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RECENT DEVELOPMENTS CONCERNING DISPUTE RESOLUTION OF SHAREHOLDER AGREEMENTS IN UKRAINE: FOR BETTER OR FOR WORSE?

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I. Introduction

The shareholder (stockholder) agreement is a steadily-developing mechanism designed to supplement legal relations among the owners of a business, in particular among the shareholders of a corporation. Although these relations are already regulated to a large extent by the constituent documents of a corporation, as well as by the mandatory provisions of Ukrainian corporate legislation, shareholders often seek to regulate their relationship in more detail and introduce tailor-made provisions that supplement, to the extent permitted, mandatory law. The main reason for the existence of any shareholder agreement is the desire of the parties, *inter socios*, to specifically regulate any outstanding issues of mutual concern.

This article deals with current dispute related issues regarding the application, validity and enforceability of shareholder agreements in Ukraine. It places a particular emphasis on recent developments in Ukrainian jurisprudence, as affected by “Recommendations” given to Ukrainian courts by the Presidium of the Highest Commercial Court of Ukraine,¹ which gave rise to extensive discussions in legal circles both in Ukraine and abroad. Although Ukrainian legislation provides a complete set of choice of law rules, as well as a special law on international private law,

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¹ RECOMMENDATIONS OF THE HIGHEST COMMERCIAL COURT OF UKRAINE of 28 Dec. 2007, No. 04-5/14, “On the practice of the implementation of legislation during litigation proceedings arising out of corporate relations,” in the following referred to as “**the Recommendations.**”

the Highest Commercial Court of Ukraine has ignored their existence, not even referring to them in the issued Recommendations. While, logically, the reasoning of any court must be based on existing legislation and court practice, the Recommendations are written in a rather different style. With no references to legal acts and with only limited arguments and analysis in support of its conclusions, the Highest Commercial Court of Ukraine has acted in a manner that is unusual for a court of a developed country.

The Recommendations, indirectly, led to restrictions on i) the choice of foreign law applicable to the regulation of the relationship between shareholders; and ii) the use of dispute resolution clauses that provide for the settlement of such disputes through international commercial arbitration. For the purposes of this article, the key provision in the Recommendations is one that directs the courts to hold choice of law agreements among shareholders null and void and that also advises the courts to refuse enforcement of arbitral awards on the grounds that they are contrary to the public policy of Ukraine. To make things worse, there is a considerable risk that the Recommendations will be applied with retroactive effect and thus will be applied to shareholder agreements concluded before the Recommendations were made. Although Ukraine is not the only country where the arbitrability of corporate disputes is questionable, in the case of Ukraine, as will be explained below, the issue requires special attention.

Ukrainian legislation and the Ukrainian court system are still in the early stages of development and are subject to constant changes and transformations. Although case law does not constitute legal precedent in its classical form in Ukraine, there is some form of practice unification by the highest courts, *i.e.* the Highest Commercial Court of Ukraine and the Supreme Court of Ukraine, which constitutes a valuable source for lawyers. Such unification assists those who seek to determine how a future court decision may be rendered. Further, it is clear that frequency of changes to legislation means that decrees and recommendations issued as part of the unification process are often not up to date. In addition, the decrees and recommendations do not cover all the necessary elements of specific cases.

In accordance with Art.39.3 of the Ukrainian Law on the court system of Ukraine² the highest courts provide methodological assistance to the lower courts with the goal of a unified application of the norms of the Ukrainian Constitution and laws of Ukraine. To perform this unification the highest courts use analysis of court statistics to provide guidance to the specialized lower courts as to the proper interpretation and application of Ukrainian law. Court statistics are analyzed by the highest courts to determine the

² Art.39.3, UKRAINIAN LAW ON THE COURT SYSTEM OF UKRAINE, No. 3018-III of 07 Feb. 2002.

categories of cases in which the lower courts are experiencing the most difficulty in reaching a consistent interpretation of legislation.

Although such Recommendations do not constitute binding legal authority, it is rare for lower courts to act inconsistently with them. In fact, as current trends show, courts are inclined to follow the decrees and recommendations because they see other lower court decisions reversed for inconsistency with similar recommendations.

The historic background of the following discussion is the development of Ukraine from a so-called command (administrative) economy to a free-market economy. Prior to 1991, when Ukraine still was a member of the USSR, all commercial trade, including international trade, was monopolized by the state, and state agencies controlled all aspects of the economy. The supply of goods was regulated by “state requirements” while modern market theories were disregarded. Since its independence from the USSR, in an effort to support the creation and maintenance of a free-market economy, Ukraine has undergone a tremendous transformation of its legislation. According to the Ukrainian Law on legal succession,³ Ukraine has confirmed its obligations under international treaties previously concluded and in such a way succeeded to all international treaties of the former USSR. With regard to international commercial arbitration, Ukraine is a signatory to the 1958 New York Convention on Recognition and Enforcement of Foreign Arbitral Awards and the 1961 European Convention on International Commercial Arbitration. In 1994, based on the UNCITRAL Arbitration Model Law, the Ukrainian Law on international commercial arbitration⁴ was adopted. In 2005, Ukraine adopted a law on international private law,⁵ which set forth the principal conflict of law rules and specific regulations in that respect. As regards the protection of foreign investments, the Ukrainian legal landscape can be regarded as fairly well-developed. Ukraine is a party to the 1965 Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (Washington Convention). In addition, Ukraine is a party to 69 bilateral investment treaties, 13 of which were concluded with CIS countries.⁶ Art. 9 of the Ukrainian constitution⁷ stipulates that state treaties, once their validity has been approved by the Ukrainian Supreme Council, constitute a part of the national legislation of Ukraine. Finally, the recent

³ UKRAINIAN LAW ON LEGAL SUCCESSION, No. 1543-XII of 12 Sept. 1991.

⁴ UKRAINIAN LAW ON INTERNATIONAL COMMERCIAL ARBITRATION, No. 4002-XII of 24 Feb. 1994.

⁵ UKRAINIAN LAW ON INTERNATIONAL PRIVATE LAW, No. 2709-IV of 23 June 2005.

⁶ Markian Malsky, “Investment Challenges of the XXI Century,” FOREIGN ECONOMIC COURIER, LCCI HERALD #7-8, p.24 (2007).

⁷ CONSTITUTION OF UKRAINE, No. 254K/96-BP of 28 June 1996.

accession of Ukraine to the World Trade Organization further supports the Ukraine's attempts to become a player on the global stage.

Despite this background of a relatively developed system of statutory laws, foreign investors are still very reluctant to bring disputes before the Ukrainian courts and they consistently choose to resolve disputes through international commercial arbitration. Without doubt, where foreign investors are involved, international commercial arbitration is one of the preferred dispute settlement options and it is fair to say that usually it is the best choice if one of the parties is a foreign investor.

II. The Recommendations of the Presidium of the Highest Commercial Court of Ukraine

a) Current trends in corporate disputes in Ukraine

According to statistics for the period 1 January 2005 to 1 July 2007, commercial courts in Ukraine have resolved approximately 2,500 corporate cases (this figure excludes cases terminated prior to the rendering of a decision on the merits).⁸ The adjusted yearly figures show an increase in the proportion of i) cases in which the general meetings of shareholders are alleged to have been invalid (4.7% in 2005; 7% in 2006; and 19.5% in 2007); and ii) cases regarding changes to shareholder structure and shareholder expulsion (1.3% in 2005; 3.2% in 2006; and 8.8% in 2007).⁹ The proportion of disputes concerned with the cancellation of state registration of the company and disputes between shareholders has declined over the same period (77.8% in 2005; 68.1% in 2006; and 34.9% in 2007).¹⁰ In the year 2007 alone, the commercial courts of Ukraine received more than 322,000 new court applications; 18,000 of these new applications were made to the Kiev City Commercial Court.¹¹ On average, each judge of a district commercial court received over 50 new court applications per month, which roughly equals 600 new cases per year.¹² Naturally, such a flow of cases creates immense pressure on the commercial court system. In addition, the court system has become a tool in corporate disputes and hostile raider attacks on enterprises. Impractical aspects of Ukrainian corporate legislation may sometimes result in unjust decisions, which in

⁸ Serhiy Shklyar & Anton Moskalenko, "Institute of Corporate Disputes in Ukraine: Actual Hardships and Their Solutions," *AKCIONERNIY VESTNIK*, p. 84 (2008); see also "Practice of Resolving Cases on Corporate Matters," Supreme Court of Ukraine, Letter of 01 Aug. 2007.

⁹ *Id.*

¹⁰ *Id.*

¹¹ DECREE OF THE PRESIDIUM OF THE SUPREME COMMERCIAL COURT OF UKRAINE of 27 Feb. 2008, "On the Results in the Year 2007 and Perspectives of Activity of Commercial Courts for the Year 2008."

¹² DECREE OF THE PRESIDIUM OF THE SUPREME COMMERCIAL COURT OF UKRAINE of 26 July 2007, "On the Results in the First Half of 2007 and Assessments for the Current Year."

turn undermine the efficiency of the judicial system. International commercial arbitration could, as a result, justifiably be considered a more flexible and impartial instrument.

Corporate legislation in Ukraine is included in the priority list for first stage execution of the plan for adapting to legislation of the European Union as part of Ukraine's efforts to become a member of the Union.¹³ In addition, a new joint stock companies law was recently adopted and will enter into force in 2009.

Corporate relations are playing a large role in Ukrainian business relations. In general, the year 2007 will be remembered in the area of corporate practice due to three major events.

First, the Ukrainian Law on changes and amendments to certain legislative acts of Ukraine regarding the determination of jurisdiction in aspects of privatization and corporate disputes¹⁴ came into force. This law amended several provisions of the Ukrainian Commercial Code,¹⁵ the Ukrainian Commercial Procedural Code¹⁶ and the Ukrainian Civil Procedural Code.¹⁷ These amendments are a first step towards providing greater clarity in the determination of the jurisdiction of courts over corporate disputes where jurisdiction is based on the subjective characteristics of the parties to the dispute, as well as those disputes where jurisdiction is based on the subject matter of the dispute itself. The reason for the previous lack of clarity was primarily ambiguity regarding the determination of jurisdiction based on the subject matter of the case, *i.e.* whether it fell within civil or commercial jurisdiction. This resulted in uncertainty as to which courts to approach and which rules of procedure to follow. The courts, in turn, also took different approaches and this further added to the aforesaid ambiguity.

Secondly, the Supreme Court of Ukraine issued a letter on the practice of resolving cases on corporate matters ("**the Letter**"),¹⁸ containing 14 detailed sections, with reference to judgments in more than 100 cases. The Letter constitutes an important source of court practice unification and

¹³ § 3, UKRAINIAN LAW ON GENERAL STATE PROGRAM OF LEGISLATION ADAPTATION TO THE LEGISLATION OF THE EUROPEAN UNION, No. 1629-IV of 18 Mar. 2004.

¹⁴ UKRAINIAN LAW ON CHANGES AND AMENDMENTS TO CERTAIN LEGISLATIVE ACTS OF UKRAINE REGARDING THE DETERMINATION OF THE JURISDICTION IN ASPECTS OF PRIVATIZATION AND CORPORATE DISPUTES, No. 483-V of 15 Dec. 2006.

¹⁵ UKRAINIAN COMMERCIAL CODE, No.1798-X of 06 Nov. 1991.

¹⁶ UKRAINIAN COMMERCIAL PROCEDURAL CODE, No. 436-IV of 16 Jan. 2003.

¹⁷ UKRAINIAN CIVIL PROCEDURAL CODE, No. 1618-IV of 18 Mar. 2004.

¹⁸ "Practice of Resolving Cases on Corporate Matters," Supreme Court of Ukraine, Letter of 01 Aug. 2007.

provides practical guidance from the Supreme Court of Ukraine. The Letter has contributed to the further establishment of a unified approach to resolving corporate disputes and determination of proper jurisdiction between the courts.

Finally, the Presidium of the Highest Commercial Court of Ukraine issued Recommendations, analysis of which constitutes the main part of this article. The Recommendations included 6 sections, mainly outlining current legislation and providing guidelines for the elimination of conflicts between the lower courts and directing them toward a unified approach. The last section, “Contractual regulation and exercise of foreign law in corporate relations and in resolving cases arising out of corporate relations,” is the most controversial. The particularities of the conclusions reached by the Highest Commercial Court of Ukraine are analyzed separately in the following sections.

b) Content of the Recommendations

According to Art. 6.1 of the Recommendations, the following are regulated *solely* by the laws and related normative acts of Ukraine: i) the activity of a joint stock company with its registered seat in Ukraine, ii) the relations between shareholders of such joint stock company and the company, and, finally, iii) the relations among the shareholders of the joint stock company as far as they regard the activity of the latter. Any choice of law clause which deviates from this principle is null and void.

Further, according to the Recommendations, the relations between the shareholders as regards the incorporation of the company, the constitution of its bodies, the determination of the authorities of the latter, the procedures for the convening of a general shareholder meeting and the process of the general meeting’s decision-making are subject to the provisions of the Ukrainian civil code¹⁹ and the Ukrainian Law on commercial companies.²⁰ Because the provisions of these laws are mandatory, their infringement constitutes a violation of Ukrainian public policy pursuant to Art.228 of the Ukrainian Civil Code.

Finally, according to Art. 6.2 of the Recommendations, the settlement of corporate disputes relating to the activity of Ukrainian companies cannot validly be referred to international commercial arbitration. In particular, the Recommendations refer to disputes relating to corporate governance, stating that such disputes are not arbitrable and that any clause purporting to refer such disputes to arbitration is not enforceable.

¹⁹ UKRAINIAN CIVIL CODE, No. 435-IV of 16 Jan. 2003.

²⁰ UKRAINIAN LAW ON COMMERCIAL COMPANIES, No. 1576-XII of 19 Sept. 1991.

The Recommendations state that the commercial courts shall impose the laws of Ukraine, and any applicable normative acts, when hearing cases involving relations between shareholders, as well as between the shareholders and the joint stock company, regarding the management of the company and the charter of the company if the company is registered in Ukraine. Therefore, issues of corporate governance may only be regulated contractually in cases where this is explicitly provided for under the legislation of Ukraine. The result is that any agreements not in accordance with the aforesaid may be considered invalid.

In order to provide clarity regarding particular aspects of corporate governance, the Highest Commercial Court of Ukraine created a non-exhaustive list of arrangements that includes such areas as the establishment of specific order of voting procedures at the general shareholders meeting, the obligation of one or several shareholders to vote in a certain manner, and the obligation of all shareholders to take part and vote in the general shareholders meetings, as well as other agreements. Arrangements on specific voting procedures in other bodies of the company (board of directors, supervisory board *etc.*) must be consistent with those required for the general meeting. Using the same reasoning regarding public policy referred to above, arrangements for formation of the executive body and supervisory board not in compliance with the laws and normative acts of Ukraine can be held invalid.

According to Art. 6.5 of the Recommendations, the shareholders of a company may not, by an agreement between them, establish rules other than those provided for under the mandatory provisions, in particular where this would violate antitrust regulations. Agreements directed toward the limitation or elimination of competition on commodity and other markets of Ukraine are also null and void.

Finally, the shareholders of a company incorporated in Ukraine are not permitted to choose foreign law to govern the validity of shareholder agreements, as the norms concerning the invalidity of agreements in Ukraine are mandatory.

At present, according to the Recommendations, shareholder agreements governed by foreign law should be considered null and void, meaning that they create no legal consequences except those connected to their invalidity.

The Recommendations lack any legal analysis; rather, they contain answers to questions, without showing the reasoning upon which the answers are based. Further, there is also a clear lack of references to any cases or legislation, including conflict of laws norms.

The issues analyzed in the Recommendations can be grouped into three categories. First, the recommendation that regulation of shareholder

agreements by foreign governing law is null and void; second, the recommendation that regulation of shareholder agreements by foreign governing law infringes the public policy of Ukraine; and finally, the recommendation that disputes regarding shareholder agreements may not be referred to international commercial arbitration.

c) Regulation of shareholder agreements by foreign governing law is null and void

The first issue requires an analysis of the existing legislation. The Recommendations in this regard do not refer to any provisions of law. Art.46 of the Ukrainian Law on international private law²¹ establishes the mandatory rule, that the law applicable to a *constituent agreement* of a legal entity with foreign participation is the law of the country of incorporation. However, Art.142 and Art.153 of the Ukrainian Civil Code explicitly provide that an agreement regarding the foundation of a joint stock company (“akcionerne tovarystvo”) or limited liability company (“tovarystvo z obmezhenoyu vidpovidalnistyu”) *is not* a constituent document of such company.

In our view, for this reason, it remains doubtful whether Art.46 of the Ukrainian Law on international private law is applicable to shareholder agreements of joint stock companies (especially open joint stock companies) and limited liability companies. If this provision does not apply, Art.5 of the same law steps in and establishes the party autonomy principle with regard to the ability of participants in legal relationships to independently regulate them with any chosen legislation concerning the content of their relationships. As a result, it is unclear upon which provisions the Highest Commercial Court of Ukraine was basing its recommendation.

d) Regulation of shareholder agreements by foreign governing law infringes the public policy of Ukraine

The Recommendations provide that regulation of shareholder agreements by foreign governing law infringes the public policy of Ukraine. Art.228 of the Civil Code of Ukraine states that a legal act infringes public policy if it is directed towards the violation of constitutional rights and freedoms of a person and citizen; or toward the destruction of, damage to, or illegal taking of, the property of a natural or legal person, the State, the Autonomous Republic of Crimea, or a territorial community.

Art. 12 of the Ukrainian Law on international private law states that public policy is the fundamental legal order of Ukraine. It also provides that a provision of foreign law shall not be applied in cases where such

²¹ UKRAINIAN LAW ON INTERNATIONAL PRIVATE LAW, No. 2709-IV of 23 June 2005.

application would give rise to consequences explicitly inconsistent with the fundamental legal order (public policy).

With the goal of unifying court practice concerning enforcement of foreign arbitral awards, the Ukrainian Supreme Court has previously issued a Decree on Practice of Consideration by the Courts of the Petitions on Recognition and Enforcement of the Awards on the Territory of Ukraine of Foreign Courts and Arbitrations and on Setting Aside of the Awards, Rendered in the Course of the International Commercial Arbitration.²² The Supreme Court has also given a determination of the *ordre public*, which should be understood as the legal order of the state, the determining principles and basis of which are the fundamentals of the order existing in the state: its independence, integrity, inviolability, essential constitutional rights, freedoms, guarantees, *etc.*

It is arguable whether the Recommendations fit under any of the provided exclusions. Although the public policy exception is widely discussed internationally in the current arbitration literature and court decisions, Ukrainian courts do not have sufficient access to those materials.

Gary Born has written that public policy is “one of the most significant and most controversial bases for refusing to enforce an international arbitral award.”²³ Among Ukrainian authors, Oleh Alyoshin sets out three possible circumstances in which the public policy exception may have application in Ukraine,²⁴ namely when the question at hand is: i) definitely incompatible with public policy and enforcement of the award would infringe the fundamental constitutional rights and freedoms of natural persons and citizens (e.g. the right to conduct entrepreneurial activity); ii) incompatible with public policy, where the rendering of the arbitral award infringed the procedural rights of the respondent; or iii) incompatible with public policy, where enforcement of the arbitral award would contravene imperative provisions of national public law.

Hardly any cases are known, where a party has successfully contested the enforcement of an award in Ukraine basing its objections solely on the ground that the award is contrary to public policy. As a rule, the objection to enforcement is based also upon other grounds envisaged in Art.V of the

²² DECREE OF THE SUPREME COURT, “On Practice of Consideration by the Courts of the Petitions on Recognition and Enforcement of the Awards on the Territory of Ukraine of Foreign Courts and Arbitrations and on Setting Aside of the Awards, Rendered in the Course of the International Commercial Arbitration,” Supreme Court of Ukraine, No. 12 of 24 Dec. 1999, available at <http://www.scourt.gov.ua/>.

²³ Gary Born, INTERNATIONAL COMMERCIAL ARBITRATION: COMMENTARY AND MATERIALS, 2nd Ed., p. 815 (2006).

²⁴ Oleh Alyoshin, “The term of public policy exception in international private law,” YURIDICHESKAYA PRAKTIKA, №41/ 303, (2003).

New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards. In several cases the courts have refused to enforce a foreign arbitral award because a court judgment has come into force regarding the same subject matter, mainly in cases where the objecting party has successfully applied to a Ukrainian court to nullify the underlying contract together with its arbitration clause. Enforcement of an illegal contract may indeed contravene public policy; however, this situation would not arise if the courts had interpreted the separability doctrine correctly in the first place.

e) Disputes regarding shareholder agreements may not be referred to international commercial arbitration

The Recommendations provide that disputes arising from shareholder agreements may not be referred to international commercial arbitration. However, pursuant to Art.1 of the Ukrainian Law on international commercial arbitration,²⁵ which is generally based on the UNCITRAL Arbitration Model Law,²⁶ according to an agreement of the parties, the following may be referred to international commercial arbitration: disputes resulting from contractual and other civil legal relationships arising in the course of foreign trade and other forms of international economic relations, provided that the place of business of at least one of the parties is situated abroad; as well as disputes arising between enterprises with foreign investment, international associations and organizations established in the territory of Ukraine; disputes between participants in such entities; as well as disputes between such entities and other subjects of the law of Ukraine. Nothing in this list, in our view, prevents the parties from concluding an arbitration agreement regarding corporate disputes.

Art. 77 of the Ukrainian Law on international private law provides a list of subject matters, disputes as to which can only be settled by the state courts of Ukraine. Ukrainian legislation lists ten dispute types that fall within the exclusive competence of Ukrainian state courts. Of these, three are disputes as to civil and family matters and seven may have a connection to international commercial arbitration. The seven types of dispute that may have a connection to international commercial arbitration are: i) disputes as to immovable property located on Ukrainian territory; ii) disputes arising from the registration of intellectual property rights secured by registration or patent certification in Ukraine; iii) disputes connected with the registration or dissolution, in Ukraine, of foreign legal entities; iv) disputes concerning the validity of notes in the state registry, or cadastre, of Ukraine; v) disputes regarding bankruptcy, if the debtor entity was created in

²⁵ UKRAINIAN LAW ON INTERNATIONAL COMMERCIAL ARBITRATION, No. 4002-XII of 24 Feb. 1994.

²⁶ UNCITRAL Model Law on Commercial Arbitration.

accordance with the laws of Ukraine; vi) disputes concerning the issuance or loss of securities drawn up in Ukraine; and vii) other cases provided for by the laws of Ukraine.

In the existing list nothing directly states that corporate disputes under shareholder agreements cannot be settled by international commercial arbitration. It is clear that the Recommendations attempt to keep corporate disputes resulting from shareholder agreements within the exclusive competence of Ukrainian law and Ukrainian courts. However, the Recommendations do not provide valid reasoning for doing so.

III. Feasible alternative

a) Defining the hardship

The situation caused by the Recommendations, creates a need for parties to attempt to find alternative feasible solutions to the problem at hand. The hardship itself, as described previously, can be defined as a prohibition on concluding shareholder agreements based on foreign law, as well as shareholder agreements with a dispute resolution clause that provides for international commercial arbitration. As any international matter involves at least two jurisdictions, specific choices can be made due to the diversity of legal systems that may be involved in the transaction.

b) Corporate structuring outside of Ukraine

Corporate structuring outside of Ukraine will require additional operational costs; however, this alternative permits the parties to reach stronger arrangements between themselves. The main idea is that, if one jurisdiction does not permit free conclusion of shareholder agreements, a sort of “jurisdiction/forum shopping” may be feasible for the parties. In this situation, the parties could jointly create a holding company in a foreign jurisdiction (Company A). The shareholder agreement between the owners in such jurisdiction would provide for the management of a subsidiary company in Ukraine (Company B). In this way Company A governs the activity of Company B, based on a shareholder agreement between the owners of Company A.

The choice of a foreign jurisdiction can be made based on existing tax treaties, in order to provide tax benefits for the parties. The choice may also depend on the legal system in place in a particular jurisdiction, as common law countries provide greater flexibility for commercial agreements. Christopher Rose, recommending similar actions, advises including a reference to the articles of association in the shareholder agreement, so that a violation of the company’s articles of association would also constitute a breach of the shareholder agreement and could be challenged under that

agreement's dispute resolution provisions.²⁷ This alternative requires extensive legal support in order to draft the necessary documents, however, in our view, it allows the desired result to be achieved.

Having chosen a non-Ukrainian jurisdiction, the parties, depending on the mandatory laws of the foreign jurisdiction, may agree to submit any disputes under the shareholder agreement to international commercial arbitration. It should be noted, however, that an arbitral award, due to the grounds stipulated above, may be not enforceable in Ukraine. On the other hand, such an award would be enforceable in any signatory country to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards without being subject to a review of the merits of the case. Therefore, this choice should take into account whether the potential respondent has assets in any countries other than Ukraine. In addition, an investment carried out in such a form may provide additional guarantees for the investors under bilateral investment treaties.

It is not recommended that Ukrainian courts be chosen as dispute resolution fora. This is because, according to para.1 Art. 390 of the Civil Procedural Code of Ukraine: "A decision of the foreign court is recognized and enforced in Ukraine, if its recognition and enforcement is provided for under international treaties, the mandatory effect of which is approved by the Supreme Council of Ukraine, or under the principle of reciprocity under an *ad hoc* agreement with the foreign country, the decision of the court of which shall be enforced in Ukraine." As of today, few international treaties provide for the recognition and enforcement in Ukraine of decisions of the courts of foreign countries. Such treaties as do exist are mainly with CIS countries. The use of the reciprocity principle of international law under a special *ad hoc* agreement has so far not found its place in the court practice of Ukraine and it is doubtful that this situation will change. Recognition and enforcement of a Ukrainian court decision in a jurisdiction other than Ukraine may also be much more difficult to achieve than recognition and enforcement of an arbitral award.

IV. Conclusion

This article has provided an analysis of recent developments in Ukraine regarding the conclusion, validity and enforceability of shareholder agreements, as well as the influence on international commercial arbitration of the Recommendations. While worldwide implementation of shareholder agreements brings a higher level of coherence to shareholder relations, the conclusion of such agreements in Ukraine is subject to the risks discussed

²⁷ Christopher Rose, "Tale of Three Little Pigs. Your Shareholder Agreement in Russia is Probably Unenforceable. Here's why," PRIVATE EQUITY AND VENTURE CAPITAL REVIEW, p. 9 (2008).

in this article. Current statistical trends concerning corporate disputes show an increasing number of disputes between shareholders, which confirms the important role of proper regulation of relationships between shareholders. The Recommendations have provided a rather restrictive approach to the ability of the parties to govern corporate relations as they choose, by indirectly limiting party autonomy. Certain feasible options in this regard, nevertheless, remain open to the parties.

The Recommendations reviewed herein have caused a great deal of debate within business and legal circles in Ukraine. It is possible that they will be canceled or amended in the near future. Nevertheless, as of December 2008 the Recommendations are active in their original version and have additionally been confirmed by the Supreme Court of Ukraine.

