

Arbitrability of Disputes Under Public Procurement Contracts In Ukraine: Recent Court Practice



Recent judgments of the Ukrainian courts have again attracted attention to the issue of arbitrability, which remains under debate both in theory and in practice in Ukraine. This time court practice deals with disputes arising out of the so-called “commercial contracts related to satisfaction of the state’s needs” (“**Public Procurement Contracts**”).

The judgments discussed in this article shed some light on the scope of the term “state needs”, which remains undefined in Ukrainian legislation. But, most importantly, they tend to confirm the arbitrability of such disputes under Ukrainian legislation currently in force.

This finding may have a much more far-reaching effect considering the fact that a provision of the Code of Commercial Procedure of Ukraine (the “**CCP**”), which imposes restrictions on the arbitrability of disputes arising under Public Procurement Contracts, also deals with corporate disputes.

Historical Background

The Ukrainian Law on International Commercial Arbitration (the “**Arbitration Law**”), which is largely based on the UNCITRAL Model Law on International Commercial Arbitration, generally allows the referral of any international commercial dispute to international arbitration.

For quite a long period of time only Article 12 of the CCP established legislative exceptions from this general arbitrability rule, prohibiting referral to arbitration of disputes:

1. of invalidation of acts of state and other bodies, enterprises and organisations;
2. arising out of entry into, amendment, termination or performance of Public Procurement Contracts;
3. arising out of corporate relations between a company and its participants (founders, shareholders, members), including a former participant, and between the participants (founders, shareholders, members) related to the establishment, activity, management and termination of the company, except for labour disputes.

Historically, these prohibitions applied both to domestic *and* international arbitration. However, in 2011, the wording of the said Article of the CCP was amended within the frame of a comprehensive reform of the procedural legislation related to the domestic arbitration of Ukraine. The new wording and new domestic arbitration context of the cornerstone statutory provision on the issue of arbitrability of commercial disputes in Ukraine sparked a new debate regarding its further application to international arbitration. Considering this, arbitration practitioners wait in anticipation for any court judgment dealing with the revised scope of application of Article 12 of the CCP.

Recent court practice

Recent court practice, although not always directly, tends to restrict the application of the new wording of Article 12 of the CCP to domestic arbitration. In particular, we refer to a number of judgments of Ukrainian courts concerning setting aside of three arbitral awards of the International Commercial Arbitration Court at the Ukrainian Chamber of Commerce and Industry (the “**ICAC**”).

Although rendered in different cases, these awards relate to the same supply agreement dated 14 September 2009 entered into by Ukrainian State Enterprise “Ukrmedpostach” (the “**State Enterprise**”) and Austrian company VAMED Engineering GmbH & CO KG (“**Vamed**”) for the supply of transport incubators, model IT-158-TS, to the State Enterprise (the “**Supply Agreement**”).

These cases on the setting aside of arbitral awards considered by the same Ukrainian courts, which managed to reach different conclusions on the validity of the same arbitration agreement, turned out to be quite controversial and inconsistent.

First Award

The first arbitral award related to the Supply Agreement was rendered on 4 April 2013 in case AC No. 195a/2012. The Arbitral Tribunal satisfied the claims of the State Enterprise and ordered Vamed to compensate arbitration costs and supply new transport incubators to the State Enterprise and, in case of failure to do so during 90 days following the receipt of the award, to reimburse EUR 4,973,590.55 paid by the State Enterprise under the Supply Agreement.

However, on 3 September 2013, Shevchenkivskyi District Court of Kyiv satisfied the motion of Vamed and [set aside](#) the award. On 30 July 2014, after several rounds of appeal, the High Specialised Court of Ukraine for Civil and Criminal Cases (the “**High Court**”) [upheld](#) the setting aside judgment of the court of first instance. More particularly, the High Court agreed with the position of the court of first instance and the court of appeal and concluded as follows:

1. Qualification of the Supply Agreement as a “contract related to satisfaction of the state’s needs” (Public Procurement Contract) since it was financed by a credit facility secured by a state guarantee in accordance with the Resolution of the Cabinet of Ministers of Ukraine dated 5 August 2009 No. 819 “On attraction of a foreign loan under state guarantee by the state-owned enterprise specialising on procurements for medical institutions ‘Ukrmedpostach’ for the purposes of implementation of an investment project on procurement of equipment, vehicles, healthcare products and drugs to the medical institutions in 2009”;
2. Invalidity of an arbitration agreement contained in the Supply Agreement at the date of its conclusion since in September 2009 Article 12 of the CCP did not allow referral of disputes arising out of Public Procurement Contracts to *either domestic or international arbitration*.

Basically, the ruling of the High Court specifically stressed the invalidity of the arbitration agreement under the legislation applicable at the date of entry into the Supply Agreement. At the same time, the High Court did not expressly conclude on the application of restrictions contained in Article 12 of the CCP exclusively to domestic arbitration at the date of the mentioned ruling. However, such a conclusion follows from the general logic of the High Court’s ruling.

Second Award

The Arbitral Tribunal rendered the second award related to the Supply Agreement on 6 June 2013 in case AC No. 209a/2012. It satisfied the claims of the State Enterprise and ordered Vamed to pay a penalty in amount of EUR 6,007.69 and compensate the arbitration and legal costs of the State Enterprise.

Vamed again filed a motion for setting aside of the award, but this time unsuccessfully. The court rejected the motion. As opposed to the previous case, when dealing with the First Award, the same court of first instance ruled that the arbitration agreement contained in the Supply Agreement was valid. The Court of Appeal [upheld](#) this ruling on 19 February 2014 and additionally found that the arbitration agreement contained in the Supply Agreement complied with the Arbitration Law, which specifies no restrictions as to the arbitrability of commercial disputes.

Furthermore, the Court of Appeal highlighted that Article 12 of the CCP contained restrictions to refer certain types of disputes (including disputes arising out of Public Procurement Contracts) only to the domestic arbitration under the special law governing domestic arbitration.

The wording of this finding of the Court of Appeal allows us to conclude that the court applied Article 12 of the CCP in its current version stating that arguments of Vamed:

do not refute correctness of findings of a court [court of first instance] given the fact that the named provision of the CCP applies exclusively to domestic arbitration governed by the Law of Ukraine “On Domestic Arbitration Courts”, para. 4 Art. 1 of which restricts its application to international commercial arbitration.

Unfortunately, the High Court did not examine these judgments – on 4 June 2014 the relevant application was returned to Vamed due to certain procedural defects.

Third Award

On 6 June 2013 the Arbitral Tribunal rendered another arbitral award related to the Supply Agreement in case No. 210a/2012. The Arbitral Tribunal satisfied the claims of the State Enterprise and ordered Vamed to repay a debt (principal amount with interest) in the amount of EUR 69,563.44 and to compensate arbitration and legal costs to the State Enterprise.

Vamed filed a motion for setting aside of this award as well, but again unsuccessfully. When dealing with the Third Award the same court of first instance also [confirmed](#) the validity of the arbitration agreement contained in the Supply Agreement. The Court of Appeal [opened](#) the proceeding under Vamed’s motion but later [returned](#) the case materials to the first instance court to complete certain formalities.

At the same time, the State Enterprise filed a motion for enforcement of the award to Podilskyi District Court of Kyiv. However, upon Vamed’s motion the court [suspended](#) the proceedings in view of the pending appeal proceedings on the setting aside of the same award.

Arbitrability of commercial disputes: outstanding issues

Although these cases demonstrate that the courts consider the arbitrability issue in the context of validity of the arbitration agreement, they applied quite opposite approaches as to the legislation applicable to this issue, i.e. legislation effective as of the date of (a) entry into the relevant arbitration agreement and (b) rendering of the respective judgment.

Notably, the findings mentioned above will have an impact on the even more debated issue of arbitrability of corporate disputes since they also appear among the exceptions imposed by Article 12 of the CCP. In other words, the discussed court practice breaks new ground in confirming the arbitrability of corporate disputes in Ukraine.

Consequently, arbitration practitioners as well as the business community anticipate further court practice on this matter which should clarify the issue of arbitrability of commercial disputes in Ukraine.

Olesia Gontar, Olena Perepelynska,

SAYENKO KHARENKO, Kyiv, Ukraine



About the Author:

[Olena Perepelynska](#)

Olena Perepelynska is a counsel at Sayenko Kharenko, Kyiv, Ukraine, and the Board Member of the Ukrainian Arbitration Association. Olena has a law degree from the Institute of International Relations, Kyiv Taras Shevchenko National University. She is Member of the Chartered Institute of Arbitrators (MCI Arb) and listed as recommended arbitrator of various arbitration institutions in Kazakhstan, Lithuania, Romania, Czech Republic, Poland and Ukraine.