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The Arbitrability of Corporate Disputes in Ukraine

LEONID SHMATENKO¹, SVITLANA BEVZ²

A. Introduction

Corporate disputes encompass various fields of law and lately follow the trend of being arbitrated instead of being litigated. Different jurisdictions take different approaches as to whether or not corporate disputes are arbitrable. Whereas the U.S. has a rather liberal approach, Germany pursues a case-by-case approach. Eastern European states such as Russia and Ukraine, however, deem corporate disputes to be non-arbitrable. As of today, the arbitrability of corporate disputes remains a highly disputed legal topic.

The arbitrability of corporate disputes is even more complicated when it comes to Ukraine because the arbitration law is insufficient and there are major shortcomings in the present case law. Additionally, the problem of arbitrability of corporate disputes as such is primarily based on the interpretation of Article 12 of the Ukrainian Code of Economic Procedure.³

The present article addresses this problem. First, it turns to a brief presentation of the historical development of the legal situation in Ukraine (B.). The authors then address the interpretation of the term “corporate dispute” and carry out an analysis of its scope (C.). Subsequently, the authors present the current legal developments, paying particular attention to the case law since 2013 (D.) before summarizing their findings and giving an outlook on legal developments (E.).

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B. Historical Development

On 24 February 1994, Ukraine introduced the Law “On International Commercial Arbitration” (the “Arbitration Act”),\(^4\) which in its Article 1(2) 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.

It was only ten years later, on 10/11 May 2004, that the Ukrainian government passed the law “On Arbitral Tribunals”.\(^5\) Article 1 provided that the law “On Arbitral Tribunals” should not apply to foreign arbitration disputes. Accordingly, the law introduced in 2004 should apply to national arbitration proceedings only. The then applicable Commercial Procedural Code (CPC)\(^6\) contained in its final list of competences neither any exclusive jurisdiction for corporate disputes nor a prohibition to submit them to arbitration.

The list of CPC competences then in force was supplemented by the amendments introduced in the CPC on 15 December 2006.\(^7\) The amendments extended the jurisdiction of commercial courts to cover disputes that may arise in a company. In particular, disputes between the company and its shareholders and between the partners in connection with the management and termination of the company’s activities, should now be subject to commercial litigation. A prohibition on the referral of such disputes to arbitration tribunals was not imposed. Thus, it can be stated that, in 2006, the legal situation of Ukraine did not prohibit arbitration of corporate disputes.

However, the Supreme Economic Court (SEC) and the Supreme Court (SC) of Ukraine took a different view. First, the SEC published guidelines “On the Practice of the Judicial Treatment of Corporate Disputes”.\(^8\)

Contrary to the clear wording of the law, the SEC also stated in its recommendations “On the Practice of Application of Legislation in

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Conciliation of Company Law Disputes”\(^9\) that it understands that the concept of corporate disputes is to be understood in a different way. In order to ensure a uniform and correct application of substantive law and procedural law in the cases relevant to corporate law, the SEC made reference to its recommendations in para. 6.2, stating the following:

“The shareholders are not entitled to assign corporate disputes arising from the business activities of companies registered in Ukraine, in particular those connected with corporate governance in Ukraine, to international arbitration tribunals.”\(^10\)

It is striking that the SEC failed to prohibit the referral of corporate disputes to domestic arbitral tribunals. However, the provisions of the 2007 Recommendations are now obsolete as a result of the resolution “On certain issues relating to the decision-making practice of relationships under company law”\(^11\) which came into force in 2016.\(^12\)

The SEC’s statements were confirmed by the SC on 24 October 2008 in its resolution “On the Practice of the Judicial Treatment of Corporate Disputes”.\(^13\) The decision of the SC reflected what the SEC had already established, including the lack of prohibition on the referral of corporate disputes to domestic arbitral tribunals.

It was only on 5 March 2009 that the law “On the Registration of Changes in Some Laws of Ukraine on the Activity of Arbitral Tribunals and Decisions of Arbitral Tribunals”\(^14\) came into force. The amendments introduced in this way supplemented Article 12 of the CPC in the sense that a prohibition on the referral of corporate disputes to domestic arbitral tribunals has now also been incorporated into the law. Accordingly, the latter have been submitted to the exclusive jurisdiction of the national commercial courts.

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\(^10\) Id. Author’s translation.


\(^12\) See also C. II.


The main reason for the change was that domestic arbitral tribunals in the form of so-called “pocket arbitration courts” were frequently set up to abuse the judicial process in order to cover up illegal corporate raiding. In particular, domestic arbitral tribunals have often been used to justify and provide a legal basis for illegal actions. However, such a reason is not necessarily transferable to international arbitration, which is why it is justified to argue that the legislature merely wished to exclude corporate disputes from domestic arbitration.

In 2011, the Ukrainian legislature amended the wording of Article 12 of the CPC to repeal the ban on the submission of corporate disputes to international arbitral tribunals, thus confirming the arbitrability of corporate disputes.

The new wording of this article and its new context regarding domestic arbitration proceedings have so far generated discussions on its applicability to international arbitration proceedings as it provides an opportunity for ambiguous interpretation and opens door to the exclusion of arbitration of corporate disputes in domestic or international arbitral tribunals.

The fact that such an ambiguous interpretation was not desired by the legislature, however, is confirmed in particular by the legislative materials on the above-mentioned amending law. They relate exclusively to the Law “On Arbitral Tribunals” and not to the Arbitration Act. According to the opinion represented here, there is therefore no doubt that corporate disputes are only

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non-arbitrable before domestic arbitral tribunals, and that this does not apply to international arbitration.20

This can also be derived from the numerous Ukrainian laws governing domestic and international arbitration. Special attention must be paid to the following points.

As mentioned above, Ukrainian law distinguishes between domestic arbitral tribunals – “tret’ejkie sudy”21 – and the corresponding provisions of the Law “On Arbitral Tribunals” and international arbitral tribunals. The correct term for international arbitration is in Russian mezhunarodnyj kommercijnyj arbitrazh and in Ukrainian mizhnarodnyj kommercijnyj arbitrazh. This is regulated in the Arbitration Act.

This delimitation can also be found in various valid laws of Ukraine. Thus, the Law “On Arbitral Tribunals” clearly states that its scope does not extend to mizhnarodnyj kommercijnyj arbitrazh, i.e. international arbitration. At the same time, the Arbitration Act stipulates, as already explained, that other laws of Ukraine which exclude or permit certain disputes from arbitration (arbitrazh) or allow them to be subject to arbitration (arbitrazh) Article1(4) Arbitration Act.

In this context, it should be emphasized that the Arbitration Act makes use of two terms, namely arbitrazh and tret’ejskij sud, which in turn indicates that there are two different dispute resolution mechanisms.

It can be deduced from the distinction between arbitrazh and tret’ejskij sud that the amendments introduced into the CPC relate exclusively to domestic arbitration proceedings. Further, based on the premise that neither case law nor the “Act of Justice” (recommendations, decisions of the highest courts) have legal force, it can be stated that the legislature considers corporate disputes with an “international element” to be arbitrable.

Such a result is confirmed, albeit indirectly, by the provisions contained in the law “On Financial Restructuring” 22 which provides for an arbitration committee to be set up to resolve conflicts regarding financial restructuring. In this law, the legislature used exclusively the term arbitrazh and provided in Article 3(3) that “without prejudice to the composition of the parties to the arbitration provided for in this Act, the arbitration procedure

21 Literally translated, this means “third court”.
shall be governed by the Law “On International Commercial Arbitration”, taking into account the particularities provided for in the Law “On Financial Restructuring”. Upon reversion, the applicability of the Law “On Arbitral Tribunals” and the CPC is excluded.

However, an exception to and limitation of the arbitrability of international corporate disputes and the above-mentioned interpretation can be found in Article 77 of the law “On Private International Law”\(^\text{23}\) (PIL). This includes a list that defines the exclusive jurisdiction of the ordinary courts of Ukraine.

Thus, with the exception of the provisions in Article 77 PIL, international arbitration proceedings, which have corporate disputes as the subject of the dispute, can be arbitrated without further ado. As already explained, this results in particular from Article 1(4) Arbitration Act in conjunction with Article 12(4) CPC in the version of 2011 and the related legislative history.

### C. Interpretation of the meaning of the term “corporate disputes”

Furthermore, there is no consensus on what Ukrainian law understands as a “corporate dispute” in the narrow sense of the term and who the parties to such disputes are. Accordingly, the interpretation of these terms is important, which will be briefly described below.

#### I. Corporate relationship and rights of the company

None of the relevant Ukrainian laws contains a legal definition of the term “corporate dispute”, but Ukrainian legal texts often use the term “disputes arising from relationships of a corporate nature”.

According to Article 167 (3) Ukrainian Commercial Code\(^\text{24}\) (CC), relationships of a corporate nature are those that “may arise, change or terminate such relationships with respect to the rights of the Company”.

The point in time from which relationships of a corporate nature may arise is the date on which the legal entity is entered in the Commercial Register. Accordingly, the establishment of the company is the legally

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decisive point in time. However, the literature argues that this is a matter of the legal relationship between the founders of the legal entity and the legal entity itself.\textsuperscript{25} Therefore, the fulfilment of the foundation criteria is the cornerstone for the establishment of relationships of a company-law nature, since otherwise there was only cooperation, and such legal relationships would be outside of company law and would only underpin the general civil law norms.\textsuperscript{26}

The current understanding of Ukrainian legal literature is that many definitions of “company rights” exist. Various different definitions can be found in several Ukrainian laws.

First of all, there is a definition in Article 167 (1) of the CC and a verbatim definition is also found in Article 14 Sec. 14.1.90 of the Ukrainian Tax Code.\textsuperscript{27} A different definition is included in Article 2(1) no. 8 of the law “On Joint Stock Companies”\textsuperscript{28}. Also Article 2 of the Law On the Regime of Foreign Investments\textsuperscript{29} provides a different definition.

As is often the case in Eastern European legislation, many different definitions are therefore available, some of them with poor precision. It is therefore necessary to abstract the above definitions and to embed them in the definition of relationships under company law.

In other words, it requires its own definition of the “relationships of a corporate nature”. Against the background of the above definitions, in the opinion of the authors, these are legal relationships 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.\textsuperscript{30}

This definition is helpful, but two questions remain. First, who is the party to a corporate dispute (II.), and second, in which cases does the Ukrainian legal practice accept a corporate dispute (III.)?

\textsuperscript{26} Id.
\textsuperscript{30} Cf. also Haritonova/Haritonov/Kossak et al. in Haritonova (eds.), Commercial Code of Ukraine: Scientific and practical commentary, 2\textsuperscript{nd} ed., Kiev 2008, Article 167.
II. The Parties to a Corporate Dispute

The aforementioned definition already implies that parties to the dispute can only be the legal entity’s governing bodies and the legal entity itself. In particular, it is also a question of what types of legal entities can be involved in corporate disputes. The SEC’s resolution “On some issues relating to the decision-making practice of company law relationships” 31 of 25 February 2016 addresses this personal scope of application, disregarding other points relevant to company law disputes. Paragraph 1.1(2) of the SEC’s decision states that “as a result of a systematic analysis of some provisions of Ukrainian legislation, relations under company law may arise in corporations, cooperatives, agricultural holdings, private enterprises, provided that two or more persons are involved.”

Paragraph 1.2 of the same resolution contains further information on the parties. It states that according to “the provisions of Article 12(4) CPC, Article 167 CC, Article 2 of the Law of Ukraine on Joint Stock Companies, parties to a corporate dispute are:

1) the legal entity and its governing bodies (founders, partners, members), including former shareholders; and

2) participants (shareholders, members) of a legal entity.

Participants who have resigned from the legal person may be a party to a corporate dispute if the dispute concerns the determination and assertion of the payment amount of their shareholding in the legal person, the decision on the nullity of their exclusion from the legal person, as well as the nullification of other decisions of the legal person, if these decisions have been made before the resignation (exclusion) of the partner and, as a result, their partners have become parties to the dispute.”

In other words: a third person, who acquires shares in a legal entity and subsequently asserts rights under the share purchase agreement, is a party not to a corporate dispute, but to a general civil dispute.32

III. Distinction between Corporate and Non-Corporate Disputes

Although the SEC’s resolution “On certain issues relating to the decision-making practice of relationships of a corporate nature” provides a list of the parties to a corporate dispute and a definition of a relationship of a


32 The views of the courts on this issue are contradictory. See D. I.
corporate nature, the question remains, as previously indicated, when a corporate dispute exists and when it does not.

On 25 February 2016, the executive committee of the SEC also adopted the resolution “On some issues relating to the decision-making practice of relationships under company law” 33 This resolution replaces the guidelines from 2007, which in number 6.2 contained the prohibition that the partners were not entitled to assign to international arbitration tribunals corporate disputes related to the business activities of companies registered in Ukraine, in particular those associated with corporate governance in Ukraine.

The resolution “On certain issues relating to the decision-making practice of relations of a company law nature” does not mention the ability to arbitrate corporate disputes. Therefore, the practical relevance of the resolution on the question of the arbitrability of corporate disputes in the context of Article 12 CPC remains highly doubtful – there is no legal certainty. However, as already explained above, the resolution is helpful in that it contains a list of non-company disputes. These are arbitrable.

However, the SEC resolution of 2016 offers the possibility of establishing groups of cases that categorise disputes as corporate disputes.

In determining the subject matter of the dispute and whether it is of a corporate nature, attention must therefore be paid to the composition of the parties to the dispute.

This is an approach that is mainly pursued by SC. Thus, the latter decided on 26 December 2007, in a dispute arising between two natural persons over the sale of shares in a company, that “the dispute did not arise between participants of a company in relation to rights under company law, but between two natural persons about the restoration of infringing property rights[...] i.e. it is not a dispute under company law, but under civil law.” 34 This leads to the conclusion that disputes which affect rights of a company law nature, but also go beyond these rights, may well be categorised as non-company disputes and could therefore be arbitrable.

34 Quoted according to Oleksiuk/Stec, Arbitrability of Corporate Rights, Úriddična gazeta 2012 (No. 39), http://www.km-partners.com/ua/presa/685-arbritabelnst-sporv.
However, this is not an isolated case, because there are other categories of disputes that are not of a corporate nature, although these rights are related to corporate law.35

The SEC concluded on 26 January 2010 in its resolution on a claim for non-performance of the obligations arising from a share purchase agreement of a TOV that the disputed legal relationships relate to monetary claims arising from a purchase agreement for shares in a TOV, i.e. it is a simple monetary claim and not the protection of rights under company law or the fulfilment of the same. Consequently, the dispute could not be qualified as being governed by company law.36

On 19 April 2011, in a further resolution, the SEC came to the conclusion that a dispute over 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 natural persons, is not of a corporate nature.37

However, the case law is far from uniform. Thus, some Ukrainian courts still tend to consider that disputes arising out of or in connection with a share purchase agreement in a Ukrainian company are of a corporate nature and cannot be submitted to arbitration.38 This view is also partly supported by the highest courts. Thus, on 5 February 2014, the Ukrainian Supreme Specialized Court for Civil and Criminal Matters (USSC) ruled that an arbitral award in which the applicant was awarded shares in a Ukrainian company was an arbitral award in a corporate dispute, and that such disputes were not arbitrable.39

In an earlier decision, the SEC ruled of 22 March 2011 that disputes over the determination of the nullity of the constituent documents and the

35 Ukrainian Supreme Economic Court, Order of 12 October 2010, Case No. 10/131, http://www.reyestr.court.gov.ua/Review/11785311. Due to safety-related measures, the Ukrainian court decision register is not accessible from abroad. It is recommended to use a Ukrainian proxy server or VPNs. A list of Ukrainian proxies is available at: https://www.proxynova.com/proxy-server-list/country-ua/. Instructions on how to set up a proxy server can be found at the following address: https://www.howtogeek.com/tips/how-to-set-your-proxy-settings-in-windows-8.1/.


determination of the nullity of the tax certificate submitted by the authorities are of administrative nature.40

D. Contemporary Developments

Apart from the new resolution of the SEC dated 25 February 2016, the current developments concerning the arbitrability of corporate disputes involve two aspects: On the one hand, an active decision-making practice of the USSC on the arbitrability of corporate disputes (I.). On the other hand, there are efforts by the Ukrainian legislator to reform the CPC (II.).

I. Current Case Law

In contrast to the interpretation outlined above, the case law of the Ukrainian courts is restrictive and very formalistic. Focusing on a narrow interpretation of Article 12 CPC, the SEC advocates that corporate disputes should not be arbitrable.41

Contrary to the view expressed in the literature and here, the case law prohibits, in accordance with the currently valid version of Article 12 CPC, the referral of all corporate disputes to domestic and international arbitral tribunals, although this is clearly consistent with the wording of Article 12 CPC and Article 1 Arbitration Act.

It is therefore little wonder that even until 2015,42 many authors describe the legal situation in Ukraine as restrictive with regard to the arbitrability of corporate disputes.

It is also striking that, since 2011, there have not been any judgments of Ukrainian courts which have been able to interpret and apply the reformed wording of Article 12 CPC. Instead, the case law continues to assume that corporate disputes are not capable of arbitration. The cornerstone of such decisions remains the SC’s resolution “On the Practice of Litigation in

40 Ukrainian Supreme Economic Court, Order of 22.03.2011, Case No. 02-03/1840/14, http://www.reyestr.court.gov.ua/Review/14416314.
41 See case law examples in D. I.
Corporate Disputes” dating back to 2008. Three judgements of Ukrainian courts, concerning Article 12 CPC – albeit in two cases only indirectly – because they were concerned with the recognition and enforcement of an arbitral award shall be addressed below.

1. **Bonduelle Development SAS v VAT Cherkasagroproekt**

   The first case, which was finally decided in 2013, concerns the French canned vegetable producer Bonduelle and its companies in the Ukraine. The three-year litigation is based on the following facts.

   On 26 March 2009, the Ukrainian company VAT Cherkasagroproekt and Bonduelle Development SAS concluded a sale and purchase agreement for the transfer of shares. The VAT Cherkasagroproekt undertook to transfer 100 percent of the shares owned by it in another company, TOV Maâk-Hudâki, which represented 99.9 percent of the share capital of the company concerned. Furthermore, the contract contained an arbitration clause stipulating that “[w]here the buyer and seller cannot reach an out-of-court agreement, all disputes arising out of or in connection with this contract shall be finally settled in accordance with the Rules of Arbitration of the International Chamber of Commerce (ICC) excluding ordinary legal proceedings. Place of arbitration is Paris, France. The decision shall be taken by one or more arbitrators appointed in accordance with the said rules. The language of arbitration shall be English.”

   However, the above-mentioned sale purchase agreement led to a dispute between VAT Cherkasagroproekt and Bonduelle. VAT Cherkasagroproekt claimed that Bonduelle did not pay the purchase price in time and filed a lawsuit with the commercial court of the Cherkasy Oblast. It stated that the purchase agreement was null and void and that Bonduelle was to be obliged to return the company’s shares in VAT Cherkasagroproekt and to oblige the Registrar to cancel any changes already made to the Commercial Register.

   Bonduelle, however, considered the commercial court to be the wrong forum and applied for the court’s decision to terminate the

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45 *Id.*

46 *Id.*

47 *Id.*
proceedings even before the court dealt with substantive law, as the dispute would be subject to the effective arbitration clause which provided for arbitration under the ICC Rules.  

On 21 December 2012, the Cherkasy Oblast commercial court granted Bonduelle’s request. The commercial court justified this with the fact that neither international agreements nor the laws of Ukraine in disputes over the declaration of nullity or the legal consequences of such a purchase contract for company shares of a TOV (LLC) is subject to the exclusive jurisdiction of Ukrainian economic courts.  

The commercial court further argued that the jurisdiction of Ukrainian courts for such a dispute could be justified in principle. However, such a decision would not preclude the parties from being able to choose another forum or arbitration body such as that of the ICC in Paris. The arbitration clause had been effectively concluded and the dispute was to be settled before the arbitral tribunal. Ultimately, the proceedings were terminated before the commercial court and the parties were referred to arbitration.

VAT Cherkasagroproekt appealed against the decision. However, the Kiev commercial appeals court, which accepted the appeal, declined to follow the reasoning and annulled the commercial court’s decision. The annulment was mainly based on Article 12(1) No. 4 CPC in force and the regulations listed therein, which assign jurisdiction for corporate disputes to the Ukrainian commercial courts. Moreover, it held that in accordance with the SC Resolution “On the Practice of the Judicial Treatment of Corporate Disputes” of 2008, a relationship of a corporate nature exists between Cherkasagroproekt and Bonduelle, and such a dispute cannot therefore be referred to an international arbitral tribunal.

Further, Article 16(5) CPC as well as Article 12(1) No. 4 CPC stipulate that the commercial court at the registered office of the company

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48 Id.
49 Id.
50 Id.
51 Id.
shall have exclusive jurisdiction for corporate disputes. A derogation of this competence by the parties is not possible.\footnote{Id.}

In addition, the Kiev commercial appeals court referred to Article 76(1) No. 7 PIL.\footnote{Id.}

Bonduelle filed an appeal against the decision of the Kiev commercial appeals court. The SEC granted the latter by its decision of 15 April 2013,\footnote{Ukrainian Supreme Economic Court, Judgment of 15 April 2013, Case No. 07/5026/1561/2012, http://www.reyestr.court.gov.ua/Review/30738456.} thereby overturning the decision of the Kiev commercial appeals court and restoring the validity of the decision of the Cherkasy Oblast commercial court.

In its reasons for its decision, the SEC stated that the subsumption of the Kiev Commercial appeals court of the facts under Article 12 (1) No. 4 CPC was wrong, because the present dispute had not arisen between the parties involved in a company. Rather, one of the parties 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 CPC.\footnote{Id.}

Furthermore, the SEC stated that Article 76(1) No. 7 PIL is not relevant, since the legal consequences defined therein should have been agreed on by the parties. However, since they agreed that all disputes arising from the contract shall be subject to arbitration, there was no room for the acceptance of the jurisdiction of a Ukrainian commercial court on the basis of said provision.\footnote{Id.}

The SEC's decision is still relevant today. Nevertheless, the SEC avoided discussing the crucial questions of Article 12 CPC. It only confirmed the 2007 guidelines in force at that time. Since the SEC qualified the dispute as non-company law related, it did not have to state its position on any interpretation of Article 12 CPC. However, the SEC referred to the SC resolution “On the Practice of the Judicial Treatment of Corporate Disputes” from 2008. Therefore, it cannot be ruled out that the SEC will continue to rely on this in the future. The consequences – without the necessary legal clarification – cannot be estimated at present.
2. Raiffeisen Property Management GmbH v Double W LLC

The second sample case, Raiffeisen Property Management GmbH v Double W LLC, was finally decided on 17 November 2014. It concerns Article 12 CPC only marginally as far as the litigation is based on an attempt by the Austrian Raiffeisen Property Management GmbH to obtain recognition and enforcement of an arbitration award issued in 2010 in accordance with the rules of the Vienna International Arbitration Centre of the Austrian Federal Economic Chamber (VIAC).

The arbitral tribunal ruled in favour of Raiffeisen Property Management GmbH. In detail, the case was based on the following facts:

Double W LLC and Raiffeisen Property Management GmbH concluded several contracts. This involved (a) a loan agreement, (b) a participation contract and (c) interest and option agreement.

These were also the subject of the VIAC arbitration proceedings, as it is clear from the court's judgment that Raiffeisen Property Management GmbH submitted the following prayers for relief in the arbitration proceedings:

1) to determine that the agreements are still effective and enforceable and that the Arbitrator is entitled to a 1 percent stake in the Ukrainian company Double W Kiev LLC (now SASSK LLC) since the entry into force of the respective agreement and a 99.90217 percent stake as of today; or

2) alternatively, if the sole arbitrator finds that the respondent has duly exercised its option under the interest and option agreement, the respondent will be ordered to pay EUR 16,819,496.16 to the claimant.

The sole arbitrator in the VIAC proceedings issued an award stating that the contracts had been concluded effectively and were valid and enforceable. The sole arbitrator further stated that the claimant was entitled to a 1 percent stake in the Ukrainian company Double W Kiev LLC (now SASSK LLC) since the entry into force of the respective agreement and a 99.90217 percent stake as of today. In addition, the respondent was ordered to bear the costs of the arbitrator for the arbitration proceedings.

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61 Id.
62 Id.
Raiffeisen Property Management GmbH turned to the Ukrainian courts with this award in 2011. The court of first instance\textsuperscript{63} ruled that the subject matter of the dispute was not arbitrable under Ukrainian law, since it concerned ownership of the share in the share capital, and consequently refused to recognize and enforce the arbitral award in question.

Double W LLC raised several objections in the recognition and enforcement proceedings. First of all, it argued that the arbitral award violated the Ukrainian public order. In particular, it argued that the subject matter of the dispute was of a corporate nature and was therefore subject to the exclusive jurisdiction of the ordinary courts, or more precisely the Ukrainian commercial courts, because it was a matter of participation in a Ukrainian company that the parties were participants in this company and had relations of a corporate nature with each other.\textsuperscript{64}

This was not enough for Double W LLC, which at the same time filed a complaint with a Ukrainian commercial court claiming that its rights to the company and other contractual rights had been infringed. The legal basis for the rights asserted by Double W LLC was the already described Article 12 CPC and Article 167 CC.

Although the lawsuits pending had a different subject matter, the court of first instance of the city of Odessa decided to determine whether the subject matter underlying the VIAC arbitration award is capable of arbitration under Ukrainian law. For this purpose, the parties obtained expert opinions on Ukrainian law, which came to contrary conclusions. Ultimately, the court concurred with the opinion of the Double W LLC expert and found that:

1) the VIAC arbitration award contained decisions which go beyond the jurisdiction of the arbitral tribunal; and

2) the subject matter of the dispute (participation rights) was not arbitrable under Ukrainian law, since the dispute was also pending before a Ukrainian commercial court.

Consequently, the court of first instance refused to recognise and enforce the VIAC award.\textsuperscript{65}

At the same time, the court of first instance ruled that the arbitration costs could be recognised and enforced on the basis of the effectively concluded arbitration agreements. However, this does not apply to the

\textsuperscript{63} Id.
\textsuperscript{64} Id.
\textsuperscript{65} Id.
lawyer’s fees to be reimbursed, since such costs are in violation of public policy and in particular the basic principles of reasonableness, fairness and good faith of Article 3 of the Ukrainian Civil Code.\textsuperscript{66}

The court of appeal concurred with this view, but also did not consider the costs of arbitration to be acceptable and arbitrable.\textsuperscript{67}

Consequently, Raiffeisen Property Management GmbH turned to the USSC. It overturned the judgment of the court of appeal and remanded the case to the court of first instance for a new decision. The reason for the remand was that “the conclusions of the court of first instance that the lawsuit is not arbitrable under Ukrainian law are erroneous”.\textsuperscript{68}

However, the court of first instance did not follow USSC’s reasoning and again refused to recognise and enforce the arbitral award in its decision of 30 November 2012.\textsuperscript{69} However, the court of appeal did not follow the arguments of the court of first instance and ruled on 6 June 2013 that the arbitral award did not violate Ukrainian law, that the dispute was arbitrable and that the award was therefore to be recognized and enforced.\textsuperscript{70} The USSC concurred with this ruling on 17 November 2014.\textsuperscript{71}

This four-year odyssey, which Raiffeisen Property Management GmbH had to take on for the recognition and enforcement of a justifiably issued arbitration award, shows two things. On the one hand, the very idiosyncratic interpretation of Ukrainian law and, on the other hand, the fact that it can be reasonably concluded that at least disputes concerning the sale of shareholdings in companies can be arbitrated before international arbitral tribunals.

\textsuperscript{68} Ukrainian Supreme Specialized Court for Civil and Criminal Matters, Judgment of 9 November 2011, Case No. 6-28841sv11, http://www.reyestr.court.gov.ua/Review/19514260.
3. VAMED Engineering GmbH & Co. KG v Ukrmedpostach

The most recent case law concerns the decision in VAMED Engineering GmbH & Co. KG v Ukrmedpostach, which was once again based on an application for recognition and enforcement of an award. This case shows what is hopefully a new trend in the interpretation of the controversial nature of Article 12 CPC. Thus, numerous Ukrainian courts decided in the above-mentioned cases that Article 12 CPC is only applicable to domestic arbitration proceedings. The VAMED Engineering GmbH & Co. KG v Ukrmedpostach saga comprises three consecutive proceedings for annulment of three arbitration awards by the International Arbitration Court of the Ukrainian Chamber of Commerce and Industry (ICAC).

Although there are three different arbitration awards from three different proceedings, the basis of all these awards is the same supply contract concluded between the Austrian VAMED Engineering GmbH & Co. KG and the Ukrainian state-owned company Ukrmedpostach on 14 November 2009. The delivery contract covered 85 incubators for premature infants.72 The dispute arose after VAMED Engineering GmbH & Co. KG delivered the equipment to the Ukraine, and Ukrmedpostach asserted claims for subsequent performance.73

Surprisingly, the courts, although always dealing with the same supply contract, have somehow managed to issue contradictory and inconsistent judgments, which again demonstrates the unpredictability of Ukrainian courts and underlines the lack of legal certainty.

a) First Proceedings

The first dispute was decided by the arbitral tribunal according to the rules of ICAC on 4 April 2013 in favour of the claimant, Ukrmedpostach. The arbitral tribunal ruled against VAMED Engineering GmbH & Co. KG to supply new incubators to Ukrmedpostach in accordance with Ukrainian law and to bear the costs of the arbitration proceedings. If VAMED Engineering GmbH & Co. KG did not comply with this obligation within 90 days of receipt of the award, it would be ordered to pay EUR 4,973,590.55 to Ukrmedpostach.74

VAMED Engineering GmbH & Co. KG filed an application for annulment of the arbitration award with the District Court of Kiev.

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73 Id.
74 Id.
Shevchenkivskyi District. The court of first instance granted this request on 3 September 2013 and annulled the award.75

After numerous appeals, the USSC eventually followed the court of first instance. In its judgement of 30 July 2014, the USSC decided that the supply contract “is a contract for the satisfaction of state needs (public contract), since it is financed by a credit institution, which is a state guarantee in accordance with the resolution of the Cabinet of Ministers of Ukraine dated 05.08.2009 No. 819 ‘On the promotion of foreign loans with a state guarantee for a state enterprise, which is specialized in the procurement of medical facilities’.”76

This reasoning was ultimately confirmed by the SC.77 The SC also confirmed the following statements of the USSC:

In accordance with Article 1 (4) of the Law 'On International Commercial Arbitration', the present Act [Note: Arbitration Act] shall be without prejudice to other laws that exclude or permit the arbitration of certain disputes.

In contrast, Article 12(4) CPC (in the version of 05.03.2009) prohibits certain categories of disputes to be referred to arbitration courts [Note: tretejskie sudy] – this includes disputes over the conclusion, entry into force, amendment, termination or performance of economic contracts concluded to satisfy state interests.78

In addition, at the time when the parties entered into the supply contract, Article 12(2) of the CPC contained a provision prohibiting dispute resolution by arbitration in contracts arising from public tenders. Accordingly, the arbitration clause contained in the supply contract was invalid. Consequently, the USSC ruled that the arbitral tribunal was not competent and annulled the award under Article 34 Arbitration Act. Referring to the European Convention on International Commercial Arbitration, the USSC further stated that a state court has the competence to annul an arbitration agreement in so far as the subject matter of the

75 Id.
dispute may not be referred to arbitration under the laws of the respective country.79

The USSC has again, with regard to Article 12 CPC, failed to make a distinction between domestic and international arbitration proceedings and to take a clear position on the arbitration capacity of corporate disputes. Although the USSC made no such statement, the USSC, it can be inferred from the context of the ruling that only domestic arbitration proceedings were intended. Thus, the USSC set an arbitration-friendly precedent for international arbitration proceedings, even if not obvious, in particular for the highly controversial public procurement contracts.80

As already mentioned, the dispute reached the SC. However, the audit did not find any deviations from Ukrainian law. In its decision of 11 March 2015, the SC therefore rejected the appeal.81

b) Second Proceedings

The second case relates to another arbitration award, also in accordance with ICAC rules. In response to an action brought by Ukrmedpostach, the arbitral tribunal ordered VAMED Engineering GmbH & Co. KG to pay damages in the amount of EUR 6,007.69 and the reimbursement of the costs of arbitration of the Ukrmedpostach.82

As before, VAMED Engineering GmbH & Co. KG opposed this award. It reiterated its request for the annulment of the award. In contrast to the first case, the same court of first instance now ruled that the arbitration clause contained in the supply contract was valid.83

The court of appeal also upheld this decision.84 In its decision of 19 February 2014, it also found that the arbitration clause contained in the supply contract was compatible with the Arbitration Act and that the latter did

79 Id.
84 Id.
not contain any restrictions with regard to the arbitration of corporate disputes.\textsuperscript{85}

The court of appeal further stated that Article 12 CPC may limit the scope for arbitration of certain matters (including disputes arising from public contracts), but this only applies to national arbitration jurisdiction governed by the Law “On Arbitral Tribunals”.\textsuperscript{86} It should be noted that this is only applicable if both parties to the arbitration are of Ukrainian origin. Such an argument suggests that the Court of Appeal is referring to the version of Article 12 CPC of 2011.\textsuperscript{87} This is also confirmed by the court’s statements when it says: “This does not contradict the correct results of the [first instance] court, since the provision in question of the CPC only applies to national arbitration proceedings subject to the Law on Arbitral Tribunals, which limits its applicability to international arbitration proceedings in Art 1(4).”

Although the judgement was submitted to the USSC for appeal,\textsuperscript{88} the USSC did not consider it relevant, since no certified copies of the judgments of the first two instances were submitted to the court of appeal. Accordingly, the appeal was rejected.

c) Third Proceedings

As in the second case, the arbitral tribunal decided in the third case according to the rules of the ICAC with an arbitral award from the same day. This time, the arbitral tribunal ordered VAMED Engineering GmbH & Co. KG to repay a loan sum of EUR 69,563.44 and to bear the costs of the arbitration proceedings.\textsuperscript{89}

Again, VAMED Engineering GmbH & Co. KG filed an application for annulment of the arbitral award. The same court as in the two previous proceedings found once again that the arbitration clause was effective.\textsuperscript{90}

\textsuperscript{85} Id.
\textsuperscript{86} Id.
\textsuperscript{87} Confirming Perepelynska, Arbitrability under Ukrainian law: Problematic issues, http://www.sk.ua/sites/default/files/ope_2015_arbitrabilnost_sporov_po_zakonodatelsstvu_ukrainy_problemye_voprosy_materialy_2_mezhd.arbitrazh.chteniy_pamyati_pobirchenka_i.g..pdf.
\textsuperscript{90} Id.
However, the Court of Appeal overturned the first-instance judgment and annulled the award.\footnote{Kiev court of appeal, Judgment of 11 September 2014, Case No. 22-c/796/4165/2014, http://www.reyestr.court.gov.ua/Review/40663692.}

d) Interim Result

Such a result shows that, in the first proceedings the courts refer to the wording of Article 12 CPC in its 2009 version, whereas in the second proceedings they use Article 12 CPC in its 2011 version. The courts do not seem to want to determine whether the law should apply in the version of the conclusion of the arbitration agreement or the judgment.

Fortunately, the approach of the courts in qualifying the dispute as “domestic arbitration” or “international arbitration” is consistent. All three proceedings result from the same supply contract and in all three proceedings the courts come to the conclusion that it is an “international arbitration”. This is a result that, while it should have been obvious in light of the wording of Article 1(2) of the Arbitration Act, was by no means certain.

Ultimately, it is regrettable that the courts only addressed implicitly Article 12(2) CPC and Article 12(4) CPC. Nevertheless, the decisions are ground-breaking for Ukrainian case law on corporate disputes and should be viewed positively.

In this respect, it is to be hoped that the question of the ability to arbitrate in disputes under company law, which remains uncertain despite the decisions taken, may be finally and conclusively resolved by reforming the CPC.

II. The current reform efforts of the Commercial Procedural Code

The draft law of a reformed Commercial Procedural Code\footnote{Draft law of 23 March 2017, No. 6232 of the Economic Code of Procedure, http://w1.c1.rada.gov.ua/pls/zweb2/webproc4_1?pf3511=61415.}, which was adopted on 20 June 2017 in the first reading of Verkhovna Rada and is to enter into force in the framework of the judicial reform in Ukraine, addresses the problem of arbitration of corporate disputes with a ban on the referral of all corporate disputes to an arbitral tribunal, whether domestic or international. However, the law provides for an exception. Disputes arising from relationships of a corporate nature, including disputes between the corporate bodies and board administrators (founders, shareholders, members) of the legal entity or between the enterprise and its bodies and board administrators (founders, shareholders, members) as well as shareholders...
who have already retired, who take up, manage or terminate the activities of such an enterprise, with the exception of labour disputes, 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.

Thus, the proposal for a reformed code of commercial procedure is indeed a step in the right direction and a step towards the final clarification of the question of the arbitrability of corporate disputes. The dispute shall be arbitrable if it is submitted to an international arbitral tribunal and the above-mentioned conditions are fulfilled. The referral of any disputes under company law to a domestic arbitral tribunal is prohibited, so they remain non-arbitrable domestically. However, against the background of the widespread corporate raiding, such a step is understandable. After all, confidence in foreign, independent arbitration institutions is undisputedly higher.

E. Conclusions

The ability to arbitrate corporate disputes in Ukraine remains a minefield that is difficult to assess. The fact that, despite the case law outlined above, supreme courts are reluctant to give their opinion on Article 12 CPC in its 2011 version leads to contradictory results. Despite its wording and contrary to Article 1(4) Arbitration Act Article 12 CPC may be applicable to both domestic and international arbitration proceedings.

However, in light of the case law, it is possible to draw some conclusions, if only a few. Firstly, in assessing whether or not a dispute is a “corporate dispute”, the courts take into account subjective rights, the reasons for the dispute and the subject matter of the dispute. Only disputes arising between owners of rights under company law are to be qualified as corporate disputes.

In the opinion of the authors, taking into account the contradictory case law, the current efforts to reform the CPC are not only necessary, but of the highest priority. This is the only way to ensure legal certainty with regard to the arbitrability of corporate disputes, even if only in the case of international arbitrations. However, these are precisely the proceedings that European and American legal practitioners are interested in. There is no doubt that such an amendment of the CPC would contribute to Ukraine’s attractiveness and ease of arbitration.

Consequently, it remains to be seen (and hoped or prayed for) for both arbitrators and market participants that the legal situation regarding arbitration of corporate disputes will be stabilized and that the existing issues
Leonid SHMATENKO, Svitlana BEVZ, *The Arbitrability of Corporate Disputes in Ukraine*

**Summary**

While, in the U.S. and the EU, corporate disputes follow the trend to be submitted to arbitration rather than being litigated, Eastern European states such as Ukraine deem them as being non-arbitrable. In Ukraine the arbitrability of corporate disputes remains a highly disputed legal topic as the Ukrainian arbitration law is insufficient and there are major shortcomings in the present case law. The problem of arbitrability of corporate disputes as such is due to the ambiguous wording of Article 12 of the Ukrainian Code of Commercial Procedure and its interpretation. Additionally, it is highly disputed when a corporate dispute actually exists.
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Aims & Scope
Switzerland is generally regarded as one of the World’s leading place for arbitration proceedings. The membership of the Swiss Arbitration Association (ASA) is graced by many of the world’s best-known arbitration practitioners. The Statistical Report of the International Chamber of Commerce (ICC) has repeatedly ranked Switzerland first for place of arbitration, origin of arbitrators and applicable law.

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