Arbitrability of Corporate Disputes in Ukraine

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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.[1] 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[2] 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) and the Supreme Court (SC) of Ukraine took a different view.[3] *Contra legem*, the SEC held that the concept of corporate disputes should be seen differently[4]. Yet, the SEC failed to prohibit the referral of corporate disputes to national arbitration courts. The SC confirmed this in its resolution.[5]

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In 2009, a law amendment[6] 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.[7] 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.[8] 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.

Numerous Ukrainian laws governing national and international arbitration distinguish between national arbitration tribunals – "*tretejskie sudy*" – and the corresponding provisions of NatArb and international arbitration – "*mežđunarodnyj kommerčeskij arbitraž*", resp. *"mižnarodnyj kommercijnyj arbitraž",* as regulated in the ArbLaw.

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 3(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] Alyoshin/Odnorih/Dobosh, Arbitrability of corporate disputes under Ukrainian law, IBA, https://www.ibanet.org/Article/Detail.aspx?ArticleUid=1edf0819-964f-4d18-a492-e74604373ee2.
[2] Law of 15.12.2006, No 483-V, http://zakon2.rada.gov.ua/laws/show/483-16/ed20061229.
[3] SC Guidelines of 1.8.2007, http://search.ligazakon.ua/l_doc2.nsf/link1/VS07830.html.
[4] SEC Recommendations of 28.12.2007, No 04-5/14, http://zakon2.rada.gov.ua/laws/show/v5_14600-07.
[5] SC Order of the Plenary Assembly of 24.10.2008, No 13, http://zakon3.rada.gov.ua/laws/show/v0013700-08.
[6] Law of 5.3.2009, No 1076-VI, http://zakon2.rada.gov.ua/laws/show/1076-17.
[7] Law of 3.2.2011, No 2980-VI, http://zakon5.rada.gov.ua/laws/show/2980-17.
[8] Draft Law of 6.11.2009, No 5322, http://w1.c1.rada.gov.ua/pls/zweb2/webproc4_1?pf3511=36488.

I. 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[9]. 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[10] 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.

[9] Resolution of the SEC of 25.2.2016, No 4, http://zakon2.rada.gov.ua/laws/show/v0004600-16.
[10] Id.

TABLE 1

Court	Outcome
Bonduelle Development S.A.S. v VAT Čerkasagroproekt	
Economic Court (EC) of Cherkasy Region, 21.12.2012, 07/5026/1561/2012	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).
Kyiv Economic Court of Appeal (KEAC), 4.2.2013, 07/5026/1561/2012	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.
SEC, 15.4.2013, 07/5026/1561/2012	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.
Raiffeisen Property Management GmbH v Double W LLC	
District Court (DC) of Malinovskiy District in Odessa, 31.3.2011, 1519/6-1/11	Refused to recognize and enforce a VIAC award on the grounds of Article 12 EPC and violation of public order, Article 3 CC.
Court of Appeal of Odessa Region (OAC), 6.7.2011, 22c-4425/11	Concurred with the view of the DC.
USC, 9.11.2011, 6-28841sv11	Overturned the judgment of a OAC and referred the case back to the DC for a new decision. The reason for the referral was that "the conclusions of the DC that the lawsuit is not arbitrative under Ukrainian law are erroneous".
DC Malinovskiy District in Odessa, 30.11.2012, 6/1519/85/11	Again refused to recognize and enforce the arbitration award.
OAC, 6.6.2013, 22-c/785/1797/13	The arbitration award did not violate Ukrainian law, the subject matter of the arbitral award was arbitrable and the award was, therefore, to be recognized and enforced.
USC, 17.11.2014, 6-36726p14	Concurred with the ruling of the OAC.
VAMED Engineering GmbH & Co. KG v Ukrmedpostach	
Case No 1	
DC Kyiv Shevchenkivskyi District, 3.9.2013, 761/20746/13-c	Granted the request and annulled the award due to violation of Article 12(2) EPC.
USC, 30.7.2014, 6-20383sv14	Arbitral tribunal was not competent. Referring to the European Convention on International Commercial Arbitration further stated that a state court has the competence to annul an arbitration agreement in so far as the subject matter of the dispute may not be referred to arbitration under the laws of the respective country.
SC, 11.3.2015, 6-241cs14	Confirmed the Judgment of the USC.
Case No 2	
DC Kyiv Shevchenkivskyi District	Ruled that the arbitration clause contained in the supply contract is valid.
Kyiv Court of Appeal (KAC), 19.2.2014, 22-c/796/1465/2014	Article 12 EPC may limit the scope for arbitration of certain matters (including disputes arising from public contracts), but this only applies to national arbitration governed by the NatArb
USC, 4.6.2014, 6-12731sk14	Did not consider the appeal relevant, since no certified copies of the judgments of the first two instances were submitted.
Case No 3	
DC Kyiv Shevchenkivskyi 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 ground-breaking for Ukrainian case law on corporate disputes and should be viewed positively.	

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."[11] 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, is not of a corporate nature.

However, the case law is not uniform: some courts still tend to consider that disputes arising out of or relating to SPA in a Ukrainian company are of a corporate nature and not arbitrable.[12] On 5 February 2014, the Ukrainian Supreme Specialized Court for Civil and Criminal Matters (USC) ruled (Case 6-53589sv13) that an arbitration award in which the applicant was awarded shares in a Ukrainian company was considered to be an arbitration award in a corporate dispute because such disputes were not arbitrable.

In an earlier decision of 22 March 2011, the SEC (Case 02-03/1840/14) held that disputes over the determination of the nullity of constituent documents and the determination of the nullity of the tax certificate submitted by the authorities are of an administrative nature.

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.

END

[11] Quoted according to Oleksiûk/Stec', Arbitrability of Corporate Rights, Ûridična gazeta 2012 (No 39), http://www.km-partners.com/ua/presa/685-arbtrabelnst-sporv.
[12] Kharkiv Economic Appeal Court, 2.4.2014, 917/429/13-g, http://www.reyestr.court.gov.ua/Review/38091483.
[13] Cf. Chernykh, Arbitrability of Corporate Disputes in Ukraine, J. Int. Arb. 2009, 745.