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A. Legislation and rules

A.1 Legislation

Ukraine is a civil law country, thus, issues of international arbitration are governed primarily by: (1) international treaties (multilateral and bilateral) (which, upon their ratification by *Verkhovna Rada* (Ukrainian parliament), have priority over domestic legislation); and (2) domestic legislation. Court precedents are not considered to be source of binding law in Ukraine. However, the courts of lower instances give due regard to the conclusions of law made by the Supreme Court of Ukraine in its decisions.

With regard to international treaties, Ukraine is a party to the New York Convention, the Geneva Convention and the ICSID Convention, as well as a number of bilateral investment treaties.

In respect of domestic legislation, international arbitration in Ukraine continues to be primarily governed by the Law of Ukraine "On International Commercial Arbitration" (the "Arbitration Law") dated 24 February 1994, to which no legislative amendments has been made since June 2016. The Arbitration Law closely follows the UNCITRAL Model Law as of 1985.

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In addition, on 15 December 2017, the new Civil Procedural Code of Ukraine and Commercial Procedural Code of Ukraine (the "Procedural Codes") were enacted, which provide for significant improvement of arbitration regulation in Ukraine.

First, the Procedural Codes considerably expand the list of arbitrable matters in Ukraine. For instance, the Procedural Codes directly provide for arbitrability of corporate disputes (ie, disputes between members (shareholders) of a legal entity or between the legal entity and members (shareholders) arising out of or in connection with the establishment, activity, management or termination of the legal entity, provided that there is an arbitration agreement between the legal entity and all its members (shareholders)), as well as disputes arising from privatization, public procurement, competition and intellectual property rights (including copyright disputes). The extension of arbitrable matters is expected to encourage parties to refer their disputes to arbitration, as well as to reduce the risk of setting aside arbitral awards (or denying recognition and enforcement of arbitral awards) based on the non-arbitrability of the relevant matter under Ukrainian law.

Second, the Procedural Codes establish the presumption of the validity and enforceability of the arbitration agreement. In particular, any inaccuracies in the text of the arbitration clause or doubts about its validity and enforceability shall be interpreted by the national courts in favor of its validity and enforceability. This is designed to reduce the risk of setting aside the arbitral award, as well as denying recognition and enforcement of the arbitral award based on minor inaccuracies in the arbitral award.

Third, the Procedural Codes establish the legal framework for effective support of international arbitration by national courts. In this respect, the Procedural Codes provide for a number of new tools in support of arbitration, namely, (1) application of interim measures in support of arbitral proceedings (which include freezing of funds of the counterparty, prohibition against taking certain actions by a

counterparty or third party and transferring items in the dispute to a third party for storage); (2) court assistance in taking evidence in support of arbitral proceedings, including the examination of witnesses; (3) inspection of evidence at the place where the evidence is located; and (4) securing evidence in support of arbitral proceedings. The above tools are applicable either on the motion of the arbitral tribunal or on the initiative of the party to arbitration proceedings itself after the dispute is referred to arbitration. As a general rule, the procedure for application of the above tools is similar to the procedure applied in national civil proceedings.

In addition, the Procedural Codes considerably detail the procedure for the recognition and enforcement of arbitral awards, as well as the procedure for setting aside arbitral awards. This is intended to improve the uniformity and predictability of the respective proceedings in Ukrainian courts.

With regard to recognition and enforcement, the Procedural Codes also establish the new expedited procedure for recognition and enforcement of the arbitral award in Ukraine on the initiative of the debtor under the award. In that case, the application for the recognition and enforcement of the arbitral award shall be considered by the court within 10 days of the day of submission of the application. In contrast, the proceedings for recognition and enforcement of the arbitral award under the general procedure, initiated by the party in favor of which the arbitral award was rendered, may take up to two months in the court of first instance alone. The above expedited procedure is designed to promote the efficient recognition and enforcement of arbitral awards and to encourage cooperative debtors to conform voluntarily with arbitral awards.

In addition, the Procedural Codes provide for separate regulation of the procedure on the recognition of arbitral awards that do not require enforcement (eg, arbitral awards regarding the invalidation of agreements).

A.2 Institutions, rules and infrastructure

The Arbitration Law provides for two arbitration institutions in Ukraine that function at the Ukrainian Chamber of Commerce and Industry (UCCI) — the International Commercial Arbitration Court at the UCCI (ICAC) and the Maritime Arbitration Commission at the UCCI (MAC). The statutes of both institutions are set out in the annexes to the Arbitration Law.

(a) The ICAC is a permanently functioning arbitral institution acting in accordance with the Arbitration Law, the Statute of the ICAC (dated 24 February 1994) and the Rules of the ICAC (approved on 17 April 2007, amended and restated as of 24 April 2014). The new version of the Rules of the ICAC were enacted on 1 January 2018.

(b) The MAC is a permanently functioning arbitral institution acting in compliance with the Arbitration Law, the Statute of the MAC (dated 24 February 1994) and the Rules of the MAC (approved on 17 April 2007, amended and restated as of 25 October 2012), which resolves disputes that arise out of or in connection with contractual and other civil relations in the area of merchant shipping, regardless of whether the parties are Ukrainian or foreign entities.

Parties to a dispute may agree to refer the dispute to ad hoc arbitration, for which purpose an ad hoc arbitral tribunal may be formed. In that case, the ICAC may act as an appointing authority in accordance with the UNCITRAL Rules and provide organizational assistance in arbitral proceedings on the basis of its separate Rules of Assistance approved by the Decision of the Presidium of the UCCI dated 27 October 2011.

The ICAC list of arbitrators includes arbitrators from Ukraine, Azerbaijan, Austria, Belarus, Bulgaria, Croatia, the Czech Republic, Finland, France, Germany, Hungary, Latvia, Macedonia, Moldova, the Netherlands, Norway, Poland, the Russian Federation, Serbia,

Slovakia, Slovenia, Sweden, the United Kingdom and the United States.

B. Cases

B.1 Validity and enforceability of an arbitration agreement concluded by way of exchange of letters and waiver of right to object

Recent court practice in Ukraine reaffirms the validity and enforceability of arbitration agreements (arbitration clauses) concluded by way of exchange of letters, in particular, the validity and enforceability of arbitration agreements (arbitration clauses) when the parties conclude (or amend) the agreement by way of filing a request for arbitration, or answering a request for arbitration and/or letter to the arbitral tribunal. In addition, recent court practice reaffirms that the party to the arbitration proceedings waives its right to object to the recognition and enforcement of the arbitral award if the party knew that any requirement under the arbitration agreement has not been complied with but still proceeded with the arbitration without stating its objection to such non-compliance without undue delay.

The above follows from the decision of the Supreme Court of Ukraine of 22 March 2017 in Case No. 757/3481/14-ц.

Thus, on 10 June 2010, a company, SES ASTRA AB, and a state enterprise, Ukrkosmos, entered into an agreement, which provided for the resolution of disputes by an arbitral tribunal consisting of three arbitrators in accordance with the ICC Rules. Due to the non-performance by Ukrkosmos under the agreement, SES ASTRA AB brought a claim against Ukrkosmos to the ICC. In its request for arbitration, SES ASTRA AB proposed that the secretary general of the ICC appoint one arbitrator at their own discretion and not three, as agreed between the parties. Ukrkosmos agreed with the proposal in its letter to the secretariat of the ICC. Thus, the ICC appointed a sole arbitrator who rendered the arbitral award.

In November 2014, SES ASTRA AB applied to the Ukrainian courts for recognition and enforcement of the arbitral award. After the case was considered by the courts of lower instance, the Supreme Court rendered a final decision and granted recognition and enforcement of the award in Ukraine.

The main issue was whether the case was considered by the arbitral tribunal composed in accordance with the arbitration agreement of the parties, considering that in the arbitration clause the parties agreed to dispute resolution by an arbitral tribunal consisting of three arbitrators, while the dispute was eventually resolved by a sole arbitrator. In this respect, the courts also considered whether the exchange of letters between the parties to the arbitration proceedings (in particular, the exchange of request for arbitration and letter to the secretariat of the ICC) could be considered as a proper amendment of the arbitration clause.

The Supreme Court of Ukraine held that the above dispute was considered by a properly composed arbitral tribunal, as the parties amended the arbitration clause by means of the exchange of letters and, thus, the arbitral award should be recognized and enforced in Ukraine. The following was noted by the Supreme Court in this regard:

"*The analysis of the legislation, the provisions of the Convention [the New York Convention] and the Regulation [the ICC Rules] gives an opportunity to make a conclusion that the arbitration clause was amended with regard to the number of the arbitrators as the parties… have agreed to the resolution of the case by a sole arbitrator by way of the exchange of letters, that is consistent with the principle of international arbitration, namely the principle of autonomy of will*."

In addition, the Supreme Court of Ukraine reaffirmed the arbitration principle of waiver of right to object. In this respect, the Supreme Court of Ukraine concluded that there were legal grounds for recognition and enforcement of the award in Ukraine as "*the defendant [Ukrkosmos] did not object to the composition of the*

arbitral tribunal and the procedure for the appointment of an individual arbitrator," which is consistent with Article 4 of the Law on Arbitration and Article 4 of the UNCITRAL Model Law.

The above shows that Ukrainian courts give due regard to the international treaties and principles of international arbitration in proceedings for recognition and enforcement of the arbitral awards.

B.2 The method of execution of the arbitral award specified in the arbitral award cannot be changed by a national court

Recent court practice in Ukraine affirmed that the arbitral awards are final and binding, in particular, national courts cannot change the method of execution of the arbitral award determined by the arbitral tribunal in the arbitral award.

This follows from the decision of the High Specialized Court of Ukraine on Civil and Criminal Cases of 19 April 2017 in Case No. 487/1441/15.

Thus, in the above case, the companies, Donso Limited, and PJSC Mykolaivskyi combinat khliboproductiv (PJSC Mykolaivskyi), entered into a contract that provided for dispute resolution by arbitration at the ICAC. Due to the non-performance of PJSC Mykolaivskyi under the contract, Donso Limited initiated arbitral proceedings at the ICAC that resulted in an arbitral award. The arbitral award partially granted Donso Limited's claim and ordered PJSC Mykolaivskyi to repay debt to Donso Limited as follows: (1) to repay the sum of USD 10,000 in cash; and (2) provide the specified services to Donso Limited in the amount of USD 157,069. The award was rendered based on the settlement agreement of the parties. Based on the application of Donso Limited, the Ukrainian court granted recognition and enforcement of the award. However, in November 2015, Donso Limited applied to the Ukrainian court for changing the method of execution of the award. In particular, it requested the court to order PJSC Mykolaivskyi to repay the sum of USD 147,077 in cash

instead of providing services for that amount as was prescribed in the arbitral award.

The court of first instance granted the application and changed the method of execution of the arbitral award, namely providing for debt repayment in cash instead of providing services for the relevant amount as was prescribed in the arbitral award. However, the court of appeal reversed the decision of the court of first instance and denied Donso Limited's application. The decision of the court of appeal was affirmed by the High Specialized Court of Ukraine on Civil and Criminal Cases.

In this respect, the High Specialized Court held that the method of execution specified in the arbitral award cannot be changed by national courts, as arbitral awards are final and binding to the parties of the arbitral proceedings.

Consequently, the decision shows that Ukrainian courts unequivocally recognize the final and binding nature of arbitral awards.

C. Funding in international arbitration

As of December 2017, neither Ukrainian legislation nor the rules of local arbitral institutions provide for any specific regulation of arbitration funding by persons who are not parties to the arbitration proceedings.