ARBITRABILITY OF DISPUTES RELATED TO THE PRIVATIZATION OF STATE-OWNED PROPERTY IN UKRAINE

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The article is devoted to the analysis of arbitrability of disputes between a privatization body and purchaser arising out of a sale and purchase agreement of a privatization object or relating thereto. Author reached a conclusion that before the Law of Ukraine on Enactment of Some Laws of Ukraine Aimed at the Improvement of Privatization Process dated 16 February 2016 No. 1005-VIII entered into force disputes in relation to alienation to privatization objects could have been referred to international commercial arbitration.

Based on the analysis of court practice in relation to sale and purchase agreements which contained arbitration clauses, author reached a conclusion that some of the arguments against arbitrability of this category of disputes did not lose their relevance even after the said law entered into force.

Keywords: arbitrability; privatization; arbitration; international arbitration; international commercial arbitration; state needs; ICCA at the UCCI; International Commercial Arbitration Court at the Ukrainian Chamber of Commerce and Industry; arbitration court; arbitration tribunal.

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1. Introduction

On 6 March 2016 the Law of Ukraine No. 1005-VIII on Enactment of Certain Laws of Ukraine Aimed at the Improvement of Privatization Process dated 16 February 2016 (hereinafter referred to as 'Law No. 1005-VIII') came into effect.[1] The Law No. 1005-VIII in particular introduces amendments to the Law of Ukraine No. 2163-XII on Privatization of State Property dated 4 March 1992 (hereinafter referred to as the 'Law on Privatization').[2]

As it may be inferred from the explanatory note to Law No. 1005-VIII,[3] the revised draft Law of Ukraine No. 2319-d on Amendment of Certain Laws of Ukraine on Clarification of Certain Provisions dated 21 December 2015, which amended the Law on Privatization, was submitted to the Verkhovna Rada (hereinafter referred to as the 'VRU'), Ukraine's Parliament, by economic policy committee in order to implement § 2.8 "Reform of State Property Management and Privatization" of the

[1] Закон України «Про внесення змін до деяких законів України щодо вдосконалення процесу приватизації» [Zakon Ukrainy "Pro vnesennia zmin do deiakykh zakoniv Ukrainy shchodo vdoskonalennia protsesu pryvatyzatsii" [On Amendment of Certain Laws of Ukraine on Amendment of Certain Laws of Ukraine on Improvement of Privatization Process]], Golos Ukrainy [Voice of Ukraine], 2015, 5 March, available at <http://zakon0.rada.gov.ua/laws/show/1005-19>.

[2] Закон України «Про приватизацію державного майна" [Zakon Ukrainy "Pro pryvatyzatsiiu derzhavnoho maina» [Law of Ukraine on Privatization of State Property]], Vidomosti Verkhovnoi Rady Ukrainy [Gazette of the Supreme Council of Ukraine], 1992, 16 June, art. 348, available at <http://zakon3.rada.gov.ua/laws/show/2163-12>.

[3] Пояснювальна записка до проекту Закону України «Про внесення змін до деяких законів України (щодо уточнення деяких положень)» [Poiasniuvalna zapyska do proektu Zakonu Ukrainy "Pro vnesennia zmin do deiakykh zakoniv Ukrainy shchodo utochnennia deiakykh polozhen" [Law of Ukraine on Amendment of Certain Laws of Ukraine on Clarification of Certain Provisions]], 2015, 21 December, available at <http://w1.c1.rada.gov.ua/pls/zweb2/webproc34?id=&pf3511=57492&pf35401=370180>.

Coalition Agreement of parliamentary groups 'Yevropeyska Ukrayina' ('European Ukraine') dated 27 November 2014,[4] and para. 5 of the Program of the Cabinet of Ministers of Ukraine (hereinafter referred to as the 'CMU') No. 26-VIII "The New Policy of State Property Management" approved by the VRU on 11 December 2014.[5]

Among other amendments introduced to the Law on Privatization, Law No. 1005-VIII vested a privatization body with a right to refer disputes in connection with sale and purchase agreements of privatization objects or arising thereof to international commercial arbitration.

Art. 1(7)(5) of Law No. 1005-VIII amended art. 27 of the Law on Privatization by adding para. 10 as follows:

> At the discretion of a privatization body a sale and purchase agreement of a privatization object may provide for the possibility of settling disputes arising between a seller and purchaser in connection with the sale and purchase agreement of the privatization object or on basis thereof in international commercial arbitration. If the privatization body provides for the referral of disputes arising out of the sale and purchase agreement of a privatization object between the seller and the purchaser or in connection thereof to international commercial arbitration, but the parties fail to agree on the choice of international commercial arbitration court in which the dispute shall be considered, any dispute, controversy or claim arising out of the signed sale and purchase agreement of the privatization object or in relation to thereof, including disputes breach, also a termination or invalidity, shall be finally settled by arbitration under the Arbitration Rules of the Arbitration Institute of Stockholm Chamber of Commerce.[6]

The first question that arises is as follows: "Should adoption of this provision be regarded as an argument that under Ukrainian law such disputes previously were non-arbitrable?"

This question is particularly interesting since a large number of agreements on the privatization of Ukraine's state property contain an arbitration clause referring

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[4] Угода про Коаліцію депутатських фракцій «Європейська Україна» [Uhoda pro Koalitsiiu deputatskykh fraktsii "Yevropeiska Ukraina" [Coalition Agreement "European Ukraine"]], available at <http://zakon3.rada.gov.ua/laws/file/text/33/f439014n8.pdf> (accessed July 19, 2016).

[5] Постанова Верховної Ради України «Про Програму діяльності Кабінету Міністрів України» [Postanova Verkhovnoi Rady Ukrainy "Pro Prohramu diialnosti Kabinetu Ministriv Ukrainy [Regulations of the Supreme Council of Ukraine on the Action Program of the Cabinet of Ministers of Ukraine]], Ofitsiinyi visnyk Ukrainy [Official Bulletin of Ukraine], 2014, 30 December, at 7, available at <http://zakon2.rada.gov.ua/laws/show/26-19>.

[6] Закон України «Про внесення змін до деяких законів України щодо вдосконалення процесу приватизації» [Zakon Ukrainy "Pro vnesennia zmin do deiakykh zakoniv Ukrainy shchodo vdoskonalennia protsesu pryvatyzatsii" [On Amendment of Certain Laws of Ukraine on Improvement of Privatization Process]], Golos Ukrainy [Voice of Ukraine (Голос України)], 2016, March 5, available at <http://zakon0.rada.gov.ua/laws/show/1005-19>.

disputes to international commercial arbitration. For example, the following privatization agreements contain an arbitration clause:

- sale and purchase agreements for shares in open joint stock company (hereinafter referred to as 'OJSC') "Lutskyy Pidshypnykovyy Zavod" of 4 January 1998 No. KPP-170, OJSC "EK "Zhytomyroblenergo" of 28 April 2001 No. KPP-313, OJSC "Kyivenergo" of 5 April 2001 No. KPP-314, state joint stock energy supply company 'Rivneoblenergo' of 15 May 2001 No. KPP-315, OJSC 'Khersonoblenergo' of 28 May 2001 No. KPP-319, OJSC "EK 'Sevastopoloblenerho' of 28 May 2001 No. KPP-320, OJSC 'Kirovogradoblenergo' of 28 May 2001 No. KPP-321 provide for settlement of disputes by the International Court of Arbitration at the International Chamber of Commerce with application of the 1976 UNCITRAL Arbitration Rules;
- sale and purchase agreements of shares in OJSC 'Kyyivzovnishtrans' of 18 June 1999 No. KPP-225, OJSC "Sudnobudivnyy Zavod 'Okean'" of 19 October 2000 No. KPP-289 provide for settlement of disputes by the International Arbitration Centre of the Austrian Federal Economic Chamber; and
- sale and purchase agreements of shares in JSC "Zaporizhskyy Vyrobnychyy Aliuminiyevyy Kombinat" of 8 February 2001 No. KPP-307, OJSC "Obyednannia Skloplastyk" of 27 May 2003 No. KPP-405, OJSC "Rivneazot" of 3 September 2003 No. KPP-420 and OJSC "Kryvorizkyy Hirnycho-Metalurhiynyy Kombinat "Krivorozhstal" of 20 October 2005 No. KPP-497 provide for the settlement of disputes by the International Commercial Arbitration Court at the Ukrainian Chamber of Commerce of Ukraine.[7]

Although Ukrainian legislation does not directly establish the non-arbitrability of this category of disputes, the analysis of judicial practice of commercial courts shows that before the adoption of Law No. 1005-VIII, disputes arising out of contracts on the sale of privatization objects were considered to be non-arbitrable.

Adoption of Law No. 1005-VIII, at first glance, implies that the intention of the legislators was to set forth at the legislative level that such category of disputes is arbitrable. However, is this indeed the case?

In light of the above, analysis of the same controversial practice of commercial courts gives reasons to assume that some arguments against arbitrability of disputes of the mentioned category did not lose their relevance even after the entry into force of Law No. 1005-VIII.

In view of the above, the author firstly aims to make an overview of the arbitrability issues of this category of disputes based on the analysis of the judicial practice of resolving disputes concerning the sale and purchase agreements of privatization objects that contain an arbitration clause.

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[7] Letter from Ihor Bilous "On the Incorporation of Arbitration Agreement to the Agreements on the Sale and Purchase Agreement of Privatization Objects", Head of the State Property Fund of Ukraine, to Mykola Oleksandrovych Frolov, Member of the Parliament of Ukraine (Apr. 11, 2016) (on file with author).

Secondly, the author aims to examine whether arguments against arbitrability of such category of disputes may be raised even after the entry into force of Law No. 1005-VIII.

The author consciously limits the subject matter of the study to arbitrability of disputes relating to sale and purchase agreements of privatization objects, since in accordance with art. 27(1) of the Law on Privatization, alienation of property owned by the State of Ukraine shall be executed only by respective sale and purchase agreements. Arbitrability of any other cases concerning privatization objects is not covered by the present study.

Detailed analysis of amendments to the Law on Privatization is also not the purpose of this article and may become the subject matter of a separate study.

The analysis of previous studies and publications gives the author grounds to acknowledge the absence of any studies on the arbitrability of disputes in this category by Ukrainian scholars – as of today it is impossible to find any study that at least indirectly relates to this issue.

Scholars from other jurisdictions paid more attention to the issue of arbitrability of privatization disputes. This issue is being briefly analysed in works of Sergey Usoskin,[8] Iván Szász,[9] Georgios Petrochilos,[10] David Goldberg, Gordon Blanke and Julia Zagonek,[11] Vladimir Khvalei, [12] etc. It should be however noted that vast majority of authors limit the analysis of arbitrability of privatization disputes by simply declaring them non-arbitrable, without providing any meaningful explanation.[13]

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[8] Sergey Usoskin, Russian Court on Law Applicable to Arbitrability, available at <http://www.cisarbitration.com/2014/06/06/russian-court-on-law-applicable-to-arbitrability> (accessed July 19, 2016).

[9] Iván Szász, Some Disputable Issues in Investment Treaty Arbitration and in Contractual Arbitration of Foreign Investment Disputes, in New Horizons in International Commercial Arbitration and Beyond 196 (Albert Jan Van den Berg gen. ed., Kluwer Law International 2005).

[10] Georgios Petrochilos, Attribution of Conduct of Non-State Organ Entities: An Introduction, in The Role of the State in Investor-State Arbitration 359 (Shaheeza Lalani & Rodrigo Polanco Lazo eds., Brill Nijhoff 2015).

[11] David Goldberg, Gordon Blanke & Julia Zagonek, Russian Federation, in Arbitration Law and Practice in Central and Eastern Europe 133 (Christoph Liebscher & Alice Fremuth-Wolf eds., Juris Publishing 2006)

[12] Vladimir Khvalei, Constitutional Grounds for Arbitration and Arbitrability of Disputes in Russia and Other CIS Countries, in Czech (& Central European) Yearbook of Arbitration 2011: The Relationship between Constitutional Values, Human Rights and Arbitration 136–137 (Alexander J. Belohlávek & Nadežda Rozehnalová, eds., Juris Publishing 2011); Vladimir Khvalei & Jonas Benedictsson, *R*ecognition and Enforcement of Foreign Arbitral Awards in the Russian Federation, in Post-Hearing Issues In International Arbitration 356–357 (Devin Bray & Heather L. Bray eds., Juris Publishing 2013).

[13] New Russian Rules on Arbitrability of Disputes, available at https://www.clearygottlieb.com/~/media/cgsh/files/publication-pdfs/new-rules-on-russian-arbitration.pdf (accessed July 19, 2016).

2. Issues of Arbitrability of Disputes Concerning Privatization of State Property Prior to the Enactment of Law No. 1005-VIII

In most cases exclusion of a dispute concerning privatization of state enterprises from the jurisdiction of Ukrainian state courts in Ukraine does not stir significant interest from within the general public. Indeed, does it really matter what authority would consider a dispute related to the sale and purchase agreement of a privatization object if (theoretically) upon consideration of the case, both the state court and the international commercial arbitration tribunal shall reach the same conclusion?

Lawyers specializing in investment activities would perhaps object by saying that sale and purchase agreements of privatization objects to foreign purchasers, as defined by art. 8(1)(3) of the Law on Privatization as "legal entities of foreign countries", may contain additional guarantees for foreign investments that are not available to Ukrainian citizens and legal entities established under the laws of Ukraine.[14]

The current Head of the Presidential Administration of Ukraine B. Lozhkyn offered to any foreign investors who invest in Ukraine an amount exceeding USD 100 mln, conclusion of a special agreement with the State of Ukraine, that would govern all the possible issues that these investors may face. According to Mr. Lozhkin, such governmental guarantees for the protection of foreign investment should include compensation for losses which foreign investors may suffer due to errors of Ukrainian state authorities. Disputes between investors and the State in relation to such a comprehensive agreement shall be referred to international arbitration.[15]

The above position almost verbatim repeats the provisions of § II "The State guarantees for protection of foreign investments" contained in the Law of Ukraine No. 93/96-VR on the Regime of Foreign Investment, which, *inter alia*, provides for state guarantees in the event of adverse changes to the legislation, protection against confiscation and illicit actions of State authorities and officials, etc.[16]

Incorporation of such clauses into the text of investment agreements is not accidental, as with the conclusion of the privatization agreement the investor assumes substantial financial commitment not only to the country as the recipient of investment, but also to the lenders who finance such a transaction.

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[14] Закон України «Про приватизацію державного майна» [Zakon Ukrainy "Pro pryvatyzatsiiu derzhavnoho maina" [Law of Ukraine on Privatization of State Property]], Vidomosti Verkhovnoi Rady Ukrainy [Gazette of the Supreme Council of Ukraine], 1992, 16 June, art. 348, available at <http://zakon3.rada.gov.ua/laws/show/2163-12>.

[15] Борис Ложкин, Четвертая республика: почему Европе нужна Украина, а Украине – Европа [Boris Lozhkin, Chetvertaja respublika: pochemu Evrope nuzhna Ukraina, a Ukraine – Evropa [Borys Lozhkin, Chetvertaja respublika: pochemu Evrope nuzhna Ukraina, a Ukraine – Evropa]] 201 (Folio 2016).

[16] Закон України «Про режим іноземного інвестування" [Zakon Ukrainy "Pro rezhym inozemnoho investuvannia» [Law of Ukraine on the Regime of Foreign Investment]], Golos Ukrainy [Voice of Ukraine], 1996, 25 April, available at <http://zakon2.rada.gov.ua/laws/show/93/96-вр>.

Once the purchaser's commitment is fulfilled, investments are made and the investment project is implemented, the opportunities to indicate the terms are redistributed, and the investor becomes vulnerable towards the actions of the government of the recipient country, which may require changes to the sale and purchase agreement of the privatization object, termination of the agreement or its invalidation.

In view of the above it seems logical that an investor would prefer to refer the disputes related to sale and purchase agreements of privatization objects to a forum devoid of any political influence. It should be taken into account that opting between the possibility to settle disputes regarding investments, particularly for investments made during the privatization process, in courts of the recipient country and international commercial arbitration, investors tend to prefer arbitration.[17]

Therefore, given the inherent risks associated with investment activities and the willingness of foreign investors to consider disputes arising out of sale and purchase agreements of privatization objects in international arbitration, we believe that the legal definition of arbitrability for the mentioned category of disputes is crucial for foreign investors in terms of risk assessment on the conclusion of investment agreement in Ukraine.

Paraphrasing a famous Russian saying "Was there the boy indeed",[18] it is firstly necessary to establish whether there was a problem that was intended to be resolved by the legislators by including provisions of the Law on Privatization on the possibility of resolving disputes regarding sale and purchase of privatization objects in international commercial arbitration. We will attempt to find the answer to this question by analyzing jurisprudence in respect to the sale and purchase agreements of state property privatization objects, containing an arbitration clause.

Having researched the Unified State Register of Court Decisions, the author of this article found two cases in which a commercial court investigated the issues of validity of arbitration clauses contained in the sale and purchase agreements of public companies' shares. These issues were considered in the case filed by *the General Prosecutor's Office of Ukraine in the interests of the State of Ukraine* (hereinafter referred to as the 'GPO'), *represented by the State Property Fund of Ukraine* (hereinafter referred to as the 'SPFU') *v. closed joint stock company "AvtoVAZ-Invest", Velbay Holdings Limited, joint-stock commercial bank for social development "Ukrsotsbank" and the joint-stock bank "ING Bank Ukraine"*. Another case was *the GPO in the interests of the State of Ukraine represented by the CMU v. the SPFU and ArcelorMittal Duisburg GmbH*. Both cases were considered in the first instance by the Kyiv Commercial Court.

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[17] Pierre Guislain, The Privatization Challenge: A Strategic, Legal and Institutional Analysis of International Experience 83 (The International Bank for Reconstruction and Development / World Bank 1997).

[18] Максим Горький, Жизнь Клима Самгина [Maksim Gor'kij, Zhizn' Klima Samgina [Maxim Gorky, Life of Klim Samgin]] fol. 19, at 40, 43, 51, 186, 204, 237, 261 (1952).

2.1 The GPO of Ukraine, v. Closed Joint Stock Company 'Avtovaz-Invest', Velbay Holdings Limited, Joint-Stock Commercial Bank for Social Development 'Ukrsotsbank' and Joint-Stock Bank 'ING Bank Ukraine'

In February 2008, the Deputy of the Prosecutor General of Ukraine filed with the Kyiv Commercial Court a claim in the interests of the State of Ukraine represented by the SPFU against closed joint stock company "AvtoVAZ-Invest" (hereinafter referred to as 'AvtoVaz') (Russian Federation), Velbay Holdings Limited, Joint-Stock Commercial Bank for Social Development "Ukrsotsbank" (hereinafter referred to as 'Ukrsotsbank') and Joint-Stock Bank "ING Bank Ukraine" on the termination of the sale and purchase agreement No. KPP-307 of shares of JSC "Zaporizhzhskyy Vyrobnychyy Aliuminiyevyy Kombinat" (hereinafter referred to as 'ZalK') entered into under competition bids of 8 November 2001, signed between the SPFU and "AvtoVAZ" (hereinafter referred to as 'Agreement No. KPP-307'), and the sale and purchase agreement of shares of ZalK of 24 March 2006, concluded between Ukrsotsbank, which acted on behalf and by proxy of AvtoVAZ and Velbay Holdings Limited endorsed by the SPFU. The basis for the claim was the fact that after the purchase of shares, covenants stipulated in the Agreement No. KPP-307 were breached.[19]

On 2 September 2009, the Kyiv Commercial Court refused to accept the claim of the Deputy Prosecutor General of Ukraine due to the incorporation of an arbitration clause in the body of Agreement No. KPP-307. As seen from the judgment of the first-instance court[20] and the Resolution of the Kyiv Appellate Commercial Court (hereinafter referred to as the 'Appellate Court') of 29 September 2009 in case No. 06.05.48/851,[21] the Kyiv Commercial Court, while refusing to accept the claim, referred to art. 62(1)(1) of the Economic Procedure Code of Ukraine (hereinafter referred to as the 'CCP'). While reaching such a conclusion, the Kyiv Commercial Court was guided by the fact that under the rules of art. 12 of the CCP, disputes on the termination of sale and purchase agreement of shares of state enterprises, entered in the privatization process, shall not be subject to the jurisdiction of commercial courts of Ukraine since these agreements contain arbitration clauses, in accordance with which the parties agreed to refer such disputes for settlement to the International

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19 Постанова Київського апеляційного господарського суду від 29 вересня 2009 р. у справі № 05-6-48/851 [Postanova Kyivskoho apeliatsiinoho hospodarskoho sudu vid 29 veresnya 2009 r. No. 05-6-48/851 [Resolution of the Kyiv Appellate Commercial Court of Sept. 29, 2009, No. 05-6-48/851]], available at <http://www.reyestr.court.gov.ua/Review/7528252>.

20 Ухвала Господарського суду міста Києва про відмову у прийнятті позовної заяви від 2 вересня 2009 р. у справі № 05-6-48/851 [Ukhvala Gospodarskogo sudu mista Kyieva "Pro vidmovu u pryiniatti pozyvnoi zaiavy" vid 2 veresnya 2008 No. 05-6-48/851 [Ruling of the Commercial Court of the City of Kyiv on the Striking out of the Claim of Sept. 2, 2008, No. 05-6-48/851]], available at <http://www.reyestr.court.gov.ua/Review/56911978>.

21 Постанова Київського апеляційного господарського суду від 29 вересня 2009 р. у справі № 05-6-48/851 [Postanova Kyivskoho apeliatsiinoho hospodarskoho sudu vid 29 veresnya 2009 r. No. 05-6-48/851 [Resolution of the Kyiv Appellate Commercial Court of Sept. 29, 2009, No. 05-6-48/851]], available at <http://www.reyestr.court.gov.ua/Review/7528252>.

Commercial Arbitration Court at the Ukrainian Chamber of Commerce and Industry (hereinafter referred to as the 'ICAC at the UCCI').

The GPO filed an appeal, where it asked the court to cancel the resolution of the first-instance court and remand a case for the re-trial by the court of the first instance. The GPO, among other issues, referred to the fact that Ukrainian legislation does not envisage the possibility of litigating disputes in respect to privatization of state property in international commercial arbitration. Also the GPO alleged that the ICAC at UCCI lacked jurisdiction with reference to art. 1 of the Law of Ukraine "On International Commercial Arbitration" (hereinafter referred to as the 'Arbitration Law') and art. 12 of the CCP, etc.[22]

> By the judgment of 29 September 2009, the Court of Appeal cancelled the decision of the court of the first instance. For convenience of further analysis, the reasoning used in the judgement is cited below without changes:
>
> Article 12 of the CCP establishes that commercial courts have jurisdiction over disputes arising out of conclusion, amendment, termination and execution of commercial agreements, including agreements related to privatization of property.
>
> According to Article 30 of the Law of Ukraine "On Privatization of State Property" disputes arising out the privatization of state property, except for disputes arising out of public legal relations which are subject to the jurisdictions of administrative courts, shall be resolved by a commercial court as provided by the Commercial Procedure Code.
>
> Sale and purchase agreements of shares of in 'ZalK' dated 08.02.2001 and dated 24.03.2006 are property privatization agreements.
>
> The first-instance court did not take into account the fact that the disputed sale and purchase agreement provides for consideration of disputes and conflicts only between the parties thereto, and between one of the parties and the State Property Fund of Ukraine in the International Commercial Arbitration Court at the Ukrainian Chamber of Commerce and Industry. However, this condition does not apply to the prosecutor since he is an independent participant of the [judicial] process.
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> …
>
> In accordance with Article 12 of the CCP disputes falling under the jurisdiction of commercial courts may be referred to the [domestic] arbitration tribunal [*treteiskii* court] ([commercial] arbitration), except for disputes on the invalidation of acts and disputes arising out of the conclusion, amendment, termination and execution of commercial agreements related to the satisfaction of [Ukraine's] State needs.
>
> With the view of circumstances [of this case] and given the above, the panel of judges of the Kyiv Commercial Court of Appeal finds that the dispute is

[22] *Id.*

subject to the jurisdiction of commercial courts and application of Article 62(1) CCP is unsubstantiated.[23]

The Higher Commercial Court of Ukraine (hereinafter referred to as the 'HCCU') (as well as the Court of Appeal) did not directly rule on the impossibility of referring disputes concerning the privatization of state property to international commercial arbitration and, in particular to the ICAC at the UCCI. It left the resolution of the Court of Appeal unchanged and the cassation appeal of Velbay Holdings Limited without satisfaction. The legal justification, due to which the HCCU decided to uphold the decision of the Court of Appeal, is almost word-for-word identical to the text of the reasoning of the decision handled by the Court of Appeal; therefore there is no practical need to cite reasoning used by the appellate court for the second time.

The only difference with the justification that the ICAC at the UCCI lacked jurisdiction over the dispute is that the HCCU did not include the part of the Court of Appeal's judgement referring to the fact that the GPO, acting in the interest of the Ukrainian State and represented by the SPFU, is not bound by the arbitration agreement entered into between the SPFU and the purchaser.

In my opinion, the judgement of the Kyiv Commercial Court, as well as the judgments of the Court of Appeal and the HCCU, was handed down in violation of substantive and procedural law. I have reached this conclusion in view of the following.

As the Court of Appeal correctly noted (the HCCU agreed with this conclusion), the Kyiv Commercial Court wrongfully refused to accept the claim on the termination of the agreement with arbitration clause, therein referring to art. 62(1)(1) of the CCP. However, unlike the courts of appeal and cassation instances, I believe that the infringement of the lower-level court was not in its erroneous conclusion in respect to the arbitrability of the subject matter of the dispute, but in the incorrect application of the applicable procedural law.

According to art. 7(1) of the Arbitration Law, arbitration agreement is an agreement by the parties to submit to arbitration of all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not. An arbitration agreement may be in a form of an arbitration clause in a contract or in the form of a separate agreement.

Art. I(2)(a) of the European Convention on International Commercial Arbitration dated 21 April 1961 (hereinafter referred to as the 'European Convention') defines arbitration agreement as either an arbitral clause in a contract or an arbitration agreement, the contract being signed by the parties, or contained in an exchange of letters, telegrams, or in a communication by teleprinter.[24]

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[23] *Id.*

[24] Европейская конвенция о внешнеторговом арбитраже [Evropejskaja konvencija o vneshnetorgovom arbitrazhe [European Convention on International Commercial Arbitration]], Ofitsiinyi visnyk Ukrainy [Official Bulletin of Ukraine]], 2004, Nov. 11, p. 357, available at <http://zakon5.rada.gov.ua/laws/show/995_069>.

Art. II(2) of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards dated June 10, 1958 (hereinafter referred to as the 'New York Convention') provides that arbitration agreement take the form of an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams.[25]

Thus, the existence of an agreement on the referral of a dispute, which arose between the parties to the Agreement No. KPP-307 or in connection therewith to international arbitration, excludes the possibility of resolution of a dispute arising thereof by the Kyiv Commercial Court, as the parties agreed to resolve such dispute in the ICAC at the UCCI in accordance to its Arbitral Rules.[26]

The court of the first instance erroneously failed to take into account that according to Art. II(3) of the New York Convention, Art. V(2) of the European Convention and Art. 8(1) of the Arbitration Law, when the court is seized of an action in respect of which the parties have made an arbitration agreement, it shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed.

Given the fact that consideration of the motion for termination of the proceedings based on the presence of an arbitration agreement, verification of its validity and verification of whether such agreement is invalid or not, may be made by the court only at the outcome of the trial held in accordance with the law, the Kyiv Commercial Court should have accepted the claim for consideration. Furthermore only in case any of the parties to the arbitration agreement – either the SPFU or Velbay Holdings Limited – would have petitioned before the court on the referral of the case to arbitration no later than the beginning of consideration of the case on its merits, it should have terminated the proceedings in the mentioned case under art. 80(1)(1) of the CCP and the ICCA at the UCCI. If, however, Velbay Holdings Limited would not have objected to the jurisdiction of the commercial court, the dispute should have been settled by the Kyiv Commercial Court as if no arbitration agreement had ever been concluded.

One cannot ignore the fact that the issue of mandatory termination of proceedings is the subject matter of the constitutional appeal of LLC "Torhovyy Dim "Armatura Ukrayiny"[27] concerning the official interpretation of art. 80 of the CCP, regarding

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[25] Конвенция о признании и приведении в исполнение иностранных арбитражных решений [Konvencija o priznanii i privedenii v ispolnenie inostrannyh arbitrazhnyh reshenij [Convention on the Recognition and Enforcement of Foreign Arbitral Awards]], Ofitsiinyi visnyk Ukrainy [Official Bulletin of Ukraine], 2004, Nov. 26, p. 329, available at <http://zakon5.rada.gov.ua/laws/show/995_070>.

[26] International Commercial Arbitration Court at the Ukrainian Chamber of Commerce and Industry, Rules (2007), available at <http://arb.ucci.org.ua/icac/en/rules.html>.

[27] ТОВ «Торговий дім «Арматура України» [TOV "Torhovyi dim 'Armatura Ukrainy'"], Конституційне звернення від 30 листопада 2015 р. № 377 [Konstytutsiine zvernennia vid 30 lystopada 2015 r. No. 377 [Consitutional application of Nov. 30, 2015 No. 377]], available at <http://ccu.gov.ua:8080/doccatalog/document?id=294934>.

which the Constitutional Court of Ukraine opened and initiated the constitutional proceedings on 5 April 2016.[28]

The correctness of the above argument is confirmed by para. 4.2.3 of the HCCU Plenum resolution No. 18 "On Certain Issues of Practice in Respect to Application of the Commercial Procedure Code of Ukraine by First-instance Courts" of 26 December 2011 (not adopted as of the date of the decision of the first-instance court)[29] and para. 5 of the HCCU Presidium clarification No. 04-5/608 "On Certain Issues of Cases Involving Foreign Companies and Organizations" dated 31 May 2002.[30]

However the judgement of the Court of Appeal supported by the HCCU expressly states that the reasoning behind a refusal to satisfy the petition to challenge the court due to lack of jurisdiction was non-arbitrability of the subject matter of the dispute. This conclusion may be reached if we analyze the reasoning of the judgments of the appellate instance (as noted above, cassation court judgment contains similar argumentation).

The Court of Appeal, the conclusion of which was supported by the HCCU, rejected a motion to refer the dispute to the ICAC at the UCCI, with reference to the following arguments:

- the legislation of Ukraine does not envisage the possibility of consideration of disputes concerning privatization of state property in international commercial arbitration courts;
- art. 30 of the Law on Privatization stipulates that the disputes related to privatization of state property, except for disputes arising out of public legal relations and subject to the jurisdiction of administrative courts, shall be resolved by commercial court in the order established by the CCP; and

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[28] Конституційні звернення на розгляді у Конституційному Суді України [Konstytutsiini zvernennia na rozghliadi u Konstytutsiinomu Sudi Ukrainy [Constitutional applications being considered by the Consitutional Court of Ukraine]], available at <http://ccu.gov.ua:8080/uk/publish/article/316535> (accessed July 19, 2016).

[29] Постанова пленуму Вищого господарського суду України "Про деякі питання практики застосування Господарського процесуального кодексу України судами першої інстанції" від 26 грудня 2011 р. № 18 [Postanova Plenumu Vyshchoho hospodarskoho sudu Ukrainy "Pro deiaki pytannia praktyky zastosuvannia Hospodarskoho protsesualnoho kodeksu Ukrainy sudamy pershoi instantsii" vid 26 grudnia 2011 r. No. 18 [Higher Commercial Court of Ukraine Plenary Ruling "On Certain Issues of Practice in Respect to Application of the Commercial Procedure Code of Ukraine by First-instance Courts" of Dec. 26, 2011, No. 18]], Visnyk hospodarskogo sudochynstva [Bulletin of the Supreme Arbitration Court of Ukraine] 2012, No. 1, at 27, available at <http://zakon5.rada.gov.ua/laws/show/v0018600-11>.

[30] Роз'яснення Президії Вищого господарського суду "Про деякі питання практики розгляду справ за участю іноземних підприємств і організацій" від 31 травня 2002 р. No. 04-5/608) [Roziasnennia Prezidii Vyshchoho hospodarskoho sudu Ukrainy "Pro deiaki pytannia praktyky rozgliadu sprav za uchastiu inozemnykh pidpryiemstv i organizatsii" vid 31 travnia 2002 r. No. 04-5/608 [Clarification of the Presidium of the Higher Commercial Court of Ukraine "On Certain Issues of Cases Involving Foreign Companies and Organizations" of May 31, 2002, No. 04-5/608]], available at <http://zakon3.rada.gov.ua/laws/show/v_608600-02>.

– art. 12 of CCP stipulates that the dispute subject to the jurisdiction of commercial courts may be referred by the parties to international commercial arbitration, save for disputes related to the invalidation of acts and disputes arising out of conclusion, amendment, termination and execution of commercial agreements in relation to satisfaction of Ukraine's State needs.[31]

However, it is worth mentioning that while the court reached a conclusion that the dispute was subject to the jurisdiction of commercial courts, it did not find that the arbitration agreement was null and void, inoperative or incapable of being performed.

Instead, the appellate court found that the parties to the arbitration clause contained in Agreement No. KPP-307 were the SPFU and Velbay Holdings Limited. As mentioned by the Court of Appeal, arbitration agreement does not apply to the prosecutor, who filed the claim in the interest of the Ukrainian State, represented by the SPFU as it, by virtue of art. 29(1) of the CCP, is an independent participant of the proceedings.

We believe that the error in the aforementioned reasoning is as follows.

Firstly, the conclusion of the Court of Appeal that international commercial arbitration may consider only those disputes that are directly set forth by the legislation of Ukraine, is not based on the existing legislation.[32] On the contrary, to the author's knowledge, rules of law that would prohibit referral of the dispute arising out of sale and purchase agreements for privatization objects to international commercial arbitration do not exist and have never existed.

As seen from art. 1(2) and (4) of the Arbitration Law, any disputes related to contractual and other civil legal relations arising out of trade and other international economic relations may be referred to international commercial arbitration, except otherwise provided by the laws of Ukraine, by virtue of which certain disputes may not be referred to arbitration.

Taking into account the above it is possible to make an interim conclusion that the Arbitration Law established the following two criteria for arbitrability of disputes. Firstly, the subject matter of a dispute shall be of a contractual nature and other civil legal relations arising out of cross-border trade and other international relations. In the academic literature this criterion is sometimes called 'objective arbitrability.' Another criterion is meeting the specific requirements of the subject composition of the parties to the dispute, as envisaged by set art. 1(2)(2) of the Arbitration Law, at least one of the participants to of the arbitration agreement shall be an enterprise

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[31] Постанова Київського апеляційного господарського суду від 29 вересня 2009 р. у справі № 05-6-48/851 [Postanova Kyivskoho apeliatsiinoho hospodarskoho sudu vid 29 veresnya 2009 r. No. 05-6-48/851 [Resolution of the Kyiv Appellate Commercial Court of Sept. 29, 2009, No. 05-6-48/851]], available at <http://www.reyestr.court.gov.ua/Review/7528252>.

[32] М. Селівон, *Взаємодія судової влади з міжнародним комерційним арбітражем,* 1 Право України 130, 136 (2011) *[*M. Selivon, *Vzaiemodiya sudovoi vlady z mizhnarodnym komertsiinym arbitrazhem,* 1 Pravo Ukrainy, 130, 136 (2011) [M. Selivon, *Interaction of the Judicial Branch With International Commercial Arbitration,* 1 L. of Ukraine, 130, 136 (2011)*]].*

with foreign investment, international association or organization established in the territory of Ukraine ('subjective arbitrability').[33]

Moreover, since Ukraine, at the signing and ratification of the European Convention, made a reservation on the possibility of legal persons of public law to enter into arbitration agreements under art. I(1), it is believed that public law entities, which is the case for the SPFU, have the right to enter into arbitration agreements. In this regard, will all due respect I cannot agree with the position of Mr. B. Zahvatayev, who believes that the legislation of Ukraine prohibits the conclusion of arbitration agreements, the party to which is a public authority or a local authority during their performance of power authority, including delegated ones.[34]

Mr. M. Selivon believes that the above wording of art. 1 of the Arbitration Law leads to the conclusion that the restrictions on referring certain categories of disputes to international arbitration should be directly established by the laws of Ukraine.[35] Although we agree with the author that the inability to refer certain categories of disputes to international arbitration is established by law, we believe that the conclusion, that non-arbitrability of the subject matter may be established only directly, *i.e*. by identifying a specific list of disputes that cannot be referred to international commercial arbitration (for one or more legal acts), is premature.

In my opinion analysis of art. 1 of the Arbitration Law leads to the conclusion that non-arbitrability of the subject matter may be established not only directly but also indirectly, including through interpretation of the laws on the reverse.

Therefore I consider reasonable the conclusion that in the absence of the prohibition to refer certain categories of disputes to international arbitration, or in case there is any doubt as to whether the subject-matter of a particular category of disputes is arbitrable, the Court of Appeal should have taken into account the presumptive validity of the

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[33] *See* Т. Захарченко, М. Теплюк, *Визнання і виконання міжнародних арбітражних рішень в Україні: питання теорії та практики [*T. Zakharchenko, M. Tepliuk*, Vyznannya i vykonannya mizhnarodnykh arbitrazhnykh rishen v Ukraini: pytannya teoriyi ta praktyky* [T. Zakharchenko, M. Tepliuk*, Recognition and Enforcement of International Arbitral Awards in Ukraine: Questions of Theory and Practice]],* Юридична газета [Yurydychna gazeta [Legal Newspaper]]*;* Олексій Фелів, Христина Федунишин*, Арбітрабельність спорів за законодавством України* [Oleksii Feliv, Khrystyna Fedunyshyn*, Arbitrabelnist sporiv za zakonodavstvom Ukrayiny* [Olexiy Feliv, Khrystyna Fedunyshyn, *Arbitrability of Disputes Under Ukrainian Law*]], Юридична газета [Yurydychna gazeta [Legal Newspaper]], 2013, Oct. 22, at 31; В.Н. Захватаев, Комментарии к мировой практике международного коммерческого арбитража [V.N. Zahvataev, Kommentarii k mirovoj praktike mezhdunarodnogo kommercheskogo arbitrazha [V.N. Zahvataev, Commentary to the World Practice of International Commercial Arbitration]], fol. 2, at 810 (Alerta 2015); С.О. Кравцов, Міжнародний комерційний арбітраж та національні суди [S.O. Kravtsov, Mizhnarodnyj komertsiinyi arbitrazh ta natsionalni sudy [S.O. Kravtsov, International Commercial Arbitration and National Courts]] 47 (Pravo 2014).

[34] В.Н. Захватаев, Комментарии к мировой практике международного коммерческого арбитража [V.N. Zahvataev, Kommentarii k mirovoj praktike mezhdunarodnogo kommercheskogo arbitrazha [V.N. Zahvataev, Commentary to the World Practice of International Commercial Arbitration]], fol. 1, at 121, 122 (Alerta 2015).

[35] Selivon, *supra* note 32, at 137.

arbitration agreement established by art. II(3) of the New York Convention, art. V(2) of the European Convention and art. 8(1) of the Arbitration Law.[36] I further believe that the HCCU agreed with the conclusion of the Court of Appeal that international commercial arbitration tribunals may consider only those disputes that are directly attributable to their jurisdiction by the legislation of Ukraine by mistake.

Secondly, the fact that the Law on Privatization stipulates that disputes over privatization of state property, except for disputes arising out of public legal relations which therefore fall to the jurisdiction of administrative courts, shall be resolved by the commercial court in the order established by the CCP, in no way means that the case related to the alienation of state property in the course of the process of privatization would be impossible to refer to an international commercial arbitration tribunal.

Given the manner in which the reasoning of the court of appeal was laid out and in spite of all efforts undertaken, it is impossible to establish what the court had been guided by while interpreting art. 30 of the Law on Privatization as one that limits the constitutional right of the parties to refer a dispute to international commercial arbitration.

A reason for this interpretation might be the fact that the court established a collision between the requirements of art. 30 of the Law on Privatization and art. 1(2) of the Arbitration Law and, while resolving this collision, found the provisions of art. 30 of the Law on Privatization as a 'special rule' compared to the 'general rule', which, following this logic, are contained in art. 2(1) of the Arbitration Law.

However, in this case, the court failed to consider that the need to determine which of the rules of the law shall prevail occurs only in the event of a genuine collision between two provisions of law. In our view, no conflict between the provisions of art. 30 of the Law on Privatization and art. 1 of the Arbitration Law exists because, as will be demonstrated below in detail, provisions of the analyzed Law on Privatization do not impose any restrictions on the possibility of referring disputes to commercial arbitration.

Incorporation of art. 30 into the Law on Privatization was not aimed at the exclusion from the general presumption of the arbitrability of the subject matter of the dispute, as one might imagine, but at the demarcation of dispute categories subject to the jurisdiction of commercial courts (which at the time of the first version of the Law on Privatization were called *arbitrazh* courts). Such a conclusion is supported by the chronology of amendments to the Law on Privatization and the CCP.

At the time of adoption of the Law on Privatization, the version of CCP effective at the time (unlike its current edition) expressly established that disputes over privatization were subject to the jurisdiction of *arbitrazh* (commercial) courts. These changes were introduced only in 2006 by the Law of Ukraine No. 483-V on Amendments to Certain

[36] Id.

Legislative Acts of Ukraine Regarding Determination of Jurisdiction for Cases for Privatization and Corporate Disputes dated 15 December 2006.[37]

In any case, if the legislator sought to establish the exclusive jurisdiction of state courts over disputes arising out of privatization of state property, it would certainly have pointed out that such disputes should be resolved 'only' ('solely', 'exclusively') by a state court, which, as seen from the analysis of art. 30 of the Law on Privatization, was not the case.

Therefore, we consider that the provisions of art. 30 of the Law on Privatization and art. 2 of the Arbitration Law are compatible with what, respectively, eliminates the need to decide which of the legislative provisions shall be applied in the case at hand.

Given the above, I am of the opinion that the Court of Appeal, in its interpretation of art. 30 of the Law on Privatization, came to the erroneous conclusion that the mentioned article established a ban to refer this category of disputes to international commercial arbitration. The mistake of the HCCU was that it did not overturn the decision of the appellate court due to the incorrect application of the law, which should have not been applied, which, as a result, led to an incorrect decision.

Thirdly, a reference in the reasoning of court decisions to art. 12 of the CCP suggests that the panels of judges of the Court of Appeal and the HCCU were guided by the fact that the sale and purchase agreement of a privatization object was a commercial contract, related to the satisfaction of State needs. However, I have to mention that the courts of appeal and cassation instances did not examine the issue of whether the disputed agreements belong to the agreements related to the satisfaction of State needs, although they should have done so.

I believe such a conclusion to regard sale and purchase agreements of privatization objects as commercial contracts related to the satisfaction of State needs is erroneous, especially given that the answer to the question as to whether art. 12(2) of the CCP limits the substantive jurisdiction of international arbitration is ambiguous and causes severe debates among both academics and in court rooms.

Proponents of the first approach believe that the provisions of the CCP may not restrict arbitrability of disputes that might be referred to international arbitration tribunals, as the subject matter of the CCP does not cover determination of the competence of domestic arbitration tribunals or international commercial arbitration courts.[38] I believe that this approach is correct.

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[37] Закон України «Про внесення змін до деяких законодавчих актів України щодо визначення підсудності справ з питань приватизації та з корпоративних спорів» [Zakon Ukrainy "Pro vnesennia zmin do deiakykh zakonodavchykh aktiv Ukrainy shchodo vyznachennia pidsudnosti sprav z pytan pryvatyzatsii ta z korporatyvnykh sporiv" [Law of Ukraine on Amendments to Certain Legislative Acts of Ukraine Regarding Determination of Jurisdiction for Cases for Privatization and Corporate Disputes]], Ofitsiinyi visnyk Ukrainy [Official Bulletin of Ukraine]], 2007, Jan. 1, at 52, available at <http://zakon3.rada.gov.ua/laws/show/483-16>.

[38] *See, e.g.* М. Селівон, *Про деякі питання взаємодії з міжнародним комерційним арбітражем, 12* Право України 27, 35 (2014) *[*M. Selivon*, Pro deiaki pytannia vzaiemodii z mizhnarodnym komertsiinym arbitrazhem, 12* Pravo Ukrainy 27, 35 (2014) [M. Selivon, *On Some Issues of Interaction of Courts and International Commercial Arbitration,* 12 L. of Ukraine 27, 35 (2014)]].

Some scholars, however, believe that the mentioned article restricts subject-matter arbitrability only for the case of domestic arbitral tribunals, but not international arbitration.[39] The logic of the supporters of this position is that art. I(2) of the Law of Ukraine No. 2980-VI on Amendments to the Commercial Code of Ukraine on Appeal Against Challenge of Decisions of the Domestic Arbitration Courts and the Issuance of Writ of Execution to Enforce Awards of Domestic Arbitration Courts dated Feb. 3, 2011 (hereinafter referred to as 'Law No. 2980-VI') amended art. 12(2) of the CCP, by elimination of the word 'arbitration' from the phrase "a dispute, subject to the jurisdiction of commercial courts, may be referred by the parties to domestic arbitral courts (arbitration)"[40] (the Law No. 2980-VI was not adopted as of the date of the judgements subject to analysis).

In view of the above and taking into account that according to art. 4(1) of the Law of Ukraine on Domestic Arbitration the scope of the mentioned law does not apply to international commercial arbitration, the proponents of the first approach believe that the provisions of the CCP cannot impose restrictions on the subject matter of the disputes that may be referred to international commercial arbitration. Such was the will of the legislator, as otherwise they would have certainly amended the Arbitration Law as well.

Some legal authorities mention the opinion that art. 12(2) of the CCP has its effect not only on domestic arbitration courts, established and acting under the Law of Ukraine No. 1701-IV on Domestic Arbitration Courts dated 11 May 2004,[41] but also on international commercial arbitration.

Regarding the third argument, I consider it worth mentioning that even if we imagine that there is a conflict between the CCP and the Arbitration Law in respect to the arbitrability of disputes arising out of the privatization process, we have to

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[39] *Id.*, at 35. *See also* Е. Перепелинская, Арбитрабельность споров по законодательству Украины: проблемные вопросы [Elena Perepelinskaja, Arbitrabelnost sporov po zakonodatelstvu Ukrainy: problemnye voprosy [Arbitrability of Disputes Under Ukrainian Legislation: Topical Issues]] in Материалы II Международных арбитражных чтений памяти академика Побирченко И.Г. [Materialy II Mezhdunarodnyh chtenij pamjati akademika Pobirchenko I. G. [Proceedings of the Second International Arbitration Readings in Remembrance of the Member of the Academy of Sciences Pobirchenko I.G.]] 32, 39 (2015), available at <http://arb.ucci.org.ua/publ/rept2014reading.pdf>.

[40] Закон України «Про внесення змін до Господарського процесуального кодексу України щодо оскарження рішення третейського суду та видачі виконавчого документа на примусове виконання рішення третейського суду» [Zakon Ukrainy "Pro vnesennia zmin do Hospodarskoho protsesualnoho kodeksu Ukrainy shchodo oskarzhennia rishennia treteiskoho sudu ta vydachi vykonavchoho dokumenta na prymusove vykonannia rishennia treteiskoho sudu" [Law of Ukraine on Amendments to the Commercial Code of Ukraine on Appeal Against Challenge of Decisions of the Domestic Arbitration Courts and the Issuance of Writ of Execution to Enforce Awards of Domestic Arbitration Courts]], Ofitsiinyi visnyk Ukrainy [Official Bulletin of Ukraine]], 2011, Mar. 11, at 21, available at <http://zakon4.rada.gov.ua/laws/show/2980-17>.

[41] Закон України "Про третейські суди" [Zakon Ukrainy "Pro treteyski sudy" [Law of Ukraine Domestic Arbitration]], Ofitsiinyi visnyk Ukrainy [Official Bulletin of Ukraine]], 2004, June 6, at 9, available at <http://zakon5.rada.gov.ua/laws/show/1701-15>.

consider that the Arbitration Law is a special law and the CCP the general one.[42] Thus, the first law shall prevail over the other.

Assuming that art. 12(2) of the CCP has its effect on international commercial arbitration and limits subject-matter arbitrability for certain categories of disputes, as some researchers believe,[43] in our opinion, the agreement on the sale of privatization objects does not fall under the definition of an agreement aimed at the satisfaction of State needs. Therefore, it is arbitrable.

Neither the CCP, nor the Law on Privatization or any other legislative acts contain a definition of "State needs", or mention which category of disputes is non-arbitrable.[44] The only legislative act, which contained a definition similar to the content of the concept was the Law of Ukraine on State Order to Meet Priority State Needs dated 22 November 1995 No. 493/95-VR[45] (in force at the time of passing the disputed resolutions but repealed by the Law of Ukraine No. 1197-VII on Public Procurements of 4 October 2014).[46]

Thus, in accordance with art. 1(1) of the said legislative act, State needs are defined as:

> Ukraine's needs for goods, works and services required to address crucial social and economic issues, maintain the country's defense and its security, create and maintain the proper level of State material reserves, implement state and interstate programs, provide for the functioning of government authorities maintained by the State budget of Ukraine.

Although art. 4 of the Law on Privatization refers to the state privatization program, which defines the purpose, ways, methods, measures and objectives for privatization of state property, given the trend towards expanding the categories of disputes that may be referred to international arbitration, disputes arising out of the sale and purchase agreements of privatization objects (or related to them), do not fall under the category of disputes arising out of conclusion, amendment, termination and execution of commercial agreements related to the satisfaction of state needs.

Therefore, I believe that the Commercial Court of the city of Kyiv reached a correct conclusion that the disputed agreements are not related to the satisfaction of State

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42 Zahvataev, *supra* note 34, at 154.

43 *Id.*

44 Feliv & Fedunyshyn, *supra note 33, at 32.*

45 Закон України «Про державне замовлення для задоволення пріоритетних державних потреб» [Zakon Ukrainy "Pro derzhavne zamovlennia dlia zadovolennia priorytetnykh derzhavnykh potreb" [Law of Ukraine on State Order to Meet Priority State Needs]], Vidomosti Verkhovnoi Rady Ukrainy [Gazette of the Supreme Council of Ukraine]], 1996, Jan. 16, art. 9, available at <http://zakon3.rada.gov.ua/laws/show/493/95-вр>.

46 Закон України «Про здійснення державних закупівель" [Zakon Ukrainy "Pro zdiisnennia derzhavnykh zakupivel» [Law of Ukraine on Public Procurements]], Ofitsiinyi visnyk Ukrainy [Official Bulletin of Ukraine], 2014, Apr. 30, p. 15, available at <http://zakon5.rada.gov.ua/laws/show/1197-18>.

needs, and, therefore, the contract does not fall within the exception contained in art. 12 of the CCP.

Without going into a detailed analysis of the fourth argument of the Court of Appeal, I consider it appropriate to note the following.

The position of the court that the arbitration agreement entered into between the SPF and the purchaser does not apply to the GPO is contrary to the other three arguments. On the one hand, the court supports non-arbitrability of the subject matter of the dispute, on the other hand it mentions that the arbitration clause, contained in the sale and purchase agreement that envisages reference disputes to the ICAC at the UCCI, shall not apply to the prosecutor. That is it confirms its validity.

In connection with the above a question arises: "Is the agreement on referring null and void, inoperative or incapable of being performed?

According to art. 216(1) of the Civil Code of Ukraine (hereinafter referred to as the "Civil Code") invalid transactions do not create legal consequences other than those related to their invalidity. Art. 236(1) of the Civil Code establishes that a void transaction or transaction recognized by a court as invalid shall be deemed invalid from the moment of conclusion thereof.

In other words, the argument of the court, which on the one hand confirms the validity of the arbitration agreement and that the parties to such agreement are bound to it, but, on the other hand, refers to the rule of law in support of its invalidity, is contradictory and contains a logical error. In the case of the invalidity of the arbitration agreement, the question whether the GPO, SPFU and purchaser are bound by the arbitration agreement does not make sense any more, given the fact that the agreement may not be valid and void at the same time. Conversely, if the arbitration agreement is valid, there is no need to provide any arguments in support of its invalidity.

As noted above, art. II(3) of the New York Convention, art. V(2) of the European Convention, and art. 8(1) of the Arbitration Law stipulate that only if the arbitration agreement is null and void, inoperative or incapable of being performed, the court may accept the case for consideration and rule on the merits. In all other cases, the court "shall" terminate the proceedings and refer the parties to arbitration. This rule deprives the court of the possibility to act at its discretion.[47]

In view of the above one may conclude that since the arbitration agreement was not declared null and void, inoperative or incapable of being performed by the court, the refusal to satisfy the purchaser's plea as to the arbitral jurisdiction is unreasonable.

I believe that the error in the position of the Court of Appeal also lies in the misapplication of the provisions of art. 36(1) and art. 36(5) of the Law of Ukraine No. 1789-XII on the Public Prosecutor's Office dated May 11, 1991, as amended, valid

[47] Zahvataev, *supra* note 35, at 432.

at the time of the case, by virtue of law.[48] In my opinion the court erred in that the arbitration agreement does not apply to the prosecutor, as he filed a claim on behalf of the SPFU.

Considering the arguments of the GPO from a different perspective, there are a number of questions that were very clearly formulated by Iván Szász: "[W]ho is bound by the privatization contract . . . who is contracting party? Who is the party who has civil law liabilities, and whose financial means will satisfy an arbitration award that states its liability and decides on its financial obligation?"[49]

International practice shows that the real party to a civil agreement on the alienation of privatization objects may, in particular be: the State, the government, the minister, ministry, central executive body with special status implementing the State policy privatization, or even a company owned by the state and authorized to dispose of property owned by the State.[50]

Therefore, to answer the question formulated above it is necessary to interpret the agreement considering the rules for interpretation of contracts contained in the legislation applicable to such agreement.

I deliberately leave the question of the true counterparty to the sale and purchase agreement of privatization object unanswered, as the answer to this question requires a thorough analysis and should be the subject of a separate study. I however note that in the case of the *Noble Ventures* arbitral tribunal, while considering the controversy that arose in connection with the privatization agreement of shares of a public company, the true party to the agreement on the sale of state property was not the privatization body, but the State. The arbitrators reached such conclusion, in particular on the grounds that the privatization body acted on behalf of the State in the course of the alienation of a privatization object and was represented the State.[51]

Some foreign scholars agree with this position. Georgios Petrochilos noted that if the alienation of state property follows through sale of shares, such actions should be attributed to the State, since although any shareholder may alienate the shares by virtue of law, privatization requires a special implementation for powers of authority.[52]

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[48] Закон України «Про прокуратуру» [Zakon Ukrainy "Pro prokuraturu" [Law of Ukraine on the Public Prosecutor's Office]], Ofitsiinyi visnyk Ukrainy [Official Bulletin of Ukraine], 2014, Nov. 7, at 9, available at <http://zakon0.rada.gov.ua/laws/show/1697-18>.

[49] Iván Szász, Some Disputable Issues in Investment Treaty Arbitration and in Contractual Arbitration of Foreign Investment Disputes, in New Horizons in International Commercial Arbitration and Beyond 196 (Albert Jan Van den Berg gen. ed., Kluwer Law International 2005).

[50] *See Id.*

[51] Noble Ventures, Inc. v. Romania, ICSID Case No. ARB/01/11, Award, ¶¶ 67, 76 (Oct. 12, 2005), 16 ICSID Rep. 210 (2012), available at <http://www.italaw.com/documents/Noble.pdf>.

[52] Georgios Petrochilos, Attribution of Conduct of Non-State Organ Entities: An Introduction, in The Role of the State in Investor-State Arbitration 359 (Shaheeza Lalani & Rodrigo Polanco Lazo eds., Brill Nijhoff 2015).

2.2. The GPO in the Interest of the State of Ukraine, Represented by the CMU v. the SPFU and ArcelorMittal Duisburg GmbH

In July 2010, the Deputy General Prosecutor of Ukraine filed to the Kyiv Commercial Court a claim in the interests of the State of Ukraine, represented by the CMU against the SPFU, ArcelorMittal Duisburg GmbH (hereinafter referred to as 'Arcelor') on the annulment of the Agreement No. 230 on amendment of the sale and purchase agreement of shares No. KPP-497 in OJSC "Kryvorizkyy Hirnycho-Metalurhiynyy Kombinat "Kryvorozhstal" of 28 October 2005, entered into by competition bids between the SPFU and Arcelor (hereinafter referred to as the 'Agreement No. KPP-497').

Para. 47 of the Agreement No. KPP-497 provides for the following dispute settlement mechanism:

> Parties to this Agreement may file any dispute, controversy or claim arising between them in respect hereof or relating here, . . . including termination or invalidity hereof, for final resolution by the International Commercial Arbitration Court at the Ukrainian Chamber of Commerce and Industry in accordance with its Rules . . .[53]

By resolution of the Kyiv Commercial Court dated Nov. 26, 2010 the claim was accepted for consideration and proceedings were initiated.[54]

At the hearing held on Oct. 1, 2010 Arcelor raised before the Kyiv Commercial Court a motion to submit the dispute to the ICAC at the UCCI due to the existence of a valid arbitration agreement in art. 47 of the Agreement No. KPP-497. However, the motion was refused due to reasons that I am not able to ascertain.[55]

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[53] Договір № КРР-497 купівлі-продажу пакету акцій відкритого акціонерного товариства «Криворізький гірничо-металургійний комбінат «Криворізсталь» за конкурсом [Dohovir No. KPP-497 kupivli-prodazhu paketa aktsiy vidkritoho aktsionernoho tovarystva "Kryvoryzkyi hirnicho-metalurhiinii kombinat "Kryvorizhstal" za konkursom [Sale and Purchase Agreement No. KPP-497 of the Public Joint Stock Company "Kryvoryzkyi mining and smelting enterprise "Kryvorizhstal"]], available at <https://dostup.pravda.com.ua/request/8497/response/12610/attach/4/attachment.pdf> (accessed July 19, 2016).

[54] Ухвала Господарського суду міста Києва про порушення провадження у справі від 26 липня 2010 р. у справі № 54/125 [Ukhvala Gospodarskogo sudu mista Kyieva "Pro porushennia provadzhennia u spravi" vid 26 lypnia 2010 r. No. 54/125 [Ruling of the Commercial Court of the City of Kyiv on the Commencement of the Proceedings of June 26, 2010, No. 54/125]], available at <http://www.reyestr.court.gov.ua/Review/10672375>.

[55] Заявление ОАО "АрселорМиттал Кривой Рог" о нарушениях законодательства во время первого судебного заседания по делу иска Генеральной Прокуратуры Украины к Фонду Государственного Имущества и компании "АрселорМиттал Дуйсбург ГмбХ" [Zajavlenie OAO "ArselorMittal Krivoj Rog" o narushenijah zakonodatel'stva vo vremja pervogo sudebnogo zasedanija po delu iska General'noj prokuratury Ukrainy k Fondu gosudarstvennogo imushhestva i kompanii "ArcelorMittal Duisburg GmbH" [Public Statement of PJSC "ArselorMittal Krivoj Rog" in Respect to Violation of Law Furing the First Court Hearing in Case of the Prosecutor General's Office of Ukraine Against the State Property Fund and ArcelorMittal Duisburg GmbH]], available at http://ukraine.arcelormittal.com/index.php?id=10&pr=178 (accessed July 19, 2016).

In fact, the Kyiv Commercial Court is not obliged to make a resolution on dismissal of a motion to refer the dispute to arbitration as a separate procedural document. This conclusion follows from para. 1 of the information letter of the HCCU No. 01-8/164 "On Specific Issues of Application of the Commercial Code of Ukraine, Raised in the Internal Reports on the Work of Commercial Courts in 2007" dated 18 March 2008, where the HCCU, in answering the question of whether upon consideration of any motions filed by parties to a dispute, the commercial court shall make a resolution as a separate procedural document, stated that the CCP does not oblige the making of a resolution as a separate procedural document for each and any motion the participants raised in the process.[56]

In the next hearing held on 5 October 2010, Arcelor again claimed that the Kyiv Commercial Court lacked jurisdiction over the case due to the presence of an agreement to refer any dispute arising between the parties to Agreement No. KPP-497 to the ICAC at the UCCI. However, the court rejected the motion without reasoning for the second time because, as stated above, the commercial court is not obliged to rule on the dismissal of a motion to refer the dispute to arbitration as a separate procedural document.[57]

It follows from the above that since the CCP does not establish obligation to issue a resolution on the dismissal of a plea as to the jurisdiction of the arbitral tribunal, the commercial court is not required to make a separate decision as a result of consideration of the motion. But at the same time the court is neither limited in its right to do so.

Reasons for refusal should have been mentioned in court decisions on the merits. However, as the CMU abandoned the claim, the GPO refused to proceed with the claim as well, and these refusals were accepted by the court.[58] Thus, there was

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[56] Інформаційний лист Вищого господарського суду України «Про деякі питання застосування норм Господарського процесуального кодексу України, порушені у доповідних записках про роботу господарських судів у 2007 році» від 18 березня 2008 р. № 01–8/164 [Informatsiinyi lyst Vyshchoho hospodarskoho sudu Ukrainy "Pro deiaki pytannia zastosuvannia norm hospodarskoho protsesualnoho kodeksu Ukrainy, porusheni u dopovidnykh zapyskakh pro robotu hospodarskykh sudiv u 2007 rotsi" vid 18 bereznya 2008 r. No. 01–8/164 [Information Letter of the Higher Commercial Court of Ukraine "On Specific Issues of Application of the Commercial Code of Ukraine, Raised in the Internal Reports on the Work of Commercial Courts in 2007" of Mar. 18, 2008, No. 01–8/164]], Visnyk hospodarskogo sudochynstva [Bulletin of the Supreme Arbitration Court of Ukraine]] 2008, No. 2, at 54, available at <http://zakon3.rada.gov.ua/laws/show/v_164600-08>.

[57] Кабинет Министров Украины не поддержал иск Генпрокуратуры к ФГИУ и «АрселорМиттал Дуйсбург ГМбХ»: если интересы государства не нарушены, то чьи же интересы защищает Генпрокуратура? [Kabinet Ministrov Ukrainy ne podderzhal isk Genprokuratury k FGIU i "ArselorMittal Dujsburg GMbH": esli interesy gosudarstva ne narusheny, to ch'i zhe interesy zashhishhaet Genprokuratura? [The Cabinet of Ministers of Ukraine did not uphold an action of the Prosecutor General's Office against the State Property Fund of Ukraine and ArcelorMittal Duisburg GmbH: If State Interests are not Violated, In Which Interests the Prosecutor General's Office Acts?]], available at <http://ukraine.arcelormittal.com/index.php?id=10&pr=179> (accessed July 19, 2016).

[58] «Арселор Міттал Кривий Ріг» уникнув прокуратури: Генпрокуратура відмовилася від позову про скасування перегляду строків зобов'язань "Арселор Міттал Кривий Ріг" ["Arselor Mittal Kryvyi Rih"

never a decision on the merits. In the absence of clear 'pathology' in the arbitration agreement, the Kyiv Commercial Court should have suspended the proceedings and referred the case to the ICAC at the UCCI.

3. Arbitrability of Disputes Concerning Privatization of State Property After Rntry Into Force of Law No. 1005-VIII

As shown above, even before the adoption of Law No. 1005-VIII, disputes arising out of or in connection with sale and purchase agreements of privatization objects were arbitrable. Establishing new rules on the Law on Privatization, which eliminate some of the arguments against subject-matter arbitrability of disputes categories considered by state courts, are welcomed by the legal community[59] and leave almost no room for debate on the impossibility to refer such disputes to arbitration.

Thus, some arguments presented in the case under the claim of the GPO against AvtoVAZ, Velbay Holdings Limited, Ukrsotsbank and ING Bank Ukraine, namely that Ukrainian legislation does not expressly provide for consideration of disputes concerning privatization of state property in international commercial arbitration courts; and that art. 30 of the Law on Privatization stipulates that disputes over privatization of state property, except for disputes arising out of public legal relations and falling within the jurisdiction of administrative courts, shall be settled by the commercial court in the order established in the CCP, have lost their relevance.

However, adoption of Law No. 1005-VIII did not resolve the issue of whether privatization agreements fall within the scope of agreements related to the satisfaction of State needs, which, as some authorities believe, make them non-arbitrable.

As noted above, I support the opinion that art. 12 of the CCP cannot restrict arbitrability disputes that can be referred to international arbitration and domestic arbitral tribunals, as the subject matter of the CCP does not include determination of the competence of domestic tribunals and international commercial arbitration courts.

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unyknuv prokuratury: Henprokuratura vidmovylasia vid pozovu pro skasuvannia perehliadu strokiv zoboviazan "Arselor Mittal Kryvyi Rih" ["Arcelor Mittal Kryvyi Rih" Got Rid of the Prosecutor's Office: The Prosecutor General's Office Dropped the Claim on the Termination of the Extension of the Terms for Compliance With Obligations by "Arselor Mittal Kryvyi Rih"]], available at <http://news.tochka.net/ua/88301-arselor-mittal-krivoy-rog-izbezhal-prokuratury> (accessed July 19, 2016); Генпрокуратура відмовилася від претензій до Міттала [Henprokuratura vidmovylasia vid pretenzii do Mittala [The Prosecutor General's Office Dropped Claims Against Mittal]], available at <http://www.unian.ua/society/411825-genprokuratura-vidmovilasya-vid-pretenziy-do-mittala.html> (accessed July 19, 2016); Відкритий лист делегатів конференції трудового колективу ПАТ «АрселорМіттал Кривий Ріг» Президенту України П.О. Порошенку [Vidkrytyi lyst delehativ konferentsii trudovoho kolektyvu PAT "ArselorMittal Kryvyi Rih" Prezydentu Ukrainy P.O. Poroshenku [Open Letter of Delegates of Employees of PJSC "ArselorMittal Kryvyi Rih"]], available at <http://girnyk.com.ua/news/vidkritiy-list-delegativ-konferenciyi-trudovogo-kolektivu-pat-arselormittal-kriviy-rig> (accessed July 19, 2016).

[59] Uncertainty ended regarding arbitration of privatisation disputes in Ukraine, available at <http://www.cms-lawnow.com/ealerts/2016/03/uncertainty-ended-regarding-arbitration-of-privatisation-disputes-in-ukraine> (accessed July 19, 2016).

However, to eliminate the possibility of broad interpretation of the concept of state needs by Ukrainian courts, it is proposed to consolidate its statutory definition, which would clearly define that disputes concerning privatization of state property shall not be deemed to be related to the satisfaction of State needs.

Moreover, although the Law of Ukraine No. 1697-VII on the Public Prosecutor's Office of 14 October 2014 (hereinafter referred to as the 'Law No. 1697 VII') significantly limited the rights of prosecution with regards to general supervision, the prosecutor is not deprived of the right to file a claim on behalf of the SPFU or the CMU against a purchaser.[60]

According to art. 23(1) of Law No. 1697-VII, claim representation of the interests of the State by a prosecutor in courts is conducted with the view to implement procedural and other actions aimed at protecting the interests of the State, in cases and in the order established by law.

Art. 23(3) and (4) of Law No. 1697-VII also established that the prosecutor represents the legitimate interests of the State in court in cases of violation or threatened violation of the interests of the State, where if the protection of these interests is inadequate or is being inappropriately performed by a public authority vested with the appropriate powers, or in the case of absence of such authority. The conditions for such representation must be justified by a prosecutor in court.

Therefore and given the above, the argument that the arbitration agreement does not apply to the prosecutor who filed a claim in the interest of the State of Ukraine, represented by the SPFU, as it by virtue of art. 18(1) of the CCP is an independent participant in the process, can be raised in order to circumvent the arbitration clause in the sale and purchase agreement of privatization objects.

Finally, it is necessary to stress that if the subject matter of privatization is shares (participatory interests, stakes) owned by the State in the authorized capital of business companies and other economic organizations and enterprises established on the basis of unification of different property forms, any dispute over recognition of ownership of shares, conclusion, termination, modification, execution and invalidation of contracts for the sale of shares as well as other disputes concerning transactions with shares, except for disputes related to violation of preemptive right to purchase shares, shall not be deemed to be arising out of corporate relations. Such conclusion follows from § 1.7 of the HCCU Plenum resolution No. 4 "On Certain Issues of Settlement of Disputes Arising out of Corporate Relations" of Feb. 25, 2016.[61]

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[60] Закон України «Про прокуратуру» [Zakon Ukrainy "Pro prokuraturu" [Law of Ukraine on the Public Prosecutor's Office]], Vidomosti Verkhovnoi Rady Ukrainy [Gazette of the Supreme Council of Ukraine]], 2015, Jan. 16, at 54, available at <http://zakon0.rada.gov.ua/laws/show/1697-18>.

[61] Постанова Пленуму Вищого господарського суду України «Про деякі питання практики вирішення спорів, що виникають з корпоративних правовідносин» від 25 лютого 2016 р. № 4 [Postanova Plenumu Vyshchoho hospodarskoho sudu Ukrainy "Pro deyaki pytannya praktyky vyrishennya sporiv, shcho vynykayut z korporatyvnykh pravovidnosyn" vid 25 lutogo 2016 r. No. 4 [Higher Commercial

Disputes concerning the alienation of shares in the authorized capital are also arbitrable. Such a conclusion was reached in the resolution of the HCCU No. 5015/4353/11 of Nov. 7, 2012 in the case of the claim of *Hatwave Hellenic American Telecommunications Wave Limited to the Ukrainian-Cypriot joint venture 'Ukrayinska Hvylia' and Leafprem Company LTD*,[62] in the HCCU judgement case No. 07/5026/1561/2012 dated Feb. 4, 2013 (*JSC 'Cherkasagroproekt' against Bonduelle Development SAS)*[63] and in the resolution dated Aug. 23, 2012 in case No. 18/17 in case of *LLC 'Firma' Double W' v. Raiffeisen Property Management GmbH and LLC 'SASSK'*).[64]

4. Conclusions

1. Before the entry into force of the Law of Ukraine No. 1005-VIII, it was possible to refer the disputes between the privatization body and the purchaser regarding sale and purchase of privatization objects to international arbitration.
2. Entry into force of the Law of Ukraine No. 1005-VIII, removed the majority of arguments put forward against arbitrability of the mentioned category of disputes. However, as seen from the analysis of jurisprudence, the adoption of the Law of Ukraine No. 1005-VIII did not resolve the issue of whether this category of agreements falls within the category of disputes related to the satisfaction of State needs.
3. Therefore, in order to achieve legal certainty regarding the arbitrability of disputes of this category, it is suggested to consolidate the definition of State needs at the legislative level, which would clearly define that disputes concerning privatization of state property are not deemed to be related to the satisfaction of the needs of the State of Ukraine.

Court of Ukraine Plenary Ruling "On Certain Issues of Settlement of Disputes Arising out of Corporate Relations" of Feb. 25, 2016, No. 4]], Visnyk hospodarskogo sudochynstva [Bulletin of the Supreme Arbitration Court of Ukraine], 2016, No. 1, at 72, available at <http://zakon5.rada.gov.ua/laws/show/v0004600-16/conv>.

62 Постанова Вищого господарського суду України від 7 листопада 2012 р. у справі № 5015/4353/11 [Postanova Vyshchoho hospodarskoho sudu Ukrainy vid 7 lystopada 2012 r. No. 5015/4353/11 [Ruling of the Higher Commercial Court of Ukraine of Feb. 7, 2012, No. 5015/4353/11]], available at <http://www.reyestr.court.gov.ua/Review/27322195>.

63 Постанова Вищого господарського суду України від 4 лютого 2013 р. у справі № 07/5026/1561/2012 [Postanova Vyshchoho hospodarskoho sudu Ukrainy vid 4 lytoho 2013 r. No. 07/5026/1561/2012 [Ruling of the Higher Commercial Court of Ukraine of Feb. 4, 2013, No. 07/5026/1561/2012]], available at <http://www.reyestr.court.gov.ua/Review/30738456>.

64 Постанова Вищого господарського суду України від 23 серпня 2012 р. № 18/17 [Postanova Vyshchoho hospodarskoho sudu Ukrainy vid 23 serpnya 2012 r. No. 18/17 [Ruling of the Higher Commercial Court of Ukraine of Aug. 23, 2012, No. 18/17]], available at <http://www.reyestr.court.gov.ua/Review/25744558>.

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