

The Year in Review

Volume 53 *International Legal Developments*
Year in Review: 2018

Article 40

January 2019

Russia/Eurasia

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Recommended Citation

Kimberly Reed et al., *Russia/Eurasia*, 53 ABA/SIL YIR 573 (2019)

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Russia/Eurasia

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AN ANNUAL PUBLICATION OF THE ABA/SECTION OF INTERNATIONAL LAW

Russia/Eurasia

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This article discusses significant legal developments in corporate, antitrust & competition, financial transactions, foreign investment, and arbitration law in Russia and Ukraine in 2018.

I. Russia

A. CIVIL CODE REFORM

On June 1, 2018, amendments to Part One and Part Two of the Russian Civil Code (the “Civil Code”)¹ and to other federal laws introduced in 2017 by Federal Law 212-FZ (together, the “Civil Code Amendments” or “Amendments”)² came into force. The Civil Code Amendments further the reforms of Russian civil legislation, which began several years ago,³ to facilitate the development of basic civil law principles in keeping with a market economy, to codify existing practices, and to achieve uniformity in

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1. GRAZHDANSKII KODEKS ROSSIOSKOI FEDERATSII [GK RF] [Civil Code] Part I, Part II (Russ.).

2. See Federal’nyi Zakon RF o [Vnesenii Izmeneni’ v Chast’ Pervuyu I Vtoruyu Grazhdanskogo Kodeksa Rossiiskoi Federatsii i Otdelnye Zakonodatelnye Acti Rossiiskoy Federatsii] [Federal Law of the Russian Federation on Introduction of Amendments in Parts One and Two of the Civil Code of the Russian Federation and Other Legal Acts of the Russian Federation], ROSSIISKAIA GAZETA [Ros. Gaz.] Jul. 31, 2017.

3. See Ukaz Prezidenta RF No. 1108 o Sovershenstvovanii Grazhdanskogo Kodeksa Rossiiskoi Federatsii (v redaktsii Jul. 29, 2014) [Decree of the President of the Russian Federation No. 1108 on Improvements to the Civil Code of the Russian Federation (as amended on Jul. 29, 2014)], available at <http://kremlin.ru/acts/bank/27787>.

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the interpretation of the law. The Civil Code Amendments significantly impact the regulation of Russia's financial sector, codify new instruments, and elevate some existing practices to the level of federal law.⁴

1. *Escrow*

The Civil Code Amendments introduced the “agreement of conditional deposit” (i.e., escrow).⁵ Previously, the Civil Code provided for general escrow accounts, but only a banking institution could act as a party and assets which could be deposited into an escrow account were limited to cash only.⁶ Under the Amendments, any party may act as an escrow agent⁷ and any movable property (such as cash funds, certified securities, and documents), cashless funds, or uncertified securities may be deposited.⁸

2. *Loans*

a. Loans of Securities

The Civil Code Amendments expressly allow agreements for loans of securities between any parties.⁹ In practice, loans of securities most often take place between Russian licensed brokers and their clients in the context of “marginal deals” under federal securities law.¹⁰ While the Civil Code previously limited the subject of such loan transactions to assets “defined by generic qualities,” Russian courts did not always recognize agreements for loans of securities as valid, so allowance of such loans is now explicitly allowed.¹¹

b. Consensual Loans

In contrast with prior law, which considered loan agreements to be, by default, “real contracts” (i.e., agreements concluded after the object of a loan had passed from lender to borrower), the new law changes the default presumption for loan transactions, provided the lender is not an individual, to “consensual contracts.” This means the parties can agree that the lender will undertake to provide a loan in the future, as in the case of credit agreements.¹²

4. See GRAZHDANSKII KODEKS ROSSIOSKOI FEDERATSII [GK RF] [Civil Code] Part I, Part II.

5. See *id.* at art. 926.1.

6. See *id.*

7. See *id.*

8. *Id.* at art. 926.1, part 3.

9. See *id.* at art. 807, part 1.

10. See Federal'nyi Zakon RF O Rynke Tsennih Bumag [Federal Law of the Russian Federation on the Securities Market] ROSSIISKAIA GAZETA [Ros. Gaz.] Apr. 1996.

11. See, e.g., Resol. of Fed. Arbitrazh Court for the Urals Region, Case N 76-2490/2007, (finding loans of securities invalid); GRAZHDANSKII KODEKS ROSSIOSKOI FEDERATSII [GK RF] [Civil Code] art. 807, part 1.

12. See GRAZHDANSKII KODEKS ROSSIOSKOI FEDERATSII [GK RF] [Civil Code] art. 807, part 3.

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c. Usury Interest

The Civil Code Amendments limit the interest rate on loans extended for “consumer purposes” between individuals, and between individuals and companies, who are not professional lenders.¹³ If the interest rate exceeds double the interest rate charged under similar circumstances, it can be decreased by a court to the normally-charged rate.¹⁴

3. *Factoring*

The Civil Code Amendments are intended to contribute to the ongoing development of factoring arrangements and securitization practices in Russia. The Amendments re-define “factoring,”¹⁵ aligning that term with the definition set out in the International Institute for the Unification of Private Law Convention on International Factoring (the “UNIDROIT Convention”),¹⁶ which took effect in Russia on March 1, 2015.¹⁷

Pursuant to the new Civil Code definition, the “factor” (i.e., financial agent) undertakes to perform at least two of the following functions in relation to the assigned claims:

- (1) finance the client/supplier;
- (2) maintain accounts (ledgers) relating to the claims (receivables) from customer-debtors;

13. *See id.* at art. 809, part 5.

14. *Id.*, discussed in *Information About the Average Market Values of the Total Cost of Consumer Credit (Loan)*, Bank of Russia (2019), http://www.cbr.ru/analytics/consumer_lending/inf/ (regarding information on median market cost of consumer credits), *Indicators of the Rates of the Interbank Market from Aug. 1, 2000*, Bank of Russia (2019), http://www.cbr.ru/hd_base/mkr/mkr_base/ (regarding inter-banking market rates), and *The Actual Average Rate on Loans Granted by Moscow Banks (MLACR, MLACR-IG, MLACR-B)*, Bank of Russia (2019), http://www.cbr.ru/hd_base/mkr/mkr_monthes/ (regarding actual monthly rates on loans extended by Moscow Banks).

15. GRAZHDANSKII KODEKS ROSSIOSKOI FEDERATSII [GK RF] [Civil Code] art. 824.

16. UNIDROIT Convention on Int’l Factoring (Ottawa, May 28, 1988), *available at* <https://www.unidroit.org/instruments/factoring> (defining “factoring contract” as “a contract concluded between one party (the supplier) and another party (the factor) pursuant to which:

- (a) the supplier may or will assign to the factor receivables arising from contracts of sale of goods made between the supplier and its customers (debtors) other than those for the sale of goods bought primarily for their personal, family or household use;
- (b) the factor is to perform at least two of the following functions:
 - finance for the supplier, including loans and advance payments;
 - maintenance of accounts (ledgering) relating to the receivables;
 - collection of receivables;
 - protection against default in payment by debtors;
- (c) notice of the assignment of the receivables is to be given to debtors.”).

17. *See* Federal’niy Zakon RF O Prisoedinenii Rossiyskoi Federatsii k Konventsii UNIDROIT po Mezhdunaridnim Factoringovim Operativam” [Federal Law on the Russian Federation on Acceding to the UNIDROIT Convention on Int’l Factoring] “ROSSIISKAYA GAZETA [Ros. Gaz.] May 2014.

- (3) collect payments from the customer-debtors; or
- (4) exercise rights under collateral agreements (such as securing payments of customer-debtors) and protect the client/supplier against default on such debts.¹⁸

The factor's extension of financing to the client/supplier, which used to be a necessary element of any factoring agreement, is now only one of the factor's possible actions under the factoring agreement.¹⁹ Moreover, unless otherwise stated in the factoring agreement, the client/supplier will be liable to the factor if the assigned claim is invalid.²⁰ This amendment shifts the risk of a debtor's objection to the client/supplier.²¹ The Civil Code Amendments abolished the previous definition of a "valid claim," which had presumed the claim was valid if the client/supplier was not aware of the circumstances which allowed the customer/debtor to refuse to make payment.²²

Another change in the factoring provisions is that in cases between a customer-debtor and client/supplier over the latter's non-performance, the customer/debtor, not the factor as previously provided for, will be entitled to recover the amounts paid to the factor from the client/supplier.²³

4. *Assignment*

a. Assignment of Monetary Claims Arising from an Agreement Concluded Through Tender

The Civil Code Amendments explicitly allow the assignment of monetary claims arising from contracts concluded through a tender process.²⁴ The Amendments also state that where a supplier assigns a debtor's debt under a contract concluded through a tender, and the debtor objects to paying the debt, if the facts or circumstances underlying such refusal to pay arose *before* the debtor was notified of the assignment to a third party (such as a factor), then the debtor must raise any objections against the assignee within a reasonable time after being notified of the assignment, or he loses the right to rely on those grounds later.²⁵

b. Non-Recourse Assignment

Under the Civil Code Amendments, an assignor and assignee may agree that the assignor will not be liable for the invalidity of assigned claims, provided (1) the original agreement between the assignor and the debtor

18. See GRAZHDANSKII KODEKS ROSSIOSKOI FEDERATSII [GK RF] [Civil Code] art. 824.

19. *See id.*

20. *Id.* at art. 827.

21. *Id.*

22. *Id.*

23. *Id.* at art. 833.

24. *See id.* at art. 448, part 7 (differing from the previous law that prohibited assignment of any rights, including monetary payments, arising under such contracts).

25. *Id.*

(which underlies the assigned claim) relates to the business activities of the assignor and assignee; and (2) the invalidity of the assigned claim is caused by either (a) circumstances the assignor was not and could not have been aware of, or (b) circumstances about which the assignor informed the assignee.²⁶

5. *Letters of Credit*

The Amendments allow for transferable letters of credit (LOCs), wherein a payee may specify a third-party beneficiary.²⁷ This is the first time such an option has been codified into Russian federal law.²⁸ In addition, the Civil Code Amendments provide for:

- 1) the ability to issue a LOC payable not only by the acceptance of a bill of exchange but also by “other means;”²⁹
- 2) a maximum of five business days for the confirming bank or issuing bank to examine the documents presented by the recipient of the payment;³⁰ and,
- 3) the right of the nominee bank not to honor uncovered LOC’s until it receives funds from the bank-issuer of the LOC.³¹

6. *Deposits in Precious Metals*

The Civil Code Amendments provide for a new type of bank account: a bank deposit in precious metals.³² This type of account previously was covered by Russian Central Bank Regulation #50 “On Executing Transactions with Precious Metals by Credit Organizations in the Territory of the Russian Federation and the Order of Banking Transactions with Precious Metals” dated November 1, 1996 (as amended). The new federal law describes such precious metals accounts and bank operations associated with opening and maintaining such accounts.³³

26. *Id.* at art. 390, part 1.

27. *Id.* at art. 870.1.

28. See *Polozheniye o pravilah osushesvleniya perevoda denezhnykh sredstv* [Regulation on Rules of money transfers], *VESTNIK BANKA ROSSIYI*, No 34, JUNE 28, 2012 (differing from when such an option was previously mentioned only in Russian Central Bank Regulation # 383-P).

29. See *GRAZHDANSKII KODEKS ROSSIOSKOI FEDERATSII* [GK RF] [Civil Code] art. 871, part 1(3) (demonstrating that “other means” can include “negotiation”, used in international banking practice, i.e. payment by way of purchase of bills of exchange drawn on a different bank).

30. *Id.* at art. 871, part 2, 6.

31. *Id.* at art. 867, part 3.

32. See *Federal’nyi Zakon RF O bankah I bankovsloi deyatel’nosti* [Federal Law on Banks and Banking Activity] *ROSSIISKAYA GAZETA* [Ros. Gaz.] Feb. 1996, art. 5, part 7.

33. *Id.*

B. ANTIMONOPOLY LAW

Throughout 2018, the topics of market globalization and digitalization of the economy were actively discussed by Russian government authorities and the business community, particularly with respect to promoting competition in the digital era.³⁴ As a result of these discussions, the Federal Antimonopoly Service (the “FAS”) proposed reforms to the antimonopoly law (the “Fifth Antimonopoly Package”),³⁵ mostly related to changes in merger control regulation. The Fifth Antimonopoly Package is a complex set of large-scale amendments to antimonopoly legislation, and although currently under debate, it is expected to be passed in Spring 2019.³⁶ Once enacted, the package will significantly change the current legal regime and create necessary conditions for the FAS to meet the challenges of a modern economy. The most important features of these proposed amendments are presented below.

1. *Changes in Merger Control Procedures*

a. New Deadlines for Consideration of Global Transactions

Current Russian antimonopoly law limits the FAS to three months for review and consideration of an application.³⁷ This term is comprised of an initial thirty-day period and an extension for two additional months.³⁸ Theoretically, the term may be prolonged up to nine months in order to secure the applicant’s implementation of preliminary conditions, after which the FAS approves the transaction.³⁹ In practice, however, the FAS rarely utilizes the entire nine-month period.⁴⁰ In contrast, in other developed countries (e.g., the European Union and the United States), antimonopoly authorities’ consideration of large-scale transactions in digital markets, due to the complexity of their analysis, often takes much more time.⁴¹ Thus, the

34. Vladimir Putin, President of Russ., Meeting of the State Council on promoting competition (Apr. 5, 2018), <http://en.kremlin.ru/events/president/news/57205>.

35. О внесении изменений в Федеральный закон «О защите конкуренции» и иные законодательные акты Российской Федерации [On Amendments to the Federal Law “On Protection of Competition” and other legislative acts of the Russian Federation], [hereinafter Draft Fifth Antimonopoly Package] *available in Russian at* <https://regulation.gov.ru/projects#search=%D0%BE%20%D0%B7%D0%B0%D1%89%D0%B8%D1%82%D0%B5%20%D0%BA%D0%BE%D0%BD%D0%BA%D1%83%D1%80%D0%B5%D0%BD%D1%86%D0%B8%D0%B8&departments=41&npa=79428>.

36. *See id.*

37. О защите Конкуренции No.135-ФЗ (с изменениями и дополнениями) [On Protection of Competition No. 135-FZ, as amended], *Sobranie Zakonodatel'stva Rossiiskoi Federatsii [SZ RF]* [Russian Federation Collection of Legislation] 2006, ? 31 (1 p.). Art. 3434 (Russ.) (“Competition Law”).

38. *Id.*

39. *Id.*

40. *Id.*

41. *See* Donald G. Kempf, Jr., U.S. Dept. of Justice, Merger Reviews: Do They Take Too Long?, Remarks as Prepared for Delivery at A.B.A. Antitrust Section Fall Forum (Nov. 17,

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FAS has proposed extending the consideration period for cross-border mergers with competition concerns to ensure sufficient time for the required level of expertise and detailed examination of market analyses.⁴² The Fifth Antimonopoly Package provides for further extension of the review period upon the consent of the federal government.⁴³ The FAS is urging against a pre-defined length for such extension periods, preferring that it be determined by the government on a case-by-case basis.⁴⁴

b. Voluntary Commitments

According to the Fifth Antimonopoly Package, the parties to a transaction under review could provide to the FAS, at any time before a clearance is issued, their voluntary commitments to taking specific steps to ensure competition in the relevant markets (“pre-notification procedure”).⁴⁵ Current Russian law provides only for offering such commitments before the formal submission of notification.⁴⁶ The proposed initiative is designed to increase the effectiveness of remedies and obligations imposed by the competition authority on the parties to transactions.

c. “Statement of Objections” and Case Hearings for Merger Control Cases

Currently, a “statement of objections” is used only when investigating antimonopoly violations,⁴⁷ but the FAS proposes introduction of such statements into merger control procedures. The Fifth Antimonopoly Package would require that before issuing a decision, the FAS will prepare a document containing: (1) the main results of its internal analysis, with reference to relevant facts and conclusions; and (2) the proposed conditions being considered by the FAS on the acquirer and other transaction parties in order to ensure competition.⁴⁸ If the FAS ultimately adopts statements of objections for merger control, such statements would be followed by hearings for which procedures will be established by the FAS.⁴⁹ While the details of these procedures are unclear, it is expected that the rules would be similar to those used in antimonopoly investigations. Introduction of these procedural options would promote dialogue between the business

2017), <https://www.justice.gov/opa/speech/file/1012156/download>; *Merger control procedures*, EUROPEAN COMMISSION (Aug. 13, 2013), http://ec.europa.eu/competition/mergers/procedures_en.html.

42. Fifth Antimonopoly Package, *supra* note 35.

43. *Id.*

44. *Id.*

45. *Id.*; see also Article 6(2) of Council Reg. (EC) No. 139/2004 (showing that such commitments are largely similar to the existing procedure in European competition regulation, which allows merging companies to offer their own remedies, thus minimizing the risks that imposed remedies will be unenforceable).

46. Competition Law, *supra* note 37, Art. 3434.

47. *Id.*

48. Fifth Antimonopoly Package, *supra* note 35.

49. *Id.*

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community and the FAS and lead to better market analysis and merger control decisions.

2. *New Mechanisms for Market Assessment and Ensuring Competition*

a. *New Approach to Market Assessment*

Another substantial development in the Fifth Antimonopoly Package concerns the use of “big data” by global companies that may create significant market-entry barriers for their competitors and thus potentially restrict competition in Russia.⁵⁰ When examining the impact of transactions involving parties with access to “big data,” the FAS has deviated from its conventional examination of market power, which was based only on existing market shares of competitors and overlap of the transaction parties’ activities.⁵¹ Instead, the FAS will now assess the influence of the parties’ digital platforms, big data, and network effects on general market conditions in Russia.⁵²

For example, in the *Bayer/Monsanto* case,⁵³ where the FAS considered the transaction between two major agricultural producers in the Russian market, it applied a new method for analyzing a transaction’s effects on markets.⁵⁴ Rather than adopting the traditional approach, the FAS repeatedly stressed that the transaction in question actually had nothing to do with particular markets, such as the markets for seeds or crop protection products, where the parties’ products overlapped in Russia or even globally.⁵⁵ Instead of analyzing the effects of the transaction in overlapping markets, the FAS focused on evaluating the knowledge, innovations, platforms, algorithms, and technologies possessed by each company that, when combined, might enable them to influence market conditions, create entrance barriers for other participants, and dictate terms for further development of the agro-industrial complex in future decades.⁵⁶

Another example is the *Uber/Yandex* case,⁵⁷ wherein the FAS considered a transaction between the two main taxi aggregators in the Russian market. Issuing a conditional decision, the FAS found that although taxi aggregators

50. *See id.*

51. *See id.*

52. *Id.*

53. Решение ФАС России №ИА/28184/18 ПРЕДПИСАНИЕ по итогам рассмотрения ходатайства компании «Бай...» от 20 апреля 2018 г. [Decision of the FAS of Russia № IA / 28184/18 Prescription on the basis of the consideration of the petition of the company “Bai” (Apr. 20, 2018), available in Russian at <https://br.fas.gov.ru/ca/upravlenie-kontrolya-agropromyshlennogo-kompleksa/ia-28184-18/>.

54. *Id.*

55. *Id.*

56. *Id.*

57. Решение ФАС России №АГ/82030/17 ПРЕДПИСАНИЕ (Яндекс) от 24 ноября 2017 г. [Decision of the FAS of Russia №АГ / 82030/17 Prescription (Yandex) of November 24, 2017] (Nov. 24, 2017), available in Russian at <https://br.fas.gov.ru/ca/upravlenie-regulirovaniya-svyazi-i-informatsionnyh-tehnologiy/ag-82030-17/>.

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do not render transport services themselves, they organize trips by connecting drivers with passengers, and given the large number of users of their applications, the aggregators nevertheless hold serious market power.⁵⁸ The resulting effect of a merger upon digital networks was a particularly important factor for the FAS in determining the market power of the parties.⁵⁹

b. Technology Transfer

In order to serve the needs of a digital economy, the FAS has proposed controversial new mechanisms to ensure healthy competition. The Fifth Antimonopoly Package introduces the mandatory transfer of technologies, or provision of non-discriminatory access to intellectual property rights, to third parties with respect to certain unique technologies and data instead of other traditionally issued behavioral or structural remedies.⁶⁰

If the parties to a transaction fail to comply with remedies ordered by the FAS and evade the transfer of technologies or access to intellectual property rights to third parties, the FAS may file a lawsuit to mandate the violator's IP being utilized by any third party necessary to ensure robust market competition ("compulsory licensing").⁶¹ Moreover, the FAS may file a lawsuit to prohibit or limit the sale of products in Russia by the party that has not fulfilled the obligations imposed by the FAS.⁶²

These controversial provisions are still under serious discussion between the FAS and the business and legal communities.⁶³ It remains to be seen how the FAS will "motivate" parties to undertake the ordered actions after the amendments are passed.

58. *See id.*

59. It is proposed by the Fifth Antimonopoly Package to define "network effects" as "dependence of customer value of the product on (i) a number of network users (direct network effects), or (ii) increase of customer value for one network group, in the case of increase of a number of network users of another network group and vice-versa (indirect network effects/network externalities)." Draft Fifth Antimonopoly Package, *supra* note 35. A growing number of global transactions in innovative digital markets will trigger such changes in the FAS' enforcement practices and influence future antimonopoly analyses. Thus, in order to keep abreast of the times, it is hoped that the FAS will follow this new approach and take into account all peculiarities and elements of digital markets. *See id.*

60. *Id.*

61. *Id.*

62. *Id.*

63. ЗАКЛЮЧЕНИЕ об оценке регулирующего воздействия на проект федерального закона «О внесении изменений в Федеральный закон «О защите конкуренции» [Conclusion on the assessment of the regulatory impact on the draft federal law "On Amendments to the Federal Law "On Protection of Competition"], Sept. 18, 2018, Russian Ministry of Economic Development No. 26742-SSh / D26i, *available in Russian at* <https://regulation.gov.ru/projects#search=%D0%BE%20%D0%B7%D0%B0%D1%89%D0%B8%D1%82%D0%B5%20%D0%BA%D0%BE%D0%BD%D0%BA%D1%83%D1%80%D0%B5%D0%BD%D1%86%D0%B8%D0%B8&departments=41&npa=79428>.

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c. Trustee and Expert Involvement

If remedies related to technology transfer and usage of IP rights are adopted, the FAS could also institute the appointment of an “authorized person” (similar to the European concept of a “trustee”) to monitor and assist the implementation by transaction parties of the FAS’s preliminary conditions or remedies imposed upon them.⁶⁴ The criteria for selecting such trustees would have to be determined prior to the enactment of such a requirement.

The FAS also may involve experts on assessing markets and on cutting-edge technology transfer regulation. Such expert input is particularly necessary considering the ongoing digitalization of markets and the ensuing complexity of economic relationships, and as utilized on a case-by-case basis, would improve the quality of analyses undertaken by the authorities.

C. FOREIGN INVESTMENT LAW

In 2018, the Russian Government continued to enact legislation to implement bilateral investment treaty (BIT) guidelines that were initially set out in September 2016 (the “2016 BIT Guidelines”).⁶⁵ In May, the Duma enacted amendments to the 1999 Law on Foreign Investments,⁶⁶ making three major changes to foreign investment law.

1. “Investor” Redefined

The definition of “investor” has been changed substantially by the Foreign Investment Amendments.⁶⁷ The concept of a “controlled entity,” which is used in Russian civil, antimonopoly, and bankruptcy law, was introduced to foreign investment law.⁶⁸ The result is that foreign companies ultimately controlled by Russians are no longer treated as foreign investors. Foreign nationals who hold Russian citizenship (i.e., dual citizens) are excluded from the definition of “foreign investor” and thus not entitled to

64. Commission notice on remedies acceptable under Council Regulation No 139/2004 and under Commission Regulation, No. 802/2004.

65. О заключении международных договоров Российской Федерации по вопросам поощрения и защиты инвестиций [Guidelines for conclusion of treaties of the Russian Federation on promotion and protection of investments. Annex to Resolution of the Government of the Russian Federation] No. 992, Sept. 30, 2016, *available at* <http://pravo.gov.ru/proxy/ips/?docbody=&nd=102412234>.

66. Федеральный закон от 31.05.2018 № 122-ФЗ “О внесении изменений в отдельные законодательные акты Российской Федерации в части уточнения понятия “иностранный инвестор” [Federal Law of the Russian Federation on Amendments in certain legislative acts of the Russian Federation in terms of clarifying the concept of “foreign investor”] No. 122-FZ, May 31, 2018, *available at* <http://publication.pravo.gov.ru/Document/View/0001201806010001> (“the Foreign Investment Amendments”).

67. *Id.*

68. *See id.*

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protection against the Russian Government for their investments in Russia.⁶⁹ In the past, UNCITRAL tribunals have allowed dual nationals to sue one of their citizenship states, and currently, at least one UNCITRAL arbitration is pending against Russia by a Russian-French businessman.⁷⁰ Whether Russia's new exclusion of dual citizens from foreign investment protection will persuade UNCITRAL to change its own policy remains to be seen, but in the meantime, Russia's law on this subject differs from UNCITRAL's past decisions.

2. *“Investment” to Exclude Indirect Investment*

The second major change enacted by the Foreign Investment Amendments is the narrowed definition of “investment” to exclude indirect investments.⁷¹ Thus, “investments” are only those made *directly* and *individually*.⁷² While several current Russian BITs (e.g., a 1989 BIT with the Netherlands, a 1989 BIT with Canada, and a 1995 BIT with Sweden) explicitly cover both direct and indirect investments, most Russian BITs include very broad definitions of “investment” (e.g., “every kind of assets”) without specifying whether they may be direct and/or indirect.⁷³

Notably, in *Sedelmayer v. Russia*,⁷⁴ Russia argued unsuccessfully for a restrictive interpretation of “investments,” as that term was used in a 1989 BIT with Germany, to mean only direct investments. A requirement that

69. *Id.* (demonstrating that by changing the definition of “foreign investor,” Russian authorities primarily intended to prevent Russian companies and citizens from “gaining . . . unfounded advantages” from rules that were intended to benefit non-Russian investors); *see also* “Explanatory note to the federal bill ‘On amendment of several legislative acts of the Russian Federation’”, Dec. 25, 2017, *available at* <http://sozd.parliament.gov.ru/download/542F0D4E-962B-4663-A532-9F0CB0BB936C> (differing from before this change when Russians who held a second citizenship could have an advantage over regular Russian nationals by claiming privileges and guarantees available only to “foreign” parties).

70. Sebastian Perry, *Decision on dual nationals is partially set aside*, GLOBAL ARB. REV., Apr. 26, 2017, <https://globalarbitrationreview.com/article/1140052/decision-on-dual-nationals-is-partially-set-aside>.

71. О заключении международных договоров Российской Федерации по вопросам поощрения и защиты инвестиций [Guidelines for conclusion of treaties of the Russian Federation on promotion and protection of investments. Annex to Resolution of the Government of the Russian Federation] No. 992, Sept. 30, 2016, *available at* <http://pravo.gov.ru/proxy/ips/?docbody=&nd=102412234>.

72. *Id.*

73. *See e.g.* Can.-U.S.S.R., Nov. 20, 1989, 852 U.N.T.S. 215 (demonstrating an agreement for the promotion and reciprocal protection of investments); Neth.-U.S.S.R., Oct. 5, 1989, 2242 U.N.T.S. 175 (demonstrating an agreement on encouragement and reciprocal protection of investments between the Kingdom of the Netherlands and the Union of Soviet Socialist Republics); U.K.-U.S.S.R., Apr. 6, 1989, 1670 U.N.T.S. 27 (demonstrating an agreement for the promotion and reciprocal protection of investments); Ger.-U.S.S.R., June 13, 1989, 1707 U.N.T.S. 171 (demonstrating an agreement concerning the promotion and reciprocal protection of investments).

74. Mr Franz Sedelmayer v. Russia, SCC Case, Award (Jul. 7, 1998), Section 4.1 at 36-37, *available at* <https://www.italaw.com/sites/default/files/case-documents/ita0757.pdf>.

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investments be direct had never been reflected in Russian law until the 2016 BIT Guidelines.⁷⁵ But on the basis that adversarial arguments made by an investor's country of nationality should not be held against that investor,⁷⁶ and that the Russian Constitution provides that an international treaty trumps domestic law when the two conflict,⁷⁷ the new restriction on investments as only "direct and individual" should not apply to already-concluded Russian BITs containing broader definitions of investments. But new investors from foreign states that are not parties to current Russian BITs should bear this change in mind.⁷⁸

3. *Availability of Arbitration for BIT-Related Disputes*

With respect to dispute resolution, the 2016 BIT Guidelines provide that disputes between a state and an investor shall be resolved in a domestic court or via an *ad hoc* or institutional arbitration.⁷⁹ Likewise, the Foreign Investment Amendments contain a blanket provision allowing resort to international arbitration only if it is expressly set out in the relevant BIT or a federal law.⁸⁰ While neither the Guidelines nor the Foreign Investment Amendments refers to or provides for permanent investments courts, Russia has not rejected the possibility of establishing such supranational bodies. In July 2017, the UNCITRAL Working Group III was mandated to consider

75. О заключении международных договоров Российской Федерации по вопросам поощрения и защиты инвестиций [Guidelines for conclusion of treaties of the Russian Federation on promotion and protection of investments. Annex to Resolution of the Government of the Russian Federation] No. 992, Sept. 30, 2016, available at <http://pravo.gov.ru/proxy/ips/?docbody=&nd=102412234>.

76. *Enron Corp. and Ponderosa Assets, L.P. v. Argentine Republic*, ICSID Case No. ARB/01/3, Decision on Jurisdiction (Jan. 14, 2004) at 48, available at <https://www.italaw.com/sites/default/files/case-documents/ita0290.pdf>.

77. KONSTITUTSIA ROSSISKOI FEDERATSII [Konst. RF] [Constitution], art. 15 Sec. 4.

78. Russia is not alone in changing its approach to BITs and foreign investments laws. For example, in 2018, Ecuador sent proposals to several states and invited them to renegotiate cancelled treaties, and in 2017, India terminated many of its BITs which were about to expire, including the one with Russia. In essence, these states have started building a new investment framework by setting up more rigid requirements and criteria in respect of foreign investors and investments. *Ecuador Begins Talks Over New BITs*, GLOBAL ARB. REV., Feb. 23 2018, available at <https://globalarbitrationreview.com/article/1159285/ecuador-begins-talks-over-new-bits>. See *Recent developments in the international investment regime*, UNCTAD IIA ISSUES NOTE https://unctad.org/en/PublicationsLibrary/diaepcbinf2018d1_en.pdf; *India — Bilateral Investment Treaties*, UNCTAD, <http://investmentpolicyhub.unctad.org/IIA/CountryBits/96>.

79. О заключении международных договоров Российской Федерации по вопросам поощрения и защиты инвестиций [Guidelines for conclusion of treaties of the Russian Federation on promotion and protection of investments. Annex to Resolution of the Government of the Russian Federation] No. 992, Sept. 30, 2016, available at <http://pravo.gov.ru/proxy/ips/?docbody=&nd=102412234>.

80. Федеральный закон от 31.05.2018 № 122-ФЗ "О внесении изменений в отдельные законодательные акты Российской Федерации в части уточнения понятия "иностранный инвестор" [Federal Law of the Russian Federation on Amendments in certain legislative acts of the Russian Federation in terms of clarifying the concept of "foreign investor"] No. 122-FZ, May 31, 2018, available at <http://publication.pravo.gov.ru/Document/View/0001201806010001>.

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an initiative of several EU countries and Canada to reform the current system of investor-state dispute resolution.⁸¹ In its Note of September 5, 2018, the UNCITRAL Secretariat proposed a list of concerns and a framework for further discussion of this subject.⁸²

D. ARBITRATION

Three court decisions in 2018 regarding arbitration proceedings were especially noteworthy in their rulings. These decisions pertained to insolvency creditors challenging foreign arbitral awards against an insolvent debtor; the enforceability of arbitral awards without an original or certified copy of the arbitration agreement; and the arbitrability of disputes related to procurement contracts with state-owned entities.

1. *Grain Export LLS v. LLC RIF*⁸³

Grain Export LLS, a Seychelles company, had sought a trial court order to enforce its arbitral award under the Arbitration Rules of the Grain and Feed Trade Association (“GAFTA”) against defendant RIF LLC, a Russian company (“RIF”).⁸⁴ The trial court granted the enforcement, but thereafter, insolvency proceedings were initiated against RIF.⁸⁵ RIF’s insolvency manager and one of its insolvency creditors appealed to the cassation court, arguing that enforcement of the award would violate Russian public policy because the debt under the arbitral award was allegedly a sham.⁸⁶

The Supreme Court upheld the ruling granting enforcement, finding that while generally, an insolvency manager and insolvency creditor may challenge the enforcement of an arbitral award if such enforcement would violate the rights of the insolvency creditor, in order to establish such a violation, the insolvency creditor must demonstrate *prima facie* evidence of the invalidity of the underlying debt.⁸⁷ Specifically, the insolvency creditor must establish that there is reasonable cause to believe that the parties’ conduct at arbitration was aimed at siphoning off the bankruptcy debtor’s property and/or abusing rights in other ways.⁸⁸ In the specific dispute at issue, the applicants failed to make such a case.⁸⁹

81. Rep. of the U.N. Comm’n on Int’l Trade Law, U.N. Doc. A/72/17 (Jul. 3–21, 2017).

82. U.N. Comm’n on Int’l Trade Law, Possible Reform of investor-State dispute settlement (ISDS), Note by the Secretariat, U.N. Doc. A/CN.9/WG.III/WP.149 (Sept. 5, 2018).

83. *Grain Export LLS v. LLC RIF*, Case: 132-1593/2016, Supreme Court of the Russian Federation, Commercial Division (Feb. 28, 2018), available at https://kad.arbitr.ru/PdfDocument/7cd45912-5047-4513-bdea-f0a4bedbf2c5/121e375b-8a89-46e0-8d8a-6680382d4c7d/A32-1593-2016_20180228_Opredelenie.pdf.

84. *Id.*

85. *Id.*

86. *Id.* at 5.

87. *Id.*

88. *Id.*

89. *Id.*

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2. *Korean National Insurance Corporation (DPRK) v. VTB Insurance*⁹⁰

In *Korean National Insurance Corporation (DPRK) v. VTB Insurance*, the claimant applied to the Moscow City Commercial Court for enforcement of twelve *ad hoc* arbitral awards rendered in London in a dispute arising from reinsurance contracts.⁹¹ The claimant was not able to present to the court either the originals or certified copies of reinsurance contracts with arbitration clauses.⁹² Both the trial and appeals courts refused to enforce the arbitral awards, holding that enforcement of arbitral awards in the absence of the originals or certified copies of the underlying contracts violates the right to a fair trial, which is a fundamental principle of public policy.⁹³ Rejecting the claimant's argument that the parties' performance of the underlying contracts essentially demonstrated the existence and validity thereof, the courts ruled that performance of the contracts does not prove that the parties entered into valid arbitration agreements.⁹⁴

3. *JSC Mosteplosetstroy v. JSC Mosinzhproekt*⁹⁵

In 2013, JSC Mosteplosetstroy (MTP) and JSC Mosinzhproekt (MIZ) entered into a construction contract for work in the Moscow Metro system⁹⁶ pursuant to public procurement requirements.⁹⁷ Years later, under the contract's arbitration clause, MTP initiated and won arbitral proceedings to recover payment for its completed work. MTP sought to enforce the arbitral award in court.

MIZ opposed the enforcement of the award, stating that the underlying dispute was not arbitrable under Russian law because the parties had entered into the contract "in the public interest" pursuant to public procurement procedures.⁹⁸ Specifically, MIZ argued that the contract was "in the public

90. *Korean National Insurance Corporation (DPRK) v. VTB Insurance*, Case: A40-60583/16-68-517, Supreme Court of the Russian Federation, Commercial Division (Jun. 20, 2018), available at https://kad.arbitr.ru/PdfDocument/d9ad5ac7-f5a6-4565-99af-63a2993a4e4d/b91fc703-2d28-45c1-bc2e-1728a52f6f38/A40-60583-2016_20180620_Opredelenie.pdf.

91. *Id.*

92. *Id.*

93. *Id.* The courts also noted that the claimant failed to provide documentary support for the authority of the signatory of the respective arbitration agreements. *Id.* at p. 16.

94. The Supreme Court denied the claimant's request to transfer the appeal to the Supreme Court's Judicial Board. *Id.* at p. 4.

95. *JSC Mosteplosetstroy v. JSC Mosinzhproekt*, Supreme Court of the Russian Federation July 11, 2018, A40-165680/2016 (Russ.), available at https://kad.arbitr.ru/PdfDocument/692507fed800-4152-b90f-77af1b4a9444/d3cee1bc-9974-4791-948f-e62880bb8672/A40-165680-2016_20180711_Opredelenie.pdf (demonstrating that the Supreme Court denied the claimant's request to transfer the appeal to the Supreme Court's Judicial Board).

96. *Id.*

97. Federal Law of the Russian Federation on Procurement of Goods, Work and Services by Certain Types of Legal Entities, [FZ] [Federal Law] 2011, No. 223.

98. The state court must refuse to enforce the award if the dispute considered by the arbitral tribunal may not be the subject of arbitral proceedings in accordance with federal law. Commercial Procedural Code, art. 239(4) (Russ.).

interest” because MIZ was wholly owned by the city of Moscow and therefore was acting in the interests of the state in entering the contract with MTP. Furthermore, MIZ alleged that the work under the construction contract was paid for by government budgetary funds. The basis for MIZ’s arguments was the prevailing position of Russian state courts at the time, under which disputes arising out of contracts entered pursuant to public procurement procedures are not arbitrable.⁹⁹ But the trial and cassation courts rejected MIZ’s arguments and agreed to enforce the arbitral award, finding no reason to refuse enforcement.¹⁰⁰

On appeal to the Supreme Court, this ruling was upheld.¹⁰¹ The Supreme Court emphasized that disputes related to public procurement contracts involving state-owned entities are of a civil law nature, and Russian law has never limited the arbitrability of disputes between state-owned companies, even when the underlying contract between them is subject to public procurement procedures. Therefore, such disputes are, as a general rule, arbitrable.¹⁰² The Supreme Court noted, however, that a claimant nevertheless may prove that the dispute involves a public policy element if, for example, the contract involves the spending of government budgetary funds, which may result in rejecting the enforcement of an arbitral award.¹⁰³ In this case, MIZ alleged but failed to prove that government budgetary funds were involved.

II. UKRAINE

Ukraine’s goal of improving its legal system and laws to match those of the progressive international community has driven its legal reform efforts over the last several years.¹⁰⁴ Addressing the need for legal reform to accommodate globalization and digitalization, these efforts generally have been aimed at increasing transparency and implementing global best practices. The main problem facing Ukraine has been its obsolete, post-Soviet legal foundation, which can no longer support progressive legal reform.¹⁰⁵

99. See, e.g., *Kazan (Volga) Federal University v. LLC Promsnab*, Povolzhsky District Commercial Court Oct. 6, 2015, ¶72-2703/2015, Resolution, available at https://kad.arbitr.ru/PdfDocument/d63d8e4c-dd98-4fff-a258-774639f8967f/8aeb2d9b-2901-4e8c-a48d-89447659e209/A72-2703-2015_20151006_Postanovlenie_kassacionnoj_instancii.pdf

100. *Id.* at 3.

101. *JSC Mosteplosetstroy v. JSC Mosinzhprouekt*, ¶40-165680/2016 (Russ.).

102. *Id.* at 12-13.

103. *Id.* at 14.

104. See Balázs Jarábik, Thomas de Waal, *Ukraine Reform Monitor: March 2018*, CARNEGIE ENDOWMENT FOR INTERNATIONAL PEACE, <https://carnegieendowment.org/2018/03/27/ukraine-reform-monitor-march-2018-pub-75909>; see also Vox Ukraine Editorial Board, *Three Years of Reforms. Has Ukraine Reformed Enough to Survive?*, VOXUKRAINE, <https://voxukraine.org/longreads/three-years-of-reforms/index-en.html>.

105. Paul Babeie, *Ukraine’s Transition from Soviet to Post-Soviet Law: Property as a Lesson in Failed Regulation*, 3 EAST/WEST; JOURNAL OF UKRAINIAN STUDIES (2016), <https://www.ewjus.com/index.php/ewjus/article/viewFile/167/61>.

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The importance of attracting both domestic and foreign financial investment in Ukraine means that laws and rules for businesses should be clearly stated, transparent, functional, and include workable enforcement mechanisms.¹⁰⁶ Ongoing reforms are expected to continue modernizing Ukrainian law to encourage more investment.

A. CORPORATE AND FOREIGN INVESTMENT LAW

In 2018, the Ukrainian Parliament (*Verkhovna Rada*) passed several important laws and amendments pertaining to Ukrainian companies and foreign investors, which have produced a more attractive and transparent legal environment that is consistent with modern legal systems globally. First, the outdated regulations for limited liability companies (LLCs)¹⁰⁷ were abolished by the new Law on Limited and Additional Liability Companies (the “UKR LLC Law”), which instituted crucial changes regarding corporate governance and LLCs as legal entities;¹⁰⁸ second, joint stock companies (JSCs) were subject to amendments by several legal acts regulating JSCs and the stock market in general;¹⁰⁹ third, the High Anti-Corruption Court was created; and fourth, changes to currency regulation were adopted. Details on the changes in each of these categories are as follows:

1. Limited Liability Companies

a. Shareholders/Members Agreements

Under the UKR LLC Law, for the first time Shareholders’ or Members’ Agreements (called “Corporate Agreements” in Ukraine) may be created by LLC members to distribute rights and obligations among themselves and to agree on the rules for their participation in and governance of the LLC, e.g., buy-sell triggers, lock-up periods, special rules regarding voting rights.¹¹⁰ Such agreements should render the corporate governance of LLCs more flexible and more attractive to investors.

106. See *Reforms in Ukraine: Progress in 2017 & Priorities for 2018*, CABINET OF MINISTERS OF UKRAINE, <https://www.kmu.gov.ua/storage/app/media/reform%20office/book-web-smallest-size.pdf>.

107. See *Zakon Ukrainy Pro Hospodarski Tovarystva [The Law of Ukraine on Business Entities, the Commercial Law]*, No. 1576-XII (Sept. 19, 1991), <http://zakon.rada.gov.ua/laws/show/1576-12> [hereinafter *The Commercial Law*].

108. See *Zakon Ukrainy Pro Tovarystva Z Obmezhenoyu Ta Dodatkovoyu Vidpovidalnistiu [The Law of Ukraine on Limited and Additional Liability Companies, the UKR LLC Law]*, No. 2275-VIII (Feb. 6, 2018), <http://zakon.rada.gov.ua/laws/show/2275-19> [hereinafter *The UKR LLC Law*].

109. See *Zakon Ukrainy Pro Vnesennia Ymin Do Deyakikh Zakonodavchykh Aktiv Ukrainy Shchodo Sproshchennia Vedennia Biznesu Ta Zaluchennia Investytsij Emitentamy Tsinnnykh Paperiv [The Law of Ukraine on Amendment of Several Laws of Ukraine Regarding Simplification of Doing Business and Investment Attraction by Issuers of Securities]*, No. 2210-VIII (Nov. 16, 2017), <http://zakon.rada.gov.ua/laws/show/2210-19#n715>.

110. *The UKR LLC Law*, *supra* note 108, art. 7 (In a holdover from Soviet law, such agreements were not regulated before this change).

b. Corporate Governance

New rules were set out for the corporate governance of Ukrainian LLCs:¹¹¹

- (1) Significantly decreasing the amount of mandatory information in a charter, which no longer must replicate multiple standard legal provisions or be revised for minor adjustments to a corporate structure or governance model.¹¹² The necessary provisions in an LLC's charter are now only the name of the company, the management bodies of the company, their powers and decision-making procedures, and terms and conditions for the interest-holders regarding their participation in the LLC;¹¹³
- (2) Abolishing the maximum number of 100 participants,¹¹⁴ which has resulted in the reorganization into LLCs of many private JSCs which were operating, *de facto*, more like LLCs than public companies;¹¹⁵
- (3) Allowing General Participant's Meetings ("GPMs") to be held by video conference;
- (4) Allowing LLCs to create Supervisory Boards and to delegate certain powers of the GPM to them;¹¹⁶
- (5) Establishing the liability of an executive body's and a supervisory board's members for losses borne by the company, but only if such losses occurred due to their fault;¹¹⁷
- (6) Making audit committees optional rather than mandatory;
- (7) Providing that an LLC's financial statements may be requested and obtained by the owners of 10% of the company's charter capital;
- (8) Allowing issuance of irrevocable powers of attorney to individuals to represent the LLC in corporate matters;¹¹⁸
- (9) Setting out rules for certain operations regarding membership interests (e.g., acquisition, disposal, inheritance, pledge, dividend distribution);¹¹⁹
- (10) Allowing debt-to-equity swaps to be used by LLCs to effectively restructure its debts;¹²⁰
- (11) Introducing detailed procedures for absentee- and poll-voting, thus simplifying decision-making by a sole-member LLC;¹²¹ and,

111. *Id.* § 4.

112. *Id.* §2, art. 11.

113. *Id.* §2, art. 11(5).

114. *The Commercial Law*, *supra* note 107, art. 50.

115. *The UKR LLC Law*, *supra* note 108, §6, art. 52.

116. *Id.* §4, art. 38.

117. *Id.* §4, art. 40. The criteria of such fault are not stipulated by the LLC Law and will be decided by courts on a case-by-case basis. *Id.*

118. *Id.* §1, art. 8.

119. *Id.* § 3.

120. *Id.* § 8.

121. *The UKR LLC Law*, *supra* note 108, § 4, art. 35–37.

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(12) Introducing the concepts of substantial and interested party transactions (which previously were applicable only to JSCs), with accompanying rules for their approval and execution.¹²²

2. *Joint Stock Companies*

(a) JSCs now will be categorized as “public” or “private” depending on whether their shares are publicly offered and/or listed on a stock exchange (public) or not (private). Previously, the distinction was based ineffectively on the number of shareholders in the JSC;¹²³

(b) Information disclosure procedures at the Ukrainian stock market were liberalized;¹²⁴

(c) JSC supervisory boards’ independence was strengthened by providing that matters of its exclusive competence cannot be subject to the control (or shared competence) of the shareholders’ meeting;¹²⁵ and,

(d) The introduction of a quorum restriction under which shares of the JSC that are owned by a legal entity controlled by the JSC are not considered for quorum determination and do not participate in voting.¹²⁶

The new amendments on LLCs and JSCs are not without their drawbacks. For example, participants holding more than 50% of an LLC’s authorized capital can withdraw from the company only with the approval of the remaining participants.¹²⁷ The approval of a “material” deal requires holding a general members’ or shareholders’ meeting, even for minor transactions.¹²⁸ Nonetheless, the expected results of the amendments to LLC and JSC laws are greater flexibility and owner security in the Ukrainian business and stock markets. In order to take advantage of the new changes, JSCs and LLCs should bring their charters and by-laws into compliance with these amendments within the time limits set by the new laws (June 17, 2019 for LLCs,¹²⁹ January 1, 2019 for public JSCs and banks, and January 1, 2020 for other JSCs¹³⁰).

122. *Id.* § 5, art. 44–46.

123. See *Zakon Ukrainy Pro Aktsionerni Tovarystva [The Law of Ukraine on Joint-Stock Companies, the UKR JSC Law]*, No. 514-VI (Sept. 17, 2018), <http://zakon.rada.gov.ua/laws/show/514-17#n925> [hereinafter *The UKR JSC Law*].

124. See *Zakon Ukrainy Pro Tsinni Papery I Fondovyy Rynok [the Law of Ukraine on Securities and Stock Market]*, No. 3480-IV (Feb. 23, 2006), <http://zakon.rada.gov.ua/laws/show/3480-15#n389>; at art. 39.

125. *The UKR JSC Law*, *supra* note 123, art. 33.

126. *Id.* art. 42-1.

127. *The UKR LLC Law*, *supra* note 108, art. 24.

128. *Id.* art. 44.

129. *Id.* pt. 5, § 8.

130. *The UKR JSC Law*, *supra* note 123, §2(13).

3. *Creation of the High Anti-Corruption Court*

The Law on the High Anti-Corruption Court (the “HACC Law”) is an important instrument for the protection of investors’ interests.¹³¹ Praised by Ukraine’s international partners and the global business community, the HACC Law created a new judicial structure aimed at fighting corruption in Ukraine. The purpose of the new Court is to hear corruption cases initiated by the National Anti-Corruption Bureau of Ukraine, the government authority undertaking corruption investigations.¹³² The High Anti-Corruption Court (“HACC”) is scheduled to begin its work in Spring 2019.¹³³

In order to ensure the independence and fairness of the HACC, a Public Council of International Experts is to be created¹³⁴ to background-check all candidates nominated as judges on the HACC.¹³⁵ This process will be transparent, with information on each stage of the candidates’ review and progression toward judgeship publicly available online.¹³⁶ It is hoped that the HACC will effectively contribute to a better climate for business in Ukraine, including for potential foreign investors.

4. *Changes in Currency Regulation*

Currency regulation reforms in the June 2018 amendments “On Currency and Currency Operations” (the “Currency Law”)¹³⁷ established new rules for the Ukrainian currency market. Taking effect on February 7, 2019, these changes provide for better, clearer, and more efficient regulation of currency operations, especially in cross-border transactions. The Currency Law is an overdue replacement for the previous statute, which was adopted about twenty-five years ago and aimed at protecting the national currency.

The main amendments introduced by the Currency Law are:

131. HACC Law, Law No. 2447-VIII, issued Jun. 7, 2018, effective Jun. 14, 2018, *available at* <http://zakon.rada.gov.ua/laws/show/2447-19/ed20180607> (Ukrainian only).

132. *Id.*

133. As per communication of the Chairman of the High Qualification Commission of Judges of Ukraine (HQCJU), there remain a few technical formalities to accomplish before launch of the High Anti-Corruption Court. For instance, special legislation on creation of such court should be adopted. Such legislation (which includes inter alia bylaw adopted by HQCJU) should specify in detail the procedures for nomination of the judges, etc. *See Chairman of the HQCJU's interview*, VKKSU.GOV.UA, *available at* <https://www.vkksu.gov.ua/ua/about/golowa-wkks-siergij-koziakow-antikorupcijnij-sud-sam-po-sobi-nie-wirishit-problemu-korupcii-w-ukraini> (Ukrainian only).

134. HACC Law, *supra* note 131, art. 9, pt. 1.

135. *Id.* art. 8, pt. 4.

136. *Id.* Art. 8, part 7.

137. Law on Currency and Currency Operations, No. 2473-VIII, (Jun. 21, 2018), (Ukr.), [hereinafter *Currency Law*], *available at* <http://zakon.rada.gov.ua/laws/show/2473-19>.

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- (1) Elimination of a requirement for corporate bylaws to include a provision on obtaining an individual license for external financial operations;¹³⁸
- (2) Allowance of Ukrainian legal entities and private persons to open bank accounts outside of Ukraine;¹³⁹
- (3) Elimination of the requirement to declare costs in foreign currency placed abroad;¹⁴⁰
- (4) Elimination of currency control for money paid to non-residents of Ukraine if the amount is below UAH 150,000.00 (approx. US\$5,400 or EUR 4,700);¹⁴¹
- (5) Cancellation of the requirement for Ukrainian residents to pay international contracts to which they are party within 180 days of the date of execution. The National Bank of Ukraine may set another time limit, but such contracts cannot be terminated based on violation of the payment term;¹⁴²
- (6) Allowance of currency receipts to be saved without converting half of them into Ukrainian currency (as was required previously);¹⁴³ and
- (7) Elimination of the requirement to register international contracts with the National Bank of Ukraine.¹⁴⁴

In the future, new trends in Ukrainian legal reform may include deregulation, which is expected to boost the development of strong national and regional economies.¹⁴⁵ This trend should continue in the near future, as should the digitalization of public services, both of which would further the goal of shortening currently lengthy procedures and making them more transparent, making the Ukraine a more favorable environment for economic development.

B. ARBITRATION

In December 2017, long-awaited arbitration reforms were introduced in Ukraine in the form of amendments to the Civil Procedure Code, the Commercial Procedure Code, and the Law of Ukraine on International

138. Decree of the Cabinet of the Ministers of Ukraine, No. 15-93 (Feb. 19, 1993), (Ukr.) [hereinafter CMU Decree], *available at* <http://zakon.rada.gov.ua/laws/show/15-93>.

139. Currency Law, *supra* note 137, art. 4, pt. 3.

140. CMU Decree, *supra* note 138, art. 9, pt. 1.

141. *Id.* art. 13, pt. 1.

142. Currency Law, *supra* note 137, art. 13, pt. 3.

143. Ruling of the Board National Bank of Ukraine, No. 65 (Jun. 12, 2018), *available at* <https://bank.gov.ua/document/download?docId=71584909>.

144. Order of the President of Ukraine, No. 734/99, (Jun. 27, 1999), *available at* <http://zakon.rada.gov.ua/laws/show/734/99> (“On Regulation of the Procedure of the Credits Receipt by Residents, Loans in Foreign Currency Landed by Non-Residents and Application of the Fines for the Violation of the Currency Legislation”).

145. *See* Reforms in Ukraine: Progress in 2017 & Priorities for 2018, CABINET OF MINISTERS OF UKRAINE, <https://www.kmu.gov.ua/storage/app/media/reform%20office/book-web-small-est-size.pdf>.

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Commercial Arbitration (together, the “Arbitration Amendments”).¹⁴⁶ These changes substantially upgraded the Ukrainian arbitration regime at the same time that extensive judicial reform was undertaken, including formation of a new Supreme Court. Below are summarized some of the major developments and case law related to the reforms.

1. *New Court Jurisdiction for Arbitration-Related Matters*

The Arbitration Amendments reduced the maximum number of court instances for arbitration-related matters (e.g., enforcement or setting aside of arbitral awards or interim measures to aid arbitration) from four to two. Now, the appellate courts are the courts of first instance for such matters,¹⁴⁷ and the new Supreme Court hears the appeals from those courts.¹⁴⁸ Parties can no longer file cassation appeals before going to the Supreme Court, which normally were available after appellate proceedings.¹⁴⁹

Notably, cases regarding enforcement of *foreign* arbitral awards are to be considered in the first instance exclusively by the Kyiv Court of Appeals.¹⁵⁰ The Arbitration Amendments thus have eliminated district courts from the process altogether, largely due to district court judges not always having the time or expertise to deal with arbitration matters appropriately. This streamlining of arbitration-related procedures should improve their efficiency and effectiveness, enhance the quality of judicial decisions regarding arbitrations, and mitigate corruption risks.

2. *Enforceability of Arbitration Agreements*

Article 22(3) of the updated Commercial Procedural Code of Ukraine¹⁵¹ provides that any inaccuracies in an arbitration agreement’s text or any doubts regarding its validity and enforceability shall be interpreted by courts in favor of its operation. This provision is aimed at countering a popular formalistic philosophy among Ukrainian judges under which they often have refused to enforce arbitration clauses unless the precise name of the arbitral institution was provided in the arbitration clause.¹⁵² In a recent decision, the Supreme Court applied Article 22(3), concluding that the exact designation

146. Law of Ukraine on Amendments to the Commercial Procedure Code of Ukraine, the Civil Procedure Code of Ukraine, the Code of Administrative Proceedings of Ukraine and other laws, No. 2147-VII (Dec. 15, 2017) (Ukr.) <http://zakon.rada.gov.ua/laws/show/2147-19>.

147. The Civil Procedure Code of Ukraine, art. 23(2) (Nov. 4, 2018) (Ukr.), <http://zakon.rada.gov.ua/laws/show/1618-15> (explaining that the appellate courts will remain appeals courts for other matters, but for the specific purpose of arbitration matters they will perform the functions of trial courts).

148. *Id.* art. 24(2).

149. *Id.* art. 389(3)(1).

150. *Id.* article 23(3)(2).

151. Commercial Procedure Code of Ukraine (Aug. 28, 2018) (Ukr.), <http://zakon.rada.gov.ua/laws/show/1798-12#n1663>.

152. *See, e.g.*, Resolution of the Supreme Economic Court of Ukraine, Case No. 910/8259/13, 27, (Nov. 2013), <http://reyestr.court.gov.ua/Review/35691495>.

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of the institution is not necessary when the parties obviously intended to refer their disputes to a specific institution and no other institution can be inferred from the contract.¹⁵³

3. *Court-Ordered Interim Measures and Preservation/Taking of Evidence*

The Arbitration Amendments empower Ukrainian courts to order interim measures in support of international arbitrations regardless of the seat of arbitration¹⁵⁴ and to preserve or take evidence for arbitral proceedings.¹⁵⁵ Previously, Ukraine had allowed court-ordered interim measures only at the stage of recognition and enforcement of arbitral awards, and the preservation or taking of evidence was completely unavailable. Although the Law of Ukraine on International Commercial Arbitration had mentioned “interim measures,”¹⁵⁶ there were no attendant procedures, making these provisions impossible to utilize.

The new provisions already have been used by Ukrainian courts to grant interim measures aiding arbitration.¹⁵⁷ For example, in September 2018, the Ukrainian Supreme Court upheld interim measures in support of a GAFTA arbitration ordered by the Appellate Court of the Odessa Region. Notably, the Supreme Court refused to review the merits even on a *prima facie* basis, saying that such considerations are the purview of the GAFTA tribunal.¹⁵⁸ In another case, the Kyiv Appellate Court rejected interim measures for an ICAC¹⁵⁹ arbitration, reasoning, *inter alia*, that the requested measures were not proportionate and not related to the arbitral claims.¹⁶⁰

The Arbitration Amendments did not incorporate provisions on enforcement of arbitral interim measures akin to Articles 17H and 17I of the UNCITRAL Model Law.¹⁶¹ Although some Ukrainian case law applies the New York Convention to such measures,¹⁶² the matter is unsettled because,

153. Resolution of the Supreme Court of Ukraine, Case No. 904/4384/17 (Apr. 17, 2018), ¶32, <http://reyestr.court.gov.ua/Review/73702604>.

154. Civil Procedure Code at art. 149(3).

155. *Id.* at arts. 116(7), 84(11).

156. The Law of Ukraine on International Commercial Arbitration (Dec. 15, 2017), art. 9, <http://zakon.rada.gov.ua/laws/show/4002-12>.

157. *See* Resolution of the Supreme Court, Case No. 785/1018/18, Sept. 24, 2018, <http://reyestr.court.gov.ua/Review/76812069>.

158. *Id.*

159. International Commercial Arbitration Court at the Ukrainian Chamber of Commerce and Industry

160. *See* Ruling of the Kyiv Court of Appeal, Case No. 125/2018 (Sept. 17, 2018), <http://reyestr.court.gov.ua/Review/76647326>.

161. UNCITRAL Model Law on International Commercial Arbitration 1985, art. 17H, 17I, http://www.uncitral.org/pdf/english/texts/arbitration/ml-arb/07-86998_Ebook.pdf (amended in 2006).

162. *See* Resolution of the Supreme Court, Case No 757/5777/15-?, (Sept. 19, 2018) http://www.reyestr.court.gov.ua/Review/76596637?fbclid=IwAR1aUd0i67g8UbN7xQkz9uQkRjY_p2LZHultlXPaHHa9y9A4RdkxqMpxqMc.

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in those cases, the New York Convention's applicability was not challenged by the parties.¹⁶³

4. *Voluntary Enforcement of Arbitral Awards, Interests and Penalties*

Certain Ukrainian foreign currency regulations complicate voluntary compliance with arbitral awards. Under these regulations, banks required a writ of execution from Ukrainian companies to process foreign currency payments in compliance with arbitral awards in favor of foreign companies.¹⁶⁴ Prior to the Arbitration Amendments, such a writ could be received only after enforcement proceedings were completed. But the amended Civil Procedure Code now enables a debtor to obtain a writ of execution in an expedited manner through a voluntary enforcement procedure. Specifically, a debtor may file an application for voluntary enforcement which must be heard within ten days of its submission, by a single judge reviewing only the arbitrability¹⁶⁵ of the dispute and any relevant matters of public policy.¹⁶⁶ Since the Arbitration Amendments were enacted, at least one such enforcement has taken place: the Kyiv Appellate Court allowed voluntary enforcement of a London Court of International Arbitration award requiring the debtor to compensate the creditor for its arbitration costs and legal fees.¹⁶⁷

In the past, Ukrainian courts were reluctant to enforce interest and penalties, which had to be calculated under conditions prescribed in the arbitral award. The updated Civil Procedure Code resolved this issue by establishing that the enforcement court shall calculate the sums up to the date of its decision, while sums accrued afterward shall be defined by the Ukrainian enforcement officers.¹⁶⁸ Although the relevant provisions do not enter into force until January 1, 2019,¹⁶⁹ the Supreme Court began applying this approach in late 2018.¹⁷⁰

163. *Id.*

164. See Decree of the Cabinet of Ministers of Ukraine, No. 15-93 (Feb. 19, 1993) (discussing the system of currency regulation and control). This decree and related regulations were repealed as of February 7, 2019 and the new Law of Ukraine on currency and currency operations and new regulations of the National Bank of Ukraine entered into force. Whether banks would require a writ of execution under the new currency regulations is as yet unclear.

165. Unlike in the U.S., in Ukraine, "arbitrability" is a narrow concept defining whether a particular type of dispute can be referred to arbitration.

166. See Civil Procedure Code at art. 480.

167. See Ruling of the Kyiv Appellate Court, Case No. 796/111/2018 (May 21, 2018), <http://reyestr.court.gov.ua/Review/74121260>.

168. Civil Procedure Code at art. 479 (4)-(5).

169. Civil Procedure Code Concluding Provisions at ¶2.

170. See Ruling of the Grand Chamber of the Supreme Court, Case No. 759/16206/14-? (May 15, 2018), <http://reyestr.court.gov.ua/Review/74630452>.

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5. *Redefined Scope of Arbitrability*

Corporate disputes were not arbitrable in Ukraine until the amended Commercial Procedure Code provided that corporate disputes arising out of a contract can be referred to arbitration, but only under an arbitration agreement that is between the company and all of its participants/shareholders.¹⁷¹ Further, the amended Commercial Procedure Code explicitly allows for the arbitration of civil aspects of disputes related to (1) the privatization of property, (2) competition matters, and (3) disputes arising from public procurement contracts.¹⁷²

171. Commercial Procedure Code art. 22(2).

172. *Id.*