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ARBITRABILITY OF DISPUTES ARISING OUT OF PUBLIC PROCUREMENT AGREEMENTS IN UKRAINE: PERSPECTIVES AFTER DRAFT LAW NO. 6232 BECOMES A LAW

According to the official data of the State Statistics Service of Ukraine, in 2010, there were 110,260 purchases of goods, works, and services in Ukraine, and the total price of contracts entered into during the reported period amounted to an astronomical UAH 152.5 billion [1]. In absolute prices, this amount corresponds to 13 percent of the gross domestic product of Ukraine over the same period [2].

Despite the impressive volume of procurement by means of public funds, on 20 June 2017, the Verkhovna Rada (hereinafter VRU), Ukraine's parliament, adopted the first reading of the Draft Law № 6232 "On Amendment of the Code of Commercial Procedure of Ukraine, the Code of Civil Procedure of Ukraine, the Code of Administrative Proceedings of Ukraine and Other Legislative Acts" (hereinafter Draft Law № 6232)[1], which, among other things, excludes the possibility of referring "*disputes arising out the conclusion, modification, rescission and performance of state procurement agreements*" to domestic and international commercial arbitration [3].

In this paper, the author will examine whether the Ukrainian legislator, based on the need to secure the balance of private and public interests, is empowered to bar parties in civil-law transactions from arbitrating certain categories of their disputes, in particular disputes related to procurement agreements in international commercial arbitration. The author also aims to shed some light on the advisability of excluding certain categories of disputes arising out of procurement agreements, and to articulate criteria for non-arbitrability of disputes arising out of procurement contracts should the VRU have the right to arbitrarily limit the number of guarantees given to participants of civil turnover with a view to protecting their rights by arbitration.

The idea of barring parties from the possibility of referring certain categories of disputes related to the procurement of goods, works, and services at the expense of public funds to arbitration is far from new. For the first time in the modern history of Ukraine, it was implemented in law in 1997 through the adoption of the Law of Ukraine "On Amendments to the Code of Arbitrazh Procedure of Ukraine"[2]. Among other things, this law supplemented Article 12(2) of the Code of Arbitrazh Procedure with a provision whose effect was that disputes arising out the conclusion, amendment, rescission and performance of commercial agreements related to the satisfaction of state needs could no longer be submitted for consideration to international commercial arbitration [4].

According to Dr Oleh Pidtserkovniy, the denial of the possibility of referral disputes arising out of public procurements for the consideration of international commercial arbitration may be detrimental to the image of Ukraine as an arbitration-friendly jurisdiction in the international arena [5; 6; 7]. Moreover, the wording of Draft Law No. 6232 suggests that the holder of legislative initiative aims to force Ukrainian contracting authorities (*замовники*) to resolve their disputes with successful foreign tenderers (*іноземні переможці процедури закупівлі*) under procurement agreements in foreign courts, and, on the other hand, force successful foreign tenderers to resolve disputes arising out of public procurement contracts in Ukrainian state courts, whose work, as Dr Pidtserkovniy notes, is in most cases far from perfect [5].

The reason for this situation is that, in the absence of an arbitration or a choice-of-court agreement entered into between the parties to a dispute, in accordance with the general principle of allocation of jurisdiction between domestic courts of different countries, a court where the defendant is located or has a registered place of business should be competent to hear disputes against such party.

Subject-matter Arbitrability of Disputes Arising out of Public Procurement Contracts Under Draft Law № 6232

First of all, consideration should be given to the fact that in relegating disputes arising in the conclusion, amendment, rescission, and performance of state procurement agreements to the category of non-arbitrable, the drafters of the Draft Code of Commercial Procedure, for no apparent reason, failed to include within the category of non-arbitrable disputes on the invalidation of state procurement agreements. In this respect, a logical question arises: may disputes on the recognition of such agreements

[1] This draft law provides that the Code of Commercial Procedure of Ukraine, the Code of Civil Procedure of Ukraine and the Code of the Code of Administrative Procedure of Ukraine shall be amended by means of restating their entirety in the new editions. The Draft Law also envisages changes to a number of statutory instruments.

[2] Before 2011 in Ukraine, state commercial courts bore the name of *arbitrazh* courts.

Table 1

Effective Code of Commercial Procedure, Article 12(1)	**Draft Code of Commercial Procedure, Article 23(1)**
"*The parties may refer a dispute falling to the jurisdiction of commercial courts to the consideration of an arbitration court, save for <...> disputes arising out the conclusion, modification, rescission and performance of* ***commercial agreements related to the satisfaction of state needs***".	"*1. The parties may refer a dispute falling to the jurisdiction of commercial courts to the consideration of an arbitration court or international commercial arbitration [tribunal], save for 1) <...> disputes arising out the conclusion, modification, rescission and performance of* ***state procurement agreements***".

as invalid be submitted to international commercial arbitration? Another question which also logically follows from the legislator's choice is what rationale (or, to put in another way, what criterion or criteria) did the legislator adopt when deciding that disputes regarding the invalidation of state procurement agreements shall be arbitrable, presuming they are indeed are?

In order to find an answer to the first question raised, I will turn to the existing court practice, namely, the ruling of the Supreme Court of Ukraine (hereinafter Supreme Court) in Case №6-640ks05 initiated upon a motion by the Israeli company SuperCom Ltd. (hereinafter SuperCom), which sought to set aside the award of the International Commercial Arbitration Court at the Ukrainian Chamber of Commerce and Industry (hereinafter ICAC at the Ukrainian CCI) dated 1 June 2004 [8]. SuperCom applied to the court to annul the said award, by which the ICAC at the Ukrainian CCI invalidated an agreement on the delivery of equipment entered into between the Department of the Ministry of Internal Affairs of Ukraine for the Supply of Resources and SuperCom. According to SuperCom, arbitrators failed to take into account that the subject matter under dispute could not be submitted to an international commercial arbitration court under Ukrainian law in light of the imperative effect of Article 12(2) of the Code of Commercial Procedure, which prohibited the referral of disputes related to the satisfaction of Ukraine's needs to arbitration[3].

Having considered the cassation appeal, a panel of judges from the Supreme Court rejected the above-mentioned argument by SuperCom, thereby reaffirming the judgement of the Appellate Court of the City of Kyiv dated 12 October 2004 to dismiss the motion filed by SuperCom to set aside the arbitral award. When dismissing the appeal, the Supreme Court proceeded from the premise that a dispute regarding the invalidation of an agreement related to the satisfaction of state needs is not included in the list of disputes which may not be submitted for arbitration in accordance with Article 12(2) of the Code of Commercial Procedure (in the wording effective at the time of the decision, which was 29 June 2006) [8].

Thus, based on an analysis of the above court judgement, it is not difficult to draw the conclusion that under Article 23(1) of the Draft Code of Commercial Procedure, disputes regarding recognition of procurement contracts as invalid, as opposed to disputes arising during the conclusion, amendment, rescission, and performance of such agreements, may be submitted for the consideration of an international commercial arbitration court.

As to the second question, there is nothing special in disputes on the invalidation of state procurement contracts that would explain why they should be arbitrable and other disputes related to such contracts should not, and the most likely explanation of why Article 23(1) has been formulated in the way it is, is that in the course of the preparation of Draft Law № 6232, there was a copy and paste exercise which resulted in the respective wording from Article 12(2) of the current Code of Commercial Procedure finding its way into the Draft Code of Commercial Procedure, in particular to Article 23(1)(1) thereof, with the simultaneous replacement of the phrase "*commercial agreements related to the satisfaction of state needs*" (*спорів, що виникають при укладанні, зміні, розірванні та виконанні господарських договорів, пов'язаних із задоволенням державних потреб*) with the phrase "*state procurement agreements*" (*договори про державні закупівлі*) (table 1) [3].

However, the drafters of the Draft Code of Commercial Procedure disregarded the fact that the disposition of the respective part of Article 12 of the effective Code of Commercial Procedure currently extends only to domestic arbitration courts established and acting under the Law of Ukraine "On Domestic Arbitration Courts" (hereinafter Domestic Arbitration Law) [9], and, therefore, cannot restrict the substantive arbitrability of international commercial arbitration tribunals [10, p. 110]. This conclusion stems from an analysis of the Law of Ukraine "On Amendment to the Commercial Procedural Code of Ukraine Regarding Setting Aside of the Decision of the Domestic Arbitration Courts and the Issuance of an Executive Document on the En-

[3] From the moment of the consideration of said dispute, the wording of Article 12(2) limited the competence of international arbitral tribunals to consider disputes arising out the conclusion, amendment, rescission and performance of commercial agreements related to the satisfaction of state needs.

forcement of the Arbitral Award" (hereinafter Law # 2980-VI), in Section I(2) of which Article 12(2) of the Code of Commercial Procedure was amended by the deletion the word "*arbitration*" from the phrase "[t]*he parties may refer a dispute falling within the jurisdiction of commercial courts to an* [domestic] *arbitration court (*[international commercial] *arbitration*)" (table 2) [11].

It should, however, be noted that the idea that dispute-related procurement agreements are not arbitrable is quite popular among Ukrainian scholars [12, p. 512]. Proponents of this position base their ideas on the premise that, despite the changes introduced by Law No. 2980-VI, the current wording of Article 12(2) of the Code of Commercial Procedure continues extending its force, not only to arbitration courts established and acting on the basis of the Domestic Arbitration Law, but also to international commercial arbitration [13, p. 312; 14, p. 52; 15, p. 272; 16, p. 183; 17, p. 17–20; 18, p. 77; 19, p. 423; 20, p. 460; 21, p. 460; 22, p. 430; 23; 24; 25; 26, p. 203; 27, p. 162].

For example, the deputy chairman of the Higher Commercial Court of Ukraine Gennadiy Kravchuk and Dr Vadym Belyanevich are of the opinion that, since the term "international commercial arbitration" (*міжнародний комерційний арбітраж*) falls within a broader term of "arbitral tribunal" (*третейський суд*), Article 12(2) of the Code of Commercial Procedure should be read so as to include the limitation of arbitrability not only of domestic arbitration courts, but also international commercial arbitration tribunals [17, p. 17–20; 15, p. 272]. Yaroslav Petrov notes that, for the purposes of determining what disputes may be submitted for resolution to international commercial arbitration, both the Code of Civil Procedure and the Code of Commercial Procedure of Ukraine operate with the term 'arbitral tribunal'; that is, they do not distinguish between the internal domestic arbitration courts and international commercial arbitration tribunals [18, p. 77]. Dr Tetiana Slipachuk notes that, although the up-to-date edition of Article 12 of the Code of Commercial Procedure does not contain any reference to international commercial arbitration, given that "*the nature of both domestic* [arbitration] *and international* [commercial] *arbitration courts are* [sic] *similar,*" there is a theoretical possibility of extending arbitration limitations on domestic arbitration tribunals to international commercial arbitration [28, p. 7].

However, in my opinion, this approach articulated by the above scholars does not take into account the distinctive legal regulation of institutes of international commercial arbitration and of domestic arbitration in Ukraine. If one makes a comparative analysis of Article 12 of the Code of Commercial Procedure (when the said provision established limitations to arbitrability), Article 1 of the Law of Ukraine "On International Commercial Arbitration" (hereinafter ICA Law) [29], and Article 6 of the Domestic Arbitration Law, it is becomes apparent that the list of disputes which may not be submitted for consideration to domestic arbitral tribunals is much wider than the list provided in Article 12 of the Code of Commercial Procedure. On the other hand, the ICA Law and other special laws positively assert arbitrability of certain categories of disputes. Thus, the problem of incompatibility between the Code of Commercial Procedure, the Code of Civil Procedure and special laws (such as the ICA Law and the Domestic Arbitration Law) will not be resolved should Draft Law No. 6232 be adopted in its current edition, but will be aggravated.

Furthermore, neither the Draft Code of Commercial Procedure nor any applicable regulatory act provides an answer to the question of the meaning of "state procurement" (*державні закупівлі*) or 'state procurement agreement' in the context of Article 23 of the Draft Code of Commercial Procedure. In order to establish the legal meaning of these terms, it is worth investigating the conceptual apparatus used in the Law of Ukraine "On State Order for the Satisfaction of Priority State Needs" (hereinafter Law N# 493/95-VR) [30], even though it has become devoid of legal effect. Under said law, the equivalent of the notion of "state procurement agreement"– "state contract"" (*державний контракт*) – is defined as

Table 2

Code of Commercial Procedure as amended by the of the Law of Ukraine "On Amendments to the Code of Arbitrazh Procedure of Ukraine" dated of 13 May 1997 № 251/97-VR	**Code of Commercial Procedure as amended by the Law of Ukraine "On Amendment to the Commercial Procedural Code of Ukraine Regarding Setting Aside of the Decision of the Domestic Arbitration Courts and the Issuance of an Executive Document on the Enforcement of the Arbitral Award" dated 3 February 2011 № 2980-VI**
***"The parties may refer a dispute falling within the jurisdiction of commercial courts to the consideration of an* [domestic] *arbitration court (*[international commercial] *arbitration)**, save for <...> disputes arising out the conclusion, modification, rescission and performance of commercial agreements related to the satisfaction of state needs*".	***"The parties may refer a dispute falling within the jurisdiction of commercial courts to the consideration of an* [domestic] *arbitration court**, save for <...> disputes arising out the conclusion, modification, rescission and performance of commercial agreements related to the satisfaction of state needs*".

an agreement concluded on behalf of Ukraine by a contracting authority (the VRU, central executive authorities, the Council of Ministers of the Autonomous Republic of Crimea, regional, Kyiv, and Sevastopol city state administrations, state organizations and other institutions which are the main administrators of the State budget) and a business entity of any ownership (resident or non-resident) which manufactures or supplies goods, performs works, or renders services in order to meet the priority needs of the state, and which determines the economic and legal obligations of the parties as well as regulating relations between the customer and the provider[4].

It is also possible to draw certain parallels between the term "state procurement" and the term "state order" (*державне замовлення*) used in Law № 493/95-VR. The latter term is defined as a means of state regulation of the economy through the formation, on the basis of a contract (agreement), of a list of the specific kinds and volumes of goods, works, and services necessary for priority state needs, and the distribution of state contracts for their supply (purchase) to enterprises, organizations and other economic entities in Ukraine of all forms of ownership[5].

The first effective normative legal act which contains a definition of related concepts is the Commercial Code of Ukraine (hereinafter Commercial Code) [31]. Article 13 of the Code defines the concept of "state order" (*державне замовлення*) as a means of state regulation of the economy through the formation, on a contractual basis, of a list of specific kinds and volumes of goods (works, services) necessary for the satisfaction of priority state needs, the distribution of state contracts for the supply (procurement) of the goods (works, services) among business entities irrespective of their form of ownership. The concept of "state contract" (*державний контракт*), in turn, is defined as an agreement entered into by a state customer on behalf of the state with a business entity, which is the executor of a state order, defining the economic and legal obligations of the parties, and regulating their commercial relations [31].

Another legislative act which contains definitions of substantially similar concepts is the Law of Ukraine "On Public Procurement" (hereinafter Procurement Law) [32]. Article 1(20) of said law defines the term "public procurement" (*публічна закупівля*) as "*the purchase of supplies, works and services by the contracting authority in accordance with the procedure as established by this Law*"[6].

Article 1(1) of the Procurement Law defines[7] the concept of "procurement agreement" (*договір про закупівлю*) as "*a contract that is concluded between the contracting authority and the tenderer based on the results of the procurement procedure and provides for the provision of services, performance of works, or acquisition of the ownership of goods*" [32].

The problem, therefore, is that despite the apparent incompatibility between the terms analysed above, the terminological uncertainty of the concepts of "state procurement" and "state procurement agreement", as well as the lack of a clear understanding of how such concepts relate to the concepts of "public procurement", "state order", "public procurement agreement" and "state contract" may (and most likely will) result in an extended interpretation by the courts of the concept of "state procurement" and "state procurement agreement" or, at worst, their complete confusion with other similar concepts.

There do not seem to be valid reasons (save for certain reservations outlined below) that would justify the necessity of forcing foreign and Ukrainian business entities to resolve the civil-law aspects of their public procurement disputes in Ukrainian courts. The approach outlined is fully in line with the global trend of expanding the scope of disputes that can be submitted for arbitration. As Jan Paulson rightly points out, today's attitude towards arbitrability of disputes arising from public procurement contracts in world practice is undergoing substantial changes; while it was previously assumed that given the specific subject composition of participants of such agreements, disputes with public law contracting authorities should be resolved by state courts only, nowadays there are frequent cases in which public legal entities include bidding documents in arbitration agreements [33, p. 121].

Dr Mykola Selivon points to a fundamental problem, as a result of which the inclusion in Article 23 of the Draft Code of Commercial Procedure of any provision limiting the competence of domestic arbitral tribunals and international commercial arbitration courts would amount to a limitation on the constitutional right of individuals and legal entities to protect their interests out of court by means of

[4] "*Державний контракт – це договір, укладений державним замовником від імені держави з виконавцем державного замовлення, в якому визначаються економічні і правові зобов'язання сторін і регулюються взаємовідносини замовника і виконавця*".

[5] "*Державне замовлення – це засіб державного регулювання економіки шляхом формування на контрактній (договірній) основі складу та обсягів товарів, робіт і послуг, необхідних для забезпечення пріоритетних державних потреб, розміщення державних контрактів на її поставку (закупівлю) серед підприємств, організацій та інших суб'єктів господарської діяльності України всіх форм власності*".

[6] "[П]*ублічна закупівля* [...] – *придбання замовником товарів, робіт і послуг у порядку, встановленому цим Законом*".

[7] "[Д]*оговір про закупівлю – договір, що укладається між замовником і учасником за результатами проведення процедури закупівлі та передбачає надання послуг, виконання робіт або набуття права власності на товари*".

alternative dispute resolution [34, p. 10; 35, p. 32]. Describing his vision of the possibility of limiting the competence of the international commercial arbitration courts by enshrining the relevant norm in Article 23 of the Draft Code of Commercial Procedure, Dr Selivon stated that the Code of Commercial Procedure must not contain any provisions that would restrict the competence of international commercial arbitration courts [34, p. 10; 35, p. 32].

Indeed, as seen from the decision of the Constitutional Court of Ukraine in case No. 1-3/2008 of 10 January 2008 № 1-rp/2008, an appeal to international commercial arbitration is a way of exercising the constitutional right to protect, by any means not prohibited by law, rights and freedoms from violations and unlawful encroachments in the field of civil and commercial relations [36]. That right is guaranteed by Article 55(5) of the Constitution of Ukraine and, in accordance with Article 22(2) and 64 thereof, may not be abolished or limited [37].

The enshrinement of a prohibition on referring disputes arising out of certain categories of procurement agreements in Article 23 of the Draft Code of Commercial Procedure therefore may be seen as violating the right to protect, in any way not prohibited by law, rights and freedoms from violations and illegal encroachments in the field of civil and commercial relations, which is guaranteed by the constitution of Ukraine.

The position expressed by Dr Selivon is a reflection of the approach that has been repeatedly upheld in the legal doctrine. The essence of this approach is that the Code of Commercial Procedure of Ukraine should not contain any provisions that would restrict arbitrability of disputes since the definition of the competence of international commercial arbitration courts or arbitral tribunals is not in the scope of the legal regulation of procedural law [38, p. 35; 10, p. 110]. Non-state jurisdictional activities for resolving disputes are, instead, subject to the regulation of special laws: the Domestic Arbitration Law and the ICA Law.

In order to resolve the situation at hand, Dr Selivon proposed amending the text of Article 23 of the Draft Code of Commercial Procedure to include therein Article 17(1) of the Draft Code of Civil Procedure as of March 2016 (as reflected in Article 22(1) of the Draft Code of Civil Procedure without changes), since it sufficiently takes account of the specificity of arbitration institutions, and also contains a blanket norm referring to the relevant provisions of special laws [34, p. 10; 35, p. 33].

According to Dr Selivon, with whom I completely agree, restatement of the wording of Article 23(1) of the Draft Code of Commercial Procedure in a similar manner to Article 22(1) of the Draft Code of Civil Procedure will allow the unification of the legal regulation of adjacent institutes of arbitral tribunal and international commercial arbitration in different procedural codes [34, p. 10; 35, p. 33]. Dr Pidtserkovniy, who shares Dr Selivon's position, notes that in an attempt to improve the Draft of the Code of Commercial Procedure and the Draft Code of Civil Procedure, it is advisable to abstain from restricting the competence of the international commercial arbitration court and to relegate the resolution of this issue to the regulation of special legal acts [5, pp. 32–33].

It is difficult to imagine that by including in Draft Law No. 6232 a provision limiting the competence of international commercial arbitration the legislator indeed intends to carve out in law a principle that all public procurements contracts, as opposed to state procurement agreements (whatever legal meaning the legislator intended to give to this term), should be non-arbitrable. It is however equally difficult to imagine that all disputes related to public procurements shall be arbitrable. For example, I see difficulties in arbitrating a dispute related to public procurement, the resolution of which is impossible without an investigation of classified information.

This controversy requires an urgent study into the question of which criteria make a dispute related to procurement agreement non-arbitrable, at the doctrinal level. Especially such study is of immediate interest in light of Ukraine's struggle to attract foreign bidders to public procurements, who for obvious reasons tend to wish to have their disputes with contracting authorities arbitrated and (in most cases) abroad of Ukraine.

The question of which criteria a contract should satisfy in order to be deemed a state procurement agreement has attracted little attention on the part of Ukrainian scholars so far. The only exception is Olena Perepelynska, who, to the best of the author's knowledge, is the only Ukrainian scholar who has attempted to identify the criteria of the public procurement contract related to the satisfaction of state needs under Ukrainian law. The first criterion outlined by this author is that a contract should involve a contracting authority with special legal standing. Perepelynska suggests that the range of such authorities "*is quite wide and includes not only state and municipal bodies, but also certain state enterprises and institutions*" [39]. She goes on to suggest that the second and apparently cumulative criterion to be met is the source of funds for the payment under such a contract. According to Perepelynska, state and municipal procurement contracts are in most cases funded from the Ukrainian state budget [39].

Since, as mentioned above, this problem has attracted little attention from Ukrainian scholars, in order to ascertain criteria for the non-arbitrability of procurement agreements, it is necessary to consider the case law of Ukrainian courts.

In the extensively reported saga of *VAMED v. Ukrmedpostach* [40, p. 31; 41, p. 104–105], the Shevchenkivskyy District Court of the City of Kyiv found that a contract for the delivery of medical equipment entered into between VAMED Engineering GmbH & CO KG, an Austrian supplier of equipment for hospitals and other healthcare institutions, and "Ukrmedpostach", a Ukrainian state enterprise for supplies to medical institutions, is a state contract aimed at the satisfaction of Ukraine's needs (and, consequently, disputes arising thereof are non-arbitrable under the legislation effective at the moment of contracting) takin account into consideration the following facts: (i) the Cabinet of Ministers of Ukraine, Ukraine's government, ordered Ukrmedpostach to enter into a contract for the delivery of medical equipment based on non-competitive (sole source) procurement; and (ii) in order to pay for the delivery of medical equipment from VAMED, Ukrmedpostach raised loan finance from UniCredit Bank Austria AG, which, in turn, has been secured by Ukraine's sovereign guarantee [42; 43; 44].

An analysis of another recent decision in the case of *The Ministry of Infrastructure of Ukraine v. South Eastern Railway (Ukraine) and Doğuş İnşaat ve Ticaret A.Ş.* shows that, when declaring invalid an arbitration agreement contained in a contract on the construction of a road-rail bridge over across the Dnipro river in Kyiv for the reason that such procurement contract has been aimed at the satisfaction of Ukraine's needs, the Commercial Court of the City of Kyiv took into account that: (i) the financing of the agreement has been made at the expense of treasury funds (*за рахунок бюджетних коштів*); (ii) "*the building of the rail-and-road bridge crossing arose from the need to satisfy a complex of interrelated public interests in the sphere of transportation, which have been determined based on the recognition of particular vital needs of an individual and a citizen, society and the state, and which satisfaction facilitates the strengthening of national security and sustainable growth of Ukraine*"; and (iii) the interests in building of the bridge over the Dniper river were of a nationwide level (*існував загальнодержавний інтерес у будівництві*) [45].

In all other cases, which I found in the Unified State Register of Court Judgements, a register containing all court judgements on merits since of 1 January 2007, courts provided very little reasoning when declaring a dispute arising out of a procurement agreement as arbitrable or non-arbitrable, if any at all [46–52].

The above analysis of judgements shows that Ukrainian courts have not yet set a definite test, which a dispute, controversy or claim arising out of or relating to a procurement contract, should satisfy in order to be deemed as non-arbitrable.

Whereas, in my opinion, there are little policy considerations, which would justify establishing the non-arbitrability of the overwhelming majority of disputes arising out of procurement agreements or related thereto, certain categories of disputes are nevertheless not appropriate for arbitration.

The first category of disputes related to public procurement contracts, which should be not be capable of being resolved by international commercial arbitration under Ukrainian law are pre-contractual disputes related to the conclusion of procurement agreements. Such category of disputes does not fit for arbitration because of the special way of concluding procurement contracts based on the results of the special procurement procedure, which may involve more than one bidder. It is equally difficult to imagine arbitrating a dispute related to public procurement, the resolution of which is impossible without an investigation of classified information.

Finally, although setting the determinative test for defining non-arbitrable disputes related to public procurement falls out of the scope of this paper, an analysis of the above case law allows to articulate three cumulative criteria (which may be however supplemented with additional criteria, if any), whose presence make a dispute arising out of a procurement agreement non-arbitrable: (i) the contract is entered into between a contractor and a contracting authority with special legal standing; (ii) the purpose of entry into an agreement is the delivery of a result that the public needs and with a view to satisfying the nationwide public interest[8]; and (iii) the financing of such state or municipal needs is realised by means of funds from respective budgets or loan finance secured by Ukraine's sovereign guarantee or a guarantee of local self-governing bodies.

Based on the analysis laid out above, this paper concludes that the Code of Commercial Procedure of Ukraine should not contain any provisions that would restrict arbitrability of disputes, including arbitrability of disputes related to procurement agreements, as the definition of competence of international commercial arbitration courts or arbitral tribunals falls outside of the scope of regulation of the procedural legislation and is regulated by special laws - the Domestic Arbitration Law and the ICA Law. Instead, Article 23(1) of the Draft Commercial Code of Ukraine should be laid out in a manner similar to Article 22(1) of the Draft Code of Civil

[8] Such interests should indeed be of a nationwide level and in order to find the definition of such interests one may look into the Law of Ukraine "On Fundamentals of National Security of Ukraine" [Про основи національної безпеки] dated 19 June 2003 No. 964-IV, which defines 'national interests' as vital pecuniary, intellectual and spiritual values of Ukrainian people as the bearers of sovereignty and the only source of power in Ukraine, determinative needs of society and the state, realisation of whichguarantees sovereignty of Ukraine and its sustainable development.

Procedure of Ukraine, especially in light of the fact that, as proven above, there are few policy considerations that would explain the need to exclude such a broad category of disputes from competence of international commercial tribunals in their entirety.

Furthermore, the inclusion in Article 23 of the Draft Code of Commercial Procedure of any provision limiting the competence of international commercial arbitration courts to resolve disputes arising out of procurement agreements would amount to a limitation on the constitutional right of individuals and legal entities to protect their interests out of court using alternative means of dispute resolution, and, consequently, may be challenged by interested persons in accordance with the law.

Finally, based on an analysis of case law from Ukrainian domestic courts, this paper articulated a three-prong test, which may be used as guidance in determining whether a dispute related to procurement agreement should be non-arbitrable as a matter of Ukrainian law.

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Анотація

Фролов О. М. **Арбітрабельність спорів, що виникають із договорів про державні закупівлі в Україні: перспективи після того, як законопроект № 6232 стане законом.** – Стаття.

У статті розглянуто можливість передачі спорів, що виникають під час укладення, зміни, розірвання та виконання договорів про державні закупівлі, на вирішення міжнародного комерційного арбітражу, а також

проаналізовано перспективи арбітрабельності зазначеної категорії спорів після набуття чинності Законом України «Про внесення змін до Господарського процесуального кодексу України, Цивільного процесуального кодексу України, Кодексу адміністративного судочинства України та інших законодавчих актів».

Ключові слова: арбітрабельність, міжнародний арбітраж, державні закупівлі, критерії.

Аннотация

Фролов А. Н. **Арбитрабельность споров, которые возникают из договоров о государственных закупок в Украине: перспективы после того, как законопроект № 6232 станет законом.** – Статья.

В статье рассматривается возможность передачи споров, которые возникают при заключении, изменении, разрыве и исполнении договоров о государственных закупках, на рассмотрение международного коммерческого арбитража, а также проанализированы перспективы арбитрабельности указанной категории споров после вступления в силу Закона Украины «О внесении изменений в Хозяйственный процессуальный кодекс Украины, Гражданский процессуальный кодекс Украины, Кодекс административного судопроизводства Украины и другие законодательные акты».

Ключевые слова: арбитрабельность, международный арбитраж, государственные закупки, критерии.

Summary

Frolov O. M. **Arbitrability of Disputes Arising out of Public Procurement Agreements in Ukraine: Perspectives After Draft Law No. 6232 Becomes a Law.** – Article.

The article takes a close look to the possibility of referral of disputes arising out the conclusion, modification, rescission and performance of state procurement agreements to international commercial arbitration as well as considers the perspectives of arbitrability of the said category of disputes after the entry into force of the law of Ukraine “On Amendment of the Code of Commercial Procedure of Ukraine, the Code of Civil Procedure of Ukraine, the Code of Administrative Proceedings of Ukraine and Other Legislative Acts”.

Key words: arbitrability, international arbitration, state procurement, criteria.