation of state assets, protection of patents, trademarks and copyright, unless purely civil law aspects (damages, repudiation of contract, etc.) are in dispute;

(ii) disputes over invalidation of (government) acts;

(iii) disputes involving state registries such as those involving the state registration of title to real estate, the intellectual property rights, rights to securities, unless such disputes are derivative from the dispute over underlying rights to tangible or intangible property;

(iv) disputes concerning the bankruptcy proceeding and disputes related to property claims against the borrower in bankruptcy, including disputes over invalidation of contract made by the borrower, and other aspects of bankruptcy;

(v) disputes over challenging of the acts (decisions) of business entities or individuals – entrepreneurs, including their corporate bodies and company officials, in commercial activities sphere;

(vi) disputes over setting aside of awards issued by domestic arbitration courts (the Treteyski courts),[10] decisions and over the challenging of the writs of execution over the domestic arbitration award;

(vii) derivative actions by shareholders against directors of the company.[11]

Finally, the Ukrainian Commercial Procedural Code sets forth another restriction to arbitrability and provides that disputes relating to corporate governance, including disputes between shareholders of a

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7 ICA Law, Part 2, Article 1.

8 ICA Law, paragraph 2 Part 2, Article 1.

9 ICA Law, Part 4, Article 1.

10 Domestic arbitration courts (Treteyski courts) are regulated by special law on Domestic Arbitration Courts (Treteyski Courts). The framework for arbitration proceeding in Domestic Arbitration Courts significantly differs from the one provided for international commercial arbitration, *i.e.* it sets forth different rules on arbitrability of disputes, enforcement of awards, etc.

11 Commercial Procedure Code, Article 22.

legal entity or the shareholders and the legal entity by itself related to the incorporation, functioning, management and dissolution of such legal entity can be submitted to international commercial arbitration only if the arbitration agreement is entered into between the legal entity and *all* of its shareholders.

3. Intervention of domestic courts

3.1 Will the courts stay litigation if there is a valid arbitration agreement covering the dispute?

3.1.1 If the place of the arbitration is inside of the jurisdiction?

3.1.2 If the place of the arbitration is outside of the jurisdiction?

In Ukraine, national courts, must discontinue proceedings and refer the parties to arbitration as soon as the respondent objects against its jurisdiction on the basis of a binding arbitration agreement. This rule applies independently of the place of arbitration.

However, if the respondent does not object, the court will proceed to hearing the case on the merits. If the arbitral tribunal seized with the matter ultimately rules on the absence of jurisdiction based on invalidity of arbitration agreement, such ruling will not have *res judicata* effect for the Ukrainian court. The Ukrainian court will have to conduct an independent review of the validity and existence of the arbitration agreement. However, courts will likely have certain deference to the ruling of the arbitral tribunal.

3.2 How do courts treat injunctions by arbitrators enjoining parties to refrain from initiating, halt or withdraw litigation proceedings?

National courts in Ukraine will not stay litigation proceeding if arbitrators issue an anti-suit injunction, unless such injunction is formally recognised by the Ukrainian court. Such recognition would have to be pursued in accordance with the Convention on Recognition and Enforcement of Foreign Arbitral Awards (the "**1958 New York Convention**"). To the best of our knowledge, no attempts to have such orders recognised in Ukraine have ever been made. However, recent attempts to have the decisions of emergency arbitrators rendered under the auspices of the Stockholm Chamber of Commerce enforced in Ukraine have shown that Ukrainian courts are prepared to treat such decisions as well as interim awards issued by foreign arbitral tribunals as "awards" enforceable under the New York Convention.[12]

Legally speaking, Ukrainian courts have a final say in the decision to stay proceedings based on the existence of a valid arbitration agreement. Therefore, the only option to achieve the discontinuance of the court proceeding is a request of either of the parties submitted to the court before its first statement on the substance of the dispute. The request should argue the existence of a valid arbitration agreement.

3.3 On what ground(s) can the court intervene in arbitrations seated outside of the jurisdiction? (Relates to the anti-suit injunction but not only)

The ICA Law prohibits national courts from intervening in arbitral proceedings except in the cases expressly prescribed by the ICA Law. Such cases include the powers of the court to:

(i) order interim measures in support of arbitration;[13]
(ii) request the production of evidence, examine of a witness or otherwise preserve evidence;[14]
(iii) set aside negative findings of the arbitral tribunal on its jurisdiction;[15]
(iv) set aside final arbitral awards issued in Ukraine.[16]

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12 Cases of *JKX Oil & Gas v. v. The State of Ukraine* represented by the Ministry of Justice of Ukraine, No. 757/5777/15-ц; and *Ostchem Holding Limited v. Public Joint Stock Company "Odessa Port Plant"*, No. 519/459/16-ц.

13 CPC, Article 149(3), 150-159.

14 ICA Law, Article 27; CPC, Articles 84(11), 85(9), 94, 116(7,8).

15 ICA Law, Article 16(3).

16 ICA Law, Article 5.

Because the ICA Law only regulates international commercial arbitration seated in Ukraine, it does not allow Ukrainian courts to intervene in arbitrations seated outside of the country, unless the court assists parties or the arbitral tribunal in submission of evidence related to the arbitration proceeding or examination of witnesses. Generally, as a matter of court practice, the Ukrainian courts follow this rule, endorse the pro-arbitration stance and do not intervene in arbitrations other than when expressly authorised by the ICA Law.

However, we are aware of cases where Ukrainian courts unlawfully issued anti-arbitration injunctions in relation to an arbitration seated outside Ukraine.[17] Those injunctions were affirmed on appeal by the Higher Commercial Court of Ukraine, whose decisions have not since been reversed. In some other cases, Ukrainian courts effectively intervened in arbitral proceedings by accepting and upholding claims for invalidation of the arbitration agreement which had been brought in parallel to arbitration proceedings. By doing so, Ukrainian courts simultaneously blocked further recognition and enforcement of any arbitral award based on invalidated arbitration agreement in Ukraine on public policy grounds. The problem was so common in the past that it was at issue in at least two investment arbitrations involving Ukraine, namely, Western NIS Enterprise Fund v. Ukraine (ICSID Case No. ARB/04/2) and GEA Group Aktiengesellschaft v. Ukraine (ICSID Case No. ARB/08/16). Both dealt with the issue of impossibility to enforce foreign arbitral award in Ukraine.

4. The conduct of the proceeding

4.1 Can parties retain outside counsel or be self-represented?

The ICA Law does not address the issue of the parties' representation. However, we are not aware of any practical difficulties with outside counsels representing clients or even with self-representation.

4.2 How strictly do courts control arbitrators' independence and impartiality? For example: does an arbitrator's failure to disclose suffice for the court to accept a challenge or do courts require that the undisclosed circumstance justify this outcome?

Ukrainian courts are not explicitly authorised to control arbitrators' independence and impartiality. The issue of arbitrators' independence and impartiality will be resolved in accordance with rules of arbitration applicable in institution or the rules of *ad hoc* arbitrations. However, arguably, any doubts relating to arbitrator's independence and impartiality might result in setting the arbitral award aside in pursuant to Article 34 of the ICA Law.

4.3 On what grounds do courts intervene to assist in the constitution of the arbitral tribunal (in case of ad hoc arbitration)?

The ICA Law does not provide for the courts' intervention or assistance in the constitution of the arbitral tribunal. Hence, Ukrainian courts are not allowed to intervene to assist in the constitution of the arbitral tribunal. The ICA Law vests in the President of the Ukrainian Chamber of Commerce and Industry certain functions of the appointment authority when parties have failed to agree on appointment of arbitrators, either in one arbitrator or three arbitrator proceedings, or if the two arbitrators have failed to agree on the third arbitrator.

4.4 Do courts have the power to issue interim measures in connection with arbitrations? If so, are they willing to consider ex parte requests?

Until recently Ukrainian courts were not allowed to impose any interim measures due to lack of proper statutory authorisation. However, the Court Procedure Reform Law has vested Ukrainian courts with the power to issue interim measures in support of international arbitration,[18] specifically injunctions with

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17 *See, e.g.*, in the broadly reported case of *Telenor Mobile Communications AS v. Storm LLC*, 584 F.3d 396 (2d Cir. 2009).

18 CPC, Part 1, Article 149.

regard to the subject of an arbitration proceeding (*e.g.* freezing orders) as well as injunctions requesting submission of evidence related to the arbitration proceeding or examination of witnesses based on a request from the arbitral tribunal or from a party to the arbitration proceeding.

Also, Ukrainian courts are empowered to issue interim measures in the course of proceedings on the recognition and enforcement of the arbitral award.[19] Such measures may include freezing of the assets, prohibition to perform some actions, etc.

The motion for interim measures is considered by the court on *ex-parte* basis. However, in exceptional cases the court may ask both parties to appear.[20]

4.5 Other than arbitrators' duty to be independent and impartial, does the law regulate the conduct of the arbitration?

4.5.1 Does it provide for confidentiality of arbitration proceedings?

The ICA Law is silent on the confidentiality issues of the arbitration proceeding. It is advised to include confidentiality provision in the arbitration agreement.

4.5.2 Does it regulate the length of arbitration proceedings?

The ICA Law itself does not regulate the length of arbitration proceedings.

4.5.3 Does it regulate the place where hearings and/or meetings may be held?

Under the ICA Law, the parties are free to agree on the place of arbitration. Failing such agreement, the place of arbitration shall be determined by the arbitral tribunal having regard to the circumstances of the case, including the convenience of the parties. An arbitral tribunal may also meet at any place it considers appropriate for consultation among its members, for hearing witnesses, experts or the parties, or for inspection of goods, other property or documents.[21]

4.5.4 Does it allow for arbitrators to issue interim measures? If the affirmative, under what conditions?

The ICA Law allows an arbitral tribunal to grant interim measures upon a party's request.[22] Such interim measure may be imposed either before the commencement of an arbitral proceeding by the ICAC President or at any stage of the arbitral proceeding by the arbitral tribunal. The ICA Law does not address the issue of the conditions under which the interim measures may be imposed.

At the same time, the degree to which parties will comply with such interim measures remains largely voluntary. This is because the chances for a party to have such interim measures enforced by a state court are rather remote due to the absence of procedural provisions entitling the parties to apply to local courts for this purpose. As a matter of practise, interim measures are frequently issued by arbitral tribunals but there is no good record to assess whether these interim measures are in fact observed by the parties.

4.5.5 Does it regulate the arbitrators' right to admit/exclude evidence? For example, are there any restrictions to the presentation of testimony by a party employee?

The power conferred upon the arbitral tribunal includes the power to determine the admissibility, relevance, materiality and weight of any evidence.[23] The ICA Law does not set forth any restrictions as to

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19 CPC, Part 1, Article 394.

20 CPC, Part 1, Article 153.

21 ICA Law, Parts 1-2, Article 20.

22 ICA Law, Article 17.

23 ICA Law, Part 2, Article 19.

the admissibility of specific types of evidence, such as restrictions with regard to presentation of testimony by a party employee.

4.5.6 Does it make mandatory to hold hearings?

Under the ICA Law, an arbitral tribunal shall decide whether to hold oral hearings for the presentation of evidence or for oral argument, or whether the proceedings shall be conducted only on the basis of documents and other materials. However, unless the parties have agreed that no hearings shall be held, the arbitral tribunal shall hold such hearings at an appropriate stage of the proceedings, if so requested by a party.[24]

4.5.7 Does it prescribe principles governing the awarding of interest?

The ICA Law does not address the issue of granting pre-award interest by the arbitral tribunal. As a matter of practice, such interest must be determined in accordance with the provisions of the contract and the law applicable to the merits of the dispute.

4.5.8 Does it prescribe principles governing the allocation of arbitration costs?

The ICA Law is silent on the allocation of costs of the arbitration between the parties. The default rules of court proceedings, according to which legal costs are apportioned to either claimant or respondent in proportion to the satisfaction of the claim, do not apply to the international commercial arbitration.

4.6 Liability

4.6.1 Do arbitrators benefit from immunity to civil liability?

The ICA Law does not address the issue of responsibility and/or immunity from civil liability of arbitrators for acts related to their decision-making function.

4.6.2 Are there any concerns arising from potential criminal liability for any of the participants in an arbitration proceeding?

Arbitrators and parties to the arbitral proceeding may be held liable for certain criminal offences.[25] Under the Criminal Code of Ukraine, arbitrators may be held liable for abuse of their powers, issuing fake documents or making false statements in arbitral awards or other documents, gross negligence, unlawful enrichment, taking bribes and extortion of a bribe.[26] In turn, parties may be prosecuted for bribing, offering or promising a bribe to the arbitrators.[27] We are not aware of any instances where arbitrators or parties to the arbitral proceeding were prosecuted for such criminal offences.

5. The award

5.1 Can parties waive the requirement for an award to provide reasons?

Pursuant to the ICA Law, the award shall contain the reasoning upon which it is based.[28] This provision is mandatory and cannot be waived.

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24 ICA Law, Part 1, Article 24.

25 The Law of Ukraine "On Prevention Corruption", Article 3.

26 Criminal Code of Ukraine, Articles 364, 366, 367, 368-2, 369, 370.

27 Criminal Code of Ukraine, Article 369.

28 ICA Law, Parts 1-3, Article 31.

5.2 Can parties waive the right to seek the annulment of the award? If yes, under what conditions?

The arbitral award shall be final and binding on the parties of the proceeding. At the same time, the parties cannot waive the right to seek the annulment of the award under the Ukrainian legislation.[29]

5.3 What atypical mandatory requirements apply to the rendering of a valid award rendered at a seat in the jurisdiction?

There are no atypical requirements to the rendering of a valid award in Ukraine.

5.4 Is it possible to appeal an award (as opposed to seeking its annulment)? If yes, what are the grounds for appeal?

No, it is not. The award made by the arbitral tribunal shall be final and subject to no further appeal. It can only be subject to annulment on limited grounds.[30]

5.5 What procedures exist for the recognition and enforcement of awards, what time limits apply and is there a distinction to be made between local and foreign awards?

Recognition and enforcement of foreign arbitral awards in Ukraine, as well as enforcement of international arbitral awards rendered in Ukraine, are governed by the Code of Civil Procedure (the "**CPC**"), the ICA Law and applicable treaties, including, most importantly, the 1958 New York Convention.

According to the CPC, the Ukrainian courts shall grant enforcement of foreign arbitral awards provided that:

(i) recognition and enforcement are permitted under a treaty ratified by the Ukrainian Parliament; or

(ii) there is reciprocity, *i.e.* courts of the state of the seat of arbitration would similarly recognize Ukrainian arbitral awards. At the same time, the CPC states that it shall be presumed that reciprocity exists between Ukraine and such other state unless it is proved otherwise.[31]

To this end, it should also be noted that when ratifying the 1958 New York Convention, Ukraine made the following reservation: *"[t]he Ukrainian Soviet Socialist Republic will apply the provisions of this Convention in respect of arbitral awards made in the territories of non-contracting States only to the extent to which they grant reciprocal treatment."*[32] On 11 November 2015, the Secretary-General of the United Nations communicated a notification of the Ministry of Foreign Affairs of Ukraine, stating that the application and implementation by Ukraine of the obligations under the New York Convention in relation to the Autonomous Republic of Crimea and certain districts of the Donetsk and Luhansk oblasts of Ukraine is limited and is not guaranteed due to acts of illegal occupation and aggression by the Russian Federation.[33]

It is not clear whether the CPC presumption of reciprocity applies to the reciprocity reservation made under the New York Convention. The correct interpretation would be to assume that those are entirely different concepts which could yield similar results.

The Court Procedures Reform Law brought some serious changes designed to simplify the procedure of recognition and enforcement of arbitral awards. Jurisdiction to recognise and enforce foreign arbitral

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29 Neither ICA Law nor CPC provide for such an option.

30 ICA Law, Article 34.

31 CPC, Part 1, Article 390.

32 United Nation Treaty Collection, available at https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXII-1&chapter=22&clang=_en#EndDec.

33 https://treaties.un.org/doc/Publication/CN/2015/CN.597.2015-Eng.pdf.

awards has been vested exclusively in the Kyiv City Court of Appeal as the court of the first instance.[34] The decision on granting or denying recognition and enforcement may be appealed only to the Supreme Court. The decision of the Supreme Court is final and subject to no further appeal.[35] An arbitral award may be applied for recognition and enforcement within three years after its entry into force.[36] The application for setting aside of arbitral award shall not automatically suspend the enforcement of the award.

The ICA Law prescribes the grounds upon which a Ukrainian court may refuse to recognise and enforce a foreign award which duplicate the provisions of Article 5 of the 1958 New York Convention.[37]

There is no distinction in procedures of recognition and enforcement of local and foreign international arbitral awards.

5.6 Does the introduction of annulment or appeal proceedings automatically suspend the exercise of the right to enforce award?

The application for annulment of the award does not automatically suspend the exercise of the right to enforce the award. However, the ICA Law provides that the court where the recognition and enforcement of arbitral award is sought may, if deems necessary, postpone rendering the ruling until the proceeding for annulment of the award is completed.[38]

5.7 When a foreign award has been annulled at its seat, does such annulment preclude the award from being enforced in the jurisdiction?

Under the ICA Law, a court may refuse to recognise and enforce a foreign award if the foreign award has been annulled at its seat.[39] There have been no precedents of attempts to enforce annulled awards in Ukraine. However, in our view, the annulment of the award at the jurisdiction of its seat would likely be regarded by Ukrainian courts as a bar to recognition and enforcement.

5.8 Are foreign awards readily enforceable in practice?

As a matter of court practice, the Ukrainian courts enforce foreign arbitral awards readily. As experience shows, proceedings for enforcement and recognition of foreign arbitral award may last for three to six months before the court of first instance and about six months before the court of appeal.

6. Funding arrangements

6.1 Are there restrictions to the use of contingency or alternative fee arrangements or third-party funding at the jurisdiction? If so, what is the practical and/or legal impact of such restrictions?

Ukrainian legislation neither imposes any restriction on the use of contingency or alternative fee arrangements nor regulates the issues of third-party funding. Therefore, making such alternative funding arrangements is not prohibited in Ukraine. At the same time, arrangements such as third-party funding are rarely used for the financing of arbitral proceedings in Ukraine.

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34 CPC, Part 3, Article 475. Before the revision, the courts competent to decide in the first instance on recognition and enforcement of foreign arbitral awards were the general courts at the seat of the debtor, and where the debtor did not have a seat in Ukraine.

35 CPC, Part 2, Article 351; Part 3, Article 419.

36 CPC, Article 391.

37 ICA Law, Part 1, Article 36.

38 ICA Law, Part 2, Article 36.

39 ICA Law, Part 1, Article 36.

7. Is there likely to be any significant reform of the arbitration law in the near future?

Ukraine is currently undergoing a far-reaching court reform. As mentioned above, the Ukrainian Parliament adopted the Court Procedures Reform Law restating a number of the procedural codes and amending several statutes, including the ICA Law. Although the Court Procedures Reform Law is aimed at overhauling the national court system in the first place, it also introduces a number of helpful changes in the arbitration sector. The Court Procedures Reform Law became effective on 15 December 2017.

7.1 Introduction of court assistance to arbitral tribunals

As explained above, the ICA Law provides that it is not incompatible with an arbitration agreement for a party to request from a court an interim measure of protection.[40] However, until recently, the Ukrainian procedural legislation did not provide for any practical tools to implement this provision effectively before Ukrainian courts.

The situation changed when the Court Procedures Reform Law came into force. In particular, the Ukrainian courts now are empowered to support the arbitration proceeding by:

(i) imposing an interim injunction with regard to the subject of an arbitration proceeding; and

(ii) requesting evidence related to the arbitration proceeding and examining witnesses based on a request from the arbitral tribunal or from a party to the arbitration proceeding.

7.2 Formal validity requirements for arbitration agreements

As described above, the attitude of the Ukrainian state courts towards the invalidation of arbitration agreements due to inaccuracies therein has been rather controversial mostly because of an overly formalistic approach.[41] In order to eliminate this ambiguity, the amendments to the ICA Law introduced by the Court Procedures Reform Law provide that any inaccuracies in the text of the arbitration agreement or doubts regarding its validity, effect and enforceability shall be interpreted by the court in favour of its validity, effect and enforceability.

The Court Procedures Reform Law also revises the formal requirements for the arbitration agreement by allowing the electronic messages, which contain information that is available for further transfer, to be considered as a written form of arbitration agreement. Also, the Court Procedures Reform Law advances the ICA Law by introducing an arbitral tribunal's right to draw adverse inferences if either of the parties does not submit the evidence requested by the arbitral tribunal, depending on which party avoids such submission and/or the probative value that this evidence may have.[42]

7.3 Post-award interest and foreign currency

The Court Procedures Reform Law expressly authorises Ukrainian courts to recognise awards with post-award interest. The post-award interest will continue to accrue until the award is fully enforced.

This amendment simultaneously resolves the issue of foreign currency in which such post-award interest may be determined. If the arbitral award is denominated in some currency/ currencies other than Ukrainian Hryvnia, the Court Procedures Reform Law authorises the enforcing court to indicate this amount in such foreign currency/currencies or, upon the creditor's request, to determine this amount in Ukrainian Hryvnia at the exchange rate of National Bank of Ukraine as of the date of the leave to enforce.

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40 ICA Law, Article 9. See Section 4.4 above.

41 See Section 2.3 above.

42 ICA Law, Part 4, Article 25: "*the arbitral tribunal may, if either of the parties does not submit the evidence requested by the arbitral tribunal, depending on which party avoids such submission and/or the probative value that this evidence may have, acknowledge the fact, for confirmation of which this evidence should have been submitted, or reject such fact, or consider the case with evidence already on the record*."

At the same time, the ICA Law does not authorise Ukraine-seated arbitral tribunals to order post-award interest.

7.4 Consolidation of annulment and enforcement procedures

In addition, the Court Procedures Reform Law authorises Ukrainian courts to consider applications for setting aside of the arbitral award and application for recognition and enforcement of the arbitral award in a single consolidated proceeding. In practice, this should save a successful claimant significant time and cost when attempting to enforce a Ukrainian arbitral award and prevent inconsistent findings in annulment and enforcement proceedings.

This novelty is especially important given the recent change in the jurisdiction of Ukrainian courts over recognition and enforcement cases of foreign arbitral awards as well as cases of annulment of international arbitral awards issued in Ukraine. The Court Procedures Reform Law vests the right to recognise and enforce the foreign arbitral award to the Kyiv City Court of Appeal, as the court of the first instance.[43] The decision on granting or denying recognition and enforcement may be appealed only to the Supreme Court. The cases for annulment of arbitral awards rendered in international arbitration seated in Ukraine will be considered by the appeal court of the region where such arbitration was seated. However, given the fact that ICAC seated in Kyiv is the only arbitral institution authorised to administer international commercial disputes in Ukraine, practically the Kyiv City Court of Appeal alone will hear the annulment cases in Ukraine.

43 CPC, Part 3, Article 475.