



UKRAINE

ARBITRATION - FRIENDLY

2011- 2012  
STATISTICAL REPORT

AAA/ICDR HKIAC LCIA CIETAC SIAC DIS SCC DIAC ICC HKIAC Vienna Rules  
ICAC UCCI Vienna Rules UNCITRAL Swiss Chambers LMAA CRCICA SCC  
DIAC SCC LCIA ICC CIETAC DIS HKIAC AAA/ICDR ICAC UCCI AAA/ICDR SIAC

**Ukraine. Arbitration-friendly jurisdiction: statistical report, 2011-2012.**

Pilkov, Konstantin. Kyiv: Cai & Lenard, 2012.

*This statistical report is based on the study of the practice of Ukrainian courts related to recognition of arbitration agreements and recognition and enforcement of arbitral awards. The study covers 2011 and the first half of 2012.*

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## Introduction

Arbitration practitioners often put Ukraine below the average ranking of countries in terms of recognition of arbitration.

Ukraine's image of a not entirely arbitration-friendly jurisdiction is "promoted" with common thought about problematic enforcement of arbitral awards in Ukraine.

In well-known case "*Regent Company v. Ukraine*", the European Court of Human Rights (in its [decision](#) of April 3, 2008) found violations by Ukraine of Part 1 of Article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms and Article 1 of the First Protocol due to the failure of the Ukrainian state authorities to enforce an arbitral award. There have been also Ukrainian court decisions where courts narrowed the jurisdiction of the arbitration, pointing out that the law does not grant any international commercial arbitration court the power to recognize agreements void. We hope that sort of decisions would never become a common judicial practice<sup>1</sup>.

In general, as shown by the practice analyzed in this study, Ukrainian courts do not create barriers for arbitration agreements to be recognized and arbitral awards to be recognized and enforced. However, the approach of economic courts still remains rather unfriendly to arbitration. On the other hand, the progress of local common courts (they are empowered to decide on requests for enforcement) in their adherence to the arbitration-friendly approach is impressive.

Common courts rarely refused to enforce arbitral awards. At the same time, the further

stages of the enforcement usually became time consuming processes. The problems of enforcement are peculiar to all court decisions, they do not show any specific negative approach to arbitral awards.

This report is a summary of the research of court practice in matters related to international commercial arbitration. The detailed overview of other findings of the study will be presented in subsequent publications. While preparing this report, we did not tend to provide any guidance or recommendations to arbitration practitioners. We believe our colleagues are aware of the risks and specific aspects of the enforcement procedure in Ukraine. The data presented in this report may only help in assessment of the materiality of those risks. We hope this report will be useful to judges, public officers, especially those of state tax service, scholars and our colleagues from other countries<sup>2</sup>.

Konstantin Pilkov, MCIArb

Head of the international trade and arbitration practice at [Cai & Lenard](#)

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<sup>1</sup> The specified findings were supported by Rivne appeal economic court (resolution of 17 May 2012, case No. 5019/207/12), Kyiv appeal economic court (resolutions of 22 May 2012, case No. 65/219 and of 11 January 2012, case No. 22/248). These cases do not have direct connection with the international arbitration related matters.

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<sup>2</sup> The report is published in Ukrainian, English and Russian.

## Content

I. Statistics of recognition and enforcement of arbitral awards .....	5
Arbitral awards left for enforcement.....	6
What are the reasons for refusing the enforcement of arbitral awards?.....	6
Abandonment of the request without consideration and other obstacles in enforcement of arbitral awards .....	7
Deferral and granting the right to pay by installments, change and establishing the manner and procedure of the enforcement.....	8
Suspension of the proceedings for leave for enforcement till the settlement of the case for setting aside the arbitral award.....	9
Courts do not interfere in arbitration, but are not inclined to help as well .....	9
II. Setting aside arbitral awards .....	10
Challenging rulings on lack of jurisdiction.....	11
III. Recognition of arbitration agreements by Ukrainian economic courts.....	12
Arbitration institutions and rules known to economic courts .....	12
How often do claimants apply to economic courts for enforcement of arbitral awards?.....	13
Court practice in cases upon claims out of or in connection with contracts containing arbitration clauses .....	14
Courts are not inclined to "restore" arbitration agreements .....	16
Nullification of an arbitration agreement.....	19
Arbitration agreement, surety and cession.....	19
Arbitral awards in bankruptcy procedures .....	19
Legal issues resolved by appeal economic courts in 2011-2012 in cases upon claims related to contracts with arbitration clauses.....	20
Legal issues resolved by the High Economic Court of Ukraine in 2011-2012 in cases upon claims related to contracts with arbitration clauses.....	21
IV. International commercial arbitration and administrative court proceedings .....	22
Penalties for violation of the terms of return of foreign currency and arbitration .....	22
What arbitration should be referred to in order to stop payment of the fines?.....	22
Since what time does the payment of penalties to be suspended? .....	23
Penalties in the event of termination of arbitral proceedings.....	24
Individual licensing regime and international arbitration .....	25
V. International commercial arbitration and criminal proceedings .....	26
Methodology .....	27
Arbitration institutions, associations and rules .....	28

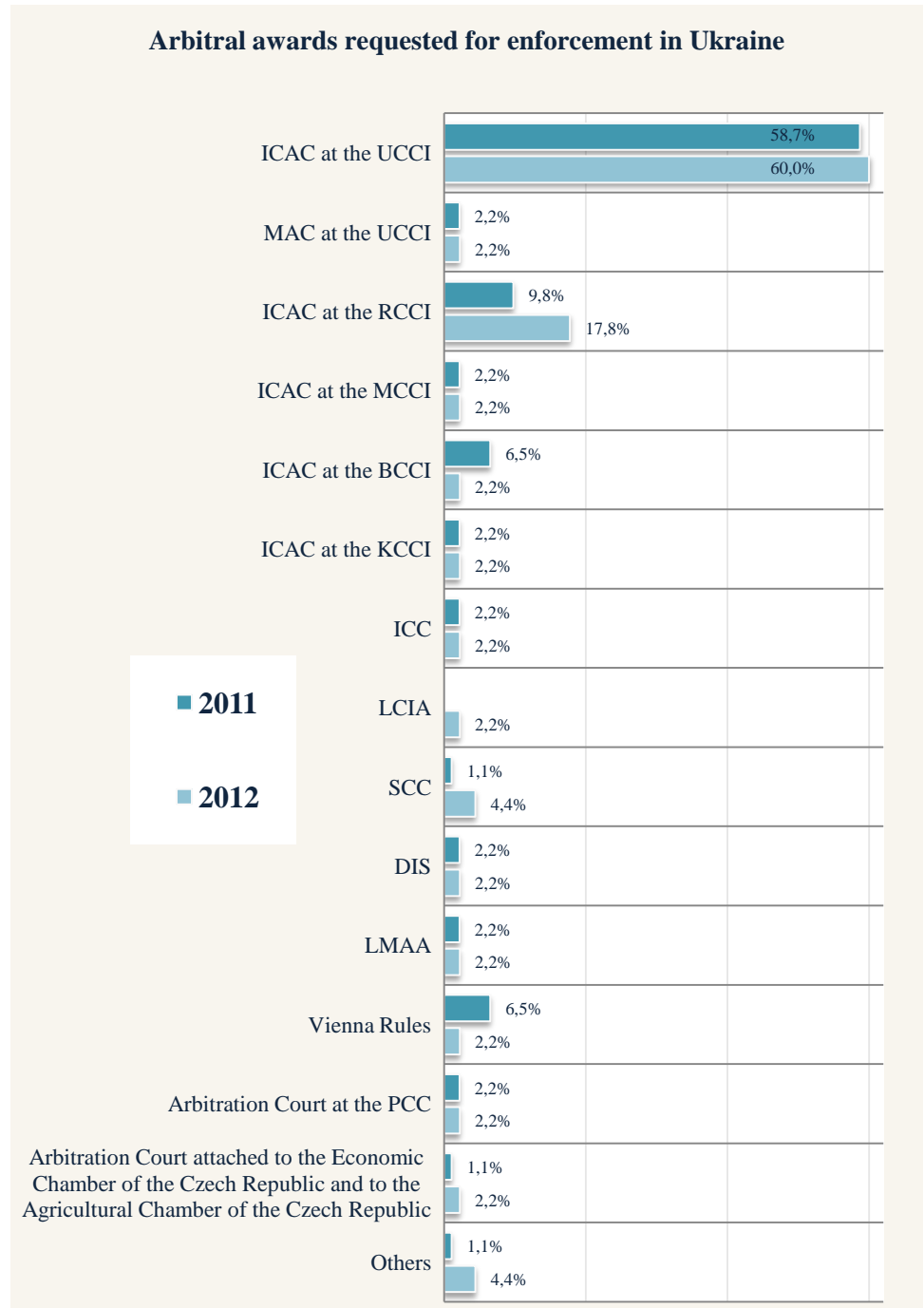
## I. Statistics of recognition and enforcement of arbitral awards

An arbitral award shall be recognized as binding and enforced in Ukraine upon application to the competent court as it follows from paragraph 1 of Article 35 of the Law of Ukraine "On International Commercial Arbitration".

Local common courts of Ukraine are the bodies authorized to decide on enforcement of arbitral awards. A decision on enforcement is the ground for an enforcement document to be issued by the same court.

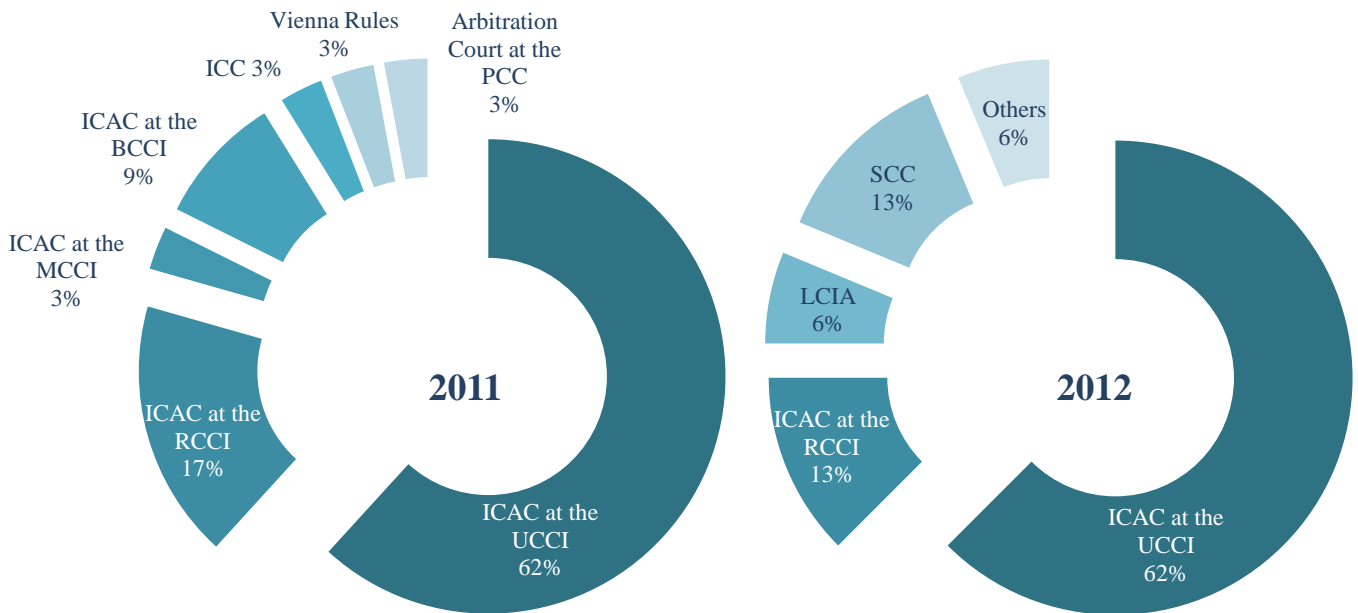
The specified algorithm meets the requirements of the UN Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958) and the UNCITRAL Model Law on International Commercial Arbitration 1985, and therefore complies with the international practice.

The Law of Ukraine "On International Commercial Arbitration" has contained in the appendixes the Regulations of the International Commercial Arbitration Court (ICAC at the



UCCI) and the Maritime Arbitration Commission (MAC at the UCCI) at the Ukrainian Chamber of Commerce and Industry. That factor along with some other factors contributed to the obtaining of a special status of these arbitration institutions in Ukraine. However, despite the dominance of the share of the ICAC at the UCCI in the number of cases involving Ukrainian entities, local courts also deal with the awards rendered by other arbitration institutions or in *ad hoc* arbitration.

## Arbitral awards left for enforcement



## What are the reasons for refusing the enforcement of arbitral awards?

Local common courts rarely refuse to grant the leave for enforcement of arbitral award (about 10% of the requests in 2011 and 6% of the requests in 2012) (*see the chart on the right*).

The most common reason for refusal to enforce arbitral awards in 2011-2012 were the following:

- the party against whom the award is invoked was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case;
- the arbitral award is set aside on the date of requesting its enforcement;
- the arbitral procedure was not in accordance with the agreement of the parties<sup>3</sup>.

Among the cases of refusal to enforce awards in 2011 were those

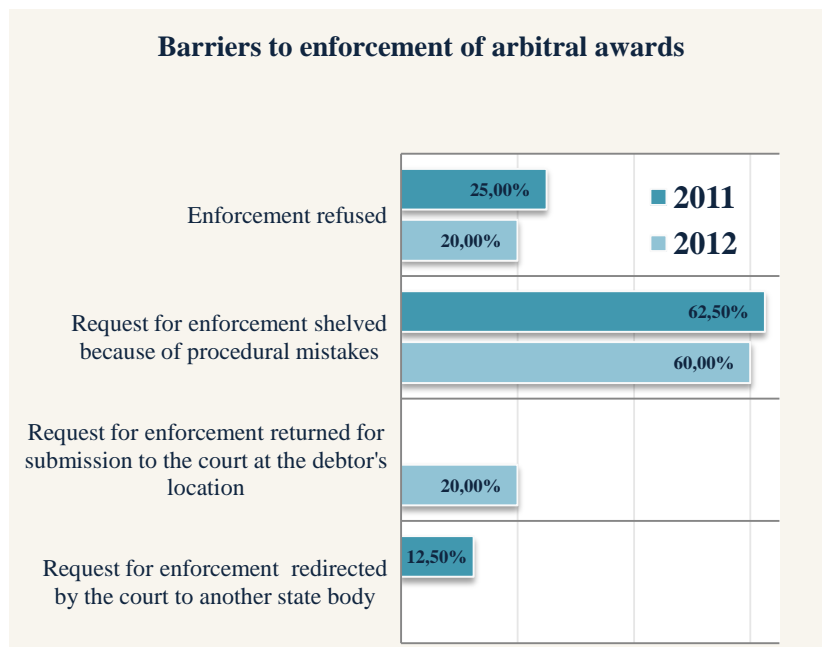


<sup>3</sup> This category also covers cases where courts indicated as the ground for refusal the noncompliance of the parties with the pre-arbitration dispute settlement procedure established in the agreement. Shevchenko district court of Kyiv in its ruling of 28 April 2012 in case No. 2610/3512/2012 dismissed the application for leave to enforce the arbitral award because the parties had not held negotiation before referring to arbitration as prescribed by the arbitration agreement.

grounded with the fact that the debtor is in bankruptcy<sup>4</sup>. This position does not comply with the law, which stipulates the list of grounds for refusal, and is contrary to the practice of economic courts in bankruptcy proceedings, where the arbitral awards left to enforcement in Ukraine are recognized as the confirmation of the undisputed claims to the debtor (*see Section III*).

If the local common court refuses to grant leave to enforce an award due to the institution of the debtor's bankruptcy proceedings, the court makes the creditor reach a stalemate because the economic court will refuse to recognize the claims confirmed with the award which is not left for enforcement in Ukraine.

## Abandonment of the request without consideration and other obstacles in enforcement of arbitral awards



Compared to the refusal of the enforcement of arbitral awards, more common are situations in which a request for enforcement is left without consideration because required documents have not been provided, or because of the provision of documents which do not comply with the law or other procedural mistakes. In some cases, local common courts have pointed to as a reason for leaving a request without consideration the lack of evidence of proper notice to the party against whom an award was invoked.

Courts of appeal in such cases referred to paragraph 15 of the Resolution of the Supreme Court of Ukraine of 24 December 1999 No. 12 "On the practice of courts in matters of consideration of requests for recognition and enforcement of foreign judgments and arbitral awards and while setting aside awards rendered by international commercial arbitration in Ukraine" and indicated that, if the document submitted as evidence of proper notice of the party did not indicate how and when that party was served and the party denied that it was served, the court should investigate the actual circumstances of the notice on the basis of other evidence and, if necessary, request from the court (arbitration) that adopted the decision (award) and inspect documents confirming the notification according to the law on which the proceedings were conducted. Recognition and enforceability of an

<sup>4</sup> Such erroneous conclusions contained, in particular, in the regulations of Rivne city court of 26 September 2011 and of the Court of appeal of Rivne region of 15 November 2011 in the same court case. Later, these mistakes were corrected by the High Specialized Court of Ukraine for Civil and Criminal Cases, which in its ruling of 13 June 2012 stated that Chapter 8 of the Code of Civil Procedure (the CCP) does not provide any exceptions to the procedure of granting permission to enforce a foreign judgment (arbitral award) if a debtor is in bankruptcy procedure.

arbitral award is presumed in both international and national law; therefore, the burden of proving the grounds for refusing recognition and enforcement has to be laid on the party opposing the request for enforcement. Laying down this duty on the applicant is a violation of procedural rules<sup>5</sup>.

Among other barriers to the enforcement of arbitral awards in 2011 were mistaken redirections of requests by courts to other bodies<sup>6</sup>. In 2012, the courts did not make such mistakes.

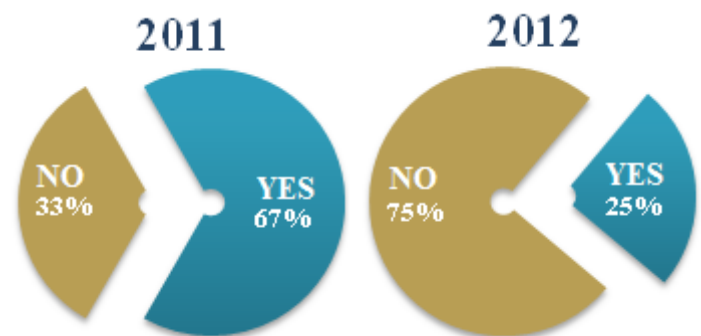
Common mistake was filing requests for enforcement to the local common court at the location of the arbitration (ICAC at the UCCI) instead of the court at the location of the debtor. In 2012, the courts rightfully returned those requests in order for them to be submitted to the court of the debtor's location.

### **Deferral and granting the right to pay by installments, change and establishing the manner and procedure of the enforcement**

As the chart below shows, in 2012, the position of the courts with respect to the court's right to defer the enforcement or grant the installment plan, change or set the manner or the procedure of the enforcement of arbitral awards has undergone dramatic changes.

The High Specialized Court of Ukraine for Civil and Criminal Cases in its Resolution of 15 February 2012 stated that Article 373 of the Code of Civil Procedure of Ukraine (the CCP) envisages the right to decide on suspension or deferral of enforcement, modification or setting manner and procedure of enforcement of the court decision, but not an arbitral award, because the arbitral award is final and signifies completion of any arbitration proceedings.

**Is the court which is authorized to decide on the enforcement also empowered to defer the enforcement or grant the installment plan, change or set the manner or the procedure of the enforcement of an arbitral award?**



Article 373 of the CCP provides that the power to change the manner and order of enforcement of a court's decision is vested in the court that issued an enforcement document. According to the requirements of Article 368 of the CCP, issues related to enforcement of a decision should be resolved by the court that decided a case on the merits. Thus, the issue of changing the manner and procedure of enforcement of a decision is a responsibility of the court (arbitral tribunal) which adopted the decision on the merits, i.e. the arbitral award, but not a court ruling on the leave for its enforcement.

<sup>5</sup> The Court of appeal of Dnipropetrovsk region pointed out such mistakes in its ruling of 5 March 2012 in case No. 22-тс/490/1992/12.

<sup>6</sup> For example, Voroshilov district court of Donetsk with its ruling of 20 April 2011 in case No. 2-k-3/11 forwarded the request for enforcement of an arbitral award to the Main department of the Ministry of Justice of Ukraine in Donetsk region. Central district court of Simferopol with its ruling of 14 November 2011 in case No. 2-к-3/11 forwarded the request to the economic court.



## Suspension of the proceedings for leave for enforcement till the settlement of the case for setting aside the arbitral award

Article 36 of the Law of Ukraine "On International Commercial Arbitration" provides for a right of a court in which enforcement of an arbitral award is sought, to adjourn its decision, if an application for setting aside or suspension of the award has been made to a court competent to decide on setting aside the award. Filing of motions for adjournment often takes place. The CCP contains a list of cases when a court is obliged or has the right to suspend proceedings (adjourn its decision). The impossibility to resolve the case prior to resolution of the other connected civil case is a mandatory ground for suspension of the proceeding. However, the Ukrainian courts almost equally support the need to stop the proceedings till the final decision on setting aside the arbitral award<sup>7</sup> and the opposite position that there is no such need<sup>8</sup>.

## Courts do not interfere in arbitration, but are not inclined to help as well

In 2011 – 2012, some claims were filed to Ukrainian courts in order to compel arbitration institutions to resume arbitral proceedings. The vast majority of these claims have been submitted due to the difficult situation for the parties, in whose favor awards were rendered, when the awards were set aside or courts refused the enforcement. Arbitral tribunals refuse to restore proceedings as the restoration is not envisaged by the rules. The courts also believe that they have no legal grounds for interference with arbitration<sup>9</sup>.

At the same time, courts are not inclined to secure the enforcement of arbitral awards. In the period covered by the study, there was not any court decision on interim measures found (either before or during arbitral proceedings or pursuant to an order of an arbitral tribunal on interim measures, or at a stage of enforcement).

When interim measures were requested by the party to an arbitration agreement	Resolution of the court	Arguments of the court
In course of arbitral proceedings	Refusal	In accordance with Part 1 of Article 153 of the CCP, a request for interim measures has to be considered by the court <b>in charge</b> of the case. An arbitration case is in charge of a respective arbitral tribunal, not a state court <sup>10</sup> .
After an award has been rendered	Refusal	In accordance with Article 151 of the CCP, interim measures are allowed at any <b>stage of the proceedings</b> . After an award is rendered the proceedings are formally completed <sup>11</sup> .
When considering a request for enforcement	Refusal	No need for such measures <sup>12</sup> .

<sup>7</sup> For example, the ruling of Yaremche city court of Ivano-Frankivsk region of 4 May 2012 in case No. 0917/149/2012.

<sup>8</sup> For example, the ruling of Berdyansk city-district court of Zaporizhzhya region of 31 May 2012 in case No. 2-к-3/11, the ruling of Feodosia city court of 8 May 2012 in case No. 6/121/88/2012.

<sup>9</sup> For example, in case No. 2610/5455/2012 of Shevchenko district court of Kyiv, the claimant requested the court to order the ICAC at the UCCI to resume the arbitral proceedings in case No. 206y/2010 for making appropriate notice to the other party. The district court in its ruling of 23 December 2011 refused to institute proceedings upon the statement of claim. The Court of appeal of Kyiv upheld the ruling of the court of first instance in its ruling of 15 March 2012.

<sup>10</sup> Ruling of Shevchenko district court of Kyiv of 8 December 2011 (case No. 2-3-30/11).

<sup>11</sup> Ruling of Holosiivskyi district court of Kyiv of 2 December 2011 (case No. 2-к-12/11).

<sup>12</sup> For example, the ruling of Berdyansk city-district court of Zaporizhzhya region of 15 February 2012 (case No. 1704/2012).

## II. Setting aside arbitral awards

The quantity of applications for setting aside arbitral awards considered by courts is insignificant if we compare it to the quantity of the awards of the ICAC at the UCCI left for enforcement<sup>13</sup>.

In 2012, courts generally refused to set aside awards, which were challenged based on the following circumstances:

**How many awards of the ICAC at the UCCI were left for enforcement and set aside in 2011-2012?**

**1 : 49**  
award set aside : awards left for enforcement

- Circumstances which, in the opinion of applicants, indicate that the arbitral procedure was not consistent with the agreement of the parties:
  - preliminary negotiations envisaged in an arbitration clause were not conducted before submitting the dispute to arbitration<sup>14</sup>;
  - arbitral proceedings have been conducted in a language other than specified in an arbitration clause<sup>15</sup>;
- Circumstances which, in the opinion of applicants, indicate that an award is contrary to the public policy of Ukraine:
  - an applicant was suffered serious violations of the fundamental constitutional principles, namely, the principle of equality before the law and the principle of equality of all participants in judicial process before the law and courts<sup>16</sup>.

In 2011, there were recourses against arbitral awards on grounds of violation of the public policy<sup>17</sup>, and inconsistencies of arbitration proceedings with an arbitration agreement (improper notification of the party). However, in most cases such claims were not met.

Setting aside an arbitral award occurs in exceptional cases. Even if a local court sets aside an award the court of appeal carefully reviews the case and usually cancels the decision on setting aside the award<sup>18</sup>.

<sup>13</sup> The study did not reveal any award rendered by an *ad hoc* arbitral tribunal seated in Ukraine and requested for enforcement in Ukraine. There have been no other arbitration institution except for the ICAC and the MAC at the UCCI which awards could fall under the jurisdiction of Ukrainian courts.

<sup>14</sup> Ruling of Shevchenko district court of Kyiv of 1 June 2012 (case No. 2610/7698/2012).

<sup>15</sup> Ruling of Shevchenko district court of Kyiv on 5 June 2012 (case No. 2610/5738/2012).

<sup>16</sup> Ruling of Shevchenko district court of Kyiv on 5 June 2012 (case No. 2610/5738/2012).

<sup>17</sup> Ruling of Shevchenko district court of Kyiv on 15 December 2011 (case No. 6-207/11) upheld by the ruling of the Court of appeal of Kyiv of 15 March 2012 (the High Specialized Court of Ukraine for Civil and Criminal Cases refused in institution of the cassation proceeding on 24 May 2012).

<sup>18</sup> The Court of appeal of Kyiv with its ruling of 11 May 2011 canceled the ruling of Shevchenko district court of Kyiv of 20 January 2011 on setting aside the award of the ICAC at the UCCI of 24 February 2009 in arbitral case No. AC 230y/2008 and sent the case to the district court for a new trial (the cassation court refused to institute the cassation proceeding).

## Challenging rulings on lack of jurisdiction

In 2011-2012, courts faced petitions for setting aside rulings of arbitral tribunals on termination of the proceedings based on tribunals' lack of jurisdiction over disputes. In our opinion, the most well-grounded position is that according to paragraph 5 of [Article 389-1 of the CCP](#) an arbitral award, if the place of arbitration is in Ukraine, can be challenged in a competent court by the parties in accordance with international agreements of Ukraine and / or the [Law of Ukraine "On International Commercial Arbitration"](#) , which allows in some cases setting aside of a final award and a ruling on jurisdiction, but not a ruling in which an arbitral tribunal declares that it has no jurisdiction over a dispute<sup>19</sup>.

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<sup>19</sup> The Court of appeal of Kyiv expressed that opinion in its ruling of 19 April 2012 (case No. 22-ts/2690/3445/12).

### III. Recognition of arbitration agreements by Ukrainian economic courts

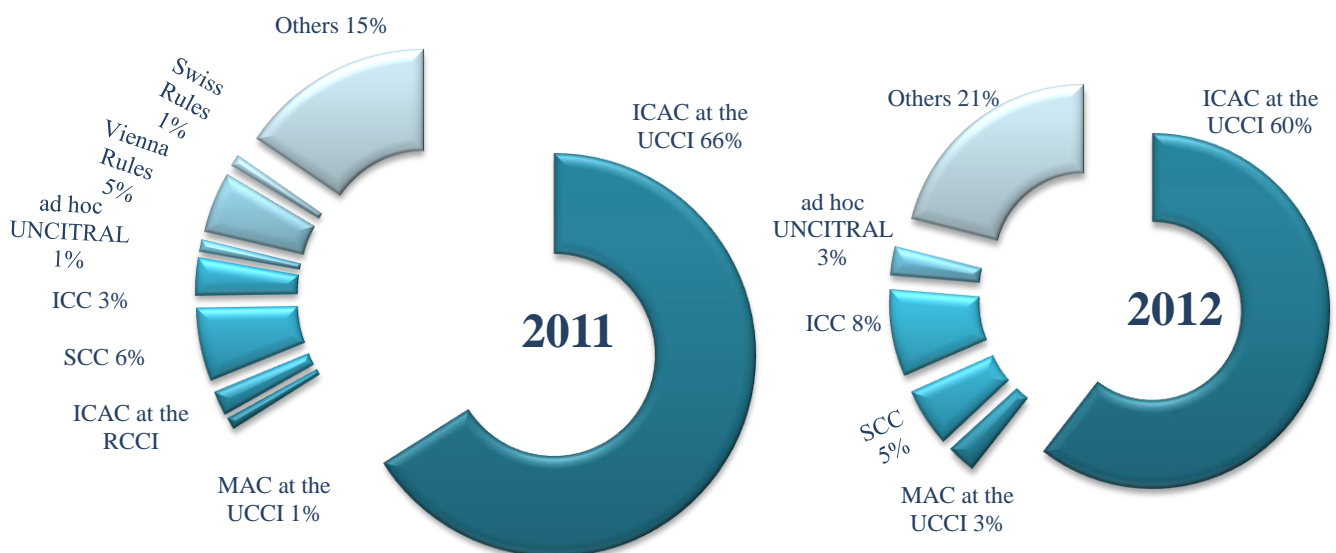
In 2011 and 2012, economic courts considered three major blocks of cases significantly related to international arbitration:

1. Proceedings upon requests for enforcement of arbitral awards, wrongfully filed with economic courts instead of common courts;
2. Commercial disputes arisen from contracts or in connection with contracts which contained arbitration clauses:
  - Cases of recognition of arbitration agreements null and void;
  - Disputes on interpretation of arbitration agreements<sup>20</sup>;
  - Cases upon claims related to improper performance of contracts;
3. Bankruptcy cases in which the undisputed status of claims confirmed by arbitral awards, was in challenged.

**Quite often the parties to an arbitration agreement submit their disputes to economic courts of Ukraine**

#### Arbitration institutions and rules known to economic courts

In 2011 and 2012, economic courts considered cases upon claims out of or in connection with contracts containing arbitration clauses referring to the following arbitration institutions and rules:

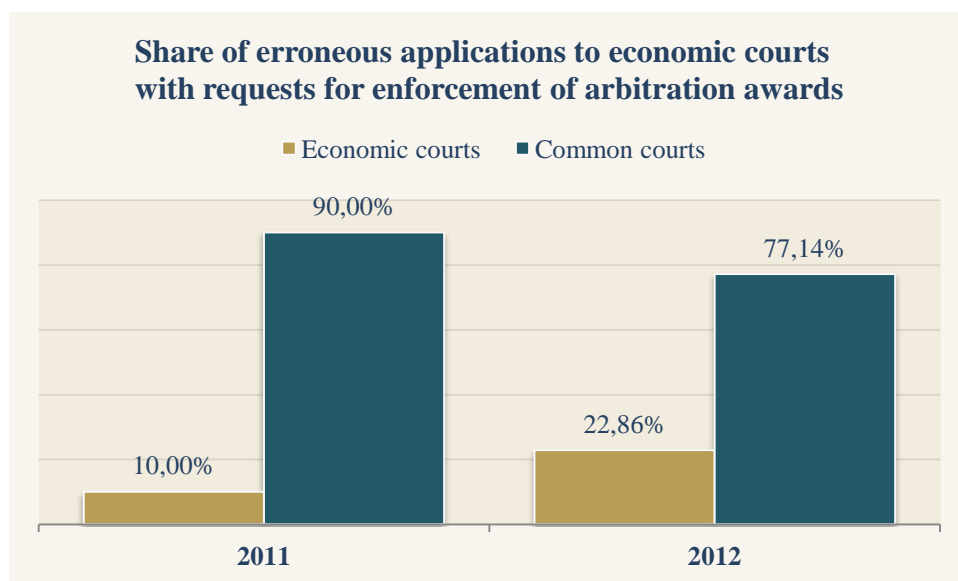


<sup>20</sup> Courts usually refused to interpret arbitration agreements.

## How often do claimants apply to economic courts for enforcement of arbitral awards?

Erroneous submission of requests for enforcement of arbitral awards to economic courts took place in 2011 and 2012. The basis for those mistakes is the provision of the [Economic Procedural Code of Ukraine](#) (the EPC) according to which economic courts are empowered to issue orders on enforcement of awards rendered by domestic arbitral tribunals, established in accordance with the [Law of Ukraine "On Arbitration Courts"](#). Since any international commercial arbitration court is inherently an arbitration court, it leads to an obvious mistake because the [Law of Ukraine "On Arbitration Courts"](#) (Article 1) clearly states that it does not apply to international commercial arbitration.

The share of erroneous requests for enforcement of arbitration awards filed with economic courts was significant in 2011, and remained such in 2012: every six requests to local common courts were followed with one mistaken request to an economic court.



Cases when economic courts make similar mistakes and issue enforcement orders are extremely rare. They took place in 2011<sup>21</sup>, but there were no such cases in 2012.

Economic courts generally follow the correct interpretation that a competent court which has jurisdiction over matters related to enforcement of arbitral awards is a respective local common court<sup>22</sup>. In case a request for enforcement of an arbitration award is filed to an economic court, the court should refuse to accept it in accordance with paragraph 1 of Part 1 of [Article 62 of the EPC](#) and return the court fee to the applicant according to paragraph 2 of Part 1 [Article 7 of the Law of Ukraine "On the Court Fee"](#). If the request was erroneously admitted for consideration, the economic court has to terminate the proceedings in accordance with paragraph 1 of Part 1 of [Article 80 of the EPC](#).

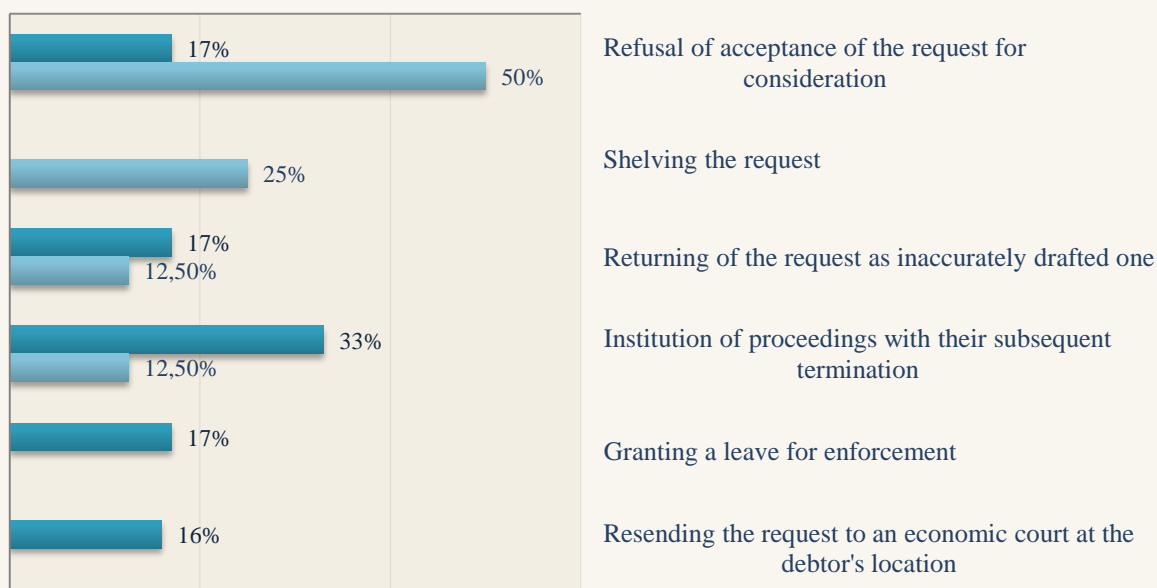
The chart on the next page illustrates court decisions adopted by economic courts in cases upon requests for enforcement of arbitral awards in 2011-2012.

<sup>21</sup> For example, the Economic court of Poltava region on 25 May 2011 issued an order for enforcement of an award of the ICAC at the UCCI (case No. 18/791/11).

<sup>22</sup> This follows from the content of paragraph 5 of [Article 389-1](#), paragraph 4 of [Article 389-7](#), Chapter 1 "Recognition and enforcement of foreign judgments" of Section VIII of the CCP (articles 390-398), paragraph 2 of [Article 34](#), paragraph 2 of [Article 6](#) of the [Law of Ukraine "On International Commercial Arbitration"](#).

### Answers of economic courts on submission of requests for enforcement of arbitral awards

■ 2011 ■ 2012



### Court practice in cases upon claims out of or in connection with contracts containing arbitration clauses

A court before which an action is brought in a matter which is the subject of an arbitration agreement shall, if a party so requests not later than when submitting his first statement on the substance of the dispute, refer the parties to arbitration unless it finds that the agreement is null and void, inoperative or incapable of being performed (Part 1 of Article 8 of the Law of Ukraine "On International Commercial Arbitration").

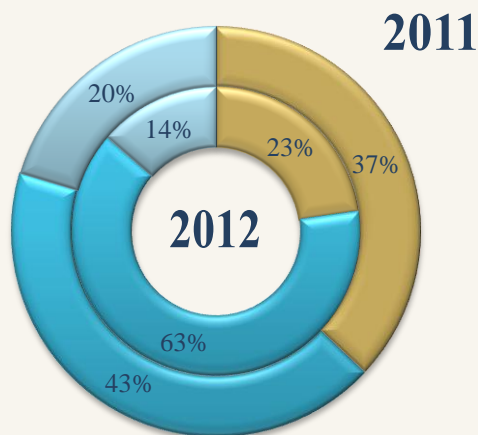
Refusal to accept a statement of claim (including those cases when from a statement of claim follows that the parties entered into an arbitration agreement) is possible if an action is brought against a foreign entity, and the Ukrainian legislation does not provide for a right to apply to courts of Ukraine (in particular, when jurisdiction of a court at the respondent's domicile is stipulated in the law). At the same time, the refusal to accept the statement of claim based solely on the fact of existence of an arbitration agreement between the parties is illegal. Some courts which refused to accept the statement of claim referred to paragraph 2.3. of the Clarification of the High Arbitration Court of Ukraine of 23 August 1994 No. 02-5/612 according to which, if a written agreement by parties to submit a dispute to arbitration concluded prior to the initiation of proceedings, the acceptance of a statement of claim should be refused on the basis of paragraph 1 of Article 62 of the EPC. The above Clarification was canceled only in 2011, although it had contradicted the court practice long before its official cancelation (see, in particular, the letter of the High Economic Court of Ukraine No. 01-08/163 of 12 March 2009 "On some issues raised in the reports on the work of the economic courts of Ukraine in the second half of 2008 on the application of the Economic Procedural Code of Ukraine "(para. 18)).

In 2011, economic courts refused to initiate the proceedings when a claim was related to a contract with an arbitration clause in 13% of the cases, but in 2012 the share of refusals decreased significantly.

By accepting a statement of claim for consideration, a court presumes that the defendant is not deprived of a right to file a petition to stop the proceedings, which should be satisfied unless the court finds that the agreement is null and void, inoperative or incapable of being performed. This thesis is set out in the letter of the High Economic Court of Ukraine of 1 January 2009, "On summarizing of economic courts practice with respect to certain categories of disputes involving non-residents", which states that courts must accept cases for consideration even if arbitration agreements are signed (and not refuse to accept statements of claim in accordance with paragraph 1 of Part 1 of Article 62 of the EPC) and, after deciding on validity and enforceability of an arbitration agreement, decide on termination of the proceedings pursuant to paragraph 1 of Part 1 Article 80 of the EPC if the respective request is filed.

#### How often do economic courts decide cases on the merits if disputes have arisen out of or in connection with contracts with arbitration clauses?

- Cases where courts satisfied requests for termination of proceedings
- Cases where courts dismissed requests for termination of proceedings and decided a case on the merits
- Cases considered on the merits when no request for termination was filed



#### Reaction of economic courts on submission of claims out of contracts containing arbitration clauses

(the share of refusals of acceptance compared to the share of instituted proceedings)

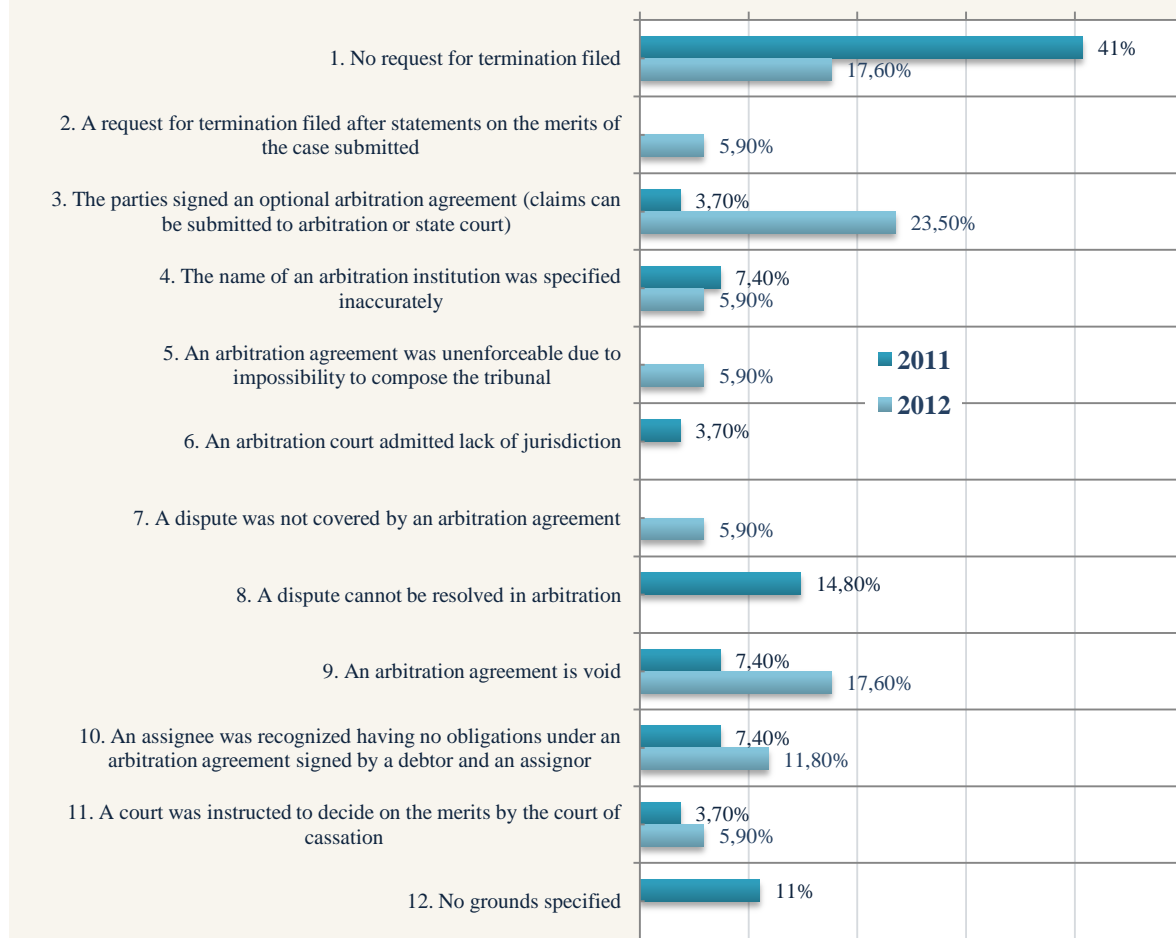


In 2012, the cases in which courts rejected requests for termination of proceedings and considered the dispute, had a three-fold numerical superiority over the cases where such requests were satisfied.

The most common reason why economic courts considered cases on the merits when disputes had arisen out of or in connection with contracts with arbitration clauses, were the following:



## Why economic courts decide cases on the merits?



## Courts are not inclined to "restore" arbitration agreements

Indication of a nonexistent arbitration institution in an arbitration agreement is one of the most common grounds for such agreement to be recognized unenforceable by an economic court<sup>23</sup>. This ground has been, often unreasonably, applied to the cases where the parties made a mistake in the name of an arbitration institution, which, however, does not preclude from the possibility to reveal the intention of the parties to submit the dispute to the particular arbitration institution.

Economic courts are very formalistic in implementation of paragraph 5 of the Clarifications of the Presidium of the High Economic Court of Ukraine of 31 May 2002 No. 04-5/608 "On some issues of court practice in cases with participation of foreign enterprises and organizations" according to which an arbitration agreement should **clearly** identify the dispute settlement body elected by the parties: the International Commercial Arbitration Court, the Maritime Arbitration Commission at the Ukrainian Chamber of Commerce and Industry or other arbitration court in Ukraine or abroad.

<sup>23</sup> Local common courts by granting leave for enforcement of arbitral awards often make mistakes in the names of arbitral institutions (e.g. in case No. 2035/1229/2012 Chervonozavodsky district court of Kharkiv in its ruling of 7 June 2012 granted leave for enforcement of the award of the International Commercial Court at the Chamber of Commerce and Industry of the Russian Federation (the correct name of the arbitral institution is the International Commercial Arbitration Court at the Chamber of Commerce and Industry of the Russian Federation)).



In our opinion the grounded position (which is also reinforced by court decisions) is that, in case of filing a request for termination of the court proceeding by the respondent, the claimant who objected to the request due to non-existence of the arbitration court must prove the impossibility of the arbitration agreement to be performed<sup>24</sup>. The court may also request proofs of existence of the arbitration court from the respondent.

Below we present some examples of court decisions where the courts recognized the arbitration agreements which were evidently “pathological” as enforceable and also decisions where the courts recognized the arbitration agreements with insignificant defects as referring to nonexistent arbitration institutions.

Provision of the arbitration agreement	Correct name	Court decision	Our comments
".. if the settlement of disputes and differences cannot be reached through negotiation, in the absence of an agreement one of the parties shall apply to the ICAC of Ukraine. "	International Commercial Arbitration Court at the Ukrainian Chamber of Commerce and Industry	The request is satisfied, the proceedings are terminated <sup>25</sup> .	This arbitration agreement may be enforceable as there is only the ICAC at the UCCI in Ukraine so there is no reasonable doubt about the intention of the parties to submit the dispute to this arbitration court. However, the court gave no grounded opinion on this issue in the decision.
".. all disputes connected with the performance of the conditions of the contract which arise between the parties shall be settled by the commercial court in Ukraine according to the rules of the court."		The request is satisfied, the proceedings are terminated <sup>26</sup> .	It does not follow from the text of the agreement that the parties intended to submit the case to arbitration.
".. the parties agreed to resolve the dispute by the International Commercial Arbitration Court of the Ukrainian Chamber of Commerce and Industry."	International Commercial Arbitration Court at the Ukrainian Chamber of Commerce and Industry	The court dismissed the request for termination of the proceedings and decided on the merits of the case <sup>27</sup> .	Insignificant mistake that did not preclude from the establishment of the parties' intention to submit the dispute to the ICAC at the UCCI.
".. any dispute arising between the parties to this Agreement or in connection with it shall be resolved in the International Commercial Arbitration at the Ukrainian Chamber of Commerce and Industry."	International Commercial Arbitration <b>Court</b> at the Ukrainian Chamber of Commerce and Industry	The court dismissed the request for termination of the proceedings and decided on the merits of the case <sup>28</sup> .	Insignificant mistake that did not preclude from the establishment of the parties' intentions to submit the dispute to the ICAC at the UCCI.
".. all contractual disputes are subject to resolution only by	<b>International Commercial</b> Arbitration	The court dismissed the request for termination	Insignificant mistake that did not preclude from the establishment

<sup>24</sup> Ruling of the Economic court of Khmelnytsky region of 28 February 2012 (case No. 10/5025/22/12).

<sup>25</sup> Ruling of the Economic court of Odessa region of 15 April 2011 (case No. 12/17-1133-2011).

<sup>26</sup> Ruling of the Economic court of Kyiv region of 14 April 2011 (case No. 5/034-11). The ruling was canceled by the appeal court, the cancelation was later supported by the cassation court.

<sup>27</sup> Ruling of the Economic court of Volyn region of 3 November 2011 (case No. 5004/1689/11).

<sup>28</sup> Case No. 55/265 of the Economic court of Kyiv (2011).

the Arbitration Court at the Ukrainian Chamber of Commerce and Industry in accordance with the rules for cases in this court. "	Court at the Ukrainian Chamber of Commerce and Industry	of the proceedings and decided on the merits of the case <sup>29</sup> .	of the parties' intention to submit the dispute to the ICAC at the UCCI.
".. All disputes that may arise under this contract or in connection with its execution shall be resolved exclusively by the arbitration court at the chamber of commerce of the defendant country" <sup>30</sup>	<b>International Commercial</b> Arbitration Court at the Ukrainian Chamber of Commerce and Industry	The court dismissed the request for termination of the proceedings and decided on the merits of the case <sup>31</sup> .	Insignificant mistake that did not preclude from the establishment of the parties' intention to submit the dispute to the ICAC at the UCCI.
".. Arbitration Court at the Chamber of Commerce in Stockholm, Sweden."	Arbitration Institute of the Stockholm Chamber of Commerce, Sweden	The court dismissed the request for termination of the proceedings and decided on the merits of the case <sup>32</sup> .	Insignificant mistake that did not preclude from the establishment of the parties' intention to submit the dispute to the unique arbitration institution that operates in Stockholm Chamber of Commerce.
".. all possible differences related to the contract shall be settled by the Court of Arbitration at the Chamber of Commerce at the location of the respondent. The right of choice belongs to the seller."		The court dismissed the request for termination of the proceedings and decided on the merits of the case <sup>33</sup> .	The enforceability of the arbitration agreement is under question, especially if the seller is the respondent.
".. disputes, claims, complaints must be resolved in the International Court of Arbitration at the location of the plaintiff."		The court dismissed the request for termination of the proceedings and decided on the merits of the case <sup>34</sup> .	The court's position is justified. <sup>35</sup>
".. all disputes of the parties to the contract shall be resolved by the Moscow International Court of Arbitration."		The court refused in accepting a statement of claim of a non-resident to a resident of Ukraine was <sup>36</sup> .	The legislation of the Russian Federation on the arbitration proceedings and international arbitration allows national arbitration courts to consider international commercial disputes, i.e., at least, any arbitration court, seated in Moscow, the rules of which allow international commercial disputes be accepted for resolution may be defined as the Moscow International Arbitration Court.

<sup>29</sup> Decision of the Economic court of Kharkiv region of 30 September 2011 (case No. 5023/5901/11).

<sup>30</sup> As the defendant was a Ukrainian entity it has determined the ICAC at the UCCI as a competent arbitral institution in its request for termination of the court proceedings.

<sup>31</sup> Decision of the Economic court of Lviv region of 16 February 2011 (case No. 17/166 (10)).

<sup>32</sup> Decision of the Economic court of Vinnitsa region of 5 September 2011 (case No. 7/61/2011/5003).

<sup>33</sup> Decision of the Economic court of Kyiv of 3 August 2011 (case No. 61/349).

<sup>34</sup> Decision of the Economic court of Cherkasy region of 24 February 2011 (case No. 06/26/114/2011).

<sup>35</sup> The International Commercial Arbitration Court at the Chamber of Commerce and Industry of the Russian Federation did not recognize its jurisdiction over the dispute (the request for arbitration was filed by a Russian company).

<sup>36</sup> Ruling of the Economic court of Kherson region of 6 July 2011 (case No. 7/1480). The ruling was canceled by Odessa appeal economic court on 23 August 2011).

## **Nullification of an arbitration agreement**

The share of judgments of economic courts of first instance on recognition of arbitration agreements void was insignificant in the total number of cases involving arbitration in 2011 and 2012 (the courts usually dismissed claims on invalidation of arbitration agreements). For example, in cases where arbitration agreements provide for a right of one party to choose between arbitration and the court, and the other party was deprived of this choice, the courts generally did not consider such asymmetry illegal and refused to recognize the arbitration agreement null and void.

## **Arbitration agreement, surety and cession**

The courts in 2011 and 2012 had no clear position whether the arbitration agreement signed by the creditor and the debtor, is binding for the guarantor.

The courts in some cases stated that a surety creates a new security obligation which is accessory, i.e. it always arises from the primary obligation and depends on it<sup>37</sup>. However, in most cases the courts take the position that a guarantor is not a party to the arbitration agreement signed by the parties to the primary obligation.

A similar problem relates to whether the person, to whom the right to claim was assigned, was bound by the arbitration agreement (arbitration clause) contained in the contract out of which such claim had arisen. In most cases, the courts tend to give a negative response indicating that the arbitration agreement is a separate agreement placed into the text of the contract only for convenience.

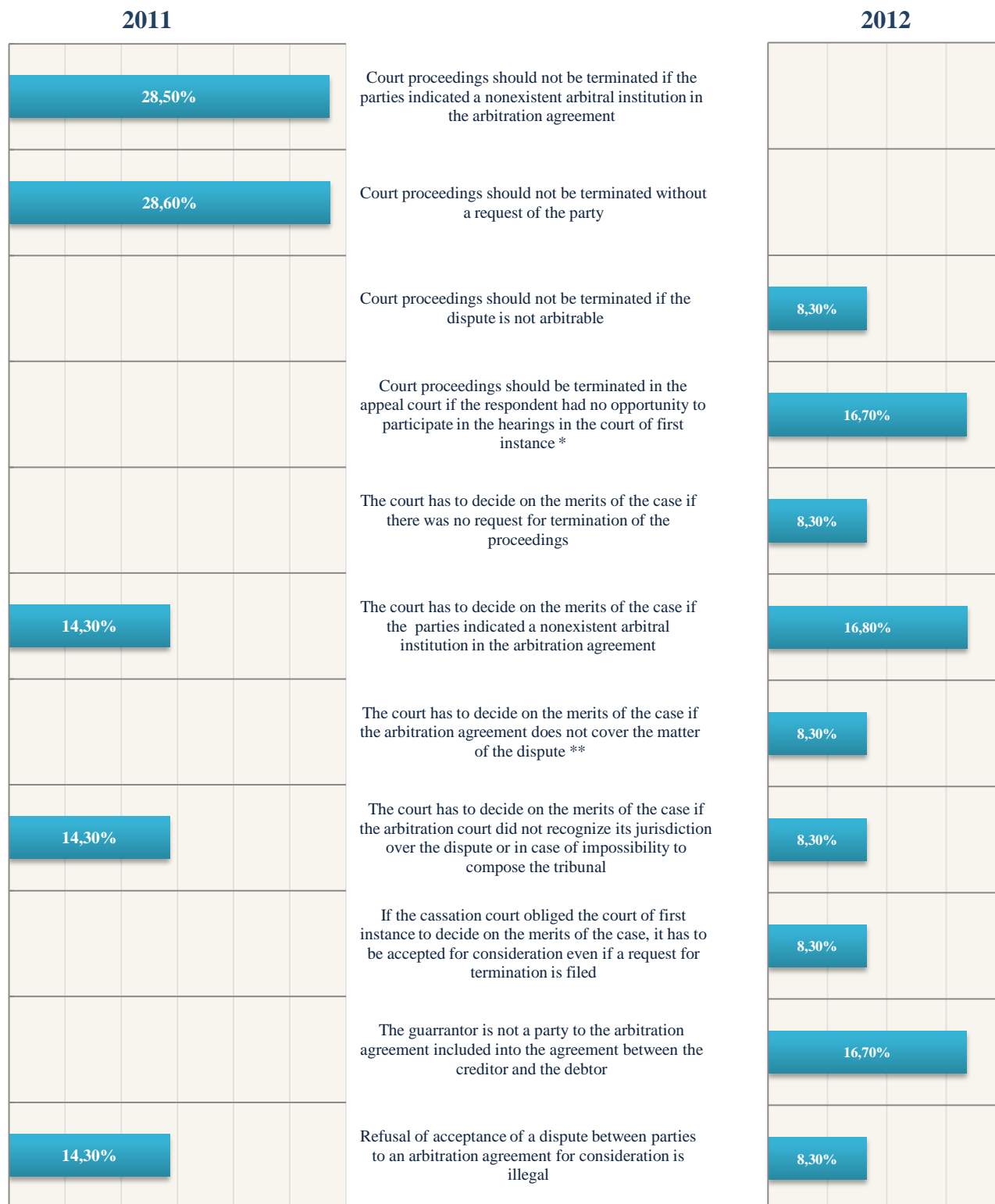
## **Arbitral awards in bankruptcy procedures**

Economic courts in most cases refused to recognize as indisputable the claims to a debtor in bankruptcy confirmed by arbitration awards not left for enforcement in Ukraine.

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<sup>37</sup> Ruling of the Economic court of Kyiv of 28 November 2011 (case No. 53/476).

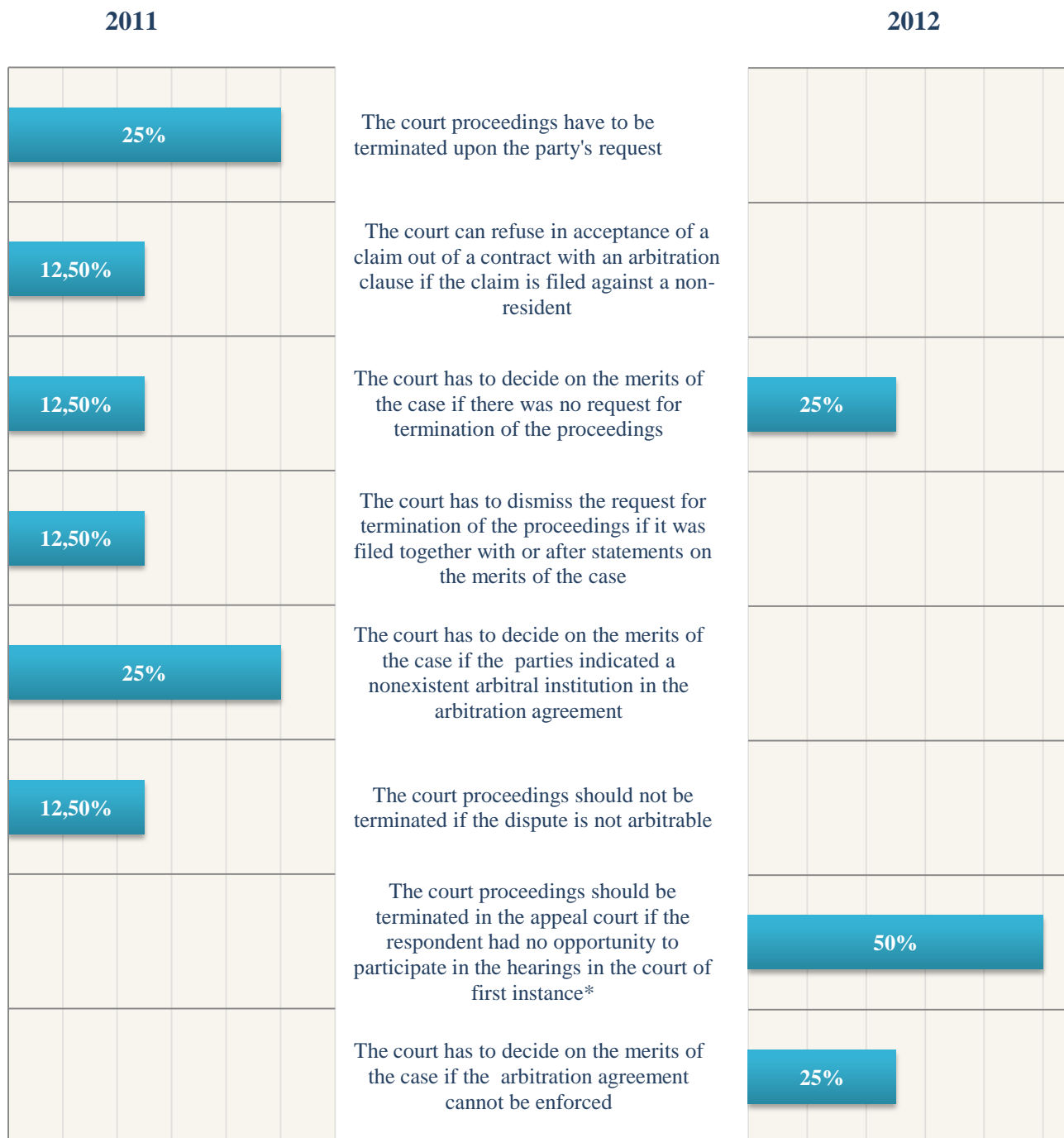
## Legal issues resolved by appeal economic courts in 2011-2012 in cases upon claims related to contracts with arbitration clauses



\* Particular court decisions clearly show that the respondents requested for termination of the court proceedings after the statements on the merits had been submitted.

\*\* There were curious cases. For example, Donetsk appeal economic court in its judgment of 27 March 2012 (case No.24/365пд) agreed with the opinion of the court of first instance that the arbitration agreement with the formula "disputes which may arise under this contract or in connection with it shall be submitted for resolution and final settlement..." does not cover disputes on the recognition of the contract null and void.

## Legal issues resolved by the High Economic Court of Ukraine in 2011-2012 in cases upon claims related to contracts with arbitration clauses



\* Particular court decisions clearly show that the respondents requested for termination of the court proceedings after statements on the merits had been submitted.

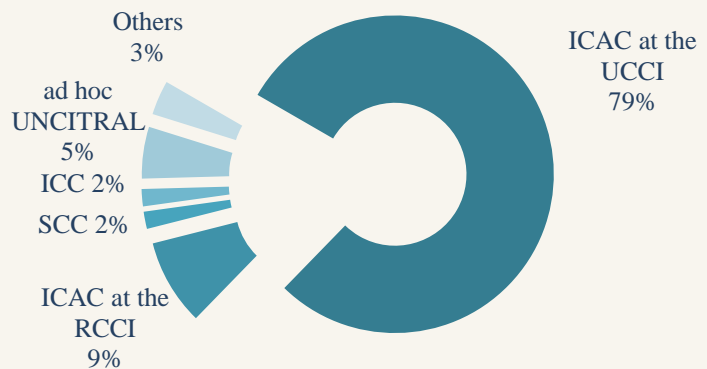
## IV. International commercial arbitration and administrative court proceedings

Administrative courts in 2011-2012 considered two blocks of cases involving international arbitration:

- Cases upon claims of taxpayers against tax authorities' decisions on imposing sanctions for violation of the legislation on foreign currency payments (when taxpayers have taken measures to recover non-resident counterparty's debt in foreign currency by submitting a statement of claim to arbitration);

- Cases upon claims of the Ukrainian importers and exporters on the abolition of sanctions in the form of individual licensing regime (when they fixed the violation of the legislation on foreign currency payments by submitting statements of claim to arbitration).

**Arbitral institutions in administrative court cases in 2011-2012**



### Penalties for violation of the terms of return of foreign currency and arbitration

The violation of the terms of return of foreign currency earnings entails the sanctions provided for by the Law of Ukraine "On Payments in Foreign Currency". However, in case the claim of a resident on recovery of a debt from a non-resident is accepted for consideration by the court or arbitration court, the penalties (fines) are not payable during the proceedings and, in the case the claim is successful, no fines shall be payable from the date the claim was accepted for consideration. If a court decision denies the claim in whole or in part as well as in case of termination (closing) of the proceedings or abandonment of the claim, the terms stipulated in Articles 1 and 2 of the above Law have to be restored, and the fines for violations are to be paid for each day, including the period of suspension.

The contradictory interpretation of the above provisions by the regulatory agencies forced taxpayers to challenge in courts the decisions on sanctions.

#### What arbitration should be referred to in order to stop payment of the fines?

The Law of Ukraine "On Payments in Foreign Currency" specifies only two arbitration institutions, the International Commercial Arbitration Court and the Maritime Arbitration Commission at the Ukrainian Chamber of Commerce and Industry. The tax authorities often use that fact as an argument against the resident that submitted a claim to any other arbitration. In 2011, the courts affirmed the

position that the list of arbitration institutions represented in the Law cannot be exhaustive<sup>38</sup>. The courts also recognize a right to submit the claim to ad hoc arbitration (the date of the request for arbitration or the date of the appointment of an arbitrator or other date, which can be considered as the date of institution of the procedure under the appropriate rules defined by the parties to an arbitration agreement, should be the date of suspension of the sanctions).

At the same time, some courts continue to make mistakes indicating as an argument the statement of the High Arbitration Court of Ukraine made in 2000 that "the list of arbitration institutions placed in Article 4 of the Law is exhaustive and is not subject to extensive interpretation" (letter of the High Arbitration Court of Ukraine of 1 August 2000 No. 01-8/38)<sup>39</sup>.

### **Since what time does the payment of penalties to be suspended?**

Administrative courts kept themselves within the following legal positions in 2011 - 2012:

- The legal fact which establishes procedural relations between the parties to the dispute and the court is submission of the claim to the court, but not the fact of institution of the proceedings. Therefore, the date of acceptance of the statement of claim by the arbitration court in terms stipulated in Articles 1 and 2 of the Law of Ukraine "On Payments in Foreign Currency" is the date of filing the claim<sup>40</sup>;
- If, at the time of a tax inspection, the resident files the claim to arbitration, there is no ground for the payment of penalties;
- Failure to provide evidence of submission of the claim to arbitration and its acceptance at the time of a tax inspection is a basis for imposition of the sanctions;
- Termination of the arbitration proceedings (closure of the case) is a ground for the sanctions to be imposed for the entire period of suspension unless the termination of the proceedings means a positive resolution of the case for the claimant (e.g., the result of a voluntary payment of the debt);
- In case an arbitral award is granted for recovery of a debt from a non-resident, the penalty has not be paid during the period from the date of the award until the date of its enforcement. However, the currency, in which the debt is due to be paid under the award should be declared as currency valuables owned by a resident of Ukraine and kept abroad<sup>41</sup>.

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<sup>38</sup> The High Administrative Court of Ukraine recognized that opinion wrongful in its resolution of 16 November 2011 (case No. K-219/08).

<sup>39</sup> For example, Dnepropetrovsk district administrative court took that position and refused to recognize an *ad hoc* arbitration award as the ground for suspension of the payment of fines (ruling of 18 May 2011, case No. 2a-6716/10/0470).

<sup>40</sup> This position was also supported by the High Administrative Court of Ukraine (in particular, in rulings of 30 January 2012, case No. K-19528/08 and of 28 May 2012, case No. K-44524/09).

<sup>41</sup> That opinion was supported by the High Administrative Court of Ukraine (ruling of 19 March 2012, case No. K-2567/09-C).

## Penalties in the event of termination of arbitral proceedings

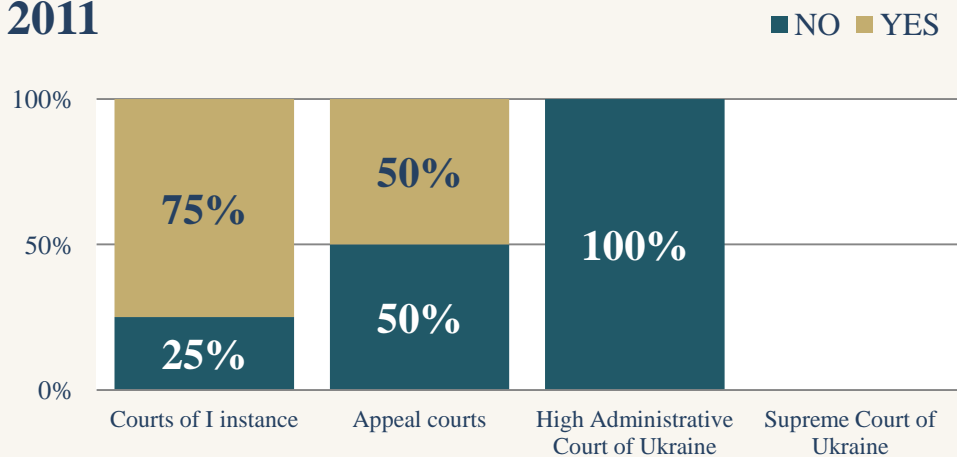
In 2011 and 2012, tax authorities have been adhering to the opinion that the fines for violation of the terms of return of foreign currency earnings or delivery of goods have to be paid in case a resident filed a claim to international arbitration, but before the award is rendered the respondent fulfills its obligations voluntarily, so that the arbitral proceedings are terminated. That opinion was supported by the High Administrative Court of Ukraine that noted in the letter of 17 March 2009 No. 359/13/13-09 "On the order of calculation of the penalties for violation of the terms of payment in foreign trade" that "the Law of Ukraine "On Payments in Foreign Currency" provides the sole ground for release of a

resident of the penalty for violation of the terms of return of foreign currency and delivery of goods under import contracts, and this ground is a court's decision for recovering the debt"<sup>42</sup>.

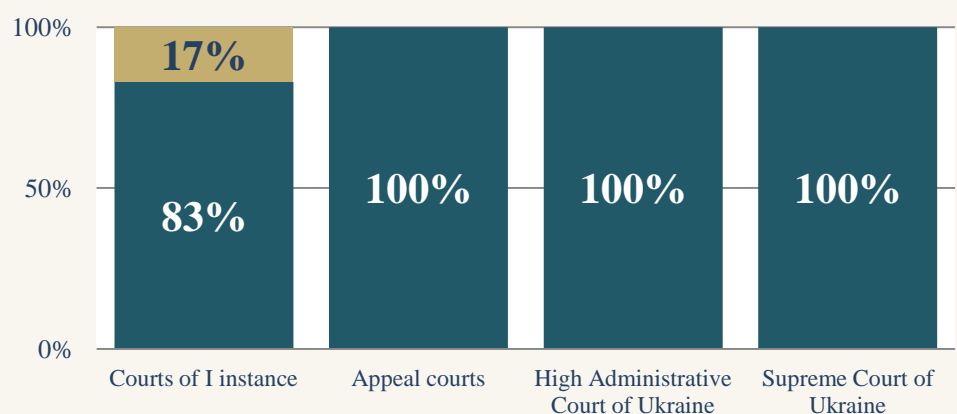
However, in 2011-2012, the courts changed the approach to such matters and now they believe that the voluntary payment of debts by a non-resident after the arbitral proceedings are instituted is a positive outcome for a resident which demonstrates the validity of its claims, which could have been met by an arbitration tribunal, so there is no reason for payment of the fines<sup>43</sup>.

### Are the penalties to be paid if the arbitration court terminated the proceedings due to payment of the debt by the respondent?

2011



2012



<sup>42</sup> Although previously the High Economic Court of Ukraine noted that "the courts have to examine the circumstances that led to the termination of the arbitral proceedings. In order to determine the grounds for imposing fines the courts have to inspect not the formal circumstance (termination of the arbitral proceedings), but reveal the outcome for the resident (payment of the debt)" (Recommendations of 17 December 2004 No. 04-5/3360).

<sup>43</sup> The High Administrative Court of Ukraine took the same position (e.g., rulings of 14 April 2011 in case No. K-5364/07, of 11 August 2011 in case No. K-8886/09, of 20 September 2011 in case No. K-21350/08, of 30 November 2011 in case No. K-7921/08, of 15 December 2011 in case No. K-9622/09, and of 22 February 2012 in case No. K-4308/08). This opinion was also supported by the Supreme Court of Ukraine, in particular, in resolutions of 13 February 2012 (case No. 21-422a11) and of 27 February 2012 (case No. 21-387a11).



## Individual licensing regime and international arbitration

In accordance with Article 37 of the Law of Ukraine "On Foreign Economic Activity", the Ministry of Economic Development and Trade of Ukraine may impose on violators of the Law of Ukraine "On Payments in Foreign Currency" a specific penalty - individual licensing regime of foreign economic activity (the order may be issued by the Ministry after the respective request of a tax authority)

In those cases when the violators are taking measures for return of foreign currency by submitting claims to arbitration, disputes often arise between them and the regulatory authorities as to whether the licensing regime has to be cancelled or not. Administrative courts in 2011-2012 have had the following answers to the most disputable questions:

- an arbitration court's order for acceptance of a claim for consideration cannot be regarded as evidence of taking measures to cure violations and thus cannot be treated as the ground for cancellation of the individual licensing regime<sup>44</sup>;
- an arbitral award in favor of a resident is the ground for cancellation of the individual licensing regime<sup>45</sup>.

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<sup>44</sup> Resolution of the district administrative court of Kyiv of 20 January 2012 (case No. 2a-16874/11/2670) illustrates that opinion.

<sup>45</sup> It was stated, for example, in the resolution of Donetsk appeal administrative court of 1 December 2011 (case No. 2a/0570/13978/2011).

## V. International commercial arbitration and criminal proceedings

In 2011-2012, there was a small number of criminal cases which were connected with the international commercial arbitration. No case of bringing arbitrators to criminal liability for their professional activities was revealed in the period covered by the study. There was only one interesting case (though the opinion of the court in that case has not been supported in any other case) in which the local court and the appeal court found that the failure to comply with the arbitral award left for enforcement in Ukraine can be regarded as the crime under Part 1 of [Article 382 of the Criminal Code of Ukraine](#) ("Non-execution of a court decision"). The courts stated that since the arbitral award was left for enforcement in Ukraine by way of issue of a decision of the Ukrainian court, there was a non-execution of the latter court decision<sup>46</sup>.

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<sup>46</sup> Ruling of the appeal court of Poltava region of 26 September 2011 (case No. 10-447).

## Methodology

This report is based on a study of about 1,400 decisions issued by the courts of Ukraine in the period which covers 2011 and the first half of 2012 (up to 30 June). The court decisions were taken from publicly available sources, in particular the Unified State Register of Court Decisions after using search criteria that allowed to select decisions essentially related to the subject of the study.

Our findings, comments and calculations made in the study are based on the available texts of judgments, but not on case materials.

In some cases the figures are grouped into the "Others" category due to the small amount of data or inaccuracies in the names of arbitration institutions or rules that made impossible to precisely determine the institution or the rule in question.

The study does not cover issues related to investment arbitration and the arbitration under the Energy Charter Treaty.

The court decisions in which we clearly identified erroneous application of the rules of international arbitral awards enforcement to enforcement of the awards of domestic arbitration courts were left out of focus of the study. The majority of these wrongful decisions were made in administrative court cases.

The study also does not include court decisions which were allegedly politically motivated (according to the opinions expressed in numerous publications in the media).

## Arbitration institutions, associations and rules

Arbitration Court attached to the Economic Chamber of the Czech Republic and to the Agricultural Chamber of the Czech Republic 5

Arbitration Institute of the Stockholm Chamber of Commerce - SCC 5, 12, 18, 22

Court of Arbitration at the Polish Center of Commerce - Arbitration Court at the PCC 5, 6

German Institution of Arbitration, Deutsche Institution für Schiedsgerichtsbarkeit - DIS 5

International Commercial Arbitration Court at the Belarusian Chamber of Commerce and Industry - ICAC at the BCCI 5, 6

International Commercial Arbitration Court at the Chamber of Commerce and Industry of the Republic of Kazakhstan – ICAC at the KCCI 5

International Commercial Arbitration Court at the Chamber of Commerce and Industry of the Republic of Moldova – ICAC at the MCCI 6

International Commercial Arbitration Court at the Chamber of Commerce and Industry of the Russian Federation - ICAC at the RCCI 5, 6, 12, 16, 18, 22

International Commercial Arbitration Court at the Ukrainian Chamber of Commerce and Industry - ICAC at the UCCI 5, 6, 8, 9, 10, 12, 13, 16, 17, 18, 22

International Court of Arbitration of the International Chamber of Commerce - ICC 5, 6, 12, 22

London Maritime Arbitrators Association - LMAA 5

London Court of International Arbitration - LCIA 5, 6

Maritime Arbitration Commission at the Ukrainian Chamber of Commerce and Industry - MAC at the UCCI 5, 12, 16, 22

Rules of Arbitration and Conciliation of the International Arbitral Centre of the Austrian Federal Economic Chamber - VIAC, Vienna Rules 5, 6, 12

Swiss Rules of International Arbitration of the Swiss Chambers' Arbitration Institution - Swiss Rules 12

UNCITRAL Arbitration Rules 12