

INTERNATIONAL
CONTRACT
MANUAL

Chapter 77A

Ukraine

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I. INTRODUCTION

§ 77A:1 Source and nature of Ukrainian law

***Nataliya Mykolska** is a counsel at Sayenko Kharenko with a particular focus on international trade. Ms. Mykolska has over 10 years of experience advising clients on all aspects of international trade including cross-border trade transactions and contracts, agency and distribution, franchising, trade financing and other matters. Ms. Mykolska is named among Top 2 lawyers in Foreign Trade by *Ukrainian Law Firms 2013*; recommended by *The International Who's Who of Franchise Lawyers 2013*, *The International Who's Who of Business Lawyers 2014*, *The International Who's Who of Trade & Customs Lawyers 2013* and *The International Who's Who Legal: CIS 2011 in Trade & Customs*. Ms. Mykolska is a country expert of the International Distribution Institute (IDI) on franchising in Ukraine. Ms. Mykolska specializes in trade remedy proceedings and regularly counsels on the application of WTO rules. Ms. Mykolska also focuses on industries with specific regulatory requirements, such as pharmaceuticals and gambling. Ms. Mykolska authored more than 40 articles published in leading Ukrainian and foreign law periodicals.

Anzhela Makhinova is an associate at Sayenko Kharenko specializing in international trade. She regularly advises clients on a wide variety of trade law aspects, involving development of distribution and franchising agreements, hotel management, etc. Ms. Makhinova has extensive experience of advising on trade investigations and applications of WTO laws. Her articles in the field of international trade, including international contracts incl. distribution, trade investigations, and WTO related issues have been published in leading law periodicals.

Svitlana Kheda, counsel heading the firm's labour and employment practice, has over 16 years of experience in advising clients on a wide range of complex issues in the area of labour and employment law, privacy and data protection regulation, anti-corruption and anti-bribery legislation and public-private partnerships (PPP) in infrastructure projects. She is named

among Top three in labour law according to *Ukrainian Law Firms 2013*; ranked among Top six lawyers for employment law in Ukraine, according to *Chambers Europe 2013*, and listed among the country's Top four lawyers in labour law and PPP, based on the results of the all-Ukrainian survey *Client's Choice. Top-100 Lawyers in Ukraine 2012–2013* conducted by the Ukrainian legal weekly *Yurydychna Gazeta*. Ms. Kheda is a certified mediator at the Ukrainian Mediation Centre. Ms. Kheda actively participates in the legislative drafting. Ms. Kheda is a published author of a monograph and over 70 articles in the U.S., U.K., Turkey, Ukraine, India, and Canada, and is a frequent speaker on various legal issues.

Dmitry Taranyk is a counsel at Sayenko Kharenko heading the Firm's Antitrust and Competition practice. Dmitry is named Antitrust Lawyer of the Year in Ukraine by *Lawyer Monthly Legal Awards 2012*; and recognized among leading lawyers in competition law by *Ukrainian Law Firms 2013*, *Chambers Europe 2013*, *Best Lawyers International 2013*, *Euro-money Expert Guides*, *The Legal 500*, 2013, *The International Who's Who of Competition Lawyers 2013*, and *PLC Which Lawyer?*, 2012. Mr. Taranyk regularly advises clients on a wide variety of antitrust law aspects, involving merger control, concerted practices, abuse of dominance, monopolization, and unfair competition. He also counsels on antitrust matters in relation to multinational and domestic acquisitions and joint ventures, including merger clearances by the Antimonopoly Committee of Ukraine. Mr. Taranyk is experienced in resolving complex antitrust disputes involving multinational companies, particularly the abuse of dominance claims, and engaged in developing antitrust compliance programs and policies for many international clients.

Dmytro Ivanusa, counsel at Sayenko Kharenko, focuses on taxation, currency control, foreign trade and customs. Mr. Ivanusa also practices in corporate, M&A, dispute resolution, concessions, real estate, commercial law, labor law and sports law. Mr. Ivanusa is among recommended practitioners in tax according to *Ukrainian Law Firms 2013*. He practiced law from 1996 at the Kyiv offices of KPMG, Baker & McKenzie, CMS Cameron McKenna and at a Ukrainian boutique law firm Levenets, Maciw & Partners. The tax practice created by Mr. Ivanusa at CMS Cameron McKenna has been recommended by the Legal 500.

Olena Perepelynska is a counsel at Sayenko Kharenko with over 10 years of experience in international commercial arbitration and international trade. Ms. Perepelynska has been named among Top 5 leading Commercial Arbitration lawyers for Ukraine by *The International Who's Who of Commercial Arbitration*. She is also recommended as one of the best experts for dispute resolution in Ukraine by *Chambers Global* and *Ukrainian Law Firms*. According to *Client's Choice. TOP-100 best lawyers of Ukraine 2012–2013* lists Ms. Perepelynska among Top 100 best lawyers of Ukraine, and recognized as one of the top Ukrainian lawyers in the areas of international arbitration, international trade and customs law. Ms. Perepelynska has acted for Ukrainian and foreign clients in more than 60 arbitral proceedings under a variety of arbitration rules (ICC, LCIA, SCC, International Commercial Arbitration Court, Maritime Arbitration Commission at the Ukrainian CCI, International Commercial Arbitration Court at the CCI of the Russian Federation, GAFTA, FOSFA, LMAA, UNCITRAL Arbitration Rules and

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others). Ms. Perepelynska handles arbitration proceedings covering a wide range of commercial issues including the sale of goods and services, corporate rights transactions, maritime, and other matters. Ms. Perepelynska is a member of the Chartered Institute of Arbitrators (MCI Arb), admitted to Kyiv City Bar, and is a Board member of the Ukrainian Arbitration Association. She is listed as recommended arbitrator of various arbitration institutions in Kazakhstan, Lithuania, Romania, Czech Republic, Poland and Ukraine.

Olexander Droug is an associate at Sayenko Kharenko. Mr. Droug specializes in dispute resolution, insolvency and banking with a special focus on arbitration and commercial litigation. Mr. Droug advises local and foreign clients on dispute resolution proceedings in Ukrainian and foreign courts, as well as arbitration under various arbitration rules. He represents both lenders and borrowers (banks and corporates) in debt restructurings in Ukraine. He publishes extensively in his areas of expertise and is engaged in legislative and regulatory advocacy on behalf of clients.

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The Ukrainian competition laws consider the market position of an undertaking to be “monopoly (dominant)” provided that the undertaking fails to prove that it, in fact, faces significant competition on the relevant market. There is a presumption of dominance if an undertaking has a market share in excess of 35% of the relevant product market. Moreover, there is a presumption of collective dominance if three undertakings have a collective market share of 50% of the relevant product market as well as in case five undertakings have a collective market share of 70% of the relevant product market. The abuse of a monopoly position is prohibited.

VI. EMPLOYMENT

§ 77A:39 In general

Ukrainian labour law has inherited a significant number of concepts and approaches from the Soviet era. Despite numerous changes, the Labour Code (of December 10, 1971), which is the key piece of legislation regulating employment matters, remains highly employee-focused and full of pitfalls. Specific statutes have been adopted since Ukraine became independent to deal with labour safety, remuneration, vacation, collective bargaining agreements, employment of population and employment of foreign nationals, but the replacement of the Labour Code is necessary to enable Ukrainian labour law to adapt to the needs of a market economy.

The majority of provisions of the Labour Code and other Ukrainian labour legislation apply equally to Ukrainian and foreign nationals. Thus, foreign employees enjoy the same benefits, guarantees, and protections available for Ukrainian employees under Ukrainian labour laws and the employer’s internal labour rules, policies and procedures.

§ 77A:40 Employment agreements

The employment relationship in Ukraine is established by an employment agreement between an employer and an employee. The Labour Code provides that employment agreements shall generally be concluded in writing and establishes some specific cases when the employment agreement must be in writing.

In general, most agreements are concluded for an indefinite term. Even though Ukrainian labour law enables an employer to conclude fixed-term employment agreements with its em-

ployees, these agreements should be concluded only with those employees whose work by its nature is of a limited duration. It is also possible to enter into an employment agreement ‘until the completion of agreed-upon work’ when it is impossible to determine the period necessary to complete the limited scope of agreed-upon work.

Ukrainian labour law also provides for a special form of employment agreement, called an ‘employment contract’, that may be concluded either for a fixed term or for an indefinite period of time. The employment contract, unlike an ordinary employment agreement, (i) allows establishing the fixed term employment relations even where the nature and conditions of employment would not ordinarily permit the conclusion of an employment agreement for a fixed term; (ii) may, importantly, contain reasons for the discharge of an employee in addition to the limited list of grounds provided in the Labour Code (e.g., dismissal of the company’s CEO at any time for any reason by a decisions of the company’s highest governing body); and (iii) may provide for additional rights, obligations and liabilities of the parties to the employment contract, as well as conditions of the employee remuneration apart from those provided by law. Such additional terms should not diminish the employee rights guaranteed by law.

The use of employment contracts is limited to cases specifically provided for by the laws of Ukraine, including in certain branches of the economy, for certain types of companies or for certain positions (e.g., with company CEOs, teachers, scientific research employees, paralegals).

Irrespective of the form of an employment agreement, the employer must issue an internal hiring order to document commencement of the employment relationship stating the employee’s position and salary. An employment agreement is deemed to be concluded even if a hiring order was not issued, but an employee was *de facto* admitted to work.

§ 77A:41 Employment of foreigners

There exist special procedures for hiring foreign nationals that must be followed to avoid administrative liability or even deportation of a foreign national.

In accordance with Ukrainian law, foreigners who intend to work in Ukraine for Ukrainian companies must obtain a work permit. Only foreign nationals permanently residing in Ukraine do not require work permits. After a foreign national

is issued a work permit, he or she has to apply for a D-type visa (as a general rule), bearing a special mark 'Employment' prior to entering Ukraine with an employment purpose.

An application for a work permit and the supporting documents are submitted by the employer to the respective Employment Centre. A decision on the issuance of a work permit shall be granted within 15 days. A work permit may be issued for a term of up to one year with a possibility of extension.

After receiving the work permit the employer shall file with the Employment Centre a certified copy of the employment agreement (contract) with the respective foreign employee within three working days from the date of its execution. Failure to fulfil this statutory requirement may result in the work permit's annulment.

Termination of an employment contract with a foreign national shall result in termination of the work permit. Thus, every time a foreign national changes his or her place of employment in Ukraine, he or she must obtain a new working permit.

Violation of the work permit regulations may result in liability for a company, its executives, and the foreign employee (up to his or her deportation from Ukraine).

§ 77A:42 Minimum salary

The employees of Ukrainian companies must be paid a salary in amount of not less than the statutory minimum salary, currently being UAH 1,147 (approximately, GBP 85). However, it is recommended for the companies to attempt to set the salary amounts for all positions at the average level established in the respective location/industry.

§ 77A:43 Working week, overtime, and vacation

The maximum number of working hours of full-time employees cannot exceed 40 hours per week, unless a non-fixed working day (week) is established for certain categories of employees (e.g., CEOs and some other managers).

Ukrainian law establishes, among others, the following working hour regimes: (i) normal business hours, when overtime is paid at a double rate and employees are entitled to a vacation allowance of 24 calendar days per year; and (ii) non-fixed working day, which may be established for employees whose working day cannot be estimated in advance; such employees are

entitled to a vacation allowance of 24 calendar days per year and to an additional vacation of up to seven working days.

The general rule is that overtime is not allowed. The Labour Code provides an exhaustive list of exceptions when an employee may be required to work overtime. The maximum limit of overtime work is 120 hours per year. Overtime work also shall not exceed four hours over two consecutive days for the same employee.

Employers are prohibited from engaging in overtime work, among others, pregnant women, employees under 18 and employees who are also full-time students receiving secondary or professional secondary education during term-time.

An employee's consent is required for overtime work if the employee has a child under 14. A trade union's permission (if exists) must be obtained for each instance of overtime work. In the case of overtime work, employees are entitled to extra remuneration at a double rate for work performed in excess of the daily, weekly or monthly limit. The law prohibits compensating overtime work only with additional vacation or leave of absence.

§ 77A:44 Global policies

Ukrainian law provides that a number of mandatory employment-related regulations can be adopted by Ukrainian companies, including a collective bargaining agreement, internal labour rules, labour safety regulations, and some other documents, depending on the specifics of a particular company's business.

All employment-related documentation including the internal labour rules must exist in Ukrainian notwithstanding the company's form or ownership.

Ukrainian companies often issue other optional internal regulations (e.g., regarding discrimination, sexual harassment, corruption, personal data protection) in accordance with their global corporate policies. The global policies are not *per se* enforceable in Ukraine and must be incorporated into the document system of a Ukrainian subsidiary as local policies.

§ 77A:45 Data protection

Under Ukrainian law, the main personal data includes a person's name, nationality, education, family status, religion, health condition, address, and date and place of birth. The

Labour Code prohibits an employer from requesting information from candidates on their nationality, political party membership, origins, place of residence and other documents which are not required by law.

Almost all companies operating in Ukraine have been facing problems with the process of adjusting their business activities to the new Ukrainian personal data protection legislation. The Law of Ukraine on Personal Data Protection (the “PDP Law”), came into effect on January 1, 2011, and was amended several times. This Law sets new rules for collecting, storing, using, processing and transferring personal data.

Liability for violating the PDP Law was increased as of July 1, 2012. The companies found in breach of the PDP Law may face serious penalties (up to GBP 1,300 in fines for each single violation and up to five years of imprisonment of the company’s CEO). Therefore, it is absolutely necessary for all entities operating in Ukraine to become compliant with the PDP Law.

The PDP Law prohibits processing personal data related to race, ethnic origin, political, religious and ideological beliefs, political party and trade union membership, criminal prosecution and judgment in a criminal case, as well as data related to health and private life, except for, among others, when such processing is required by law in the area of employment relationships.

The company controlling personal data is responsible for ensuring protection of such data from any illegal processing and access, including by designating an employee to perform these functions.

To assist in proving the absence of guilt in violating the personal data protection legislation before the PDP Service’s inspectors or the court, a sound corporate personal data protection program should be developed by every entity doing business in Ukraine. This program should include developing model internal documentation (e.g., policies, regulations, orders, letters of consent, personal data protection clauses in the employment agreements (contracts), etc.).

Ukrainian law does not require registration for the cross-border transfer of personal data. If the employer wishes to transfer its employees’ personal data abroad, it should obtain these employees’ prior written consent for such transfer. The permission should contain, in particular, information on the data addressee, the scope of the transferred data and the purpose of its processing. It is advisable for the employer to

enter into an agreement with a foreign data recipient requiring the transferred data to be treated as confidential information.

§ 77A:46 Termination of employment

Termination of an employment agreement at the employer's initiative is difficult and the employee cannot be dismissed without cause. The employer may dismiss an employee in the limited cases provided in the Labour Code (e.g., redundancy, systematic failure to perform the employee's duties, insufficient qualification, etc.). A labour contract may provide for additional grounds for an employee dismissal, which is a useful tool in regulating employment relations with the company's CEO.

On the dismissal date, the employer provides the employee with his or her labour book and dismissal order, and settles all payments due to this employee.

Employees subject to dismissal on any grounds provided by Ukrainian law are entitled to receive compensation for unused vacation. The employer shall also pay to an employee any additional compensation or benefits that may be specified in a written employment agreement or contract with this employee and the collective bargaining agreement (if any).

The law does not prohibit the employer and the employee from concluding a settlement agreement. To be enforceable, however, the provisions of this agreement must not worsen the employee's position as compared to Ukrainian labour law.

VII. COMMERCIAL DISPUTE RESOLUTION

§ 77A:47 In general

The Ukrainian court system is currently structured so that the identities of the parties and the subject of the commercial dispute determine the competent court. Generally, civil matters involving individuals are heard in the general courts ("civil courts"). Legal entities, such as corporations, and individual entrepreneurs bring matters before the commercial courts. Commercial courts also have a jurisdiction over certain types of cases notwithstanding the parties of the dispute are individuals or legal entities, such as corporate disputes, bankruptcy proceedings, etc. The size of a claim does not determine which court has jurisdiction. In addition, the Ukrainian court system includes administrative courts, which exercise jurisdiction over matters involving disputes with state authorities, including tax disputes, and public officials.