Arbitrability of Corporate Disputes in Ukraine

While corporate disputes follow the trend of being arbitrated instead of being litigated, in most Eastern European states, corporate disputes are either non-arbitrable or their arbitrability remains disputed. In Ukraine, both the legal basis is insufficient and current case law is flawed. The problem of arbitrability of corporate disputes as such is based on the interpretation of Article 12 of the Ukrainian Code of Economic Procedure (EPC) and the question of when a corporate dispute actually exists. The following article addresses these problems.

**Historical development**

Article 1(2) of the 1994 On International Commercial Arbitration Law (ArbLaw) provided that by agreement parties can submit certain disputes to arbitration if no exception is provided in Ukrainian law, thereby determining that corporate disputes could be the subject of arbitration.

In 2004, Ukraine introduced the Law On Arbitration Courts (NatArb). Article 1 provided that the NatArb should not apply to foreign arbitration disputes, as well as the then applicable EPC.

The amendments introduced in the EPC in 2006 supplemented the existing list and extended jurisdiction of commercial courts to cover disputes that may arise in a company, yet not prohibiting the referral to arbitration tribunals.

The Supreme Economic Court (SEC) of Ukraine took a different view. Contra legem, the SEC held that the concept of corporate disputes should be seen differently. Yet, the SEC failed to prohibit the referral of corporate disputes to national arbitration courts. The SEC confirmed this in its resolution.

In 2009, a law amendment introduced changes in a way that complemented Article 12 EPC and introduced a ban on the transfer of corporate disputes to national arbitration courts.

In 2011, Article 12 EPC was amended to repeal the ban on the transfer of disputes to international arbitration tribunals, thus confirming arbitrability.

This is highly disputed and possibly ambiguous, as it could permit the exclusion of arbitration of both national and international corporate disputes.

However, legislative materials indicate that this ambiguity was not desired by legislators, as they relate exclusively to the NatArb and not to the ArbLaw. According to the opinion represented here, there is no doubt that corporate disputes are not arbitrable at national arbitral tribunals, while this does not apply to international arbitration.


The ArbLaw makes use of two terms, namely arbitraž and tretejskij sud indicating two different dispute resolution mechanisms. The amendments introduced in the EPC relate to national arbitration proceedings only, leaving corporate disputes with an “international element” to be arbitrable.

The Law On Financial Restructuring confirms this as it only uses the term arbitraž in Art 5(3). E contrario, the applicability of the NatArb and the EPC is excluded.

However, Article 77 of the Law On Private International Law (PIL) limits arbitrability by providing an exhaustive list. Thus, according to Art 1(4) ArbLaw in conjunction with Article 12(4) EPC in the version of 2011, international arbitration proceedings which are corporate disputes can be arbitrated without further ado except for the provisions in Article 77 PIL.

**Interpretation of the Meaning of the Term Corporate Dispute**

The definition of a “corporate dispute” and who its parties are, remains unclear. These terms will be interpreted below:

1. Corporate relationship and rights of the company

None of the relevant laws defines the term "corporate dispute", but Ukrainian laws refer to "disputes arising from relationships of a corporate nature", the definition of which is contained in the Commercial Code of Ukraine (CC). Pursuant to Article 167(3) CC, relationships of a corporate nature are such that "may arise, change or terminate such relationships with respect to the rights of the Company". The current understanding of Ukrainian legal literature is that many definitions of "company rights" exist.

One definition is provided in Article 167(1) CC and identically in Article 14 Sec. 14.1.90 The Tax Code of Ukraine; another one in Article 2(1) No. 8 of the Law On Joint Stock Companies; a third one in Article 2 of the Law On the Regime of Foreign Investment. It is, therefore, necessary to abstract the above definitions.

In the opinion of the authors, "relationships of a corporate nature" are those established by law, which may arise between the corporate bodies of the legal entity and the legal entity itself during the formation, administration, distribution of dividends and liquidation of the company.

II. The parties to a corporate dispute

The definition already implies that parties to the dispute can only be the legal entity's governing bodies and the legal entity itself. The SEC's resolution addresses this personal scope of application, whereby the SEC disregards points relevant to company law disputes. Para. 1.1(2) of the SEC's resolution contains information on the parties and refers to the provisions of Article 12(4) EPC, Article 167 CC, Article 2 Law On Joint Stock Companies and states that a third person, who acquires shares in a legal entity and subsequently asserts rights under the share purchase agreement, is not a party to a corporate dispute, but to a general civil dispute.

III. Distinction between corporate and non-corporate disputes

On 25 February 2016, the executive committee of the SEC adopted a new resolution, thereby replacing the guidelines from 2007. The resolution is helpful in that it contains a list of non-company disputes and establishes groups of cases that constitute as corporate disputes.

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**TABLE 1**

<table>
<thead>
<tr>
<th>Bonduuelle Development S.A.S. v VAT Čerkasagroprojekt</th>
<th>Outcome</th>
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<tr>
<td>Economic Court (EC) of Cherkasy Region, 21.12.2012, 07/5026/1561/2012</td>
<td>Neither international agreements nor Ukrainian law provides for the exclusive jurisdiction of Ukrainian ECs for a purchase contract for company shares of a TOV (Limited company).</td>
</tr>
<tr>
<td>Kyiv Economic Court of Appeal (KEAC), 4.2.2013, 07/5026/1561/2012</td>
<td>Article 16(5) EPC as well as Article 12(1) No.4 EPC stipulate that the EC at the registered office of the company shall have exclusive jurisdiction for corporate disputes. Derogation of this competence by the parties is not possible.</td>
</tr>
<tr>
<td>SEC, 15.4.2013, 07/5026/1561/2012</td>
<td>The dispute involved a party that had not participated in the company in question, which is why the subject matter of the dispute was not governed by company law and, therefore, not within the scope of application of Article 12 EPC.</td>
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**Raiffeisen Property Management GmbH v Double W LLC**

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<th>Case No 1</th>
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<tr>
<td>DC Kyiv Shevchenkovskyi District, 3.9.2013, 761/20746/13-c</td>
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<tr>
<td>USCC, 30.7.2014, 6-20383sv14</td>
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<tr>
<td>SC 11.3.2015, 6-241cs14</td>
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**VAMED Engineering GmbH & Co. KG v Ukrmedpostach**

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<th>Case No 2</th>
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<tr>
<td>DC Kyiv Shevchenkovskyi District, 3.9.2013, 761/20746/13-c</td>
</tr>
<tr>
<td>Kyiv Court of Appeal (KAC), 19.2.2014, 22-c/796/1465/2014</td>
</tr>
<tr>
<td>USCC 6.6.2014, 6-12731sk14</td>
</tr>
</tbody>
</table>

**Case No 3**

| DC Kyiv Shevchenkovskyi District, 25.11.2013, 761/26004/13-c | Found once again that the arbitration clause was valid. |
| KAC, 11.9.2014, 22-c/796/4165/2014 | Overturned the DC judgment and annulled the award. |

Fortunately, the courts consistently qualify the dispute as "national arbitration" or "international arbitration". All three proceedings result from the same supply contract, and in all three proceedings, the courts concluded that it is an "international arbitration". A result that, although due to the wording of Art 1(2) of the ArbLaw seems obvious, but was by no means to be expected. Ultimately, it is regrettable that the courts only addressed implicitly Art 12(2) EPC and Art 12(4) EPC. Nevertheless, the decisions are groundbreaking for Ukrainian case law on corporate disputes and should be viewed positively.
CORPORATE DISPUTES

In determining the subject matter of the dispute and whether it is of a corporate nature, the composition of the parties to the dispute is crucial. This approach is mainly pursued by SC and was decided in 2007, where it held that a dispute between two individuals over the sale of shares in a company “is not a dispute under company law, but under civil law.”13 Hence, disputes which affect the rights of a company-law nature, but also go beyond them, are non-company disputes and arbitrable.

There are also other categories of disputes that are not of a corporate nature, although these rights are related to corporate law (SEC, 12.10.2010, Case 10/131).

However, in 2010, the SEC (Case K12/122-08) concluded in its resolution on a claim for non-performance of obligations arising from a SPA of a LLC – tovaristvo z obmeženoû vìdpovìdalnìstû (TOV) that the disputed legal relationships were monetary claims. Consequently, the dispute could not be considered as being governed by company law.

On 19 April 2011, the SEC (Case 2/190-PN-10) concluded that a dispute on the recognition of the claimant’s right of ownership of ordinary registered shares and the dissolution of the underlying purchase agreement, the parties to which are individuals over the sale of shares in a company “is not a dispute under company law, but under civil law.”13 Hence, disputes which affect the rights of a company-law nature, but also go beyond them, are non-company disputes and arbitrable.

IV. Contemporary developments

Apart from the new resolution of the SEC of 25.2.2016, current developments involve both an active decision-making practice of the USC and efforts by legislators to reform the EPC.

1. Current case law

Contrary to the view expressed in literature and here, the case law takes a very formalistic approach holding corporate disputes to be not (inter-)nationally arbitrable. Authors describe the legal situation in Ukraine as restrictive.13 Three recent judgements by Ukrainian courts regarding Article 12 EPC are outlined in table 1.

2. The current reform efforts of the EPC

The Draft Law of 23 March 2017 (No. 6232) on the reformed EPC addresses the problem of arbitrability of corporate disputes: with a ban on the transfer of all corporate disputes to an arbitral tribunal, be it national or international – with the exception that disputes arising from relationships of a corporate nature may be subject to international arbitration. However, this requires an effectively concluded arbitration agreement between the company and all its governing bodies and board administrators.

The proposal for a reformed code of economic procedure is a step in the right direction and a step towards the final clarification of the question of the arbitrability of corporate disputes. The transfer of any disputes under company law to a national arbitral tribunal is prohibited, so that they do not remain arbitrable nationally, which is understandable due to widespread corporate raiding.

CONCLUSIONS

The ability to arbitrate corporate disputes in Ukraine remains difficult to assess. Despite the case law supra, supreme courts refrain to opine on Article 12 EPC (2011 version), which leads to contradictions and the possibility that Article 1(4) ArbLaw may be applicable to both national and international arbitration proceedings.

However, in light of the case law, it is possible to conclude, for example, that only disputes arising between owners of rights under company law are to be qualified as corporate disputes.

It remains to be hoped that the legal situation regarding arbitration of corporate disputes will be resolved as soon as possible whether through consistent case law or clear statutes.