

Navigating the Ukrainian COURT SYSTEM

Identifying deal opportunities in Ukraine is the easy part. Before that contract is signed, though, take care to follow a few legal precautions, write Arthur Nitsevych, partner, and Ivan Movlyak, senior lawyer, at Ukrainian law firm 'International Law Offices', Kiev.

Ukraine has a well-developed industrial base, rich agricultural resources and is close to existing unused markets. Because many of the former Soviet Union's high-tech military and industrial plants were situated in Ukraine, the country boasts a highly skilled engineering workforce. Certainly, doing business in Ukraine is not easy but equally it is never going to be dull. Indeed,

once past the initial barriers, business can be conducted in the same way that is anywhere else in the world.

In a climate where risk is involved in getting good returns from contracts, an initiated due diligence can be a vital tool to success. It is important to carry out the check prior to establishing any business or financial relationship. Prior to this, you need to define whether your prospective partner (a company or individual) is providing you

with full and accurate information. The aim is to confirm the *bona fides* of your prospective partner.

Due diligence enquiries are essential today. At a very basic level it ensures that the person you are dealing with (or intend to deal with) actually exists. There have been instances where companies have turned out to be completely fictitious. Second, even if it exists, it is not reasonable to take what is said for granted. Without a due



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diligence, you run the risk of losing money and reputation. Just make sure you are not involved with people who could cause compliance problems and financial losses.

How a foreign entity can protect interests if the Ukrainian counterpart fails to fulfill obligations

There have been cases when just a claim drawn up competently and sent by fax to a counterparty directly from a law firm office was sufficient for the Ukrainian party to fulfill its obligations. Of course, sometimes, it doesn't work and if there is no security upon the agreement, then you should not waste time, and should bring the case before the competent court as soon as possible.

Usually parties agree what law shall be applied and in what court or arbitration venue it will be heard. It gets more difficult – or interesting depending on your view – when there is no corresponding clause in the contract. Then, which law to apply is decided in each particular case. For the most part, it is likely going to be the commercial court depending on where the Ukrainian party has its registered office.

In one instance, the Ukrainian commercial court decided a dispute using English law. Of course, it took time and extra funds to receive an official statement

from the UK lawyers on the substance of the English law to be applied.

Ukrainian legislation does allow for an application to be filed with the court to take necessary precautions until the judgment will be executed. These can be:

- Attachment of the debtor's funds;
- Attachment of the debtor's movable and/or immovable property;
- Imposing a ban on doing some actions.

In general, such preliminary workouts play a significant role in the outcome. That is because the burden of proof of the case's circumstances lies with the parties.

Court system

Unless there is an arbitration clause in the agreement, most disputes are heard by the commercial courts, which is a local multi-level system consisting of:

- Regional courts of the first instance;
- Commercial courts of appeal;
- High Commercial Court of Ukraine;
- The Supreme Court of Ukraine.

The commercial court of the first instance accepts and considers almost all claims that fall under its jurisdiction. A case is usually decided within two months although considerations can last as long as three months.

Commercial courts of appeal hear the appeals. These are to be filed within ten days from when the first instance court made its decision; if this deadline is missed the regional court of the first instance's decision stands. The court of appeal decides these cases in the same term they are filed and in the same order in which they were originally heard. Thus, the maximum length a case will be pending is two months.

The High Commercial Court of Ukraine must also make its decision within two months after receiving the cassation appeal along with the case from the court of appeal. This follows a typical two-week period in which the case for the appeal is delivered from the court of appeal.

In short, the legal system acts with alacrity. All challenges starting with the filing of the claim and up to the decision of the

court of cassation will take no more than seven months to be decided, although in certain circumstances it can take more. Of course it can easily take less time as well.

A final point to remember: in February 2006 Ukraine adopted the law on enforcement of the judgments and application of the practice of the European Court of Human Rights (ECHR). Therefore, the Ukrainian courts shall apply the practice of ECHR as a source of law when considering cases.

Recovering debt

To receive the judgment is only the first step. Obtaining a writ of execution and its lodging at the special State Enforcement Service of Ukraine is the next stage and a separate procedure.

If a Ukrainian debtor is not willing to pay the debt, though, it has many opportunities at this stage to postpone the payment. As an example, in one case the writ of execution read, 'to recover from 'A' Ltd debt to the amount of \$100,000'.

The debtor filed an appeal to throw out its case and to release its bank accounts because the state executor attached an arrest not only onto the account in US dollars but also on the accounts in Ukrainian hryvnia and euros. This case is the perfect illustration of how even a letter in the judgment text can be crucial.



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IVAN MOVLYAK, INTERNATIONAL LAW OFFICES, KIEV

Arbitration

Court litigation can be avoided in the first place if the parties agree to submit to arbitration as part of the contract, a process with much lower fees. In Ukraine there are two permanent arbitration institutions – the International Commercial Arbitration Court (ICAC) and the Maritime Arbitration Commission at the Ukrainian Chamber of Commerce and Industry (UCCI). They are independent tribunals, such as the ones in Stockholm or Paris. They have their own contract wording, which includes the name of the arbitration tribunal, procedural rules, applied law and language. For example, “Any dispute arising out of the present contract or in connection with it is to be referred for consideration and final settlement to the ICAC at the UCCI.”

Arbitration is seen by some as a more reasonable way of dispute resolution than regular commercial courts. One can choose its own arbitrator and there are no upper instances. Also, the arbitration award can be annulled only in cases of procedural drawbacks – for example, if the dispute was resolved in absence of one of the parties and there are no evidences that such a party was duly informed about the hearings.

Enforcing foreign judgments

Ukraine is a signatory to the New York Convention on Recognition and Enforcement of Arbitration Awards (1958) that recognises and enforces foreign arbitration awards in Ukraine. In the situation of foreign regular court decisions, recognition and enforcement depends on the existence of a relevant bilateral agreement between Ukraine and the country where the award was pronounced. So, in each case you should check whether there is an agreement allowing the decision to be enforced in Ukraine.

The bureaucratic process in Ukraine can be complicated. In general keep contracts simple, straightforward and, above all, in strict compliance with Ukrainian standards. The more complex you make them the easier it will be for someone to find a way to break them. □

Further details on International Law Offices can be found at www.murs.com.ua. The firm is a member of the international legal network World Link for Law.