

Concluding contracts with Ukrainian business partners: practical advice

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Contracts with Ukrainian business partners: key issues

Implementation of joint projects with Ukrainian business partners, supply of goods or carrying out works (e.g., construction or installation works) for Ukrainian companies, as well as outsourcing of freelancers' services, are arranged based on international business contracts between Ukrainian and foreign partners (e.g., supply agreement, contractor agreement, service contract, etc.). It is not uncommon that such contracts are signed in a rush in order to avoid slowing down the business activity and project implementation.

Therefore, many provisions of such contracts do not receive the proper consideration, which surfaces in the times of crisis or in case of deterioration of the financial situation and can create an increase in legal disputes due to the failure of Ukrainian business partners to comply with their obligations under the international business contracts.

To the foreigners' surprise, when they decide to sue their Ukrainian business partners, Ukrainian courts refuse to take into consideration many arrangements between the parties that have been established in various forms during the conclusion of agreements or implementation of projects. Foreign companies mostly act in line with the regulations established in their own countries, as well as common commercial traditions they are used to, missing the fact that the agreements they sign or separate provisions thereof are governed by Ukrainian laws. Hence, if a dispute arises, it is considered by the Ukrainian courts.

Additionally, business relationships are often based on mutual trust, so if a party is already convinced of a given business partner's reliability, they might disregard certain details with the intent to speed up a project implementation or supply of goods. During the implementation of international business contracts, it is critical to pay close attention to the means of communication with a business partner, the powers of authorized signatories, as well as to the acceptance of services or goods.

Communication

Since foreign enterprises involved in implementing joint projects with Ukrainian partners commonly do not have representative offices in Ukraine, they tend to communicate via e-mail, telephone, or chats. The parties expect that all additional agreements or arrangements regarding the provisions of the contracts agreed upon, by means of e-mail correspondence or through the chat system, will be

subsequently used as confirmation of reached agreements, without any reservations, in particular in the event of a dispute. However, in practice, in Ukrainian courts, it appears to be rather complicated to achieve the realization of rights, in the view of international business contracts, based on electronic correspondence.

In a Ukrainian trial, the acceptance of e-mail correspondence or chats as evidence is decided upon at the discretion of a judge. The correspondence by e-mail or communication via the chat system may be attached by a judge to a court case, only after confirmation by an opposing party. If no such fact is confirmed, the following clarifications should be taken into account.

The common court practice in Ukraine (which, though not considered as a legal source, is crucial in generalizing law enforcement), recognizes that referring to e-mail correspondence occurs if the parties have agreed upon such communication means in the contract. A clear and conclusive agreement in the international business contract on communication between the parties during the project implementation, or provision of services, with reference to authorized contact persons, with their e-mail addresses attached (preferably the e-mail addresses of the respective enterprises) increases the chances that the judge will take into consideration the content of electronic correspondence. Exceptionally, an expert examination may be appointed to establish the fact of communication by e-mail.

Digital signatures may be legally used to evidence the fact of e-mail communication. The use of electronic signatures requires registration, which complicates the communication between the parties and is therefore held in low regard. The foreign party to the contract should also have a digital signature. It helps to specify the number of e-mails sent, and identify the sender. This method is effective, although, due to its complexity, it can be taken into account only in exceptional cases. For this reason, most business partners prefer the classic paper-based contract signing method.

Acceptance of services or goods

Another issue playing an essential role in the performance of agreements with Ukrainian business partners is the services or goods acceptance. When signing international business contracts, business partners agree mainly that payment for services will be made only after the relevant transfer and acceptance certificate is signed.

Thus, the foreign contractor becomes dependent on signing of this certificate by the Ukrainian customer. After receiving all services, the Ukrainian customer may deny the provision of services by the relevant contractor or deny the scope of these services and refuse to accept the contract works. For some contracts, the law provides mechanisms for protection against such actions of the customer. For example, a contractor who provides services may, having provided all the services under the contract, prepare the transfer and acceptance certificate, sign it and send it to the customer. In this way, the customer is required to sign this transfer and acceptance certificate. If the contractor has not received from the customer the transfer and acceptance certificate with the signature of the latter, it shall have the right to refer to the court on the basis of a unilaterally signed certificate for payment for the works performed.

In case of supply contracts, it is always vital to check whether the parties' representatives (of logistics companies or the customer) who receive the relevant goods have the appropriate authority to sign international bills of lading and other documentation. It is extremely difficult to prove in the Ukrainian court without signatures and, if necessary, seals of authorized persons that the goods have been transferred.

As a rule, having concluded a contractor agreement with a Ukrainian business partner, under which a large amount of services is provided, it is advisable to sign provisional acceptance certificates before signing the final one. The best practice would be for the parties to approve a schedule and sign a provisional acceptance certificate after each stage of works (e.g. installation works) is completed. This could be burdensome during the implementation of large-scale projects, especially for foreign companies that do not have a representative office in Ukraine. Yet, this approach proves to spare time and funds for both parties, that would be otherwise spent to establish who has delivered the relevant services and in what amount.

Powers and credentials of representatives

The powers and credentials of representatives who communicate with foreign business partners on behalf of a Ukrainian company and who sign contractual documents, certificates of delivery and acceptance, bills of lading, transportation documentation, etc., are of very great importance during the presentation of evidence during court proceedings in Ukraine.

Quite often, written and electronic communications are not conducted by the executive director of a Ukrainian company, but rather by the participants in that company; that is, the actual shareholders in the company who are considered to be the authorized decision makers. Letters, attestations, agreements and certificates of delivery and acceptance may also be signed by third parties who, although they may be connected with the Ukrainian company in a certain way, are not officially connected by way of any legal relationships. This results in Ukrainian courts deeming many documents to be invalid and thus disregarding them, since the signatories did not have the relevant powers when signing such documents.

For this reason, it is critical to make sure that the signatories and contact persons acting on behalf of a Ukrainian company are authorized to do so. This can be verified by means of numerous official sources, such as open state registers, as well as by PoAs or confirmation of the parties to a given contract.

In any case, it is worth receiving professional advice regarding the peculiarities of contract law in Ukraine, before concluding a contract with a Ukrainian business-partner or during the contract implementation.