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# Draft law on judicial control over and provision of judicial support to international arbitration by Ukrainian courts

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## Background

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- Under effective Ukrainian legislation national courts do not support parties in arbitration.
- Ukraine has not adopted 2006 changes to the Model Law.
- Ukrainian legislation includes many irregularities related to arbitration proceedings.
  
- In 2014 Ukrainian Arbitration Association and ICC Ukraine established working groups aiming to develop changes to Ukrainian legislation on court assistance in arbitration and improve overall arbitration climate.
- **In March 2016 the joined UAA and ICC Ukraine Draft Law was registered in the Parliament under No.4351.**

## The Draft Law aims:

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- to enhance the efficiency of judicial control over international commercial arbitration in Ukraine;
- to establish pro-arbitration practice of state courts;
- to create a positive image of Ukraine as a jurisdiction friendly to arbitration;
- to increase popularity of Ukraine as a place for arbitration;
- to reduce the caseload of state courts with complicated disputes involving foreign parties, as well as outflow of such disputes to foreign jurisdictions.

# Recognition and enforcement of arbitral awards in Ukraine

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- The Draft provides for **establishing a specific procedure for recognition and enforcement of arbitral awards in Ukraine irrespective of the place of arbitration, and a procedure for setting aside rulings or awards of arbitral tribunals** if the place of arbitration is Ukraine.
- Currently these issues are partially regulated by the provisions of Chapter VII-1 (Proceedings in Cases on Challenges against Awards of [Domestic] Arbitration Courts and Issuance of Execution Writs for Enforcement of Awards of [Domestic] Arbitration Courts) and Chapter VIII (Recognition and Enforcement of Foreign Court Decisions in Ukraine) of the Code of Civil Procedure of Ukraine, **which do not take into account the particularities of international commercial arbitration and are obviously insufficient.**

# Change in jurisdiction of courts and single proceedings for setting aside and enforcement

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- The Draft provides for that only the **Kyiv City Appellate Court and the High Specialized Court of Ukraine for Civil and Criminal Cases** may consider all arbitration-related matters, including recognition and enforcement of arbitral awards, setting aside rulings or awards of arbitral tribunals, and provision of judicial support to international arbitration by state courts to two court instances.
- The Draft Law provides:
  - for a possibility of considering applications for setting aside and granting permission for enforcement of an arbitral award **in a single proceeding**;
  - the same time-limit for both proceedings in Kyiv City Appellate Court – two months.

## Deciding on jurisdiction and suspension of setting aside proceedings

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- The Draft establishes a procedure by which the **courts take decisions concerning kompetenz-kompetenz rulings of arbitral tribunals** which is currently not regulated.
- The Draft establishes a procedure of realisation by the court of provisions of Article 34(4) of the Law of Ukraine “On International Commercial Arbitration”, under which the **court may, where it finds it appropriate, suspend the setting aside proceedings** for a period of time determined by it in order to give the arbitral tribunal an opportunity to resume the arbitral proceedings or to take such other action as in the arbitral tribunal’s opinion will eliminate the grounds for setting aside.

## Enforcement and interpretation of arbitration agreements

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- In order to establish a general approach of the courts to enforcement and interpretation of arbitration agreements, the Draft Law provides that **any defects in the arbitration agreement and/or doubts as to its validity, operability and capability of being performed should be interpreted by the court in favour of its validity, operability and capability of being performed.**
- This will promote pro-arbitration court practice in cases when, for example, the arbitration agreement has certain defects which may be remedied by interpretation (e.g. mistake in the name of arbitration institution).

## Solving the problem of voluntary compliance

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- The Draft Law solves the problem of voluntary compliance with arbitral awards. In view of applicable **currency restrictions**, it is currently not possible to voluntarily comply with an arbitral award if the amount in it is indicated in a foreign currency, since the payer must provide to its servicing bank an execution writ in addition to the arbitral award itself.
- The execution writ may be obtained only after a permission for enforcement of an arbitral award was given by a state court.
- Since the Draft is not aimed at amending currency restrictions, as a compromise, **it provides for a simplified procedure of issuance of such execution writs upon the debtor's application**, with the judicial control limited to issues of public policy and arbitrability.

# Solving the problem of the currency of payment

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- The Draft solves the problem of the currency of payment pursuant to an arbitral award.
- Under current provision of the Code of Civil Procedure, the court must determine in the ruling on granting permission for enforcement of an arbitral award the amount of payment in national currency of Ukraine in accordance with the National Bank of Ukraine rate as of the date of the ruling. This means that the amount is indicated in the Ukrainian national currency in the execution writ as well, and the Execution Service recovers funds in national currency (UAH). However, in the majority of cases the foreign creditor does not have an account in UAH in a Ukrainian bank, so it will be impossible to get the money from the Execution Service. In addition, there are currency risks connected with conversion of debt into national currency of Ukraine.
- The Draft Law provides for that conversion of the amount to be paid under the arbitral award into national currency of Ukraine or a freely **converted currency may be made only pursuant to the creditor's relevant application.**

## Interests on payments due under arbitral awards

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- The Draft Law regulates the issue of recovery of annual interest on payments due under arbitral awards. This is an efficient stimulus for voluntary compliance with an arbitral awards and encourages the debtor not to drag payments.
- The Draft Law defines the court's powers and the procedure for calculation of amount of annual interest pursuant to an arbitral award accrued as of the date of the ruling on recognition and enforcement of an arbitral award.

## Application of *res judicata* principle

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- The Draft establishes a general approach to application of *res judicata* principle in connection with a dispute decided by an arbitral tribunal: circumstances established in the operative part of an award of a domestic arbitral tribunal or international commercial arbitral tribunal need not be proved in other cases between the same parties, provided that a court decision was rendered in Ukraine pursuant to which such award was recognized and/or enforced, or setting aside of such award was refused.

# Requesting interim measures after commencement of arbitral proceedings

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- The Draft Law provides for the possibility to submit a request for interim measures in support of international arbitration after commencement of arbitral proceedings.
- Application of the interim measures is subject to the same standard as established for granting interim measures in course of obtaining a permission to enforce an arbitral award.
- The Draft Law provides for the possibility to apply any interim measures existing in the civil procedure, with additional exceptions set under the Commercial Procedure Code of Ukraine with respect to the corporate disputes.

## Interim measures

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- The Draft Law provides that change or discharge of the interim measures in support of international arbitration shall be conducted subject to general procedure established under Article 154 of the Civil Procedure Code of Ukraine with certain peculiarities which take into account the specific nature of the international arbitration and are determined to prevent any abuse on the part of the applicant after interim measures were granted to the latter.
- The Draft Law provides for that in the event of discharge of interim measures, **the person against whom such measures in support of international arbitration are introduced, shall be entitled to compensation of the damages** caused by such measures except insofar as the parties have signed a settlement agreement.
- The compensation of damages shall be decided in a judicial procedure – by the same court that has ruled for application of the measures – largely by means of the cross-undertaking/security.

## Court fees

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- for consideration of an application for setting aside of rulings and awards of international commercial arbitral tribunals – 2 per cent of the amount of claim brought to arbitration, but no less than 12 minimal salaries and no more than 120 minimal salaries;
- for consideration of applications for recognition and enforcement of awards of international commercial arbitral tribunals – 1 minimal salary;
- for consideration of the application for interim measures in support of international commercial arbitration – 40 statutory established minimum wages;
- for submission of a request for court assistance in taking of evidence – 20 statutory established minimum wages.

# Contact us

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