

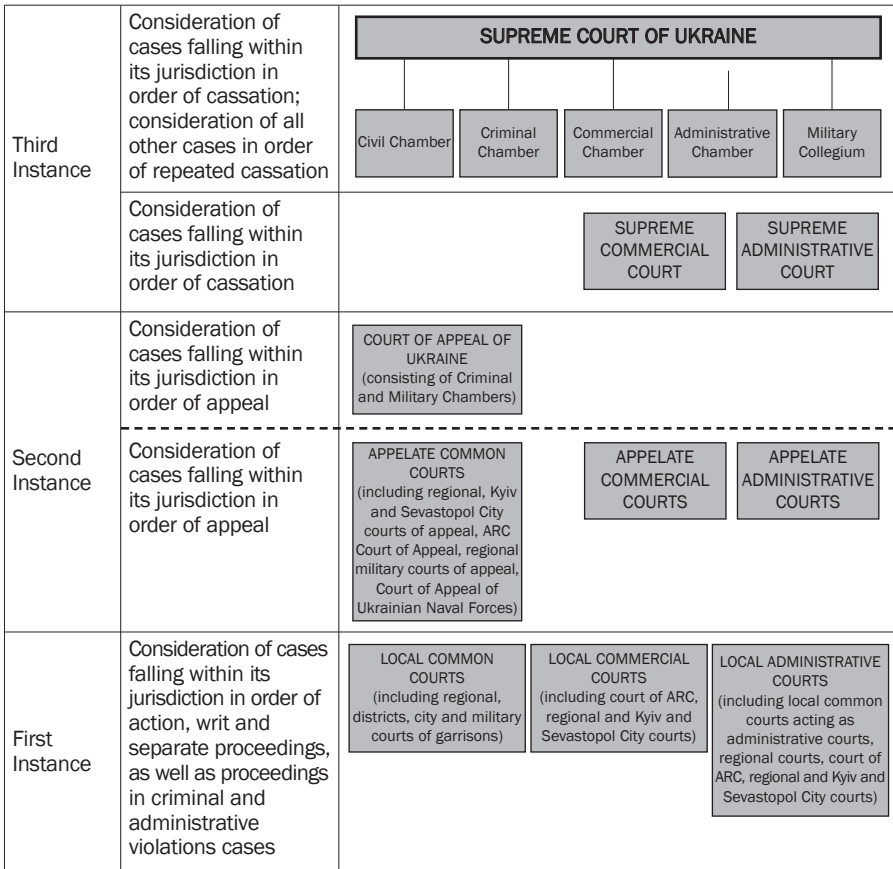
10. DISPUTE RESOLUTION

10.1 Introduction

A foreign or Ukrainian legal entity or individual entrepreneur may apply to an appropriate Ukrainian court, or to an appropriate arbitration tribunal or institution within or outside of Ukraine, for the resolution of disputes.

In Ukraine, the courts of general jurisdiction are organized according to the principles of territoriality and specialization and include: local courts; appellate courts and the Court of Appeal of Ukraine; Supreme Specialized Courts; and the Supreme Court of Ukraine, as shown in Diagram 1, below.

Diagram 1: The Ukrainian Court System



Local courts consist of common courts (including military courts) and specialized courts (*i.e.*, commercial and administrative courts). Local common courts adjudicate civil and criminal cases as well as actions for administrative violations. Local commercial courts exercise jurisdiction over disputes arising out of commercial relations, while local administrative courts administer justice in disputes connected with legal relations in the area of state government and municipalities.

The appellate instance courts are comprised of the relevant appellate courts and the Court of Appeal of Ukraine, which reviews decisions of the local common courts in the limited cases provided for by the applicable procedural rules.

Cassation supervision is carried out by the relevant Superior Courts of special jurisdiction. Also, in certain cases identified by the applicable procedural rules, the cassation review of the decisions of the lower courts is accomplished by the Supreme Court of Ukraine.

Since Ukraine is a civil law country, the exercise of judicial power is based solely on the application of statutes. Court decisions do not constitute binding precedents, although decisions by the Supreme Court of Ukraine and the Supreme Commercial Court are summarized, in order to introduce uniformity to the interpretation and application of the applicable legislation, and are followed by the lower courts on a quasi-mandatory basis.

10.2 Commercial Litigation in Ukraine

For the resolution of business-related disputes, a foreign or Ukrainian legal entity or individual entrepreneur may apply to an appropriate Ukrainian court or to an appropriate arbitration tribunal or institution within or outside of Ukraine. A legal entity's/individual's right to apply to a Ukrainian court may not be waived by contract, even by an arbitration agreement between the parties. If an arbitration agreement exists between the parties, the party objecting to the review of the dispute by a Ukrainian court must raise such objection in the relevant court proceeding before making any submission on the merits of the dispute; otherwise, the court will accept jurisdiction and will proceed to review the dispute and to render a judgment.

Currently, specialized commercial courts exist within the system of courts of general jurisdiction (*i.e.*, "*hospodarski sudy*" or "commercial courts"). As a general rule, any business-related dispute between business entities (including individual entrepreneurs)

will be reviewed by the commercial court having jurisdiction over location of the respondent, according to the rules set forth by the *Commercial Procedural Code* (the *Commercial Procedural Code*), dated 6 November 1991. It should be noted however, that all corporate disputes between a company and its participant (shareholder) as well as all disputes between the founders (shareholders) of the company shall be considered by the commercial court having jurisdiction over location of the company. Such disputes will be reviewed by the commercial courts even in the event when the party thereto is an individual (rather than a legal entity or an individual entrepreneur). In all other cases involving individuals, such commercial cases will be adjudicated in the local common courts under the rules of the *Civil Procedural Code*, dated 18 March 2004. As a rule, a commercial court will not accept jurisdiction over a dispute between a foreign respondent and a foreign claimant, neither of whom has real estate property which is the subject of the dispute or a registered presence in Ukraine. In general, there are no limitations (including monetary limits) on the jurisdiction of the commercial courts, other than specialization and territorial factors.

The *Law of Ukraine "On International Private Law"*, dated 23 June 2005, comparing to the Commercial and Civil Procedural Codes, envisages more wide opportunities for consideration of the cases where foreign person is involved by Ukrainian courts. For example, a Ukrainian court may take for its consideration cases with foreign participant, provided that parties concluded an agreement on the Ukrainian court jurisdiction earlier; or the damages, which are subject of the dispute, when caused on the territory of Ukraine; or act or event, which is the ground for litigation took place on the territory of Ukraine etc., this Law also foresees the list of disputes over which Ukrainian courts have exclusive jurisdiction.

Despite the fact that the *Law of Ukraine "On International Private Law"* provides that a Ukrainian court may consider cases with foreign participant if parties concluded an agreement on the Ukrainian court jurisdiction, this provision is currently not applying by the Ukrainian commercial courts and, respectively such cases are generally not accepted for the considerations for the following reasons. Neither the effective *Commercial Procedural Code*, nor any other act regulating commercial court proceedings, provides for possibility to choose the court at the agreement of the parties. Legislative provisions also do not oblige commercial courts to refuse consideration of the statement claim if the parties agreed to consider particular case in other jurisdiction. The abovementioned provision apparently was adopted in order to make Ukrainian law consistent with the *Hague Convention on Choice of Court Agreements* of 30 June 2005.

However, as Ukraine has not ratified this Convention so far and, respectively, has not accordingly amended the procedural legislation, the provision on the possibility to agree on the competent court was not realized in practice, at least within commercial proceedings. At the same time, *the Civil Procedural Code* allows the parties to agree on the competent local civil court to consider particular dispute, except for the disputes which shall be considered under the rules of exclusive jurisdiction.

Under the *Commercial Procedural Code*, the court venue is determined following the territorial principle. As a general rule, disputes are adjudicated by the commercial court at the place of location of the defendant. Cases for the conclusion, modification, termination or recognition as null and void of agreements are considered by the court at the location of the debtor party to such agreement (i.e., the party under obligation to provide the services, to transfer property, etc.).

The exclusive venue for disputes involving title to property, the illegal use of property, or the removal of obstacles to use property is established by the court at the place of the location of such property. The Kyiv City Commercial Court exclusive venue is established for disputes arising out of transportation agreements by the court at the location of the transportation organization and where the defendant is a central government authority, or a certain state secret is involved.

In the commercial proceedings, the plaintiff may seek issuance of the injunction relief before the commencement of the court proceedings or during consideration of the case by the competent court. In its request for the injunction relief the plaintiff may ask the court to impose one or several measures, such as, e.g., arrest or funds or other assets of the defendant or ordering the defendant or third parties to refrain from certain actions.

Recently adopted amendments to the Commercial Procedural Code prohibit application of injunctive relief involving:

- (i) prohibition on holding the general shareholders meetings or other meetings of the owners of a commercial enterprise and on issuance of decisions at these meetings;
- (ii) prohibition on providing the register of privileged shares or information about the shareholders or other owners of a commercial enterprise by the shares issuer, the registrar, the keeper, or the depositary for the purpose of holding general shareholders meetings of the commercial enterprise;

- (iii) prohibition on participating in the general shareholders meetings by the shareholders or by other owners of the commercial enterprise, or on establishing the legal capacity of the general shareholders meetings or other meetings of the owners of a commercial enterprise.

Such amendments were enacted in order to improve consideration of corporate disputes by the commercial courts and to protect the rights of the shareholders and other owners of commercial enterprises to govern their enterprises and to prevent unlawful corporate takeovers.

10.3 Commercial Arbitration

A business-related dispute between a foreign legal entity or individual entrepreneur and a Ukrainian legal entity or individual entrepreneur may be referred, by the agreement of the parties, for settlement by either an ad hoc or an institutional arbitration, either within or outside of Ukraine. A business-related dispute involving only Ukrainian parties may be referred to either an ad hoc or an institutional arbitration only on the territory of Ukraine and is not subject to international commercial arbitration. At the same time disputes of Ukrainian legal entity with foreign investments between themselves, their participants, as well as their disputes with other Ukrainian entities may be referred to international commercial arbitration.

In view of clarifications on court practice regarding corporate disputes recently adopted by the Supreme Commercial Court and the Supreme Court of Ukraine, prohibiting the shareholders' (participants') of Ukrainian companies, irrespectively of their nationality, from settlement of corporate disputes related to such companies by means of international commercial arbitration, there is a risk that the local Ukrainian courts may reject to grant party's requests on recognition and enforcement of such arbitral awards in Ukraine.

Currently, there are two well-established bodies of institutional arbitration in Ukraine: the International Commercial Arbitration Court of the Chamber of Commerce and Industry of Ukraine, and the Maritime Arbitration Commission of the Chamber of Commerce and Industry of Ukraine.

10.4 Enforcement of Foreign Court Judgments

Foreign court judgments will normally not be recognized or enforced in Ukraine in the absence of an international agreement, or unless Ukraine and the country in which the judgment was made have agreed ad hoc on the reciprocal enforcement of their judgments. Ukraine has agreements on the reciprocal enforcement of foreign judgments with several countries, mostly members of the former Soviet Union and/or Soviet Block.

A foreign judgment will not be enforced in Ukraine if it is determined that: foreign judgment did not come into force; and or Ukrainian courts or other Ukrainian authorities possess exclusive jurisdiction over such disputes; and/or a Ukrainian court has rendered a judgment or is currently considering a dispute in the same matter between the same parties and such consideration had started before opening of the proceedings by the foreign court; and/or the established term for applying for enforcement of a foreign judgment expired; and/or under Ukrainian legislation a disputed matter is not subject to a court's consideration. Ukrainian courts will also not recognize a foreign judgment against a party which was not given an opportunity to participate in the proceedings due to improper notification, if the enforcement of such judgment would threaten the interests of Ukraine or in other cases prescribed in international treaties and Ukrainian legislation.

10.5 Enforcement of Foreign Arbitration Awards

Foreign arbitration awards are, in general, easier to enforce in Ukraine than foreign court judgments, since Ukraine is a member of the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitration Awards.

A foreign arbitration award should be recognized as binding and enforced upon the filing by a party of an appropriate motion with the competent Ukrainian court, unless the losing party proves the existence of any of the following grounds established by the applicable Ukrainian legislation for the denial of the recognition and enforcement of the foreign arbitration award:

- the agreement to arbitrate is invalid under the chosen law;
- one of the parties, while entering into the arbitration agreement, was legally incapable;

- the losing party was not duly notified of the appointment of the arbitrator or the conduct of the arbitration proceedings;
- the losing party could not submit its explanations for valid reasons;
- the arbitration award was rendered on an issue outside the scope of the arbitration agreement;
- the arbitration panel or procedure did not comply with the arbitration agreement; or
- the arbitration award did not enter into force in, or was annulled or its execution was suspended by the court of, the country, according to the laws of which such arbitration award was rendered.

Similarly, a foreign or local arbitration award may be unenforceable in Ukraine if a Ukrainian court determines that: the object of the dispute cannot be subject to arbitration under Ukrainian legislation; or the recognition and enforcement of such arbitral award contradicts the public order of Ukraine.

11. CAPITAL MARKETS

11.1 General

The debt and equity securities markets in Ukraine are regulated by several laws, as well as by regulations and resolutions issued by the State Commission on Securities and the Stock Market of Ukraine (the Securities Commission). The principal legislation in this area includes the *Civil Code of Ukraine*; the *Commercial Code of Ukraine*; the *Law of Ukraine “On Securities and the Stock Market,”* dated 23 February 2006; the *Law of Ukraine “On Companies,”* dated 19 September 1991; the *Law of Ukraine “On Joint Stock Companies,”* dated 17 September 2008; the *Law of Ukraine “On the State Regulation of the Securities Market in Ukraine,”* dated 30 October 1996; the *Law of Ukraine “On the National Depository System and Specifics of the Electronic Circulation of Securities in Ukraine,”* dated 10 December 1997; the *Law of Ukraine “On the Circulation of Promissory Notes in Ukraine,”* dated 5 April 2001; the *Law of Ukraine “On Mortgage,”* dated 5 June 2003; the *Law of Ukraine “On Mortgage Lending, Transactions with Consolidated Mortgage Debt and Mortgage-Backed Certificates,”* dated 19 June 2003, and the *Law of Ukraine “On Mortgage-Backed Bonds,”* dated 22 December 2005.