

# ARBITRATION IN UKRAINE

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By Sergiy Gryshko and Oleksandr Gudko, CMS



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## 1. Legislative framework

- 1.1.1 The right for parties to arbitrate their disputes in Ukraine is enshrined in national legislation and in a number of international treaties. In the event of a conflict between the national legislation and the provisions of a treaty to which Ukraine is a party, the treaty prevails.
- 1.1.2 The treaties to which Ukraine is a party include, amongst others, the New York Convention;<sup>1</sup> the 1961 European Convention; and the Minsk Convention on Legal Assistance and Legal Relations in Civil, Family and Criminal Matters (**Minsk Convention**).<sup>2</sup>
- 1.1.3 When discussing the national legislation, it is important to note that Ukraine has separate legal regimes for international and domestic arbitral proceedings. The Law “On International Commercial Arbitration” (**Ukrainian Arbitration Act**) governs all international arbitral proceedings conducted in Ukraine.<sup>3</sup> Domestic arbitral proceedings, on the other hand, are governed by the provisions of Ukrainian Law “On Courts of Arbitration” (**Law on Domestic Arbitration**).<sup>4</sup>
- 1.1.4 The Ukrainian Arbitration Act is complemented by the Ukrainian Civil Procedure Code dated 18 March 2004 (**CPC**).<sup>5</sup> The CPC regulates, amongst others, the procedure for recognition and enforcement of foreign court decisions and international awards. Other relevant legislation includes the Commercial Procedure Code (**CoPC**), which limits the types of disputes that can be submitted to domestic or international arbitration.<sup>6</sup>
- 1.1.5 A useful analysis of court practice in Ukraine on the recognition and enforcement of foreign awards can be found in a dated yet still effective Resolution of the Plenum of the Supreme Court of Ukraine “On the Court Practice of Entertaining Applications for the Recognition and Enforcement of the Judgments of Foreign

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<sup>1</sup> For the full text of the New York Convention, see CMS Guide to Arbitration, vol II, appendix 1.1.

<sup>2</sup> The Minsk Convention was signed by the Commonwealth of Independent States (**CIS**) member states on 22 January 1993 and entered into force in Ukraine on 3 December 1994 by Law of Ukraine “On Ratification of the Convention on Legal Aid and Legal Relations in Civil, Family and Criminal Cases”, Law No 240/94-BP, 10 November 1994.

<sup>3</sup> Law No 4002-XII enacted on 24 February 1994 and entered into force on 20 April 1994, incorporating amendments made by Laws of Ukraine: Law No 762-IV, 15 May 2003; and Law No 2798-IV, 6 September 2005. Published in *Golos Ukrainy*, No 73 (823), 20 April 1994.

<sup>4</sup> Law No 1701-IV, 11 May 2004.

<sup>5</sup> The Code was adopted by the *Verkhovna Rada* on 18 March 2004 and came into force on 1 September 2005.

<sup>6</sup> Law No 1798-XII, 6 November 1991.

Courts and Foreign Arbitral Awards Rendered in the Course of International Commercial Arbitration in Ukraine”.<sup>7</sup>

## 2. Scope of application and general provisions of the Ukrainian Arbitration Act

### 2.1 Subject matter

2.1.1 The Ukrainian Arbitration Act is based on the Model Law (1985)<sup>8</sup> and divides the responsibility for assisting and supervising arbitral proceedings (with the seat of arbitration in Ukraine) between the President of the Ukrainian Chamber of Commerce and Industry (**UCCI President**) and the local courts of Ukraine.

2.1.2 In adhering to the legislative practice of the former USSR, the Ukrainian Arbitration Act establishes two permanent arbitral institutions under the auspices of the Ukrainian Chamber of Commerce and Industry (**UCCI**), namely the International Commercial Arbitration Court (**ICAC**) and the Maritime Arbitration Commission (**MAC**). The powers and legal status of these local arbitral institutions are set forth in two appendices to the Ukrainian Arbitration Act. In contrast with the Russian Federation that has a similar arbitration act, the ICAC and the MAC are, at the present time, the only institutions established in Ukraine that are authorised to administer arbitral proceedings involving foreign parties in Ukraine. However, it does not necessarily follow that arbitrations seated in Ukraine cannot be administered by foreign arbitral institutions (e.g. under the ICC Arbitration Rules<sup>9</sup>).

2.1.3 It is also worth noting that the Ukrainian Arbitration Act is the mirror image of the Russian Law “On International Commercial Arbitration”.<sup>10</sup> However, the Ukrainian and Russian courts have not necessarily interpreted the provisions of their respective laws in the same way.

### 2.2 Structure of the law

2.2.1 Although the Ukrainian Arbitration Act is based on the structure of the Model Law (1985),<sup>11</sup> there are differences.

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<sup>7</sup> Resolution No 12, 24 December 1999.

<sup>8</sup> CMS Guide to Arbitration, vol II, appendix 2.1.

<sup>9</sup> CMS Guide to Arbitration, vol II, appendix 3.7.

<sup>10</sup> Federal Law on International Commercial Arbitration No 5338-1, approved by the Supreme Soviet of the Russian Federation on 7 July 1993, as amended by Federal Law No 250-FZ dated 3 December 2008.

<sup>11</sup> CMS Guide to Arbitration, vol II, appendix 2.1.

- 2.2.2 For example, the jurisdiction provisions of the Ukrainian Arbitration Act differ from those of the Model Law (1985).<sup>12</sup> The Ukrainian Arbitration Act provides that disputes involving Ukrainian legal entities with foreign investment (arguably with at least 10% foreign shareholding)<sup>13</sup> or involving participants of such legal entities can be submitted to international arbitration.<sup>14</sup>
- 2.2.3 The Ukrainian Arbitration Act provides that the provisions of a treaty to which Ukraine is a party should prevail over the provisions of the Ukrainian Arbitration Act in case of any discrepancy.<sup>15</sup> It follows that where differences arise, the provisions of the New York Convention<sup>16</sup> and/or the 1961 European Convention will prevail over the Ukrainian Arbitration Act.
- 2.2.4 The Ukrainian Arbitration Act contains a definition of “commercial” which is absent from the Model Law (1985).<sup>17</sup> The term “commercial” is interpreted broadly to include trade relations, which can be either contractual or non-contractual. Further, it contains a non-exhaustive list of examples of such trade relations (e.g. sale of goods and services, leasing, financing and transportation of goods and passengers).
- 2.2.5 The Ukrainian Arbitration Act also contains a preamble emphasising the important role of international arbitration.<sup>18</sup> The other provisions of the Ukrainian Arbitration Act generally follow the wording of the Model Law (1985)<sup>19</sup> and have only been modified in order to fit in the general drafting language and practicalities of Ukrainian law.

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<sup>12</sup> The provisions of the Model Law (1985), ch 1, art 1(3)(b) and 1(3)(c) are not reflected in the Ukrainian Arbitration Act. For the Model Law (1985) see CMS Guide to Arbitration, vol II, appendix 2.1.

<sup>13</sup> Commercial Code of Ukraine (**Commercial Code**) No 436-IV, 16 January 2003, ch 2, art 116. We note, however, that the Ukrainian Arbitration Act does not provide any definition of a “company with foreign investment” and there is no court practice confirming the view that the provisions of the Commercial Code shall apply in this case. Thus, whether this 10% threshold is to be construed to create jurisdiction for an international arbitral tribunal remains to be clarified.

<sup>14</sup> Ukrainian Arbitration Act, ch 1, art 1(2).

<sup>15</sup> *Ibid*, ch 1, art 1(5).

<sup>16</sup> CMS Guide to Arbitration, vol II, appendix 1.1.

<sup>17</sup> Ukrainian Arbitration Act, ch 1, art 2. For the Model Law (1985) see CMS Guide to Arbitration, vol II, appendix 2.1.

<sup>18</sup> The preamble follows the preamble of the respective arbitration act adopted in the Russian Federation. The text of the preamble is based on the preamble of the Resolution No 40/72 of the UN General Assembly (1985) whereby the General Assembly requested the Model Law (1985) to be circulated to the governments of member states, arbitration institutions and other interested parties.

<sup>19</sup> CMS Guide to Arbitration, vol II, appendix 2.1.

## 2.3 General principles

- 2.3.1 Following the wording of the Model Law (1985),<sup>20</sup> the Ukrainian Arbitration Act stipulates that it shall apply to all international commercial arbitral proceedings where the seat of arbitration is in Ukraine.<sup>21</sup> Some provisions, however, apply even if the arbitral proceedings do not take place in Ukraine, for example:
- stay of court proceedings in favour of arbitration;<sup>22</sup>
  - interim measures granted by the court in support of arbitral proceedings;<sup>23</sup> and
  - recognition and enforcement of awards.<sup>24</sup>
- 2.3.2 As mentioned at paragraph 1.1.3 above, the Ukrainian Arbitration Act applies exclusively to international commercial arbitration.<sup>25</sup> This is why the range of disputes capable of resolution by way of arbitral proceedings is limited to:
- disputes which arise out of contractual and other civil law relationships in the course of foreign trade and other types of international relations, provided that one of the parties is a commercial entity located outside Ukraine; and
  - disputes involving entities with foreign investment and/or international associations and organisations established in the territory of Ukraine.<sup>26</sup>
- 2.3.3 Thus, in contrast to the Model Law (1985),<sup>27</sup> the Ukrainian Arbitration Act allows arbitration of essentially domestic disputes between Ukrainian companies, where at least one of them has “foreign investment”.<sup>28</sup> In practice, the “foreign investment requirement” has been interpreted to imply that the company in question has foreign shareholders. The thresholds for such foreign shareholdings are currently not clear-cut.<sup>29</sup>
- 2.3.4 As a result of the wording of the Ukrainian Arbitration Act, the jurisdiction of the “international” arbitral tribunals and the “domestic” arbitral tribunals may significantly overlap. The demarcation line between domestic and international disputes that may be submitted to international arbitration is still to be drawn.

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<sup>20</sup> *Ibid*

<sup>21</sup> Ukrainian Arbitration Act, ch 1, art 1(1). The Ukrainian Arbitration Act does not include the 2006 amendments to the Model Law (1985) (see CMS Guide to Arbitration, vol II, appendix 2.1).

<sup>22</sup> *Ibid*, ch 2, art 8.

<sup>23</sup> *Ibid*, ch 2, art 9.

<sup>24</sup> *Ibid*, ch 8, arts 35–36.

<sup>25</sup> *Ibid*, ch 1, art 1(2).

<sup>26</sup> Whether such disputes arise between the entities, the participants of such entities or between a foreign investment (or international) entity and an entity incorporated under the laws of Ukraine.

<sup>27</sup> CMS Guide to Arbitration, vol II, appendix 2.1.

<sup>28</sup> Ukrainian Arbitration Act, ch 1, art 1(2).

<sup>29</sup> See paragraph 2.2.2 above for more detail.

- 2.3.5 In line with the Model Law (1985),<sup>30</sup> the Ukrainian Arbitration Act defines “arbitration” to include both institutional and ad hoc arbitration.<sup>31</sup> In practice, ad hoc arbitration, including under UNCITRAL Arbitration Rules,<sup>32</sup> is very rarely, if ever, used. This is probably due to the numerous practical and technical complexities of conducting proceedings and eventually attempting to enforce the award, which will have to be certified as effective in order to be enforced in Ukraine. The lack of information about this procedure may also be an impediment to the growth of ad hoc arbitration. However, there is information in the public domain about certain high profile disputes over stakes in a major ferroalloy company between large business groups (Interpipe and Privat) which were submitted to ad hoc arbitration.<sup>33</sup>

## 3. The arbitration agreement

### 3.1 Definitions

- 3.1.1 The Ukrainian Arbitration Act defines an arbitration agreement as:  
 “[A]n agreement between parties to refer to international commercial arbitration all or certain disputes, which have arisen or may arise between parties concerning their legal relationship irrespective of whether they are contractual or not.”<sup>34</sup>

### 3.2 Formal requirements

- 3.2.1 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.<sup>35</sup>
- 3.2.2 The arbitration agreement must expressly indicate the full name of any arbitral institution and the range of disputes that the parties have agreed to submit to arbitration.<sup>36</sup> Parties should be careful to comply precisely with these requirements as, on a number of occasions, the Ukrainian courts have held an arbitration agreement to be invalid as a result of a mere misspelling of the name of the arbitral

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<sup>30</sup> CMS Guide to Arbitration, vol II, appendix 2.1.

<sup>31</sup> Ukrainian Arbitration Act, ch 1, art 2.

<sup>32</sup> CMS Guide to Arbitration, vol II, appendices 3.1 and 3.2.

<sup>33</sup> Ukrayinska Pravda: Interview with Gennady Korban, 25 October 2007 [Available in Russian at <http://www.pravda.com.ua/articles/2007/10/25/3308776/>] (accessed 1 December 2011).

<sup>34</sup> Ukrainian Arbitration Act, ch 2, art 7(1).

<sup>35</sup> *Ibid*, art 7(2).

<sup>36</sup> Clarifications of the Higher Commercial Court of Ukraine “On Certain Questions of Practice of Resolving Cases to Which Foreign Companies and Organizations are Parties”, Clarification No 04-5/608, 31 May 2002.

institution.<sup>37</sup> Parties normally indicate the law governing both the dispute and the procedure for appointing the arbitrator(s) and the seat and language of the arbitration in the arbitration agreement.

3.2.3 An arbitration agreement may also be incorporated by reference into the parties' contract. According to the Ukrainian Arbitration Act, a reference in a contract to a document containing an arbitration clause constitutes an arbitration agreement provided that the contract is executed in writing and the reference is such as to make the outstanding clause a part of the contract.<sup>38</sup> The parties should include a clear and express reference to ensure that the respective provisions of, for example, the general terms and conditions constitute an integral part of the contract.

3.2.4 It is unclear whether two Ukrainian parties may submit their disputes to an arbitration seated overseas. Since Article 1 of the Ukrainian Arbitration Act – which provides for a right of Ukrainian entities “with foreign investment” to submit their disputes to international arbitration – is not one of the Articles applicable to arbitration both in Ukraine and abroad, companies registered in Ukraine may not submit their disputes to arbitration institutions or ad hoc tribunals based elsewhere. There is no case law to put an end to this ambiguity, but, as a matter of practice, it is not uncommon for Ukrainian companies with foreign shareholdings to agree on arbitration seated abroad.

### 3.3 Special tests and requirements for jurisdiction

3.3.1 While Ukrainian law does not provide a comprehensive list of disputes that can or cannot be submitted to arbitration, the Ukrainian Law “On Private International Law” (**Law on Private International Law**) provides a useful list of the disputes that fall within the exclusive jurisdiction of the Ukrainian courts.<sup>39</sup> The list includes, *inter alia*, disputes:

- concerning real estate property located in the territory of Ukraine;
- relating to the formalisation of intellectual property rights (e.g. registration or certification (patent) issues);
- relating to the registration or liquidation of foreign legal entities or sole traders in Ukraine;
- relating to the validity of information contained in state registries in Ukraine;
- relating to the issuance or cancellation of securities in Ukraine; or
- arising out of the bankruptcy of an entity that is established in Ukraine.

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<sup>37</sup> See further examples at section 11.3.

<sup>38</sup> Ukrainian Arbitration Act, ch 2, art 7(2).

<sup>39</sup> Law No 2709-IV, 23 June 2005, art 77.

- 3.3.2 These provisions vest Ukrainian courts with exclusive jurisdiction over the disputes listed above and are likely to be construed to prohibit arbitral tribunals from resolving them.
- 3.3.3 The CoPC provides that the local courts shall have exclusive jurisdiction to entertain actions relating to the conclusion, amendment, termination and execution of contracts for the procurement of goods, work and services for “state needs” (public procurement) and corporate governance disputes.<sup>40</sup>
- 3.3.4 Moreover, arbitral tribunals may not entertain cases of a non-adversarial nature that do not involve a legal dispute. In particular, the disclosure of bank secrets and the restoration of title for lost bearer securities or promissory notes must be considered by the general state courts in a non-adversarial proceeding.<sup>41</sup>

### 3.4 Separability

- 3.4.1 The Ukrainian Arbitration Act provides that an arbitration clause that forms part of a contract shall be treated as an agreement independent of the other terms of the contract for the purposes of determining the jurisdiction of the arbitral tribunal and the validity of the arbitration agreement. The fact that the main contract may be null and void therefore does not invalidate the arbitration clause as a matter of law.<sup>42</sup>

### 3.5 Legal consequences of a binding arbitration agreement

- 3.5.1 The Ukrainian Arbitration Act prohibits national courts from intervening in arbitral proceedings except in the circumstances expressly prescribed by the Ukrainian Arbitration Act.<sup>43</sup> The circumstances in which national courts are entitled to intervene include:
- ruling on the jurisdiction of the arbitral tribunal;<sup>44</sup> and
  - ruling on applications to set aside awards.<sup>45</sup>

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<sup>40</sup> CoPC, s III, art 12, as discussed in section 11.2 below.

<sup>41</sup> CPC, art 234 and 235.

<sup>42</sup> Ukrainian Arbitration Act, ch 4, art 16.

<sup>43</sup> *Ibid*, ch 1, art 5.

<sup>44</sup> *Ibid*, ch 4, art 16.

<sup>45</sup> Ukrainian Arbitration Act, ch 7, art 34.

- 3.5.2 In keeping with the provisions of the Model Law (1985)<sup>46</sup> and the New York Convention,<sup>47</sup> the Ukrainian Arbitration Act provides that in the event an action is brought before a state court in a matter which falls within the scope of an arbitration agreement, a state court shall<sup>48</sup> terminate the proceedings and refer the parties to arbitration, unless it finds that the agreement is null and void, inoperative or incapable of being performed.<sup>49</sup>
- 3.5.3 However, in practice, a state court does not really “refer parties to arbitration”. Rather, the court terminates proceedings. Where an action falling within the ambit of an arbitration agreement is brought before a state court, a party wishing to enforce an arbitration agreement should request the court to terminate the proceedings.<sup>50</sup> The termination of proceedings is discussed in more detail at section 8.2 below.
- 3.5.4 The Ukrainian Arbitration Act also provides that an action before a state court should not delay the arbitral proceedings, arbitral proceedings may be commenced or continued and an award may be entered into.<sup>51</sup>

## 4. Composition of the arbitral tribunal

### 4.1 Constitution of the arbitral tribunal

- 4.1.1 The Ukrainian Arbitration Act provides that an arbitral tribunal shall consist of three members, unless otherwise agreed by the parties.<sup>52</sup> Each party appoints one arbitrator and the appointed arbitrators appoint the third arbitrator. Under the ICAC Rules, the arbitrator appointed by the two members of the arbitral tribunal shall “automatically” be the chair.<sup>53</sup> If the parties do not agree upon the procedure for appointing the arbitrators or if, for example, one of the parties does not appoint an arbitrator, the arbitrator(s) shall be appointed by the UCCI President

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<sup>46</sup> CMS Guide to Arbitration, vol II, appendix 2.1.

<sup>47</sup> CMS Guide to Arbitration, vol II, appendix 1.1.

<sup>48</sup> If the party seeking to enforce the arbitration agreement does so before submitting its first statement to the court on the substance of the dispute.

<sup>49</sup> Ukrainian Arbitration Act, ch 2, art 8(1).

<sup>50</sup> See further at section 7.5.

<sup>51</sup> Ukrainian Arbitration Act, ch 2, art 8(2).

<sup>52</sup> *Ibid*, ch 3, art 10.

<sup>53</sup> ICAC Rules, ch 3, s 4, art 27(2).

upon the request of either of the parties.<sup>54</sup> The UCCI President's decision is binding on the parties and may not be appealed or cancelled.<sup>55</sup>

## 4.2 The challenge and substitution of arbitrators

### *Challenge of arbitrators*

- 4.2.1 An arbitrator may only be challenged if he or she lacks the qualifications required by the parties in their arbitration agreement or if the parties establish the existence of facts giving rise to justifiable doubts as to his or her impartiality or independence.<sup>56</sup>
- 4.2.2 To limit the need for future challenges, the Ukrainian Arbitration Act requires an arbitrator, prior to his or her appointment, to disclose any circumstances, which could give rise to reasonable doubts as to his or her impartiality and independence.<sup>57</sup> This duty of disclosure is a continuing duty with the consequence that arbitrators must disclose any circumstances that arise during the course of the arbitral proceedings that could bring their impartiality or independence into doubt.

### *Procedure for challenging an arbitrator*

- 4.2.3 Each of the parties may challenge the arbitrator(s) within 15 days from the date on which they are notified of the constitution of the arbitral tribunal or from the date on which they become aware of the circumstances allegedly giving rise to doubts as to the arbitrator's impartiality or independence.<sup>58</sup> If the arbitral tribunal rejects the challenge, the challenging party may, within 30 days of receipt of the rejection of the challenge, request the UCCI President to rule on the challenge.<sup>59</sup> The UCCI President's decision on challenges is final (i.e. it is not subject to appeal).
- 4.2.4 There is no clear guidance as to whether the arbitral tribunal and the UCCI President should apply the "appearance of bias" test or the "actual bias" test when ruling on challenges to arbitrators.

### *Substitution of arbitrators*

- 4.2.5 An arbitrator may also resign, die, or have his or her mandate terminated in circumstances where he or she is *de jure* or *de facto* incapable of performing his or her functions. In such cases, a substitute arbitrator will be appointed in accordance with the same procedure as that set out in paragraph 4.1.1 above.<sup>60</sup>

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<sup>54</sup> Ukrainian Arbitration Act, ch 3, art 11(3).

<sup>55</sup> *Ibid.*, ch 3, art 11(5).

<sup>56</sup> *Ibid.*, ch 3, art 12(2).

<sup>57</sup> *Ibid.*, ch 3, art 12(1).

<sup>58</sup> *Ibid.*, ch 3, art 13(2).

<sup>59</sup> *Ibid.*, ch 3, art 13(3).

<sup>60</sup> *Ibid.*, ch 3, art 15.

### **4.3 Responsibility of the arbitrators**

4.3.1 Arbitrators derive their authority from an arbitration agreement, which is entered into by the parties pursuant to the principle of party autonomy incorporated in Ukrainian legislation. The Ukrainian Arbitration Act and the ICAC Rules are silent on the responsibility of arbitrators. The Law on Domestic Arbitration only provides that arbitrators may be held responsible for not complying with the obligations of the arbitrator in accordance with the applicable rules or the contract entered into between the parties and arbitrators.

4.3.2 In July 2011, a new anti-corruption law introduced criminal liability for arbitrators as well as for parties.<sup>61</sup> Arbitrators may now be held liable for abuse of their powers,<sup>62</sup> excess of powers,<sup>63</sup> issuing false documents or misrepresentation in such documents,<sup>64</sup> gross negligence,<sup>65</sup> extortion of a bribe,<sup>66</sup> unlawful enrichment<sup>67</sup> and taking bribes.<sup>68</sup> Under the new law, parties may also be prosecuted for bribing an arbitrator.<sup>69</sup> Legal entities may not be held liable for criminal offences. Instead, an individual actually giving a bribe on behalf of a legal entity can be prosecuted.

### **4.4 Arbitration fees**

4.4.1 The Ukrainian Arbitration Act is silent on the fees and expenses of arbitrators. However, under the ICAC Rules, the claimant shall pay registration and arbitration fees.<sup>70</sup>

4.4.2 In ad hoc arbitrations, the arbitrators' fees and expenses are subject to the parties' and the arbitrators' mutual consent.

### **4.5 Arbitrator immunity**

4.5.1 Ukrainian legislation currently does not provide for arbitrator immunity.

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<sup>61</sup> The Law of Ukraine on Prevention and Combating Corruption, Law No 3206-VI, 7 April 2011.

<sup>62</sup> Penal Code of Ukraine, No 2341-III, 05 April 2001 (**Penal Code**), s XVII, ch 2, art 364.

<sup>63</sup> *Ibid.*, ch 2, art 365.

<sup>64</sup> *Ibid.*, ch 2, art 366.

<sup>65</sup> *Ibid.*, ch 2, art 367.

<sup>66</sup> *Ibid.*, ch 2, art 370.

<sup>67</sup> *Ibid.*, ch 2, art 368-2.

<sup>68</sup> *Ibid.*, ch 2, art 368.

<sup>69</sup> *Ibid.*, ch 2, art 369.

<sup>70</sup> ICAC Rules, ch 3, s 1, art 16(1).

## 5. Jurisdiction of the arbitral tribunal

### 5.1 Competence to rule on jurisdiction

5.1.1 Article 16 of the Ukrainian Arbitration Act, based on the Model Law (1985),<sup>71</sup> provides that the arbitral tribunal is competent to rule on its own jurisdiction (including on the existence or validity of the arbitration agreement).<sup>72</sup> Procedurally, any challenge to the jurisdiction of the arbitral tribunal must be made to the arbitral tribunal no later than the filing of the statement of defence.<sup>73</sup> Similarly, any objection that the arbitral tribunal acted in excess of its jurisdiction should be raised as soon as the facts underpinning such an objection arise in the course of the arbitral proceedings.<sup>74</sup>

5.1.2 The arbitral tribunal may rule on the challenge to its jurisdiction either as a preliminary issue (by rendering an interim order on jurisdiction) or as part of its final award. If the arbitral tribunal determines the issue of jurisdiction by way of an interim order, either party may challenge such order before the competent national court, within 30 days of receipt of the interim order.<sup>75</sup> The decision of the national court is not subject to any further appeal. Pending the outcome of the application to the national court, the arbitral tribunal may continue the arbitral proceedings and issue an award, which may subsequently be set aside if the court finds that the arbitral tribunal lacked or exceeded its jurisdiction.<sup>76</sup>

### 5.2 Power to order interim measures

5.2.1 The Ukrainian Arbitration Act, the ICAC Rules and the MAC Rules permit arbitrators to grant interim measures at a party's request.<sup>77</sup> Such interim measures may be obtained at any stage of the arbitral proceedings, as well as before proceedings commence. For example, the ICAC President or the MAC President are authorised to grant interim measures on the party's request even before the arbitral tribunal is constituted.<sup>78</sup> After the constitution of the arbitral tribunal, the arbitral tribunal may grant interim measures. The ICAC Rules provide that an award on security for costs is binding on the parties and remains in force until the end of the arbitral

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<sup>71</sup> Model Law (1985), ch 4, art 16 (see CMS Guide to Arbitration, vol II, appendix 2.1).

<sup>72</sup> Ukrainian Arbitration Act, ch 4, art 16.

<sup>73</sup> *Ibid.*, ch 4, art 16(2).

<sup>74</sup> *Ibid.*, ch 4, art 16(2).

<sup>75</sup> *Ibid.*, ch 4, art 16(3).

<sup>76</sup> *Ibid.*, ch 4, art 16(3).

<sup>77</sup> Ukrainian Arbitration Act, ch 4, art 17; ICAC Rules, ch 1, art 4; and MAC Rules, ch 1, art 1.9.

<sup>78</sup> ICAC Rules, ch 1, art 4 and MAC Rules, ch 1, art 1.9.

proceedings.<sup>79</sup> However, interim measures are difficult to enforce, not least because there is no provision under Ukrainian law entitling parties to apply to local courts to enforce such measures.<sup>80</sup>

- 5.2.2 Interim measures can take many forms, including, asset freezing orders, anti-suit injunctions and orders for disclosure of documents.<sup>81</sup> The MAC President can even grant interim measures in the form of attachment orders against ships or cargo currently located in a Ukrainian port.<sup>82</sup>

## 6. Conduct of proceedings

### 6.1 Commencement of arbitration

- 6.1.1 According to the Ukrainian Arbitration Act, arbitral proceedings (whether institutional or ad hoc) are deemed to commence on the date when the request to submit a particular dispute to arbitration has been received by the respondent.<sup>83</sup> However, the ICAC Rules stipulate that the arbitral proceedings are not deemed to have commenced until the claim has been filed with the ICAC and the registration fee has been paid.<sup>84</sup>

### 6.2 General procedural principles

- 6.2.1 The main principles of the Ukrainian arbitration legislation are as follows:
- independence and impartiality of the arbitrators;
  - equal rights of the parties to participate in the arbitral proceedings and to provide the arbitral tribunal with their evidence; and
  - party autonomy.
- 6.2.2 The arbitral tribunal is entitled to conduct the arbitral proceedings in the manner that it deems appropriate, unless the parties have determined the procedure for the arbitration.<sup>85</sup>

### 6.3 Seat and language of arbitration

- 6.3.1 Unless otherwise agreed by the parties, the seat of the arbitration is determined by the arbitral tribunal taking into account the circumstances of the case and the

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<sup>79</sup> *Ibid.*, ch 1, s 2, art 4(2).

<sup>80</sup> See further at section 8.4 below.

<sup>81</sup> CoPC, art 67.

<sup>82</sup> Code of Merchant Navigation, Law No 176/95-BP, 23 May 1995, ch 4, arts 41–42.

<sup>83</sup> Ukrainian Arbitration Act, ch 5, art 21.

<sup>84</sup> ICAC Rules, ch 3, s 3, art 21.

<sup>85</sup> Ukrainian Arbitration Act, ch 5, art 19.

interests of the parties.<sup>86</sup> However, it is important to emphasise that the arbitral tribunal is at all times free to meet for consultation among the arbitrators and examine evidence (including witnesses) at a location other than the seat of arbitration.<sup>87</sup>

- 6.3.2 In the absence of agreement between the parties, the arbitral tribunal shall choose the language of the arbitration and impose requirements on the parties relating to the translation of documents relevant to the arbitral proceedings.<sup>88</sup>

#### **6.4 Multi-party issues (intervention and joinder)**

- 6.4.1 The Ukrainian Arbitration Act is silent on multi-party arbitral proceedings. The ICAC Rules contain a small number of provisions to regulate such arbitral proceedings.<sup>89</sup>

- 6.4.2 The consolidation of arbitral proceedings is not addressed in either the Ukrainian Arbitration Act or the ICAC Rules. In multi-claim arbitral proceedings, the ICAC Rules provide that where a statement of claim contains claims arising out of several contracts, it shall be accepted for arbitration provided that there is an arbitration agreement covering all such claims and that the fulfillment of obligations under these contracts cannot be separated under several claims.<sup>90</sup> Where these prerequisites are not met, the ICAC will propose that the claimant separates his claims and submits independent statements of claim under each contract.

- 6.4.3 Furthermore, it is worth noting that the intervention of a third party is allowed, subject to the parties' written consent.<sup>91</sup> The parties may apply for joining a third party only before the statement of defence is submitted to the arbitral tribunal.<sup>92</sup>

#### **6.5 Oral hearings and written proceedings**

- 6.5.1 Where the parties have not explicitly decided on the issue of an oral hearing, the decision is made by the arbitral tribunal, subject to a request of one of the parties.<sup>93</sup> If the parties have not agreed to an oral hearing and no request is made to the

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<sup>86</sup> Ukrainian Arbitration Act, ch 5, art 20(1).

<sup>87</sup> *Ibid.*, ch 5, art 20(2).

<sup>88</sup> *Ibid.*, ch 5, art 22.

<sup>89</sup> For example, multiple claimants or multiple respondents shall jointly nominate an arbitrator. A 30-day period is provided to agree on the respective candidate. In the case of a failure to appoint, the default procedure for appointment will apply. ICAC Rules, ch 3, s 4, art 27(3).

<sup>90</sup> ICAC Rules, ch 3, s 2, art 19(2).

<sup>91</sup> *Ibid.*, ch 3, s 6, art 43.

<sup>92</sup> *Ibid.*, ch 3, s 6, art 43.

<sup>93</sup> Ukrainian Arbitration Act, ch 5, art 24(1).

arbitral tribunal, the arbitral tribunal may decide whether to have an oral hearing for the parties to present their evidence and pleadings, or to decide the case based on the written evidence and other materials submitted by the parties.<sup>94</sup>

- 6.5.2 The Ukrainian Arbitration Act states that all declarations, documents and other information to be submitted to the arbitral tribunal shall be delivered simultaneously to the other party. Both parties shall also receive any other expert reports, opinions or other documents which may be decisive for the arbitral tribunal.<sup>95</sup>
- 6.5.3 The format and content of the parties' submissions to the arbitral institutions, as well as the timetable for filing such submissions, shall be determined by the respective rules. For example, the ICAC Rules require all documents and other evidence to be submitted in no less than three copies.<sup>96</sup> The ICAC Secretariat is responsible for dispatching all the documents in a timely manner.<sup>97</sup> Copies of the statement of claim or the statement of defence and other important documents may be delivered or handed to the parties against receipt of delivery.<sup>98</sup>
- 6.5.4 The Ukrainian Arbitration Act also allows the parties (subject to their consent) to change or amend their statements of case during the course of the arbitral proceedings unless the arbitral tribunal considers such changes or amendments to be late.<sup>99</sup>

## 6.6 Default by one of the parties

- 6.6.1 Unless otherwise agreed by the parties and in line with the Model Law (1985),<sup>100</sup> the Ukrainian Arbitration Act provides for the following:
- where the claimant fails to communicate his statement of claim (with sufficient detail as required by the Ukrainian Arbitration Act),<sup>101</sup> the arbitral tribunal shall terminate the arbitral proceedings;
  - where the respondent fails to communicate his statement of defence (with sufficient detail as required by the Ukrainian Arbitration Act),<sup>102</sup> the arbitral tribunal shall continue the proceedings without treating such failure in itself as an admission of the claimant's allegations; or

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<sup>94</sup> Ukrainian Arbitration Act, ch 5, art 24(1).

<sup>95</sup> *Ibid*, ch 5, art 24(3).

<sup>96</sup> ICAC Rules, ch 3, s 1, art 15(1).

<sup>97</sup> *Ibid*, ch 3, s 1, art 15(3).

<sup>98</sup> *Ibid*, ch 3, s 1, art 15(4).

<sup>99</sup> Ukrainian Arbitration Act, ch 5, art 23(2).

<sup>100</sup> CMS Guide to Arbitration, vol II, appendix 2.1.

<sup>101</sup> Ukrainian Arbitration Act, ch 5, art 23(1).

<sup>102</sup> *Ibid*, ch 5, art 23(1).

— where any party fails to appear at a hearing or to produce documentary evidence, the arbitral tribunal may continue the arbitral proceedings and make the award on the evidence before it.<sup>103</sup>

## 6.7 Evidence generally

6.7.1 The Ukrainian Arbitration Act contains only limited provisions on the submission of evidence.<sup>104</sup> Each party has the burden of adducing evidence sufficient to prove the facts upon which it seeks to rely in support of its claims or defences. As under the Model Law (1985),<sup>105</sup> the Ukrainian Arbitration Act requires that any information provided by one party to the arbitral tribunal shall be shared with all other parties to the arbitral proceedings.<sup>106</sup>

## 6.8 Appointment of experts

6.8.1 The arbitral tribunal is entitled to appoint an expert to report on specific issues.<sup>107</sup> The arbitral tribunal may at its discretion or at the request of either of the parties, order an expert to examine certain goods or documents.<sup>108</sup> The tribunal-appointed expert does not need to be a certified expert according to Ukrainian Law “On Forensic Expertise”.<sup>109</sup>

6.8.2 The parties may also submit to the arbitral tribunal reports prepared by party-appointed experts in support of their claims or defences. The arbitral tribunal is free to determine the weight that it wishes to attach to any evidence submitted by the parties.<sup>110</sup>

6.8.3 The parties may at their discretion choose an expert to deliver an expert opinion that will be submitted to the arbitral tribunal as evidence. The arbitral tribunal usually requests the party-appointed expert to provide its written opinion in advance. Unless otherwise agreed by the parties, if a party requests, or if the arbitral tribunal considers it necessary, a tribunal-appointed expert shall, after delivery of his or her written or oral report, participate in a hearing where the parties have the opportunity to examine him or her and to present party appointed expert witnesses in order to testify on the points at issue.<sup>111</sup>

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<sup>103</sup> *Ibid*, ch 5, art 25.

<sup>104</sup> *Ibid*, ch 3, art 27.

<sup>105</sup> CMS Guide to Arbitration, vol II, appendix 2.1.

<sup>106</sup> Ukrainian Arbitration Act, ch 5, art 24(3).

<sup>107</sup> *Ibid*, ch 5, art 26.

<sup>108</sup> *Ibid*.

<sup>109</sup> Law No 4038a-XII, 25 February 2004.

<sup>110</sup> Ukrainian Arbitration Act, ch 5, art 19(2).

<sup>111</sup> *Ibid*, ch 5, art 26(2).

- 6.8.4 The ICAC Rules state that the arbitrators are free to decide on the admissibility of any evidence, including that of expert witnesses. The arbitral tribunal shall assess the evidence according to its sole discretion.<sup>112</sup>
- 6.8.5 Unless the parties have agreed otherwise, it is within the arbitral tribunal's powers to define the questions that will need to be reported upon by an arbitral tribunal-appointed expert.<sup>113</sup> Any reports prepared by tribunal-appointed experts shall be transmitted to the parties.<sup>114</sup>
- 6.8.6 Any expert (whether party or tribunal-appointed) may be challenged by a party on the same grounds as an arbitrator (i.e. if circumstances exist that give rise to justifiable doubts as to his or her impartiality or independence, or if he or she does not possess qualifications agreed by the parties).

## **6.9 Confidentiality**

- 6.9.1 The Ukrainian Arbitration Act does not address the issue of confidentiality. However, the arbitral proceedings are considered confidential in Ukraine and awards are not published. The ICAC Rules state that the ICAC President, his or her deputies, arbitrators and the ICAC Secretariat are bound by the duty of confidentiality relating to information that they have become aware of in the course of the arbitration.<sup>115</sup> Parties to arbitration are not mentioned in the above list. Therefore, it is advisable for the parties to include provisions on confidentiality into the arbitration agreement where Ukrainian law governs the arbitration. ICAC can publish summaries and excerpts from awards but in these instances all information regarding the parties is excluded.
- 6.9.2 Arbitral proceedings in Ukraine are not subject to privilege. In cases where a party to arbitration is represented by a lawyer admitted to the bar, communications and relations between a client and an attorney-at-law are subject to legal privilege. However, admission to the bar is voluntary in Ukraine and many practicing lawyers are not admitted.

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<sup>112</sup> ICAC Rules, ch 3, s 6, art 42(5).

<sup>113</sup> Ukrainian Arbitration Act, ch 5, art 26(1) and ICAC Rules, ch 3, s 6, art 44.

<sup>114</sup> Ukrainian Arbitration Act, ch 5, art 24 (3) and ICAC Rules, ch 3, s 1, art 15(2).

<sup>115</sup> ICAC Rules, ch 3, s 1, art 12.

## 7. Making of the award and termination of proceedings

### 7.1 Choice of law

7.1.1 The arbitral tribunal must resolve the dispute in accordance with the law chosen by the parties. Unless otherwise agreed, the parties' agreement on the governing law refers only to the substantive law of the chosen country and not to its conflict of laws rules.<sup>116</sup> In the absence of agreement between the parties on the governing law, the arbitral tribunal shall apply the law determined by the conflict of laws rules that it considers to be appropriate.<sup>117</sup>

### 7.2 Timing, form, content and notification of award

7.2.1 The Ukrainian Arbitration Act provides that an award must comply with the following formal requirements:

- (i) it shall be made in writing and shall be signed by the arbitrator(s); and
- (ii) it shall contain the date and seat of the arbitration, the reasons upon which it is based, the arbitral tribunal's findings on the issues submitted for consideration and the allocation of costs between the parties.<sup>118</sup>

7.2.2 The ICAC Rules additionally require that the award should contain:

- (i) the name of the ICAC;
- (ii) case registration number;
- (iii) full names of the arbitrators;
- (iv) names of the parties in dispute and other persons participating in the arbitral proceedings;
- (v) subject matter of the dispute and a summary of the circumstances of the case; and
- (vi) conclusion on the granting or dismissal of the claim.<sup>119</sup>

7.2.3 Dissenting opinions of arbitrators may be set forth in awards or in a separate document.<sup>120</sup> After the award has been made, each party should receive a copy of the award signed by the arbitrator (if the dispute has been resolved by a sole arbitrator) or by the majority of arbitrators (if the arbitral tribunal consists of three members).<sup>121</sup> The reasons for the absence of any signatures should be indicated in the award.<sup>122</sup>

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<sup>116</sup> Ukrainian Arbitration Act, ch 6, art 28(1).

<sup>117</sup> *Ibid*, ch 6, art 28(2).

<sup>118</sup> *Ibid*, ch 6, art 31(2).

<sup>119</sup> ICAC Rules, ch 3, s 7, art 49(4).

<sup>120</sup> *Ibid*, ch 3, s 7, art 49(3).

<sup>121</sup> Ukrainian Arbitration Act, ch 6, art 31(4).

<sup>122</sup> *Ibid*, ch 6, art 31(1).

7.2.4 The ICAC Rules provide that after rendering an award, the arbitral tribunal should announce the operative part (i.e. disposition) of the award to the representatives of the parties.<sup>123</sup> The ICAC Secretariat should forward a reasoned award to the parties within 15 days from the date that the disposition is announced to parties. In exceptional circumstances the ICAC President may extend the term by ten days.<sup>124</sup>

7.2.5 In cases of particular complexity, an ICAC arbitral tribunal may, after the oral hearing is finished, decide that the award will be forwarded to the parties without the announcement of the operative part (i.e. disposition) of the award within a period not exceeding 20 days.<sup>125</sup>

### **7.3 Settlement**

7.3.1 The parties are free to settle their dispute during the course of arbitral proceedings. A settlement by the parties will result in the termination of the arbitral proceedings.<sup>126</sup> In the event that the parties do not wish to record their settlement in the form of an award, they may notify the arbitral tribunal that they have reached the settlement and request that the arbitral tribunal terminates the arbitral proceedings.

7.3.2 The arbitral tribunal may, at the request of the parties, record such a settlement in the form of an award on the agreed terms.<sup>127</sup> Such an award shall indicate that it is an award. This award will be subject to the same requirements – and will have the same status and effect – as any other award rendered by the arbitral tribunal.<sup>128</sup>

### **7.4 Power to award interest and costs**

#### *Interest*

7.4.1 Arbitral tribunals are empowered to award interest upon the claimant's request. Such interest is normally determined in accordance with the law applicable to the dispute at hand. Ukrainian law also permits awarding liquidated damages according to the rates (if any) stipulated in the contract between the parties.<sup>129</sup> However, Ukrainian legislation prohibits ordering penalties exceeding double the discount rate of the National Bank of Ukraine for the relevant period, unless

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<sup>123</sup> ICAC Rules, ch 3, s 7, art 52(1).

<sup>124</sup> *Ibid*, ch 3, s 7, art 52(2).

<sup>125</sup> *Ibid*, ch 3, s 7, art 52(3).

<sup>126</sup> Ukrainian Arbitration Act, ch 6, art 30(1).

<sup>127</sup> *Ibid*, ch 6, art 30(1).

<sup>128</sup> *Ibid*, ch 6, art 30(2).

<sup>129</sup> Commercial Code, ch 35, art 343.

otherwise agreed by parties to a contract.<sup>130</sup> It is unclear whether the “double discount rate” rule also applies to contracts that are governed by foreign law.

#### Costs

7.4.2 The Ukrainian Arbitration Act does not address the allocation of costs of the arbitration between the parties. This matter is left to either the agreement of the parties or in case there is no such agreement to the discretion of the arbitral tribunal.<sup>131</sup>

7.4.3 The ICAC Rules provide that all the costs and fees shall be reimbursed by the unsuccessful party to the successful one, unless otherwise agreed by the parties.<sup>132</sup>

### 7.5 Termination of the proceedings

7.5.1 Arbitral proceedings may result either in termination or in a final award. The Ukrainian Arbitration Act provides that the arbitral tribunal may terminate the proceedings where:

- (i) the claimant withdraws its claim and the respondent does not object thereto or the arbitral tribunal does not recognise such objections to be reasonable;
- (ii) the parties agree to terminate the proceedings; or
- (iii) for any other reason, the arbitral tribunal considers that continuation of the proceedings would be unnecessary or impossible.<sup>133</sup>

### 7.6 Effect of the award

7.6.1 The award is considered to be final and binding upon the parties. The award is not subject to ordinary appeal on the issues of law or fact.<sup>134</sup> However, the effect of an award on the same disputes involving the same parties, in particular, the *res judicata*, remains debated.

7.6.2 The *res judicata* effect of an award under Ukrainian law is that a commercial court shall terminate court proceedings if the award has been rendered in a case between the same parties, on the same issue and arising out of the same grounds.<sup>135</sup>

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<sup>130</sup> *Ibid*, ch 26, art 231.

<sup>131</sup> Ukrainian Arbitration Act, ch 6, art 31(2).

<sup>132</sup> ICAC Rules, Schedule on Arbitration Fees and Costs, s 6.

<sup>133</sup> Ukrainian Arbitration Act, ch 6, art 32(2).

<sup>134</sup> However, it may be set aside by the local courts on certain limited grounds. See further at section 9.3 below.

<sup>135</sup> CoPC, s XI, art 80.

7.6.3 Where at least one of the parties is an individual the case falls to be heard by the general (civil) courts. In contrast with commercial courts, the civil courts apply different provisions with respect to *res judicata* which only refer to decisions of “arbitration courts”.<sup>136</sup> This will most likely be considered to refer only to domestic arbitration courts, as Ukraine has two different legal frameworks for international and domestic arbitration. Ukraine’s higher courts have yet to clarify this issue so no guidance can be drawn from available court practice now. Therefore, whether court proceedings before the general (civil) court are to be terminated in cases where an award is in place will depend on the judge hearing the particular case.

7.6.4 Thus, facts established in an award may be recognised as *res judicata* only by the commercial court. The CoPC excludes only domestic arbitration courts in this respect and, implicitly, allows recognition as *res judicata* of facts established in a foreign award.<sup>137</sup> By contrast, the CPC is silent with respect to this and it only stipulates that civil courts extend the *res judicata* effect to the facts established by courts of law only.<sup>138</sup>

## **7.7 Correction, clarification and issue of a supplemental award**

7.7.1 The Ukrainian Arbitration Act allows an arbitral tribunal (on a party’s request or on its own initiative) to correct any errors (misprints, errors of calculations, etc) in the award.<sup>139</sup> The parties have 30 days to apply for such corrections from the date the award has been received by the parties.<sup>140</sup> The arbitral tribunal may also clarify anything that is unclear in the award (subject to the parties’ consent). Such corrections or clarifications shall become integral parts of the award.<sup>141</sup>

7.7.2 The parties may also request the arbitral tribunal to make an additional award. Such awards may cover issues that were submitted to the arbitral tribunal for consideration but were not resolved in the “main” award. If such requests are considered by the arbitral tribunal to be proper, it has a further 60 days to make an additional award.<sup>142</sup>

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<sup>136</sup> CPC, s V, ch 6, art 205.

<sup>137</sup> CoPC, s V, art 35.

<sup>138</sup> CPC, s I, ch 5, art 61.

<sup>139</sup> Ukrainian Arbitration Act, ch 6, art 33.

<sup>140</sup> *Ibid*, ch 6, art 33(1).

<sup>141</sup> *Ibid*, ch 6, art 33(5).

<sup>142</sup> *Ibid*, ch 6, art 33(3).

## 8. Role of the courts

### 8.1 Jurisdiction of the courts

8.1.1 The Ukrainian Arbitration Act prohibits national courts from intervening in arbitral proceedings except in the circumstances expressly prescribed by the Ukrainian Arbitration Act.<sup>143</sup> The circumstances in which national courts are entitled to intervene include:

- (i) ruling on the jurisdiction of the arbitral tribunal; and
- (ii) ruling on applications to set aside awards.

### 8.2 Termination and stay of court proceedings

8.2.1 In line with the provisions of the Model Law (1985)<sup>144</sup> and the New York Convention,<sup>145</sup> Article 8 of the Ukrainian Arbitration Act provides that the court shall terminate its proceedings as soon as it becomes aware<sup>146</sup> of the existence of a binding arbitration agreement.<sup>147</sup> However, if both parties waive their right to arbitration, the court may proceed to hear the case on the merits.

8.2.2 The court will also have jurisdiction to hear a case if it establishes that, under Ukrainian law, the case is non-arbitrable or that the arbitration agreement is invalid, inoperative or incapable of being performed.<sup>148</sup> The Higher Commercial Court has provided guidance to the commercial courts on how the Ukrainian Arbitration Act must be construed and applied by Ukrainian courts.<sup>149</sup> According to the Higher Commercial Court, the decision to terminate proceedings due to an arbitration clause must be taken by a court following a full hearing on the issue of the validity of an arbitration agreement. Therefore, Ukrainian courts, unlike other less intervening jurisdictions, are not required to give any deference to an arbitral tribunal's competence to rule on their own jurisdiction (*competence-competence*). It follows that regardless of the determination of the issue of enforceability, validity or effect of an arbitration clause by the arbitral tribunal in question, the court seized to rule on the same issues will do so independently.

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<sup>143</sup> *Ibid*, ch 1, art 5.

<sup>144</sup> CMS Guide to Arbitration, vol II, appendix 2.1.

<sup>145</sup> CMS Guide to Arbitration, vol II, appendix 1.1.

<sup>146</sup> The court will become so aware if an application contesting the court's jurisdiction is made by the respondent. The application should be made no later than the submission of the statement of defence.

<sup>147</sup> Ukrainian Arbitration Act, ch 2, art 8(1).

<sup>148</sup> *Ibid*, ch 2, art 8(1).

<sup>149</sup> Higher Commercial Court, Informational Letter "On certain questions posed in commercial courts activities reports for the second half of 2008 in relation to the application of Commercial Procedure Code", Letter No 01-08/163, 12 March 2009.

- 8.2.3 The legal effect of the termination of the court proceedings is that the claimant is precluded from filing the same claim with Ukrainian courts.<sup>150</sup>
- 8.2.4 The stay of court proceedings in favour of the ongoing arbitral proceedings is provided for in the 1961 European Convention.<sup>151</sup> In particular, it provides that if the court proceedings challenging the existence, validity or scope of the arbitration agreement were issued after the commencement of arbitral proceedings, the court must stay such proceedings until the arbitrators have ruled upon their own jurisdiction.<sup>152</sup> If the arbitral tribunal decides that it has jurisdiction, the court must decline jurisdiction. That said, the parties may later challenge the arbitral tribunal's assumption of jurisdiction by applying to the court to set aside the arbitral tribunal's award for lack of jurisdiction.<sup>153</sup> If the 1961 European Convention applies to the arbitration agreement,<sup>154</sup> the Ukrainian court will be precluded from deciding upon the validity, enforceability or effect of an arbitration clause and will stay the proceedings.

### **8.3 Preliminary rulings on jurisdiction**

- 8.3.1 The Ukrainian Arbitration Act provides that local civil courts in the seat of arbitration are vested with the power to assist in international arbitrations.<sup>155</sup> In particular, local civil courts are authorised to rule on the jurisdiction of the arbitral tribunal as contemplated by the Ukrainian Arbitration Act. The Ukrainian Arbitration Act provides that both parties to arbitral proceedings may challenge the ruling of the arbitral tribunal on its jurisdiction within 30 days from the date when the parties have learned about such ruling.<sup>156</sup>
- 8.3.2 In addition, Ukrainian legislation does not provide for declaratory judgments in aid of international arbitration.

### **8.4 Interim protective measures**

- 8.4.1 While the Ukrainian Arbitration Act permits arbitrators to grant interim measures at a party's request, the Ukrainian rules of procedure in both the CPC and CoPC fall short of any provisions to implement this part of the Ukrainian Arbitration Act.

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<sup>150</sup> CoPC, s XI, art 80.

<sup>151</sup> 1961 European Convention, art 6(3).

<sup>152</sup> *Ibid.*

<sup>153</sup> Further details are set out at section 9.1 below.

<sup>154</sup> The 1961 European Convention applies to arbitration agreements when both parties thereto have their habitual place of residence or their seat in different Contracting States.

<sup>155</sup> Ukrainian Arbitration Act, ch 1, art 6(2).

<sup>156</sup> *Ibid.*, ch 4, art 16(3).

The Ukrainian law does not have a discrete procedure for issuing interim injunctions. Injunctive relief may only be sought and obtained when a suit is filed with a court in Ukraine. Thus, no powers to grant interim measures in furtherance of arbitration are vested in Ukrainian courts.

- 8.4.2 The absence of an appropriate procedural framework for Ukrainian courts renders meaningless the Ukrainian Arbitration Act provisions on interim measures in support of foreign and Ukrainian arbitrations.<sup>157</sup> In particular, in accordance with the Ukrainian Arbitration Act, the local courts are authorised to enforce the interim conservatory measures granted by an arbitral tribunal.<sup>158</sup> However, neither CPC nor CoPC provide for a power of a court in Ukraine to endorse conservatory measures granted by an arbitral tribunal. Without the “blessing” of a Ukrainian court conservatory measures ordered by a tribunal will not be enforceable (i.e. bailiffs will not look for or arrest the assets as would be the case with a court injunction).
- 8.4.3 The CPC has recently been amended<sup>159</sup> to provide for interim measures in the course of recognition and enforcement proceedings with respect to foreign awards. Thus, an award creditor requesting a state court to enforce an award may apply for interim measures.<sup>160</sup> Interim measures may be granted by a state court at any time during consideration of the enforcement application provided that the absence of certain interim measures of protection may significantly complicate future enforcement or make it impossible.<sup>161</sup>

## 8.5 Obtaining evidence and other court assistance

- 8.5.1 The Ukrainian Arbitration Act provides that the arbitral tribunal or a party to an arbitration with the permission of the arbitral tribunal may address a competent court of Ukraine with a request for assistance in collecting evidence.<sup>162</sup> Similar provisions are provided for by the ICAC Rules.<sup>163</sup> However, as in the case of interim relief, Ukrainian procedural law fails to implement effectively this provision of the Ukrainian Arbitration Act into the general legislation. Thus, the assistance of Ukrainian courts in collecting evidence in support of the arbitral proceedings is not available.

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<sup>157</sup> *Ibid*, ch 2, art 9.

<sup>158</sup> *Ibid*, ch 2, art 9.

<sup>159</sup> Law No 3776-IV, 22 September 2011, art 1.

<sup>160</sup> CPC, s VIII, ch 1, art 394.

<sup>161</sup> CPC, s III, ch 3, art 151(3).

<sup>162</sup> Ukrainian Arbitration Act, ch 5, art 27.

<sup>163</sup> ICAC Rules, ch 3, s 6, art 42(4).

## 9. Challenging an award through the courts

### 9.1 Jurisdiction of the courts

9.1.1 Since 29 September 2005, all awards rendered by an arbitral tribunal constituted under the auspices of the ICAC or MAC may be challenged before the Shevchenkivsky District Court of the City of Kyiv.<sup>164</sup> There are no provisions in the Ukrainian Arbitration Act which allow an appeal of awards on their merits. A challenge against an award may be made only by initiating proceedings to set aside the award before a competent court.

9.1.2 Awards issued by other arbitral tribunals may be challenged to a local court at the seat of the arbitration.<sup>165</sup> Since there are no arbitral institutions in Ukraine other than ICAC and MAC, and no awards of ad hoc arbitral tribunals are reported to have been challenged to date, no other courts have entertained challenges to awards.

### 9.2 Appeals

9.2.1 Although awards are not subject to appeal, court decisions to set aside an award can be challenged in higher courts. For example, a decision of the Shevchenkivsky District Court can be appealed to the Kyiv Court of Appeal, Higher Specialised Court for Civil and Criminal Cases and to the Supreme Court of Ukraine.<sup>166</sup> Needless to say, the existence of these various venues of appeal can result in substantial delays in the enforcement of awards.

### 9.3 Applications to set aside an international award

9.3.1 The Ukrainian Arbitration Act contains an exhaustive list of the grounds for setting aside an award, which mirrors the grounds contained in the Model Law (1985),<sup>167</sup> namely:

- (i) if the party making the application furnishes proof that:
  - a party to the arbitration agreement was under some incapacity; or the arbitration agreement is not valid under the law to which the parties have subjected it or, failing any indication of the law, under Ukrainian law;
  - the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings, or was otherwise unable to present its case;

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<sup>164</sup> ICAC Rules, ch 1, s 2, art 3.

<sup>165</sup> Ukrainian Arbitration Act, ch 1, art 6(2).

<sup>166</sup> For discretionary review on limited grounds.

<sup>167</sup> CMS Guide to Arbitration, vol II, appendix 2.1.

- the award deals with a dispute that was not contemplated by – or not falling within – the terms of the submission to arbitration, or contains decisions on matters beyond the scope of the submission to arbitration. However, if the decisions on matters submitted to arbitration can be separated from those not so submitted, only that part of the award which contains decisions on matters not submitted to arbitration may be set aside; or
  - the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with mandatory provision of the Ukrainian Arbitration Act or, failing such agreement, does not accord with the Ukrainian Arbitration Act; or
- (ii) if the court finds that:
- the subject matter of the dispute is not capable of settlement by arbitration under Ukrainian law; or
  - the award is in conflict with Ukrainian public policy.<sup>168</sup>

9.3.2 In practice, one of the popular grounds for challenging awards is that the recognition and enforcement of the award is contrary to Ukrainian public policy. This ground is popular in part due to the allegedly broad definition of “public policy” contained in a resolution of the Supreme Court of Ukraine.<sup>169</sup> In some past high-profile cases, the courts were inclined to use this “catch-all” ground to set aside awards that were felt to be contrary to Ukrainian national interests.<sup>170</sup> However, there have not been any recent reported cases that would suggest that the public policy argument has been successful and that this trend is progressing.

9.3.3 The award may be set aside by the court of its own motion or on the application of one of the parties. The application to set aside the award must be submitted to the court within three months of receipt of the award by the challenging party, although this time limit may be extended by the court.<sup>171</sup>

9.3.4 If the award is set aside, the dispute may be resolved by another arbitral tribunal, unless the dispute is considered to be non-arbitrable.

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<sup>168</sup> Ukrainian Arbitration Act, ch 7, art 34.

<sup>169</sup> Resolution of the Plenum of the Supreme Court of Ukraine, Resolution No 12, 24 December 1999.

<sup>170</sup> See ex. Ruling of the Supreme Court No. 6-2941cb05, 13 December 2006.

<sup>171</sup> Ukrainian Arbitration Act, ch 7, art 34(3).

#### 9.4 Application to set aside a domestic award

- 9.4.1 The Law on Domestic Arbitration sets out four grounds upon which a domestic award may be challenged:
- (i) the award deals with a non-arbitrable dispute;
  - (ii) the award is rendered on a dispute that was not covered by the respective arbitration agreement, or on matters beyond the scope of competence of the arbitral tribunal;
  - (iii) the arbitration agreement is considered to be invalid by the competent court; or
  - (iv) the arbitral tribunal was not composed in accordance with the relevant provisions of the Law on Domestic Arbitration.<sup>172</sup>

## 10. Recognition and enforcement of awards

### 10.1 Domestic awards

- 10.1.1 Domestic awards, if not honoured by the parties voluntarily, are enforced on a basis of a writ of execution issued by the local courts. Such enforcement is regulated by the Law on Domestic Arbitration and by the Law of Ukraine “On Enforcement Proceedings” (**Enforcement Law**).<sup>173</sup> According to the Enforcement Law, an award creditor must submit the application with a writ of execution to the state enforcement office at the location of the respondent’s operating office or the place at which the respondent’s property is situated.<sup>174</sup>

### 10.2 Foreign awards

#### *General Overview*

- 10.2.1 Foreign awards in Ukraine may be enforced in Ukraine only after being recognised by the Ukrainian courts pursuant to the New York Convention<sup>175</sup> or any other applicable instrument.<sup>176</sup> In the absence of a treaty providing for recognition and enforcement, foreign awards will be recognised and enforced based on the reciprocity principle.<sup>177</sup> The most important treaty concerning recognition and enforcement of foreign awards is the New York Convention.<sup>178</sup>

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<sup>172</sup> Law No 1701-IV, 11 May 2004, ch 6, art 51.

<sup>173</sup> Law No 606-XIV, 21 April 1999.

<sup>174</sup> Enforcement Law, ch 3, art 19 and 20.

<sup>175</sup> CMS Guide to Arbitration, vol II, appendix 1.1.

<sup>176</sup> CPC, s VIII, ch 1 art 390(1).

<sup>177</sup> Reciprocity is presumed unless proved otherwise by a party contesting enforcement. CPC, s VIII, ch 1, art 390(2).

<sup>178</sup> CMS Guide to Arbitration, vol II, appendix 1.1.

10.2.2 Ukraine is a signatory to the New York Convention.<sup>179</sup> However, it has made a reciprocity reservation to the effect that Ukraine is only obliged to enforce awards originating in countries that have also ratified the New York Convention.<sup>180</sup>

10.2.3 Awards may be submitted to enforcement within three years from the date on which the award became effective, although this term may be extended by the courts “on the basis of valid excuses”.<sup>181</sup>

*Grounds for refusing recognition and enforcement*

10.2.4 The Ukrainian Arbitration Act sets out the grounds upon which a Ukrainian court may refuse recognition and enforcement of a foreign award.<sup>182</sup> In summary, the grounds for refusing recognition and enforcement are the same as those for setting aside an award.<sup>183</sup> However, an additional ground is provided by the Ukrainian Arbitration Act – the Ukrainian courts may refuse recognition and enforcement if the award has not yet become binding on the parties, or if it was annulled or terminated by the courts of the country where, or under which law, it was made.<sup>184</sup>

10.2.5 If an application for setting aside or suspension of an award has been made to a competent court, the court where recognition or enforcement is sought may (if it considers it proper) adjourn its decision. It may also order the other party to provide appropriate security.<sup>185</sup>

*Enforcement procedure*

10.2.6 In Ukraine, foreign awards are enforced under the “partial” control of the courts (i.e. the award is considered to be binding on the parties from the date upon which it is received by the parties, but may be enforced only upon application in writing to the competent court).<sup>186</sup> Decisions of foreign courts shall be recognised and enforced in Ukraine by the general courts of first instance at the place of the respondent’s domicile or – if the respondent has no domicile in Ukraine or his domicile is unknown – at the place in which his property is situated.<sup>187</sup>

<sup>179</sup> *Ibid.*

<sup>180</sup> New York Convention, art 1(3) (see CMS Guide to Arbitration, vol II, appendix 1.1).

<sup>181</sup> CPC, s 1, ch 6, art 73.

<sup>182</sup> Ukrainian Arbitration Act, ch 8, art 36.

<sup>183</sup> As listed at paragraph 9.3.1 above.

<sup>184</sup> Ukrainian Arbitration Act, ch 8, art 36(1)(v).

<sup>185</sup> The court will be able to do so by an application of the party claiming recognition or enforcement of the award. Ukrainian Arbitration Act, ch 8, art 36(2).

<sup>186</sup> Ukrainian Arbitration Act, ch 8, art 35.

<sup>187</sup> *Ibid.*, ch 1, art 6.

- 10.2.7 The decision of the court of first instance may be appealed to the local courts of appeal, to the Higher Specialised Court on Civil and Criminal Cases and to the Supreme Court of Ukraine. The case may be referred back to the court of first instance by the appeal court or the Higher Specialised Court on Civil and Criminal Cases.<sup>188</sup> Such appeals will delay enforcement of the award.
- 10.2.8 When making an application to recognise and enforce an award, a party must submit the following documents:
- (i) a duly certified copy of the award;
  - (ii) an official document certifying that the award has entered into force (if the award itself is silent on this issue);
  - (iii) a document certifying that the party against whom the award was rendered and who did not take part in the arbitral proceedings, was duly notified about the place and time of the hearings;
  - (iv) a document (if any) stating whether enforcement is being sought fully or in part in another country; and
  - (v) if the award is in a language other than Ukrainian or Russian, the party must also produce a translation of such document certified by an official or sworn translator, or by a diplomatic or consular agent.
- 10.2.9 In addition to these documents, the New York Convention<sup>189</sup> also requires parties in the context of a foreign award to produce a copy of the arbitration agreement and a certified Ukrainian translation.<sup>190</sup>
- 10.2.10 If the application is filed by a representative of a party, that representative must file a power of attorney certifying his or her power to represent the party in question.<sup>191</sup>
- 10.2.11 A party seeking to enforce a foreign award in Ukraine may benefit from interim measures that may be granted by a state court considering an application to enforce an award in question.<sup>192</sup>

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<sup>188</sup> CPC, s V, ch 1, art 311(1).

<sup>189</sup> CMS Guide to Arbitration, vol II, appendix 1.1.

<sup>190</sup> New York Convention, art 4(2) (see CMS Guide to Arbitration, vol II, appendix 1.1).

<sup>191</sup> Enforcement Law, ch 2, art 9.

<sup>192</sup> See paragraph 8.4.3 above.

## 11. Special provisions and considerations

### 11.1 Consumer disputes

- 11.1.1 Amendments to the Law on Domestic Arbitration, introduced in early 2011, rendered disputes with respect to the protection of consumers' rights (including consumers of banking services) non-arbitrable. Considering that the Law on Domestic Arbitration governs only domestic arbitration and specifically provides that it does not govern international commercial arbitration, the latter can still be a forum for resolution of consumer disputes.
- 11.1.2 Not long before those amendments were introduced, the Supreme Court of Ukraine clarified that not all the disputes between a consumer and a bank fall within the meaning of a "consumer dispute".<sup>193</sup> The Supreme Court took the view that a dispute can be deemed a consumer dispute in cases where the claim concerns, *inter alia*, providing adequate information to the consumer as to the terms of a loan, types of interest rate, currency risks and procedure of performance of the loan agreement that precedes the signing of the loan agreement. The Supreme Court went on to conclude that after the loan agreement is entered into by the parties, the nature of legal relations between the parties changes as they become involved in credit relations and, therefore, general rules of civil law on loans and credits should apply instead. One may understand this to mean that a debt collection claim filed by the bank does not fall within the meaning of a "consumer dispute".
- 11.1.3 The effect of these recent amendments and clarifications is yet to be seen. It is not yet clear how Ukrainian courts will apply the provisions in question and whether they will follow the logic of the Supreme Court of Ukraine as regards the scope of the term "consumer disputes".

### 11.2 Disputes arising out of corporate governance relations

- 11.2.1 As briefly mentioned in paragraph 3.3.3 above, the CoPC reserves exclusive jurisdiction to the local courts to entertain corporate governance disputes that are defined as disputes arising out of corporate relations between legal entities and their participants. Such disputes can relate to situations where a participant has withdrawn from the company, or can be between participants of legal entities relating to the establishment, activity, management and termination of the legal entity.<sup>194</sup>

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<sup>193</sup> Letter of the Supreme Court of Ukraine, "Summary of court practice in civil cases arising out of loan legal relations with respect to loans (2009–2010)", 7 October 2010.

<sup>194</sup> CoPC, s III, art 14.

11.2.2 The non-arbitrability of corporate governance disputes was first introduced in the recommendations to lower commercial courts issued by the Higher Commercial Court of Ukraine in 2007.<sup>195</sup> It provided that corporate disputes involving Ukrainian companies are non-arbitrable.

11.2.3 Later, the Supreme Court of Ukraine, supporting the overall approach of the Higher Commercial Court, clarified that the term “corporate disputes” should be construed restrictively, as it only encompasses disputes arising out of corporate governance relations and does not include disputes related to shares and purchase of shares in Ukrainian companies.<sup>196</sup> It is likely that any arbitration agreements in respect of corporate governance relations will be considered void by the Ukrainian courts. The enforcement of foreign awards concerning this type of dispute that have been rendered in Ukraine is likely to be denied.

### **11.3 Correct spelling of the arbitration forum’s name in the arbitration agreement**

11.3.1 Pursuant to the provisions the Ukrainian Arbitration Act, a state court before which an action is brought in a matter which is subject to an arbitration agreement may continue the proceedings if it finds that the arbitration agreement in question is null and void, inoperative or incapable of being performed.<sup>197</sup>

11.3.2 The Ukrainian Arbitration Act does not specify under which conditions the arbitration agreement is incapable of being performed. However, this issue has been clarified by the High Commercial Court of Ukraine.<sup>198</sup> According to this clarification, “an arbitration agreement is incapable of being performed where the parties have stipulated the wrong name of the arbitration court or have indicated an arbitral institution that does not exist.”

11.3.3 This view has been confirmed by the Ukrainian courts, which have held on a number of occasions that such pathological arbitration agreements are incapable of being performed and invalidated them, thereby preventing the successful enforcement of foreign awards.<sup>199</sup> This practice has recently shifted to the field of

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<sup>195</sup> Recommendations of the Higher Commercial Court of Ukraine “*On Application of Legislation in Resolving Disputes Arising out of Corporate Relations*”, Recommendation No 04-5/14, 28 December 2007.

<sup>196</sup> Ruling of the Supreme Court “*On the Court Practice of Resolving Corporate Disputes*”, Ruling No 13, 24 October 2008.

<sup>197</sup> Ukrainian Arbitration Act, ch 2, art 8.

<sup>198</sup> Clarification of the High Commercial Court of Ukraine “*On Certain Questions of Practice of Resolving Cases to Which Foreign Companies and Organizations are Parties*”, Clarification No 04-5/608, 31 May 2002.

<sup>199</sup> See Judgment of the Kyiv Oblast Commercial Court, Case No 4/184-09, 29 September 2009.

setting aside of awards. The Supreme Court of Ukraine<sup>200</sup> upheld the decisions setting aside the award made on grounds that the parties had indicated the incorrect name of the arbitral institution and had provided for arbitration in the “International commercial arbitration court at the Chamber of Commerce and Industry of Kyiv”.<sup>201</sup>

- 11.3.4 Therefore, the parties should at all times ensure the correct spelling of the name of the arbitral institution in order to be able to enforce their arbitration agreement and any subsequent award.

## 12. Concluding thoughts and themes

- 12.1.1 Recourse to arbitration as a means of resolving commercial disputes is becoming more and more popular in Ukraine. Generally speaking, Ukraine’s legislative framework supports the conduct of arbitral proceedings and Ukraine is party to all of the main international conventions. The principal obstacle to be overcome in Ukraine at the present time is the relative inexperience of the judiciary in handling sometimes complex issues that can arise in the context of arbitral proceedings. The judiciary remains cautious about the quality and robustness of “private justice” that arbitral tribunals provide. Until judicial attitudes change, parties should expect a degree of unpredictability when it comes, amongst others, to the issue of enforcing foreign awards in Ukraine.

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<sup>200</sup> Ruling of the Supreme Court of Ukraine, Case No N/A, 13 October 2010.

<sup>201</sup> The correct name of the arbitral institution is: the International Commercial Arbitration Court at the Chamber of Commerce and Industry of Ukraine.

## 13. Contacts

### CMS Cameron McKenna LLC

6th Floor, 38, Volodymyrska Street  
01034 Kyiv  
Ukraine

#### **Olexander Martinenko**

Partner

**T** +380 44 39133 77

**E** olexander.martinenko@cms-cmck.com

#### **Sergiy Gryshko**

Associate

**T** +380 44 39133 77

**E** sergiy.gryshko@cms-cmck.com

#### **Oleksandr Gudko**

Associate

**T** +380 44 39133 77

**E** oleksandr.gudko@cms-cmck.com