

International Civil Procedure (Cross-Border Litigation)

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The aim of pending judicial reform in Ukraine is to create effective judicial protection of property rights, freedom of entrepreneurship, investment, etc. And this reform affects Ukrainian businesses, citizens and institutions as well as foreign businesses and investors.

Judicial reform consists of several elements: (a) reform of procedural legislation, its approximation to world standards of “a fair trial” and introduction of procedural institutes, which shall make the trial more effective; (b) reformatting of the country’s proper judicial system by removing “superfluous” instances (namely two cassation instances) and building of a simple and effective judicial vertical structure, consisting of courts of first instance, appellate courts and a sole court of cassation (the Supreme Court); (c) renewal of the judiciary by formation of the new Supreme Court and renewal of corps of judges of lower courts (courts of first instance and appellate courts). Moreover, the reform provides for creation of some new courts, namely, the Supreme Intellectual Property Court and the Supreme Anticorruption Court.

The reform of procedural legislation was carried out by adoption of the amended *Civil Procedure Code* (for general courts) and of the amended *Commercial Procedure Code* (for commercial courts). Both codes came into force at the end of 2017.

The new Supreme Court was created via a multistage competition with the participation of not only professional judges, but also researchers and former lawyers.

The first year of work of the new Supreme Court has already passed. As practitioners in the field of dispute resolution, including those where foreign companies are involved, we have the opportunity to observe its work, and we note significant progress in resolution of complex legal issues accumulated over the years in the judicial and legal system of Ukraine. Judgments by the Grand Chamber of the Supreme Court slowly and steadily eliminate divergences and contradictions in judicial practice and introduce uniform approaches in resolution of similar cases, and we admit that the judgments of the Supreme Court are commonly based on the principles of legality and justice.

The Supreme Intellectual Property Court, which will consist of 21 judges selected in a separate competition, is still being formed. The peculiarity of this court is the appeal chamber formed from the same 21 judges that will act as an appellate instance in resolving disputes that fall within its jurisdiction.

The jurisdiction of the Supreme Intellectual Property Court includes disputes regarding the rights of intellectual property objects (inventions, utility models, industrial designs, etc.), disputes on the rights of authors and related rights, cases in disputes regarding agreements on the disposal of intellectual property rights ownership, commercial concession and others. The above cases shall be considered and resolved by the Supreme Intellectual Property Court at the place of its location in Kyiv under the Commercial Procedure Code.

CROSS-BORDER DISPUTE RESOLUTION

In cross-border disputes in commercial and civil matters the most relevant and significant issues traditionally referred to in the international civil procedure are:

(a) The international jurisdiction of Ukrainian and foreign courts regarding commercial and civil matters where Ukrainian and foreign parties are involved (namely, foreign-related cases);

(b) equal access of foreign persons to justice (national regime), equal treatment of parties and a fair trial;

(c) judicial cooperation or international legal assistance for the service abroad of judicial documents and taking of evidence abroad;

(d) recognition and enforcement of foreign judgments and arbitral awards.

Ukraine is a party to the Hague Conventions, namely, the *Convention of 1 March 1954 on Civil Procedure*, the *Convention of 15 November 1965 On the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters*, the *Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters*.

The central body in Ukraine is the Ministry of Justice of Ukraine.

Every year the Ministry of Justice of Ukraine receives hundreds of requests for the service of judicial documents to Ukrainian companies and individuals as defenders as well as letters of request for legal proceedings (acquiring evidence, interviewing witnesses, obtaining information on foreign legislation, etc.). Many letters of request come from Germany, Italy, Portugal and other countries.

INTERNATIONAL JURISDICTION

Ukrainian courts have the right to consider foreign-related disputes in cases provided for by the law of Ukraine on international private law, bilateral treaties on legal assistance in civil and commercial matters, entered into by Ukraine with 30 countries, and many conventions, primarily the Hague Conventions and foreign investment promotion and protection agreements (around 50 agreements).

CHOICE OF COURT IN CROSS-BORDER LITIGATION

Ukrainian court practice shows broader use of choice of court agreements by Ukrainian companies and their foreign partners in their commercial contracts. Ukrainian commercial courts consider cases under Article 75 of the Law of

JURVNESHSERVICE

Jurvneservice was formed in 1987 and since then has been advising leading Ukrainian and foreign corporations on legal issues of the contemporary Ukrainian market. Jurvneshservice's attorneys have cultivated the culture, commercial pragmatism and technical and interpersonal skills required to deliver world-class services tailored for the preferences of world-class clients. Over the years of practice the firm's attorneys have received numerous awards and written a great number of publications.

Jurvneservice cooperates with such leading law publishers as Kluwer Law International, which issued the Anna and Gennadii Tsirats monograph *Civil Procedure in Ukraine* (2012) and *Intellectual Property Law in Ukraine* (2011). Gennadii Tsiat is an expert in cross-border litigation and has published monographs *International Civil Process: Modern Condition and Perspectives*

of *International Unification* (2013), *International Commercial Arbitration* (2002) and *International Arbitration as a Means of Disputes Settlement* (1997).

As the leading expert on franchising in Ukraine, Anna Tsiat has published the *Guide on Drafting of Franchise Agreements* (2010) as well as *Franchise and Franchising Agreement* (2002). Her studies in aircraft finance are reflected in the monograph *International Private Air Law* (2018). Anna Tsiat is the author of numerous chapters on Ukraine that are updated annually. These include *The Official Guide to Aircraft Registration and Tax*, *PWSP World Aircraft Repossession Index*, *Aircraft Financing*, *Aircraft Liens and Detention Rights*, *International Agency and Distribution Law*, *Getting the Deal Through: Air Transport*, *Getting the Deal Through: Franchise in 28 Jurisdictions worldwide*, *Getting the Deal Through: License in 28 Jurisdictions worldwide*, *The*

Aviation Law Review, *International Joint Ventures*, *International Secured Transactions*, *International Franchising*, etc.

Jurvneservice attorneys work as one team with clients, other law firms, advisers and one another. This approach enables the needs of clients to be addressed more efficiently. Clients retain Jurvneshservice because its attorneys understand their businesses and are committed to finding practical ways to help them to grow and succeed.

The main practice areas of Jurvneshservice are aircraft finance, anti-corruption, bankruptcy, corporate disputes, criminal law, cross-border litigation and debt recovery, enforcement of foreign arbitral awards and judgments, intellectual property including franchising protection, international arbitration, project finance, white collar crime, unfair competition.

Ukraine On Private International Law (PIL) according to which foreign-related disputes may be considered by Ukrainian courts in accordance with the agreement of the parties.

Adoption of the new procedural codes has resulted in the broadening of application of choice of court agreements in civil and commercial disputes. While Articles 75 and 76 of PIL provide the possibility of choice of merely Ukrainian courts, the relevant rules of the amended procedural codes (Article 22 of the *Civil Procedure Code* and Article 23 of the *Commercial Procedure Code* directly grant the parties the right to refer consideration of disputes to foreign courts).

These changes reflected a new Ukrainian approach to the choice of court agreements in the sphere of cross-border litigation since the time of Ukraine's accession to the Hague Convention of 30 June 2005 on Choice of Court Agreements in 2016.

FUNCTIONS OF ASSISTANCE AND JUDICIAL CONTROL OVER INTERNATIONAL COMMERCIAL ARBITRATION

The foundation of interplay between state courts and international commercial arbitration is a pro-arbitration approach on the part of state courts. The purpose of such a pro-arbitration approach is to create the conditions for the widespread use of international commercial arbitration as a means of com-

mercial disputes resolution by eliminating the possibility of parallel judicial and arbitration proceedings, and granting to arbitration a primary right to resolve issues of its own competence. This purpose is ensured by the use of the institute of inadmissibility (the protest against the jurisdiction of the state court to consider the case, if there is an arbitration clause; no jurisdiction of the state court to consider a case on invalidity of the arbitration clause, etc).

The functions of judicial control over international commercial arbitration are governed by the *Law of Ukraine On International Commercial Arbitration* and the *Civil Procedure Code*. These include the procedures for setting aside arbitral awards and procedures for granting permission to enforce arbitral awards.

Applications for setting aside arbitral awards are considered by Ukrainian courts only in respect of arbitral awards if the place of arbitration is located in Ukraine, particularly, the awards of the International Commercial Arbitration Court at the Ukrainian Chamber of Commerce and Industry or *ad hoc* arbitration. The grounds for setting aside an arbitral award are established by law, and the list is exhaustive. In accordance with the amended *Civil Procedure Code* the mentioned applications shall be considered by the appellate general courts at the place of the arbitration as courts of first instance and the Supreme Court as an appellate instance.

RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGMENT AND ARBITRAL AWARDS

Foreign judgments in civil and commercial matters can be enforced in Ukraine after the procedure of recognition and obtaining of a permit for enforcement (exequatur). These cases are considered by local general courts at the place of residence (stay) or the location of the debtor as courts of first instance and, accordingly, can be subject to appeal and cassation.

A foreign judgment may be enforced in Ukraine if its recognition and enforcement is stipulated by an international agreement or is based upon the principle of reciprocity (there is a presumption of the existence of reciprocity). Courts have the right to refuse to grant permission to enforce a foreign judgment, if one of the grounds provided for by an international agreement or Ukrainian law is present. The practice of Ukrainian courts is, in such cases, generally positive and the majority of foreign judgments are enforced in Ukraine.

Notably, the most common reason for refusal to enforce is the absence of due notification of the defendant of arbitration proceedings, or a flawed (improper) notification by the defendant, and, consequently, non-participation of the latter in arbitration proceedings, or the existence of a competing judgment of a Ukrainian court rendered prior to or even after the judgment that is sought to be enforced (e. g. when there is a judgment of a state court on the invalidity of an arbitral award).