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## FROM THE CO-CHAIRS

Looking forward:  
beyond Dubai

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Co-Chairs, Arbitration Committee

As we embark on another exciting year of arbitration developments and events, we wish to extend to our committee members and colleagues a warm wish for a prosperous and healthy new year. 2009 will feature a full lineup of exciting arbitration events, and we hope to see many of you in person throughout the year. Already, we are off to a strong start. Our first event of the year, the IBA's 12th International Arbitration Day, took place at the Jumeirah Emirates Towers in Dubai on February 15–16, 2009. Our theme, Due Process in International Arbitration, was selected for its timeliness and pertinence to arbitration practitioners around the world. Our sessions and speakers were more limited in number this year in order to ensure a rich dialogue and exchange of views among all conference participants. We are pleased to report that more than 420 individuals from 50 countries attended this year's conference.

Committee members gathered and mingled at an informal welcome reception and dinner at the Dubai International Financial Centre (DIFC) on Sunday evening. The next morning, prior to commencement of the conference sessions, the Mediation Committee hosted a breakfast during which The Right Honourable Sir Anthony Evans, Chief Justice of the DIFC Courts in Dubai, delivered an illuminating address. Sir Anthony Evans was appointed Chief Justice in April 2005, and has presided over an important period

*Continued overleaf*

## International Bar Association

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therefore remains a fact-specific analysis. This ruling confirms that the threshold is high: claimants who initiate arbitration against non-signatories have little hope to prevail unless there is clear evidence that the non-signatory meant to be bound by the arbitration clause on which the claimant relies. That is good news for parent companies dragged into arbitration proceedings based on arbitration agreements entered into by their affiliates.

Last but not least, the efficiency of the Supreme Court proceedings merits mention. Merely five months passed from the date of the application to set the award aside to the Court's ruling.

#### Notes

<sup>1</sup> The original French opinion is available at the Supreme Court's web page [www.bger.ch](http://www.bger.ch). It will also be published in the *ASA Bulletin*. An English translation will be published in 2009 in *Swiss 2 International Arbitration Law Reports* (2008).

## UKRAINE

### Arbitrability of corporate disputes in Ukraine

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This article discusses the peculiarities of corporate legislation in Ukraine and analyses the recently adopted Recommendations, issued by the High Commercial Court, which bind all lower commercial courts in Ukraine. Contrary to the Recommendations' intended purpose of facilitating corporate dispute resolution, they may damage Ukraine's reputation as an investor-friendly country.

#### The Recommendations

To ensure the uniform and proper application of substantive and procedural law in corporate cases arising from or in connection with corporate relations, the Presidium of the High Commercial Court of Ukraine adopted Recommendations No 04-5/14 (the Recommendations) on 28 December 2007. The Recommendations were issued to establish the primary methods of dispute resolution for typical corporate disputes, to provide legal opinions, and to give guidance to practitioners, thereby creating a unified system of dispute resolution.

In general, the Recommendations provide clarifications to the courts regarding: subject matter jurisdiction and territorial jurisdiction; exercise and

protection of corporate rights; acquisition, transfer, and termination of corporate rights; full or partial annulment of business documents of incorporation; application of injunctive measures; and contractual regulation and application of foreign law in corporate relations.

The Recommendations also provide significant clarification regarding the use of methods for securing a claim. For example, the Recommendations prohibit interim orders for the seizure of an enterprise's property, because the seizure could lead to the interruption of that enterprise's business. However, if a commercial court suspects that the actions of a corporate executive body (or a body whose election is disputed) may lead a business into a state of severe financial distress or permanent insolvency, the court may prohibit the alienation of fixed assets, immovable property, and other company property. Thus, the court may actually secure a claim by clearly determining what property may not be alienated.<sup>2</sup> These clarifications aside, as it turns out, the Recommendations, which seemed to be a means to resolve problems in Ukraine, have serious flaws.

#### Controversial features

Chapter 6 of the Recommendations, which is the most controversial and gives rise to the gravest concerns, states that any agreement between shareholders and a company that is governed by foreign law will be null and void as contrary to the public policy of Ukraine. Chapter 6 also specifies that shareholders of companies incorporated in Ukraine are prohibited from agreeing to resolve corporate disputes through international commercial arbitration. As a result, party autonomy is considerably restricted and foreigners are unable to apply their own corporate law to contracts executed with Ukrainian parties or resolve disputes through international arbitration.

In light of Chapter 6 of the Recommendations, the definition of 'corporate dispute' has become critical, because it is the key to determining how and where corporate disputes may be resolved. However, Ukrainian legislation does not provide a clear definition of 'corporate dispute'. In an attempt to add clarity, the Recommendations define 'corporate disputes' as those involving:

- the claims of participants (ie, shareholders or founders) in business entities, including claims against the entity or against each other, in relation to the establishment, activity, management, or termination of the entity in question;<sup>3</sup>
- the invalidation of a decision to remove a participant from a company, including a decision determining the size and debiting of the value of the share of a company's property to be paid to a participant who has left the company;

- participants' claims regarding the invalidation or amendment of all or part of the company's formation documents;
- claims by shareholders against registrars in relation to amendments to the register of securities owners or the entry, amendment, termination, or invalidation of agreements for the maintenance of the register;
- repealing of amendments to documents of incorporation (eg, in cases involving the invalidation of a decision made at a shareholders' meeting to change such documents or cancel the registration of a share issue, if the shareholders' meeting vetoes the increase of the company's authorised capital); and
- the violation of the prior rights to acquire shares.

Although the High Commercial Court intended the Recommendations to provide practitioners and business professionals with some guidelines as to what constitutes a 'corporate dispute', in reality the definition is too vague to serve as a meaningful guide.

### Application of the Recommendations

What is surprising about the Recommendations is that they are written using mandatory language. While decisions issued by courts in common law jurisdictions are usually considered legally binding, in civil law countries, such as Ukraine, only legislation and other normative acts are binding. Despite the Recommendations' mandatory language, according to the Act on Judicial System of Ukraine, the Recommendations are not a source of law, and it is not mandatory for the commercial courts to follow them. Instead, the Recommendations only provide guidance for lower courts. In practice, however, judges regularly refer to the Recommendations in their decisions, especially in complicated cases involving the application of foreign governing law and matters involving corporate relations with a foreign element. Because the Recommendations go beyond their intended purpose of providing guidance, it is necessary to examine their legality.

Corporate disputes, including those arising from corporate governance issues, fall within the jurisdiction of the commercial courts. According to Article 12 of the Commercial Procedure Code of Ukraine, cases falling within the jurisdiction of commercial courts can be arbitrated by the parties, except in the case of disputes regarding the validity of a corporate act or disputes regarding the signing, alteration, or annulment of contracts related to State needs.

In addition to Article 12 of the Commercial Procedure Code of Ukraine, Article 6 of the Law on the Courts of Arbitration and Article 77 of the Law on International Private Law also delineate certain 'non-arbitrable disputes'. However, unlike Article 12, neither of these articles bans the arbitrability of corporate disputes.

Elsewhere, and in contrast to Chapter 6 of the Recommendations, the Law on International Commercial Arbitration provides that international commercial arbitration may be used to resolve disputes between Ukrainian companies and foreign investors, participants, and other parties who are subject to Ukrainian law. Similarly, in Article 12 of the Commercial Procedure Code of Ukraine, there is a general rule pertaining to corporate matters that permits the reference of any dispute to international commercial arbitration, unless there is a statutory prohibition.

Article 16 of the Commercial Procedure Code of Ukraine also does not contain any direct prohibition of international arbitration, since it provides for exclusive jurisdiction within the framework of the entire system of commercial courts. That is, even though exclusive jurisdiction is set for disputes arising from the breach of intellectual property rights, those disputes may also be resolved in arbitration.

Moreover, according to the Law on Regime of Foreign Investments, Ukrainian courts have exclusive jurisdiction to hear disputes between foreign investors and the State concerning regulation of foreign investments and activities of companies with foreign investments. All other disputes (including corporate disputes) can be brought in the courts of Ukraine or as permitted by the agreement of the parties. Thus, Ukrainian law, unlike the Recommendations, does not explicitly prohibit the referral of corporate disputes to international commercial arbitration.

Despite this fact, Article 6.2. of the Recommendations states, 'the participants of business entities, irrespective of subject composition of the shareholders, cannot submit the corporate disputes connected with activity of business entities registered in Ukraine (including those which arise from the corporate governance in a procedure) to consideration of an international commercial arbitration'.

As discussed above, Article 6.2 of the Recommendations is not vested with the authority of Ukrainian law. In fact, the High Commercial Court of Ukraine clearly went beyond the scope of its mandate by trying to create such a new rule of law. The Recommendations defy the fundamental principles of law and the rights of foreign investors granted by international treaties and Ukrainian legislation. Even though they are not mandatory, the Recommendations will likely negatively affect the investment climate in Ukraine by influencing court practice in this country.

Indeed, the application of the Recommendations may cause Ukrainian companies to become less attractive to foreign investors and may damage Ukraine's reputation as an investor-friendly country. Their application violates the rights of foreign investors and has the potential to increase the number of cases against Ukraine that are taken to the European Court of Human Rights. The Recommendations may also cause foreign investors to initiate disputes against

Ukraine in the International Centre for Settlement of Investment Disputes. Further, if Ukrainian courts fail to recognise the validity of arbitration agreements, and, consequently, arbitral awards issued by foreign arbitral tribunals, other countries may reciprocate by ceasing to recognise arbitral awards issued by Ukrainian tribunals. This would be detrimental to Ukraine's reputation as an investor-friendly country, particularly after its recent accession to the World Trade Organization.

### Conclusion

To prevent any adverse effect on the investment climate in the future, the Recommendations should either be revoked or significantly altered. With this in mind, the legal committees of the European Business Association and the American Chamber of Commerce in Ukraine have recently established working groups to lobby for changing and/or revoking the Recommendations.

### Notes

- 1 Andriy Tsyetkov is a Managing Partner and Director, and Kateryna Stretovych is a junior lawyer with AS Consulting, LLC, Kiev, Ukraine.
- 2 Alexey Reznikov, Recommendations Set Limits of Court Involvement in Commercial Disputes, ILO, 6 May 2008.
- 3 A person is deemed a participant – and is thus party to a legal corporate relationship – from the moment they acquire shares (ie from the point at which the relevant change is made to the shareholders' register).

## UNITED STATES

### Non-party discovery in arbitration: the Second Circuit weighs in

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The 83-year-old first chapter of the Federal Arbitration Act (FAA) says either nothing or very little – depending on one's reading of section 7 – about pre-hearing discovery. That is understandable, because the FAA was motivated mainly by a concern about the enforceability of arbitration agreements and the enforcement of arbitral awards, and not by a desire to establish procedures to be followed by arbitrators.

Section 7 is the singular exception to this. It is concerned with the subpoena power of the arbitrator. It was and is a special provision vesting in arbitrators some of the powers to secure evidence by compulsory process that were vested in federal district judges under rules governing subpoenas that predated Rule 45 of the Federal Rules of Civil Procedure.

Section 7 provides in relevant part that the

arbitrators may subpoena persons to 'appear before them to give testimony' and 'to bring with them' relevant documents. Over the years, arbitrators have acted with varying degrees of adherence to these seemingly unambiguous words, and courts have drawn conflicting conclusions on whether section 7 permits subpoenas for pre-hearing discovery. In November 2008, the United States Court of Appeals for the Second Circuit, embracing a Third Circuit decision in 2004 (written by a notable strict statutory constructionist, then-Circuit Judge now-Supreme Court Justice Samuel Alito),<sup>1</sup> held that section 7 does not permit issuance of arbitral subpoenas for pre-hearing discovery from non-parties (*Life Receivables Trust v Syndicate 102 at Lloyd's of London*, 549 F 3d 210 (2d Cir 2008)).

### The *Life Receivables Trust* decision

The *Life Receivables* decision arose from arbitration over an obscure insurance product. Claimant (Trust) and an affiliate (Peartree) had a business buying life insurance policies from the elderly, for cash payments at a discount to policy values. Peartree would buy the policies and transfer them to Trust. Trust then paid the premiums to keep the policies in force until the insured people died. Trust elected to insure with Respondent, a Lloyd's of London Syndicate (Syndicate), the risk that the named insured on the purchased life policy would outlive his or her calculated life expectancy. Trust thus paid Syndicate premiums, in exchange for Syndicate's commitment to pay Trust the net death benefit of the underlying life policy if the insured outlived his or her life expectancy by two years or more.

Arbitration ensued when Syndicate denied payment on a Trust claim. Syndicate sought documents from Trust, including Peartree documents. Trust said it had no 'control' over Peartree, and could not produce Peartree documents. Syndicate responded by having the arbitral tribunal issue a subpoena to Peartree for pre-hearing documents discovery, which Trust did not oppose. Peartree moved in District Court to quash the subpoena; Syndicate cross-moved to compel compliance; and the District Court granted the motion to compel. Peartree complied with the subpoena, but nevertheless appealed from the District Court order. The Second Circuit concluded that the dispute was not mooted by the compliance, and proceeded to decision.

The holding of the Second Circuit is in fact quite narrow, although some effort is required to discern the holding and its limitations. And, as is often the case, even what the Court states to be the 'holding' cannot be understood without reference to other amplifying remarks. At one point, the Court states that, under the clear language of section 7,<sup>2</sup> '[d]ocuments are only discoverable in arbitration when brought before arbitrators by a testifying witness'.<sup>3</sup> This is in fact quite