THE INTERNATIONAL ARBITRATION REVIEW

NINTH EDITION

Editor
James H Carter

THE LAWREVIEWS

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PREFACE

International arbitration is a fast-moving express train, with new awards and court decisions of significance somewhere in the world rushing past every week. Legislatures, too, constantly tinker with or entirely revamp arbitration statutes in one jurisdiction or another.

The international arbitration community has created a number of electronic and other publications that follow these developments regularly, requiring many more hours of reading from lawyers than was the case a few years ago.

Scholarly arbitration literature follows behind, at a more leisurely pace. However, there is a niche to be filled by an analytical review of what has occurred in each of the important arbitration jurisdictions during the past year, capturing recent developments but putting them in the context of the jurisdiction's legal arbitration structure and selecting the most important matters for comment. This volume, to which leading arbitration practitioners around the world have made valuable contributions, seeks to fill that space.

The arbitration world often debates whether relevant distinctions should be drawn between general international commercial arbitration and international investment arbitration, the procedures and subjects of which are similar but not identical. This volume seeks to provide current information on both of these precincts of international arbitration, treating important investor–state dispute developments in each jurisdiction as a separate but closely related topic.

I thank all of the contributors for their fine work in compiling this volume.

James H Carter
Wilmer Cutler Pickering Hale and Dorr LLP
New York
June 2018

Chapter 44

UKRAINE

Ulyana Bardyn, Christina Dumitrescu and Victor Marchan[1]

I INTRODUCTION

i International commercial arbitration

Ukraine is a civil law country. The key sources of Ukrainian law are national legislative acts (statutes and codes) adopted by the parliament and international treaties ratified by Ukraine.[2] Under Ukraine's Constitution, international treaties, when ratified, become an integral part of the country's legal system and take precedence over conflicting domestic laws (except for Ukraine's Constitution).[3] This hierarchical rule is equally applicable in the arbitration context; therefore, international arbitration treaties take precedence over Ukraine's national laws governing international arbitration.

Ukraine is a signatory to the key international arbitration instruments, such as the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958 (New York Convention) and the European Convention on International Commercial Arbitration of 1961 (European Convention), and is also a party to important regional treaties such as the Commonwealth of Independent States (CIS)-wide Kiev Convention on the Procedure for Settling Disputes Connected with Economic Activity of 1992 (Kiev Convention).[4]

Ukraine's Law on International Commercial Arbitration (ICAL) was adopted in February 1994. Prior to that date, international commercial legislation in Ukraine was virtually non-existent. The ICAL is entirely based on the UNCITRAL Model Law on International Commercial Arbitration of 1985 (Model Law).[5] The ICAL applies to international commercial arbitration proceedings seated in Ukraine.

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1 Ulyana Bardyn is a senior managing associate at Dentons US LLP, Christina Dumitrescu is an associate at Dentons US LLP, and Victor Marchan is an associate at Dentons Europe LLP.

2 Resolutions of the Supreme Court of Ukraine provide guidance on some important substantive and procedural law issues. The legal positions specified in resolutions of the Supreme Court of Ukraine are mandatory and binding on all state bodies. Such legal positions should also be taken into account by Ukrainian courts while adjudicating disputes, but the resolutions are not binding on said courts.

3 Constitution of Ukraine, Article 9.

4 Another important regional treaty, the Kishinev Treaty on Mutual Legal Assistance in Civil, Family and Criminal Matters of 2002, has not yet been ratified by Ukraine; therefore, the Kiev Convention remains the only regional arbitration-related treaty currently effective in Ukraine. The Kiev Convention creates a legal framework within the CIS for the resolution of business disputes in the national courts of the CIS states. While the Kiev Convention concerns primarily the jurisdiction of national courts, it also contains an important provision pertaining to the reference of disputes to arbitration.

5 A few minor deviations, Articles 1(3)(b) and 1(3)(c) of the Model Law, were not included in the ICAL. It should also be noted that the ICAL remains intact since its adoption in 1994 (except for provisions relating

Ukraine's two major permanent commercial arbitration institutions are the International Commercial Arbitration Court (ICAC)[6] and the Maritime Arbitration Commission (MAC), both established 20 years ago under the auspices of the Chamber of Commerce and Industry of Ukraine (CCIU). Both the ICAC and the MAC operate based on the regulations incorporated into the ICAL and the rules of procedure drafted and approved by the ICAC and the MAC, respectively.

The ICAC recently overhauled its rules, implementing new provisions on interim measures and expedited proceedings and expanding both the power of arbitrators and the freedom of parties.[7] The new rules, which took effect on 1 January 2018, allow arbitrators to modify or terminate interim measures previously granted, require a party to provide security to reimburse possible damages, and punish both parties and legal counsel for acting in bad faith when issuing orders for costs.[8] Under the new rules, parties may now, for the first time, request expedited proceedings if provided for in their arbitration agreements.[9] In these newly offered expedited procedures, respondents must file a statement of defence within 10 days and arbitrators must render an award within 20 days following completion of the proceedings.[10]

The ICAL makes a distinction between domestic and international arbitration proceedings.[11] Pursuant to the ICAL, the following disputes may be referred to international commercial arbitration:

a disputes resulting from contractual and non-contractual civil relationships arising in the course of foreign trade and other forms of international business relations, provided that the place of business of at least one of the parties is located outside of Ukraine;

b disputes arising between or among enterprises with foreign investments or international associations, on the one hand, and organisations established in the territory of Ukraine, on the other;

c disputes between or among the shareholders of the above entities; and

d disputes between such entities and other persons or entities that are subject to Ukrainian law.[12]

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to courts entrusted with controlling powers envisaged by Clause 2 of Article 6). It should also be noted that unlike some other countries, Ukraine has not as yet implemented the UNCITRAL amendments to the Model Law adopted in 2006.

6 A 2017 report published by the court shows that the ICAC is fast becoming a leading arbitral institution in the region. The ICAC registered the largest number of cases (553) among arbitral institutions in Central Europe in 2016. These cases involve parties from 56 different countries (47 per cent from Europe, 27 per cent from the CIS region, 18 per cent from Asia, 7 per cent from North and South America, and 1 per cent from Africa). The ICAC also released information on gender diversity. For example, of the 750 arbitrators appointed in 2016, 40.7 per cent (305) were women. Notably, more than half of appointments (52.9 per cent) made by parties went to women. For more information, see 'Statistics and Practice of the International Commercial Arbitration Court at the UCCI', ICAC 2017, available at https://icac.org.ua/wp-content/uploads/Statictics-and-Practice-of-the-ICAC_2017_eng.pdf.

7 'Ukrainian centre revamps rules', Global Arbitration Review, 15 March 2018.

8 Ibid.

9 Ibid.

10 Ibid.

11 Currently, there are 69 permanent domestic arbitration institutions in Ukraine that handle domestic arbitration cases (searchable at ddr.minjust.gov.ua (available in Ukrainian only)).

12 ICAL, Article 1(2). Although the text of the ICAL is based almost entirely on the Model Law, the wording of Article 1(2) of the ICAL differs from that of Article 1(2) of the Model Law.

The scope of arbitrability is relatively broad in Ukraine. With a few notable exceptions, Ukrainian law allows arbitration of civil and commercial disputes, both contractual and non-contractual.[13] The exceptions pertain to disputes that are within the exclusive jurisdiction of the Ukrainian courts, which include, *inter alia*:

a disputes connected with the registration or liquidation of legal entities or private entrepreneurs in Ukraine;

b disputes concerning entries in Ukraine's State or Land Registries;

c disputes concerning inheritance, if the testator was a Ukrainian citizen who lived in Ukraine;

d disputes concerning real property, including land located in Ukraine;[14]

e disputes concerning intellectual property requiring registration or issuance of a certificate (e.g., a patent) in Ukraine;[15]

f disputes concerning the issuance or cancellation of securities in Ukraine;[16]

g bankruptcy, financial restructuring or other insolvency proceedings in which the debtor is a Ukrainian entity;[17]

h setting aside of acts of governmental agencies;[18]

i disputes arising in connection with government procurement agreements;[19]

j corporate disputes between a corporate entity and its shareholder (e.g., a founder or shareholder) as well as disputes between shareholders of corporate entities – provided that these disputes arise in connection with the creation, operation, management or termination of activities of those entities;[20]

k disputes arising from labour law relations;

l matters pertaining to government secrets;

m disputes between a private party and a state or municipal body (or its officers), including state institutions and organisations;

n disputes relating to protection of consumer rights, including those in the banking sphere; and

o other disputes expressly designated by Ukrainian law as non-arbitrable.

The ICAL recognises such widely accepted arbitration concepts as separability of the arbitration clause from the main agreement[21] and the principle of *Kompetenz-Kompetenz*.[22] Clause 1 of Article 8 of the ICAL states that reference to arbitration is a right, rather than an

13 ICAL, Article 2.

14 Law on International Private Law (IPL), Article 77; see also Law on Arbitration Courts (ACL), Article 6.

15 Ibid.

16 Ibid.

17 Ibid.

18 ACL, Article 6.

19 Ibid.

20 Ibid.

21 ICAL, Article 16(1).

22 Ibid. In this regard, it is worth noting that the arbitral tribunal may either bifurcate the proceeding into the 'jurisdiction' and 'merits' stages or, alternatively, may consider jurisdictional and substantive issues concurrently. If the arbitral tribunal rules on its jurisdiction as a preliminary matter, that ruling can be challenged in the national court. The decision of the national court will be final. Notably, if the tribunal's jurisdictional ruling is so challenged, the tribunal may nevertheless proceed to hearing the merits of the case while the challenge is pending with the national court.

obligation. Therefore, to preserve its right to arbitration, the party that is being brought to court (despite the existence of a valid and applicable arbitration agreement) should submit its request to terminate the court proceedings and refer the parties to arbitration as soon as possible but, in any event, no later than its first substantive submission to the court.

Importantly, a legal issue settled in an arbitration proceeding that results in a final arbitral award is considered *res judicata*, and subsequent attempts to refer the same dispute between the same parties to a court will be denied, unless the arbitral award has been set aside on the grounds set forth in Article 34 of the ICAL.[23]

Mandatory rules of Ukrainian law pertaining to arbitration are relatively straightforward. They include the requirements that the arbitration agreement needs to be in writing,[24] and that the arbitration award should be in writing, signed by the arbitrator (or arbitrators),[25] reasoned,[26] and contain references to the date of its issue, place of arbitration, the final decision on satisfying or dismissal of claims, the amounts of arbitration fees, costs borne by the parties to the arbitration as well as their distribution between those parties.[27] The parties may not derogate from the procedures available under Ukrainian law for the setting aside of an arbitral award or refusal of its recognition and enforcement.[28]

In addition, certain mandatory provisions of Ukrainian laws may not be avoided by subjecting the agreement to a foreign law. By way of example, except as otherwise provided in an applicable international treaty or Ukrainian law, a foreign economic agreement (i.e., an agreement concluded between a Ukrainian enterprise or entrepreneur and a foreign counterparty concerning a commercial activity that has a foreign component)[29] must be made in writing, regardless of the place of its execution.[30] Similarly, an agreement concerning real property located in Ukraine must strictly follow the requirements of Ukrainian law.[31] Furthermore, a foreign law provision may not apply to a contractual relationship if such application would result in a violation of the fundamental 'legal order' (i.e., public policy) of Ukraine.[32]

The ICAL sets forth two key requirements for an arbitration clause: it must be in writing, and it must provide that the parties agreed to refer to arbitration all or some of the disputes arising out of their contractual or non-contractual relationship.[33] In addition, an arbitration clause may not cover disputes that are not arbitrable under Ukrainian law. Any clause that does not comply with these requirements will be declared invalid by a Ukrainian court.

As a practical matter, it is advisable that the parties set forth in their arbitration clause further provisions, such as:

23 Commercial Procedure Code of Ukraine, Article 80; Civil Procedure Code, Article 205.

24 ICAL, Article 7(2).

25 ICAL, Article 31(1). In arbitration proceedings with more than one arbitrator, the signatures of the majority of all members of the arbitration tribunal shall suffice, provided that the reason for any omitted signature is stated.

26 ICAL, Article 31(2).

27 ICAL, Article 31.

28 ICAL, Articles 34 and 36.

29 Law of Ukraine on Foreign Economic Activity, Article 1.

30 IPL, Article 31(3).

31 IPL, Article 31(2).

32 IPL, Article 12.

33 ICAL, Article 7.

a the correct name of the institution that will administer the proceeding[34] or, alternatively, a reference to an *ad hoc* arbitration (in which case the parties should agree on the rules that would govern their proceeding and on the method for constituting the arbitral tribunal);
b the seat of the arbitration and place of the hearings (if different);
c the language of the arbitration; and
d the applicable law (unless provided elsewhere in the agreement).

In the absence of the parties' agreement as to items (b) through (d), the arbitral tribunal is authorised to conduct the proceeding as it deems appropriate,[35] set the language of the proceeding[36] and determine the substantive law based on the conflict-of-law rules that the tribunal deems appropriate to apply.[37]

The ICAL is silent on the issues of consolidation of arbitral proceedings and joinder of third parties; therefore, parties should expressly provide for these in their agreement, if they wish to address these issues.[38]

Pursuant to the ICAL, the arbitral tribunal shall be constituted in accordance with the parties' agreement. In the event that the parties have not reached an agreement, the tribunal will be constituted with the assistance of the President of the CCIU, serving as the appointing authority. Ukrainian law does not authorise national courts to partake in the appointment process, and the CCIU President's appointment decisions are not subject to appeal.[39] Nevertheless, to provide an additional layer of protection, Ukrainian law permits court review of the adequacy of the appointment procedure at the set-aside or enforcement stages.[40]

When choosing an arbitrator for a CCIU proceeding, it should be borne in mind that, as a practical matter, only the persons included on the List of Recommended Arbitrators approved by the Presidium of the CCIU may be appointed as arbitrators.[41] The only requirements expressly applicable to an arbitrator sitting in an ICAL proceeding are independence and impartiality.[42] If there are any circumstances giving rise to justifiable doubt as to the arbitrator's independence or impartiality, the arbitrator could be subject to challenge.[43]

34 The Clarification issued by the High Commercial Court of Ukraine No. 04/5/608 of 31 May 2002 provided that in the event that the arbitration agreement fails to refer the dispute to an existing arbitration institution, it would be impossible to ascertain the parties' intent as regards such a key procedural matter, and, therefore, the court may find that it is impossible to refer the dispute to arbitration in accordance with the parties' agreement. Ukrainian courts may also set aside a domestic or international award where the name of the arbitration institution was not indicated with sufficient precision.

35 ICAL, Article 19(2).

36 ICAL, Article 22(1).

37 ICAL, Article 28(2).

38 According to the Rules of the ICAC and the MAC, the joinder of a third person (not a party to the arbitration agreement) to the arbitration proceedings is possible upon mutual consent of the parties to the arbitration and that third person. Such consent should be made in writing.

39 ICAL, Article 11(5).

40 ICAL, Articles 34(2) (1) and 36(1).

41 Although that list is entitled the List of Recommended Arbitrators, selection of an arbitrator from among the candidates on that list is, in fact, mandatory. The List of Recommended Arbitrators of the ICAC is available at arb.ucci.org.ua/icac/en/arb_list.html.

42 ICAL, Article 12; ICAL Rules, Article 28.

43 ICAL, Article 12(2); ICAL Rules, 28(1).

Likewise, an arbitrator can be challenged if he or she does not have the qualifications required by the relevant arbitration agreement. A party can challenge the arbitrator appointed by it only for reasons of which it became aware after the appointment.

There are no special arbitration courts in Ukraine. Under Article 6.2 of the ICAL, only appellate-level courts can provide support and supervision to arbitration proceedings conducted in Ukraine, both domestic and international.

The ICAL does not permit any court interference in arbitration matters except as expressly provided by relevant provisions of the ICAL. At the same time, the ICAL recognises the supporting and supervising role of national courts. One important aspect of this role is the ability of the participants to an arbitration proceeding to seek, in domestic court, interim relief in support of arbitration.[44] Although the general provision setting forth the possibility of obtaining interim relief has been in place for a long time, only recently was the Civil Procedure Code amended to set out, in Articles 150-153, the procedure for obtaining interim relief. According to this procedure, a request for interim measures is to be supported by documents showing the existence of the underlying arbitration proceeding and the relevant arbitration agreement. A request for interim measures must be considered by the court within two days of its filing. The Civil Procedure Code also contains provisions for obtaining security measures at the stage of enforcement of arbitral awards in Ukrainian courts.[45] A party seeking enforcement of an arbitral award at any point in the enforcement proceeding can make an application for the security measures necessary to preclude rendering the arbitral award and its enforcement meaningless. Available types of security measures include, *inter alia*, an attachment of property, an injunction, an order to perform certain actions and the deposit of the property at issue with a third party.[46]

While the Civil Procedure Code expressly provides that, if necessary, the court shall be entitled to apply other security measures, Ukrainian courts remain reluctant to impose any measures that are not directly provided for under Ukrainian law. In addition, the court cannot attach salaries, scholarships, alimony payments, pensions and other social benefits, or impose measures interfering with procedures for the administration or liquidation of a bank as ordered by the Deposit Guarantee Fund.

Ukrainian courts hear motions for security measures in camera. If a security measure is imposed, it takes effect immediately and is enforced in accordance with the rules for enforcement of court judgments. A security measure can also be appealed to a higher court, but that appeal will not suspend its execution.[47] Likewise, the appeal will not stay any further court proceeding in the enforcement case.

In addition, a party may seek interim measures from the arbitral tribunal (unless the parties' agreement contains a provision to the contrary). Pursuant to the ICAL, the arbitral tribunal is authorised to grant interim relief as it deems appropriate.[48] The arbitral tribunal may require the party seeking interim measures to provide security for costs. The enforceability of interim relief issued by a arbitral tribunal is subject to debate as procedural

44 ICAL, Article 9.

45 Civil Procedure Code, Articles 477.

46 Civil Procedure Code, Article 150.

47 Civil Procedure Code, Article 153(10).

48 ICAL, Article 17.

orders, as opposed to a final award, are currently not enforceable in Ukraine. Nonetheless, even if the interim order is unenforceable, the recalcitrant party would seemingly be inclined to obey it, given that the same tribunal will be deciding the merits of the case.

Ukrainian law also provides for a relatively straightforward process of enforcement of arbitral awards. However, since Ukraine made a 'reciprocity' reservation to the New York Convention, it will only enforce arbitral awards that were made in the territory of another signatory to that Convention.

The enforcement process starts with the filing of an application with a court of appeal of general jurisdiction. Foreign arbitral awards can be enforced in the Court of Appeal in Kiev, while arbitral awards issued in Ukraine can be enforced in the district of the debtor's domicile or the location of its property. The application has to be made within three years of the date the award became enforceable.

In addition to the documents required to be submitted with the application pursuant to the New York Convention (i.e., the original or duly certified copies of the arbitral award and the arbitration agreement), the enforcing party would be well advised to submit additional documents envisaged by the Civil Procedure Code, such as proof that the arbitral award is final and binding, and that the adverse party was duly notified of the arbitral proceedings, as well as documents identifying the portion of the award to be enforced (in the event that the award was partially enforced previously) and a power of attorney issued to the representative of the enforcing party.[49]

The applicable law requires that the court rule on an enforcement application within two months of its submission. However, in practice this period may be much longer. In addition, if the enforcement order is appealed, the enforcement of the award will be stayed until the ruling of the appellate court. However, subsequent appeals to higher courts do not prevent the party from seeking enforcement from obtaining a writ of execution and proceeding with the enforcement of the award. Typically, a contested award can be heard at all appellate levels and enforced, if appropriate, within 12 months.

The grounds for setting aside an arbitral award are identical to the grounds set forth in the Model Law. An arbitral award will be set aside if it is established that:

a a party to the arbitration agreement was under some incapacity or the agreement is invalid under the law to which the parties subjected it or, in the absence thereof, under the law of Ukraine;

b the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings, or was otherwise unable to present its case;

c the award settles a dispute not contemplated by or not falling within the terms of the submission to arbitration, or contains decisions on matters beyond the scope of the submission to arbitration;[50]

d the constitution of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties (unless such agreement was in conflict with a provision of the ICAL from which the parties cannot derogate) or, where there was no such agreement, was not in accordance with the ICAL;

49 Civil Procedure Code, Article 476.

50 However, to the extent that the decisions on matters duly submitted by the parties to arbitration can be separated from those that were not within the scope of their arbitration agreement, then only that part of the award that contains decisions on matters not submitted to arbitration can be set aside.

e the court determines that the subject matter of the dispute is not capable of settlement by arbitration under the applicable laws of Ukraine; or

f the award is in conflict with the public policy of Ukraine.[51]

The likelihood of an arbitral award being set aside based on public policy considerations is not easy to assess, as Ukrainian law does not delineate expressly the parameters of this concept. The Supreme Court has shed some light on the meaning of public policy by indicating that it is to be understood as the legal order of Ukraine, comprising such fundamental principles as the independence of Ukraine, its constitutional freedoms, as well as the rights and guarantees of its citizens. Accordingly, national courts enjoy wide discretion in determining what constitutes the public policy of Ukraine.

For example, the Supreme Court of Ukraine held that relations among founders or shareholders of a commercial enterprise regarding the formation of the entity's governing bodies and determination of the scope of their competence are governed by laws that are 'imperative by their nature'.[52] According to the Supreme Court, any failure to observe imperative legal provisions results in a violation of public policy.[53] In light of this judicial clarification, the recognition and enforcement of a foreign arbitration award is likely to be denied in Ukraine if the award contravenes any provisions of Ukrainian law that are deemed to be 'imperative'.

While the process of enforcement of foreign arbitral awards in Ukraine is governed by the New York Convention, the European Convention and the ICAL, the execution of court decisions ordering such enforcement is governed by the Law on Enforcement Procedure (LEP). In addition, as of 1 January 2013, another relevant legislative act came in force: the Law on Guarantees Regarding the Execution of the Court Judgments (GRECJ Law). The main purpose of the GRECJ Law is to establish state guarantees to secure a more efficient enforcement of the LEP. The GRECJ Law improves the process of execution of judgments against governmental agencies and state enterprises.[54] The GRECJ provides that if the central executive authority that implements governmental policy in the area of Treasury servicing of budgetary funds does not pay the amount awarded, the party enforcing the award shall receive compensation from the Ukrainian State Budget at a yearly rate of 3 per cent of the amount due.

ii Investor–state arbitration

Ukraine has been actively participating in investor–state arbitrations both as a respondent state and also through its investors. Prominent cases in which Ukraine was involved in the

51 ICAL, Article 34.

52 See Resolution of the Plenum of the Supreme Court of Ukraine No. 13, 24 October 2008 'On Court Practice of Adjudication of Corporate Disputes'.

53 Ibid.

54 The GRECJ Law was enacted as a result of the 15 October 2009 decision of the European Court of Human Rights that, through the exercise of its pilot judgment in *Yuriy Nikolayevich Ivanov v. Ukraine*, ordered Ukraine to rectify numerous deficiencies in its legal systems pertaining to the execution of court and arbitral awards by January 2011 (which deadline was later extended to 15 July 2011). See correspondence from the Registry of the European Court of Human Rights concerning a pilot judgment delivered in the case of *Yuriy Nikolayevich Ivanov v. Ukraine*, available at wcd.coe.int/com.instranet.InstraServlet?command=com.instranet.CmdBlobGet&InstranetImage=1805662&SecMode=1&DocId=1690454&Usage=2.

past include Western NIS Enterprise Fund, Generation Ukraine, Tokios Tokeles, Alpha ProjektHolding GmbH, Windjammer Beteiligungsgesellschaft mbH & Co KG and Inmaris Perestroika Sailing Maritime Services GmbH, Bosch International Inc and B&P Ltd Foreign Investment Enterprise, GEA Group Aktiengesellschaft and Global Trading Resources Corp.

Ukraine is a signatory to the Convention on the Settlement of Investment Disputes between the States and Nationals of Other States of 1965 (ICSID).[55] Ukraine is also a signatory to the Energy Charter Treaty and over 70 bilateral investment treaties (BITs), of which 16 BITs have not yet been ratified.[56] The term 'investment' is quite expansive under most BITs, although some treaties contain express limitations.[57]

II THE YEAR IN REVIEW

i Developments affecting international arbitration

2016 saw meaningful progress in Ukraine's effort to build a legal infrastructure capable of supporting and promoting arbitration. Perhaps the most notable occurrence was Parliament's consideration of two draft laws that are designed to significantly improve judicial support and oversight of arbitration.[58] These drafts clarify the procedure for seeking interim measures in support of arbitration, outline the mechanism for obtaining security for costs and restrict the losing party's ability to challenge an arbitral award in courts. They also propose to expand the scope of arbitrability to cover any commercial and civil dispute that can be settled amicably, implement mechanisms for judicial assistance concerning evidentiary matters in support of arbitration, and streamline the process for providing judicial assistance to arbitration by concentrating such authority in two courts located in Kiev.

ii Arbitration developments in local courts

In addition to the above-mentioned legislative improvements, Ukrainian courts continue doing their part to clarify and develop the nation's arbitration law. To date, the vast majority of court decisions that touch on arbitration relate to enforcement of arbitral awards.

In *Donso Limited v. PJSC Mykolaivskiy combinat khliboproduktiv*, Ukrainian courts confirmed that they have no authority to modify arbitral awards issued by tribunals. Donso Limited (Donso) requested the court to modify the process for performance under an arbitral award because the debtor had repeatedly failed to make monthly payments and carry out specific (non-monetary) obligations under the award. The court of first instance ruled in favour of Donso and ordered a change from payment in instalments to one lump-sum payment of the entire amount. It reasoned that such a change would not in any way affect the substance of the award, but would ensure that Donso receives the amount to which it is entitled. The decision was reversed on appeal. The cassation court stressed the importance of the principle of finality and completeness of arbitration proceedings and emphasised that

55 The list of contracting states is available on ICSID's website.

56 See list of Ukraine's BITs, available at http://investmentpolicyhub.unctad.org/IIA/CountryBits/219.

57 For example, the Ukraine–Canada BIT expressly excludes property 'not acquired in the expectation or used for the purpose of economic benefit'. See Article I(f) of the Agreement Between the Government of Canada and the Government of Ukraine for the Promotion and Protection of Investments dated 24 October 1994.

58 The two bills have been submitted to Parliament under No. 4351 (bill on arbitration) and No. 6232 (bill on amendments to several codes of procedure).

the role of courts in such proceeding is narrowly circumscribed. Such role, the court noted, is limited to the enforcement of the will of arbitral tribunals and the courts do not have any authority to modify the tribunals' awards.

A recent case of *PJSC Company Rise v. Nuseed Serbia d.o.o.* highlights the importance of following the tribunal constitution process as set out in the arbitration clause. Under the arbitration clause, Rise and Nuseed agreed to have their disputes resolved by a two-member tribunal under the ICAC rules. Each party had to nominate one arbitrator, but it so happened that both Rise and Nuseed chose the same individual. As a result, ICAC formed a tribunal composing of a sole arbitrator. The arbitrator awarded Nuseed €2,384,498 in contract damages. Rise sought annulment of the tribunal's award based on non-compliance with the arbitration clause. The lower court denied annulment and the case progressed through the court of appeal to the cassation court. The cassation court held that the lower courts made a reversible error when they found that the arbitration procedure was in compliance with Ukrainian law and ICAC rules. The parties' unintended selection of the same arbitrator neither resulted in an amendment to the arbitration clause, nor gave a right to the arbitration institution to modify the clause. The cassation court remanded the case to the court of first instance, which, this time around, found that the process of tribunal constitution was in breach of the arbitration clause and set aside the award. Another appeal ensued and, on 12 January 2018, the court of appeal upheld the new decision of the court of first instance. The court of appeal reasoned that the head of ICAC should have solicited the parties' agreement as to the second arbitrator instead of modifying the number of arbitrators provided for in the arbitration clause. The Court also noted that neither the applicable law nor the ICAC rules granted the parties a right to challenge ICAC decisions, including decisions related to the process of the constitution of arbitral tribunals. However, the law does provide for a possibility to challenge an award issued by an improperly established tribunal – which is exactly what Rise did in this case. The Supreme Court of Ukraine has yet to rule on this dispute. It is to be seen whether the Supreme Court adopts in this case the rationale that determined its decision in *SES Astra AB v. State Enterprise UkrCosmos* (see below).

SES Astra AB v. State enterprise UkrCosmos is one case that demonstrates that Ukrainian courts have become more disciplined in adopting a narrow interpretation of the New York Convention's grounds for refusal to enforce arbitral awards.[59] SES Astra AB (SES) sought to enforce an award issued by a sole arbitrator under the Rules of Arbitration of the International Court of Arbitration of the International Chamber of Commerce. In the arbitration, a sole arbitrator had found that UkrCosmos breached its contractual obligations to SES, and awarded SES damages. After UkrCosmos failed to voluntarily comply with the award, SES commenced enforcement proceedings in Ukraine. The court of first instance granted the petition to enforce on 20 April 2015. UkrCosmos appealed, citing Article V(d) of the New York Convention and claiming that the composition of the arbitral tribunal was not in accordance with the parties' agreement on the ground that the arbitration clause provided for a three-member tribunal while the dispute was decided by the sole arbitrator. The case progressed through all instances of the Ukrainian court system to the Supreme Court. On 22 March 2017, the Supreme Court overturned the lower court's decision, finding that, despite the requirement of a three-member tribunal in the arbitration clause, the parties had agreed to refer the dispute to a sole arbitrator and, as such, they modified the terms of their agreement to arbitrate. The Supreme Court also pointed out that, apart from that

59 *SES Astra AB v. State enterprise UkrCosmos*, Supreme Court of Ukraine, decision of 22 March 2017.

modification, UkrCosmos also participated in the arbitration and never once raised an issue regarding the tribunal's composition, and, as a consequence, it waived any objections it may have had. The Supreme Court held there were no grounds for refusing to enforce the award and proceeded with the enforcement.

iii Investor–state disputes

Given the political upheaval of the past few years, it should come as no surprise that Ukraine and Ukraine's investors are now involved in even more investor–state disputes than they were several years ago.

As regards claims brought by Ukraine's investors, many arise out of the change of authority in Crimea. There are currently eight cases pending arising out of this conflict:

a *Aeroport Belbek LLC and Mr Kolomoisky v. The Russian Federation*;[60]
b *PrivatBank and Finance Company Finilon LLC v. The Russian Federation*;[61]
c *LLC Lugzor and others v. The Russian Federation*;[62]
d *PJSC Ukrnafta v. The Russian Federation*;[63]
e *Stabil LLC and others v. The Russian Federation*;[64]
f *Everest Estate LLC and others v. The Russian Federation*;[65]
g *JSC Oschadbank v. The Russian Federation*;[66] and
h *NJSC Naftogaz of Ukraine, PJSC State Joint Stock Company Chornomornaftogaz, PJSC Ukrgasvydobuvannya and others v. The Russian Federation*.[67]

Another claim alleging expropriation was noticed to Russia, this time by DTEK KrymEnergo, a Crimean subsidiary of Ukrainian energy company DTEK. The cases have been commenced under the Ukraine–Russia BIT. They all involve allegations of expropriation of Ukrainian businesses that operated in Crimea.

These cases contemplate a number of interesting and novel issues of international law. One such issue is whether the claimants had qualifying 'investments' in Russia that meet the requirements of Articles 1 and 5 of the relevant BIT. The claimants had established their businesses in the territory of Ukraine, as at that time Crimea was part of Ukraine. However, when Russia incorporated Crimea into its territory on 20 March 2014, the claimants' investments effectively changed their domicile. The question has thus arisen whether, by virtue of that change, claimants can be said to have made investments in the territory of Russia. Claimants have reportedly taken the position that, by asserting *de facto* control over Crimea, Russia effectively assumed obligations under the Ukraine–Russia BIT. Russia has not appeared in any of the aforementioned proceedings, but it has submitted statements in several of the cases, including the *Aeroport Belbek* and *Lugzor* cases, noting that the '[Ukraine–Russia

60 PCA Case No. 2015-07.
61 PCA Case No. 2015-21.
62 PCA Case No. 2015-29.
63 PCA Case No. 2015-34.
64 PCA Case No. 2015-35.
65 PCA Case No. 2015-36.
66 PCA case number is not known at present.
67 PCA Case No. 2017-16.

BIT] cannot serve as a basis for composing an arbitral tribunal to settle [claimants' claims]' and that it 'does not recognise the jurisdiction of an international arbitral tribunal at the [PCA] in settlement of [claimants' claims].'[68]

Although many of the proceedings (and thus pleadings filed therein) remain confidential at the time of writing, interim jurisdictional awards are reported to have been issued in most of the cases and are imminent in others. In particular, it is understood that the arbitral tribunals in *Aeroport Belbek* and *PrivatBank* rendered jurisdictional decisions that are favourable to investors on 24 February 2017, allowing the cases to proceed to the merits stage and concluding that the Ukraine–Russia BIT applied to Ukrainian investments in Crimea as soon as Russia asserted control over Crimea in March 2014.[69] The arbitral tribunals are identical in those two cases, being composed of Sir Daniel Bethlehem (claimants' nominee), Dr Vaclav Mikulka (appointed on behalf of the respondent) and Professor Pierre Marie-Dupuy (presiding arbitrator).[70] A hearing on the merits was held from 4 to 7 November 2017, at the Peace Palace in The Hague.[71] A final decision is pending. Furthermore, in Everest, the tribunal, comprised of Michael Reisman (claimants' nominee), Rolf Knieper (appointed on behalf of the respondent) and Andres Rigo Sureda (presiding arbitrator), also issued a unanimous decision on jurisdiction, allowing the case to proceed to the merits.[72] In its decision, the tribunal explained that the key question was whether there was any requirement in the Ukraine–Russia BIT that an investment made by an investor from one contracting party had to be in the territory of the other contracting party at the time the investment was made.[73] The tribunal ruled that there was no such requirement and concluded that the investment need only be on the other contracting state's territory at the time of the alleged breach.[74] It has also been reported that a tribunal chaired by Donald McRae, including co-arbitrators Bruno Simma (appointed by claimants) and Eduardo Zuleta (appointed by Andres Rigo Sureda as appointing authority), held a hearing on jurisdiction and admissibility in the *Lugzor* case, and issued a letter on 29 August 2017 indicating that it will issue a final award in which it will uphold its jurisdiction over the dispute and find that all claims are admissible.[75] Russia did not appoint an arbitrator in the case (Zuleta was appointed on Russia's behalf by Andres Rigo Sureda, the appointing authority), and has not participated otherwise. The tribunal granted an application from Ukraine to make submissions in the case as a non-disputing party.[76] In June 2017, a tribunal composed of Gabrielle Kaufmann-Kohler (presiding arbitrator), Daniel Price (claimants' nominee), and Brigitte Stern (appointed on the respondent's behalf) ruled that it had jurisdiction in another pair of cases: *Stabil* and *Ukrnafta*. Although the

68 PCA press release dated 6 January 2016, available at www.pcacases.com/web/sendAttach/1553; 'Another claim over Crimea given go ahead', *Global Arbitration Review*, 14 December 2017.

69 'Crimea cases against Russia to proceed', *Global Arbitration Review*, 9 March 2017.

70 PCA press releases dated 9 March 2016, available at www.pcacases.com/web/sendAttach/2090 and www.pcacases.com/web/sendAttach/2093.

71 PCA press release dated 6 December 2017, available at https://pca-cpa.org/wp-content/uploads/sites/175/2017/12/Press-Release-dated-6-December-2017.pdf.

72 PCA press release dated 5 April 2016, available at https://pca-cpa.org/wp-content/uploads/sites/175/2017/04/Press-Release-dated-5-April-2017.pdf.

73 'Crimea real estate claim goes forward', *Global Arbitration Review*, 5 April 2017.

74 Ibid.

75 PCA press release dated 31 December 2017, available at https://pca-cpa.org/wp-content/uploads/sites/175/2017/12/Press-Release-dated-13 December-2017.pdf.

76 Ibid.

precise reasoning of the tribunals is currently unknown, the arbitrators considered, according to a reputable arbitration newsletter, Russia's *de facto* control over Crimea in deciding the jurisdictional issue of whether the relevant investments were made in Russia.[77] The hearing on the merits was held from 5 to 6 February 2018 in Geneva, Switzerland and a final decision is pending.[78]

Further developments occurred in *Tatneft v. Ukraine*, the arbitration that we reported on in the 2014 edition of this chapter. To recapitulate, that arbitration was a six-year long proceeding, and it concluded with an award in favour of Tatneft, a company owned by Russia's semi-autonomous Republic of Tatarstan.[79] Tatneft's claim against Ukraine arose out of Tatneft's investment in Ukrtatnafta, a company operating the largest oil refinery in Ukraine. Tatneft and its affiliates initially owned a controlling stake in the company, and the remaining minority interest was split between the Ukrainian State Property Fund and an enterprise called Privat Group, controlled by Ukrainian businessman Ihor Kolomoysky. The case was unusual in that Tatneft maintained that Ukraine was responsible for the actions of Privat Group by adopting a series of measures that effectively transferred control over the company from Tatneft to Privat Group. A tribunal composed of Orrego Vicuña (presiding arbitrator), Charles N Brower (as Tatneft's nominee) and Marc Lalonde (as Ukraine's appointee) ruled that the totality of Ukraine's actions regarding the physical takeover of Ukrtatnafta and the ouster of Tatneft as a shareholder amounted to a breach of the Russia–Ukraine BIT's 'fair and equitable treatment' standard. Ukraine lost a set-aside application before the Paris Court of Appeal in November 2016.[80] Tatneft is also pursuing enforcement of the award in the United States, United Kingdom and Russia. In a ruling on 27 June 2017, the Arbitrazh Court of Moscow dismissed with prejudice Tatneft's attempt to enforce the award.[81] In that proceeding, Tatneft had attempted to enforce the award against Ukraine's embassy to Russia and a Ukrainian cultural centre in Moscow, properties it argued were state-owned assets.[82] Ukraine had countered that the embassy land and cultural centre could not be used to establish the court's effective jurisdiction under the doctrine of sovereign immunity and could not be used to execute an award.[83] However, in August, a Moscow circuit court overruled the lower court's decision, finding that Ukraine had waived its right to jurisdictional immunity, and sent the enforcement action back to the lower court to review on the merits.[84] Ukraine appealed the circuit court's decision but a screening judge for the Russian Supreme Court declined to hear Ukraine's appeal.[85] In a decision issued on 31 October 2017, the screening judge for the court ruled that Ukraine's arguments that Tatneft's enforcement action should be halted based on sovereign immunity grounds did not merit consideration and allowed the

77 'In Jurisdiction Ruling, Arbitrators Rule that Russia is Obliged under BIT to Protect Ukrainian Investors in Crimea Following Annexation', IA Reporter, 9 March 2017.

78 PCA press release dated 19 February 2018, available at https://pca-cpa.org/wp-content/uploads/sites/175/2018/02/Press-Release-dated-19-February-2018.pdf.

79 *OAO Tatneft v. Ukraine*, Award on the Merits, dated 29 July 2014.

80 See Tatneft's press release dated 30 November 2015, available at www.tatneft.ru/press-center/press-releases/more/4918/?lang=en.

81 'Moscow court blocks enforcement against Ukrainian state assets', *Global Arbitration Review*, 4 July 2017.

82 Ibid.

83 Ibid.

84 'Russia's top court declines Ukraine's appeal over treaty award', *Global Arbitration Review*, 3 November 2017.

85 Ibid.

enforcement action before the Moscow Arbitrazh Court to continue.[86] On 19 March 2018, the US District Court for the District of Columbia rejected Ukraine's motion to dismiss Tatneft's enforcement application.[87] The court was unpersuaded by Ukraine's claim that the court lacked subject-matter jurisdiction to grant Tatneft's petition to confirm the award on the grounds of sovereign immunity, holding that US law provides an exception to foreign sovereign immunity for actions to confirm arbitral awards made pursuant to an agreement to arbitrate (here, the Ukraine–Russia BIT) and that are governed by an international treaty in force in the United States calling for the recognition and enforcement of arbitral awards (here, the New York Convention).[88] While it also refused the state's motions for a stay of proceedings, the court did explain that additional briefing was warranted with respect to Ukraine's arguments regarding the improper constitution of the tribunal and the possibility that the award is contrary to US public policy under Article V of the New York Convention.[89] The court is expected to render a final decision sometime this year. According to TASS, a Russian news agency, the Commercial Court of the Queen's Bench Division of the High Court of Justice in London granted Tatneft's application to enforce the award sometime last summer.[90] At the time of writing, it is unclear whether Ukraine is appealing the decision.

Further developments also occurred in *JKX Oil and Gas PLC (JKX), Poltava Gas BV (PG) and JV Poltavska Gazonaftova Kompania (PGK) v. Ukraine*, a case we reported on in prior editions of this chapter. The claims arose from Ukraine's allegedly discriminatory measures, including the passage of a July 2014 law that temporarily raised tax on gas production (from 28 to 55 per cent) and the promulgation of November 2014 regulations that required private companies to purchase gas solely from Naftogaz, a state-controlled company (thus discriminating against private sellers). An arbitral tribunal comprising of Professors James Crawford (presiding arbitrator), Bernard Hanotiau (claimants' appointee) and Michael Reisman (respondent's appointee) issued the final award in February 2017. Although the award remains confidential at the time of writing, the claimants have reported that their claims under the UK–Ukraine BIT were successful only in part, and that the tribunal awarded them US$11.8 million in damages – less than one-fourteenth of the amount sought.[91] Ukraine recently commenced a set-aside proceeding in London, alleging 'serious irregularity' in the conduct of the arbitral proceedings.[92] According to JKX Oil, on 27 October 2017, the High Court of Justice of England and Wales dismissed Ukraine's request to set aside the award and ordered that Ukraine should pay JKX Oil's costs.[93] As of the time of writing, the court's decision has not been made public.

86 Ibid.

87 *Pao Tatneft v. Ukraine*, Civil Action No. 17-582 (CKK) (D.D.C. 19 March 2018).

88 Ibid. at 11.

89 Ibid.

90 'London court grants Tatneft's application on recovery of $144 mln from Ukraine', TASS, 22 August 2017, available at http://tass.com/economy/961408.

91 See JKX's press release dated 7 February 2017, available at otp.investis.com/generic/regulatory-story.aspx?&cid=519&newsid=842356.

92 See JKX's press release dated 21 March 2017, available at http://www.jkx.co.uk/-/media/Files/J/JKX/press-release/2017/High%20Court%20Claim%20PRESS%20RELEASE%20DRAFT%20v3%20CLEAN.pdf.

93 See JKX's press release dated 30 October 2017, available at http://otp.investis.com/generic/regulatory-story.aspx?&cid=519&newsid=945043.

A further development also transpired in connection with the enforcement of an emergency arbitrator award. As reported, JKX sought to enforce the emergency arbitrator award in Ukraine. While the court of first instance had granted the petition of enforcement, Ukraine appealed, arguing, *inter alia*, that enforcement of the emergency award would violate Ukraine's public policy, as it would effectively reduce the applicable tax rate from 55 to 28 per cent in violation of Ukraine's tax law. The case was appealed to the High Specialised Court, which remanded the matter to the court of appeal for further consideration of the aforementioned public policy argument. On 21 December 2016, the court of appeal rendered a decision denying enforcement on the ground that the award violates Ukraine's public policy by changing its tax law as well as because Ukraine did not have a reasonable opportunity to present its case since the entire proceeding took place during Ukraine's Christmas holidays in mid-January.[94]

In January 2017, Igor Boyko, a US–Russian dual national filed a claim under the UNCITRAL rules under the Ukraine–Russia BIT.[95] Mr Boyko's claims relate to the alleged expropriation of a chocolate factory in the western Ukrainian city of Zhytomyr, including state measures that removed his firm from the state companies register and granted ownership to third parties and the physical seizure of the factory with Ukrainian police support.[96] A tribunal composed of David Caron (chairman), Robert Volterra (state appointee) and Gaetan Verhoosel (investor appointee) was constituted in June 2017.[97] In December 2017, the tribunal issued a rare emergency order on an *ex parte* basis in response to alleged immediate danger to Mr Boyko's well-being.[98] Counsel for Mr Boyko alleged that just days before the order was issued, Mr Boyko was arrested, taken into custody, and driven to an unknown location where he was severely beaten.[99] Mr Caron, writing for the tribunal, deemed that a temporary restraining order was warranted.[100] As of the time of writing, it is unclear when hearings will take place.

Other investment disputes against Ukraine are looming. In September 2017, Sanofi-Aventis Ukraine LLC, a Kiev-based subsidiary of French pharmaceutical group Sanofi, threatened Ukraine with bringing an investment treaty claim over alleged fraud in Ukrainian courts.[101] According to a reputable international arbitration newsletter, Sanofi has said that the dispute relates to a Ukrainian commercial court judgment allowing alleged 'fraudsters' to seize nearly US$1.9 million from the company and claims that these 'fraudulent activities' took place with the 'active assistance' of the State Execution Service, a government body tasked with enforcing Ukrainian court judgments.[102] As of the time of writing, it is unclear which treaty Sanofi would invoke or whether Sanofi has filed a formal notice of dispute.

94 Decision of the Court of Appeal in the case of *JKX Oil and Gas PLC, Poltava Gas BV and JV 'Poltavska Gazonaftova Kompania' v. Ukraine* of 21 December 2016.

95 'Tribunal is finalized to hear claim by Russian investor against Ukraine over alleged expropriation of chocolate factory', IA Reporter, 6 June 2017.

96 Ibid.

97 Ibid.

98 'After alleged violent assault on claimant, Igor Boyko, emergency *ex parte* relief is ordered by UNCITRAL BIT tribunal to protect him from further harm in Ukraine', IA Reporter, 4 December 2017.

99 Ibid.

100 Ibid.

101 'Ukraine risks new claim as hearings loom in oligarch case', *Global Arbitration Review*, 18 September 2017.

102 Ibid.

Additionally, late last year, Gennadiy Bogolyubov warned that he might bring an investment treaty claim under the UK–Ukraine BIT due to the loss of his stake in Privatbank, Ukraine's largest commercial bank.[103] Privatbank had been nationalised in late 2016 after regulators allegedly discovered a capital shortfall to the tune of US$5.65 billion.[104] Mr Bogolyubov, a Ukrainian-born businessman with both United Kingdom and Cypriot citizenship was a co-owner of Privatbank before it was nationalised. Mr Bogolyubov seeks compensation for nationalisation and the 'untrue allegations about related party-lending, non-performing of loans and misappropriation of funds.'[105] It is presently unclear whether Mr Bogolyubov has filed a formal notice of dispute.

III OUTLOOK AND CONCLUSIONS

During 2017, Ukraine demonstrated its commitment to improving the transparency of its court system, enhancing its regulatory framework and eradicating corruption. While this process is not without its setbacks, the progress is becoming more visible. It is hoped that Ukraine's efforts on the international plane and within its domestic borders will continue to establish a solid foundation for its continued development as a modern democratic state.

103 'Oligarch warns of treaty claim over bank nationalisation', *Global Arbitration Review*, 9 November 2017.

104 Ibid.

105 Ibid.

Appendix 1

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