

# The Role of Ukrainian Counsel in International Loan Transactions

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For the last few years, the role of Ukrainian counsel has dramatically increased in international loan transactions. From the one hand, this has been caused by purely economic and financial factors, such as the continuing and increasing need for fund-raising, as well as the appearance of faster-growing industries. From the other hand, the emergence of more complicated and complex funding techniques has also contributed to this phenomenon.

For the purposes of this study, international loan transactions include individual or syndicated lending, whether secured or non-secured, and based on the LMA Recommended Form of Primary documents governed by English law. Borrowers include primary Ukrainian companies and commercial banks.

The author would argue that yet a third reason is non-enforcement of the respective arbitration award due to public policy reasons. However, the third reason requires a specific analysis and, as such, is beyond the scope of this study.

Although there are some developments aimed at treating Ukraine as a market-based economy, there are still a number of circumstances which cause Ukrainian counsel to be very careful in qualifying the risk associated with Ukraine being an emerging market. One of the key grounds for doing this is to determine what the chances are that the court will treat the financial transaction in question as invalid.



The focus of this study is the role of Ukrainian counsel when acting on behalf of foreign lenders with regard to the legal risks associated with entering into loan transactions.

Normally, such risks constitute the main part of the legal opinion rendered by Ukrainian counsel to foreign lenders as the scope of its mandate.

## The position of Ukrainian courts as to the application of Ukrainian law

Although a loan agreement normally provides for an arbitration clause, there are at least two reasons to take into account the position of Ukrainian courts as to matters of Ukrainian law. The first reason is that position of Ukrainian courts is the part of interpretation of Ukrainian law and, as such, will be likely taken into in the course of arbitrating. The second reason is that there are Ukrainian courts that will consider the merits of the case if the loan agreement provides that Ukrainian courts are for certain reasons competent to adjudicate disputes arising out of the loan agreement.

Some of the likely techniques for doing this are to put into the legal opinion a number of qualifications of a general nature. For instance, counsel rendering the opinion could say that the Ukrainian court system is far from perfect and the position of Ukrainian court could differ. One could go ahead and emphasise that although the Ukrainian court system is not a case-law system of stare decisis and Ukrainian courts are therefore not

bound by the decisions of other courts of Ukraine, the decisions of the Supreme Court would nevertheless have persuasive value in the event of a same or similar case. It is the author's opinion that the last qualification is of paramount importance and leads to another conclusion. The substance of that conclusion is that the lawyer, in drafting the legal opinion, should be aware of the position of Supreme Court's judges which have been held in cases directly or indirectly relevant to the transaction (i.e., the package of financing agreements).

## Mandatory provisions of Ukrainian law

It is the role of Ukrainian counsel to verify that English law governing the loan agreement is in compliance with the so-called mandatory provisions of Ukrainian law. The certain difficulty in doing this is that Ukrainian laws do not specifically indicate what the mandatory provisions are and what criteria should be used to qualify those provisions as mandatory ones.

Generally speaking, existing practice suggests that mandatory provisions could be deemed to be those provisions which cannot be avoided despite the fact that the contract is subject to foreign law. Conditionally, mandatory provisions can

be classified into two main groups. The first group covers provisions of an administrative nature relating to currency control, taxation, state licensing, registration, and the like.

The second group normally covers corporate and investment law. For the most part, the first and the second group do not normally present any difficulty in determination – it is unlikely that someone would argue that Ukrainian currency control regulation can be avoided even if the loan agreement provides otherwise and that the corporate existence of the Ukrainian borrower should be checked based on English law rather than Ukrainian law. However, it represents a problem and a more careful approach should be taken into account.

For instance, in some cases financing documents call for the irrevocability of a power of attorney and agency instructions as a typical English-based approach.

As a general rule, Ukrainian law does not recognise irrevocability in most cases, and such a rule can be qualified as a mandatory provision of Ukrainian law.

## English legal concepts. Lack of determination in Ukrainian law

While rendering legal opinions on loan agreements, one should take into account that English-based models of loan agreements incorporate legal concepts and approaches, which are not commonly used in Ukraine.

At the same time, one can hardly argue that due to the discretionary nature of the Civil Code of Ukraine, such concepts and approaches are absolutely prevented from being applied in Ukraine.

However, their application should be carefully checked on a case-by-case basis. For instance, the concept of representations and warranties has no distinctive legal definition in Ukrainian law, and to some extent may not be enforced in Ukrainian courts as a breach of the loan agreement.

The concept of indemnity as purely English law security instrument is not spelled out in Ukrainian law and, as such, its application is questionable. However, one could advance an opposite argument.

The basis for such an argument is that since there are no similar legal concept and regulation in Ukrainian law and that cannot cause a conflict of application of the chosen English law concept, there is no concern.

The author's view is that although both approaches in rendering legal opinions are possible, the legal opinion's qualification should refer to the certain degree of risk which the lenders should accept or ignore altogether.

