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DOING BUSINESS IN UKRAINE

2018





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2018

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Doing Business in Ukraine 2018, by Frishberg & Partners, is a legal reference guide/analysis of the key laws in Ukraine pertaining to foreign investors. It is written to be used as a guideline for those foreign investors interested in entering the Ukrainian market. At a time when Ukraine is becoming a viable investment opportunity, this handbook provides all the basics that foreign investors need to know when assessing whether the Ukrainian market is of strategic interest to their business needs. Having assisted foreign investors in Ukraine since 1991, Frishberg & Partners is pleased to provide you with this short, yet concise, overview of what investors need to know when entering the Ukrainian market.

Ведення бізнесу в Україні 2018» («Doing Business in Ukraine 2018»), виданий компанією «Фрішберг і партнери», – це юридичний довідник/аналіз ключового законодавства України, яке стосується іноземних інвесторів. Він укладений для використання в якості інструкції іноземними інвесторами, зацікавленими у тому, щоб вийти на український ринок. Зараз, коли Україна перетворюється на конкуретоспроможний інвестиційний ресурс, цей посібник пропонує базові відомості, необхідні іноземному інвестору для оцінювання потенційної цінності українського ринку для їх комерційних інтересів. Компанія «Фрішберг і партнери» допомагає іноземним інвесторам з 1991 року, і зараз ми раді запропонувати вам цей стислий, але місткий огляд того, що потрібно знати іноземним інвесторам, які виходять на український ринок.

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1. INTRODUCTION



More than 25 years have passed since the Soviet Union fell apart and Ukraine inherited its independence. Since then, countless foreign companies have successfully registered their wholly-owned subsidiaries and representative offices, rented offices/warehouses/production facilities and hired staff (both foreign and local). And every foreign company and its employees in Ukraine had to keep up with the labor, immigration and tax laws. In doing so, they relied on the laws and regulations

that we describe immediately below in this legal reference guide, “Doing Business in Ukraine”.

As any emerging economy, Ukraine has experienced its fair share of economic and political turmoil, and even survived two revolutions. Today, with an unresolved conflict with Russia and systematic corruption, foreign investors are weary of doing business in Ukraine, which is precisely the reason why 2018 may well have been the best year to invest in Ukraine: the market is wide open. Moreover, with strong EU ties, in the next few years Ukraine will surely gain forward momentum, and the cost of market entry will increase accordingly.

In any case, all foreign companies and entrepreneurs who are interested in setting up business operations should remember that Ukraine is a challenging market; here, success requires careful preparation and assistance of practical lawyers with hands-on experience. Ever since we opened offices in Kiev in 1991, we



have worked with numerous embassies (including U.K., Belgium, Norway, Sweden and Denmark, among others), multi-national companies and entrepreneurs.

Through the years, Ukrainian legislation has changed significantly, and it keeps adapting to accommodate the increasingly complex modern business world. This 25th anniversary issue of “Doing Business in Ukraine: is perhaps the most reader-friendly edition we have prepared to date. We hope it proves to be a useful guide to contemporary Ukraine.*

Scott E. Brown, Esq.
Frishberg & Partners
Kiev, Ukraine

** No parts of this publication should be relied upon as legal advice due to the frequent changes in Ukrainian legislation. We strongly recommend that you seek appropriate advice by writing to office@frishberg.com.ua and requesting updated information before entering into any business transactions in Ukraine.*

Dear Guest,

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All the best wishes

Jesper Henriksen

***General Manager and City Director
Radisson Blu Hotel, Kyiv***

A handwritten signature in blue ink, appearing to read 'Jesper', written in a cursive style.



“Since 1992 we have the pleasure of being the client of **Frishberg & Partners**, and recent results just confirm that this was and still is a very right choice for KLM Royal Dutch Airlines.”

*Sergey Fomenko, Commercial Manager
(KLM Royal Dutch Airlines)*

“The services of **Frishberg & Partners** are much valued by the Embassy. I do not hesitate to highly recommend Mr. Alex Frishberg and his associates as reliable and trustworthy lawyers and **Frishberg & Partners** as a highly qualified law firm.”

*Christians Dons Christensen, Ambassador of Denmark
to Ukraine, Georgia and Armenia*

“Mr. Alex Frishberg Esq. and his associates at **Frishberg & Partners** have for years, including during my predecessors, provided invaluable and highly qualified legal advice and services to the Embassy of Sweden in Kyiv. We have especially appreciated Mr. Frishberg's and his law firm's support on matters concerning real estate, including by conducting negotiations on our behalf, and on a range of other issues...”

Stefan Gullgren, Ambassador, the Embassy of Sweden in Kyiv

“Since several years Alex Frishberg and his competent team have successfully assisted us on a variety of matters. Besides the quality of their legal support, we have always been particularly pleased with their business-minded and pragmatic approach as well as with their high level of responsiveness. Alex and his team have also proven to have an excellent insight in the Ukrainian political and economic context in which their clients operate.”

Piet Grillet, Group Head, Lead Regional Counsel Europe, MasterCard

“**Frishberg & Partners** are a law firm I have had pleasure working with for many years. Their expertise and knowledge of the Ukraine market is unsurpassed and they are excellent in providing considered and hands-on legal expertise. This is reflected clearly in their book on the Ukraine legal environment which is an invaluable source of information for any executive doing business in this market.”

Dr. Daniel Thorniley, Senior Vice President, The Economist Group, Vienna

“We at Sun and I am personally as legal counsel for Sun operation in CIS region, are very pleased with a level of expertise and service which were and are provided to our company in Ukraine by Frishberg & Partners. I would like to particularly mention also a constant effort of F&P lawyers to keep its clients updated on the most recent developments of Ukrainian legal environment and their responsiveness to our needs in that country.”

Dr. Andrei Zalivako, Sun Microsystems

2. MOST COMMONLY USED BUSINESS STRUCTURES



In combination, both the Ukrainian Civil Code (No. 435-IV, dated January 16, 2003, effective January 1, 2004) and Economic Code (No. 436-IV, dated January 16, 2003, effective January 1, 2004) provide for virtually any type of companies. Despite the dazzling range of business structures offered under Ukrainian law, foreign investors typically choose one of the following four business structures:

-
1. representative office (which is not a legal entity, and is usually non-commercial);
 2. wholly-owned foreign subsidiary or enterprise (usually with limited liability provided in the foundation documents);
 3. “joint ventures” – companies with the participation of a Ukrainian partner or other foreign partners or within a common group of companies (foreign or local) with divided equity stakes/ shareholdings; or
 4. agreements on joint cooperation and production, which do not require registration of a separate legal entity, such as toll manufacturing or production outsourcing agreements.
-

Resident vs Non-resident Status

One significant consideration in selecting the appropriate business structure involves Ukrainian foreign currency legislation, which categorizes the above structures as either non-residents or residents, depending on the type of activities carried out.

Non-commercial representative offices are “non-residents” under currency regulations and tax legislation, while limited liability companies, subsidiaries and joint ventures are generally classified as “residents” because they are legal entities, registered and residing in Ukraine for more than 183 days per year. While the distinction is not clearly expressed in other laws, it is significant in terms of tax



consequences and the ability of foreign businessmen to effectuate transactions in foreign or Ukrainian currency.

Both subsidiaries (limited liability companies) and joint ventures bear the status of separate corporate entities and, thus, both limit an investor's liability to its initial investment. As Ukrainian corporate entities, joint ventures and subsidiaries are considered to be "residents" under Ukrainian currency regulations and they are subject to a different financial regime than "non-residents" (such as representative offices). For instance, resident companies may only transact business in Ukrainian currency.

Representative Offices

By definition, a representative office of a foreign company is not a separate legal entity, but is viewed as an "arm" of a non-resident company. As such, a representative office is not incorporated under Ukrainian law. A representative office simply represents the interests of a foreign legal entity on the territory of Ukraine and, consequently, there is flow-through liability for the parent company.

Another consequence: representative offices that are accorded "non-resident" status under the Ukrainian taxation system are subject to a special financial regime under tax laws and currency regulations. Foreign companies initially prefer to register their presence as non-resident representative offices, particularly in case of monitoring import-export activities or simple research of the market opportunities and conditions.



The key function of such non-resident representative offices is to service or monitor existing contracts between the non-resident parent company and local customers, but not to engage in commercial activities on its own behalf. Engaging in so-called “commercial activities” (executing contracts in its own name, accepting payment for goods, etc.) may result in a representative office’s re-classification as a “resident,” thereby being taxed on local revenues derived from its activity in Ukraine with no limitation of liability.

Moreover, the Ukrainian corporate tax legislation places non-residents into two categories: those which effectuate profit-generating activities in Ukraine (a) through a permanent representative office (active), or (b) without a permanent office (passive). Different tax rates and payment procedures attach to each category. This significant distinction is aimed at closing the loophole by which non-resident representative offices circumvented currency regulations and paid lower (if any) taxes in Ukraine on activities typically performed by resident companies.

The following documents are required for the registration process:

-
1. An application to register a representative office, describing the company’s proposed activities, purpose for opening a representative office, number of foreign employees (usually up to three (3)), etc. In addition, the said application must state the legal address of the future office;
 2. An extract from the government or commercial register in the country where the applicant-company has been registered, evidencing registration of the company with an indication of its legal address;
 3. An original notarized bank letter of good standing in the bank where the applicant-company has accounts, confirming that the parent company has an account in its bank and said account is currently in good standing;
 4. A notarized power of attorney authorizing the applicant-company’s representative in Ukraine to act as its representative in Ukraine for



- registering a representative office in Kiev, and performing all other activities related thereto, with the representative's citizenship, passport number, and address;
5. A notarized copy of the charter/by-laws/articles of association of the parent company (applicant) for opening a bank account;
 6. A standard reference list about the parent company (applicant), which must be on the applicant company's letterhead, signed by an authorized individual, and affixed with the official corporate seal of the applicant company (if available);
 7. An original resolution of the parent company's board of directors (or highest governing body) to form a representative office in Ukraine, affixed with the applicant's official corporate seal (if available), resolving to (1) establish a representative office in Kiev, (2) appoint a specific person as the head of the representative office and (3) issue a power of attorney to the law firm or other representative appointed to register the representative office;
 8. A notarized Power of Attorney identifying the individuals legally able to execute all documents and registration steps on behalf of the representative office. It is quite common for local attorneys to act as a local representative for registration purposes in addition to the parent company's chosen head representative;
 9. A copy of the lease agreement or sale-purchase agreement, evidencing the location of the representative office in Ukraine. The parent company must be a party to the lease agreement. Unlike in other countries, the Ukrainian registration authorities require that a lease agreement be negotiated before registration, and therefore the parent company should arrange for a legal address prior to the registration process. In addition, according to the Civil Code, if a lease agreement is concluded for 3 years or longer, such agreement must be executed before a notary; and



10. A photocopy of the Ukrainian tax identification tax codes for the head representative and chief accountant of the representative office (local and foreign).

The documents listed in items 1-8 above must be

- 1. properly executed and notarized;*
 - 2. translated into Ukrainian (officially attached to the original, not stapled);*
 - 3. certified by Apostille or legalized at the Ukrainian consulate (if certification by Apostille is not recognized in the country of origin).*
-

Ukrainian legislation provides the Ministry 60 business days to register a representative office. However, the Ministry usually reviews the document and processes registration over a shorter period. The Ministry's fee to register a representative office is two thousand five hundred (2,500) US Dollars,



which is a one-time payment. Post-registration steps include registration with the Ministry of Statistics, the Unified Pension and Social Insurance Fund and the district tax inspection, and the opening of a special foreign currency bank account, which can only be funded by the parent company, unless the representative office will undertake commercial activity.

Residents: Joint Stock and Limited Liability Companies

Wholly-owned foreign subsidiaries and joint ventures (companies with unrelated shareholders) usually take the form of either private joint stock companies or limited liability companies, depending on the particular requirements of the project. Both structures are considered to be “residents” under the Ukrainian currency regulations and tax laws, and both have a corporate shield, which limits the liability of founders or shareholders to the value of their contributions to the company.

Several differences exist between the above companies. For example, in a limited liability company, the founders own equity in the company, expressed by a percentage of ownership (i.e., such a company does not issue physical shares of stock). The main difference between a limited liability company and a joint stock company, however, lies in the degree of structural complexity. Limited liability companies are relatively simplistic and generally accommodate the interests of minority owners, unless the founders/participants conclude a specific corporate agreement that restricts minority owner voting rights. In sharp contrast, joint stock companies can be extraordinarily complex, particularly in cases of highly negotiated joint ventures with state-owned enterprises, and do not give minority shareholders very much protection.

The management structure of a stock company and that of a limited liability company is very similar with a few minor variations. The three-part structure is headed by the “general assembly of shareholders” (or in case of a limited liability company, “general assembly of participants”) which represents the interests of the company owners. The next level, the “supervisory council” (a.k.a. the “board of directors”) is optional in both



structures, unless the amount of simple shareholders in a stock company exceeds 10. It is commonly employed in the stock company structure, but smaller companies tend to disregard it. The Supervisory Council oversees the activity of the company's management between general assemblies of shareholders. The final level, the management board, performs the company's day-to-day functions.

In practice, simple joint ventures or 100% foreign-owned companies usually register in the form of a limited liability company. This company structure allows a relatively small number of people to avoid a complex multi-layered management structure composed of a general assembly, supervisory council and management organs and to avoid the registration of shares of stock. It is particularly attractive in cases of 100% foreign-owned companies because the charter (by-laws) can provide for one executive organ where the founder has complete and unequivocal control.



Capitalization Requirements

The Laws “On Joint Stock Companies” and “Limited and Additional Liability Companies” govern the formation of joint stock companies and limited liability companies respectively and contain no limitations on the size of the authorized capital for joint stock companies. While limited liability companies can be 100% owned by one shareholder/participant without limitations, joint stock companies may not have as its sole shareholder a company with only one shareholder/participant. Moreover, joint stock

companies may not have in its shareholder composition only legal entities whose shareholder is one and the same entity.

The minimum capitalization for registration of joint stock companies is 1,250 minimum monthly salaries, while for limited liability companies there is no established minimum capitalization. However, we recommend setting an authorized capital sufficient to start up operations and pay salaries for several months until the company can stand on its own. As of January 1, 2018, one minimum monthly salary is equal to 3,723 Ukrainian Hryvnia for 2018. Note that increases of the minimum monthly salary are commonly revised for each calendar year depending on the state budget and; therefore, this information should be verified before calculating the authorized capital, fines, fees, etc. Contributions to the authorized capital of a company may be either in cash or in-kind.

Founding shareholders of stock companies must pay the full value of the shares they acquired prior to the date of approval of the results of the initial placement of shares. The company will be deemed to have not been duly established if the shareholders fail to fully pay for their acquired shares prior to this date. In all cases, a company does not have the right to conduct any operations that are not connected to its establishment until at least 50 percent of the authorized capital is paid in. For limited liability companies, the authorized capital must be paid in by the participants within six months from the date of the company's registration, unless otherwise provided by the company's charter.

Company Registration

On July 1, 2004, the Law of Ukraine No. 755-IV "On State Registration of Legal Entities and Physical Entities-Entrepreneurs," dated May 15, 2003 (hereinafter the "Law"), came into force. The Law was specifically tailored to correspond with the Civil and Economic Codes of Ukraine, which simultaneously came into effect on January 1, 2004. The discussion below focuses on the registration of legal entities.

State registration in Ukraine evidences the creation or liquidation of legal entities, as well as any other registration activities which require an entry into the Unified State Register of Legal Entities, Natural Persons-Entrepreneurs and Civil Associations (the “Register”). The Register is fully operational in 2018, including a “one-window” registration point.

Registration is performed by a duly qualified state registrar. They are responsible for registering legal entities, reserving names of legal entities (a novelty in Ukraine), providing information to various state authorities from registration cards, creating and storing registration cards, filling out and issuing certificates of registration and extracts from the Unified State Register, registering amendments in the foundation documents of legal entities, and registering company terminations.

Document Preparation

All documents to be submitted for any registration activity must be personally submitted or sent by registered mail and must be written in or translated into Ukrainian. Registration cards must be typewritten or handwritten in print and signed (in case of dispatch by registered mail, the applicant’s signature must be notarized). All founding documents (charters, founding agreements, if applicable, regulations) must completely conform to the requirements of Ukrainian legislation.

Please note that documents, which are executed and issued in a foreign country, must be duly signed, notarized with a certification of the notary’s signature by the authority in the foreign country authorized to certify such signatures and, finally, legalized with the Ukrainian Consulate in the foreign country or certified by an Apostille stamp, provided that the foreign country has recognized Ukraine as a member to the 1961 Hague Convention Abolishing the Requirement of Legalization for Foreign Public Documents.

After a legal entity or private entrepreneur is entered into the Unified State Register, the relevant state registrar will create a registration file and assign it a registration number.

Registration Process

The registration of a legal entity usually entails preparation of the following documents:

1. A copy of the founder's certificate of incorporation with the relevant government's seal placed thereon;
2. An extract from the government/commercial register of the country in which the founder is registered, evidencing registration of the founder's company, or an extract from the commercial/banking registry in the founder's country of incorporation;
3. Any official document which may show information on the shareholding structure from the relevant state register which keeps such information. This is needed to enter the company's ultimate beneficiaries into Ukraine's unified state register (the



registered company's bank will require this information prior to opening a bank account);

4. A copy of the document confirming registration of the founder(s) in the tax authority of the founder's (founders') country of registration, duly certified by the said authority (for purposes of opening the company's bank accounts);
 5. A power of attorney issued to the individual(s) authorized to undertake the registration procedure, to execute all documents on behalf of the company, to register it, and to open its bank accounts;
 6. The original resolution (minutes) of the founder's board of directors (or other authorized body) reflecting the decision to form a company in Ukraine and to issue the relevant powers of attorney (affixed with the founder's company seals, if available);
 7. The original lease agreement or sale-purchase agreement for the local company, certified by a notary and evidencing the location of the company in Ukraine (this document can be obtained just prior to registration).
-

Once again, if the above documents are issued in a foreign country, then such documents must be notarized, certified and affixed with an Apostille stamp in accordance with the 1961 Hague Convention (or legalized in the Ukrainian consulate in the country of origin) to use them officially in Ukraine. Importantly, "state registration" does not include mandatory registration with the social insurance fund of Ukraine and the tax authorities.

In addition, the state registrar must provide to the statistics bodies, the state tax authorities, and the state social insurance funds (hereinafter "Registration Authorities") notice on the state registration of the company with an indication of the number and date of registration and all information in the company's registration card. This act alone will be the basis for the

inclusion of the company into the registers of the aforementioned state authorities.

Individuals, who carry out commercial activities, including the manufacturing and sale of products, the rendering of services or the performance of certain jobs, must also register as entrepreneurs for tax purposes. As a brief overview, the state registration of entrepreneurs includes the submission of a duly executed registration card and a copy of the individual's certificate evidencing registration as a taxpayer and payer of other mandatory payments and the payment of the registration fee. Entrepreneurs are also entered into the Unified State Register and their information is publicly accessible with the exception of their tax identification codes and passport data.



3. TAXATION



The Ukrainian system of taxation contains the following principle taxes and/or mandatory payments:

- *Corporate Income Tax;*
 - *Value Added Tax;*
 - *Personal Income Tax;*
 - *Customs Duties;*
 - *Pension Fund and Social Security Fund Contributions;*
 - *Excise Duties;*
 - *State Duties;*
 - *Land Tax;*
 - *Vehicle Owners Tax;*
 - *Payments for Licenses/Patents.*
-

Corporate Income Tax (CIT)

Tax Jurisdiction

Legal entities incorporated and operating under the legislation of Ukraine are normally treated as tax ***residents*** and are taxable on their worldwide income. Legal entities incorporated abroad and operating under the laws of another country are normally treated as foreign tax residents (***non-resident***) and are taxable on two sources of income:

- Business income received from carrying out trade or business in Ukraine; and
 - Other non-business income received from Ukrainian sources.
-

Residency is established for individuals if an individual has a place of residency abroad, but his/her permanent place of residency is in Ukraine. If an individual also has permanent residency abroad, he/she will be deemed a resident if he/she has closer personal and economic ties (vital interests)



in Ukraine. If this is impossible to determine, then an individual is deemed a resident if he/she is located in Ukraine for no less than 183 days (including dates of entry and exit) during the tax reporting period or periods. In looking at an individual's so-called vital interests, some of the main factors considered are whether Ukraine is the permanent place of residency of an individual's family members or whether the individual is registered



as a private entrepreneur in Ukraine. If it is still impossible to determine residency using the aforementioned tests, an individual's Ukrainian citizenship will be the deciding factor of his/her residency status.

Permanent establishments of non-residents are also subject to CIT on their income from Ukrainian sources or from agency (representative) functions related to such non-residents and their founders. The Tax Code defines "permanent establishment" as a permanent place of activity via which the commercial activity of a non-resident is fully or partially conducted, including place of management, branches, offices, plants, workshops, warehouses, servers, etc. Permanent establishments are required to register with their local controlling authorities prior to commencing commercial activity.

According to the Tax Code of Ukraine, the tax on companies is known as corporate income tax, which is a tax on company profit. Currently, this tax is generally calculated at a flat rate of 18%. Special tax rules may apply to certain companies, such as insurance and gambling companies.

The tax year corresponds to the calendar year. Taxpayers must submit tax returns for the calendar year, unless they generate income exceeding 20,000,000 UAH, which entails the submission of a tax declaration for

each quarter, half year, three quarters and calendar year, but allows for tax adjustments. Annual tax returns must be filed by March 1st, while quarterly tax returns must be submitted within 40 days following the last calendar day of each calendar quarter, half year and three quarters and the fourth (i.e., last) quarter.

Resident entities are taxable on their worldwide income received or accrued within a reporting period. The amount of taxable income is determined by subtracting allowable deductible expenses and capital allowance from gross income.

Non-resident entities, depending on the type of income received from Ukrainian sources (dividends, royalties, interest, lease payments, sale of real estate, etc.), may be taxed at the rates of 0, 4, 6 12, 15 and 20 percent, taking into account relevant international treaties on avoidance of double taxation.



Gross Income

Gross income is defined as any income from domestic or foreign sources, which is determined by way of adjustment (increase or decrease) of financial results prior to taxation (profit or losses), determined in the financial reporting of a company using national accounting standards or international standards of financial reporting. Such income may be in monetary, tangible or intangible form. Gross income includes income received from any activity, including the sale of goods, works or services, operational income, financial income, etc.

The following items are specifically excluded from gross income:

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- Amounts of VAT received (accrued) by the taxpayer on top of the cost of goods/services, except in cases when the taxpayer is not registered as a payer of VAT;
 - Income received from joint activity on the territory of Ukraine without the creation of a legal entity, including dividends received from resident companies, unlike dividends received from non-resident companies, which dividends are taxed according to a special procedure;
 - Monetary or in-kind contribution of capital to an entity or partnership in exchange for an equity interest therein, irrespective of whether the investor acquires a controlling interest following such contribution.

Deductible Expenses

Any current business-related expenses are deductible unless such deduction is restricted or disallowed by the Tax Code. The following items are specifically included as deductible expenses:

-
- Compensation for goods or services to be used by a taxpayer in its own business;

- Any current expense in connection with starting-up, managing and carrying out of business;
 - Capital asset improvement costs of up to 10 percent of the total book value of all capital assets at the beginning of the reporting year. Excess costs are capitalized.
-

Deductions of certain expense items is specifically prohibited, including penalties and fees paid, dividend payments, corporate and personal income tax payments, as well as VAT amounts included in the price of purchased goods (services) and amusement, entertainment, or recreational expenses. Of course, this restriction does not apply to expenses incurred by the taxpayer whose main business activity is furnishing amusement, entertainment, or recreation.

Corporate-Shareholder Taxation

The tax legislation entitles Ukrainian resident companies to pay dividends to its shareholders, provided that the paying entities have recorded profit for the tax period. Ukrainian tax law treats taxes on dividends as a constituent part of corporate income tax and not as a separate tax.

Corporate Income Tax

Corporate income tax is paid at the local level on dividends distributed to residents and non-residents alike at the rate of 18 percent as of 1 January 2018.

Dividends – Withholding Tax

Dividends are not treated as a separate tax and, therefore, are treated as CIT for legal entities and PIT for individuals. The tax is withheld by issuing company from the income of the dividend recipient.

Dividends in favor of individuals, whether residents or non-residents, are taxed at the rate of 5%. If the issuer is a payer of the simplified tax or is



a joint investment institute, then the tax rate is 9%. Dividends are also currently subject to a 1.5% military/war tax until this tax will be cancelled upon cessation of military actions in the eastern regions of the country.

Dividends paid in favor of resident legal entities are taxed at the general CIT rate of 18%. The issuer pays the tax without withholding it from accrued dividends, but it is paid to the State at the time of dividend distribution. For example, if the amount of accrued dividends is 2,000 UAH, the issuer pays 18% on top of 2,000 UAH (360 UAH) to the budget as CIT and 2,000 UAH to the recipient. From January 1, 2018, payers of the simplified (unified) tax are exempt from paying the tax in advance and the amount of dividends is included into their income for purposes of CIT.

Dividends paid in favor of non-residents legal entities are taxed on two levels simultaneously: (i) 18% CIT on accrued dividends and (ii) 15% is withheld upon payout, unless there is a better rate provided by respective



international double taxation treaties with Ukraine. Using our example of 2,000 UAH, the issuer pays 18% on top of 2,000 UAH (360 UAH) as CIT and 300 UAH is withheld as non-resident income and the non-resident receives 2,000 UAH – 300 UAH = 1,700 UAH.

Simplified Taxation System for Companies and Individuals

The Tax Code provides a simplified tax system for those companies and individuals duly registered as “subjects of entrepreneurial activity”. This system allows them to pay a considerably lower monthly tax amount at a fixed rate or percentage, provided they meet certain requirements. In general, there are currently four groups:

Group No.	Who can use the simplified tax system?	Tax Rate
<i>Group 1</i>	Individual entrepreneurs who do not use hired labor and carry out the retail sale of goods from trade spots on markets and/or carry out business activity involving the provision of consumer services. The amount of income of such entrepreneurs within the calendar year should not exceed 300,000 UAH.	Fixed rate set by local authority up to 10% of the minimum living standard for employable individuals* set on January 1 st , depending on type of activity.
<i>Group 2</i>	Individual entrepreneurs who provide services, including consumer services, to other payers of the unified tax or the general public or who manufacture and/or sell goods or who are active in the restaurant business. Such entrepreneurs may only hire up to 10 persons as employees. The amount of income of such entrepreneurs within the calendar year should not exceed 1,500,000 UAH. Entrepreneurs, who provide intermediary services involving the purchase, sale, lease and appraisal of real estate, may not elect Group No. 2 (see Group No. 3).	Fixed rate set by local authority up to 20% of the minimum monthly salary* set on January 1 st , depending on type of activity.

Group 3	Both individual entrepreneurs , who do not use hired labor or who may have an unlimited amount of employees, and legal entities of any organizational legal form. The amount of income of taxpayers in this group may not exceed 5,000,000 UAH during the calendar year.	3% of income in case of separate payment of VAT or 5% of income if VAT is included into the unified tax amount.
Group 4	Agricultural producers with a percentage of agricultural products in their turnover which equals to or exceeds 75%.	The rate is set at a certain percentage for each hectare of land and depends on type and location of land (from 0.45% to 3%).

**The minimum living standard and monthly salary are set each year from January 1 to December 31. For example, for January 1, 2018 the minimum living standard was set at 1,762 UAH and the minimum monthly salary was set at 3,723 UAH.*

For individual entrepreneurs in groups 1-3 above, the tax rate of 15% will apply towards:

-
- 1. any amount exceeding the maximum permissible income in their respective groups;*
 - 2. income received from activities not indicated in the register of payers of the simplified tax (for groups 1 and 2);*
 - 3. income received by applying a tax calculation method not permitted under the simplified tax regime;*
 - 4. income received from carrying out activities not permissible under the simplified tax regime;*
 - 5. income received by individuals in the 1st and 2nd groups from carrying out activity not permitted in their respective groups.*
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For legal entities in the 3rd group above, double the amount of their respective tax rates will apply towards:

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- 1. any amount exceeding the maximum permissible income in the 3rd group;*
 - 2. income received by applying a tax calculation method not permitted under the simplified tax regime;*
 - 3. income received from carrying out activities which do not grant the right to apply the simplified tax regime.*
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Prior to 2018, there was a constant debate between foreign individuals, who wished to register as private entrepreneurs and elect the simplified taxation system, and the state registrars as to whether a temporary residency, at a minimum, was required for a foreigner to register as a private entrepreneur in Ukraine. On January 23, 2018, the Ministry of Justice finally resolved this debate by issuing its Letter No. 1028/8.4.3/ІН-18, which explained, in essence, that no residency permits are necessary for registration as a private entrepreneur. In other words, as long as a foreigner is located in Ukraine on legal grounds and can provide an address (lease agreement), registration as a private entrepreneur is permissible.

Value Added Tax

1. Taxable Transactions

In accordance with the Tax Code, local registration as a payer of value added tax (“VAT”) is mandatory if the total amount of operations involving the supply of goods or services subject to value added tax (“VAT”), including via the use of local and global networks, over the last 12 calendar months in aggregate exceeds 1,000,000 UAH (without taking into account VAT), unless the taxpayer has elected the simplified tax system and falls within groups 1 – 2. VAT is paid during the customs clearance of goods without registration as a VAT payer in the event goods are imported by non-registered parties into the customs territory of Ukraine in volumes that require payment of VAT.



For VAT purposes, operations involving the import or export of goods are treated as the placement of goods into any customs regime established by the Customs Code of Ukraine. Thus, VAT is imposed on:

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- (a) the domestic supply of goods, including operations involving the gratuitous transfer or transfer of ownership rights to pledged objects to a creditor for goods that were transferred under conditions of commodity credit and involving the transfer financial leasing objects to the lessee;
 - (b) the domestic supply of services;
 - (c) the import of goods into Ukraine;
 - (d) the export of goods outside of Ukraine;
 - (e) the supply of services involving the international carriage of passengers and baggage and cargo by railroad, automobile, ship or airplane (unless an international treaty is applicable).
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VAT is levied at a rate of 20% of the taxable amount for domestic sales and imported goods or services. For exported goods or services, the VAT rate is 0%. The general rule is that the taxable amount is defined on the basis of the contractual value or arms-length value of the goods or services supplied. A 7% VAT rate is applied, for example, to qualifying medical products, supplies and equipment.

2. Exempt Transactions

(1) Transactions Specifically Exempt from VAT

The Tax Code exempts certain transactions from VAT. These include, but are not limited to sale of domestically produced baby food products, published periodicals, student notebooks, textbooks, books, and supplementary study materials, educational services by institutions with special permission (license) to provide such services, special-



purpose goods for disabled individuals, certain licensed healthcare services, pensions and monetary assistance to the population, public transportation services, among many others.

(2) Transactions Not Subject to VAT

According to the VAT Law, certain transactions are not subject to VAT. These include, but are not limited to:

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- Issuance of securities by enterprises, the National Bank of Ukraine, the Ministry of Finance of Ukraine, and by local authorities;
 - Insurance and reinsurance services, including social and pension insurance;
 - Transfer of lease property by a resident lessor to a lessee and the return of the lease property by the lessee to the lessor; the payment of interest or commission in lease (leasing) payments calculated on the value of the leased object (without calculating the portion of



leasing payments provided as compensation of a part of the value of the leased object pursuant to agreement);

- The pledge of property to a creditor pursuant to a credit agreement and the return of the property; the transfer by a resident creditor of a mortgaged object into possession or use by a borrower; and cash payments of the principal amount and interest under a mortgage;
- Payment of salary, pensions, stipends, subsidies and other cash or in-kind payments to natural persons at the expense of budgets or social and insurance funds;
- Payment of dividends and royalties in monetary form or in the form of securities;
- Provision of commission (brokerage) and dealer services for the sale or management of securities;
- Reorganization of legal entities. Transfer/import of fixed assets as a contribution to the authorized capital of a legal entity in exchange for equity interest therein, provided that these assets are used to form a business (or part thereof) as a going concern.

According to the Tax Code, individuals may freely import or export goods from Ukraine without VAT if their value does not exceed 150 EUR. For example, travelers may take goods valued at less than 150 EUR into Ukraine free of VAT in their accompanying baggage or individuals may send them to one recipient (natural person or legal entity) in one dispatch/consignment from one sender in international postal or express packages.

3. Taxable Persons

There are several types of taxable persons defined as VAT-payers, based on the kind of business activity they perform. These VAT-payers include, but are not limited to, any person/entity which:

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- a) carries out or plans to carry out commercial activity and voluntarily registers as a VAT-payer;
 - b) is subject to mandatory registration as a VAT-payer (see above) or has voluntarily registered as a VAT-payer;
 - c) imports goods (accompanying services) in volumes subject to taxation by VAT in accordance with the law;
 - d) any person/entity which imports (for natural persons – imports or sends) goods (accompanying services) into the customs territory of Ukraine for their use or consumption on the customs territory of Ukraine by others, regardless of which customs regime it uses pursuant to legislation.
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Note that foreign legal entities are able to register as VAT-payers in Ukraine only if they carry out business in Ukraine through a permanent establishment.

4. Taxable Amount

For any taxable domestic sale, VAT is chargeable on the contractual value of money, goods/services or any other consideration received or accrued in connection with the sale. Should a taxable supply be made to a related person, to a non-registered VAT person, or for any consideration other than money (in-kind consideration), VAT is chargeable by the supplier on normal price (“fair market value”) of goods or services being sold or provided.

5. VAT Administration

(1) Remittance

VAT on domestic supplies and importation of services is administered by the tax service, while VAT on the importation of goods is administered by the customs service.



Any taxable person should assess the amount of VAT to be remitted to the budget by reducing (“crediting”) its output VAT liability (VAT collected on outward taxable sales) with input VAT credit (VAT incurred on inward taxable sales and import sales). VAT must be reported on a monthly basis within 20 calendar days of the following month and paid within 10 calendar days after the last date for reporting and submitting declarations (i.e, after the 20th day of each month). VAT can now be administered electronically by taxpayers.

VAT on imported goods is payable by the importer at the customs border directly to the state treasury. A taxable person responsible for paying import VAT must pay the tax prior to or on the date of presenting a customs declaration, unless an exemption is applicable.

(2) VAT Credit

Any input VAT incurred by a taxable person on inward domestic sales and import sales is creditable against output VAT liabilities provided that such input VAT was incurred in connection with the:

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- acquisition or production of goods and services;
 - acquisition (construction, erection) of fixed assets (including upon their acquisition or import as contributions to the authorized capital of an entity and/or their transfer to the balance of the taxpayer authorized to maintain the account of the results of joint activity);
 - receipt of services provided by a non-resident on the territory of Ukraine and services with a “place of delivery” (usually the place of registration of the service provider) on the customs territory of Ukraine;
 - import of fixed assets into the customs territory of Ukraine under operative or financial leasing agreements;
 - import of goods and/or fixed assets into the customs territory of Ukraine.
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If a VAT-payer acquires (produces) goods (services) and fixed assets, which are not intended for their use in operations not subject to VAT or exempt from VAT, such VAT is not creditable, but may be deductible or depreciable/amortizable for CIT purposes. If produced and/or acquired goods (works, services) are partially used in taxable operations, then that portion of the paid VAT is creditable upon their production or acquisition which corresponds to the portion of use of such goods (works, services) in taxable operations of the reporting period.

(3) Tax Refunds

Since export sales are zero rated, any taxable person making sales of goods/services for use or consumption outside of Ukraine may claim as a credit its input VAT incurred in connection with exported supplies.

Although the excess credit is refundable and Ukraine has instituted an electronic VAT return system geared toward timeliness and transparency,

very strict requirements for such refunds are established, including strict requirements for maintaining and registering VAT invoices for the system. The rules for allowing tax audits on input VAT (in part due to the onerous VAT invoice requirements) make VAT refunds very difficult to obtain or at least delay them considerably. Regrettably, the VAT refund system is still in very much need of extensive reform in 2018.

VAT Incentives in the IT Sector

In 2013, the Tax Code extended CIT benefits to qualified IT companies and individuals by reducing their profit tax rate to 5%, provided that they maintained separate accounting of income and expenses of their activity in the software product industry. These tax benefits were supposed to be effective until January 1, 2023; however, they have since been recinded.

Since the IT sector is one of the economic sectors in Ukraine with the greatest earning potential for the economy, the Tax Code still extends VAT benefits for qualifying IT companies. From January 1, 2013 until January 1, 2023, the supply of software products and operations involving software products, except those involving the payment of royalties, are exempt from VAT.

Software products are defined by the Tax Code as follows:

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- the result of computer programming in the form of an operating system, and systems, application, recreational and/or educational computer programs (or their components), and in the form of internet websites and/or on-line services and access thereto;
 - copies of computer programs and their parts and components in hard or electronic copy, including in the form of a code (codes) and/or download links to computer programs and/or their parts and components in the form of a code (codes) for activation of a computer program or another form;

- any changes, updates, applications, supplements and/or expansions of computer programs and the right to receive such changes, updates, applications, supplements and/or expansions over a specific period;
- cryptographic means of data protection.

Personal Income Tax

Individuals, who are tax residents in Ukraine, are subject to personal income taxation on their worldwide income. Non-resident individuals are subject to taxation only on income from Ukrainian sources.

Personal Income Tax

1. Tax Rates

As of January 1, 2018, the personal income tax rate is levied at a flat rate of 18%. In 2014, a military tax of 1.5% on the personal income of *all* individuals was introduced until December 31, 2014. However, the military



tax has continued to be extended into 2018 until such time as the military actions in the eastern part of the country cease. Please note that this tax is applied to almost all types of income received by an individual and, when applicable, must be withheld by employers on behalf of their employees.

In addition, there is a 5% income tax on interest income received from dividends and corporate rights related to resident profit tax payers. Income derived from dividends paid by non-residents in relation to stock, corporate rights and/or investment certificates is taxed at the rate of 9%.

2. Taxable Income

Resident individuals are taxable on their worldwide income, i.e., on income received from both domestic and foreign sources. Income is taxable irrespective of whether it is received in cash or in-kind. If a resident individual receives benefits in-kind, the amount of taxable income is determined on the basis of the fair market value of the property, services or other benefits received. Certain benefits, received by a resident individual, are specifically excluded from personal income taxation, such as state pension and social insurance payments.

With respect to salary-related taxes, the employer, as the tax agent, must withhold personal income tax from each employee's salary at the rate of 18%. Please note that the minimum monthly salary rate is set each year and for the 2018 calendar year is 3,723 UAH. Rates should be regularly checked according to the State Budget passed for the corresponding year.

The military tax at the rate of 1.5% must also be withheld by the employer as tax agent from each employee's salary. Thus, if an employee's monthly salary is 100,000 UAH, then 1,500 UAH (military tax) and 18,000 UAH (personal income tax) is taken from the employee's salary and he/she receives 80,500 UAH net salary.

From the employer's side, a unified social insurance/pension contribution must be paid directly to the state unified social insurance funds based



on the amount of each employee's salary. This unified social insurance contribution is set at a flat rate of 22% for 2018. In 2018 the maximum tax base for withholding and paying social insurance contributions is 55,845 UAH. Social insurance contribution rates from the employer's side are only applied to this maximum base and are not applied to any amount in excess of such maximum base. To follow our example, if the individual's monthly salary is 100,000 UAH in 2018, then the unified social insurance contribution from the employer's side will be $55,845 \text{ UAH} \times 22\% = 12,285.90 \text{ UAH}$ (thus, 44,155 UAH is not taken into account for withholding purposes by the employer).

3. Taxation of Foreign Citizens Resident in Ukraine

Foreign citizens, who are tax residents of Ukraine, are taxed under the very same rules applicable to Ukrainian tax resident-citizens.

Non-resident individuals are taxable only on income received from Ukrainian sources. Under the Law, income is considered to be derived from Ukrainian sources if it is received or earned in Ukraine.



4. LABOR LAW



Labor laws are perhaps one of the least understood (and most frequently violated) areas of Ukrainian legislation. It helps to categorize all persons residing in Ukraine into two groups of employment relationships: (1) labor employment agreements governed by the Labor Code of Ukraine; or (2) agreements with private entrepreneurs or self-employed individuals governed by the Civil Code of Ukraine.

The first category is further divided into three different types of labor agreements: (1) labor agreements of indefinite duration; (2) labor agreements of specific duration; and (3) labor agreements effective for the duration of a specific project. One type of agreement of “specific duration” is called a “labor contract,” which permits an employer to prematurely terminate such contract only for reasons provided by Ukrainian labor legislation. Therefore, special emphasis will be made on labor contracts as a separate type of labor agreement.

A. General Requirements and Benefits

At the initial stages of employment, an employee is hired on the basis of a labor agreement, and may be placed on probation for a period not exceeding either three months or one month, depending on the classification of such worker under Ukrainian law. If the employee continues to work after such period has expired, the employee is considered to have “passed the test,” and is entitled to all rights and protection under Ukrainian law. Importantly, pursuant to Article 24 of the Labor Code, an employee may be permitted to perform work only after the conclusion of an employment agreement and notification to the local tax office regarding the employee’s employment.

Essentially, this means that Ukrainian employees are entitled to social insurance benefits as described below and must be paid at least the minimum monthly salary during the course of a normal work week of no more than 40 hours. Any additional time put in by the employee, even if he or she is hired on a temporary basis, is subject to overtime payment rates. Depending on the actual duration of the employment term, the employee



also is entitled to vacation, sick leave and regularly scheduled salary payments of two times/installments per month.

B. Social Security Benefits

By law, the Ukrainian government provides all employees (except subcontractors or consultants) with certain social protection by requiring all enterprises and organizations, except those specifically covered by relevant international agreements, to make deductions to the unified social insurance fund on behalf of its employees. Ukrainian employers (100% subsidiaries, local companies with foreign participation and representative offices), from their side, must withhold and pay toward the unified social insurance fund 22% of their employees' monthly salaries. Note that all social insurance contributions are made by the employer, in Ukrainian hryvnias, on top of the employee's salary (i.e., not taken out of the employee's paycheck). In the event that the employer fails to make such payments, the employee is still entitled to certain social security benefits, but the tax authorities will levy heavy fines retroactively if such violations are discovered anytime in the future.



In the past, Ukrainian employees were also personally required to make monthly payments in the amount of 3.6% of their salary to the unified social insurance fund, which their Ukrainian employers would withhold on their behalf. However, as of 2016, this unified social insurance contribution by employees was abolished. Employees are responsible for paying their own personal income tax (18%, including income from their salaries) and a 1.5% military tax on any other income received in relation to and outside of salary-related payments. The 1.5% military tax on all income will remain

in effect until the Ukrainian government recognizes an end to the military conflict in eastern Ukraine (it is still in effect in 2018).

C. Employee Compensation

As a rule, salaries must be paid in two installments per month in Ukrainian hryvnias. Official salaries of employees are determined in accordance with the employment contract, but by law such salaries cannot be lower than the minimum monthly salary set by the Ukrainian government (the equivalent of 3,723 Ukrainian hryvnias as of January 1, 2018). Incidentally, the minimum monthly salary rate may be subject to escalating changes throughout the calendar year to allow certain segments of the Ukrainian population (for example, senior citizens and certain government employees) to keep up with the spiraling cost of living.

The Ukrainian Labor Code also requires additional compensation for overtime, holidays and nighttime work. For example, an employee is entitled to receive overtime payments in the amount of double such





employee's hourly rate for each hour worked overtime. Unfortunately, an employer, at its own discretion, cannot compensate employees for overtime by giving time off from work. In certain cases, an employee is entitled to choose either monetary compensation or a day off for work during weekends or official holidays.

Employment Agreements and Contracts

The Labor Code differentiates labor “agreements” from labor “contracts”, which can be concluded with employees depending on their position in the company. While labor agreements are general agreements for all staff members that must strictly comply with the Labor Code, labor contracts may be concluded with so-called “high-level staff members” and can be more flexible for the employer.

Various employers, including wholly-owned foreign subsidiaries and representative offices, utilize so-called “labor contracts” for their high-level staff as their preferred form of labor agreements because only a “labor contract” may contain provisions in addition to those contained in the Labor Code, including employment period, specific rights and obligations, and employment benefits.

Importantly, the law allows the parties to include into labor contracts a wide variety of practical reasons for termination, such as disclosure of confidential information, harmful or competitive actions toward the employer, use of company property for personal benefit, etc., which are not specifically provided in the Labor Code. On the other hand, dismissals cannot be arbitrary (e.g., for pregnancy, age or personal reasons/preferences unrelated to employment).

Thus, the labor contract affords the employer the widest latitude in instituting a labor relationship, because all these additional rights and obligations are enforceable simply as contractual agreements of the parties. However, Ukrainian legislation provides one limitation: the provisions of labor agreements should not in any way deteriorate the status of hired



workers of enterprises in comparison to the minimum conditions stipulated by effective Ukrainian labor legislation.

The Ukrainian Labor Code requires that all employees must at least be hired on the basis of a written labor agreement, which may be for a definite or indefinite term or for a specific assignment. Importantly, the Labor Code allow an employer to retain an employee for a probationary period of up to three months, depending on the classification of the employee under Ukrainian law. Generally, specialists, managers, technicians, etc. may have a probationary period of up to 3 months, but lower, non-specialist staff may only have a probation period of up to one month. Once the probation period expires, however, the employee is entitled to all rights and protections under Ukrainian labor law.

Several categories of employees may not be subjected to a probationary period, including: persons under the age of 18; young workers that finished vocational training schools; young specialists that graduated from institutions of higher learning; persons discharged from military or alternative (non- military) service; and disabled persons referred to work in accordance with the recommendation of a medical and social expert examination. The following individuals also may not be subjected to a probationary period: elected officials (directors, CEOs, CFOs, etc.), individuals hired on the basis of competitions for vacant positions, individuals hired after undergoing training, pregnant women, single mothers with a child of up to 14 or a disabled child, employees hired on the basis of a fixed-term employment agreement with a term of less than 12 months, employees hired for temporary or seasonal work, and internally transferred employees. A probationary period may not be established upon transfer for work in a different locality or at a different enterprise, organization or institution, as well as in other cases provided for by law.

Probationary periods do not include days when the employee has not actually worked, regardless of the reason for not working (e.g., sick leaves). If the employer believes that the employee is not qualified to continue to work in his/her position after the probationary period, the

employer may dismiss the employee during the probationary period in writing three days prior to the desired date of dismissal. However, the employee retains the right to appeal the employer's decision via the normal labor dispute procedure.

The basic full-time employment conditions provided by the Code, are as follows: the work week must not exceed 40 hours. In a 40-hour week, employees work for five days. Although an employee may work a six-day week, he may not work more than seven hours a day.

The Labor Code strictly limits and regulates overtime work for employees in Ukraine. An employee may only work a maximum of 4 hours of overtime over a two-day period or 120 hours in a one-year period. If an employee works overtime, the employer must pay him/her at double their salary rate. Employees also have a minimum of 24 calendar days as paid vacation. In addition to these paid vacations, employees are not permitted to work on any of Ukraine's 11 official holidays, such as Orthodox Christmas and Ukrainian Independence Day.

When entering into a labor agreement, a Ukrainian citizen must produce his or her passport or other identification document, a so-called "labor book" and, in cases required by law, a certificate of education (field of specialty, qualification), health and/or other documents. A labor agreement is deemed concluded and executed when the owner (employer) issues an order regarding the hiring of an employee and notifies the corresponding state fiscal authority.

An employee's labor book evidences an employee's employment record and must be submitted by an employee to an employer upon hiring. The instructions on the procedure for maintaining labor books at enterprises, institutions and organizations, are described in Order No. 58 of the Ministry of Labor, the Ministry of Justice and the Ministry of Social Protection of the Population of Ukraine on July 29, 1993.



Further, Resolution No. 301 of the Cabinet of Ministers “On Labor Books of Employees,” dated April 27, 1993, requires all enterprises, institutions and organizations to keep their employees’ labor books at their location as any document of strict accountability (i.e., financial, reporting or accounting documents specifically determined by Ukrainian legislation). An employer must return an employee’s labor book after their labor relations have concluded with the appropriate entries, stamps and signatures as required by Order No. 58.

In July of 2018, the Ukrainian government introduced amendments to Resolution No. 301, which finally permit representative offices of foreign business entities to independently maintain and make entries into their employees’ labor books. These amendments potentially eliminate the role of the infamous General Directorate for Serviceing of Foreign Representative Offices (GDIP) in the lives of representative offices. Nevertheless, many representative offices may still choose to use GDIP’s labor book and other services, such as payroll services, accounting services, etc., if they do not wish to have their own accountant department or external accountants.

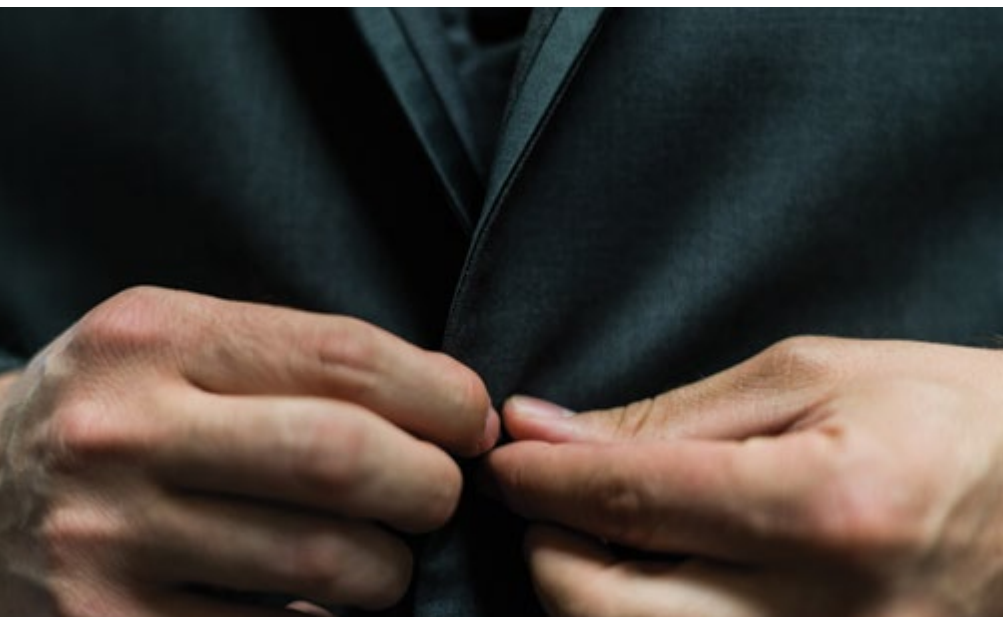
Part-time Employees

The Labor Code governs relations between employers and permanent or temporary employees. As with any labor relations in Ukraine, the Labor Code provides that temporary employees enjoy the same basic labor rights as permanent employees in relation to discriminatory policies of employers. Further, the Labor Code states that any labor agreements, which worsen labor conditions in comparison with Ukrainian labor legislation, shall be deemed invalid.

In accordance with the Labor Code, an employee has the right to enter into a labor agreement with several enterprises at the same time, unless otherwise provided by Ukrainian legislation, a collective agreement or an individual agreement between the relevant parties. Part-time work is the performance by an employee, in addition to such employee’s principal

work, of regularly paid work during an employee's free time from principal work for another or the same employer (or for a private entrepreneur). In order to work part-time, an employee does not need permission from its principal place of work. However, certain categories of employees are not allowed to perform part-time work in addition to their principal work.

The Labor Code stipulates that part-time employees receive their salary for actually performed work. Part-time employees are entitled to annual leave at their additional place of work at the same time as at their principal place of work. Part-time employees may be dismissed according to general rules set forth in the Labor Code. Moreover, according to the Labor Code, a part-time employee's labor agreement may be terminated at the employer's initiative upon the hiring of a full-time employee to take over such part-time employee's position. Please note that contractor or consultancy agreements under civil law are not considered part-time employment agreements under labor legislation. Finally, labor disputes involving part-time employees are resolved pursuant to the general procedure for resolving labor disputes.





Independent Contractors

Ukrainian legislation distinguishes employees (whether temporary or permanent) from contractors and consultants based on the type of agreement concluded. If an individual concludes a labor contract with an employer, such individual may be considered an employee by law, whereas if an individual concludes a civil law contract, such as a service or consulting contract, with a customer/client, such individual will be deemed an independent contractor, and not an employee.

In contrast to labor agreements, civil law agreements typically contemplate hiring a worker to complete a specific task, work or service at his or her own risk (i.e., free lance workers). As elsewhere in the world, the independent contractor maintains relative independence in performing the designated task and typically receives payment upon completion of work or services.

Many international companies prefer using the services of independent Ukrainian contractors in certain situations, including sales representatives, direct sellers, various consultants (including accountants and lawyers), computer programmers and software designers, customs brokers, among others.

Ukrainian independent contractors typically include legal entities or individuals who are officially registered as “subjects of entrepreneurial activities.” Contractors are hired by a company on the basis of a civil contract for a specific task at a specific cost. Since independent contractors and consultants are not considered employees, they are independently responsible for paying their own personal income tax (including profit tax) and do not receive the benefits of social security payments, medical insurance, mobile phones, etc. from employers.

A civil law agreement should not provide that an employee shall work for a fixed salary, but that an individual should provide a specific type and volume of work for a remuneration agreed upon on a case-by-case or per order basis. Therefore, civil law agreements are concluded for the performance of concrete works with a specific performance result and term that terminate upon completion of such works or one-time projects.

Below is a basic guideline about the differences between labor and civil law agreements:

Labor Law	Contract Law
Applicable Law	
The Labor Code of Ukraine and other sub-legislative acts and regulations passed in accordance with the Labor Code	The Civil Code of Ukraine and other laws and sub-legislative acts which regulate civil relations
Parties to the Agreement	
Employer and employee	Customer/client and contractor (independent contractor, service provider, freelancer, etc.)
Agreement Terms and Conditions	
1. The minimum/maximum quality and volume of performed works is found in the definitions of professions, specialties, qualifications or positions set forth in the tariff and qualification reference guide (i.e., if you are a lawyer, your employer cannot require you to perform medical procedures).	1. The contractor has the right, unless otherwise provided by agreement, to hire other contractors (sub-contractors) to perform work.
2. The employee must abide by the internal labor regulations of the employer and the employer's higher officers. The employee works according to a specific work schedule or regime established by the employer.	2. The rules and norms of labor legislation and internal labor regulations do not apply. For example, a contractor is not subject to strict working hours and allowable breaks, but can be requested to perform works/ services during certain hours (e.g., the customer's regular business hours).
3. The employee has the right to certain guarantees, privileges, compensations, etc. provided by labor legislation (paid vacations, medical leaves, etc.).	3. The contractor does not have the right to any guarantees, privileges and compensations provided by labor legislation (paid vacations, medical leaves, etc.). Expenses may be reimbursed by the customer upon provision of receipts.
4. The workplace is created by the employer who ensures all labor conditions required for performance of the employee's labor agreement (contract) and duties.	4. The contractor performs work at its own risk and independently organizes the performance of work ordered by the customer.
5. The employer and employee may agree upon a trial (probationary) period.	5. The contractor and the customer agree upon a start and finish of the term for performance of work by the contractor pursuant to a personal or agreed upon work schedule based on the contractor's current abilities.

With regard to the payment for work under a civil law agreement, Article 854 of the Civil Code provides that if a contractor agreement does not provide for advance payment for the performance of work or payment in increments or on an installment basis, then the customer must pay the contractual price after the final stage of work, provided that such work is completed in the proper manner (quality) and within the agreed upon term or, upon agreement of the parties, ahead of schedule. The work result is customarily set forth in a transfer-acceptance act of works or services, which serves as the basis for payment of the contractor's fee. At the same time, the contractor has the right to demand payment in advance only if advance payment is provided in the contractor agreement (for example, for the purchase of materials necessary for performance of the specific volume of work, etc.).

In conclusion, when a company enters into civil law agreements for the provision of works or services: (i) with one and the same individual, (ii) under a monthly invoice (transfer-acceptance act) which covers one and the same works and/or services, (iii) for one and the same monthly remuneration (or even for varying amounts), (iv) with the provision of instruments, materials and equipment for performing works and/or services (i.e., creation of a workplace), and (v) all invoices and additional agreements are similar and executed like "carbon copies", then such civil agreements are more susceptible to scrutiny by the controlling authorities, as they basically contain the terms and conditions essential under labor agreements with individuals.

Leave of Absence

All issues regarding leaves, including parental, maternity and other leaves, are governed by the Ukrainian Constitution (Article 45), the Law of Ukraine "On Leaves," and the Labor Code. The Law "On Leaves" establishes five basic types of leaves, including (i) basic and additional annual leaves, (ii) leave in connection with education or athletic events, (iii) sabbatical, (iv) social leave (maternity, parental, etc.), and (v) unpaid leave.

Below we briefly discuss annual, maternity, parental and unpaid leave of absence.

- **Annual leave**

According to Articles 74 and 75 of the Labor Code, Ukrainian citizens working in enterprises, organizations or institutions, regardless of their ownership form and type of activity, as well as those working under a labor agreement with a natural person (individual), are entitled to an annual (basic and additional) leave without sacrificing their position and salary. Employees are entitled to basic annual leave of no less than 24 calendar days for each year of service (the basic annual leave is 31 calendar days for those under 18). In special cases provided by Ukrainian legislation, employees working in hazardous and difficult conditions or working in certain types of labor are entitled to additional annual leave in accordance with specific Ukrainian legislative acts.

Article 79 of the Labor Code provides that employees, together with their employers or the authorized representatives thereof, develop a schedule of annual leave. An employee's leave schedule must be coordinated with his or her employer in such a manner that the interests of both parties are taken into account. Please note that an employee must be notified of the commencement date of his or her leave no later than 2 weeks from the date agreed upon in the leave schedule. Employees must receive their salary for their entire annual leave time no later than 3 days before commencement of leave.

Significantly, sick and maternity leaves are not included into annual leaves, provided that such leaves are evidenced by properly executed medical documents.

Significantly, sick and maternity leaves are not included into annual leaves, provided that such leaves are evidenced by properly executed medical documents.

- **Maternity leave**

Pursuant to a duly executed medical conclusion of pregnancy, females are entitled to paid maternity leave, which consists of 70 calendar days



prior to delivery and 56 calendar days as of the date of delivery. In case of delivery of two or more children, a female is entitled to 70 calendar days of leave after delivery. Notably, if a female adopts a child directly from a delivery ward, then such female is entitled to 56 days of paid maternity as of the date of adoption (70 calendar days upon the adoption of two or more children).

• **Parental leave**

The Law “On Leaves” provides that upon completion of maternity leave, if a female so desires, she may take a leave to care for her child until such child reaches the age of three. An employer, at its own expense, may grant to mothers partially paid leave or unpaid leave for a longer period of time. Such leave may also be partially or fully used by a child’s father, grandparents or any other relative, who in fact is taking care of such child, or by persons who adopted a child.

A working mother, who has two or more children of less than 15 years of age or a disabled child, as well as single parents (or in case of lengthy illness of one parent), adoptive parents and guardians, may, upon request, receive an additional paid leave of 10 calendar days. In case of substantiated necessity, this additional leave may be increased up to 17 calendar days.

• **Unpaid leave**

Employees are entitled to take a leave without pay in the following cases and for the following terms:

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1. mothers or fathers, raising children without a mother (including cases when a mother is undergoing lengthy treatment in a medical institution), with two or more children under the age of 15 or a handicapped child: up to 14 calendar days annually;
 2. husbands and wives, who are taking post-birth leave: up to 14 calendar days;

3. mothers and other relevant individuals (relatives, husbands, adoptive and foster parents, etc.) in case a child needs nursing or care at home: for the duration determined in the relevant medical findings, but only up until the child reaches the age of six (or the age of sixteen in diabetes type I cases or the age of eighteen for certain disabled children). Additional leave without pay may be taken by a parent, relative and/or guardian in case of a declared quarantine on children up to 14 years of age;
4. war veterans and individuals with special privileges from the country, and individuals to which the Law “On the Status of War Veterans and Guarantees of their Social Protection” applies: up to 14 calendar days annually;
5. individuals with special labor-based privileges from the country: up to 21 calendar days annually;
6. pensioners and disabled individuals of the 3rd group: up to 30 calendar days annually;
7. disabled individuals of the 1st and 2nd groups: up to 60 calendar days annually;
8. individuals entering into marriage: up to 10 calendar days;
9. employees, in case of the death of blood relatives or relatives by marriage (including husband, wife, parents, in-laws, child (stepchild), brothers and sisters): up to 7 calendar days without taking into account the time necessary for traveling to and from the place of burial; in case of the death of other relatives: up to 3 calendar days without taking into account the time necessary for traveling to and from the place of burial;
10. employees caring for sick blood relatives or relatives by marriage, who need permanent, external care according to the conclusion of a medical institution: the duration determined in the medical conclusion, but for no more than 30 calendar days;

11. employees, for completion of sanatorium-spa treatment: the duration determined in a relevant medical conclusion;
12. employees permitted to take entrance examinations in higher educational institutions: up to 15 calendar days without taking into account the time necessary for traveling to and from the relevant study institution;
13. employees permitted to take entrance examinations for post-graduate studies, whether or not such employees continue normal work, as well as employees in post-graduate studies while continuing normal work and successfully fulfilling their individual plan of preparation: for the duration necessary for traveling to and from the higher learning or scientific institution;
14. persons holding more than one job: for the period until the end of leave in their principal place of work;
15. veterans of labor (individuals working a minimum of 25 years): up to 14 calendar days annually;
16. employees, who did not use their annual basic or additional leave from a former work place in full or in part and who received monetary compensation for such: up to 24 calendar days in the first year of work in their current enterprise before they have uninterruptedly worked 6 months;
17. employees with children up to 18 years of age, who are entering an educational institution in another city, town, etc.: 12 calendar days without taking into account the time necessary to travel to and from such educational institution;
18. employees studying in post-graduate school while continuing normal work are entitled to one day off from work per week, if they so desire, without pay for the duration of their fourth year of studies. Moreover, an employee and employer (or its authorized body) may agree upon a leave without pay due to

family circumstances or other reasons, but for no more than 15 calendar days in a year;

19. employees who are located in areas where antiterrorist operations are being conducted (i.e., the Donetsk and Luhansk Regions in 2018) are entitled to unpaid leave for the period of antiterrorist operations in the corresponding locality, taking into account the time necessary to return to the workplace, but for no more than seven calendar days after the decision has been made to terminate antiterrorist operations.

Termination of Employment

The procedure for terminating Ukrainian employees embodies many of the socialist ideas that existed before Ukrainian independence, when the average employee's right to work was guaranteed by extensive legislation. To this day, the courts lean heavily in favor of the employee in dismissal court claims.





At first glance, this system of worker protection seems overwhelming to foreign businesses who wish to streamline their operations in light of the existing economic situation. However, careful adherence to the rules and prudent legal preparations for effective termination makes the process of dismissing employees almost as simple as the hiring of such employees.

Generally, employment termination can be either amicable (mutual consent) or unilateral. In the first instance, the Labor Code provides that parties to a labor agreement may agree to terminate their contractual relations for many reasons, including the following:

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1. mutual consent of the parties;
 2. expiration of the labor agreement (contract), except in cases when labor relations actually continue and neither party has any objections as to termination;
 3. military draft or recruitment of an employee;
 4. termination of the labor agreement (contract) at the initiative of the employee, the owner, a body authorized thereby, a trade union, several trade unions or other bodies which are authorized to represent the workers' collective;
 5. in case the employee agrees to be transferred to another company or affiliate;
 6. refusal of the employee to be reassigned to another location of the enterprise, institution or organization, or the employee's refusal to work due to significant changes in labor conditions;
 7. court order for imprisonment of the employee or other sentence which excludes the possibility to perform his/her employment duties;
 8. conclusion of a labor agreement (contract) in contradiction to the requirements of the Law "On Measures Against and Prevention of

- Corruption”, established for individuals who resigned or otherwise terminated activity connected with the performance of government functions within one year from the date of termination;
9. on the basis of grounds established by the Law of Ukraine “On Lustration” (“government cleansing”);
 10. any other grounds provided by an agreement between the employer and the employee or by law.
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The last point allows the parties to a labor contract (see differentiation between a labor agreement and a labor contract above) to include provisions regulating termination in addition to those already contained in the Labor Code. Regardless of the provisions of a labor contract, however, an employer may not dismiss pregnant women and other specific categories of women, except in cases of total liquidation of an enterprise, institution or organization.

In case of unilateral termination, Ukrainian law requires an employer to take certain steps to legally dismiss an employee that can prove to be time-consuming. The reasons, and hence, the procedure for the dismissal itself, can vary from case to case. Still, it all begins with paragraph 2.3 of the Instruction “On the Procedure for Maintaining Labor Books,” as confirmed by joint Decree No. 58 of the Ministry of Labor, the Ministry of Justice and the Ministry of Social Protection, dated July 29, 1993. This documents provides for so-called “dismissal notes,” which describe the date and reason for dismissal to be entered into an employee’s labor book with a reference to the provision of the law used as the ground for dismissal. Such dismissal notes must be inscribed using the terminology contained in relevant provisions of the labor laws.

Moreover, any employee subject to dismissal must be personally notified at least two (2) months prior to such dismissal. Such notice consists



of “familiarizing” the employee with the order of dismissal, which the employee must personally sign and date.

Additionally, the Labor Code allows employers to unilaterally dismiss an employee only in the following cases:

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1. changes in production and labor structure, including liquidation, restructuring or changing of the company profile accompanied by staff reduction;
 2. inability of the employee to carry out his/her responsibilities due to insufficient qualifications or health-related reasons;
 3. an employee’s failure, on a regular basis, to perform his/her obligations as provided by labor agreement and the rules of internal procedure, in case such employee has previously been cited for disciplinary or civil penalties;
 4. truancy, including absence from work without reason for more than three (3) hours during any business day;
 5. absence from work for more than four (4) months consecutively due to the employee’s temporary disability;
 6. reinstatement of an employee who previously held the relevant position (i.e., such reinstated employee was on temporary leave for known reasons);
 7. appearance at work under the influence of alcohol, narcotics or any other toxic substances;
 8. theft (including pilferage) of the employer’s property as determined by a court of law or by resolution of the investigative body authorized to carry out administrative or civil penalties; or
 9. military draft or mobilization of an owner during an exceptional (emergency) period.
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Note that employees may be terminated for reasons described in points (1), (2) or (6) only if they refuse to be transferred to other jobs. However, it is expressly prohibited to dismiss employees who are on vacation or temporarily disabled, except for cases provided in point (5) above. Importantly, these limitations do not apply in case of a company's liquidation.

The Labor Code provides that the dismissed employee must be paid any monies due to him or her by the employer on the day of dismissal. If the employee is absent from work on the final day, the sum must be paid no later than the next day after the employee makes demand for payment. If the employer does not make timely payment, the employer must pay the employee's average salary for the entire time of the delay until final settlement is actually made.

According to the Labor Code, employees dismissed due to inability to carry out responsibilities, and in connection with the reinstatement of an employee who previously held the relevant position, must be paid a severance payment in an amount of no less than the employee's average monthly salary. The term average monthly salary is used to protect individuals whose salaries vary from month to month over the course of a year. Therefore, if the salary is fixed, the average monthly salary will be equivalent to the employee's monthly salary.

In case a labor agreement is terminated due to military draft, recruitment or alternative service, an employee must be paid his or her average salary for 2 months. If a labor agreement is terminated because an owner or its authorized body violates labor legislation or a collective or labor agreement, the relevant employee must receive severance pay required by a collective agreement, but no less than his or her average salary for 3 months. In case of the termination of the authorities of officials, including due to their repeat violation of laws in the sphere of licensing, permits or provision of certain administrative services involving licenses, permits and/or metrology, the severance payment may be no less than 6 average monthly salaries.



Finally, terminations of pregnant women or single mothers with children up to 14 years of age are practically impossible to achieve without encountering serious legal problems. For instance, the Labor Code expressly prohibits dismissal of pregnant women and women with children up to three years of age, except in case of an employer's complete liquidation. Moreover, other women with children fall into a special category, granting them protection, including (a) single (unmarried) mothers with a child up to 14 years old, (b) mothers with a child under three years old, and (c) pregnant women.

Redundancy

In response to Ukraine's turbulent economic climate, many foreign companies find themselves in need of reducing their workforce. Understandably, some employees often do not wish to leave voluntarily and may create uncomfortable situations at the workplace. Although dismissing employees can become an emotionally charged undertaking, Ukrainian law provides a clear procedure for such terminations due to company downsizing.

In Ukraine, redundancy is permitted in case of changes in the production or labor organization of a company, including mergers and acquisitions. The Labor Code provides that an employer must personally give an employee 2 months notice before such employee is made redundant. Simultaneously with the notice, the employer must offer the employee alternative work. If no work is available in the employer's company or if the employee refuses alternative work, the employee may independently seek assistance at the State Employment Center. In the case of mass dismissals, the employer must notify the State Employment Center upon making employees redundant, indicating the employees' profession, field of specialty, qualifications and salary.

Note that Ukrainian legislation sets forth a priority list for dismissal of redundant employees. In case of staff reduction due to changes in the production and labor structure, the following persons will have preferential rights to continue their work with the employer:

- 1) married persons with two or more dependants;
- 2) persons whose families do not have other members with independent salaries;
- 3) employees with a long tenure of experience at the enterprise subject to production and labor re-organization;
- 4) employees who simultaneously work and study in higher or secondary scientific institutions;
- 5) military veterans, invalids of wars and individuals subject to the Law of Ukraine “On the Status of Veterans of War, Guarantees and Social Securities”;
- 6) authors of inventions, utility models, industrial designs and streamlining (labor efficiency) proposals;
- 7) employees from the enterprise who received work-related injuries or sicknesses;
- 8) persons deported from Ukraine within 5 years of the date of their return to their permanent residence in Ukraine;
- 9) employees, who have formerly served in the military or have served in other alternative (non-military) organizations, within two years from their completion of service;
- 10) employees with less than three years until pension age who will be entitled to pension payments upon reaching pension age; and
- 11) other individuals who have such rights in accordance with special legislation.

The ultimate factor in identifying who will continue working in the company after reducing the workforce, however, is the qualification (experience) of the employee. Therefore, the employer (owner) of an enterprise is entitled to make relevant substitutions within similar professions and positions. In other words, the employer may transfer a more qualified employee whose position has been cancelled, upon



such employee's consent, to another lower position and at the same time dismiss the lesser qualified employee from that position.

If an employee's reason for dismissal is due to changes in the production and labor structure (redundancy), the employer must pay a severance payment in an amount no less than the employee's average monthly salary. In addition, the employer should pay the dismissed employee's average monthly salary until the employee finds other work, but for no more than a period of three months.

Special Case Terminations

Ukrainian labor legislation allows an employer to terminate a labor contract prior to the expiration date in the following "special" cases, such as one-time gross violations and crimes of moral turpitude by a director, deputy director, chief accountant and financial officers, including the following reasons:

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1. if a director, deputy director or chief accountant of a company (branch, representative office, division or other separate unit) fails to fulfill his/her labor obligations;
 2. if the acts of a director lead to the untimely payment of salaries or the payment of salaries in an amount lower than the minimum monthly salary established by law;
 3. if an employee who directly handles cash or material assets commits an act, which provides grounds for distrust towards such employee on the part of the employer (owner); or
 4. if an employee "performing educator functions" (i.e. instructors or teachers who work at a company or other workplace) commits an immoral indiscretion which is incompatible with the further performance of his/her functions;

5. if an employee is directly subordinate to a close relative in violation of the Law “Measures Against and Prevention of Corruption”;
 6. in case of termination of an official’s authorities due to repeat violations in the sphere of licensing, special permits and metrological services (control over weight and measurement of the accuracy of meters and appliances) – with six months of mandatory severance pay.
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In the aforementioned cases, employment termination requires specific proof of gross violations or immoral acts. Such proof may be difficult to substantiate because of subjective opinions about moral values, loyalty towards the victim/perpetrator, etc. The above “special” cases rarely succeed in terminating employment, except in certain professions that require a higher sense of moral behavior, such as teachers, instructors or trainers. In such cases, evidence of moral turpitude is easier to establish.

Employment Litigation

Litigation may arise whenever an employee’s or employer’s constitutional rights or rights under the Labor Code are violated. The grounds for litigation are numerous, including discrimination of a citizen’s equal right to employment (age and sex discrimination), wrongful dismissal due to unfounded or illegal grounds, unsubstantiated change in labor conditions, breach of labor agreement, etc.

Individual disputes are heard by either a labor dispute commission or a court of general jurisdiction (regional, district, city district, city courts, etc.). In almost all cases, a labor dispute commission has the competence at the lowest level to review a dispute. Decisions of a labor commission may be appealed to a court of general jurisdiction.



The Labor Code sets forth the cases when a court of general jurisdiction has jurisdiction at the lowest level over a labor dispute, including, but not limited to, the following cases:

- (i) when no labor commission is appointed at an enterprise, institution or organization;
 - (ii) when a labor dispute is initiated by a director or chief accountant;
 - (iii) when a labor dispute is initiated by an owner and involves compensation of damages caused by an employee.
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Courts of general jurisdiction will also consider disputes involving a refusal to hire certain categories of employees, for example, pregnant women or pensioners.

Consequences of Wrongful Dismissal

In case of wrongful dismissal, the only way for a disgruntled employee, who believes his/her rights have been violated, to fight back is by initiating legal proceedings against the employer. Because of the lingering Soviet mentality, where all persons were guaranteed a right of unconditional employment, many Ukrainians cling to the illusion that they cannot be fired at will. As a result, many employees tend to submit labor-related disputes regardless of the existence of any justifiable labor disputes.

As in the Soviet system, the employee may file a labor dispute within one month from the day he or she receives a copy of the dismissal order or the labor book. If no entry regarding dismissal appears in the labor book, then a claim may be filed within 3 months of the day when the employee should have become aware of the violation of his rights. Should the employee fail to file a claim within the above time frames due to substantiated reasons, such terms may be extended by the court or

labor commission. Notably, there is no statute of limitation on claims for unlawfully withheld salary payments.

In the meantime, the employer/owner must pay the average salary of the employee for the entire period of involuntary truancy, but for no longer than one year. If the legal proceedings continue for over a year, however, then the employer may be ordered to pay the average salary of the employee for the entire period of the employee's involuntary truancy without placing a limit on such period. In addition, the employer may be forced to pay the employee's average salary if inadequate reasons for the dismissal were entered into the employee's labor book that prevented the employee from finding gainful re-employment.

The most recent court precedence in 2018 shows that courts still side in favor of employees and do not limit an employee's award to lost wages decreased by any wages currently earned by the employee at another job. In other words, courts still can award an employee his/her full salary amount for time missed due to unlawful dismissal, plus moral damages with no limited amount of recovery.

Discrimination in the Workplace

Article 24 of the Ukrainian Constitution guarantees all citizens equal constitutional rights and liberties, as well as equal treatment under law. According to Article 24, there shall be no privileges, limitations or restrictions based on race; skin color; political, religious and other beliefs; sex; ethnical and social origin; ownership status; place of residence; language or any other ground.

Further, Article 24 guarantees equal rights for men and women by providing equal opportunities with respect to socio-political and cultural activities, the receipt of an education and professional training, and work and compensation for such work. Equal opportunities for men and women are also guaranteed by way of special measures with respect to labor, safety and healthcare for women and pension benefits for



women, the creation of an environment allowing women to combine work and motherhood, legal protection and material and moral support of motherhood and childhood, including the provision of paid leaves and other benefits to pregnant women and mothers.

Workers Compensation

The Labor Code provides that assistance in connection with proven temporary disability is paid in an amount of up to an employee's full salary, depending on the circumstances. In case of illness, social insurance assistance is paid until the employee's ability to work is restored or such employee is declared permanently disabled.

The Law of Ukraine No. 1106-XIV "On Mandatory State Social Insurance," dated September 23, 1999, regulates the legal, organizational and financial grounds for mandatory state social insurance payments to citizens in case of a temporary inability to work, among other issues. According to the said Law, an employee is entitled to social insurance assistance due to



temporary disability, including any illness, on the basis of a temporary disability certificate issued by a certified medical institution.

Labor Unions and Workers' Collective

Many production enterprises, especially privatized plants with redundant employees, involve specific problems related to trade unions. According to the Labor Code, the workers' collective of a company is composed of all citizens, who participate in the activity of such enterprise via their labor efforts pursuant to labor agreements (contracts) or any other form regulating labor relations between an employee and a company.

With reference to trade unions, according to Article 36 of the Ukrainian Constitution, Ukrainian citizens have the right to unite into political parties and other public organizations in order to protect their rights and liberties and satisfy their political, economic, social or other interests. Article 36 also entitles citizens to form trade unions in order to protect their labor and socio-economic rights and interests.

Relations between owners (employers) and employees, as a rule, are regulated on the basis of a collective agreement. Collective agreements must be concluded in any company which uses hired labor between the owner (or its authorized body) and the workers' collective (or its trade union or other authorized body) at the request of any employee(s).

If a trade union functions in the company, then dismissals may in many cases only take place with the consent of the trade union (except in cases of company liquidation). The trade union will review the substantiations of the owner of the company regarding the dismissal of a trade union member within a 15-day period and provide a written report informing the owner of its decision within three days after taking such decision. The employee has the right to be present during the trade union's review and invite a legal representative. A trade union's refusal to grant consent must be based on concrete legal grounds; otherwise, the owner/employer has the right to dismiss the employee without the trade union's consent.



The owner has the right to dismiss an employee no later than one month after receiving consent from the trade union. If an employee files suit against an owner for wrongful dismissal, and it is discovered that the owner acted without the consent of the trade union, the court must suspend the dismissal case and ask the trade union's permission to proceed with the dismissal. If the trade union still refuses to give its consent to the employee's dismissal, the court will review the dismissal case on its merits.

If there is a dispute regarding the dismissal of an employee in the case of changes in the enterprise's production and labor structure, (i.e., liquidation, restructuring or changing of profile), the court will inquire as to whether the company has actually been "restructured" or any other changes have taken place, and if so, whether such changes necessitated termination of the workforce. The court will also determine whether the employee was wrongfully dismissed in violation of his rights to remain at work.

When it comes to hearing collective labor disputes, the Law of Ukraine No. 137/98-VR "On the Procedure for Resolving Collective Labor Disputes (Conflicts)," dated March 3, 1998, determines the legal and organizational grounds. For this purpose, the President of Ukraine issued Decree No. 1258/98, dated November 17, 1998, which established the National Service of Mediation and Conciliation (the "NSMC") and approved its regulations.

The NSMC is a permanently active state body, which facilitates the resolution of collective labor disputes. The NSMC acts pursuant to the Ukrainian Constitution, the Law of Ukraine "On the Procedure for Resolving Collective Labor Disputes (Conflicts) and other laws and regulations of Ukraine, the President and the Cabinet of Ministers. On November 16, 2000, the NSMC issued Order No. 96, which approved the Instructions on the procedure for preparing and filing with courts an application on the resolution of collective labor disputes (conflicts). These Instructions have been redrafted since 2008 and now include two separate regulations for resolving disputes by a labor commission or arbitration.

Procedurally, collective labor disputes, depending on the subject matter of the dispute, are either submitted to a conciliation commission or labor arbitration panel. In case the parties to a labor dispute (conflict) are unable to resolve their dispute, the case may be further submitted to a court of general jurisdiction.

Employee Health and Safety

The Law of Ukraine No. 2694-XII “On Labor Safety,” dated October 14, 1992 (as further amended), governs health and safety issues related to the workplace. This Law covers labor safety issues for employees, as well as contractors, consultants, visitors, etc., and is aimed at eliminating risks to the health and safety of the said persons. Pursuant to the requirements of the Law “On Labor Safety,” the Ministry of Labor and Social Policies of Ukraine, together with the Committee on Supervising Labor Safety Issues, approved the Regulations on developing labor safety instructions. On the basis of the said Regulations, all enterprises, organizations and institutions must approve their own labor safety instructions. All employees, contractors, consultants, etc., must comply with the instructions developed for the relevant workplace. For home-based employees, the employer is still obliged to inspect the employees’ work stations and conditions to make sure that they comply with the labor safety regulations.

The Law “On Labor Safety” applies to contractors, consultants, citizens, state workers, etc, who visit the workplaces of other enterprises, institutions and organizations. This law provides that an employer (owner) must compensate any damages incurred by other enterprises, citizens and the state on the general compensation principles provided by Ukrainian law in case such damages arise as a result of violations of labor safety requirements. Additionally, if an employer (owner) fails to comply with the labor safety requirements, such employer (owner) must pay social insurance contributions for injuries at work and professional diseases at higher rates (as established by the Cabinet of Ministers).



Socially-Protected and Disabled Individuals

The Law “On Employment of the Population” introduces several categories of individuals who enjoy additional guarantees for job placement. These categories include:

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1. one parent or guardian who supports a child of up to six years of age, or one parent or guardian without a spouse who supports a child of up to fourteen years of age or a handicapped child, or one parent or guardian without a spouse who supports a child born handicapped (regardless of age) and/or a group I handicapped individual (regardless of reason for handicap);
 2. orphans and children without parental support and individuals who have reached the age of fifteen and may, as an exception, be employed with a parent or guardian’s consent;
 3. individuals released from imprisonment or mandatory medical treatment;

4. youths who have finished or terminated studies in general, technical and higher educational institutions or who have been released from military service or alternative service (within six months after completion or termination of studies or service) and who are hired for the first time;
5. individuals who have ten or less years left prior to attaining pension rights according to Article 26 of the Law “On Mandatory State Pension Insurance” or disabled individuals who have not reached pension age according to Article 26 of the Law “On Mandatory State Pension Insurance”;
6. individuals who have reached fifteen years of age and who, with the consent of a parent or guardian, may be employed as an exception; and
7. certain participants in military actions.

Employers with over 20 employees must meet a quota of hiring 5% of the above individuals within their staff for the last calendar year. Employers are obliged to independently monitor and observe this quota and report their compliance on an annual basis. Failure to comply with the quota may lead to a penalty in the amount of 30 to 100 non-taxable minimum salaries of an individual (510 to 1,700 UAH). An additional fine in the amount of 2 minimum salaries may be applied in case of an unsubstantiated refusal to hire an individual from the above categories.

Irrespective of organizational form, every company is required to hire disabled individuals. The number of handicapped persons should constitute at least 4% of the average amount of the workforce of the company for one year. In cases where a company employs between 8 and 25 individuals, at least one handicapped person should be employed, unless otherwise provided by specific laws. Enterprises employing less than 8 persons are exempt from such quota. Employers that do not comply with the above rules are required to pay annual penalties,



which are calculated as the average annual salary of employees of that company for each workplace that should be but is not occupied by a disabled person. Failure to comply with the quotas for the employment of disabled persons may subject the employer to a significant fine.

Worktime Regulations

In general, according to the Labor Code, the working time for employees (part-time, full-time and temporary) cannot exceed 40 hours per week. The Labor Code provides a shortened work week for employees aged 18 years or younger, specifically, 36 hours per week for employees between the ages of 16 and 18, and 24 hours per week for employees between the ages of 15 and 16 (or 14 and 15 for students working during summer vacation). A shortened work week of 36 hours is established for employees working under unhealthy and hazardous working conditions.

Moreover, the Labor Code establishes either a five-day work week for employees (with two days off) or a six-day work week (with one day off). A six-day work week may be established if a five-day work week would not be expedient to business, taking into account the character of production and working conditions for employees. For six-day work weeks, the working hours for one day may not exceed 7 hours for a 40 hour work week, 6 hours for a 36 hour work week and 4 hours for a 24 hour work week. The Labor Code also establishes special rules for holidays, weekends, nighttime work, working in shifts, etc.

Please note that the above provisions of the Labor Code apply for employees only, and not for consultants and independent contractors, unless specifically provided otherwise.

Record Keeping and Regulatory Compliance

In addition to financial, corporate records and accounting documents, employers must maintain their employees' labor books (documents that

evidence an employee's employment record and which must be submitted by an employee to an employer upon hiring).

With reference to maintenance of personal data, relations connected with the receipt and processing of personal information in Ukraine are defined in the Ukrainian Constitution and in the Law "On Personal Data Protection". Moreover, issues related to the protection of an individual's character and business reputation are regulated by the Civil and Criminal Codes of Ukraine.

Ukrainian law does not require that employers register their employee databases with the state. However, other databases, such as client databases may need to be registered, depending on the sensitivity of the data being collected, stored, processed and/or transferred to third parties. There are still many conflicts, flaws and loopholes, which adversely affect the constitutional rights and liberties of Ukrainian citizens. However, the Law "On Personal Data Protection" was drafted in close compliance with European standards as far as liability for protection of personal data is concerned. As of September 2018, the Law "On Personal Data Protection" has not been updated or amended to correspond with the new EU General Data Protection Regulation (GDPR), which became effective in May of 2018. Nevertheless, due to Ukraine's EU cooperation obligations, we can expect to see amendments to the Law "On Personal Data Protection" to bring it into full compliance with the GDPR.

Severance Payment

In the event the need arises to terminate an employee, a severance agreement can provide an employer with a sense of finality and protection from potential claims a disgruntled terminated employee may have. A comprehensive severance agreement can be a highly effective alternative to protracted litigation in claims involving wrongful termination or other employment related issues.



Typically, a severance agreement will include the payment of a lump sum of money, as well as possible benefits ranging from insurance payments to references. Importantly, it will also include a waiver by the terminated employee of any potential future claims the employee may have against the employer.

In certain cases of dismissal, the Labor Code requires an employer to pay the employee a one-time severance payment in an amount no less than the employee's average monthly salary. These cases include the following:

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- (i) refusal to continue work in connection with a change of essential labor conditions;
 - (ii) changes in labor and production organization, including liquidation, reorganization, bankruptcy or changes in company profile, and redundancy;
 - (iii) inability to carry out responsibilities due to low qualification or health reasons; and
 - (iv) the reinstatement of an employee who previously held the relevant position (e.g., return of a mother from maternity leave).
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In the case of severance payment, "average monthly salary" is calculated proceeding from the total salaries paid during the last 2 months of the employee's actual work, plus additional payments such as bonuses, monetary incentives, etc., paid during this period. However, if the salary is fixed and no bonuses were paid, the average monthly salary will be equivalent to the employee's monthly salary.

In the event a labor agreement is terminated due to military draft, recruitment or alternative service, an employee must be paid a severance payment in the amount of 2 average monthly salaries. If a labor agreement is terminated because an owner or its authorized body violates labor legislation or a collective or labor agreement, the relevant employee must receive a severance pay required by such collective agreement, but no less than his or

her average salary for 3 months. In case an employer, at its own initiative, dismisses a director or other official due to termination of authorities, the severance pay may be no less than 6 average monthly salaries.

Please note that the legislation sets forth only the minimum requirements, and the employer and employee are free to agree upon a higher severance payment in a labor agreement. The minimum amount is usually used as a starting point for negotiations on mutual employment termination in difficult dismissal cases.

Temporary Staff

For the first time, the Law “On Employment of the Population” introduced the concept of outstaffing (i.e., hiring of staff for further work at other employers) or outsourcing into Ukrainian legislation by creating the possibility for “intermediary services in employment”. These services also include the search for employment or laborers and recruitment, including the search for Ukrainian employees for work abroad. Companies that hire employees for further work in Ukraine with other employers under labor arrangements must obtain a simple permit to provide their services, while companies that search for Ukrainian laborers for hire abroad must obtain a license to provide their services.

Personal Data Protection

The Law of Ukraine No. 2297-VI “On Personal Data Protection”, dated June 1, 2010 (hereinafter the “PDP Law”) came into force on January 1, 2011. It is based on the framework EU Directive 95/46/EC on the protection of individuals with regard to the processing of personal data and on the free movement of such data. Keep in mind that the EU’s GDPR came into effect in May of 2018 and, following the history of the initial law, we should soon see amendments which fall more in line with the streamlined and simplified data protection legislation from the EU

Nevertheless, the provisions are standard – the parties to personal data protection and their roles are as follows:

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1. Personal data subjects – natural persons whose personal data is processed;
 2. Owners of Personal Data (Personal Data Controllers) – natural persons or legal entities who/which determine the purpose of personal data processing and define the content of such data and processing procedure, unless otherwise established by law;
 3. Administrators of Personal Data (Personal Data Processors) – natural persons or legal entities who/which possess personal data or by law are granted the right to process such data on behalf of personal data controllers;
 4. Third parties – any party, except personal data subjects, controllers and processors and the Ukrainian Parliament Commissioner for Human Rights (Ombudsman), to whom personal data are transferred by a controller or processor of personal data.
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The law specifically applies to licensed doctors, lawyers and notaries as well as banks, insurance companies, employment agencies, law firms, discount card systems and other businesses that collect, register, accumulate, store, adapt, amend, use, distribute, transfer, sell or destroy personal data of Ukrainian citizens.

The current legislation requires that all steps in data collection, storage and processing, must, in the very least, have the explicit consent of the individual. This is not a novelty in Ukraine, as the Law of Ukraine No. 2657 “On Information”, dated October 2, 1992, required the consent of any individual before his/her information could be collected and processed in Ukraine and/or abroad. However, the legislation expands the consent requirement to include consent to the volume, purpose, content, destruction of and amendment to personal data. Pursuant to the current law, any data processed must be collected for a specific, lawful purpose and must be transparent, accurate and kept updated.

As in most countries, personal data in Ukraine may be effectuated without consent only in the interests of national security, human rights, protection of the individual in question's vital interests (until such time as consent may be given) and "economic welfare".

The collection of personal data related to race or ethnicity, political, religious or ideological conviction, membership in a political party and professional unions, criminal charges or criminal convictions, or health or sex life is restricted. This does not apply in cases when personal data is processed upon the unambiguous consent of the data subject or when it is necessary to process personal data to exercise rights and perform obligations in labor relations according to law.

All individuals enjoy certain integral and inviolable rights, such as the right to know the location of databases containing their personal data and to access their personal data free of charge.

Data owners only need to notify the Ombudsman (Ukrainian Parliament Commission for Human Rights) regarding the processing of personal data which constitutes a "special risk for the rights and freedoms of personal data subjects".

Personal data may be transferred to foreign personal data processors on the condition that their countries have a sufficient level of data protection comparable to Directive 95/46/EC. Personal data may be transferred to a foreign personal data processor in case of (i) the data subject's explicit consent, (ii) the necessity to conclude or perform a transaction between the personal data owner and a third party in favor of the data subject, (iii) the necessity to protect the vital interests of the data subject, (iv) the necessity to protect public interests and the establishment, performance and protection of legal claims, and (v) the provision by the personal data owner of a guarantee to refrain from interference in the data subject's personal and family life.



Non-Compete and Non-Disclosure Obligations for Company Officers

In June 2018 the Law “On Limited and Additional Liability Companies” came into effect, bringing with it new obligations and liabilities for company officers (members of a company’s supervisory or management body). For a company director or members of the directorate, they must receive consent of the General Participants’ Meeting or Supervisory Board to:

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- 1) undertake commercial activity as a private entrepreneur in the sphere of the company’s activity;
 - 2) be a participant of a full (unlimited) partnership or participant of a limited partnership which acts in the same sphere of business as the company;
 - 3) be a member of the executive body or supervisory board of another business entity which acts in the same sphere of business as the company.
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Members of the Supervisory Board only need to receive consent of the General Meeting. Failure to obtain consent may be used as grounds to dismiss a company officer without payment of any compensation.

This new law also defines a “conflict of interests” as a conflict between a company officer’s obligation to act in good faith and reasonably in the interests of the company in full and such company officer’s private interests or the interests of his/her affiliated persons. Company officers must keep the General Participants Meeting updated on his/her list of affiliated persons (family members, relatives, business partners, etc.). A conflict of interests includes situations when a company officer and/or his/her affiliated persons receive payment from a third party to act or refrain from acting in connection with performance of his/her obligations for the company.

Company officials are obliged to notify the executive and/or supervisory body of a company within two days should a conflict of interests arise. The General Participants Meeting must also be notified within two days thereafter about such conflict of interest.

Company officers are prohibited from disclosing information which became known to them in connection with the performance of their official duties and is a commercial secret of the company or confidential, except when such disclosure is required by law. This prohibition remains effective by law during one year from the date of the termination of the agreement between the company officer and the company, unless the parties establish a longer or shorter term.

A breach by a company official of the obligations set forth above may be used as grounds for his/her immediate termination without payment of any additional compensation.



5. WORK PERMITS AND IMMIGRATION RULES FOR FOREIGNERS



Work Permits

Ukrainian immigration legislation and practice have always been a source of confusion and frustration amongst foreigners. For many years a near complete lack of enforcement helped to alleviate many of the problems, which foreigner visitors are starting to recently encounter. Today, Ukraine is closer to Europe than ever before, and for the first time since 1991, Ukrainian customs officials are beginning to strictly enforce the visitation rules for foreigners to periods of up to 90 days within a 180-day term, unless different rules are applicable to specific visas.

At the same time, in September of 2017 changes to several laws, including the Law “On Employment of the Population” and “The Legal Status of Foreigners and Stateless Persons”, among others, has expanded the list of foreigners who can receive work permits and temporary residency permits. One of the key categories of foreigners who can obtain work permits in Ukraine will be those who are registered as private entrepreneurs that hire employees.



The Law “On Employment of the Population” now provides six categories of foreigners affected by the aforementioned changes. Moreover, work permits will now be issued for a longer term for certain categories, providing them the opportunity to apply for 3-year work permits. The table below lists the categories of foreigners who require work permits and the maximum term of their work permits.

No.	Category	Work Permit Term
1.	High-paid professional foreigners (foreigners with a salary that equals at least 50 minimum monthly salaries – currently $3,723 \times 50 = 186,150$ UAH).	For the term of the labor agreement (contract), but no more than 3 years.
2.	Foreign investors (founders and/or participants and/or beneficiaries (controllers) of legal entities created in Ukraine.	
3.	University graduates from schools within the top 100 of globally rated universities set forth in the list issued by the Cabinet of Ministers of Ukraine.	
4.	Foreign employees in creative professions (foreigners who occupy positions which call for the creation of copyright and/or related rights objects as their principal duty).	For the term of the agreement (contract), but no more than 3 years.
5.	Foreign IT specialists (foreigners who occupy positions connected with the development and implementation of computer programming (operational systems, computer programs and their components, websites, online services) and cryptographic means of protecting information in legal entities carrying out computer programming as their principal type of business (under the National Classifier of Types of Economic Activity)	
6.	Foreign employees on business trips (foreigners sent by foreign employers to Ukraine for the performance of a specific volume of works (services) on the basis of agreements (contracts) concluded between Ukrainian and foreign business entities)	For the term of the agreement (contract), but no more than 3 years.
7.	Intra-corporate transferees (foreigners recognized as such according to Ukraine's schedule of specific commitments under the WTO's General Agreement on Trade in Services)	For the term of the decision of the foreign business entity regarding the transfer of a foreigner for work in Ukraine and the contract concluded between the foreigner and the foreign business entity on transfer for work in Ukraine.
8.	All other hired foreign workers (foreigners working under labor agreements (contracts) in Ukrainian business entities)	For the term of validity of the labor agreement (contract), but no more than one year.

Work permits can be prolonged an unlimited number of times, provided the legal grounds for their issuance remain valid.

The recent changes also introduced a salary floor for work permits issued to foreigners as follows:

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- no less than 5 minimum monthly salaries (currently 18,615 UAH) – foreigners hired for work in non-governmental organizations, charitable organizations and certain educational institutions;
 - no less than 10 minimum monthly salaries (currently 37,230 UAH) – for all other categories of hired workers.
-

Please note that the above rates do not apply to work permits received in categories 1-5 of the above table. Of course, for high-paid professionals the minimum salary of 50 minimum monthly salaries (currently 186,150 UAH) will still apply. These rates only apply to the salaries of foreigners who received or prolonged work permits after September 27, 2017.

The Law “On Employment of the Population” now sets forth the rules for issuing work permits to foreigners who concurrently work in other jobs. A foreigner may work in different positions with one or more employers, provided that the foreigner receives a work permit for each position. Highly paid professionals may work without an additional work permit in concurrent positions if the validity of his/her concurrent (secondary) labor agreement does not exceed the validity of his/her principal labor agreement.

The law also provides limitations regarding the performance of work by foreigners of the duties of a temporarily absent co-worker. Such parallel work is permitted only if it will last for no more than 60 calendar days within one calendar year.



The fee for issuance of a work permit is determined by Article 42 of the Law “On Employment of the Population”. The amount is tied to the amount of the minimum standard of living rate and the term for which the work permit is issued. Below are the current fees for a work permit:

No.	Term of work permit or prolongation term	Fee for issuance or prolongation of work permit
1.	From 1 to 3 years	Six minimum standard of living rates established by law as of January 1 st of the calendar year in which the work permit application documents are submitted by the employer (currently 10,572 UAH)
2.	From 6 months to one year (inclusive)	Four minimum standard of living rates established by law as of January 1 st of the calendar year in which the work permit application documents are submitted by the employer (currently 7,048 UAH)
3.	Up to 6 months	Two minimum standard of living rates established by law as of January 1 st of the calendar year in which the work permit application documents are submitted by the employer (currently 3,524 UAH)

Prior to September 27, 2017, the state did not collect an official fee for the prolongation of a work permit. After September 27, 2017, the state now collects an official prolongation fee. The official fee must be paid by the employer within 10 business days from the date of the decision to issue or prolong a work permit. If payment of the state fee is not made on time, the work permit will be cancelled.

As an example, the documents required for an employer to apply for a work permit for employment of a foreigner in a local company are as follows:

- standard application form, confirming that the foreigner’s position does not require Ukrainian citizenship by law and does not grant access to state secrets;
- a copy of the foreigner’s passport data pages, translated into Ukrainian and notarized;

- a 3.5 cm x 4.5 cm photograph of the foreigner;
 - a copy of the draft labor agreement (contract) with the foreigner.
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For other categories, the list of documents is similar, but in place of the draft labor agreement (contract) the applicant will need to submit a document confirming the need for a foreigner's labor. For example, (i) the service contract for a specific volume of works to be performed by a foreigner in Ukraine concluded between a Ukrainian and a foreign business entity (for foreign employees on business trips); or (ii) decision of a foreign business entity to send a foreigner to Ukraine for work and a copy of the contract between the said foreign business entity and the foreigner to perform the work in Ukraine for a specific duration (for Intra-corporate transferee). In other cases, (i) proof of complete contribution of authorized capital (for founders, shareholders and beneficiaries/controllers of legal entities), or (iv) proof of computer programming as permissible legal activity of the employer (for IT specialists), the State Employment Center will independently verify this information from the unified state company register.

Upon receipt of all required documents, the State Employment Center has seven (7) business days to reach its decision to issue a work permit or three (3) business days to prolong a work permit or introduce any amendments thereto. Such amendments include:

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- changes to the name of the legal entity (employer) and reorganizational changes (via merger or otherwise) or changes to the name of a private entrepreneur (employer);
 - the foreigner's new passport, including name changes;
 - change of the name of the position of the foreigner or his/her internal transfer to another position during the validity of the work permit.
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An employer is obligated to notify the Employment Center and request cancellation of a work permit if:

- the labor agreement (contract) with the foreigner is terminated;
 - the agreement (contract) between Ukrainian and foreign business entities under which the foreigner was sent to Ukraine is fulfilled;
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The Employment Center will cancel a work permit at its discretion in the following circumstances:

- the employer fails to pay the state duty for the issuance or prolongation of a work permit within 10 days from the Employment Center's decision to issue a work permit;
- the employer fails to provide to the Employment Center a copy of the labor agreement (contract) with the foreigner within 90 days;



- false or incorrect information that couldn't be revealed during the work permit application consideration was provided by the employer;
 - a lawful decision is issued to deport the foreigner;
 - a foreigner's labor is used under conditions other than those set forth in the work permit or by another employer (except part-time work or temporary performance of work for an absent worker);
 - the foreigner is sentenced for the commission of a crime.
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Penalties for violations of the work permit rules, including work without a required work permit, failure to leave the country after expiration of a work permit, illegal registration of a foreigner (temporary residency), etc., can be imposed on the officers of the employer or on private entrepreneurs who hire foreigners for work. The penalties range from 100 to 200 untaxed minimum incomes (currently 17 x 100 to 200 or from 1,700 UAH to 3,400 UAH). Further, an employer (including private entrepreneurs who hire foreigners from September 27, 2017) can be fined for the following:

- for labor agreements (contracts) or other agreements without proper procurement of a work permit – a penalty may be imposed for each individual in the amount of 20 minimum monthly salaries upon discovery of a violation (currently 74,460 UAH). Moreover, the employer's chief executive officer may be subject to a various personal administrative fines for violating or facilitating the violation of foreigners' stay in Ukraine (including work without a required work permit);
- for use of the labor of a foreigner under conditions other than those set forth in the work permit or by another employer – a penalty may be imposed for each individual in the amount of 10 minimum monthly salaries upon discovery of a violation (currently 37,230 UAH);

- Violation of the requirement to notify the State Fiscal Service about the commencement of employment of a foreigner under a duly executed employment agreement entails a penalty upon the employer in the amount of currently 111,960 UAH per employee hired without notification to the fiscal service.
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These fines have significantly increased since 2017 due to the sharp increase of the minimum monthly salary and can be expected to increase further as potential EU integration comes closer to reality.

Foreign Residency Permits

After receiving a work permit, the foreigner and/or his/her employer will need to take certain post-work permit steps in order to ensure the foreigner may reside in the country for over 90 days at a time. Firstly, especially for employment and tax purposes, the foreigner will need to apply for a tax identification code. This is a simple application procedure and requires up to 7 business days. This may be done concurrently with the work permit procedure.

Once the work permit is issued, the foreigner will need to apply for a long-term visa “D” at a Ukrainian consulate outside of Ukraine. Unfortunately, there are no current options for applying for a Ukrainian visa in-country. If the foreign citizen wishes to apply for a long-term “D” visa at a Ukrainian consulate other than the Ukrainian consulate in his or her home country, we strongly recommend confirming with the desired consulate whether they will issue a “D” visa to the foreign citizen.

The visa “D” is specifically tied to the legal grounds for the issuance of such visa; for example, “for employment” or “work in a representative office of a foreign entity” or “work in a representative office of a foreign bank” or “work in a technical assistance project”, etc. Therefore, the relevant documents will need to be affixed to the visa application (i.e., work permit, registration card of a technical assistance project,

registration certificate of a representative office, etc.) along with the other standard documents required for visa applications. As a general rule, long-term “D” visas are issued as multiple entry visas for a term of 90 days during which the visa holder must register with the local authorities as described below.

As of June 1, 2018, temporary residency permits have taken on a new form (contactless electronic cards with biometric data as opposed to the typical passport form). As with the old permits, the new permits will be generally issued for the term of an individual’s work permit or other term based on the recipient’s legal grounds for residency. An important novelty is the ability for the founders and/or shareholders and/or ultimate beneficiaries (controllers) of registered legal entities to apply for temporary residency for a term of up to two years.

The procedure still requires up to 15 business days from the date of due receipt of all application documents to receive a temporary residency permit card (“TRP Card”). Temporary residency cards are still issued by the local State Migration Service via the Main Data Processing Center of the Unified State Demographic Register in conjunction with the State Center of Document Personalization. This ensures that the data and permits are processed in compliance with the Law “On Personal Data Protection”.

Applications and documents must be submitted no later than 15 business days prior to the expiration of an individual’s legal stay in Ukraine (e.g., expiration of 90 days, expiration of work permit and TRP Card, etc.). If any changes are necessary to information contained in a TRP Card, including receipt of a new passport by the TRP Card holder, the information must be submitted within one month from such changes in order to receive a new TRP Card. Extensions of TRP Cards have been cancelled and, in their place, new TRP Cards must be applied for according to the initial procedure.

The following documents are required to apply for a TRP Card:

- 1) Passport document with a visa type “D” (unless otherwise provided by legislation or an international agreement);
- 2) Identification document of a legal representative and his/her power of attorney (or other document confirming authority);
- 3) A certified Ukrainian translation of the applicant’s personal data page in his/her passport;
- 4) A valid medical insurance policy;
- 5) The document confirming payment of the administrative fee for the TRP Card issuance (or document confirming exemption from payment);
- 6) The documents confirming the applicant’s legal grounds for stay in Ukraine – for example, for duly registered companies the applicant’s original work permit and the employer’s guarantee to inform the state migration office about termination of the applicant’s labor agreement. This document may also be a request of the beneficiary of an international technical assistance project and the project’s registration card (for technical assistance projects) or a request of a representative office and its registration certificate (for representative offices) or a request of an NGO and its registration certificate, etc.

Any changes to the above documents must be submitted to the TRP Card issuer within ten (10) days for introduction into the State Migration Service’s informational system.

The originals of items 1, 2, 4 and 5 must be presented upon submission of the application (items 1, 2 and 4 will be returned). The original POA of a legal representative must be submitted with the application as well. For the applicant’s dependents, the following documents must be submitted for a TRP Card: (i) the document confirming family member status (original to be returned); (ii) document confirming the principal’s sufficient financial security to support family members; and (iii) the TRP Card of the principal family member (personally submitted with return of original).

In case of a favorable decision to issue a TRP Card, the holder's personal data is securely transferred to the Main Data Processing Center, which will enter the personal data into its automated database system and produce the TRP Card. Upon issuance, the local State Migration Service will affix the date of return of a TRP Card (if applicable), the date of receipt and the signature of the applicant on the TRP Card application.

After expiration of a TRP Card, the applicant must de-register from his/her place of residence within a seven-day period and exit the country. The TRP Card must be returned to the State Migration Service.

If a TRP Card is lost or stolen, it must be immediately reported to the State Migration Service and, if stolen, the local police. If a lost TRP Card is found, it must be returned to the State Migration Service within one day.

TRP Cards contain the following information: (i) full name; (ii) sex; (iii) citizenship; (iv) birth date; (v) unique registration number; (vi) document number; (vii) date of issuance; (viii) expiration date; (ix) grounds for issuance (code - for international technical assistance projects the code is 04/05); (x) issuing authority code; (xi) place of birth; (xii) digitized facial picture; and (xiii) digitized signature.

Practically speaking, the foreigner should visit the immigration authority to make sure an annulment stamp is placed over the stamp in his/her passport which states that he/she was issued a temporary residency permit until "x" date. This is important if the foreigner will request temporary residency in Ukraine in the future. While failure to de-register and return a temporary residency permit does not entail any penalties, it can also cause problems for the foreigner's landlord in de-registering the individual and registering further individuals at their residence.

In conclusion, it is not as easy as it once was for a foreigner to remain in Ukraine for more than 90 days without subsequently encountering unpleasant consequences (fines, entry bans and deportation). Now, more than ever, it is vital for foreign citizens to understand and comply with the Ukrainian immigration rules.

6. FOREIGN ECONOMIC CONTRACTS OR CROSS-BORDER TRANSACTIONS



Since declaring its independence in August of 1991, the Ukrainian government has struggled to establish a legal system to accommodate its entrance into the global commercial economy. Foreign investment has always been governed by somewhat archaic laws such as “On the Protection of Foreign Investments in Ukraine,” “On the Foreign Investment Regime,” “On Foreign Economic Activities,” “On Privatization of State-Owned Property,” “On Privatization of Small State Enterprises (Small-scale Privatization),” “On Restoration of the Solvency of a Debtor or Recognition of a Debtor as Bankrupt,” and “On Secured Transactions,” etc. Imposing sounding names notwithstanding, these laws fail to take into account the practicalities of real world business.

Foreign Economic Contracts

Long gone are the days of mandatory permissions before Ukrainian entities could enter into import-export agreements (also known as “foreign economic contracts”). Today, any Ukrainian individual or company may enter into foreign trade contracts without obtaining any special state permits. That said, however, Ukrainians engaging in any commercial activities (local or foreign) should be registered as “subjects of entrepreneurial activity” with the local state authorities and pay income tax. The introduction of a simplified taxation procedure and a comparatively low personal income tax rate has made the payment of income taxation almost commonplace.

The parties to a foreign economic contract (cross-border contract) have the right to choose foreign arbitration for settlement of disputes. Alternatively, such issues can be resolved in Ukraine under foreign law by agreement of the parties. If the parties do not agree on a choice of law under a contract, international private law will dictate the law to be applied to the contract. For example, contracts for the construction or acquisition of immovable property on the territory of Ukraine and labor agreements (contracts) are governed exclusively by Ukrainian laws.



While the form of cross-border contracts is determined by the place of execution thereof, unless the parties provide otherwise, many global companies make the mistake of using their standard global forms. True, a contract entered into in a foreign country cannot be invalidated by Ukrainian laws for reasons of non-compliance with Ukrainian standard forms. However, cross-border contracts will not be accepted by Ukrainian banks unless they adhere to certain substantive rules which may seem outdated to many companies that have extensive experience in international business.

This means that a cross-border contract must be complete in form as well as substance if such contract is to be smoothly executed in Ukraine. Under Ukrainian law, either a foreign agreement or some of its provisions may be declared invalid or void by a court if it does not comply with the requirements of Ukrainian law or international agreements of Ukraine. An agreement is void under Ukrainian law from the moment of its execution. Most foreign companies meet this unfortunate fate when trying to receive payment at their very own Ukrainian banks, which act



as the “police” for the National Bank of Ukraine and often protect their own interests rather than the interests of their clients. For this reason, we highly advise that a professional review the draft contract prior to signing with Ukrainian parties.

Here are the basic provisions you should include into your contract with a Ukrainian party in order to avoid issues with your bank’s or the government’s controlling authorities:

- The title, number (Ukrainian accountants will ask for this), date and place of execution;
- A preamble with the parties’ full names, legal address and authorized signatory (Ukrainian banks may ask you to prove the authority of the signatory by providing an extract from the commercial register where the foreign party is registered);
- Subject of the agreement – i.e., sale of goods, provision of works or services, including the type of goods/services, brand and/or the end result of duly rendered services. Many Ukrainian companies will ask for a specification of goods or services to be annexed to the contract with a description of quality, quantity, the technological process in stages, waste management, etc.;
- Contract term – i.e., when delivery of goods or completion of services is expected;
- Delivery terms – preferably the latest INCOTERMS with clear definition of when risks are transferred between the parties;
- Contract price or value;
- Payment terms (payment date, advance payment terms, foreign currency, full bank details of the parties, warranties, etc.);
- Transfer-acceptance terms. Ukrainian banks still tend to ask for transfer-acceptance acts whereby the parties clearly state that

the goods or services were properly transferred and accepted without claims for any patent defects;

- Packaging and marking, if applicable, including storage terms, product size, transport conditions, etc.;
- Force majeure circumstances, penalties and reclamation (product return, etc.), dispute resolution clause and full requisites of the parties (including full bank account information of both parties regardless of whether the party is the payer or beneficiary).

The parties to a cross-border agreement may also agree upon insurance, quality warranty, possible subcontractors, agency relations, transportation conditions, documentation transfer, tax and customs payments, intellectual property provisions, contract amendment terms, etc.

A Ukrainian resident company or individual can execute a contract to sell or purchase any desired goods or services. In a typical import transaction, for instance, a Ukrainian resident can convert Hryvnia, the Ukrainian national currency, into virtually any foreign convertible currency. The contractually agreed-upon amount will then be wired to the seller as payment under a foreign economic agreement (e.g., sale-purchase of goods or services).

Be aware of Ukrainian parties asking for payment outside of Ukraine, as they may be violating Ukrainian currency regulations and you may have no recourse against them if a dispute arises.

Taxation of Cross-Border Transactions

1. Outbound Transactions

Since resident entities are taxable on their worldwide income in Ukraine and may also be taxable by foreign countries on their income derived from sources within that country or from carrying on business in such countries, the same income is potentially subject to double taxation.

In order to avoid this double taxation, Ukraine uses a foreign tax credit method in its double taxation treaties. Under this method, foreign taxes paid by a resident taxpayer on foreign source income may be credited against its Ukrainian tax liabilities on such foreign source income.

2. Inbound Transactions and Double Taxation Treaties

Ukraine has a surprisingly extensive global treaty network. To date, it has concluded double taxation treaties with over 70 countries, which generally follow the OECD Model Income Tax Convention. Plus, Ukraine was a legal successor to a number of double taxation treaties concluded by the former Soviet Union. We attach a table at the end of this publication for your perusal.

In an effort towards counteracting tax evasion and promoting transparency, Ukraine signed the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit





Sharing on July 23, 2018. The signing of this Convention is aimed at preventing the application of international treaty conventions in “inappropriate” circumstances and optimizing dispute resolution mechanisms. In short, it is aimed at drawing capital from the “gray” areas into full transparency despite the difficulties it may create for Ukrainian companies doing business abroad. Generally, the Convention strives to prevent the ability to shift profits from jurisdictions where taxes are high to jurisdictions where taxes are lower, to avoid the legal requirement to establish permanent establishments, and to reap exorbitant benefits from real estate transactions due to porous double taxation treaties in this sphere. The provisions of this Convention should see ratification and enforcement in 2019.

Other Applicable Taxes

1. Value Added Tax

i) Import of Goods

For the import of goods, VAT is chargeable on the contractual value of the goods imported. However, if their contractual value is less than their customs value, the taxable amount is their customs value.

The customs value of any imported goods is equal to their value in terms of the customs laws of Ukraine, including expenses for transportation; loading, unloading, reloading and insurance up until the customs crossing point of Ukraine; payment of brokers, agency, commission and other fees connected with the import of such goods, payment for use of related intellectual property, excise duty, import duty, and other fees and duties included into the price of such goods.

ii) Import of Services

Should services be imported for use or consumption within Ukraine, VAT is chargeable on the contractual value of services received under the “reverse-charge mechanism”. This mechanism is defined by the VAT

law as follows: “For services provided by non-residents on the customs territory of Ukraine, the basis for taxation is the contractual value of such works or services taking into account excise duty and other taxes and fees (mandatory payments), which are included into the price of such works or services, excluding VAT. The determined value is recalculated into Ukrainian hryvnias according to the currency exchange rate of the National Bank of Ukraine effective at the end of the operational day preceding the day on which the act certifying the fact of receipt of the services was executed.”

2. Excise Duty

Excise duty is imposed on taxable items produced in, or imported into, Ukraine and is included in the price of such goods. In addition, excise tax at the rate of zero percent is imposed on export sales. Since excise duty works as an indirect tax, any excise duty paid in connection with exported items produced in Ukraine can normally be refunded to the exporter.

Excise duty is imposed on alcohol and tobacco products, motor fuels, motor vehicles, beer and jewelry. Excise duty is normally imposed when a taxable item is sold for domestically produced articles or prior to its entering Ukraine for imported articles. In 2018, the excise tax on cigarettes and tobacco products will be subject to a gradual increase over an eight-year period. The ultimate goal is to reach at least 60% of the weighted average retail selling price of cigarettes. If this target is not reached, the excise tax will continue to increase from 2025.

3. Customs Fees

Under the rules of the tax and customs laws of Ukraine, customs fees are collected for customs registration of goods and other articles in zones of customs control that are located on the premises of the enterprises storing these goods (i.e., customs bonded warehouses). Customs fees are also charged for the storage of goods and other articles under the jurisdiction of a customs warehouse in cases when their detainment on the territory of the customs-house is not obligatory.

7. CURRENCY REGULATIONS



Foreign currency operations on the territory of Ukraine are under state currency control. A key feature of currency control is the concept of residency. The currency restrictions imposed on residents are more severe than those for non-residents. Under the regulations, a resident of Ukraine is defined as:

- Any natural person, including foreign citizens, permanently residing in Ukraine, including those citizens temporarily staying outside of Ukraine;
 - Legal entities, branches or other structural subdivisions thereof located and performing business activities on the territory of Ukraine;
 - Ukrainian diplomatic, consulate, trade and other official governmental institutions abroad that enjoy diplomatic privileges and immunity;
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Any other person or structural subdivision, which is not a resident of Ukraine, is treated as a non-resident for the purposes of exchange control regulations. The basic rules of currency regulations include the following:

- Only local currency may be used in business transactions between residents;
- Foreign currency is the only means of payment between residents and non-residents involved in international transactions (trade and investment) through authorized banks;
- Foreign currency proceeds received by a company from its foreign customers must be credited to a local bank account no later than 180 days after the day of export of the services/goods. Failure to comply with this provision renders the Ukrainian company liable to a penalty of 0.3 percent of non-received proceeds per day;
- Goods must be imported into Ukraine within a period of 180 days after pre-payments have been made by a Ukrainian company to

its suppliers. Failure to comply with this provision renders the Ukrainian company liable to a penalty of 0.3 percent of non-received proceeds per day.

Other transactions with local and foreign currency are subject to licenses from the National Bank of Ukraine (e.g. settlements in foreign currency on the territory of Ukraine). An NBU license is issued for a certain period of time and with a limited amount of foreign currency specified. The procedure for obtaining an individual license is quite troublesome and requires a specific set of documents to be submitted to the NBU for approval.

The NBU establishes the exchange rates of UAH to other currencies on a daily basis. Authorized banks, when trading in foreign currencies, may establish different rates than those established by the NBU; however, the rates used by banks do not usually differ dramatically from those established by the NBU.

Procedurally, all residents must carry out foreign currency transactions through a Ukrainian bank that is licensed to perform currency operations. Residents may purchase foreign currency from such banks for a specific business purpose, which must be declared at the time of the purchase. This includes procurement of foreign currency for payment under an import contract. 50% of all foreign currency proceeds received by resident companies are subject to mandatory conversion into local currency with a few exceptions. This rule is reviewed every six months, with the next review upcoming in June of 2018.





Salaries paid in Ukraine may only be paid in local currency. Ukrainian residents are generally prohibited from opening and maintaining foreign bank accounts, unless they have permission from the National Bank of Ukraine or are duly registered to work abroad.

All residents (i) must declare their ownership of currency, securities and property located outside Ukraine; (ii) must declare their worldwide income and (iii) must submit monthly reports regarding their foreign currency operations to the regional branch office of the National Bank, as well as to the local tax inspections. Failure to disclose such ownership is subject to a fine set by the National Bank of Ukraine.

Finally, in order for a resident business entity to effectuate payment to a non-resident business entity, which renders or performs services or works or transfers intellectual property rights to such resident entity under a foreign economic agreement in a total amount exceeding 50,000 EUR, such resident will be required to obtain a so-called “act of price examination” from the Ukrainian state information and analytic center for monitoring external markets.

On February 7, 2019, a new Law “On Currency and Currency Operations” will come into effect and replace the above currency regulations. This law is aimed at providing investors, especially resident investors, more freedom of currency movement in their transactions with non-residents. Some of the highlights include the following:

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- Freedom of currency operations – residents may freely conclude agreements with non-residents and perform their obligations thereunder in local or foreign currency, including the freedom to open bank accounts in foreign financial institutions and effectuate foreign currency operations via such accounts.
 - Residents may freely acquire currency valuables and assets abroad and clear them through customs.

- The state should not interfere in any currency operations without legal and substantiated grounds. If any laws or regulations cannot be unambiguously interpreted with respect to currency operations or the state's authority to conduct currency control, then such laws or regulations must be interpreted in favor of residents and non-residents.
- Non-residents may open accounts in Ukrainian banks and conduct currency operations via such accounts on equal grounds with residents.
- Individual licenses from the National Bank of Ukraine will no longer be required for residents to purchase or sell currency valuables (including foreign securities or equity shares in foreign companies) in non-cash form, to open bank accounts in foreign currency, and to make settlements in foreign currency.
- The procedures for residents to obtain loans from non-residents or provide loans to non-residents should become more simplified.
- The parties to import-export contracts are no longer required to make final settlement under such contracts within 180 days, although the National Bank retains the power to set such types of limitations in the future. In fact, the National Bank retains most of the authorities granted to it under the current currency regulations to put in place various measures to protect the country's currency market in case of signs of instability.
- Currency control has now been replaced by "currency oversight". Any import/export transactions in excess of 150,000 UAH (as required by the anti-money laundering legislation for transactions requiring financial monitoring) must be subject to currency oversight. Currency oversight is performed by the National Bank and its agents (Ukrainian banks, licensed non-financial institutions, customs officials, etc.), who may demand all documentation in connection with a transaction that exceeds the aforementioned threshold.

8. UKRAINIAN REAL ESTATE: INVESTMENT OPPORTUNITIES AND APPLICABLE TAXES



As any Ukrainian real estate agent will confirm: 2018 is the best year to invest in residential properties in Kiev. The prices for apartments are at their lowest since 1993, ranging from \$800 to \$1,500 per square meter (depending on the location and condition of the unit). At the same time, no bank financing is available, which gives prospective purchasers with cash a tremendous negotiating advantage. Last, but not least, in June 2017 Ukrainian citizens were granted visa-free entry into the EU, which means that Ukraine will surely become a European nation in 5-10 years and, consequently, prices for real estate will increase over the next few years.

When viewed together from an investor's perspective, this is the perfect time to buy an apartment (or two) and rent it out while real estate prices increase. For a mid-size investor, who does not have enough cash to buy an apartment in London or New York, investing in Kiev is an excellent option, especially considering the low expenses associated with property (taxes, condo fees, etc).

But how does a foreign investor go about buying an apartment in Kiev?

First, you have to decide whether to purchase an old apartment or invest into new construction. The center of Kiev has comparatively few newly constructed residential buildings, and they are all rather expensive. For that reason, most investors who insist on living in the center of Kiev usually buy older apartments (with or without repairs). It is vital to conduct a full inspection of the property, since many old apartments have legal and practical problems such as unregistered renovations, undiscovered fungus (showers), leaky pipes (sewage, water, gas), etc.

Other investors prefer to live in newly constructed residential buildings, where they have the opportunity to design the lay-out of their apartment to their taste. Such construction is classified as either unfinished or finished. We briefly review both alternatives below:

Unfinished Construction means that no exploitation permit has been issued and, thus, the premises are currently not fit for occupation.



There are several options for an investor to acquire an apartment in an unfinished building, including: (a) investment into special purpose bonds; (b) creation of a construction financing fund that partners with a developer; and (c) creation of a cooperative that will jointly own and finance the construction.

Unfortunately, it is always time-consuming and risky to invest into unfinished construction for several reasons. For instance, there is no guarantee that the building will be “put into exploitation/operation” on time, or that there will be sufficient funds to finish the construction in the first place. For these reasons, most foreign investors insist on buying apartments in buildings that have completed construction and are registered with all authorities that permit occupation of the premises.



Finished construction that is fit for occupants to immediately live in always involves questions of security in the property's title and ownership rights. The reason is simple: fraudulent transactions are abundant and, as a consequence, all issues connected with title transfer and the identity of the true owner must be flushed out before the actual execution of a sale-purchase agreement before a notary public.

To avoid pitfalls, any potential buyer must review the background documentation that serves as the ultimate proof of ownership, including:

- (i) if the ownership was acquired prior to 2013, you will need to obtain the title document (confirmation of ownership) that is registered with the BTI (Bureau of Technical Inventory); if the property was bought after 2013, you will need to obtain an extract from the State Register of Immovable Property Title (issued directly by a notary prior to certification of a sale-purchase agreement or by the state registrar upon the owner's request);
 - (ii) the technical passport (submitted if it is inalienable from title document);
 - (iii) the list of registered household members (issued by a housing management authority or other relevant authority for the issues of residence registration);
 - (iv) in case the property owner has underage children - consent from the child custody and guardianship agency should be provided in the name of the minor; the birth certificate of the minor; and obligatory presence of parents with passports and tax identification codes at the sale;
 - (v) waiver from all co-owners, especially spouses, of the right to exercise their preemptive purchase rights;
 - (vi) an independent appraisal of the apartment price by a licensed appraiser for taxation purposes.
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Furthermore, the foreign investor can be either a natural person (individual) or a legal entity (usually an LLC). Below we review additional documents required in both cases:

For individual investors/non-residents, the following documents should be examined:

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- (i) passports and tax identification codes of the parties (if executed via a legal representative, he/she should present a notarized power of attorney and his/her own passport and tax identification codes);
 - (ii) notarized confirmation of consent to the sale or acquisition of property from a spouse;
 - (iii) marriage certificate (if applicable).
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For legal entities/investors, the following documents should be carefully examined:

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- (i) the founding documents of the legal entity (charter, extract from the Unified State Register of Legal Entities, Natural Persons-Entrepreneurs and Civil Associations);
 - (ii) the passport and tax identification code of the representative authorized to act on behalf of the legal entity, as well as the document confirming the authorities of the representative (usually the director, which means review of the minutes on his/her appointment to the position, or another authorized representative, which means review of a duly executed power of attorney);
 - (iii) the minutes of meeting of shareholders/participants with the approved decision to alienate or acquire the property in question;
 - (iv) company seal (if applicable).
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With reference to applicable taxes, the investor is not required to pay taxes upon purchase of property. However, the investor often agrees with the seller to split the following expenses related to notarization of the sale-purchase agreement: (i) 1% of the purchase amount indicated in the agreement, but not lower than 1% of the evaluated price; and (ii) 1% of the purchase amount indicated in the agreement (contribution to the Pension Fund).

When a foreign investor decides to sell his Ukrainian property, the following tax rules apply:

- (a) if the property is sold within three (3) years: the state duty is 1%, the personal income tax or corporate tax is 18%, currently a military tax is assessed at 1.5% on income/profit, 1% must



be paid to the pension fund, and the notary's fee (can be split amongst the parties) must also be paid.

- (b) if the property is sold after three (3) years of ownership, a non-resident seller pays 1% state duty, 1% to the pension fund and 1% to the notary (can be split amongst the parties), but no personal or corporate income tax is paid.
 - (c) if more than one property is sold within one tax year, the non-resident seller has to pay state duty of 1), personal or corporate income tax of 18%, the military tax of 1.5% and 1% to the pension fund, including 1% for the notary fee (can be split amongst the parties).
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After collecting and reviewing the above documents, the actual purchase procedure is fairly straightforward: first, the parties and the notary review and verify the aforementioned documents. Next, the sale-purchase agreement should be signed (caution: you should pay close attention to the property's technical characteristics, correct spelling of names of the parties, tax identification numbers, dates and amounts, etc.) and all taxes and notary fees will be paid. Finally, actual settlement between the parties will occur.

After signing and notary certification of the main agreement, the seller will receive a notarized copy, and the buyer receives the original and a notarized copy, an extract from the state register of immovable property, title confirming his/her registration as the new owner, and the property's technical passport.

In conclusion, with all the new construction (both finished and unfinished) flooding the Kiev housing market, there is a tremendous surplus of apartments. The political and economic risk has decreased due to the EU visa-free regime. Couple that with the impossibility of obtaining credit, and anyone with a little extra cash can enjoy a wonderful investment opportunity in Ukraine that provides instant rental income and capital appreciation.

9. COMMERCIAL LITIGATION AND ARBITRATION



Introduction

Recognizing the general rule that “everything always goes wrong at the worst possible moment,” large multi-national companies often agree to resolve their disputes with each other in an international, and therefore presumably unbiased, arena. In an effort to accommodate the business needs of such companies, the world’s leading nations have entered into numerous bilateral and multilateral international arbitral agreements. Such agreements set the stage for implementing the accepted international arbitration rules and executing the resulting judgments on a local level.

Likewise, Ukraine has established a similar forum for resolving international commercial disputes at the Ukrainian Chamber of Commerce and Industry, the rules of which are based on the Law of Ukraine “On International Commercial Arbitration” which, in turn, is based on UNCITRAL rules. Ukraine also adheres to many international agreements previously entered into by the former Soviet Union, including the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958, and the European Convention on





International Commercial Arbitration of 1961 (Geneva). Plus, Ukraine is a signatory to the multi-lateral Agreement on the Procedure of Dispute Resolution Connected with Commercial Activity between the CIS states (also known as the Kiev Agreement).

Following the declaration of its independence in August 1991, Ukraine passed its own comprehensive legislation governing dispute resolution in the context of both domestic and foreign transactions and investments. Generally, Ukraine's local and foreign arbitration legislation is in accordance with global standards. As in other countries, the parties to international agreements have the freedom to select either the domestic (Ukrainian) national court system or international arbitration in any country (including Ukraine). The final award or ruling can be executed in Ukraine under the 1958 New York Convention, assuming that all parties involved in the arbitration are signatories to that Convention. While the applicable legislation is well-settled in today's Ukraine, numerous unexpected practical problems may arise to prevent the actual enforcement of international arbitral decisions.

Under Ukrainian legislation, foreign investors may submit disputes for resolution to either (1) Ukrainian national (commercial) courts; (2) Ukrainian national arbitration courts or (3) any other international arbitration tribunal. The third option can be further separated into two categories: (a) arbitration conducted in Kiev at the Ukrainian Chamber of Commerce and Industry or (b) arbitration held in a third-party country (e.g., Sweden, Great Britain, U.S.A.).

The Ukrainian National Court System

Like all of its legislation, Ukraine inherited its court system structure from the Soviet Union. Only recently the court system has begun undergoing reforms with the passage of a number of laws. In 2010 a complete revamping of the court system took place via the Law of Ukraine No. 2453-VI "On the Court System and the Status of Judges," dated July 7, 2010 ("Law No. 2453") with even more reforms coming in 2016.

In general, Law No. 2453 provides the overall structure of the new judicial system after August 3, 2010. It defines the legal bases for the organization of the judiciary branch of power and the service of justice in Ukraine, the system of general jurisdiction courts, the basic requirements in the forming of the professional judges' corps, the system and procedure of carrying out of judicial self-regulation, etc. Law No. 2453 also legalizes the relations, which already exist between the branches of the executive and judicial powers. Related amendments were also introduced to the Civil, Commercial and Criminal Procedural Codes.

Under the reformed judicial system, there are the constitutional court and a system of general jurisdiction courts based on the principles of territoriality, specialization and instances. The currently effective, unified system of general jurisdiction courts is as follows:

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1. Local courts of first instance (regional, city, inter-regional, etc.);
 2. Appellate courts which may consider civil, criminal, commercial and administrative cases. Commercial appeals are considered by commercial appellate courts created in appellate circuits pursuant to presidential decrees;
 3. The Supreme Court (including the cassation stage) is the highest judiciary authority in the system of general jurisdiction courts.
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There are also specialized courts, which consider matters in specialized fields (i.e., civil, criminal, commercial, administrative, intellectual property, anti-corruption, etc.). Commercial courts (formerly known as arbitration courts) have also been subordinated to the Supreme Court, subjecting their decisions to reconsideration by the Supreme Court as is the case with any other court of general jurisdiction.

All foreign investors, as well as Ukrainian resident companies (such as joint ventures and wholly-owned foreign subsidiaries), have the right to



submit their disputes with other Ukrainian entities to commercial courts. In fact, unless a provision in an international agreement specifically defers arbitration to take place elsewhere (e.g., the Ukrainian Chamber of Commerce and Industry), then national commercial courts have jurisdiction. While many foreigners may be skeptical of their efficiency and fairness, both the Ukrainian Chamber of Commerce and Industry and the national commercial courts are surprisingly good choices of forum because they are comparatively inexpensive and efficient, handling many international cases per year.

In practice, companies usually try to use a “pre-trial” procedure whereby the injured party first sends a written complaint by confirmed or registered mail, return receipt requested to the other party. This is also known as a “warning letter,” which should contain the grounds for the complaint, confirmation of the circumstances under which the complaint arose, the demands of the injured party, the amount in controversy and copies of various documents which confirm the complaint.

The respondent then has one month to consider the letter (complaint) from the day it is actually received, which period can be suspended if any necessary supporting documents are absent from the letter. In case the parties agreed to review any issues (for instance, review of defective goods by the manufacturer) the resulting complaints may be further considered over a two-month period. The respondent should provide a written answer regarding its consideration of the complaint.

If the parties are unable to resolve their dispute in the “pre-trial” stage, then a national court will hear the case, unless the parties specifically called for arbitration. In contrast to the finality of arbitration, any litigant can appeal the final decision of a Ukrainian national commercial court. Appeals are submitted via the commercial court that issued the final decision. If the parties to the dispute are not satisfied with the decision at the appellate level, they may further appeal the decision to the Supreme Court or specialized courts at the cassation level.

Recognition and Enforcement of Foreign Court Awards

The Civil Procedure Code of Ukraine and the Law “On Enforcement Proceedings” attempt to solve the common problem in Ukraine when foreign investors (or other holders of valid foreign judgments) would have to go through the lengthy process of obtaining a foreign judgment in their favor only to find that enforcement of such judgment was impossible in Ukraine.

Importantly, the Civil Procedure Code applies to the foreign court judgments only if they have come into force and are subject to mandatory enforcement on the territory of Ukraine in accordance with international agreements to which Ukraine is a party. Conversely, if a judgment is made by a foreign court in a country without an international agreement with Ukraine, such judgment may only be subject to mandatory enforcement based on the principle of reciprocity. In most cases, reciprocity is presumed to exist unless proven otherwise.

With reference to the statute of limitations, a foreign court judgment may be presented for mandatory enforcement in Ukraine within three years from the date when it came into legal force. There is an exception for foreign court judgments that call for the recovery of periodical payments, which may be presented for mandatory enforcement during the entire term for collecting indebtedness that arose over the last three years.

In general, the court at the place of residence or location of the debtor considers requests for the mandatory enforcement of a foreign court judgment in Ukraine. If the place of residence or location of the debtor is unknown, the issue will be considered by the Ukrainian court where the debtor’s property is located.

There are two methods for submitting a petition for the mandatory enforcement of a foreign court judgment in Ukraine. The first method is the direct submission of the petition by the judgment creditor or its representative or by another party permitted under an international



agreement. The second method is submission via a state authority when an international agreement calls for submission only via a particular state authority.

A petition for the mandatory enforcement of a foreign court judgment must be submitted in writing and contain the name and residence/location of the applicant, the name and residence/location of the debtor or the debtor's property, and the grounds for submission. The foreign judgment holder may also request the court to take interim measures to secure the claim, and the court may apply such measures at any stage of the consideration of a petition if the failure to take measures will complicate enforcement of the judgment or render it impossible.

Unless an international agreement states otherwise, the foreign judgment holder must submit a petition to enforce the foreign judgment, along with the following documents:

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- a) a duly certified copy of the foreign court judgment;
 - b) an official document confirming that the foreign court decision has come into legal force (if this is not indicated in the decision itself);
 - c) a document certifying that an absent party (defendant) was timely and duly notified of the time and place of the foreign court proceeding;
 - d) the document that determines in which part or from what time the foreign court's decision is subject to enforcement (if not earlier enforced);
 - e) a document certifying the authority of the representative of the foreign judgment holder (if the petition is submitted by a representative); and
 - f) a duly certified translation of the above documents in the Ukrainian language or other language provided by a relevant international agreement.
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Procedurally, the court must inform the debtor in writing regarding the receipt of a petition to enforce a foreign court judgment within a five-day term. In its turn, the debtor has a one-month term to respond with any objections. After the one-month term has passed, the court will issue a decision on the time and place of the court's consideration of the petition and inform the parties in writing no later than ten days prior to consideration. The parties may request a rescheduling of the court consideration for valid reasons. The court's decision to satisfy or refuse the petition to enforce a foreign court judgment will be sent to the parties within a three-day term from the date of its issuance. Two of the most important issues (among others) the court will consider for accepting or refusing to enforce a foreign court decision is whether the foreign court decision has come into force and whether the parties were duly notified about the proceedings and given the fair opportunity to participate.

If security measures are determined necessary by the court based on the judgment holder's request, the court may order individually or a combination of measures; for example:

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- a) the arrest of property or cash funds owned and possessed by the debtor (or other party, if applicable);
 - b) a ban on undertaking certain actions;
 - c) an obligation to undertake certain actions;
 - d) a ban on other parties from making payments or transferring property to the debtor or performing other obligations in relation to the debtor;
 - e) the transfer of disputed amounts or property for custody to other parties.
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In case the foreign court judgment reflects a debt amount in foreign currency, the court will initially determine the amount in Ukrainian



hryvnias pursuant to the exchange rate of the National Bank of Ukraine on the date of the issuance of the court's decision to enforce the foreign court judgment.

Should the court resolve that the foreign court judgment is subject to mandatory enforcement in Ukraine, the court will execute an executive order (executive document) for the creditor on the basis of the foreign court judgment and its decision to grant permission for mandatory enforcement.

Arbitration Options for Foreign Investors

Recognizing that Ukraine is a young nation without a long history of rendering and enforcing international commercial arbitral awards involving foreign investors, Western parties naturally prefer dispute resolution to take place in an impartial third-party country, such as the United Kingdom, Sweden or Switzerland. Considering the current Ukrainian economic climate, however, decisions concerning the place of arbitration must be made in light of each particular transaction.

For instance, a foreign arbitration provision probably would not serve its intended purpose in a transaction where a private Ukrainian company or an individual cannot afford the arbitration fees and costs. Similarly, a foreign partner in a Ukrainian joint venture that has minimal capitalization or a comparatively small project may not seek to effectuate such foreign arbitration provision, particularly if the international arbitration took place in a third-party (and rather expensive) country. Linguistic restrictions, visa requirements and extensive document production may also have an impact on the choice of forum for arbitration.

Ukrainian commercial law is quite liberal where foreign investors are concerned. For instance, as an alternative to national commercial courts, parties engaged in so-called “foreign economic activities” have the option of submitting their disputes for resolution to any international arbitration forum, applying any substantive law the parties chose in their agreements.

Under Ukrainian laws, the parties to a foreign economic agreement may provide for arbitration to take place in any forum and in accordance with established international rules, including the United Nations Commission on International Trade Law (“UNCITRAL”), the International Convention on Settlement of Investment Disputes (“ICSID”), or the Rules of the Court of Arbitration of the International Chamber of Commerce (“ICC”). This effectively results in two choices: holding international arbitration in Ukraine or anywhere else in the world. Below we discuss the first option in greater detail.

A. International Arbitration in Ukraine

In 1991, Parliament created the Ukrainian International Commercial Arbitration Court (the “Court”) at the Ukrainian Chamber of Commerce and Industry (the “Chamber”). In its usual less-than-swift response to changing circumstances, on February 24, 1994, the Parliament finally adopted the Law “On International Commercial Arbitration,” which permits litigation, either on the basis of a court order or the agreement





of the parties, by an arbitrator or panel of arbitrators approved by the Court. The above law incidentally also acknowledged the “Maritime Arbitration Commission” of the Ukrainian Chamber of Commerce and Industry as a forum for numerous maritime disputes (most of which took place overseas anyway).

The Court is an independent arbitral tribunal engaged in the resolution of economic disputes involving foreign parties. The Chamber uses UNCITRAL-based rules as the Court’s procedural rules to be applied to international arbitration cases. The Chamber selects the Court’s Presiding Officers and prepares a list of recommended arbitrators (including foreign arbitrators) that are “independent and impartial in fulfilling their duties” in accordance with Ukrainian legislation. In contrast to the national arbitration system, the Court currently handles numerous international arbitration cases a year at a surprisingly efficient rate.

In order for the Court to hear a case, the parties should specifically provide an arbitration clause to that effect at the time they negotiate and document their agreement. Such clauses must be evidenced in writing and can be part of an agreement or signed as a separate agreement. To avoid additional expenses in the future, and to provide greater predictability, the arbitration clause should declare the substantive law regulating the matter, the place of arbitration, the number of arbitrators, the language of the proceedings, translation costs, etc. In fact, the Court has published a recommended text for arbitration clauses in cross-border agreements.

To initiate arbitration proceedings, the plaintiff must submit to the Court its complaint and various documents supporting the complaint (with copies of such documents for the respondent). The signed claim must include various statements, including the circumstances on which the plaintiff bases its claim, evidence that supports the claim, well-grounded calculations of the amount in controversy, the applicable legislation upon which the plaintiff bases its claim, the list of documents and any other evidence attached to the claim, etc.

At that time, the Court's secretary will send to the plaintiff a list of recommended arbitrators and an invoice for the arbitration fees and costs, payable to the Chamber. At the same time, the Court's secretary will send to the respondent a copy of the complaint, the attached documents and the list of recommended arbitrators and administrative (arbitration) costs.

Unless otherwise provided in the parties' agreement, under the Court's rules (which were collated into the Law "On International Commercial Arbitration"), the parties must agree on the number of arbitrators (any odd number, including one). If no such agreement exists, the arbitration court will require the selection of 3 arbitrators by default.

Failure by either the plaintiff or the respondent to appoint an arbitrator in a timely fashion will result in the Court appointing an arbitrator or arbitrators on their behalf. The parties can challenge the appointment on only two grounds: (1) circumstances exist which cast doubts about such arbitrator's independence and impartiality; or (2) the arbitrator's lack of necessary qualifications, as specified by the parties.

During the actual arbitration process, the arbitration tribunal will apply any language and substantive law selected by the parties to the agreement, as well as the trade customs relevant to the particular case. Provided such conditions are met, the arbitration tribunal may decide to examine the case verbally (i.e., presentation of oral evidence and discussions) or to examine the case based solely on written documents and other printed materials.

Like UNCITRAL Rules, awards or rulings made by an arbitration tribunal with more than one arbitrator are made by a majority vote, unless the parties specifically agreed otherwise. The chairman of the arbitration tribunal, however, may resolve certain procedural issues if such individual is empowered so by the parties or, alternatively, the members of the arbitration tribunal.

Proceedings should not exceed six (6) months from the date the Court receives the plaintiff's complaint or arbitration fees; however, this term

may be extended for reasonable cause as demonstrated by the arbitration tribunal or one of the parties. The arbitration proceeding is completed after the arbitration tribunal has delivered its final award or ruling.

The final arbitration award must be in writing, signed by the arbitrator(s) and rendered within thirty (30) days of the completion of the arbitration hearing. The ruling must state the specific reasons for the final decision, unless the parties agree ahead of its rendering that such reasons should not be disclosed.

As in UNCITRAL Rules, within a reasonable amount of time, any of the parties may request the Court to rectify an administrative error, such as mathematical miscalculations or misprints, or request a clarification of any part of the ruling. If the arbitration tribunal finds the request justified, it will rectify the ruling or award or, alternatively, give the necessary explanations within thirty (30) days from receiving the request.

Any party may submit a request to the arbitration court to hand down additional decisions on claims which were submitted during the arbitration proceedings, but not included in the final decision. If the arbitration court finds grounds for making such additional decision(s), it must do so within sixty (60) days.

Significantly, the Court's awards are final and binding, and must be carried out by the parties within the period indicated by the Court. Awards or rulings not carried out voluntarily are enforced in accordance with international agreements and the procedural rules of the country where enforcement is sought.

B. International Arbitration in a Foreign Forum

As mentioned earlier, foreign parties may provide in their agreements with Ukrainian entities for the arbitration process to take place in any third-party country. In the past, strict visa requirements and high arbitration costs made it difficult for Ukrainian parties to attend arbitration hearings in



foreign forums. This issue sometimes resulted in significant impediments to subsequently enforcing the foreign arbitration court's award in Ukraine. For instance, the respondent could have asserted before the Ukrainian court that it was not properly served notice during the arbitration process or was not provided with a fair opportunity to participate in the arbitration hearings due to the timing to receive a visa. The granting by the EU of a visa-free regime to Ukrainian citizens has somewhat mitigated these issues.

Enforcement of Foreign Arbitration Awards

The procedure for enforcement in Ukraine of foreign court judgments and foreign arbitration awards is determined by the corresponding international treaties of Ukraine and the laws of Ukraine. In the absence of an international treaty, such judgments or awards may be enforced on the principle of reciprocity.

The succession of Ukraine in respect of the rights and duties of the USSR under its various treaties is governed by the Law of Ukraine "On Legal Succession of Ukraine." Ukraine became a legal successor under any international agreements to which the USSR was a party so long as these agreements were not inconsistent with the Ukrainian Constitution and interests of Ukraine.

On August 10, 1960, both the USSR and Ukraine, in a separate capacity, became a party to the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitration Awards (subject to the proviso that awards issuing from a state not a party would be enforced only in the event of reciprocity), and on September 17, 1966, to the 1954 Hague Convention on Civil Procedure. Further, the Ukrainian Soviet Socialist Republic became a party on January 25, 1964, to the 1961 European Convention on International Commercial Arbitration. On May 16, 1995, Ukraine ratified the Stockholm Convention on Reconciliation and Arbitration within the Council on Security and Cooperation in Europe.

After 1991, Ukraine concluded a number of bilateral agreements providing for the recognition and enforcement of foreign judgments and arbitration awards which can be classified into two groups:

- (i) agreements on providing legal assistance in civil, criminal, family, etc. cases entered into between Ukraine and Azerbaijan (1993); Russia (1993); Kirgisia (1993); China (1993); Belarus (1993); Lithuania (1993); Moldavia (1994); Poland (1994; 1998); Estonia (1995); Georgia (1995); Latvia (1995); Mongolia (1995); Greece (1996); Turkmenistan (1996); and Turkey (2000); and
- (ii) agreements on mutual encouragement of investments which provide for mutual recognition and enforcement of court/arbitration judgments as far as investments are concerned. Such agreements were concluded with Denmark (1992); Egypt (1992); Poland (1993); Germany (1993); United Kingdom (1993); Vietnam (1994); Armenia (1994); Lithuania (1994); U.S.A. (1994); Slovak Republic (1994); the Netherlands (1994); Argentina (1995); Bulgaria (1995); Estonia (1995); France (1995); Georgia (1995); Canada (1995); Kazakhstan (1995); Korea (1995); Czech Republic (1995); Sweden (1995); Austria (1996); Benelux (1996); Belarus (1996); Lebanon (1996); Chile (1996); Cuba (1996); Greece (1996); Hungary (1996); Israel (1996); Italy (1996); Moldavia (1996); Switzerland (1996); Turkey (1996); Azerbaijan (1997); Croatia (1997); Latvia (1997); Indonesia (1997); Iran (1997); Spain (1998); Macedonia (1998).

As a result of various treaties, conventions and laws, Ukrainian courts recognize and enforce judgments only of courts of foreign nations that have concluded international agreements with Ukraine regarding recognition and enforcement of such judgments. Foreign money judgments may also be enforced on the principle of reciprocity if an international agreement is not available.



The 1958 New York Convention, to which Ukraine is a signatory, requires courts of member states to recognize that written arbitration agreements take precedence over normal rules of jurisdiction, and to enforce arbitral awards rendered abroad. Moreover, according to the New York Convention, arbitral awards are enforced according to the procedure provided by legislation of the country where the enforcement is requested. In Ukraine, foreign arbitration decisions are enforced according to the procedure described above in accordance with the Civil Procedure Code.

A Ukrainian court will consider recognition and enforcement petitions if the debtor has residence or a registered location in Ukraine. If the debtor does not have residence or a registered place of location in Ukraine, the issue of granting mandatory enforcement of a foreign arbitration decision will take place at the place of the debtor's property. Of course, the debtor may also voluntarily perform the foreign arbitration decision prior to recognition and enforcement proceedings.

Applications to recognize and enforce a foreign arbitration decision must be submitted to the Kyiv Appellate Court within three years from the date of the foreign arbitration decision. This term may be extended by the court for a valid and substantiated reason. The application must contain the following information:

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- 1) name of the court and the name of the arbitration court (if applicable) which rendered the award;
 - 2) the name of the arbitration parties and their authorized representatives and their place of residence or location;
 - 3) the date and place of the international arbitration decision; the date of receipt of the international arbitration decision by the applicant;
 - 4) the request for an enforcement order (enforcement document).

The application must be accompanied by the original duly executed arbitration award (or a notarized copy thereof) and the original arbitration

agreement (clause) or a notarized copy thereof. Other administrative documents will be required, such as proof of payment of the court's fee, duly executed powers of attorney for authorized representatives, and copies of the application for all arbitration participants. The documents should be duly translated into Ukrainian or another language stipulated by an international agreement.

An application on recognition and enforcement of a foreign arbitration decision must be reviewed by one judge within two months from the date of receipt by the court in a court hearing with notice to the parties. Similar to enforcement requests for national court decisions, at the petition of a party the court may request certain evidence and demand interim measures to secure the claim. The court will send written notice about the application to the debtor within five days and propose the debtor to submit possible objections within one month. After this term,





the court will set a hearing date and place and inform the parties no later than 10 days prior to the set hearing.

Unless there are objections or defenses to the proceedings, the court will issue a decision to recognize the foreign arbitral award and order the execution of an enforcement document. The enforcement order must be entered into the unified state register of enforcement documents no later than the day following its issuance. The parties have the opportunity to appeal the court's decision to grant or reject enforcement.

Possible Defences to Enforcement of Foreign Arbitration Awards

According to Civil Procedure Code and the Law of Ukraine “On International Commercial Arbitration,” an arbitration award, regardless of the state of origin, is recognized as mandatory (binding) and, after submission of a written petition to the competent court, is subject to enforcement. The party referring to an arbitration decision or submitting an enforcement petition must submit either originals or duly certified copies of the arbitration decision and the initial arbitration agreement to the court and, if applicable, such documents must be duly translated into Ukrainian.

Note, however, that the respondent has several viable defences, any one of which would emasculate all efforts to enforce foreign arbitration court's award in Ukraine. Specifically, the respondent has the right to appeal to the competent court with a request to refuse recognition and enforcement of a decision of a foreign court. In fact, pursuant to Article 5, paragraph 1 of the New York Convention, the Civil Procedure Code and the Law “On International Commercial Arbitration,” the recognition and enforcement of an arbitration decision may be denied at the request of the respondent if it provides evidence that:

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- a) the parties to the arbitration agreement were, under the law applicable to them, under some incapacity, or the said agreement

- is not valid under the law which the parties chose to govern said agreement or, in the absence of such agreement, under the law of the country where the award was made; or
- b) the party against whom the award was issued was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case; or
 - c) the award deals with a dispute not falling within the arbitration agreement or clause, or it contains decisions on matters beyond the scope of the arbitration agreement or clause. However, if decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced; or
 - d) the composition of the arbitration court or the arbitration procedure did not correspond to the agreement of the parties, or, in the absence of such agreement, was not in accordance with the law of the country where the arbitration took place; or
 - e) the award has not yet become binding on the parties or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made.

As Ukraine is also a signatory to the 1961 European Convention on International Commercial Arbitration in Geneva, during the consideration of a petition on the recognition and enforcement of decisions of international commercial arbitration courts, it is important to take into account the provisions of Article IX of the said Convention regarding the recognition of arbitral decisions as invalid. Specifically, paragraph 2 provides that in the relations between states, which are signatories to the European Convention and simultaneously signatories to the 1958 New York Convention, paragraph 1 of Article IX limits the application of Article 5, paragraph 1(e) (see above) of the New York Convention in certain cases.

Further, an arbitral decision may be declined for recognition and enforcement if the competent authority (in Ukraine, the competent



court) of the country in which the relevant request for recognition and enforcement determines the following:

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- a) The object of the dispute cannot be the subject of arbitration under the law of such country; or
 - b) The recognition and enforcement of such decision contradicts such country's public order.
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Obtaining a foreign arbitration court's award is only half of the battle. Enforcing the judgment is the other half, which in Ukraine can be far more difficult to accomplish than obtaining the initial decision.

Executive Enforcement Procedure

The enforcement of foreign court and arbitration decisions is generally governed by the Civil Procedure Code of Ukraine and, in much more detail, the Law "On Enforcement Proceedings". As a rule, foreign court decisions are recognized and enforced in accordance with international agreements to which Ukraine is a party or on the basis of reciprocity.

In order to initiate the executive enforcement procedure, the judgment holder must present to the state enforcement service or a private enforcement officer an enforcement document. The enforcement document must be registered in the unified state register of enforcement documents by the relevant court.

Private enforcement officers are somewhat new and, therefore, are restricted to only being able to enforce foreign court and arbitration decisions which do not exceed 20 million UAH (or its equivalent in foreign currency) during their first year of activity. They may also not collect cash debts that exceed their insurance coverage.

An enforcement document must contain, at the very least, the following information:

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- 1) the name and date of the document and the name of the issuing authority or officer;

- 2) the date and number of the decision pursuant to which the document was issued;
- 3) the full name of the creditor and debtor, their full addresses (registered location or residence) and birth dates (if applicable);
- 4) for legal entities – their registration number in the Unified State Register or for individuals – their tax ID numbers or passport numbers;
- 5) the part of the commercial or arbitration court’s decision in favor of the creditor for mandatory enforcement;
- 6) the date when the foreign court or arbitration decision will come into force (unless it calls for immediate enforcement);
- 7) the term for presenting the court decision for enforcement.

The enforcement document may also contain other information which enables identification of the parties, such as place of employment, property location, bank account requisites of the parties, mobile number, electronic address, etc. The judgment holder also has the right to request the enforcement officer to place an arrest on the debtor’s property and cash funds (Ukrainian securities) and to prohibit their alienation. The judgment holder should also submit the documents evidencing the court’s decision to confiscate property (or the absence of property) and/or the decision to apply security measures (if applicable).

Generally, the enforcement procedure is conducted at the place of location (residence, sojourn, work) of the debtor or the location of the debtor’s property. In case the debtor is obliged by the court decision to take certain actions, the place of enforcement will be the place where such actions must take place. Enforcement officers, if necessary, may also conduct an investigation regarding the existence and availability of the debtor’s property or work at places other than the debtor’s location. Any property uncovered by the enforcement officer will be set forth in a description and subject to arrest in the presence of witnesses.



Generally, an enforcement document must be presented to the state enforcement service or private enforcement officer within a three-year period. A judgment holder, who failed to timely present an enforcement document, may petition the issuing court or the court at the place of enforcement to renew the submission term. Obviously, the judgment holder must provide a valid reason for missing the deadline for presenting the enforcement document.

Once an enforcement document is presented within the prescribed term and in the proper manner on the basis of a valid foreign court or arbitration decision, the state or private enforcement officer must issue an order to initiate the enforcement procedure. Depending on the subject of the court case, the judgment holder may need to make an advance payment to the enforcement authority. The advance payment is usually 2 percent of the debt amount, but no more than 10 minimum monthly salaries (currently $3,723 \times 10 = 37,230$ UAH) or for non-proprietary disputes 1 to 2 minimum monthly salaries of the debtor.

In cases being handled by a state enforcement officer, the enforcement authority will collect an enforcement duty from the debtor which will be equivalent to 10% of the amount actually collected or returned amount of the debtor or 10% of the value of the property subject to transfer by the debtor to the judgment holder. If the judgment holder includes the debtor's bank accounts in its application, the enforcement authority may be able to immediately arrest the debtor's funds.

Various enforcement actions must be completed within various timeframes from the opening of the enforcement procedure, depending on the nature of the enforcement action. The terms may be further extended if time is necessary to conduct expert conclusions or property appraisals, to prepare technical documentation for the sale of the debtor's property, court-imposed delays or suspensions of the enforcement procedure, etc.

Generally, an enforcement officer will levy collection on the debtor's available funds to cover the enforcement duty (or a private enforcement



“ Mr. Alex Frishberg has been legal advisor and attorney for the Royal Norwegian Embassy in Kyiv since 1992. In this period Mr. Frishberg has assisted the Embassy in matters relating to Ukrainian property law, labour law, commercial code and other aspects of civil law. We have been happy to recommend his and his law firm's services to Norwegian companies that have been interested in investing or otherwise engage in the Ukrainian market, and we know that many such companies have made use of his services and with great success. Mr. Frishberg has on numerous occasions demonstrated extraordinary insight into the legal, political and economic framework for companies and other entities operating in Ukraine and it is a pleasure for us to recommend Mr. Frishberg's services to whomever may be interested or in need. ”

Olav Berstad, Ambassador, the Royal Norwegian Embassy in Kyiv

“ Alex Frishberg has been my Honorary Legal Adviser since 2006. He has been an invaluable source of advice to the British Embassy, providing clear legal guidance and a unique insight into the legal and political structures of Ukraine. I have to terminate this appointment on my departure from Kiev, but I hope that Alex's association with the British Embassy can continue, and I wish him every success for the future. ”

Tim Barrow, Her Majesty's Ambassador, British Embassy in Kyiv

“ Since 2008 Alex Frishberg is the Legal Adviser on the Belgian Embassy and gives the Embassy of Belgium timely and helpful advice, on important legal issues. These includes property and human resource questions as well as other issues associated with running a busy Embassy in Kyiv. We value this help. ”

Mark Vinck, Ambassador, the Embassy of Belgium in Kyiv

“ Since many years, **Frishberg and Partners** provides legal services to Air France and KLM. Alex Frishberg and his associates have provided valuable support on various legal matters such as litigation, contracting, expats' visa related issues and more. We are very pleased with the level of service provided by Alex and his team. It is also important to mention the added value of Alex as a person who has vast knowledge on the political and economical system of Ukraine. His guidance positively contributed to our business. ”

Hanan Zweig, Country Manager Ukraine, Air France and KLM Royal Dutch Airlines

“ I am very happy to recommend Mr. Frishberg and his law firm's services, without constraints, to any private individual, or corporation being interested in investing, currently operational, or otherwise engage in the Ukrainian market. Mr. Frishberg has on numerous occasions demonstrated extraordinary insight into the legal, political and economic framework for companies and other entities operating in Ukraine and it is a personal pleasure for me to recommend Mr. Frishberg's services to whomever may be interested or in need. ”

Kasper Ditlevsen, Managing Partner, Founder Lead Nordic Ltd.



officer's agreed upon remuneration), the advance duty paid by the creditor, enforcement expenses and, of course, the debt owned to the creditor, including penalties. In case the debtor is a legal entity, the state enforcement service has the right to levy collection on its property and the property on the balance sheet of its branches, representative offices and other subdivisions, regardless of who actually uses the property.

Any property, which must be sold to cover the debt amount, will be sold at public sales, auctions or on a commission basis. Property must be sold at prices derived from the official appraisal value of such property. Any pledged property may be subject to mandatory levying of execution if the judgment holder is not the pledgee (mortgagee). This is possible if (i) the pledge right (lien) arose after the Ukrainian court's decision to permit the enforcement of the foreign court decision and (ii) the value of the pledged property exceeds the amount of the debtor's indebtedness before the pledgee (mortgagee).

Conclusion

Overall, Ukrainian legislation has covered many of the gaping holes that existed in foreign court enforcement legislation contained in Ukrainian international agreements. However, the law should not be viewed as an automatic vehicle for foreign investors to quickly line up and obtain judgments against their breaching Ukrainian counterparts. Both (a) a careful review of the various international agreements to which Ukraine is a party and (b) meticulous adherence to a well-structured dispute resolution provision are absolutely mandatory prerequisites to relying on the effective Ukrainian legislation as a guideline to legal enforcement.

Ukraine's joining of the World Trade Organization means that the practical aspects of enforcing foreign judgments will become even more transparent and predictable as time goes by. Until such time, we strongly encourage you to retain experienced professional counsel if you require assistance with potential or existing litigation in Ukraine.

Withholding Tax Rates for Treaty Countries					
Country of Recipient	<u>Dividends</u>			<u>Interest</u>	<u>Royalties</u>
	Major Rate (%)	Minor Rate (%)	Major Holding (%)	(%)	(%)
Armenia	5	15	25	10	-
Austria	5	10	10	2/5	5
Azerbaijan	10	10	-	10	10
Belarus	15	15	-	10	15
Belgium	5	15	20	2/5	5
Bulgaria	5	15	25	10	10
Canada	5	15	20	10	10
China (P. Rep. of)	5	10	25	10	10
Croatia	5	10	25	10	10
Cyprus	5	15	20*	2	10
Czech Republic	5	15	25	5	10
Denmark	5	15	25	10	10
Egypt	12	12	0	12	12
Estonia	5	15	25	10	10
Finland	5	15	20	5/10	5/10
France	5	15	10/20	2/10	10
Georgia	5	10	25	10	10
Germany	5	10	20	2/5	5
Hungary	5	15	25	10	5
India	10	15	25	10	10
Indonesia	10	15	20	10	10
Iran	10	10	-	10	10
Israel	5	10/15	25	5/10	10
Italy	5	15	20	10	7

Japan	15	15	-	10	10
Kazakhstan	5	15	25	10	10
Korea	5	15	20	5	5
Kyrgyzstan	5	15	50	10	10
Latvia	5	15	25	10	10
Lithuania	5	15	25	10	10
Macedonia	5	15	25	10	10
Malaysia**	15	15	-	15	10/15
Moldova	5	15	25	10	10
Mongolia	10	10	-	10	10
Netherlands	5	15	20	2/10	10
Norway	5	15	25	10	5/10
Poland	5	25	25	10	10
Portugal	10	15	25	10	10
Romania	10	15	25	10	10/15
Russia	5***	15	-	10	10
Slovak Republic	10	10	-	10	10
Spain	18	18	-	-	5
Sweden	5	10	20/25	10	10
Switzerland	5	10	20/25	10	10/15
Turkey	10	15	25	10	10
Turkmenistan	10	10	-	10	10
United Kingdom	5	10	20	-	-
United States	5	15	10	-	10
Uzbekistan	10	10	-	10	10
Vietnam	10	10	-	10	10
Yugoslavia	5	10	25	10	10

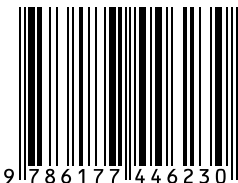
* Or investment of no less than 100,000 EUR.

** A new double taxation treaty was signed in 2016 and is expected to come into force in the future.

*** Or company investment of no less than 50,000 USD or equivalent.

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