Ukraine

ANDREY Y. ASTAPOV, OLEH A. BEKETOV, SCOTT BROWN, GENE M. BURD, DMITRI EVSEEV, IRINA NAZAROVA, YAROSLAV PETROV, OLENA SHCHERBYNA, YAROSLAV SHKVORETS, AND NIKOLAI SOROCHINSKIY*

The 2010 presidential election ushered in a tectonic shift in Ukrainian politics to the party of now-President Victor Yanukovich and away from the duo of the former Prime Minister Yulia Tymoshenko and ex-President Victor Yushchenko, whose rule has been lauded for democratic values but also criticized for corruption, in-fighting, and incompetence. The legal landscape of Ukraine has also undergone several important transformations, as described below. Section I discusses Ukraine's new tax code adopted to curb tax avoidance and to streamline the taxation system. Section II focuses on new rules for joint stock companies, designed to improve corporate governance. Section III describes a new law on public-private partnerships, which offers new possibilities for infrastructure investments. Section IV describes the new Judiciary Law, intended to promote the efficiency and effectiveness of the court system. Section V focuses on a new law on data protection, which brings Ukraine closer to meeting EU data privacy rules. Finally, Section VI discusses a recent controversial decision by a Ukrainian court prohibiting a party from proceeding with an international arbitration in another jurisdiction.

I. Taxation: The New Tax Code

Amid protests by small and medium-sized businesses leading to the last-minute amendments, on December 2, 2010, President Yanukovich signed into law the Tax Code (the Code). In so doing, the government agreed to do away with proposed provisions limiting the simplified taxation system (which provides significant tax breaks to certain businesses) and those provisions providing tax authorities with unrestricted audit and control powers.

* Yaroslav Shkvorets, counsel at Russian Ukrainian Legal Group, authored Section I. Yaroslav Petrov and Nikolai Sorichinskiy, associates at Asters, wrote Section II and co-wrote Section III with Andrey Astapov, managing partner, and Oleh Beketov, counsel, both at Astapov Lawyers International Law Group. Olena Scherbyna, counsel at Sayenko Kharenko, wrote Section IV. Scott Brown, partner at Frishberg & Partners, wrote Section V. Irina Nazarova, managing partner at Engarde, drafted Section VI. Gene M. Burd, Kyiv office Managing Director at Marks & Sokolov, and Dmitri Evseev, Partner at Arnold & Porter LLP, acted as editors.

Still, the law provides for significant changes, most of which are effective as of January 1, 2011.[1]

A. Corporate Taxation

Under the new law, the general corporate tax rate declines from twenty-five percent to twenty three percent in 2011, twenty-one percent in 2012, nineteen percent in 2013, and sixteen percent in 2014. A zero percent to twenty percent rate applies to foreign entities with income sourced from Ukraine, depending on income source type. Tax breaks (zero percent profit tax rate) will be introduced as of April 1, 2011 and will continue until January 1, 2016, for companies incorporated after April 1, 2011 and for certain smaller companies. In addition, companies engaged in certain types of activities (*e.g.*, aircraft construction, shipbuilding) are exempt from the profit tax until 2015. With some exceptions, the accrual principle applies to recognition of revenues and expenses. Depreciable fixed assets have been classified into sixteen groups (in contrast to four under the old regime), and minimal depreciation periods are established for most groups. Intangible assets can now be depreciated throughout the period of the right's duration as well.

B. Limited Deductibility of Payments to Nonresidents

The Code specifically lists tax-deductible expenses and expenses for which deductibility is limited or denied. The Code limits deductibility of royalty payments to nonresidents to an amount not exceeding four percent of income (revenues) received from the sale of products (goods, works, and services) received during the year that precedes the reporting year (exclusive of value-added tax and excise tax). This limitation does not apply to (1) royalty payments to permanent establishments of nonresidents in Ukraine that are taxed in Ukraine; (2) payments made by businesses in the sphere of television and radio broadcasting; and (3) payments for the right to use motion pictures, musical, and literary works produced abroad.

Additionally, royalty payments made to nonresidents may not be deductible when (1) a nonresident receiving such payments has offshore status; (2) a nonresident receiving such payments is not a beneficiary of such royalty payments; (3) royalties are paid in respect of intellectual property that was previously owned by a Ukrainian resident; or (4) a nonresident receiving royalty payments is not subject to taxation in respect of such royalties in the country of its residency.

The Code also limits deductibility of payments to nonresidents for consulting, marketing, and advertizing services to the amount not exceeding four percent of income (revenues) received from sale of products (goods, works, and services) received during the year that precedes the reporting year (exclusive of value added tax and excise tax), unless service payments are made to permanent establishments of nonresidents in Ukraine who are subject to taxation in Ukraine. In cases in which a nonresident receiving such service payments has offshore status, the whole amount of the payments is non-deductible.

1. Corporate profit tax regulations shall be valid as of April 1, 2011, and a gradual phase-in period for certain new taxes will be established (*e.g.* three years for the ecological tax). *See* Tax Code of Ukraine, Law No. 2755-VI, ch. 10 (2010) (Ukr.), *available at* http://zakon1.rada.gov.ua/cgi-bin/laws/main.cgi?page=35&nreg=2755-17.

C. Value-Added Tax (VAT)

The VAT rate will decrease from the current twenty to seventeen percent commencing January 1, 2014. The taxpayer has the right to apply VAT credit for up to 365 days following the date of the VAT invoice. The Tax Code exempts from VAT certain transactions including import and supply of certain engines used in biofuels industry (until 2019), as well as certain transactions in the printing industry and aerospace engineering (until 2015).

D. Personal Income Tax

Ukrainian tax-resident individuals will be taxed at a fifteen percent rate on worldwide income, but, under the new law, income above ten times the minimum wage (currently about $115.25 per month) is taxed at seventeen percent. Certain personal income, *e.g.* royalties and dividends, is taxed at five percent. Nonresidents are taxed on personal Ukrainian-source income at the same rate as residents.

E. Real Estate Tax

Ukraine did not previously have a real estate tax (apart from a land tax), but one will be introduced beginning in 2012 for residential units. The rate will vary depending on the size of the property. Legal entities will pay the tax on a quarterly basis; individuals will pay the tax once a year. Non-residential properties (*e.g.*, factories or offices) are not subject to this tax.

II. Infrastructure Investment: New Public-Private Partnership Law

On July 1, 2010, the Ukrainian Parliament adopted the Public-Private Partnership Law (PPP Law) that was aimed to facilitate investment in infrastructure projects. The law facilitates the use of public-private partnerships (PPPs) in such areas as construction and operation of transportation facilities, tourism, healthcare, power generation, and in the exploration of natural resources. It permits PPPs in the form of concessions (also known as "build-operate-and-transfer" arrangement), joint ventures, production sharing, or other arrangements. The PPP Law is a framework legal act, which means that certain types of agreements established by the PPP Law may also be regulated by other statutes.

The law permits using PPPs for long-term projects, defined as those lasting from five to fifty years as well as for the existing public facilities, including ones in need of reconstruction or further construction. Upon expiration of the PPP, the title to the facility is reverted to the public partner. PPP facilities cannot be privatized during operation of the PPP project. The PPP Law also facilitates acquisition of land rights for PPP projects. First, it is the public partner's responsibility to allocate, lease, and arrange for use approval of the land for the project. However, the private partner is responsible for the associated costs. Second, PPPs have the right to use a simplified procedure for the leasing of state or municipal land. For example, a PPP can secure a lease without the additional land auction that is normally required for lease of state or municipal lands. Third, the private partner can use land easements held by the public partner if such right is granted by the PPP agreement. The PPP Law introduces other incentives for private partners in infrastruc-

ture projects as well. For example, the private partner may reduce concession payments by the amount of depreciation of assets used in the PPP project. These new incentives send a welcome signal to foreign investors considering Ukrainian infrastructure projects.

III. Court System: The New Judiciary Law

Laws have been introduced in an attempt to improve the Ukrainian judicial system fraught by endemic delays, corruption, and poor quality of judges.[2] The law "On Judiciary and Status of Judges (Judiciary Law)" came into effect on July 30, 2010, followed by the enactment of the Law on "Prevention of Abuse of the Right to Appeal."[3] Among the most important changes are changes to the organization of courts, the process for nomination, appointment, and dismissal of judges, civil and criminal procedure, as well as the legal effect of court judgments. However, it remains to be seen whether the changes will increase the speed and quality of justice.

A. Encouraging Efficiency Through Stricter Court Deadlines and Other Procedural Reforms

The Judiciary Law aims to facilitate faster disposition of cases by shortening certain procedural deadlines. For example, in criminal matters, the time to challenge an appellate decision has been reduced from six months to three months from the date of the decision.[4] In commercial matters, a mandatory two-month pre-trial settlement period is now limited to a fifteen-day extension in exceptional circumstances[5] only as when compared to previously available unlimited extensions, which led to potential abuses. Furthermore, the period to apply for interim measures has been reduced from ten to five days;[6] the period to appeal the rulings of the trial-level commercial courts has been reduced from ten to five days;[7] and the term for submitting a secondary (causation) appeal on the decision of an appellate court is twenty days instead of one month.[8] Procedural deadlines in civil cases have been drastically shortened as well.

The Judiciary Law also takes other steps to lessen the opportunity for the unnecessary or excessive prolongation of cases. For example, a claimant may now only amend the complaint before the court proceeds to the merits of the case. This rule is applicable to both civil and commercial disputes. The same rule applies equally to the respondent's

2. These defects have been pointed out by a number of international organizations including the Venice Commission. *See* Marina Stayniychuk, *Judicial Reform: A Step Forward and Two Steps Back*, Finance (Ukr.), Oct. 23, 2010, http://news.finance.ua/ru/~/2/0/all/2010/10/23/214273; *see* Interview by Lavrinovic Volodimirovich with Mykola Onishchuk, Justice Minister Ukr., (2009), *available at* http://www.minjust.gov.ua/0/22467.

3. On Judicial System and the Status of Judges, Law No. 2453-VI (2010) (Ukr.), *available at* http://zakon1.rada.gov.ua/cgibin/laws/main.cgi?nreg=2453-17.

4. *Id.* art. 386.

5. Commercial Procedural Code of Ukraine, Law No. 1798-XII art. 69 (2010) (Ukr.), *available at* http://zakon1.rada.gov.ua/cgi-bin/laws/main.cgi?page=1&nreg=1798-12.

6. *Id.* art. 43-3.

7. *Id.* art. 93.

8. *Id.* art. 110.

right to file a counter-claim. Previously, parties could abuse the right to amend by doing so well after the case's advancement to the merits phase.

The new law also precludes one of the most popular methods of delaying the case, namely the filing of an appeal on interim rulings that are not subject to interlocutory appeal. The new amendments to the procedural code clearly enumerate the rulings that can be subject to appeal. Moreover, an appeal of such rulings does not prevent the lower court from proceeding with the case. To streamline procedures, the law does the following: it prohibits the courts of appeal from remanding cases for a new trial; implements the possibility to send subpoenas via e-mail and fax in administrative procedures; and introduces the right of a person to submit appeals in administrative and civil cases without filing a preliminary application about the intent to appeal. The purpose of these procedural changes is to expedite the trial and appeal. Ukrainian courts are overloaded with cases, so it will be a challenge for judges to meet the deadlines imposed on them by the new law.

B. Creation of a New Specialized High Court and Changes in the Status of the Supreme Court

The Judiciary Law also implements structural changes. For instance, it creates a new court: the High Court for Civil and Criminal Cases. This court assumes most of the roles of the Supreme Court's Chambers on Civil, Criminal, and Military Cases and will have a status similar to the so-called "high specialized courts" in commercial and administrative cases. In other words, the new high court is the ultimate court of appeal for most civil and criminal cases.

One of the most controversial reforms introduced by the Judiciary Law is its reduction of the powers of the Supreme Court. The Supreme Court will no longer be able to hear appeals without authorization from the highly specialized courts—the High Commercial, High Administrative, and High Courts for Civil and Criminal Cases. Thus, in order to appeal to the Supreme Court, a party will have to receive permission from the very court whose judgment the party wishes to challenge (although the judges directly involved in the consideration of the case are excluded from decision-making on the issue). Because it is not clear that such permission would be routinely granted, the rule effectively means that most parties may not be able to have their cases heard by the Supreme Court.

Moreover, the Supreme Court will no longer be able to decide with finality even those few cases that reach it. It will only have authority to send the cases for review to the high specialized court. Previously the Supreme Court was able to send cases for a new trial to the court of first instance, thus forcing the parties to re-litigate cases two or more times. Some cases took years to reach a final decision.

As a practical matter, removal of the Supreme Court from involvement in most specific cases may prove to be beneficial for litigants, who now will be able to obtain a definitive and final court judgment sooner. This removal promises to achieve greater speed and finality in resolving disputes.

The Judiciary Law introduces the concept of judicial precedent, which did not previously exist under Ukrainian law. Under the Judiciary Law, and for the first time in Ukraine's history, those few decisions that the Supreme Court still has authority to issue will be a source of generally applicable law. Prior to these amendments, the Supreme

Court decisions were only binding on the parties in the particular matter. Now the decisions will become a direct source of law for the state authorities and courts of Ukraine.

C. Changes in the Appointment and Dismissal of Judges

The Judiciary Law helps to make the procedure for the appointment of judges more objective and transparent. For example, the statute includes an anonymous test that candidates for the first judicial appointment would have to take and requires publication on the Internet of judicial vacancies. Although it would be naïve to expect that Judiciary Law to eliminate nepotism and corruption, the statute's attempt at even modest reform is a welcome one.

With regard to judicial challenges, the issue is now to be decided by a specially appointed judge or panel of judges. In the past, only the Chairman of the Court could decide the issue, which could lead to significant delays. The Judiciary Law's streamlining reforms may come at the price of limiting judicial independence. The Judiciary Law, building on the changes introduced by the Act of May 13, 2010, now makes it much easier to dismiss judges, and centralizes decision-making in institutions perceived as friendly to the current government, like the High Council of Justice and the High Administrative Court. Under the new legislation, the Council no longer needs a two-thirds majority to convene, and any dismissal decision by the Council may now be reviewed only by the High Administrative Court, and not by the lower courts, as under the previous regime. Ukrainian and international legal observers will have to see the Judiciary Law's implementation in practice to see whether it has properly struck the balance between judicial independence and effective supervision of errant judges.

IV. Corporate Law: New Rules For Joint Stock Companies

The Joint Stock Companies Law (JSC Law), which came into effect on April 30, 2009, was adopted after nine years of parliamentary deliberations and has been perhaps the most significant recent corporate legal development in Ukraine.[9] International observers hailed the JSC Law as enhancing investors' protection by regulating approval of transactions between interested parties, increasing disclosure requirements in annual reports, and making it easier to sue directors in cases of prejudicial transactions between interested parties.[10] The law is much more detailed than previously existing laws and provides more certainty.

The law grants Ukrainian joint stock companies, established before April 30, 2009, a two-year transition period until April 30, 2011, to bring their corporate documents into compliance with the new rules.[11] Newly established companies are governed by the new law from the time of their formation.[12]

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9. On Joint Stock Companies, Law No. 514-VI (2008) (Ukr.), *available at* http://zakon1.rada.gov.ua/cgi-bin/laws/main.cgi?nreg=514-17.

10. *The World Bank, Doing Business: Business Reforms in Ukraine*, Int'l Fin. Corp., http://www.doingbusiness.org/reforms/overview/economy/ukraine (last visited Jan. 29, 2011).

11. On Joint Stock Companies, ch. XVII(5).

12. *Id.* art. 1.; *see also* Clarification of the Securities and Stock Market State Commission No. 8 (July 14, 2009) (Tsinni Papery Ukrainy, 2009, 07, No. 30).

A. Non-Documentary Shares

The JSC Law broadly defines "joint stock company" as any company with authorized capital divided into shares of equal par value.[13] While previously joint stock companies were permitted to choose whether to issue documentary shares (title to which is represented by a physical certificate) or non-documentary shares (title to which is recorded in a register in electronic form),[14] the new law requires all joint stock companies to convert their shares into non-documentary form.[15] This change was aimed to ease the transferability of shares.

B. Private and Public Companies

The JSC Law establishes two types of joint stock companies: private and public. While private companies distribute shares through a private placement,[16] public companies trade their shares on one of several Ukrainian stock exchanges and distribute them through either private or public placements.[17]

The mandatory listing requirement was aimed at providing liquidity to the fledgling Ukrainian stock market. Unfortunately, the State Commission on Securities and Stock Market and individual stock exchanges established listing requirements that cannot be met by many Ukrainian companies. For example, a listed company is required to have UAH 100,000,000 (over $12.5 million) in annual revenue and net assets. The company must also be operational for a minimum of three years. In an attempt to comply with the law, some companies apply with an exchange to obtain a listing, and, once rejected, register the securities as unlisted. It is unclear whether such a practice is legal, which presents a risk that transfer of securities in such companies can be set aside. A positive development is that Parliament is currently considering amending the JSC Law to eliminate the obligatory listing requirement.[18]

C. Improved Corporate Governance

The JSC Law improved corporate governance by heightening requirements for the general meeting of shareholders, the executive, and auditing organs of the company. The companies are now required to hold a general meeting of shareholders at least once annually.[19] Shareholders have the right to redress the failure to hold the meeting through court action.

While the JSC Law did not change the sixty percent quorum requirement,[20] significant matters must now be approved by a supermajority of seventy-five percent. Such matters

13. On Joint Stock Companies, art. 3.

14. *See* On Securities and Stock Market, Law No. 3480-IV art. 6(3) (2006) (Ukr.), *available at* http://zakon1.rada.gov.ua/cgi-bin/laws/main.cgi?nreg=3480-15.

15. On Joint Stock Companies, art. 20(2).

16. *Id.* art. 5(2).

17. *Id.* arts. 5(2), 24(1).

18. Draft Law No. 6212.

19. On Joint Stock Companies, art. 32(2).

20. *Id.* art. 41(2). For comparison, *see* On Business Associations, Law No. 1576-XII (1991) (Ukr.), *available at* http://www.wipo.int/wipolex/en/text.jsp?file_id=182425.

include changes to the corporate form, issuance of shares, changes of the company's authorized capital, or reorganization.[21]

The law also improves transparency by mandating disclosures for the acquisition of ten percent or more of common shares.[22] The acquirer must notify the issuer and publicly disclose its intention to reach the threshold as well as provide information on itself and affiliated persons.[23] The term "affiliated persons" includes parent companies, subsidiaries, and companies controlled by the same party, as well as close family members for individual acquirers.[24] Although the law still leaves room for potential abuses, the inclusion of affiliated persons in the disclosure is a major step forward.

While the traditional "one share–one vote rule" for shareholders' vote still applies,[25] the law now provides for cumulative voting for the purposes of election of the supervisory board members.[26] Cumulative voting is a novelty for Ukrainian corporate law and is intended to provide minority shareholders with more participation in the company governance.

D. Shareholder Buy-Outs

The JSC Law introduced the opportunity for minority shareholders to sell their shares in the event of a change of control.[27] A person acquiring fifty percent or more of common stock is obligated to submit an offer to buy shares of all other shareholders.[28] Unfortunately, the law does not permit companies to vary this provision to address situations when a controlling block of shares constitute less than fifty percent of the shares, as is often the case with public companies.

Furthermore, shareholders who oppose certain fundamental changes in the company, significant transactions, or changes in the statutory capital have the right to require the company to buy their shares.[29] The price at which the company is required to buy their shares cannot be lower than the market price,[30] is determined based on the market value of securities circulated on a stock exchange,[31] and should be approved by the supervisory board of the company.[32] The law, however, gives no guidance to the supervisory board with respect to the determination of appropriate market price so long as it is above the price established at the exchange. This law creates an issue when the company's shares have no effective trading volume or trade sporadically. It is also unclear whether shareholders can agree in advance on a procedure for determination of the buy-out price, a matter generally addressed through shareholders' agreements in the West.

21. On Joint Stock Companies, arts. 33(2), 42(5).
22. *Id.* art. 64(1).
23. *Id.*
24. *Id.* arts 2(1), 64(1).
25. *Id.* art. 25(1).
26. *Id.* art 53(3).
27. *Id.* art. 65(1)-(2).
28. *Id.*
29. *Id.* art 68(1)-(2).
30. *Id.* art. 69(1).
31. *Id.* art. 8(2).
32. *Id.* art. 8(3).

E. Preemptive Rights

The JSC Law provides shareholders with preemptive rights to acquire newly issued, privately placed shares.[33] There is, however, no similar provision for publicly issued shares.[34] The law mandates preemptive rights for owners of common stock and provides an option for the company to provide such rights to the owners of preferred stock by providing them in the company charter.[35] Prior to any private placement of newly issued shares, a company is required to provide to shareholders a thirty-day notice including information on the number of shares, their price, rules for determination of the number of shares to which shareholders have preemptive rights, as well as time period and procedure to exercise such right.[36] The company must also publish notice informing shareholders that they can exercise their preemptive rights.

F. Simplification of Voting Procedures

Another positive development is the simplification of voting procedures for companies with fewer than twenty-five shareholders. These companies may now amend their charters to permit the adoption of resolutions by unanimous written consent in lieu of a formal meeting of shareholders.[37] Previously, even minor decisions relating to nominal changes in corporate documents were required to be adopted at the shareholders meetings held after a formally published notice and after a statutory period.

G. Shareholders' Agreements

The law made a step towards recognition of shareholders' agreements. Previously, the Ukrainian High Commercial Court refused to recognize shareholders' agreements governed by foreign law or those subject to international arbitration.[38] While the new law did not specifically address the issues of foreign law and international arbitration, it set out a general possibility of concluding shareholders' agreements. It remains to be seen whether Ukrainian courts will allow the development of comprehensive agreements among shareholders.

V. New Law On Data Protection In Ukraine

In an important development for international business that went virtually unnoticed, on June 1, 2010, President Yanukovich signed a law on protection of personal data (PDP Law), which became effective on January 1, 2011.[39]

33. *Id.* arts. 15(3), 27(2).
34. *Id.* art. 15(3).
35. *Id.* art. 27(2).
36. *Id.*
37. *Id.* art. 48(1).
38. *See* Recommendations of High Commercial Court of Ukraine, ch. 6, (Dec. 28, 2007), No. 04-5/14 (Yurydychnyi Visnyk Ukrainy, 2008, 02, No. 7); *see also* Andriy Tsvyetkov & Kateryna Stretovych, *Ukraine: Arbitrability of Corporate Disputes in Ukraine*, 14 Arb. Newsl. no.1 66 (Int'l Bar Assoc. Legal Practice Div., London, U.K.) (2009).
39. On Protection of Personal Data, Law No. 2297-VI art. 30 (2010) (Ukr.), *available at* http://zakon1.rada.gov.ua/cgi-bin/laws/main.cgi?nreg=2297-17 [hereinafter PDP Law].

The PDP Law is based on the framework EU Directive 95/46/EC[40] and provides a more detailed legislative basis for data protection in Ukraine. On the positive side, by implementing the PDP Law, Ukraine is bringing its legislation into closer compliance with European standards, perhaps with the eventual hope of European integration. However, the PDP Law leaves open the usual questions of implementation and enforcement surrounding Ukrainian laws.

A. Definitions and Application

Similarly to EU Directive 95/46/EC, the PDP Law applies to data processed by both automated means and non-automated filing systems and collected by legal entities or individuals in Ukraine.[41] Personal data is defined as information about an individual who may be specifically identified.[42] The primary sources of information may be documents issued to an individual, documents signed by an individual, and information provided by an individual.[43]

The PDP Law does not apply to databases and personal data processed by natural persons for non-professional personal or household needs, journalists for their official or professional duties, and professional creative specialists.[44] Notably, Directive 95/46/EC does not refer to the latter two categories.

Specifically, the PDP Law applies to legal entities or natural persons, who by law, or at the consent of the individual whose data are collected (data subject), are granted the right to process personal data, and who authorize purposes for which personal data are processed.[45] These are referred to as "owners" and "controllers" of personal databases, the latter being those companies or persons who are authorized to process an owner's database. The law expressly applies to licensed doctors, lawyers, and notaries.[46] It might also be applied to such institutions 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.

B. Regulation of Data Processing

The fundamental principle applicable to personal data processing under the PDP Law is that all steps in the collection, storage, and processing of data must have the consent of the data subject.[47] This principle is not a novelty in Ukraine, as the Law of Ukraine No. 2657 "On Information" already required the consent of any individual before his or her information could be collected and processed in Ukraine or abroad. However, the PDP Law expands the consent requirement to include consent as to volume, purpose, content,

40. Council Directive 95/46, 1995 O.J. (L 281) 31-50 (EC) (on the protection of individuals with regard to the processing of personal data and on the free movement of such data).
41. PDP Law, art. 2.
42. *Id.*
43. *Id.* art. 6.
44. *Id.* art. 1.
45. *Id.* art. 2.
46. *Id.* art. 24.
47. *Id.* art. 11.

destruction of, and amendment to personal data.[48] Pursuant to the PDP Law, any data processed must be collected for a specific, lawful purpose and must be precise, accurate, and when necessary, kept up-to-date.[49] There is no mention of marketing as being a lawful purpose.

The processing of personal data in Ukraine may be effectuated without consent only in the interests of national security, human rights, protection of the vital interests of the individual whose data is processed (until such time as consent may be given), and "economic welfare."[50] The PDP Law does not further elaborate on the definition of "economic welfare," whereas Directive 95/46/EC is only a bit more specific in stating clarifying the definition as, "important economic or financial interests of a Member State or of the European Union, including monetary, budgetary and taxation matters."[51]

The PDP Law does not permit the processing of personal data regarding race or ethnicity, political, religious, or ideological conviction, membership in a political party and trade unions, health, and sex life.[52] It is interesting to note that while Directive 95/46/EC does not mention "membership in a political party," Ukraine (which is notorious for having many politicians who double as executives or oligarchs) specifically restricted the storage and processing of data that reveals any political party affiliation.[53] The aforementioned restrictions do not apply in cases in which such 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 the law.[54]

C. Rights of Individuals

Under the PDP Law, all data subjects enjoy certain integral and inviolable rights, such as the rights to (1) know the location of all databases containing their personal data; (2) the receipt of full information about the owner or controller of their personal data; (3) free of charge access to their personal data; (4) demand changes, restriction, or destruction of personal data; and (5) object, on legitimate grounds, to the processing of their personal data.[55] Data subjects also have the right to request relevant authorities to protect their personal data, specifically with respect to any damages incurred from unlawful disclosure and the provision of false personal data to third parties, including information that can damage an individual's business reputation.[56] This broad right includes the right to appeal to the said public authority for protection of an individual's data protection rights and the right to use any other legal means provided by law for such protection (i.e., the Ukrainian judicial system).[57] Data subjects must be notified in writing of the rights connected to their personal data being held in any database.[58]

48. *Id.* arts. 6, 21.
49. *Id.*
50. *Id.* arts. 6, 7, 25.
51. Council Directive 95/46, art. 13.
52. The PDP Law, art. 7.
53. *Id.*
54. *Id.*
55. *Id.* art. 8.
56. *Id.* arts. 8, 10.
57. *Id.* arts. 8, 18.
58. *Id.* art. 12.

D. The Requirement of State Registration

The PDP Law requires state registration of all databases containing personal data.[59] For this purpose, the state authority responsible for data protection[60] will maintain a state register of personal databases when the Cabinet of Ministers approves such authority's regulations. The problem is that as of today, the government has yet to create that authority.

Generally, the registration procedure will entail submission of an application containing information about the owner, the name, and location of the database, the purpose for processing personal data in the database, the controller(s), if any, and confirmation of all personal data protection measures provided by the law. If all registration documents are in order, the owner of the database will receive a certificate of registration within ten working days.[61]

While an individual's access to his or her personal data is free of charge,[62] third parties may access personal data only with the consent of the data subject and payment of the owner's fees (set by the Cabinet of Ministers) for obtaining a data subject's personal information.[63] The database owner's or controller's employees are obligated to use, or disclose personal data only within their official capacity, and this obligation remains with such employees even after they have left their official position.[64] Of course, the data subjects must be notified of the transfer of their personal data to third parties if their consent was subject to such condition.[65]

E. The Transfer of Data Overseas

Personal data may be transferred to foreign personal data processors under the condition that the foreign countries have a sufficient level of data protection, presumably comparable to Directive 95/46/EC; the transferor has the relevant permit; and the recipient uses the personal data for the purposes for which it was collected.[66] Naturally, this provision brings up a number of difficult issues, for instance—who issues they said permit and when? How will the Ukrainian authorities verify whether countries other than EU Member States have the required data protection rules? How can the issue of the collection purpose be controlled or verified?

Due to the broad nature of the PDP Law and the lack of official interpretations, the collection of data by a foreign legal entity or law firm during foreign discovery proceedings may arguably be considered the processing of personal data and be subject to the above rule for foreign data collectors. The same issues may apply to foreign companies that obtain information about Ukrainian consumers. Presumably, the issue of consent to the collection of a Ukrainian individual's personal data should be covered by the foreign

59. *Id.* art. 9.
60. *Id.* art. 23.
61. *Id.* art. 9.
62. *Id.* art. 19.
63. *Id.* arts. 10, 16, 17, 19.
64. *Id.* arts. 10, 16.
65. *Id.* art. 21.
66. *Id.* art. 29.

companies' clear notice to the Ukrainian purchaser that his or her data will be collected for certain purposes.

F. Future Implementation

Overall, the Ukrainian PDP Law covers all of the issues required by Directive 95/46/EC as well as additional issues particularly relevant in Ukraine, such as state use, business reputation, and labor protection. It is doubtful that the Ukrainian government can resolve some of the open issues left by the PDP Law. For instance, the Ukrainian government has not yet created the relevant public authority responsible for monitoring personal data protection issues, has not yet set up the electronic database of registered owners and controllers of personal data, and has not issued the model procedure for processing personal data, including personal data deemed banking secrets, as required by the PDP Law.

VI. Anti-Suit Injunctions Preventing International Arbitration: A Growing Problem in Ukraine and Steps Towards a Solution

In a recent surprising development, a Kiev Commercial Court issued an anti-suit injunction prohibiting a foreign individual claimant from proceeding with international arbitration against a foreign company with business interests in Ukraine.[67] The concept of an anti-suit injunction originated in the English courts, which may grant anti-suit injunctions to enjoin parties from proceedings in another country brought in breach of an arbitration agreement.[68] However, the concept is foreign in Ukraine (a civil law jurisdiction), and the decision is troubling because it demonstrates the susceptibility of Ukrainian courts to tactical maneuvering aimed at circumventing an arbitration agreement.[69] This is at least the second notable case, after *Telenor*, where parties appear to engage in collusive proceedings in Ukraine to frustrate international arbitration.[70]

The facts of the case are as follows: a non-Ukrainian citizen residing outside of Ukraine brought an arbitration claim against an Austrian company under the rules of a major international arbitration institution. The place of arbitration was outside of Ukraine. Subsequently, a Ukrainian wholly owned indirect subsidiary of the Austrian respondent filed a claim in the Commercial Court of the City of Kiev against, among others, its Austrian parent and against the claimant in arbitration proceedings. The Ukrainian company asked the court to declare the contract and the arbitration clause between the Austrian company and the individual invalid. The Ukrainian claimant was not itself a party to the contract or to the arbitral proceedings; however, the company asserted that its direct parent, itself a

67. The author represented the foreign individual and has reviewed the court decision, which is confidential, except for the operative part, published in the Ruling of the Kyiv Commercial Court on correcting of technical mistakes in case No. 6/64 of 19.02.2010, *available at* http://www.reyestr.court.gov.ua/Review/8463891.

68. *See* W. Tankers, Inc. v. Riunione Adriatica di Sicurta SpA, [2005] EWHC (Comm.) 454 (Eng.); *see also* Patrick Boylan, *West Tankers: End of the Anti-suit in Europe?*, Practical L. Co., Sept. 29, 2008, http://arbitration.practicallaw.com/8-383-4278.

69. *See* Franklin Gill et al., *Russia and Ukraine*, 43 Int'l Law. 1173 (2009).

70. *See* Storm LLC v. Telenor Mobile Commc'ns AS, 2006 WL 3735657 (SDNY Dec. 15, 2006) (finding that a party facilitated Ukrainian collusive litigation that prevented enforcement of the arbitration award in Ukraine).

subsidiary of the Austrian company, adopted a resolution requiring the Ukrainian company to accede to the contract between the Austrian company and the arbitration claimant. The Ukrainian company claimed that its parent's resolution was adopted improperly and requested to set aside the underlying agreement on that basis.

The Ukrainian company also requested that the court issue an injunction prohibiting parties to the Ukrainian lawsuit (including the Austrian company and the arbitration claimant) to take any action in connection with the arbitration. The court granted the injunction, thus prohibiting the individual claimant from proceeding with arbitration until resolution of the Ukrainian litigation, which can last for years.

The Ukrainian court's decision was short and virtually devoid of reasoning. The court prohibited the claimant in the international arbitration "personally or through representatives" from carrying out *any* acts relating to the consideration of any disputes relating to the contract before the international arbitration body.[71] The injunction was issued *ex parte* and the arbitration claimant learned of it only after reviewing the Ukrainian court files.

The court's sole justification for the injunction was that the failure to grant it would render enforcement of a possible future Ukrainian court judgment difficult or impossible. The court did not provide further analysis or grounds for the injunction other than citing provisions of the Ukrainian legislation affording the court the power to issue interim measures. Failure to abide by a Ukrainian court order may subject individuals and their lawyers to criminal prosecution with up to three years of imprisonment.[72]

A. Analysis

The Ukrainian court ruling is highly unusual because Ukrainian law does not explicitly provide for anti-suit injunctions and arguably prohibits them as a limitation on protected personal rights. First, there is nothing in the Ukrainian Commercial Procedure Court that would authorize the issuance of anti-suit injunctions. The court simply applied general provisions for interim measures.[73] However, interim measures cannot be used in declaratory judgment matters, such as the present case.[74]

Second, the Ukrainian Constitution guarantees every person the right to protect his or her rights and freedoms by any means not prohibited by law.[75] That right also includes the right to submit contractual disputes to international arbitration specifically provided for by the International Arbitration Law.[76] Furthermore, courts are prohibited from intervening in the arbitration matters unless specifically permitted by the Arbitration Law.[77] At the same time, no provisions of the Arbitration Law provide for the power of the court to prohibit or suspend arbitration proceedings. Thus, the court decision is inconsistent with basic rules established by the Ukrainian Constitution and the Arbitration Law.

71. Ruling of the Kyiv Commercial Court, *supra* note 67.

72. On Judicial System and the Status of Judges, Law No. 2453-VI (2010) (Ukr.).

73. Code of Commercial Procedure of Ukraine, Law No. 1798-XII, art. 66 (2010) (Ukr.).

74. Ruling of the Higher Commercial Court of Ukraine in case No. 39/305 of Mar. 17, 2010, *available at* http://www.reyestr.court.gov.ua/Review/8801026.

75. Constitution of Ukraine, Law No. 254?/96-VR, art. 55 (1996) (Ukr.), *available at* http://www.rada.gov.ua/const/conengl.htm.

76. On International Commercial Arbitration, Law No. 4002-XII, art. 1 (1994) (Ukr.).

77. *Id.* art. 5.

The decision suggests that a troubling trend of subverting international arbitration initiated by the *Telenor* case is alive and well in Ukrainian courts. As in the *Telenor* matter, parties adverse to arbitration use related entities and fabricated claims to manipulate Ukrainian courts to retain jurisdiction to frustrate international arbitration. In contrast, the party interested in pursuing the arbitration has virtually no ability to challenge the injunction in Ukrainian courts. The court cannot set aside interim measures unless the need to ensure enforcement of the judgment no longer exists, or the circumstances justifying interim measures have changed.[78] Even if the plaintiff who requested the interim measures in the Ukrainian court proceedings is somehow compelled to withdraw its request (for instance, through its indirect parent company), the court must review such a request objectively and is not obligated to lift the measures merely because the party decides to withdraw the request.

As the *Telenor* case shows, resolution of this dispute could take years of proceedings in multiple jurisdictions. Whatever the outcome, it seems clear that unjustified anti-suit injunctions by a national court highlight both the need for international arbitration as a neutral venue, as well as the difficulties that arise when a national court is willing to obstruct an arbitral proceeding.

78. Clarifications of the High Arbitration Court of Ukraine, *On the Certain Aspects of Practice of Interim Measures*, No. 02-5/611 of 23.08.94, *available at* http://zakon.rada.gov.ua/cgi-bin/laws/main.cgi?nreg=v_611800-94.