

TO: Clients and Friends of the Firm
FR: Frishberg & Partners
RE: Ukrainian Arbitration System

I. Introduction

Companies pray for orderliness and predictability in effectuating their international transactions. Recognizing the general rule that “everything always goes wrong at the worst possible moment,” the contracting parties often agree to resolve their disputes with each other in an international, and therefore presumably unbiased, arena.

In an effort to accommodate the business needs of multi-national corporate clients, the world’s leading nations have entered into bilateral or multilateral international arbitral agreements. Such agreements set the stage for implementing the accepted international arbitration rules and executing the resulting judgments on a local level.

Similarly, Ukraine has established a forum for international commercial disputes at the Ukrainian Chamber of Commerce and Industry, the rules of which are based on the Law of Ukraine “On International Commercial Arbitration.” Actually, the Law of Ukraine “On International Commercial Arbitration” is based on the UNCITRAL Model Law. Additionally, Ukraine adheres to many international agreements previously entered into by the former Soviet Union. For instance, Ukraine is a party to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958, and the European Convention on Commercial Arbitration of 1961.

Following the declaration of its independence in August 1991, Ukraine passed comprehensive legislation governing dispute resolution in the context of both domestic and foreign transactions and investments. These laws included the Law No. 1142-XII “On Commercial Courts,” dated June 4, 1991 (lost force in February 2002), the Law No. 4002-XII “On International Commercial Arbitration,” dated February 24, 1994, the Law “On the Foreign Investment Regime,” dated March 19, 1996, No. 93/96-VR and the Law “On Foreign Economic Activities,” dated April 16, 1991, No. 959-XII, among others.

Overall, Ukraine’s local and foreign arbitration legislation is in accordance with world standards. As in other countries, the parties to international agreements have the freedom to select either the domestic (Ukrainian) national court system or international arbitration in any country (including Ukraine). The final award or ruling can be executed in Ukraine under the 1958 New York

Convention, assuming that all parties involved in the arbitration are signatories to that Convention. The biggest problem lies not in the legislation itself, however, but in the issue of practical enforcement of international arbitral decisions.

This chapter examines the various commercial arbitration issues involving foreign investors and Ukrainian entities.

II. Arbitration Options for Foreign Investors

Under Ukrainian legislation, foreign investors may submit disputes for resolution to either (1) the Ukrainian national arbitration courts or (2) any other international arbitration tribunal. The second option can be further separated into two categories: (a) arbitration conducted in Kiev at the Ukrainian Chamber of Commerce and Industry or (b) arbitration held in a third country (e.g., Sweden, Great Britain, U.S.A.)

Recognizing that Ukraine is a young nation without a long history of rendering and enforcing international commercial arbitral awards involving foreign investors, Western parties naturally prefer dispute resolution to take place in a third country, such as Switzerland. Considering the current Ukrainian economic climate, however, decisions concerning the place of arbitration must be made in light of each particular transaction.

For instance, a foreign arbitration provision probably would not serve its intended purpose in a transaction where a private Ukrainian company or an individual cannot afford the arbitration fees and costs. Similarly, a foreign partner in a Ukrainian joint venture that has minimal capitalization or comparatively small project matters may not seek to effectuate such foreign arbitration provision, particularly if the international arbitration took place in a third (and rather expensive) country. Linguistic restrictions and extensive document production may also impact on the choice of the forum for arbitration.

In 2005, foreign investors were provided with clearer guidelines to the enforcement of foreign judgments in Ukraine when the new Civil Procedure Code (No. 1618-IV, dated March 18, 2004) came into effect. The Civil Procedure Code effectively cancelled Law No. 2860-III “On the Recognition and Enforcement of Foreign Court Decisions in Ukraine,” dated November 29, 2001, which previously provided the rules governing the enforcement of foreign judgments in Ukraine.

The Civil Procedure Code was designed to solve the age-old problem in Ukraine when foreign investors (or other holders of valid foreign judgments) would go through the lengthy process of obtaining a foreign judgment in their favor, only to find that enforcement of such judgment is impossible in Ukraine. The Code contains provisions governing the recognition and enforcement of foreign judgments subject to mandatory enforcement and the recognition of foreign judgments not subject to mandatory enforcement.

.....
: If you wish to receive the entire article, please
: contact us at: office@frishberg.com.ua.
:
:
: Thank you.
:.....