Arzinger

Newsletter

№42 | **April 13, 2010**

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DISPUTE RESOLUTION

Decision of the Constitutional Court of Ukraine as to competence of the Supreme Court

– On March 11, 2010 the Constitutional Court of Ukraine adopted its decision N 8-рп/2010 in case on constitutional petition of 46 people's deputies of Ukraine as to official definition of terms "highest judicial organ", "supreme judicial organ", "cassation appeal" which are contained in articles 125, 129 of the Constitution of Ukraine. People's deputies required to explain whether the Supreme Court is authorized to review decisions of the Supreme Economic and Supreme Administrative Courts in cassation procedure and in procedure of review due to exceptional conditions. The Constitutional Court of Ukraine decided that the constitutional status of the Supreme Court does not authorize it to act as court of cassation as to decisions of supreme specialized courts which act as cassation instance. The Constitutional Court of Ukraine also decided that only single cassation appeal and review of courts' decisions can be legal.

Comments of

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– First of all, it shall be noted that this decision will not lead to a "court revolution" and the courts will not change their practices tomorrow. The reason is that decision of the Constitutional court did not declare unconstitutionality of provisions of the Economic Proceedings code, Administrative Proceedings code or the Law of Ukraine on court system that provide possibility for subsequent appeal in cassation procedure of decision of supreme specialized courts. The reason is that this question was not actually viewed by the court, as it was not the subject of constitutional petition. On the other hand, now the situation is dangerous, when the basis for next appeal can be existing conclusions of the Constitutional court as to these issues, and according to the principle of finality of decisions, the Constitutional court of Ukraine will not be able to step away from them. It is not hard to envisage consequences of such developments. In fact, the point here is the possibility of complete blocking of functioning of respective chambers of the Supreme Court of Ukraine for an indefinite term. At risk can theoretically be also such decisions, which have been approved by the Supreme Court of Ukraine before this decision of the Constitutional Court of Ukraine as well as cases being in the proceedings right now, though it is difficult to believe in such critical scenario. It is also hard to believe that from now on the Supreme Court of Ukraine voluntary stops to decide on economic and administrative cases.

In addition the court decided "not to close all doors behind it" and summed up that while deciding if the lawmakers can stipulate other forms for appeal against decisions of courts of general jurisdiction, except such provided in par. 8 part three article 129 of the Constitution of Ukraine as basis of judicial proceedings – appeal and cassation appeal, it came to conclusion that according to its content this constitutional provision does not contain exhaustive list of forms for appeal against decisions of courts of general jurisdiction. It means that it is possible that soon in Ukraine can appear third form for appeal against court judgments which would fall into competence of the Supreme Court of Ukraine. It is also interesting that the Supreme Court in consequence of made decision becomes hostage of subjects of constitutional petitions, as we all remember the story with creation of the Cassation Court, which did not happen exactly due to respective decision of the Constitutional Court of Ukraine. It can be stated that the Constitutional Court of Ukraine has experience in "killing" other courts, even if on the stage of establishment and not after years of existence and the dimension is not the same. On practice, the Supreme Court of Ukraine is often the last hope for justice and it cannot be said that possible changes would lead to more qualitative proceedings. On the other hand, four instances for economic and administrative cases rather surprise than please. As, provided wish from one of the parties, a case can last for many years and it cannot be excluded that its proceedings will not be renewed due to new circumstances and becoming in such situation an everlasting bad dream. It is not a secret as well that the almost absolute majority of cases the Supreme Court does not review decisions of lower instances and in most cases they remain in legal force. The criteria for refusal also, unfortunately, cannot be considered as transparent.

In the context of lawmaking this court decision can become a serious impulse for new judicial reform, as realizing the risk of "stopping" of the respective chambers of the Supreme Court of Ukraine it is not excluded that a number of actions will be taken in order to regulate the judicial system and to prevent the chaos, as the latter is of no advantage for anyone. It is also clear that unlikely and rather scandalous would be quick dismissal of all judges and other employees of respective chambers of the Supreme Court of Ukraine. Almost anyone understands that the judicial system of Ukraine is not perfect and it is likely that this news can provoke serious initiatives for reforms in the judicial system. I think that current cassation "dualism" shall be eliminated, but this requires time and some great lawmaking efforts and measured steps. Most likely, the first step has been made.

Fight against procedural sabotage during economic procedures

(as to the Informational letter of the Supreme Economic Court of Ukraine dd. 15.03.2010 N 01-08/140)

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– In the court practice interested parties often use different methods directed at the deliberate protracting of the court proceedings abusing in this way their procedural rights. Analysis of the respective provisions of the Economic Procedural Code of Ukraine (hereinafter - EPC) leads to a conclusion that it is possible to use them in order to protract the case trial for a really long period of time. In particular, there are a lot of unreasonable removals of judges of economic courts, absence of representatives of parties of legal processes without good reasons, submission of unreasonable petitions on taking legal measures by the court, filing of countersuits without adherence to requirements of the EPC, simultaneous appeal against court judgments in appeal and cassation procedure, appeal and cassation appeal against court rulings which cannot be appealed etc. How to deal with it? The Supreme Economic Court of Ukraine (hereinafter – SECU) tried to answer this question in its Informational letter N № 01-08/140 dd. 15.03.2010 "On some issues on prevention of abuse of procedural rights in economic legal proceedings".

The SECU indicated that such practice violates the rights of other parties of legal proceddings and contradicts provisions of article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms as of 1950, which was ratified by Ukraine, as to right to a public hearing before an independent and impartial tribunal within reasonable time. At this, the SECE underlined the provision of part 3 article 22 of the EPC: "the parties are obliged to use their procedural rights in good faith, to show mutual respect to rights and legally protected interests of the other party, take measures for comprehensive, full and objective examination of all case circumstances".

It is important that the SECU did not only ascertain the fact and described methods of abuse of procedural rights by the parties, but also described the prevention methods for each of them. It is important to note that this issue is very urgent. The prevention of abuse by the parties of their procedural rights and deliberate protraction of court proceedings will help to accelerate the administration of justice. It is not a secret that provided active "sabotage" of the other party even a simple case can turn into misery and last for years. The parties use different methods to protract proceedings. The SECU described only a part of them, but there are no limits for creativity of the parties. In particular, this Informational letter did not mention such methods of case protraction as appointment of experts, appeal against any and all appealable court rulings, filing of parallel "technical" countersuits in order to stop proceedings on main case etc.

At solving such issues it is important to be aware of effective methods of defense which can protect the victim party from case protraction but at the same time would not limit procedural rights of the other party. Additionally, the courts themselves often protract proceedings, mainly, through not keeping procedural periods. This issue also has to be solved.

As stated in this Informational letter, the SECU will further discuss issues of abuse of procedural rights in order to elaborate respective recommendations for the Presidium of the SECU or explanations for the Plenum of the SECU. So, let there be hope that a step on the way to quick justice, which is this Informational letter, will be implemented in the court practice and will be followed by further steps which will be able to prevent parties from abuse of their procedural rights.

Further change of a date for coming into force of the anticorruption legislation

– The Parliament of Ukraine passed the Law "On amendments to certain laws of Ukraine on prevention of and fight against corruption" (law draft N6159). This legislative act postpones the date of coming into force of the laws "On principles of prevention of and fight against corruption", "On liability of legal entities for corruption" and "On amendments to certain legislative acts of Ukraine on liability for corruption" from April 1, 2010 to January 1, 2011.

News in the pharmaceutical sector

1. **The procedure for the state drug quality control has been approved.**

   With its Resolution dd. 03.02.2010 #260 (came into force as of 18.03.2010) the Cabinet of Ministers of Ukraine has approved the Procedure for the state drug quality control (hereinafter "Quality Procedure") as well as Procedure for selection of drugs for laboratory analysis during conduction of the state drug quality control (hereinafter - "Selection Procedure"). This act cancelled the resolution of the Cabinet of Ministers of Ukraine dd. 26.04.2003 #610.

   The Quality Procedure and the Selection Procedure determine the mechanism for the state drug quality control in order to prevent turnover of falsified, substandard and unregistered drugs.

   This act shall be applied for all health care institutions (including retail and wholesale economic subjects irrespective their ownership form).

   The state control shall be carried out by the State drug inspection and its territorial subdivisions by means of scheduled and unscheduled revisions, procedure for which is stipulated in the Law of Ukraine "On main principles of state control in the sphere of economic activity".

   The Quality control is conducted by means of:

   a) revision of cover documents to the drug series,

   b) random visual control over consistency of drugs with requirements of the quality specification,

   c) selection of drug samples in cases provided by the Selection Procedure.

   The selection of drugs for laboratory analysis is carried out within the framework of the state quality control. At this, the Selection Procedure contains reasons for decision-making on conduction of a laboratory analysis, in particular:

   a) drug inconsistency with requirements of the quality specification upon results of a visual control;

   b) discrepancies in cover documents to the drug series;

   c) violation of certain conditions for drug production in the pharmacy under doctor prescription, its storage, transportation and sale which can negatively influence its quality.

   In general, with passing of this act the state drug quality control shall become more transparent, in particular due to the fact that the Quality Procedure clearly specifies procedures, terms, and limits of its conduction as well as cases for deciding on ceasing turnover of respective series.

   The positive aspect it that the producer (supplier) of drugs or its official representative shall be obligatory informed about results of the laboratory analysis as to the drug quality.

   Additionally, the principle of financing has been changed considerably: all expenses as to selection, delivery and analysis shall be borne by the State drug inspection or its territorial subdivisions. And only after proving the fact of drug quality inconsistency the economic subject shall compensate such costs.

2. **The procedure for the state quality control over drugs imported into Ukraine has been changed.**

   With its resolution as of 01.03.2010 the Cabinet of Ministers introduced new version of the Procedure for the state quality control over drugs imported

into Ukraine (hereinafter – the Procedure) (came into force as of 18.03.2010).

This Procedure has considerably changed the previous quality control system for imported drugs.

Foremost it concerns amendments to the list of documents necessary for obtaining conclusion on quality of drugs imported into Ukraine. It is not required to provide a documents confirming GMP certificate (copies of GMP certificate of the manufacturer issued or accepted by the State drug inspection or a decision on certificate acceptation).

Besides, report on quality of imported drugs shall be issued ones for the whole drug series (and not for the shipment, as previously) provided such series is imported by one economic subject. This change will allow importers to save enormous costs for storage of drugs during the control procedure in the quarantine zone.

The forms and terms of control are specified clearly, in particular:

a) expertise of documents provided by the economic subject to state control authorities (within 3 days after submission of an application and necessary documents);

b) control of the freight by the state control authorities in respect to conformity with the customs declaration, quantity of drugs in each series and visual control of any package from each series of drugs (within 3 days after submission of an application and necessary documents);

c) laboratory analysis in cases stipulated by the Procedure in respect to conformity of drugs with requirements of the quality specification.

Further, there is an exhaustive list of cases when a laboratory analysis of drug series shall be conducted with application of only such methods which are approved by the Ministry of Health of Ukraine for drug registration or are stipulated by the State pharmacopoeia of Ukraine.

At this, if manufacturers of drugs have GMP certificate issued by the respective authority of a EU member state, USA, Japan or any other country being member of PIS/S, no laboratory analysis of drugs shall be conducted.

All expenses for selection, delivery and laboratory analysis shall be borne by the state control authority, and only after proving upon results of the laboratory analysis that the drugs do not correspond with legal requirements as to quality, the importer shall compensate such costs.

3. **State drug quality control inspection with direct subordination to the Ministry of Health of Ukraine has been established.**

   On 17.03.2010 the Cabinet of Ministers of Ukraine passed its resolution providing establishment of the State drug quality control inspection which will be directly accountable to the Ministry of Health of Ukraine. Such change is intended, in first place, for enforcement of the Law of Ukraine "On drugs" according to which a special state drug quality control authority shall be subordinated to the Ministry of Health of Ukraine. Abovementioned resolution has not been published yet, and respectively has not come into force as for now.

   It shall be noted that the status of now existing State drug quality control inspection, subordinated to the Cabinet of Ministers of Ukraine according to its resolution as of 20.12.2008 #1121, does not comply with the current legislation.

ENERGY

Legal regulation on land of electric powers

– On 05.03.2010 the Parliament of Ukraine took as basis the draft law on land of electric powers and the legal status for special zones of energy facilities. The draft law N4680 proposes to establish organizational and legal principles for acquisition of title to land for energy facilities, establishment and observance of a legal regime for use of lands in special zones of energy facilities in order to ensure their continuous functionality, rational use of land, environment protection and environmental safety.

  This draft includes provisions on peculiarities of parceling and use of land plots for energy facilities. In particular, there is possibility to use lands for allocation of electricity transmission objects on basis of servitude rights and construction of electricity transmission objects not only on lands of electric powers but also on land of other categories. This draft law also stipulates rights of electric power enterprises in special zones of energy facilities.

It is also suggested to provide for obligatory compensation of losses for land owners and users in case of introduction of restrictions in connection with establishment of special zones.

AGRICULTURE

Introduction of new mechanisms for agriculture support

– On 04.03.2010 the Parliament of Ukraine took as basis the draft law on amendments to the Law "On state support of agriculture of Ukraine" on improvement of mechanisms on support of agricultural enterprises. The draft law N5471 provides that buyers of agricultural products shall be obliged to pay for the products within 40 calendar days after their delivery or acceptance of title documents. In case of delay of payment the buyers shall be obliged to pay penalty in the amount of 0,1 per cent of the value of unpaid goods for every day of delay, and in case of delay for more than 14 days they shall pay a penalty in amount of 7% of the stated value (or more, if this is provided in the sale and purchase agreement).

REAL ESTATE

Amendments to the Law of Ukraine "On state registration of corporeal rights to real estate and their limitations" came into force

– On March 16, 2010 the Law of Ukraine "On amendments to the Law of Ukraine "On state registration of corporeal rights to real estate and their limitations" and other legal acts of Ukraine" came into force. This law introduces new version of the Law of Ukraine "On state registration of corporeal rights to real estate and their encumbrance" and amends certain legislative acts related to this important subject.

Comments of the

Senior Partner, **Timur Bondaryev**

– This law was long expected as for now the system of title registration is dualistic – title to land is registered by the bodies of the State committee for land resources, and title to real estate located on land plots, its encumbrance and any deeds (authorization) as to real estate are registered by the bodies of the Ministry of Justice of Ukraine. The current system does not meet expectations of foreign investors and does not allow getting quick and accurate information as to real estate etc.

This law contains a lot of new provisions which are impossible to be unambiguously evaluated now and which will influence the development of this important issue in both positive and negative way. The main innovation of this law is the provision on transfer of powers in the field of state registration of corporeal rights to real estate and their encumbrances from the State committee for land resources to the Ministry of Justice of Ukraine.

It shall be noted that the law version effective till March 16, 2010 stipulated the state registration of title by the State committee for land resources, but this law could not be fully enforced in this part and the state registration of title to real estate was carried out, as said above, by the State committee and the Ministry of Justice of Ukraine (in fact, by the communal enterprises of the Bureau of technical inventory). Unfortunately, without taking into account the logic of the law as to unification of the title registration system and merger of all real estate registers into one, the content of the new law version shows that the cadastre will be kept by a second body (the State committee for land resources!?), which contradicts the concept of a unified register.

Second important innovation of the law is that the law cancels the registration of deeds (authorization) on real estate, which eliminates the necessity of double registration of real estate deeds.

Current situation with the registration of title to and deeds on real estate is that in addition to obligatory registration of title to real estate a deed on real estate can become effective only after its registration in the respective register by the notary. Such double registration (registration of the title and the deed) was a subject of numerous discussions among experts, as in the opinion of some experts there was no clear interpretation when the title to real estate is created – after its registration in the title register or after registration of the deed.

Thus, currently in order to acquire the title to real estate and to be entitled to dispose of it at least three actions shall be taken: 1) notary certification of the contract (deed), 2) its state registration in the register of deeds, 3) registration of title. As of today, the contract comes into force after its state registration and the title to real estate is created as of the moment of the state registration of the deed. At the same time, the owner can dispose of the real estate only after registration of the respective title.

With passing of the law this discussion came to an end, the registration of deeds on real estate has been eliminated, due to which in the future the respective contracts are subject only to notary certification without their registration in the register of deeds. Therefore, contracts on real estate shall become effective after their notary certification and the title shall be created after its registration in the respective register.

It shall be noted that respective legal provisions as to registration of the title by the bodies of the Ministry of Justice of Ukraine as well as to cancellation of the registration of deeds (authorization) shall come into force as of 01.01.2012, i.e. until then all necessary preparations shall be taken and the registration system shall be established.

The new version of the law entitles the state registrars to wide interpretation of the list of title documents being basis for registration of the title to real estate. On the one hand this shall be considered as positive moment as the previous list was very limited due to which some contracts on real estate actually existing in practice (e.g. transfer of real estate into charter capital) have not been considered as title documents which forced the acquirer of the title to file a suit on recognition of title and obligation to conduct state registration of the title. At the same time, extension of the list can be abused and have negative consequences.

The law also provides for a new institution "of termination of state registration of title", which can be carried out upon court decision or upon application of the owner. In practice such procedure already existed in form of the security for a claim in a procedural order, therefore the law envisages such institution as separate procedure and clearly defines the procedure of its application in practice.

Unfortunately, the law did not solve a very important issue as to accessibility of the register of title. As known from the common world practice, register of title to real estate is open to third parties who have access to information on encumbrances and owners of the real estate object. The law clearly defines that information from the state register can be obtained only by owners of the real estate or their authorized persons, heirs and legal successors of legal entities as well as persons who are beneficiaries under the encumbrances. Surely, the respective information can also be obtained by state bodies. At the same time, the law does not envisage access to the register for third parties or attorneys-at-law.

Thus, the law worsens the state of things existing now when any interested person can get information from the register on prohibition of real estate alienation.

The right to use information from the state register of title is also granted to notaries and banks as to receipt of information on mortgages and other encumbrances on real estate - this (last) possibility was not provided for banks previously.

It shall be noted that for enforcement of the law a number of other by-laws shall be passed. We can also expect that for purposes of its enforcement the law shall be amended in some parts. As experience shows there were a number of obstacles after coming into force of this law in its previous version; that is why the new law, in our opinion, will face some difficulties too. At the same time, this is a very positive step towards establishment of a transparent system of registration of title and we hope that all flaws mentioned above will be eliminated till 01.01.2012.

As to the concerns that this law will affect the notary business this will not be the case, as main income of notaries comes from state duty (service fee) which is charged for notary certification of mortgage or sale and purchase agreements. Despite the fact that the law practically eliminated the registration of deeds, the notary certification of contracts remains in force and, due to this, this law should not affect the profitability of the notary business. Further more, the notaries will have more time to carry out their main activity.

Extension of the list of construction works not requiring construction permit

– The Cabinet of Ministers of Ukraine with its Decree "On amendments to certain decrees of the Cabinet of Ministers of Ukraine" dd. 27.01.2010

N 160 introduced amendments to the List of construction works not requiring construction permit, approved by the Decree of the Cabinet of Ministers of Ukraine dd. 30.09.2009 N 1104, extending it with new type of works – construction of private residential houses of a villa type, cottages and garden houses, additional buildings with total area up to 500 m2 inclusive, outbuildings and constructions.

New procedure for assignment of cadastre numbers for land plots

– The State committee for land resources with its Decree dd. 15.02.2010 N 168 approved a procedure for assignment of cadastre numbers for land plots which determines the order for creation and giving a cadastre number to a land plot and registration of respective data in the state land register.

The Decree stipulates a principle of a unified system of cadastre numbering of land plots on the whole territory of Ukraine. The land plots at their allocation, the land plots created in result of parceling and consolidation of other land plots are assigned with new cadastre numbers. At this, previous cadastre numbers get the status of archival and shall not be further used.

The cadastre numbers shall be assigned to all land plots irrespectively of their ownership form. By transfer of title to land plot, by creation of other rights but the title and corporeal rights to land plot the cadastre number shall remain unchanged.

The cadastre number shall be used only for encoding of the land plot, contains information about the land plot assignment to a cadastre quarter and a cadastre zone defined according to the index cadastre map. Reduplication of cadastre number for land plots is not admissible.

Creation of cadastre numbers for land plots which are allocated for the first time as well as for land plots which are in the ownership (use) but do not have cadastre numbers at to coming into force of the Decree shall be carried out by the bodies of the State committee for land resources. Creation of cadastre numbers is free of charge.

Cadastre number of a land plot is deemed to be assigned as of creation of the Land register for the respective land plot. The Land register is created at the moment of the state registration and issuing of a document confirming the title to the land plot.

Assignment of a cadastre number for a land plot is confirmed by an excerpt from the State land register issued by the respective structural subdivision of the branch of the Centre of the State land cadastre.

Regulation of the procedure on issue of special permits for removal of the top soil

– On 04.03.2010 the Parliament of Ukraine took as basis the draft law on amendments to the Law of Ukraine “On land protection” as to issuance and annulment of special permits for removal and transfer of the top soil. The draft law N4528 envisages legal regulation of relations in connection with application of special permits at conduction of activity as to removal and transfer of the top soil.

According to the draft law owners and users of land plots, including lessees, carrying out mining, exploration, construction and other works, are allowed to remove and transfer the top soil based on special permit for removal and transfer of the top soil issued by the State land inspection and its territorial bodies. This permit is not required in following cases:

- works connected with liquidation and prevention of emergency situations on pipeline transport and energy underground cable systems;
- transfer of the top soil within one land plot allocated for: farming; individual farming; construction and operation of individual residential house, outbuildings and constructions (backyard); gardening; individual cottage construction; individual garage construction.

FOOD AND BEVERAGES

Strengthening of requirements for baby food

– On 04.03.2010 the Parliament of Ukraine took as basis the draft law on amendments to the Law of Ukraine “On baby food” as to strengthening of requirements for production and turnover of foodstuff.

The draft law N4584 envisages strengthening of requirements as to production and turnover of foodstuff. In particular, the current law shall be amended and supplement as to requirements on production of baby food and raw products used for its production.

The draft law contains provision on prohibition of: use for production of baby food of raw products cultivated not in special raw product zones; carrying out of any activity which can worsen the environmental situation in such zones (currently only construction of industrial and any other chemical objects is prohibited which negatively influence agro-climatic and ecological state, except for cases such construction is of strategic importance).

The draft law clarifies norms on prohibition of use for production of baby food of raw products made of genetically modified organisms as well as raw products containing hormonal agents, antibiotics, heavy metals, pesticides, radionuclide and any other substances dangerous to children's' health.

The draft law stipulates that baby food shall be produced exclusively on industrial basis in specialized factories and workshops (or on special processing lines).

Taking into account the world experience the draft law stipulates limitations for use in the production of the baby food of some components — it is prohibited to use artificial flavouring and colouring agents, sweeteners (except for foodstuff produced for children with diabetes); preservatives, flavour intensifiers; mixtures, spices and herbs containing prohibited food supplements; some kinds of fats, (triglyceride, stearic acid, palm stearin, margarine, spread, cotton seed, sesame oil).

In addition, it shall be prohibited to use some sorts of raw products (mechanically deboned meat, pigskin, some sorts of sub-products, soya protein) in production of infant formulas made out of meat. At production of formulas containing meat or fish it is not allowed to use refrozen meat or fish.

At this, the draft law envisages to cancel prohibition on use in baby food of starch and wheat flour stipulated in the Law of Ukraine "On baby food" in current version.

Violation of the legal requirements during reorganization of joint stock companies

- The State commission on securities and stock market with its decision dd. 16.03.2010 N 328 obliged its territorial administrations to monitor joint stock companies which have changed their legal organizational form and have not cancelled registration of share issues and have not annulled certificates on registration of share issues in accordance with the requirements of the Procedure for cancellation of share issue registration and annulment of certificates on share issue registration.

  If territorial administrations reveal such violations they are obliged to inform the corporate relations department which, in its turn, within 10 business days as of receipt of such information shall submit for consideration of the commission its draft decision as to elimination of violations on the stock market.

  The territorial administrations of the State commission shall control enforcement of commission's decisions as to correction of violations on the stock market. If such decisions are not enforced within 10 business days as of their coming into force, territorial administrations shall press charges on violations on the stock market against legal successors of reorganized joint stock companies.

Explanation as to means of notification of shareholders about calling in of general meetings of joint stock companies

- The State commission on securities and stock market issued its explanation N 5 dd. 16.03.2010 "On procedure for application of par. 14 article 2, article 35 part seven article 38 of the Law of Ukraine "On joint stock companies" as to notification about calling in of general meetings of joint stock companies" and approved it with its Decision N 307 as of March 16, 2010.

This explanation, in particular, concerns notification about calling in of general meetings of joint stock companies.

Pursuant to par.14 в. 2 of the Law “On joint stock companies” notification to shareholders means a notification containing information as provided by the law and the charter of a joint stock company and sent to the addressee in form of a letter with description of the enclosure and return receipt.

Analyzing the norm of this Law the State commission came to a conclusion that this norm directly stipulates that means of notification of shareholders about calling in of general meetings of joint companies and their agenda as well as about changes of the agenda shall be determined in the charter of the company.

Therefore, a joint stock company can provide in its charter means of notification about calling in of general meetings and their agenda as well as about changes of the agenda which can differ from the means provided in par. 14 в. 2 of the Law.

At this, means for personal notification provided in the charter shall be the same for all shareholders and include, at least, notice to shareholders mailed to place of their location (residence). The charter of a joint stock company can also envisage additional means of notification of shareholders.

Regulation of foreign investment issues

– On 01.03.2010 the Ministry of Justice of Ukraine has registered the Resolution of the National bank of Ukraine (hereinafter – the NBU) “On Regulation of issues as to effectuation and registration of foreign investment” as of 23.12.2009 N762 (hereinafter Resolution N762), passed as enforcement of the Law of Ukraine “On amendments to certain laws of Ukraine in order to overcome negative influence of the financial crisis” as of 23.06.2009 N1533-VI.

This Law being in effect as of 24.11.2009 introduced essential amendments to the procedure of foreign investment in Ukraine, in particular, it stipulated:

- obligatory state registration of foreign investment, including in monetary form;
- foreign investment in Ukraine in monetary form is possible only in national currency of Ukraine;
- foreign investment in Ukraine in monetary form is possible only trough investment accounts opened in authorized banks of Ukraine.

In spite that mentioned legal requirements have come into force, respective regulatory legal basis of the NBU was not provided which makes practical application of the law more difficult. Some explanations of the new procedure for foreign investment have been provided by the BU in its letter as of 10.12.2009 N13-215/7968-22877 but it did not solve the problem with lacking of regulatory control.

The Regulation N762 stipulates:

1) the Provision on procedure for state registration of foreign investment by the National bank of Ukraine (hereinafter –Provision on investment registration);

2) Amendments to the Provision on procedure for foreign investment in Ukraine, approved by the Resolution of the National bank of Ukraine as of 10.08.2005 N280 (hereinafter –Provision N280);

3) Amendments to the Provision on procedure and terms for foreign currency trade, approved by the Resolution of the National bank of Ukraine as of 10.08.2005 N281 (hereinafter –Provision N281).

The procedure envisaged by the Provision on foreign investment registration shall be applied only to registration of foreign investment in monetary form. The state registration of foreign investment is confirmed by a notice of the territorial NBU administration.

For registration of a foreign investment a document set shall be submitted to the territorial NBU administration according to the location of investment object (if the investment is in form of investment contribution – according to the location of the respective bank) which is not different to the document set required for registration of foreign investments according to the Resolution of the Cabinet of Ministers as of September 7, 1996 N928. At the same time, the territorial NBU administration is entitled to require submission of additional documents as to the foreign investment the list of which is not stipulated. Free interpretation of this provision by the employees of the territorial NBU administration can make the registration of foreign investment in praxis more complicated.

According to the Provision on foreign investment registration the foreign investor or a person authorized by it shall submit within 30 days after investment effectuation an application on registration of the foreign investment. If the foreign investment has been effectuated after 24.11.2009, the 30-days term begins as of the date of coming into force of Resolution N762.

Despite the fact that registration of foreign investment is obligatory, liability for non-registration is not provided. It can be assumed that negative consequences in such case for foreign investor can arise at repatriation of the foreign investment. In addition, taking into account problems in connection with exchange rate differences and the fact that in some cases foreign investor has to legalize documents, 30-days term seems to be too short.

Amendments to Provision N280 and Provision N281 introduced by Resolution N762 have brought these Provisions into compliance with the law and specified the mechanism of investment in Ukraine and investment return.

So, the definition of a "portfolio investment" in Provision N280 has been changed. Now, if foreign investor purchases shares of a company in amount exceeding 10 percent of the company's charter capital on the stock market, it is not considered to be a portfolio investment. It is also stipulated that sale by a foreign investor of the investment object – company's shares (or payment of dividends for them to the foreign investor) in amount of less than 10 percent of the company's charter capital, shall be considered as return of portfolio investment (and/or income on foreign investment), irrespectively of number and type of transactions on purchasing of such shares by the foreign investor.

Besides, definition of a "direct investment" has been excluded from Provision N280. Now all investments, except for portfolio investments, shall be called "foreign investment" and regulated according to the standard procedure.

In addition, Provision N280 has been brought into compliance with legislative requirements as to effectuation of foreign investment in monetary form only through investment accounts and in national currency of Ukraine. Respectively, all norms allowing transfer of the currency directly to the resident's current account, including for conduction of joint activity, have been excluded.

It is also stipulated that foreign investors are entitled to open deposit accounts in the authorized banks only in UAH by means of transfer of monetary funds from the investment account.

Par. 3.1. of Provision N280 stipulating procedure for investment repatriation has been also changed. In particular, repatriation of investment in foreign currency to the account of the foreign investor in the foreign bank does not depend on the fact whether the money have been previously transferred by the foreign investor from the investment account or directly from the account in the foreign bank.

As positive moment making the requirements to investor less strict is exclusion of par. 3.8. from Provision 280 which provided that the foreign investor for investment repatriation shall submit a copy of a tax certificate on payment of profit (income) tax or a legalized certificate on residence. Now such certificate shall be submitted only in some cases provided by Provision N281. In particular, it is not required to submit such certificate if the sale price of the investment object does not exceed its purchase price or if the authorized bank is the tax agent for the investment transaction of the foreign investor.

Positive is also exclusion of the requirement as to obligatory use of a security broker's account for transactions on effectuation/return of portfolio investments.

Provision N762 introduces new version of par.2 chapter 3 section II Provision N281 which stipulates the list of documents necessary for purchase and exchange of foreign currency for return of foreign investment and income gained by foreign investors out of investment activity in Ukraine. Positive is that it is specified which document shall be submitted in what case.

The most negative moment of the new legal act is that now in case of purchase of foreign currency for investment return authorized banks are obliged to credit funds in UAH to separate analytical account and are entitled to transfer them for purchase of foreign currency not earlier than on 5th calendar day after crediting of funds to this account. It is clear that in this way the NBU tries to prevent simultaneous rush access of speculative investors to interbank currency market in case of exceptional depreciation of the national currency, but this provision worsens the situation of all investors, including those making real investments into Ukrainian economy.

On the other hand, possibility to conduct settlements abroad between non-residents for investment objects in Ukraine, as it comes out based on the analysis of the norms of par. 2 Provision N281, shall contribute to investment attractiveness of Ukrainian objects as it decreases risks of foreign investors and simplifies the procedure of purchase and alienation of such assets.

Certainly, the regulation by Provision N762 of some opened issues which arouse after passing of the Law of Ukraine "On amendments to certain laws of Ukraine in order to overcome negative influence of the financial crisis" is, indeed, a positive moment which will allow to achieve more certainty in issues of foreign investment.

But there are also some additional complications for investors which will not help to increase the interest to invest into Ukraine.

For example, if previously in case of investment in foreign currency through purchase of corporate rights the exchange rate fluctuation did not influence the amount of the authorized charter capital of the company – object of investment and the exchange rate difference at the currency sale the Company added to income or wrote off, after passing the law and the new procedure the situation has changed. Amount of the charter capital to be paid by the foreign investor can be estimated only at the date of the currency sale by the foreign investor and transfer of the amount in UAH to the account of the company – investment object.

Therefore, additional restrictions on foreign investment stipulated by the law increase cost of foreign investors for business conduction in Ukraine as well as increase currency risk of investors by instability of the national currency.

At the same time, taking into account that according to Transitional Provisions of the Law such restrictions shall cease to be in force as of January 1, 2011, we hope that the National bank of Ukraine manages to introduce respective amendments to its bylaws in time.

EMPLOYMENT

Fight against "black" salaries

– Essential deficit by the Pension fund and other social insurance funds forced the Cabinet of Ministers to take active measures to achieve reporting real salaries. On 02.03.2010 respective Instruction has been passed and an action plan directed at bringing the salaries out of the shadows has been approved.

In addition to general measures having non-regulatory character – such as explanatory work, formation of a negative attitude towards employers paying "black" salaries in the society, increase of prestige of legal income etc. – following initiatives of the Cabinet of Ministers shall be noted:

- the State Tax Administration of Ukraine, the Pension Fund of Ukraine and other authorities are obliged to monitor the rate of wages indicated in job ads and actual salaries. Surely, from a legal perspective to prove guilty based only on monitoring will be impossible, but – in order to avoid additional attention of controlling authorities – we recommend not stating salary rates in job ads;
- it is also planed to intensify control over payment of salaries and their rates, follow up the salary rates compared to net income of companies as well as to monitor contractors under civil law contracts (regularity of payments, existence of real labour relations);
- the Cabinet of Ministers intends to submit to the Parliament some draft laws providing increase of liability for payment and receipt of salaries "in envelopes" and to envisage protection of persons reporting as witnesses receipt of such "black" salaries.

It is also planed to analyze the payroll burden and amount of payments to the Pension Fund and social insurance funds of Ukraine, but taking into account the demographic situation in Ukraine and catastrophic budget deficit decrease of general tax rates for the payroll cannot be anticipated.

TAX

Tax stimulation of investment and innovation activity

– On 10.03.2010 the Parliament of Ukraine has passed the Resolution #1960-VI taking as basis (in first reading) the draft law on amendments to certain legal acts of Ukraine as to intensification of investment and innovation activity in Ukraine (draft #2356).

The draft law provides introduction of amendments to the Laws of Ukraine "On company's profit tax" and "On procedure for discharge of liabilities to the budgets and state special purpose funds". The amendments are designed to stimulate the investment and innovation activity of economic subjects and provide:

- application of decreased (20%) rate for company's profit tax as to profits invested during the accounting period for acquisition of fixed assets group 2 and 3 (equipment, machinery, cargo transport, except for cars) and immaterial assets (rights for inventions, useful models, industry samples, plant sorts, animal breeds, know-how) which shall be used in economic activity for not less then three following years;
- establishment of special investment allowances in form of investment and innovation tax credit which shall be provided with observation of certain requirements.

The draft law envisages that investment and innovation tax credit shall be provided for implementation of registered investment (innovation) projects. At this, the tax payer shall keep separate records on financial activity under each registered investment (innovation) project.

Such tax credit shall be provided on the basis of an agreement on provision of investment and innovation tax credit between the tax payer and the state tax authority. Such agreement shall be concluded after arising of first tax obligation under the tax accrued in connection of the tax payer's activity under the investment and innovation project.

The investment and innovation credit tax shall be provided for the period of the investment (innovation) project implementation but not more than for three years by means of delay of the company's profit tax payment.

It shall be noted that this draft law envisages accrual and payment of interest rate for using of such credit, in particular: interest rate for using such credit shall be accrued for the amount of the delayed tax obligation under such tax in the amount 50% of the discount rate of the National bank calculated for each day of credit using and shall be paid on the monthly basis.

The draft law also provides that the amount of the investment and innovation tax credit shall not exceed the amount of investment actually paid by the tax payer according to the investment project and all funds gained under such credit shall be used exclusively for purposes of the investment (innovation) project.

Until such draft law is finally passed by the Parliament of Ukraine, the Ministry of Finance shall determine the extent of monetary influence of such draft law on revenues and expenditures part of the budgets and submit propositions on advisability of its passing and coming into force terms.

STATE PROCUREMENT

Veto to the draft law on state procurement

– The President of Ukraine imposed veto to the Draft Law of Ukraine "On state procurement of goods, works and services" passed as of 11.02.2010 by the Parliament of Ukraine.

Comments of

Senior Lawyer **Pavel Nurzhinskiy**:

– Despite the fact that representatives of the Block of Yulia Tymoshenko tried to prevent adoption of this Law on February 11, the Parliament of Ukraine did pass the law on state procurement of goods, works and services.

High hopes were put on this law as it was expected to contribute to development of fair competition, openness and transparency on all stages of the state procurement and to increase efficiency in this field. The law excluded discrimination of tender participants. It also contained provisions directed at prevention of corruption and abuse of power.

Pursuant to this law a new system of state bodies should have been established which should have been responsible for state regulation and control over state procurement, there was detailed description of the actual state procurement procedure and the procedure of appeal against the actions of the principal.

The reason for veto to this "revolutionary" law is the letter of Laura Garagnani, the Head of Operations of the Delegation of the European Union to Ukraine, and Mr. Martin Reiser, the Head of the World Bank's office in Ukraine, Belarus and Moldova to the President of Ukraine and the Cabinet of Ministers.

Unfortunately, Ukraine did not see this law coming into force due to a simple reason that the government was afraid to loose the support of the European Union and the World Bank.

Therefore, heavily criticized old law on state procurement remains in force. The major minus points of this law are lack of accuracy and transparency in the procurement procedure which creates very wide possibilities to inflict further damages to the state.