Arbitrability of Corporate Disputes in Ukraine

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What is “Arbitrability”?

“arbitrability goes beyond the scope of an arbitration agreement, it is inherent to the power of States as to what issues are capable of being resolved through arbitration and it is outside the will of the parties.”

Ukraine is among the jurisdictions that have restrictive approach towards arbitration of corporate disputes.
Historically, there were **no limitations on arbitrability of corporate disputes**. Parties were free to refer their disputes to arbitration.

Article 1 of the *International Commercial Arbitration Act* states that parties may agree to refer the following disputes to international arbitration, including:

- disputes between enterprises with foreign investment, international associations and organizations established on the territory of Ukraine; *disputes between the participants of such entities*; as well as disputes between such entities and other subjects of the law of Ukraine.
2006 - The allocation of jurisdiction between the courts of general jurisdiction and specialized commercial courts.

Corporate disputes were submitted to the jurisdictions of commercial courts (Article 12 Commercial Procedural Code of Ukraine (the CCP)).

However, part 2 of Article 12 CCP stated that a dispute that falls within the jurisdiction of commercial court may be referred to arbitration if agreed by the parties.

Therefore, nothing at that time affected international arbitration and parties could freely opt out state courts and refer their corporate dispute to international arbitration.
In 2007 the Higher Commercial Court of Ukraine adopted Recommendations “On Practice of Application of Legislation in Disputes Arising out of Corporate Relations” (“the 2007 Recommendations”).

The 2007 Recommendation prohibited the resolution of corporate disputes related to Ukrainian company through international arbitration (Section 6.2 of the 2007 Recommendation).
In 2008 the Supreme Court of Ukraine issued the Resolution “On Court Practice of the Corporate Disputes Consideration” (“the 2008 Resolution”).

In its 2008 Resolution the Court stated that “shareholders irrespective of their shareholding structure have no right to refer corporate disputes, related to the activity of a company registered in Ukraine and, in particular, arising out of corporate management, to international arbitration.” (section 9 of the 2008 Resolution)
Neither “recommendations”, nor “resolutions” of superior courts of Ukraine are mandatory for lower courts, as Ukraine, a civil law country, has no judicial precedents.

However, such “guidance” of superior courts traditionally treated by lower courts as binding and are usually followed in their practice.
In 2009 position of superior courts of Ukraine was reflected in Article 12 CCP, that explicitly excluded corporate disputes from the list of disputes that might be referred to arbitration.

(The amendments were made under the Law of Ukraine dated March 5, 2009, No. 1076- VI on the Introduction of Changes into Certain Laws of Ukraine as to Activity of Treteyski Courts and Enforcement of the Awards of Treteyski Courts in Ukraine).
What disputes are ‘corporate’ disputes?

Article 12 of CCP provides that the following disputes may not be referred to arbitration and are subject to exclusive jurisdiction of commercial courts:

“disputes arising out of corporate relations between a company and its participant (founder, shareholder), including a former participant, as well as disputes between the participants (founder, shareholder) of the company relating to the establishment, activity, management and liquidation of the company (except for labour disputes).”
In order dispute to fall within the requirements of Article 12 CCP it must satisfy all the elements:

(a) Corporate relations;

(b) Parties to a dispute:
  - between company and its participants (founders, shareholders), including former participant; or
  - between the participants (founders, shareholders);

(c) Disputes relating to:
  - establishment;
  - management;
  - activity;
  - liquidation of the company.
What disputes are ‘corporate’ disputes?

**Corporate relations** are deemed as relations arising out of, amending and terminating corporate rights.

**Corporate rights** are defined as “the rights of a person, with the determined participation interest in the authorised share capital of a business entity, that include this person’s right to participate in the management of this business entity, to receive certain part of the profit (dividends) of this entity and assets in case of its liquidation, as well as other rights provided for in law or statutory documents.”

(Article 167 of the Commercial Code of Ukraine)
The Higher Commercial Court of Ukraine in its 2007 Recommendations defined the following disputes as corporate and therefore subject to the exclusive jurisdiction of commercial courts:

- disputes between participants (shareholders) of a business entity related to its establishment, liquidation and management (section 1.4.);

- disputes arising out of participants’ claims on invalidation of statutory documents or their amendments (section 1.4);

- disputes related to liquidation or annulment of state registration of a business entity under the actions of its participants (section 1.4.);

- disputes on invalidation of business entity’s deeds under the participants’ (shareholders) actions claiming violation of their corporate rights and interests (section 1.2.);

- disputes arising out of participants’ actions related to invalidation of shareholders’ resolutions on their expulsion from the company’s participation (section 1.3).
The Supreme Court of Ukraine in its 2008 Resolution specified, that following disputes are not corporate and therefore are not subject to commercial courts’ exclusive jurisdiction:

- disputes arising out of the establishment, activity, management and liquidation of economic activities other than business entities (such as cooperatives, private and collective enterprises et.) if one of the parties is a natural person;

- the prohibition set forth in Article 12 CCP is not applicable by analogy to other subjects of economic activity;

- the prohibition set forth in Article 12 CCP cannot be construed broadly to disputes, where one of the party is not a participant (founder, shareholder) of business entity (disputes involving heirs of the participant, that have not become the participant yet).
What disputes are not ‘corporate’?

Examples of disputes that are not corporate:

- disputes arising out of invalidity of the decisions taken by the company’s management bodies under actions of creditors, pledgors, leaseholders or other third parties, that are not business entity’s participants (section 1.5 of the 2007 Recommendation);

- disputes on invalidation of business entity’s articles of incorporation or their amendments under the actions of tax authorities, or other state bodies that control company’s activity (section 1.5 of the 2007 Recommendation);

- disputes between the joint stock company with registrar relating to the execution, amendments, termination, performance and invalidation of agreements on maintenance of shares registrars (section 1.8.)
However, according to 1.11 of the 2007 Recommendations:

**disputes on** recognition of **property rights in shares**, on the conclusion, termination, amendment, performance and invalidation of share purchase agreements (apart from violation of pre-emptive rights to acquire shares) are *not “corporate” disputes.*
The current version of Article 12 CCP that prohibits referring corporate disputes to arbitration appears to contradict with Article 1 of the International Commercial Arbitration Act, which establishes the right of shareholders of companies with foreign investments to bring their disputes before international arbitrations.
Article 12 CCP prohibits referral to domestic arbitration only
Divergent view and possible interpretation of Article 12 CCP

Arguments to support this position:

- Article 12 CCP uses the term ‘treteyski’ courts when speaking on prohibition to refer corporate disputes to arbitration and contains no definition on the type of arbitration (domestic or/and international) it includes;

- Two different bodies of law use the term ‘treteyski’ courts, that bears different meaning (has different subjective and objective criteria) in each of these laws: the 1994 International Arbitration Act and the 2004 Treteyski Courts Act (regulates domestic arbitration);

- The amendments to Article 12 CCP were made by the law that was aimed to introduce certain changes to Treteyski Courts Act, i.e. the prohibition concerned domestic arbitration;

- The prohibition in Article 12 CCP had political reasons – to combat the so called “corporate raids” that were frequently done through domestic arbitration;

- Ukraine is a civil law country. No judicial precedents, therefore ‘recommendations’ and ‘regulations’ of superior courts are a mere guidance and are not mandatory.
Therefore, taking into account the *in favour arbitris* principle and reading in conjunction with Article 1 of the International Arbitration Act (that sees corporate disputes as arbitrable) Article 12 CCP may be interpreted as excluding the reference of corporate disputes to domestic arbitration, but allowing such reference to international arbitration.
Case Law on arbitrability of corporate disputes in Ukraine

- **Double W LLC v Raiffeisen Property Management GmbH dispute**, in which Raiffeisen sought the recognition and enforcement in Ukraine of an arbitral award of the Vienna International Arbitral Centre of the Austrian Federal Economic Chamber (the VIAC).

- The arbitration concerned several agreements related to the transfer of participation interest in Double W Kiev LLC.

- The Local and Appellate courts refused the recognition and enforcement of the VIAC arbitral award stating that the subject matter of the dispute (title to participation interest) was not capable of settlement by arbitration under Ukrainian law.
BUT!

On 9 November 2011, the High Specialised Court reversed the ruling of the Court of Appeal and sent the case back for reconsideration to the Local Court, stating that:

“...the conclusions of the first instance court that the present dispute is a corporate dispute which is not capable of settlement by arbitration under Ukrainian law are groundless”.
The issue of arbitrability of corporate disputes seems not to be as ‘set in stone’ as it is claimed and Article 12 CCP is open for interpretation!
Conclusions

Exclusive national courts’ jurisdiction over corporate disputes in Ukraine

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Policy favouring arbitrability of corporate disputes - arbitration friendly environment in Ukraine
Thank you for your attention!

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