Arbitration Guide
IBA Arbitration Committee

UKRAINE

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I. Background

(i) How prevalent is the use of arbitration in your jurisdiction? What are seen as the principal advantages and disadvantages of arbitration?

International arbitration is widely used for foreign trade contracts in Ukraine. The finality of the arbitral awards and their enforceability under the UN Convention on the Recognition and Enforcement of Foreign Arbitral Awards ('New York Convention') are the most commonly referred to advantages of international arbitration. High cost and the length of the proceedings are among the disadvantages of arbitration usually mentioned by Ukrainian companies, especially with regard to international arbitrations outside of Ukraine.

Domestic arbitration is also used for domestic disputes as an alternative to state courts. It is regulated by separate legislation that provides that domestic arbitration courts can decide only internal disputes, that is, disputes between Ukrainian companies.

(ii) Is most arbitration institutional or *ad hoc*? Domestic or international? Which institutions and/or rules are most commonly used?

Most arbitrations in Ukraine, either international or domestic, are institutional.

Currently in Ukraine there is only one *international arbitration institution* – the International Commercial Arbitration Court (ICAC) at the Ukrainian Chamber of Industry. ICAC is one of the leading international arbitration centres in Europe. In the last three years it has received approximately 300–350 new international cases per year. Further information on the ICAC can be found at **www.ucci.org.ua**.

As of June 2011, 66 permanent domestic arbitration courts were registered in Ukraine according to official data from the Ministry of Justice of Ukraine.

The UNCITRAL Arbitration Rules are used in the majority of *ad hoc* arbitration cases. The ICAC can provide administrative support for *ad hoc* proceedings if so agreed by the parties.

(iii) What types of disputes are typically arbitrated?

The following may be referred to international commercial arbitration:

- disputes resulting from contractual and other civil law relationships arising in the course of foreign trade and other forms of international economic relations, provided that the place of business of at least one of the parties is situated

abroad; and

- disputes arising between enterprises with foreign investment, international associations and organisations established in the territory of Ukraine, disputes between the participants of such entities and disputes between such entities and other subjects of the law of Ukraine.

According to the Commercial Code of Ukraine (Article 116), a legal entity has the status of an enterprise with foreign investment when foreign investment constitutes at least 10% of its authorised capital. Such Ukrainian entities may choose between domestic and international arbitration when entering into contracts with other Ukrainian entities.

(iv) How long do arbitral proceedings usually last in your country?

In the majority of ICAC cases, arbitral proceedings last around six months from the date of the acceptance of the dispute by the institution. In complicated cases, however, the proceedings may last approximately eight to ten months.

(v) Are there any restrictions on whether foreign nationals can act as counsel or arbitrators in arbitrations in your jurisdiction?

There is no need for a foreign lawyer to obtain a working permit or an advocate certificate to participate in an international arbitration as an arbitrator or counsel. Duly certified powers of attorney are required (either with apostille or notary legalisation depending on applicable international treaty) to be admitted as a counsel in ICAC proceedings.

With regard to nomination as an arbitrator, it is necessary to note that currently the ICAC provides a closed list of arbitrators. The appointment of persons outside the list (either Ukrainian or foreign) is almost impossible.

In domestic institutional arbitration, only Ukrainian residents included on the list of the relevant arbitration institution can be nominated as arbitrators. The list is registered with the Ministry of Justice of Ukraine.

II. Arbitration Laws

(i) What law governs arbitration proceedings with their seat in your jurisdiction? Is the law the same for domestic and international arbitrations? Is the national arbitration law based on the UNCITRAL Model Law?

International commercial arbitration is governed by the Law on International

Commercial Arbitration (LICA) of 24 February 1994. (Information on the LICA is available at **www.ucci.org.ua/arb/icac/en/icac/html**).

In 2004, the Parliament of Ukraine adopted a separate law on domestic third-party arbitration (the Law on Arbitration Courts), which does not apply to international commercial arbitration. This law corresponds to the major principles of the UNCITRAL Model Law but it is difficult to say that it is based on it.

The Law of Ukraine on International Private Law (IPL) of 23 June 2005 regulates some issues related to arbitration, such as the choice of applicable law.

(ii) Is there a distinction in your arbitration law between domestic and international arbitration? If so, what are the main differences?

There are multiple differences between the regulation of international and domestic arbitration. The principal difference is that the regulation of international arbitration is based on internationally-accepted principles. The regulation of domestic arbitration, which has been seriously criticised for certain unlawful decisions rendered in immovable property' disputes, is closer to national practice. Areas where the differences between international and domestic arbitrations are especially apparent include the qualification of the arbitrators and the manner of the proceedings. However, it is necessary to mention that the practices of the domestic arbitration courts are improving.

The main distinctions between the law applicable to domestic and international arbitration in Ukraine include the following: it is impossible to apply foreign law or appoint a foreign arbitrator in domestic arbitration; the domestic arbitration procedure is regulated in more detail which limits the scope of the discretion of the arbitral tribunal; the grounds for setting aside and refusing enforcement of domestic arbitration awards are wider than those specified in the UNCITRAL Model Law. For instance, an award rendered by a domestic arbitration court can be challenged, not only by the parties, but also by third persons who did not take part in the arbitration if the arbitration court decided on their rights and duties.

(iii) What international treaties relating to arbitration have been adopted (eg, New York Convention, Geneva Convention, Washington Convention, Panama Convention)?

Ukraine has been a party to the New York Convention since 1960 and applies the Convention to the recognition and enforcement of arbitral awards rendered in member states only on a reciprocal basis.

Ukraine is a party to the European Convention on International Commercial

Arbitration and the Commonwealth of Independent States (CIS) Treaty on Settling of Disputes Related to Commercial Activity (Kiev, 20 March 1992). This Treaty is open to CIS member states only and has been ratified by Armenia, Belarus, Kazakhstan, Kyrgyzstan, Moldova, the Russian Federation, Tajikistan, Turkmenistan, Ukraine and Uzbekistan.

The application of the European Convention on International Commercial Arbitration (Geneva, 21 April 1961) is limited mostly to *ad hoc* arbitrations conducted in Ukraine. However it was also referred to in several ICAC awards with regard to the matters of jurisdiction.

(iv) Is there any rule in your domestic arbitration law that provides the arbitral tribunal with guidance as to which substantive law to apply to the merits of the dispute?

The law applicable to domestic arbitration in Ukraine does not broadly provide for parties to agree on the application of foreign law as such agreement can be entered into only within relationships with a foreign element. Thus, as a rule Ukrainian law is applicable in domestic arbitration.

With regard to international arbitration, the LICA and ICAC Rules provide almost the same wording as the UNCITRAL Model Law. So, failing agreement of the parties, the arbitrators shall apply a law determined by the conflict of laws rules which they deem appropriate. The IPL contains conflict of law rules for arbitrators to consult. The arbitrators can decide *ex aequo et bono* or as *amiable compositeur* only if the parties have expressly authorised them to do so.

III. Arbitration Agreements

(i) Are there any legal requirements relating to the form and content of an arbitration agreement? What provisions are required for an arbitration agreement to be binding and enforceable? Are there additional recommended provisions?

The following are required for a valid arbitration agreement:

- the parties must have legal capacity to create the arbitration agreement;
- the parties' representatives must be duly authorised to sign any agreements on behalf of the respective party;
- the matter referred to arbitration must be arbitrable; and
- the arbitration agreement must be in writing in the main agreement; in a document that the latter refers to; or in an exchange of letters, faxes,

telegrams, etc.

Under Ukrainian law, the arbitration agreement is separate and autonomous. Therefore avoidance, rescission or termination of the main contract, as well as statute of limitations and novation arguments applicable to the main contract, do not affect the arbitration agreement. It can be terminated either upon the agreement of the parties or if found to be defective (and therefore void).

The arbitration clause recommended by the ICAC looks as follows:

'Any dispute, controversy or claim arising out of or relating to this contract, or the interpretation, execution, breach, termination or invalidity thereof, shall be settled by the International Commercial Arbitration Court at the Ukrainian Chamber of Commerce and Industry in accordance with its Rules.

The parties to a contract may wish to consider adding:

This contract shall be regulated by the substantive law of _____.
The number of arbitrators shall be _____.
The place of arbitration shall be _____.
The language of the arbitral proceedings shall be _____.'

It is strongly recommended to state in the arbitration agreement that it applies *to interpretation of the contract* including the arbitration clause therein. The latter is intended to counteract the latest practice of the Ukrainian state courts in setting aside or refusing enforcement of the arbitral awards rendered by international arbitration.

(ii) What is the approach of courts towards the enforcement of agreements to arbitrate? Are there particular circumstances when an agreement to arbitrate will not be enforced?

The practice of the Ukrainian state courts towards the enforcement of agreements to arbitrate is controversial and not really arbitration-friendly. Thus it is important to ensure the clear wording of the arbitration clause and correctness of the name of the arbitral institution referred therein.

(iii) Are multi-tier clauses (eg, arbitration clauses that require negotiation, mediation and/or adjudication as steps before an arbitration can be commenced) common? Are they enforceable? If so, what are the consequences of commencing an arbitration in disregard of such a provision? Lack of jurisdiction? Non-arbitrability? Other?

So-called multi-tier clauses, especially those which provide for negotiations as a pre-arbitration stage, are quite common and enforceable. There are also no legal obstacles or limitations to providing for mediation or conciliation as a prerequisite to arbitration. It should be noted, however, that enforcement of such clauses could be difficult in view of the absence of sufficient legal regulation of the said procedures in Ukraine and because of the lack of legal culture connected with their implementation by the Ukrainian parties.

If a party commences an arbitration in disregard of such a provision and another party objects thereto, the arbitration court can decide to terminate the arbitration and refer the parties to follow the pre-arbitration negotiations or other agreed procedures. If the party which applies to arbitration is able to prove that it duly attempted to follow the pre-arbitration steps but failed because of the other party's refusal to cooperate, the arbitration court can proceed with arbitration.

(iv) What are the requirements for a valid multi-party arbitration agreement?

The LICA contains no provisions on multiparty arbitration.

The requirements for a valid multiparty arbitration are the same as those for two-party arbitration. Difficulties may occur regarding joint appointment of an arbitrator. In practice, when the claimants or respondents fail to agree on a sole arbitrator or panel, it shall be appointed by the relevant authority or institution.

The ICAC Rules provide for an appointment procedure in multiparty arbitration, according to which claimants or respondents must jointly appoint one arbitrator from each side. If multiple claimants or respondents fail to agree jointly on the arbitrator, the arbitrator will be appointed by the UCCI president.

(v) Is an agreement conferring on one of the parties a unilateral right to arbitrate enforceable?

Such agreements are quite rare in Ukrainian legal practice, however, they are not unenforceable *ipso jure.* Their interpretation by state courts can be unfavorable.

(vi) May arbitration agreements bind non-signatories? If so, under what circumstances?

Generally, only signatories are bound by an arbitration agreement. Third parties may be or become bound through universal succession (such as bankruptcy or mergers). Third parties may also become bound through singular succession, such as through agency or an assignment or subrogation of an agreement containing an arbitration clause, but only where there exists a clear intention to assign the arbitration clause. Again it is necessary to ensure that all necessary formalities are

met in the agreement as the state courts will be very formalistic if they are asked to evaluate the effectiveness of the arbitration clause with regard to a third party.

IV. Arbitrability and Jurisdiction

(i) Are there types of disputes that may not be arbitrated? Who decides – courts or arbitrators – whether a matter is capable of being submitted to arbitration? Is the lack of arbitrability a matter of jurisdiction or admissibility?

Ukrainian legislation does not provide an exhaustive list of the disputes which are or are not arbitrable. Therefore, each particular case should be carefully studied subject to the applicable provisions of Ukrainian law.

For instance, the last amendments to Commercial Procedure Code of Ukraine ('Code') made the issue of arbitrability even more unclear then earlier. Article 12 of the Code contains restrictions and prohibits submitting to third party arbitration (the term used for domestic arbitration courts) the following disputes falling within the jurisdiction of the commercial courts of Ukraine:

- disputes on invalidation of acts,
- disputes arising out of the conclusion, amendment, termination and performance of public procurement contracts,
- disputes arising out of corporate relations between a company and its participant (founder, shareholder), including a former participant, and between the participants (founders, shareholders) related to the establishment, activity, management and termination of the company.

This Article, like other provisions of the Code, does not refer to international arbitration. However, as the nature of both domestic and international arbitration courts are similar, it is reasonable to conclude that the above restrictions could be treated widely as restrictions on the ability to refer a dispute to international arbitration as well.. There is no court practice regarding this matter yet.

One may note that provisions of the Arbitration Act and of the CCP on the arbitrability of disputes between the participants of Ukrainian companies (with foreign investment) are opposite. When evaluating the risks of referring such a dispute to international arbitration, one should bear in mind that even if the arbitral tribunal finds such disputes arbitrable and renders an award thereon, the award will probably be submitted to a local Ukrainian court for obtaining an enforcement permit and writ of execution, and therefore Ukrainian court practice should also be taken into account. Ukrainian courts have taken a definite 'non-arbitrable' approach in corporate disputes.

(ii) What is the procedure for disputes over jurisdiction if court proceedings are initiated despite an arbitration agreement? Do local laws provide time limits for making jurisdictional objections? Do parties waive their right to arbitrate by participating in court proceedings?

A valid arbitration agreement excludes the jurisdiction of the state courts. A court faced with a matter that is the subject of an arbitration agreement shall, if any of the parties so requests before submitting its first statement on the substance of the dispute, stay its proceedings and refer the parties to arbitration. However if the court finds that the agreement is null and void, inoperative or incapable of being performed, then it may exercise jurisdiction.

The parties and the arbitration court are bound by any court decision deeming the arbitration agreement null or void. Nevertheless, the arbitral proceedings may be commenced or continued, and an award may be made, while the issue of jurisdiction is pending before the court (LICA, Article 8, part 2).

(iii) Can arbitrators decide on their own jurisdiction? Is the principle of *competence-competence* applicable in your jurisdiction? If yes, what is the nature and intrusiveness of the control (if any) exercised by courts on the tribunal's jurisdiction?

The arbitrators can decide on their own jurisdiction. The arbitral tribunal may rule on the above-mentioned issue either as a preliminary question or in an award on the merits. If the tribunal rules as a preliminary question that it has jurisdiction, any party may request the state court at the place of arbitration (competent first instance court) to decide the matter within 30 days of receiving notice of that ruling. Such a decision shall not be subject to appeal. While such request is pending, the arbitral tribunal may continue the arbitral proceedings and make an award.

V. Selection of Arbitrators

(i) How are arbitrators selected? Do courts play a role?

Article 10 of the LICA follows the UNCITRAL Model Law principle and provides that parties are free to decide on the number of arbitrators. Thus, a panel consisting of an even number (eg, two) is permissible. Three arbitrators shall be appointed should the parties fail to determine a number.

The parties in international arbitration are free to agree on the procedure for

appointing the arbitrators. Failing such an agreement, each party shall appoint one arbitrator and these two arbitrators shall appoint the third arbitrator. If a party fails to appoint an arbitrator within 30 days of receipt of a notification to do so, or if the two arbitrators fail to agree on the third arbitrator within 30 days of their appointment, the third arbitrator shall be appointed by the president of the UCCI. The president also has the power to appoint a sole arbitrator where the parties fail to agree.

The UCCI president must give due regard to any qualifications required of the arbitrator by the agreement of the parties and to such considerations as are likely to secure the appointment of an independent and impartial arbitrator. In the case of a sole arbitrator or president of the arbitral tribunal, the UCCI president shall also take into account the advisability of appointing an arbitrator of a nationality other than that of the parties. These decrees of the president are not subject to appeal.

The ICAC Recommended List of arbitrators, approved by the UCCI presidium, includes Ukrainian nationals and persons of other nationalities. The ICAC Rules do not directly address the previously-existing uncertainty as to whether it is permissible to nominate arbitrators that are not on the list. However, the practice of the ICAC has been to consider the list closed.

(ii) What are the requirements in your jurisdiction as to disclosure of conflicts? Do courts play a role in challenges and what is the procedure?

In Ukraine there are no specific rules on disclosure of conflicts in arbitration.

The LICA reiterates the UNCITRAL Model Law provision that prior to accepting the appointment an arbitrator shall disclose any circumstances that may give rise to justifiable doubts as to his or her impartiality or independence. The ICAC Rules do not contain the list of such circumstances, but it is understood that these circumstances include any professional contacts with either party, such as any past performance of tasks or duties on their behalf; financial or private interests in the outcome of the case; or any kind of familial or other relations with either party. According to the ICAC Rules, the arbitrator has to complete and sign a special statement regarding his or her acceptance to act as an arbitrator.

A party may challenge an arbitrator it has appointed, should any issues or information arise subsequent to the appointment. Under the LICA the parties are free to agree on the procedure for challenges, but after the constitution of the arbitral tribunal any challenge must be lodged in writing with the arbitral tribunal within 15 days of becoming aware of the circumstance that gives rise to the challenge. Unless the challenged arbitrator withdraws from his or her office, or the

other party agrees to the challenge, the arbitral tribunal itself shall decide on the challenge. If the challenge is dismissed, the challenging party may request the UCCI president to make a final decision on the challenge. While such a request is pending, the arbitral tribunal, including the challenged arbitrator, may continue with the arbitral proceedings and make an award.

Under the ICAC Rules, the ICAC presidium is empowered to decide on the challenge if the challenged arbitrator does not withdraw from office or if the other party does not agree to the challenge. The ICAC presidium can also decide the challenge on its own if circumstances exist that may give rise to justifiable doubts as to arbitrator's impartiality or independence. The ICAC presidium is not obliged to give reasons for its decision on the challenge. In any case the final decision is taken by the UCCI president. The ICAC Rules consider the matter of a challenge as an official function pertaining to the ICAC itself and do not provide for any possibility for the parties to agree on a procedure for challenging an arbitrator. The ICAC Rules state that the ICAC secretariat must give the other party an opportunity to comment on the challenge.

The state courts have no authority to deal with challenges to an arbitrator.

(iii) Are there limitations on who may serve as an arbitrator? Do arbitrators have ethical duties? If so, what is their source and generally what are they?

In general, any person who has full legal capacity can act as arbitrator. No person shall be precluded by reason of nationality from acting as an arbitrator, unless otherwise agreed by the parties. There are no direct requirements regarding domicile, nationality or education of the arbitrators in international arbitration. Former judges or civil servants act as arbitrators in international arbitration under the ICAC Rules. However, certain categories of civil servants (such as the prime minister, ministers, acting judges) and deputies of the Parliament of Ukraine cannot act as arbitrators in view of specific legislation regarding their particular status.

In domestic arbitration, the sole arbitrator or the presiding arbitrator must have a higher judicial education.

There are no specific codes or rules of ethics for arbitrators or counsel acting in arbitration. The LICA reiterates the provisions of UNCITRAL Model Law regarding independence and impartiality of the arbitrators. The arbitrators shall be independent and impartial in fulfilling their duties and none shall be a representative of either party to the dispute. When a person is approached in connection with his possible appointment as an arbitrator, he or she shall disclose any circumstances likely to give rise to justifiable doubts as to his impartiality or independence. The arbitrator shall give immediate notice to the ICAC and to the

parties of any such circumstance if he becomes aware of it during the arbitral proceedings.

(iv) Are there specific rules or codes of conduct concerning conflicts of interest for arbitrators? Are the IBA Guidelines on Conflicts of Interest in International Arbitration followed?

There are no specific rules or codes of conduct concerning conflicts of interest for arbitrators. The IBA Guidelines on Conflicts of Interest in International Arbitration are followed on the individual basis. Ukrainian arbitrators being mostly scholars, former judges or state officials rarely apply the IBA Guidelines directly, however they are guided by similar principles established by the Guidelines.

VI. Interim Measures

(i) Can arbitrators enter interim measures or other forms of preliminary relief? What types of interim measures can arbitrators issue? Is there a requirement as to the form of the tribunal's decision (order or award)? Are interim measures issued by arbitrators enforceable in courts?

Unless otherwise agreed by the parties, the arbitral tribunal may, at the request of a party, order the other party to take such interim measures of protection as the arbitral tribunal may consider necessary in respect of the subject matter of the dispute. The arbitral tribunal may require a party to provide appropriate security in connection with such measure. Usually an arbitral tribunal issues an order in which it provides the respondent with instructions to refrain from using money in its accounts in the amount of the claim.

A peculiarity of the ICAC lies in the following possibility. According to Article 5 of the ICAC Statute and Article 4 of the ICAC Rules, the ICAC President may, at the request of a party, determine the amount and the form of the security for the claim in matters subject to its jurisdiction. This decision may be taken *ex parte* prior to the communication of the claim to the respondent and the formation of the arbitral tribunal. Such an order may be revised by the arbitral tribunal upon the application of the respondent, without which it will remain in force until the final arbitral award is given. There are no provisions in the ICAC Rules on the claimant's responsibility to provide security for any damage suffered by the respondent due to the interim protection granted. The rules of Ukrainian civil procedure do not provide any legal framework for the enforcement of a granted measure of interim protection, in view of the latter these provisions remain declaratory

(ii) Will courts grant provisional relief in support of arbitrations? If so, under what circumstances? May such measures be ordered after the constitution of the arbitral tribunal? Will any court ordered provisional relief remain in force following constitution of the arbitral tribunal?

The LICA reiterates the provision of the UNCITRAL Model Law that it is not incompatible with an arbitration agreement for a party to request, before or during arbitral proceedings, a court to order interim protection measures and for a court to grant such measures. However, Ukrainian procedural legislation still does not contain procedural norms to enforce this possibility.

(iii) To what extent may courts grant evidentiary assistance/provisional relief in support of the arbitration? Do such measures require the tribunal's consent if the latter is in place?

The arbitral tribunal, or a party with the approval of the arbitral tribunal, may request a competent Ukrainian court to assist in taking evidence. However, Ukrainian procedural legislation does not contain procedural norms to carry out this possibility.

VII. Disclosure/Discovery

(i) What is the general approach to disclosure or discovery in arbitration? What types of disclosure/discovery are typically permitted?

In arbitrations provided under LICA or ICAC Rules neither disclosure nor discovery is practiced. The reason lies in Ukrainian legal system and culture including principles of civil procedures. The latter does not mean that it is impossible to ask for disclosure or discovery but more than likely this request will be denied. However in arbitrations seated in Ukraine under the other rules (i.e. UNCITRAL Arbitration Rules or ICC Rules) disclosure or discovery could be granted by the tribunal.

Article 25 of the ICAC Rules is headed 'Discovery of additional documents and explanations' but merely stipulates that the Secretary-General of the ICAC may request additional documents or information from the parties concerning any written statements submitted by them. If the requested information, (in particular, the Respondent's correct postal address, or any requested documents) is not provided, the ICAC President may terminate the arbitral proceedings. Because this power is vested with the ICAC President, it looks like this provision is applicable only in respect to arbitral proceedings before the composition of the arbitral tribunal.

This is a full rendition of the contents of Article 25 and thus it is clear that the use of the English word 'discovery' in the translation of the heading to Article 25 does not cover the full width of international arbitration in general.

(ii) What, if any, limits are there on the permissible scope of disclosure or discovery?

See response to VII(i) above.

(iii) Are there special rules for handling electronically stored information?

There are no rules regarding handling of electronically stored information. It is important to note that usually the party which relies on such evidence can face additional problems in proving validity of electronic documents or electronically stored information.

VIII. Confidentiality

(i) Are arbitrations confidential? What are the rules regarding confidentiality?

Arbitrations are confidential. However, there are no direct provisions regarding confidentiality in the LICA. Under the ICAC Rules (Article 12) the ICAC presidium, arbitrators and the ICAC secretariat are bound by confidentiality. The principle of confidentiality applies to all aspects of arbitration including the dispute, the proceedings, the evidence submitted, the information disclosed and the award. No duty of confidentiality exists between the parties unless otherwise agreed in the arbitration agreement. Witnesses and experts are not bound by any confidentiality clause in the parties' agreement.

(ii) Are there any provisions in your arbitration law as to the arbitral tribunal's power to protect trade secrets and confidential information?

There are no specific provisions except as referred to above.

(iii) Are there any provisions in your arbitration law as to rules of privilege?

No.

IX. Evidence and Hearings

(i) Is it common that parties and arbitral tribunals adopt the IBA Rules on the Taking of Evidence in International Arbitration to govern arbitration

proceedings? If so, are the Rules generally adopted as such or does the tribunal retain discretion to depart from them?

It is not common and to the best of the author's knowledge has never happened in practice yet.

(ii) Are there any limits to arbitral tribunals' discretion to govern the hearings?

In this respect the provisions of both the LICA and the ICAC Rules are similar to those used worldwide. The arbitration agreement of the parties is the main limit on the arbitrators' discretion to govern the hearing.

(iii) How is witness testimony presented? Is the use of witness statements with cross examination common? Are oral direct examinations common? Do arbitrators question witnesses?

Witness testimony is not common in principle. Neither the Law nor the Rules contains a provision regarding the examination of witnesses. Important to note that witness testimony is unusual in practice for the ICAC. Its presentation depends on practical experience of the parties (and their counsels). For Ukrainian parties and their in-house lawyers, witness testimony does not constitute essential part of the evidentiary procedure as, historically, Ukrainian legal doctrine provides for principal importance of documentary evidence in disputes between legal entities. Usually in-house lawyers, as well as legal advisors, prefer to include in the list of party's representatives commercial staff being engaged in the fulfillment of the contract. Sometimes the CEO's of the Ukrainian party can take part in the proceedings but again usually they act as representatives. Where examinations are allowed, the witness statements are submitted and the witnesses are summoned, and the arbitrators, unless otherwise agreed by the parties, may determine the way in which witnesses are to be examined. Cross examination of the witnesses is not common, as arbitrators prefer to question witnesses directly.

(iv) Are there any rules on who can or cannot appear as a witness? Are there any mandatory rules on oath or affirmation?

If witnesses appear in arbitration, they do not testify under oath before the arbitral tribunal. Usually, there is no cross examination of the witnesses. In fact, the Ukrainian parties seldom ask the tribunal to hear witnesses at all. The reasons for this are to be found in Ukrainian legal traditions.

(v) Are there any differences between the testimony of a witness specially connected with one of the parties (eg, legal representative) and the testimony of unrelated witnesses?

No, but the testimony of witnesses in general is rare.

(vi) How is expert testimony presented? Are there any formal requirements regarding independence and/or impartiality of expert witnesses?

If the parties have not agreed otherwise and a party so requests, or if the arbitral tribunal considers it necessary, after delivery of his written or oral report, an expert may be required to participate in a hearing. The parties will have the opportunity to submit questions to him and present their own expert witnesses on the point at issue. In the practice of the ICAC, experts have taken part in several cases, usually in cases involving complicated construction projects or other specific issues. The participation of the experts has worked very well, both when requested by the parties and when arranged at the tribunal's own initiative.

(vii) Is it common that arbitral tribunals appoint experts beside those that may have been appointed by the parties? How is the evidence provided by the expert appointed by the arbitral tribunal considered in comparison with the evidence provided by party-appointed experts? Are there any requirements in your jurisdiction that experts be selected from a particular list?

No, it is not common for arbitral tribunals to appoint experts. Nor are there requirements that experts be selected from a particular list..

(viii) Is witness conferencing ('hot-tubbing') used? If so, how is it typically handled?

No.

(ix) Are there any rules or requirements in your jurisdiction as to the use of arbitral secretaries? Is the use of arbitral secretaries common?

A key individual in arbitrations at the ICAC is the 'reporter' (*dokladchik*) whose function is now recognised by ICAC Rules (Section 5 of Article 8), which permit the ICAC President, if appropriate and requested by the arbitral tribunal, to appoint a reporter from among the employees of the ICAC Secretariat. Technically the reporter's only function is to take part in the meetings of the arbitral tribunal, but in many cases it will no doubt be the reporter that keeps the facts and the law of a case together and makes many contributions to the progress of a dispute to the final award. For instance, the reporter not only takes care of the file and proper exchange of documents presented by the parties, but also, according to the tribunal's instructions, drafts procedural documents, including the final award.

X. Awards

(i) Are there formal requirements for an award to be valid? Are there any limitations on the types of permissible relief?

The award must be in writing, signed by the arbitrators, state the reasons upon which it is based, contain a resolution regarding satisfaction or rejection of the claim, and include the amount of the arbitration fee, costs and instructions on how they are to be apportioned. It shall record the date and the place of arbitration and the names of the parties and arbitrators. According to the ICAC Rules, the award must also contain a reference to the subject matter and a brief description of the circumstances of the case.

ICAC awards have certain common features in execution (letterhead, naming of the tribunal's members, description of their appointment and delivery of documents, etc.) , as well as infrequent referring to precedents, other cases, or scholars' writings.

(ii) Can arbitrators award punitive or exemplary damages? Can they award interest? Compound interest?

Arbitrators cannot award punitive or exemplary damages. They can award interest, although interest may not be claimed for arbitration costs. Interest as a rule can be awarded only in a lump sum as part of the monetary claim paid by the arbitration fee. There are no provisions as to charging interest on unpaid interest and there is no direct prohibition as to the granting or prohibiting of compound interest under Ukrainian law.

(iii) Are interim or partial awards enforceable?

The ICAC Rules open the possibility for the arbitrators to render a final and a separate award, which is allowed on separate issues or parts of claims, including the granting of a claim in part, pending a full and final award. Both types are fully enforceable.

This provision on separate awards was introduced in 2007 and, while it may be expected that it will operate in the same way as similar provisions in the rules of other arbitration institutions, there is as yet no Ukrainian practice to report.

(iv) Are arbitrators allowed to issue dissenting opinions to the award? What are the rules, if any, that apply to the form and content of dissenting opinions?

Article 49(3) of the ICAC Rules provides for the possibility of a written dissenting opinion to be delivered with an award. There are no specific rules or requirements as to the form and content of dissenting opinions.

(v) Are awards by consent permitted? If so, under what circumstances? By what means other than an award can proceedings be terminated?

Awards by consent are permitted.

Arbitration can be terminated by termination orders. Article 55 of the ICAC Rules provides for two principal categories of cases where the arbitration is to be terminated by an order depending on the stage of the proceedings. If the tribunal has not yet been formed, a termination order shall be issued by the ICAC President. It happens, for instance, when claimant withdraws his claim or fails to pay the arbitration fee, or if the ICAC President finds that the continuation of the proceedings has for any other reason become unnecessary or impossible. After the constitution of the tribunal the arbitration can be terminated only by it.

(vi) What powers, if any, do arbitrators have to correct or interpret an award?

Article 33 of the LICA repeats the provisions of the UNCITRAL Model Law as to the correction, interpretation of the award and the rendering of an additional award.

XI. Costs

(i) Who bears the costs of arbitration? Is it always the unsuccessful party who bears the costs?

Allotment of the arbitration fee is established by the ICAC Rules' schedule on arbitration fees and costs. In practice the decisions taken by arbitral tribunals sometimes follow opposite approaches in allocation of the arbitration costs.
In general the arbitration fees shall be borne by the unsuccessful party, subject to any other rules. Where the claim is awarded partially the arbitration fees shall be borne by the parties in relevant proportions. Parties are free to agree on an allotment of the arbitration fee other than that provided in the schedule.

(ii) What are the elements of costs that are typically awarded?

The following general list of costs of the arbitral procedure are typically awarded:

- special expenses of the arbitral tribunal incurred in connection with the

examination of a case;

- expenses of conducting expert examinations and preparing translations;
- sums to be paid to interpreters, experts and witnesses;
- travelling allowances connected with the case examination; and
- expenses of the parties incurred separately in defending their interest before the arbitral tribunal, such as travelling allowance, lawyers' fees, etc..

In addition, the schedule on arbitration fees and costs provides separate rules for the reimbursement of the arbitrators' costs for participation in the hearing. In the ICAC's practice, such costs are not recoverable.

(iii) Does the arbitral tribunal have jurisdiction to decide on its own costs and expenses? If not, who does?

The arbitral tribunal has to decide on its own costs and expenses.

(iv) Does the arbitral tribunal have discretion to apportion the costs between the parties? If so, on what basis?

The arbitral tribunal has discretion to apportion the costs between the parties.

(v) Do courts have the power to review the tribunal's decision on costs? If so, under what conditions?

There are no legal provisions or practices regarding the possibility of a court reviewing the tribunal's decision on costs.

XII. Challenges to Awards

(i) How may awards be challenged and on what grounds? Are there time limitations for challenging awards? What is the average duration of challenge proceedings? Do challenge proceedings stay any enforcement proceedings? If yes, is it possible nevertheless to obtain leave to enforce? Under what conditions?

An arbitral award may be set aside only by filing a claim with the competent court. According to Article 34(3) of the LICA, an application for setting aside may not be made after three months have elapsed from the date on which the party making that application received the award. In a case of the request of any party for correction or interpretation of the award or issuance of additional award, provided under Article 33 of the LICA, the said 3 month term shall be calculated from the date on which that request had been decided by the arbitral tribunal.

Ukrainian law repeats the corresponding wording of the UNCITRAL Model Law as to the grounds for setting aside arbitral awards. In the setting aside procedure the state courts may not check the substance of the dispute; therefore the arbitral award cannot be challenged by reference to a mistake of fact or incorrect application of the substantive law.

The LICA provides that if an application for setting aside or suspension of an award has been made to a competent court, the Ukrainian court in the place where recognition or enforcement is sought may, if it considers it proper, adjourn its decision. It may also, on the application of the party claiming recognition or enforcement of the award, order the other party to provide appropriate security.

(ii) May the parties waive the right to challenge an arbitration award? If yes, what are the requirements for such an agreement to be valid?

The parties may not waive the right to challenge an arbitral award.

(iii) Can awards be appealed in your country? If so, what are the grounds for appeal? How many levels of appeal are there?

The challenge procedure can go through all three instances as the ruling of the competent first instance court is subject to appeal to the relevant court of appeal and then to the cassation court. The first instance court shall decide the case within one month after acceptance of the file. The terms for appeal as well as the duration of the appellate procedure are quite limited (10 and 15 days correspondingly). However, the general length of the setting aside procedure in all three instances could be approximately six months or even more. There are no specific grounds for appeal from a ruling on setting aside and therefore the general grounds, such as erroneous application of substantive and procedural law, are deemed to be applicable.

(iv) May courts remand an award to the tribunal? Under what conditions? What powers does the tribunal have in relation to an award so remanded?

Yes. The LICA reiterates relevant provisions of the UNCITRAL Model Law in this regard. The Civil Procedure Code of Ukraine (CPCU) does not provide for procedural rules or conditions on such a remand.

XIII. Recognition and Enforcement of Awards

(i) What is the process for the recognition and enforcement of awards? What are the grounds for opposing enforcement? Which is the competent court? Does such opposition stay the enforcement? If yes, is it possible nevertheless to obtain leave to enforce? Under what circumstances?

Recognition and enforcement of foreign arbitral awards in Ukraine, as well as enforcement of international arbitral awards rendered in Ukraine, are governed by Chapter VIII of the CPCU, the LICA and respective bilateral or multilateral international treaties in this respect (eg, the New York Convention).

Chapter VIII of the CPCU provides a unified enforcement procedure for all 'decisions of foreign courts', clarifying in Article 390 that the latter term includes awards of foreign and international arbitral tribunals.

Pursuant to Article 390 of the CPCU, Ukrainian courts shall grant enforcement of foreign arbitral awards provided that: (i) recognition and enforcement are permitted under an international treaty ratified by the Ukrainian Parliament; or (ii) on the basis of the reciprocity principle. The CPCU expressly provides that where the recognition and enforcement of a foreign arbitral award depends on the reciprocity principle, it shall be presumed that reciprocity exists unless it is proved otherwise.

The CPCU grants jurisdiction over the enforcement of foreign arbitral awards to the local general courts at the place of the debtor's residence or location, or, where the debtor does not have a place of residence or location in Ukraine, to the court at the location of the debtor's property. The ruling of the local court can be appealed.

Both Article 36 of the LICA and Article V of New York Convention provide almost identical grounds for refusal of recognition or enforcement of an arbitral award. This list of grounds is exhaustive and thus the court may not invoke any other provision of Ukrainian legislation to refuse enforcement. However, the ability to interpret the arbitrability of the dispute and the notion of public order still gives Ukrainian courts rather wide discretion to deny enforcement.

If an application for setting aside or suspension of an award has been made to a competent court, the Ukrainian court in the place where recognition or enforcement is sought may, if it considers it proper, adjourn its decision. It may also, on the application of the party claiming recognition or enforcement of the award, order the other party to provide appropriate security.

(ii) If an *exequatur* is obtained, what is the procedure to be followed to enforce the award? Is the recourse to a court possible at that stage?

There is no separate procedure for obtaining an *exequatur* in Ukraine.

(iii) Are conservatory measures available pending enforcement of the award?

Quite recently the CPCU provided for parties to apply for security pending the enforcement procedure. Now a competent court has the power to grant interim measures during recognition and enforcement proceedings. The court may order any of the interim measures envisaged by civil procedure legislation, for example attachment of a debtor's assets or money, injunctions against certain debtor's actions, orders to the debtor to carry out certain actions, injunctions against transfers of money or assets to the debtor by third parties, orders to transfer the object in dispute to the custody of third parties, etc.

(iv) What is the attitude of courts towards the enforcement of awards? What is the attitude of courts to the enforcement of foreign awards set aside by the courts at the place of arbitration?

It is possible to say that the attitude of courts towards the enforcement of awards is not really friendly. It is also possible to conclude that certain local or political influence is present. The attitude of courts towards the enforcement of foreign awards set aside at the place of arbitration is negative. Such enforcement would not be actually granted.

(v) How long does enforcement typically take? Are there time limits for seeking the enforcement of an award?

It can take half a year or even more to receive an execution writ.

A foreign arbitral award can be brought for compulsory execution in Ukraine within three years from the date of its coming into legal force except in the case of awards with payment by installments. In this case, an action for enforcement can be brought during the whole term provided for payment by installments (ie even within more than three years) but with right to settle the debt for the last three years only.

XIV. Sovereign Immunity

(i) Do state parties enjoy immunities in your jurisdiction? Under what conditions?

State parties enjoy immunities in Ukraine. The IPL provides absolute immunity of foreign states against jurisdiction, security and execution. With regard to Ukrainian legal doctrine, there is a move from absolute to functional immunity being suggested. For instance, in Article 32 of the Law on Production Sharing Agreements it is directly provided that in a PSA with the foreign investor it is assumed that the state waives its right to judicial immunity, immunity from interim relief and execution of the court judgment.

(ii) Are there any special rules that apply to the enforcement of an award against a state or state entity?

There are no such rules except as mentioned above.

XV. Investment Treaty Arbitration

(i) Is your country a party to the Washington Convention on the Settlement of Investment Disputes Between States and Nationals of Other States? Or other multilateral treaties on the protection of investments?

Ukraine is a party to the Washington Convention.

(ii) Has your country entered into bilateral investment treaties with other countries?

Currently Ukraine has concluded 63 bilateral treaties for the reciprocal promotion and protection of investments (some of them pending ratification in Ukraine or another state party) and one multilateral investment protection instrument (the 1994 Energy Charter Treaty).

XVI. Resources

(i) What are the main treatises or reference materials that practitioners should consult to learn more about arbitration in your jurisdiction?

The International Commercial Arbitration Court at the Ukrainian Chamber of Commerce issued several books on international commercial arbitration in Ukraine including observation of its practice (in Ukrainian or Russian only). There are also a number of publications about the law and practice of international arbitration in Ukraine in English in various internet resources and legal journals. Consider the following list for more information.

Practice of ICAC at the ICC Ukraine. Foreign economic disputes / Under general editorship of the chairman of the ICAC and MAC at the ICC Ukraine, Prof. I. H. Pobirchenko. – Kyiv, 2006 (in Russian);

Alyoshin, Oleg and Slipachuk, Tatyana
Enforcement of foreign arbitral awards in the Ukraine: To Be or Not To Be.
Journal of International Arbitration, Vol.22 No. 1, February 2005: pp. 65 – 73.

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Arbitration Clause Enforcement in Ukraine – On the Importance of Using a Model Clause. Stockholm Arbitration Report. Vol. 1, 2004: pp. 41 – 50.

Andrey G. Alexeyev, Sergei A.Voitovich
The Jurisdictional Question Dramatically Splits the ICSID Tribunal (Tokios Tokeles v. Ukraine, ICSID Case No.ARB/02/18) The Ukrainian Journal of Business Law, July 2004.

International Centre for Settlement of Investment Disputes (ICSID): issues of jurisdiction and arbitration procedure. Monography/A.G. Alekseev, S.A. Voytovich, D.I. Gryshchenko, O.V. Shevcuk. Yuridicheskaya praktika (2005).

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Assistance of Ukrainian State Courts to International Arbitration: "Enforcement" of the Arbitration Clause
Ukrainian Law Firms 2007/A Handbook for Foreign Clients
http://ukrainianlawfirms.com/areas/int_arbit/

Sergei Voitovich
Western NIS Enterprise Fund vs. Ukraine: Certain Issues of Denial of Justice in the Discontinued Investment Arbitration. The Ukrainian Journal of Business Law, 2006, Vol. 4 No.8 August (pages 26 – 28)

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Recognition and Enforcement of Foreign Arbitral Awards in Ukraine
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The Ukrainian Journal of Business Law, 2007, Vol. 5 No.1 January (pages 32 – 33)

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Olena Perepelynska
Party Autonomy vs. Mandatory Rules in International Arbitration;
The Ukrainian Journal of Business Law Vol.10, No.1-2, January-February; 2012 pp. 38-39

Olena Perepelynska
Arbitrability of Commercial Disputes in Ukraine; Spain Arbitration Review No.9/2010

Olena Perepelynska
Ukrainian Courts Review Arbitrability of Corporate Disputes CIS Arbitration Forum, 15 January 2012

Olena Perepelynska
New Rules for Interim Measures Related to Enforcement of Arbitral Awards in Ukraine; CIS Arbitration Forum, 20 December 2011

Julia Chernykh
Arbitrability of Corporate Disputes in Ukraine
Journal of International Arbitration No. 26, 2009, pp. 745-749

Markiyan Kliuchkovskyi, Kseniia Koriukalova, Serhii Uvarov

The European & Middle Eastern Arbitration Review 2012. Country Chapters: Ukraine

(ii) Are there major arbitration educational events or conferences held regularly in your jurisdiction? If so, what are they and when do they take place?

Since 2010, the Ukrainian Bar Association has been hosting yearly Kiev Arbitration Days in mid November.

XVII. Trends and Developments

(i) Do you think that arbitration has become a real alternative to court proceedings in your country?

Yes, during the last few years the International Commercial Arbitration Court at the UCCI has received around 350 new international cases per year. However, the development of international arbitration is quite controversial and is not fully supported by court practice.

(ii) What are the trends in relation to other ADR procedures, such as mediation?

Development of other ADR procedures, including mediation, is at its early stages.

(iii) Are there any noteworthy recent developments in arbitration or ADR?

As mentioned above, there have been noteworthy recent developments connected with the legal possibility of imposing security with regard to the enforcement of foreign arbitral awards.