

TO: Clients and Friends of the Firm
FR: Frishberg & Partners
RE: Foreign Currency Checking Operations

I. Introduction

Occasionally, foreign businessmen in Ukraine have inquired “do you accept checks?” They may as well have asked “where is the nearest moon?”

With the passing of Resolution No. 520 of the National Bank of Ukraine “On Approval of the Regulations on the Procedure for Carrying Out Checking Operations in Foreign Currency on the Territory of Ukraine,” dated December 29, 2000 and registered with the Ministry of Justice on February 21, 2001 under No. 152/5343 (hereinafter the “Regulations”), however, foreign businesses and entrepreneurs are now legally able to use checks (instead of cash or wire transfers) to pay Ukrainian businesses for their goods and/or services. And yet, the question remains: how will Ukrainians react to the appearance of negotiable instruments?

Although the practical effects of the Regulations is still relatively unknown, below we provide a discussion on the legal aspects of the Regulations as they pertain to payable checks. The discussion below does not touch upon travelers checks, however, although the Regulations also govern the use of travelers checks on the territory of Ukraine.

II. Discussion

First and foremost, the Regulations do not establish the actual mechanism for Ukrainian residents to pay with checks for goods or services amongst themselves. In fact, as in transactions involving foreign currency between residents, the Regulations strictly point out that such operations are expressly prohibited. This is not to say that in practice Ukrainian residents are completely precluded from using checking operations. After all, many Ukrainian residents own offshore, non-resident companies that may use checks to pay for goods or services provided by Ukrainian residents.

Barring transactions between residents, the Regulations set forth the circumstances under which settlements between residents and non-residents may be effectuated by issuing a check in foreign currency, including:

- (i) if a foreign economic agreement indicates that settlement will be made by writing out a check from a non-resident to a Ukrainian resident;
- (ii) if a non-resident writes out a check to a Ukrainian resident to pay for goods or as collateral or a guarantee to fulfill obligations before a resident (in this case the purpose of payment must be indicated directly on the face of the check or in documents accompanying a check); or
- (iii) the non-resident check drawer is a bank, government, international organization, corporation or insurance company.

In the last case, the drawer must have an international, long-term rating, which is confirmed by a world leading rating agent (as an example, the Regulations mention Fitch, Standard & Poor's, Moody's and Thomson Bank Watch). The above provisions do not apply to checks written out by a non-resident to a resident, which is a representative in intellectual property affairs (patent attorney). In this case, a check will be accepted by a bank only upon the presentation by the resident of a certificate evidencing his or her right to represent the non-resident in the realm of intellectual property rights (i.e., as a patent attorney).

As in most countries, checks must contain certain information, including an order to pay a certain sum to the holder (payee), the drawer's (payor) and drawee's (i.e., foreign bank or foreign company who is ordered to pay by the drawer) full information, the name of the payee, the currency and amount of the check, the date and number of the check, the signature of the drawer, etc. If any of the above requisites are absent, a Ukrainian bank will refuse to accept a check for payment. Interestingly, checks made out for cash (i.e., payable to a bearer) are not acceptable in Ukraine, rendering all checks traceable and payments thereon accountable.

If a term of validity is not indicated on a check, its validity term is deemed 6 months, unless the legislation of the drawer's country provides otherwise. If a foreign investor pays a Ukrainian resident by check, however, such resident must ensure that the amount of the check is credited to its account no later than 90 calendar days from the date of customs clearance of exported goods or from the moment of signing the transfer certificate or any other document confirming the provision of services. In such cases, therefore, a six-month or more term of validity is rendered useless by the provisions of the Law of Ukraine No. 185/94-VR "On the Procedure for Effectuating Payments in Foreign Currency," dated September 23, 1994. Due to recent amendments to Law No. 185/94 on May 31, 2007, however, starting from January 1, 2008, the 90-day term will be increased to 180 calendar days.

Checks may be handwritten or printed out. Facsimile checks, however, are prohibited for purposes of placing a signature thereon. As a narrow exception, facsimile checks are accepted for signature

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