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Ukrainian Round Table: Judicial Reform in Ukraine

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On August 17, a gathering of Dispute Resolution experts from many of the leading domestic and international law firms in Ukraine gathered in Baker McKenzie's Kyiv offices for a Round Table conversation.

The discussion revolved around the controversial and long-awaited reform to Ukraine's judiciary and the overall quality and competence of the country's courts.

Round Table Participants:

- Baker McKenzie (Host): Viacheslav Yakymchuk, Partner, Head of Corporate/M&A and Private Equity in Kyiv
- Aequo: Pavlo Byelousov, Counsel, Head of International Arbitration
- Avellum: Serhii Uvarov, Senior Associate
- Asters: Dmytro Shemelin, Counsel
- Arzinger: Kateryna Gupalo, Partner, Head of Tax and Customs Disputes and White Collar Defense
- CMS: Olga Shenk, Senior Associate
- DLA Piper: Olga Vorozhbyt, Partner
- Sayenko Kharenko: Serhiy Verlanov, Partner
- Redcliffe Partners: Sergiy Gryshko, Head of Dispute Resolution
- International Commercial Arbitration Court at the Ukrainian Chamber of Commerce and Industry: Tatyana Slipachuk, Arbitrator

CEELM: What's happening right now? I know that a new Ukrainian Supreme Court is being selected. What's the status of that process right now?

DLA Piper: It's been a long process of competition for positions on the Supreme Court. 120 candidates were approved for further appointment. Now we know their names, and the following steps would be for their approval by the President of Ukraine. That's a pretty formal step.

CEELM: How many will be approved?

DLA Piper: 120. But generally, the plan is to extend this to 200, if I'm not mistaken.

CEELM: For those of us from America, where the Supreme Court has nine members, how does a Supreme Court of 200 work?

DLA Piper: One might say that nine is not enough. (laughter). For Ukraine, one might say 120 is not enough! Filing to protect one's rights in court is a pretty low-cost exercise in Ukraine, and it is common practice to go through the process until the very end, and that basically means that almost every case ends up at the Supreme Court.

CEELM: So the Supreme Court here is the final stage of appellate review. Are there different panels, or are they selected individually for each case? How does that work?

DLA Piper: There are four panels – an Administrative panel, a Civil panel, a Criminal panel, and a Commercial panel – with specializations that reflect the current division by specialization of the lower courts. Thus, when the selection process took place, it was made with respect to those specific specializations.

Sayenko Kharenko: Basically, for the sake of clarity, the process of selecting judges was headed by the High Qualification Commission of Judges – they conducted different challenges, tasks, and interviews, and so on. The list of 120 winning candidates was referred to the High Council of Justice, which has the right to veto candidates it concludes are unqualified. However, no hearings have been scheduled yet. The final list will ultimately be transferred to the President.

CEELM: Is there a deadline for that?

Sayenko Kharenko: No. There was a deadline for this last March, but then it was moved. The formal establishment of the new Supreme Court is linked to several other judicial developments, including the adoption by the Parliament of new procedural codes, which has not yet happened. This is where political considerations become involved as well, of course. As to the structure, the new Supreme Court is supposed to be a two-chamber court: The lower chamber will consist of four separate panels (or "courts") – those that Olga referenced earlier – and there will also be a Grand Chamber, which will contain at least five judges from each of the lower chamber's four panels.

CEELM: And is the Grand Chamber another level of review?

Sayenko Kharenko: Yes. It is about double cassation. The second level of cassation.

Avellum: Basically, what the previous Supreme Court did was not review cases on their substance, but rather check whether the law was applied consistently. This is what the Grand Chamber of the new Supreme Court will be doing.

CEELM: What was the system before this revision? Was it also 200 Supreme Court judges, and are they being replaced now, or is this an entirely new system?

Redcliffe: It was different. There were three higher courts: The Civil and Criminal Court, the Commercial Court, and the Administrative Court. And then of course the Supreme Court. Because the historical division of branches within the judiciary was that there were general courts which heard civil and criminal matters between individuals, basically, and commercial matters between legal entities, and then the administrative branch was added in 2005 which heard disputes against the state.

They were all headed by their own cassation courts, and then the Supreme Court was the top, which reviewed the decisions of the cassation courts.

CEELM: And how big was that Supreme Court?

Redcliffe: It was 60 judges, I think, right?

Sayenko Kharenko: I think in 2009 the total was as high as 120 judges.

Redcliffe: But then they changed.

Sayenko Kharenko: At some point 48 remained, with many others transferred to the High Civil and Criminal Court.

CEELM: You said there's a double cassation. How many judges will be on that final level?

Sayenko Kharenko: 20 judges, plus the Head of the Court – so 21.

CEELM: When do you think this process will be finished?

Sayenko Kharenko: Most likely by the end of this year.

Aequo: As Serhiy [from Sayenko Kharenko] mentioned, it is actually linked to the new procedural codes, so we hope or expect that these codes will finally be adopted by the Parliament during the fall.

DLA Piper: There was a slight, slight chance that they would be adopted this summer.

Aequo: There was almost no chance, with the desires of our deputies, our parliamentarians, to go on vacation – there was almost no chance. But in autumn we expect that these codes will be finally adopted.

CEELM: Is this reform being greeted both in public and by you and your peers as a good thing – a necessary improvement to the system – or is it problematic?

Aequo: That's a tough question. We should probably start from 1991. (laughter)

Redcliffe: There are two aspects to that. The first question is, do we need to change something? The answer is: of course. And the second is, are we happy with the way it's being done? Probably not. Well, I think Serhiy is in a better position to comment on that, because he was in this Public Integrity Council that screened all the candidates – especially the candidates who are acting judges. Most of them couldn't explain how they had Bentleys and mansions, with salaries of only like 100 dollars a month. So that's the problem. But the thing is, most of those judges were nominated to the new Supreme Court by the High Qualification Commission. And this is why we're not particularly happy with the way it's been done.

Aequo: I agree with Serhiy that there are several aspects, and probably the first one will be the structure which we have just discussed. I'm not really sure that the structure was the key problem, and whether we have a specialized or a single Supreme Court – that alone will not change much. What will change a lot is replacing the old judges with new judges, and of course a lot has been done in that direction, but there are still a lot of questions about some judges who were actually approved by the High Qualification Commission in the new selection process but with respect to whom there are still some concerns as to their integrity.

CEELM: So in your opinion it's more about the questions of integrity, corruption, and competence than it is about the restructuring.

Aequo: Right, yes, absolutely. And the third aspect would be the new procedural rules, in terms of how the process is done, but this is a rather technical issue, so the first and most important aspect will be doing justice at the Supreme Court.

CEELM: And are you all confident that this process will result in more qualified and less corrupt people?

Avellum: My feeling is that it will result in more qualified judges, but the question is that the ultimate goal of this process was not just to get more qualified and honest judges, but the most qualified and the most honest.

Aequo: But the process overall was quite transparent, and we may argue that we don't like some of the candidates or whatever, but my perception is that basically, the High Qualification Commission selected the best candidates from those who applied.

Redcliffe: I'm not so sure.

Aequo: And we have this proportion of almost 20% of scholars and attorneys being selected as judges of the Supreme Court who have never been judges before, and that is unique, I think, in Europe. I cannot find any jurisdictions with the same result, where 20% of judges will be previous attorneys or scholars.

CEELM: That's one of the changes, is that right? That lawyers are now able to be selected for this process, although they weren't in the past?

Aequo: Yes. Even for appellate or local courts, though in some of the interviews made during the selection process, several attorneys were asked, if you are not successful in the competition to become a judge of the Supreme Court, would you then apply to the appellate court, and the attorneys said, "no, that's not so attractive, to go to the appellate courts." That, perhaps, is due to the salary, since the salary of the Supreme Court judges is significantly more than of other judges. My colleagues may correct me, but I think that the average is like 150,000 hrivnya a month as a basic level plus some additional amounts depending on terms of service, position, PhD, and so on.

Redcliffe: Either way, it's certainly more than it was before.

DLA Piper: Well, if I just may add a short comment, at the beginning it was expected that more people from the legal profession and scholars would apply to the Supreme Court, and people from inside were encouraging people to apply, but for some reason they generally decided to stay within their own worlds.

CMS: I have a couple friends who were seriously considering applying to become judges of the Supreme Court, and the very heavy requirements put them off. Many people whom I would personally be very happy to see as a judge on the Supreme Court just said, "No, we will not even try." I say, "But consider, you would be the perfect judge, we need very professional people there." Because, from my perspective the level of professional qualification of judges previously was not sufficient, but the problem was that very many scholars and attorneys just didn't try at all.

CEELM: Why not?

CMS: Probably, there was not sufficient belief in the successful result of this procedure.

Redcliffe: And I heard that many people were just screened out at the very beginning, because to qualify, to be eligible for this nomination, you have to prove at least ten years of experience in the courts. Which means you have to furnish documents – I mean, furnish court rulings where you are mentioned as an attorney of record, for each of these ten years, to the qualification commission. And as you can imagine it is quite difficult – especially if you change offices, for instance, you don't keep all your files with you. Things like that. So it was too difficult, too complicated. And I think it was meant to be like that, to discourage attorneys from applying. So, you know, the one hand is giving, and the other is taking – a very Stalinist style type of thing. It is what we've been up to for the last three years.

CEELM: So it's technically possible, but in reality there won't be very many lawyers on the Supreme Court.

Sayenko Kharenko: I can provide some statistics, because I was part of this process. Of the 120 final candidates, 91 are sitting judges, and from these 91 about 55 work either in the Supreme Court of Ukraine or in one of the high specialized courts (the courts of cassation in the current system), so basically nothing is supposed to change for them. Then, of the 29 non-sitting judge candidates, nine are attorneys, 16 are legal scholars, and four have so-called "mixed experience" (of which only one has never been a judge).

And the composition of the chambers varies as well: For example, in the Commercial Chamber between 11 and 13 of the successful candidates are not sitting or retired judges – but in the Administrative Chamber many sitting judges who are already working in the High Administrative Court are on top of the rating and will just transfer to the new Supreme Court. It's a problem, notably because although the selection process was transparent, the results are being challenged by some participants, and the High Administrative Court is the court resolving those disputes. So we may (and actually do) face a situation where a judge who has won the competition will hear a case that may knock him off the winners' list. Actually, there are at least 15 judges in the winners' list who are currently working in the High Administrative Court.

Redcliffe: What a great leap in quality!

CEELM: You sound very cynical.

Redcliffe: I am. It's not me who screened the system to keep all the same people in place.

ICAC: Frankly speaking, I don't think that we need to start any discussions or draw any conclusions based on the assumption that all of the people now being selected for the high courts are somehow corrupt or guilty. I don't really believe that it would be a good solution for the system if we got almost entirely new judges. The whole system could collapse if it were made up only of new people without the requisite institutional knowledge of the judicial system. We have new procedural courts. So it will be a big problem and a big challenge for the state. We need to have the most qualified people among the judges in the system, and we need to have new blood in order to develop further.

And I also can say that, international arbitrator, state judge, and private counsel are not the same – they all do different kinds of work. And not every lawyer can be a good arbitrator, while not every lawyer can be a good judge. So we must be careful. We really have a good result, and we must be very helpful and assist both the new people in the court system and the old people in the court system. They want to develop, they want to change the system. They are also accepting a challenge now, because they know they will be criticized. So let's be helpful to them.

Arzinger: You mentioned the possibility of collapse. Just two months ago I was talking with one of the judges of the Higher Administrative Court and I asked him how many cases he had pending and he told me that his court – just one of the three courts, don't forget – has 27,000 unsolved cases. And all of these cases would be transferred to the Administrative Chamber of the Supreme Court, which consists of 30 people, and I cannot imagine how 30 people can solve such an enormous amount of cases, which of course keep coming and coming. And the current court does not have a lot of judges, because many of them are on vacation, or on maternity leave, and so on, and the ones who remain are discouraged from solving such cases, so they make no effort to hurry. We might have some kind of collapse, trying to solve all this.

Avellum: I would agree, at least partially, with Tatiana, that the problem is not that a large number of the new judges have previous experience as judges. There's no problem with that, per se. There are certain concerns regarding the integrity of the new candidates, so that's probably what should be discussed, rather than their previous positions.

Sayenko Kharenko: I have some more figures here. Our Public Integrity Council was established under the law, and it was the first such experiment in Europe. It consisted of both lawyers and non-lawyers (generally, civil society representatives), and there was a quite high qualification barrier to enter into this election process. The Public Integrity Council screened the candidates, and 20 members

of the Council voted on whether each candidate satisfied the integrity and professional ethics criteria. When the process started, 1500 applications were submitted. Only 800 candidates succeeded in fulfilling the application requirements, from which 650 met qualifying criteria and were admitted as candidates, which is what Serhiy was talking about. Then there were two exams on professional skills and case law, after which 384 candidates remained in the process. Those 384 candidates were subjected to the Public Council of Integrity's screening, and 130 of them received negative conclusions from the Council, which could only be overruled by a qualifying majority (11 of the 15) of the members of the High Qualification Commission. In fact, only about 30 negative conclusions were upheld by the Council (and these candidates were eliminated from further consideration), while about 100 of the negative conclusions were overruled, and those candidates continued to participate. Eventually, another 30 candidates from the winners' list received negative conclusions from the Public Integrity Council, and the Highest Council of Justice now has the power to dismiss these candidates.

Asters: Just one more comment to that. It looks like many of the people who could not satisfy the integrity requirement were former judges. These were not people off the street, or lawyers who came to take part in the competition. These were former judges, and it looks to me, at least as if, the more involved the applicant was with the former hierarchy, the greater the likelihood was that he would be unable to satisfy the integrity criteria.

CEELM: What's happening right now? Is there a functioning Supreme Court right now?

Aequo: We have the old system right now in place. Yes, it functions. Though the current judges of the courts of cassation, to be honest, are reluctant to consider cases when these judges have not participated in the selection for the Supreme Court and they know that their functions will be terminated soon.

CEELM: They know they're on the way out.

Aequo: So they're reluctant to consider a lot of cases, and that's a problem right now.

CEELM: Let's move to the competence and the reliability of the courts here in general. At the lowest level of courts here – at the first level – how good are they? How reliable are the outcomes? If you have a winning case, do you win?

DLA Piper: Not necessarily. Basically, for two reasons. First, there is always a risk of corruption, always, which can never be excluded. And unfortunately, I do not believe they will be able to exclude that risk for the coming five years at least. And second, due to inconsistent professional skills and incomplete understanding of laws and the substance of the cases before them. In major cities of Ukraine, like Kiev, Kharkiv, and Dnipro, the situation is a little bit better, but when you go to regions far from the major cities, it's much worse, especially when it comes to international disputes or disputes having international components. It can be very difficult to explain your case, as often you need to go over the basics to educate your judge, so that's still a problem.

And in such situations, a lot of times it's really appreciated when the judge in the local court says, "Please explain, please justify this submission, one submission, two submissions, I will look into it, I will consider it, I will decide, I will do my best." But sometimes you are submitting, explaining, explaining, explaining, and you see the judge is not understanding, does not want to understand, and your motion is denied just because it was not understood due to a lack of professional level of the judge. It happens.

Asters: I think one of the aspects of the problem is the motivation, actually. Because, the popular understanding seems to be that the principal motivation of a lot of judges, I won't say the majority, I will say a lot of judges, is to earn money on cases. And when you have to go an extra mile to understand the background of the case, when you have to spend hours on discussing evidence, on discussing legal concepts, on reading submissions which may be 30 or 40 pages long, but you do not get paid for that except for your regular salary, you're not really motivated.

DLA Piper: And you will not get fired if you just do the minimum amount of work.

Asters: Yes. There is little motivation if you cannot get fired if you just resolve the dispute on the basis of the first article you find in the civil code.

Redcliffe: Or flipping a coin.

Asters: They say, "I found this article, it's fine, it's fine."

Aequo: We should put things in their proper context first, I think. As I said, we should go back to 1991. Back then Ukraine inherited its court system from the old Soviet system, so inquisitorial courts, focused on and dealing with two kinds of cases: criminal and family. That's all. No commercial, in our contemporaneous understanding of commercial cases. There were some civil cases, but the role of attorneys was zero – almost zero. The executive body, police, and prosecutor's office all exerted substantial influence on the judges, and these are the judges we started our Ukrainian judicial system with. Later on, commercial disputes were more frequent for Ukraine, and judges started to consider reforming commercial courts on the basis of the former arbitrage courts …

ICAC: You mentioned that we had state arbitrage courts, and good arbitrage decisions in Soviet Union, and at least there was wide understanding of commercial courts during that period. It is not true that we only started to consider commercial cases after 1991. That is not true. The amount of such cases was enormous. Especially when we talk about state enterprises. Almost all the disputes between state enterprises went to the state arbitrage courts, and they handled a great amount of cases. It was a very interesting practice. I actually completed my scientific degree in economic law in arbitrage procedure. I researched these practices. It was interesting, and it was really very sophisticated for that period of time. So it is not really true to say everything began in 1991: we have a good history of commercial and dispute resolution in Ukraine.

But now, can I ask a question? When we speak about the qualification of judges, should we not also discuss the level of qualification of lawyers? I am sorry, but sometimes, sometimes, you listen and you cannot understand the level of education a young lawyer has. So the judge is not always the problem. But when I hear in a courtroom that, for example, the provisions of international treaties are not applicable in Ukraine, or something like that, something so absolutely incorrect, I can't believe it. We also have a problem with legal education, and this is a real problem, because as a result we have a large number of lawyers with – in my personal opinion – quite a low level of education and understanding of the law, both in terms of procedural and substantive law.

Baker McKenzie: In my 20 years of practice, we rarely prepare agreements which are governed by Ukrainian law on cross-border M&A transactions. For example, 99% of cross border transactions in which our film is involved are governed by laws other than Ukrainian, so our clients rarely end up in the Ukrainian courts or use the Ukrainian arbitration system. And in terms of Tatiana's comment about education, she is mixing two points: We're not here discussing the quality of education. If a lawyer is not prepared, then only his client will suffer. If a judge is not prepared, then the whole system suffers because justice is not done. I think it's up to the client to select the lawyer, and up to the law firms to improve professional standards. We know that top firms probably already follow very high professional standards. And we cannot say, "Boy, it's okay that the judges are as they are, because the lawyers are not also very good." I think it's just a wrong argument. We are here to discuss the reform of the judicial system, and I agree with my colleagues that we are currently frustrated. We in the corporate department are frustrated so much that we have no agreements done using Ukrainian law. In my 20 years of practice, it's very rare that agreement is done using Ukrainian law. So this is the result of the system. We are happy that we can avoid the Ukrainian system in our group. Many of my colleagues in other areas, like IP or tax, unfortunately, cannot go and litigate in London or somewhere else.

Redcliffe: It's so humiliating, you know, you're a Ukrainian lawyer, and you have to advise your client to avoid Ukrainian courts at all costs. It is so humiliating, to be honest, we want this to change.

Asters: Probably the education argument would be important if there were, let's say, 30 lawyers across all of Kyiv and you had to go to one of them. But there are thousands of lawyers in Kyiv. But there are only 30 judges in the commercial court, or something like that. So it's not comparable at all.

ICAC: I was only objecting to the suggestion that lawyers are always forced to educate judges. It is not the situation in our system that lawyers initially are always better-read and better-educated than judges. I was only speaking about this.

Baker McKenzie: But lawyers should not educate the judges. If I read the decisions of Supreme Court of U.S., you can read and enjoy reading the decisions. How they put it is really impressive. You learn, all the lawyers learn from the decisions. What can we learn from the decisions of our judges? In the U.S., the system is that you learn from precedent, you learn from the language, you learn how to develop your analysis, you learn from court decisions. So the people in the U.S. who elect judges really teach the entire population how to practice law. And I think this is what we ultimately should try to achieve, but I don't know how many years it will take.

Avellum: I think it will be really difficult to achieve in our system. Not because of competence, necessarily, but imagine, 30 people needing to decide 27,000 cases.

Sayenko Kharenko: Not 30, 25. Because 5 will be delegated to the Grand Chamber.

Avellum: Yes, 25.

Sayenko Kharenko: It is a real problem.

Avellum: It's a huge problem, and basically we have similar situations at all levels. The caseload is enormous. And we cannot expect judges to write 50-page decisions with detailed reasoning and discussion of all possible concepts and so on and so forth. So when you open the text of the decision, it can be not helpful for further practice. The most important thing is that the decisions should be correct on law and on facts, and I think it's not fair to say that our judges are absolutely incompetent or whatsoever; they do try to go deep into the cases. A lot of judges before whom I have pleaded cases, including from the regions, have tried to understand them.

CEELM: You think they're just overwhelmed?

Avellum: Yes, they are overwhelmed. Insofar as they do not know some concepts like international arbitration, international law, whatever, foreign law, they try to understand, they invite the parties to provide submissions, they try to understand what the case is about. So if we put aside the corruption concern and the integrity concern and we are talking only about the competence, I think the main problem here would be not incompetence of the judges but the fact that they are overwhelmed with a huge case load.

Asters: In Ukraine the caseload is primarily caused by the inevitability of appeals, because every case which is worth anything goes all the way up to the Supreme Court. Okay, the Supreme Court might not accept it, the cassation court theoretically might not accept it, but any case normally ends up at least in three stages of hearings. While my colleagues know that in England or in the U.S., for a case to go to the Supreme Court is exceptional. Lawyers plead in the Supreme Court like five times in their lifetime …

CEELM: … and most never do.

Asters: … and here it's like you go there on a straight road. It does not feel like three instances of appeal, it feels more like three hearings: you get a first hearing in the first instance, okay, we lost it, then we have an appeal, okay, we lost it, then we have cassation. And why is that so? My impression is that it relates to the question of integrity. Because the higher levels of judiciary initially did not believe that the parties have had a fair hearing at the lower level.

It's the perception both in the public and in the profession itself. Let's say in England, when a court has tried a case of first instance, that's basically it. The facts are straight, the law is more or less

straight, and there are maybe two or three legal problems which can go either way, so that's a question for an appeal. But here, you know, the cases are often pleaded anew on appeal, then in the cassation you have new legal arguments because you know that the judge of the first instance just would not hear them, so it's totally different.

Aequo: We can discuss for eternity who is more guilty, judges or attorneys, but at the end of the day the result is simple: The trust of Ukrainian people in the court is very low – almost zero. And to be honest, when your clients or potential clients come to your office and ask for legal support and then at the end they say, "what can you do?" and you say, "Okay, we will review your documents and suggest a strategy for the court, we have experience in these type of cases, and we can help you, we will see the court practice and will develop your position," and their response is, "We don't need you to spend time on drafting something. We need to solve the problem, if you know what I mean." And you say, "Okay, thank you, our meeting is over." I would say something like 40% of Ukrainian clients ask this question. And you always have to deal with this, to explain that "We are not mediators or 'fixers.' We solve problems with legal tools."

DLA Piper: Yes, but let's be fair, a lot of legal professionals do just that. And when you do that, and then sit and blame courts and judges because all the while they were corrupt … who corrupts them?

Aequo: That was my point. The judges, attorneys, parties …

Redcliffe: If you're willing to take the bribe, you take it. It's as easy as that.

Avellum: If you're willing to give the bribe, you give it.

Redcliffe: If you give it to someone who doesn't want to accept it you will be caught. You only give it when you know it will be accepted.

DLA Piper: So that's what happens. And generally, don't forget, our judiciary system is very young in Ukraine, even though we have long history of Soviet-era judiciary. In the modern way, we are very young, and there are growing pains. Like every normal teenager we are pretty turbulent. So it takes time to develop.

Asters: But It's already almost 30 years!

DLA Piper: It takes us a bit of time. (laughter)

Redcliffe: Maybe we have some problems? A special-needs teenager?

CEELM: It does sound to me like being a dispute resolution lawyer in Ukraine involves a number of challenges that perhaps it doesn't in some other countries, involving levels of strategy and levels of decision-making beyond simply, "Where does the law fall on this, and how likely are we to win?" How do you advise your clients? What do you tell your clients when they say, "We've got a problem, we want you to go to court and win this for us"? Do you say, "Eh, we'll roll the dice and see what happens"? What do you say to them?

DLA Piper: Normally, for me personally, there are two components. I try to understand the legal position of the case, and I do my best to present the case based on strong legal arguments. We cannot exclude, as I already said, corruption risks. That's why, when the case is pretty big and important, media support really helps. International organizations like the IBA, the American Chamber of Commerce, and sometimes the embassies – sometimes I have representatives of embassies going with me to court just to make judges concentrate a bit more. You just need to bring more attention to the case.

CEELM: To focus their attention a little bit?

DLA Piper: Yes. Normally making a dispute more known to the public makes the lives of judges a bit more difficult if they intend to go beyond the legal framework, so that's how we do it.

Aequo: You have to employ also all the procedural tools provided by the prevailing procedural codes, which is also the point of Tatiana, I think, about the education and experience of attorneys. If a street lawyer is just passing money to judges, et cetera, you can see it in the hearing, that the attorney usually is not ready to go through the process, as well as the judge, if he or she is a bit reluctant to go to the merits since the judgment has already been made. But that doesn't mean that you should not file submissions at all, or you should not defend the client's interests. There are a lot of instances where the judges, when they see all the force of these procedural tools and the weight of your position, and when you show that the practice of the Supreme Court of Ukraine is negative for the result the judge or opposite party would like to get, they will step out in some instances.

CEELM: Do you guys have more confidence in the higher levels of the judiciary? Do you think at the end of the day, the Supreme Court's probably going to come to the right decision?

Baker McKenzie: After analyzing the case, we have this conversation with all our clients – and probably everyone here has the same – if we believe that the client is right, we say, we may lose in the first instance, you should be prepared, but we think we can get a fair trial at the higher court. Because otherwise to tell the client that he's fully right but then they lose in the first instance court, I think it frustrates them a lot.

CEELM: So you have to prepare them.

DLA Piper: Yes. We always do that too.

CEELM: Let's move to the availability and effectiveness of alternate dispute resolution methods here. Are arbitration clauses standard in contracts, or are they becoming more standard, and are you seeing more use of arbitration, for instance, in Ukraine than in past years?

DLA Piper: I think it's a nice tool to take a case out of Ukraine.

Aequo: Not out of Ukraine, but out of courts.

Redcliffe: It's common in international contracts, it's common. And it's been like that for decades, I think.

ICAC: For 25 years.

Avellum: I don't think that we see increase in popularity, but it was popular and it remains quite popular.

Redcliffe: You have to appreciate that there are two regimes for arbitration in Ukraine: there's domestic arbitration and there's international commercial arbitration based on the UNCITRAL model. So if we speak about international contracts, it's very common and it's been common all along to submit to the international commercial arbitration court of the Ukrainian Chamber of Commerce and Industry since its inception in 1992. But if we speak about domestic arbitration – i.e., between domestic parties – it was very popular back in the noughties to have an arbitration clause in a contract, especially in a contract where you wanted to avoid certain mandatory procedures prescribed by Ukrainian law. For instance, when you wanted to register a proper title on real estate, the state registration procedures were so cumbersome that it was quite common to include an arbitration clause, go to the domestic arbitration court, who would say, "Well, now you are the owner of that piece of real estate, and it is a piece of real estate, by the way, and it can be now registered." So domestic arbitration was widely used as the tool to circumvent the mandatory registration procedures in the noughties – but then unfortunately this bonanza was eliminated when the parliament made those disputes non-arbitrable in 2009, and since then we have seen a huge decline in interest in domestic arbitration. I think for that very reason.

Aequo: But that concerns only domestic arbitration, international arbitration is used, and for example Ukrainian – the only permanent Ukrainian international commercial arbitration court yielded only I think last year the title of the most in-demand international arbitration court to the ICC International

Court of Arbitration. So basically, I think that those problems we have been discussing which are inherent to Ukrainian litigation proceedings, they sometimes also affect issues of competence and experience in arbitrators as well, so they cause those domestic cases to go to international arbitration.

CEELM: Tatania, you're with the ICAC, right?

ICAC: Yes, and my personal view is that we need to understand that for international arbitration, we had to launch it some 25 years ago. We need to understand that for the first five years or so the institution had to gain experience while gaining an audience and lawyers, because here we have this negative effect of the former Soviet Union, where all international trade was concentrated in Moscow. For Ukraine it was a challenge to set up its own courts, and I think that it was quite successful. For me it is difficult to say anything else, because I was one of the first people engaged in creating and establishing it, in putting it in contracts, and you know that international arbitration is alive when there are three very important things: First, good legislation with understandable arbitrability provisions because where arbitrability is unclear it is a problem. The second requirement is a professional community of lawyers able to be counsels and/or arbitrators. Finally, there is the existence of understandable standard rules. In Ukraine as we speak the situation is fine, and I think that we have all three things.

We have good legislation, finally, I hope, within these final steps of adopting the new procedural codes, which will include all the procedures we need for international arbitration in Ukraine as well, taking into account the possibility for interim measures by state boards, etc. A very contemporary approach is beginning now. I hope that we will be successful in having arbitrability provisions as of now within the draft, opening the door as well to corporate disputes and some other disputes that are important.

Sometimes I hear criticisms regarding the practice of international arbitration courts, but we have almost the same rules as any other institution. We sometimes have a problem with arbitrators – you can still sometimes receive old-fashioned arbitrators instead of contemporary arbitrators, less knowledgeable compared to more knowledgeable, etc. It is your choice, so be active in choosing the arbitration, be active in applying to the court, saying that we are not satisfied with our arbitrators. But it is a very solid structure. Understandable. This is true for foreign parties as well, because the structure is similar to almost all European countries: The same system, the same procedures, and the same rules. The same intention to give the parties more flexibility and to provide all the modern tools like videoconferences, etc. We have foreign arbitrators on the list. We have English-speaking arbitrators. When we speak about some specific cases and reference them to the Ukrainian arbitration court, let's say that in many situations, in principle, the choice of applicable law is something which seriously influences the choice of the institution. And for Ukraine, the substantial Ukrainian laws – civil law, for example, or corporate law – until recently was a problem. And that's why it was also a problem for us. I share your reluctance to say to clients, "Let's have your M&A deal governed by Ukrainian law." Because we do not have the contractual instruments in Ukrainian law expected by the parties, and we see a shift towards English law, and in this situation, we need arbitrators with knowledge of English law. We need to go to England, to use English arbitrators! It's something that usually happens, but when you have Ukrainian law, Ukrainian matters to be applicable in a London court ….

During the last five years or so the arbitration community here in Ukraine has become more active and more consolidated. It means that you can develop a practice, you can develop approaches, you can write a lot of articles, but my main concern is how to explain to judges all these new mechanisms which are now in the procedural courts. This is the issue.

Asters: Just as a point of discussion: the fortune of our domestic arbitration is a really interesting question. We have a reasonably large practice at the International commercial arbitration court, we have a huge amount of activity in the commercial courts, with some ten thousand cases yearly – even though it seems as if nobody trusts the courts. So why don't people use domestic arbitration, which is kind of an obvious alternative? Historically it was used as some kind of bypass. First, it was this

issue of immovables. As Sergiy said, you kind of gamed the system by using the domestic arbitration courts. Then it was an issue of the banks, which established their pocket arbitration institutions to resolve disputes under the loan agreements, and you can imagine what the results of those disputes were. And there is, unlike international cases, there is still no institution which is a comparable authority on domestic arbitration. There are lots of small pocket institutions. Some are a little bit bigger, but the trust in them is also very low. So there is some room for improvement at this level, but the trust in domestic arbitration is extremely low.

ICAC: It was compromised. Yes, you are right. It was seriously compromised at the very beginning of its cases, and it was unfortunate that, at the beginning, it was very easy for anybody who wanted to be included on the list of arbitrators for domestic courts. This means that the quality of the decisions taken was below acceptable expectations. And it's really a seriously compromised procedure, and it will take a long time to fix.

CEELM: Is everyone here optimistic about these changes in general, or not?

Arzinger: We don't have a lot of choice. (laughter)

CMS: It may not have sounded like it during the last two hours. But generally, the legal profession is in support of judicial reform. Of course, we would like it to be much better – like much better. (laughter). But the fact that we have judicial reform, of such a size, of such substance, is very good.

DLA Piper: I would say that we have no other choice than to be optimistic, because otherwise we should quit.

Aequo: And we have not discussed these new procedural codes, but just one remark on this: The great excitement is that the new procedural codes are based on almost an adversarial system rather than the inquisitorial system which prevails right now. And that is a challenge not only to the judges – I hope that the judges will comply with this, and will educate themselves, and learn all the tools – but that is the problem for attorneys as well.

CEELM: And you think that's a good change?

Aequo: Yes, absolutely. Right now the inquisitorial system allows parties sometimes to succeed with no input in the case. With no oral argument, with no good submission, without anything.

Redcliffe: There is a submission. A donation, I would say. (laughter)

Aequo: And you know, the problem is when you have young lawyers, who just observe this, when you perform in the courtroom, you submit documents, draft, and another party does almost nothing, and this party wins at the end? That makes especially young lawyers very unhappy with Ukraine.

Note: We would like to thank Oksana Kozhukhivska and Baker McKenzie Kyiv for their generosity and hospitality in agreeing to host the Round Table, and Kathleen Smallwood for her assistance in transcribing the conversation.

Photo: Visiting session of the Cabinet of Ukraine in the Supreme Court in Kiev, October 13, 2014. Chairman of the Supreme Court of Ukraine Yaroslav Romaniuk. (photo credit: igorgolovniov)