USAID
FROM THE AMERICAN PEOPLE

fhi360
THE SCIENCE OF IMPROVING LIVES

Public Private Partnership Development Program

PPP GUIDANCE NOTE NO. 3

Dispute Resolution and Municipal PPPs in Ukraine

IMPROVING PUBLIC SERVICES, INFRASTRUCTURE, THE ENVIRONMENT AND THE ECONOMY THROUGH PUBLIC-PRIVATE PARTNERSHIPS

GUIDANCE NOTE NO. 3

Dispute Resolution and Municipal PPPs in Ukraine

Chris Shugart
April 2015

DISCLAIMER

The findings, interpretations, and conclusions expressed in this Guidance Note are entirely those of the author and should not be attributed in any manner to the Public-Private Partnership Development Program (P3DP), FHI360, the United States Agency for International Development (USAID), or to any of its partners. Neither P3DP nor FHI360 guarantees the accuracy of the information included in this publication and do not accept responsibility for any consequence of their use.

Although the material in this publication is owned by P3DP, dissemination of this note with accreditation is encouraged.

For questions about this document, please contact P3DP at p3dp@fhi360.org. This and other P3DP publications can be found online in both English and Ukrainian at www.ppp-ukraine.org.

Table of Contents

About the Public-Private Partnership Development Program

The goal of the Ukrainian Public-Private Partnership Development Program (P3DP), implemented by FHI 360 and funded by the United States Agency for International Development (USAID), is to broaden the use of PPPs in Ukraine and expand the role of private sector finance, expertise, and modern technology to improve infrastructure, the quality of public services, and the environment. The program provides assistance to the Government of Ukraine at national, regional and municipal levels to improve the legal and institutional framework, enhances the capacity of individuals and organizations to design and engage in PPP activities, and supports the implementation of pilot PPP projects. Importantly, P3DP assistance is developing the capacity of government to work effectively with the private sector in building or rehabilitating infrastructure, improving or restoring public services, and developing the economy.

Beginning operations in October 2010, the Program is pursuing the achievement of four interrelated, mutually-reinforcing objectives, each contributing to the development of PPPs in Ukraine in full alignment with USAID's Country Development Cooperation Strategy for Ukraine:

1. **Create a Legal and Regulatory Framework Conducive to PPPs** by improving legislation, regulations, and policies that support PPP initiatives at national and municipal levels.
2. **Strengthen the MOEDT's Capacity to Guide and Support PPPs** so that it serves as valuable resource for municipalities and government agencies seeking to improve the efficiency and quality of public services and infrastructure through private sector participation. The MOEDT coordinates much of its PPP support work through the recently established PPP Unit.
3. **Develop PPP awareness and capacity** of municipalities to create and implement PPPs while improving local governance practices. Training, workshops, seminars, conferences, and study tours contribute to the growing body of knowledge on PPPs at the local level. P3DP also demonstrates how strategic communication programs that reach out to the general public and media provide valuable input during the PPP development process.
4. **Implement Pilot PPPs in key sectors** by providing technical assistance to selected municipalities in all phases of development, from initial concept through the transparent, competitive tendering process. Practical experiences and lessons learned provide valuable feedback to further improve the PPP environment and processes in Ukraine.

About the Author

Dr. Chris Shugart is an independent consultant who has been specializing in private sector participation in infrastructure and PPPs (among other related things) since 1994. He received his Ph.D. from Harvard University in 1998, his dissertation being devoted to PPP contracting. Dr. Shugart works as an advisor, transaction consultant, researcher, and trainer. His principal areas of expertise include: private participation in infrastructure; public-private partnerships (PPPs); concession, BOT, and management contracts (including water and wastewater); structuring incentives; pricing policy; regulatory frameworks, systems, and methodologies; project finance; support in negotiations; and litigation support.

Dr. Shugart has recently been involved in the preparation of a major PPP guide. He was the lead external advisor in the preparation of PPP Guide to Guidance commissioned by the European PPP Expertise Centre. Dr. Shugart has strong PPP transaction experience. He worked as a Senior Banker for the EBRD for five years (1995–2002) and led the development and financing of several PPPs, including the Sofia water concession and the Zagreb wastewater treatment plant BOT.

Before that, he was one of the two lead advisors to the Municipality of Maribor (Slovenia) to prepare a BOT project for a wastewater treatment plant (1995–1997), the first such project in former-socialist central Europe, and a project in operation today.

ACKNOWLEDGEMENTS

The author gratefully acknowledges the helpful discussion of some of issues in this note with Ruslan Kundryk (P3DP), Markian Malskyy (Arzinger), Oleg Alyoshin (Vasil Kisil & Partners), and Maksym Lavrynovych and Iryna Marushko (Lavrynovych & Partners), among others. They may not agree with the opinions expressed in this note, and any errors of fact remain those of the author.

SUMMARY

Use of a country's court system is generally not considered to be the best way to resolve most disputes that arise under long-term public private partnerships (PPPs). Arbitration and some form of expert determination are considered to be better suited.
This note looks at the applicability of arbitration and expert determination for this purpose in Ukraine.
International commercial arbitration has considerable potential, but several problems remain:

- If no foreign investment is involved, this method cannot be used.
- In practice, the parties are not entirely free to choose the arbitrators they wish.
- Enforcement of the arbitrator's award can be problematic and time consuming.

Domestic arbitration is another possibility, but this method suffers from certain drawbacks:

- Most important, neither the state nor a municipality can be a party to domestic arbitration.
- Because of past experience, domestic arbitration is viewed with some suspicion.
- As with international commercial arbitration, enforcement can be difficult.

In a number of countries, binding and final expert determination can be a good way to resolve disputes in a PPP involving narrow technical or financial issues. The problem in Ukraine is that the legal system does not ordinarily permit a third-party expert's decision to be binding and final – i.e. not subject to substantive review by the courts. There are possible work-around solutions that would achieve the main objective, but it is not clear if they would be legally feasible.

The outcome is that, for the moment, the scope and beneficial impact of PPPs in Ukraine is severely limited by the lack of an impartial, competent, and effective means of dispute resolution.

1. INTRODUCTION

A public private partnership (PPP) is commonly thought of as being based on a *long-term legally binding contract* that sets out each party's rights and obligations, contract conditions, and related things. Although written contracts can be useful as a way to clarify issues even if they are never legally enforced, the parties generally will not make important commitments unless they feel confident that they can enforce their contractual rights in an effective way. If they do not have that confidence, the agreement becomes what is often called a "relational contract" – one that is implemented and kept relatively stable because of the relationship between the parties and other, extra-legal, influences the parties can exert on each other. Much of the potential value of the PPP will be lost.

The importance of effective enforcement should not be judged by how often the parties end up in a dispute resolution forum; this may never happen. They may even rarely look at the contract. But when parties implement a long-term contract or attempt to renegotiate it, the fallback position – the enforceable rights that each party has at present – is always in the background of the discussion.

It is generally agreed that the national court system in most countries is not well-suited to adjudicate many of the disputes that might arise in a PPP contract. PPP disputes often require special expertise – including sophisticated financial concepts – to be handled competently. Most courts are not well-equipped to deal with this – even with testimony by expert witnesses. For this reason, among others, arbitration has been the preferred final method of dispute resolution for PPPs in many countries – especially when foreign investors are involved.

This note looks at the options outside the Ukrainian court system for dispute resolution concerning PPP agreements in Ukraine. The focus is on PPPs at the municipal level, which is the level at which the USAID-funded Public Private Partnership Program (P3DP) has been most active in the preparation of pilot PPP projects, but many of the conclusions are relevant to PPPs at all governmental levels in Ukraine.

The note is written for non-specialists, is meant to provide an overview only, and does not do justice to the complexity of the legal issues in Ukraine. That is not its purpose. The aim instead is to raise a number of critical concerns of a broader nature for PPP policy makers and practitioners.

Finally, it should be noted that the note looks only at methods for obtaining *binding* decisions by a third party; it does not examine possibilities for mediation or conciliation of PPP disputes.

2. INTERNATIONAL ARBRITRATION

2.1 International Practice

International commercial arbitration is a common way to deal with disputes in a PPP contract when the PPP company is foreign or has foreign investors.

For commercial arbitration to be "international", it does not mean that the arbitration necessarily takes place outside the country in which the PPP project is located (although it often does take place outside that country). Rather, the term implies that significant aspects of the parties or the dispute relate to more than one country (e.g. the parties have their places of business in different countries), and it often suggests that the arbitration is conducted using rules issued by a recognized international organization (or closely based on such rules) or conducted under the auspices of such an organization.

2.2 Ukraine

Ukraine has a law "On International Commercial Arbitration", enacted in 1994, and has signed the major international agreements relating to international arbitration, including the New York Convention and the European Convention on International Commercial Arbitration.

This is a good-practice law, based largely on the widely used UNCITRAL Model Law on International Commercial Arbitration. It governs all international commercial arbitral proceedings conducted in Ukraine. The law applies only when at least one party is foreign or has "foreign investment", which is not defined in the arbitration law but has been generally interpreted as meaning at least 10% foreign ownership.

The law establishes two "permanent arbitral institutions", one of which, referred to as the International Commercial Arbitration Court (ICAC at the UCCI), is under the Ukrainian Chamber of Commerce and Industry. (The other is the Maritime Arbitration Commission, which is not relevant to the present discussion of PPPs.) The parties may also make use of *ad hoc* arbitration – i.e. using a tribunal set up by the parties themselves and not organized under the rules of an organization.

Since it would be a rare case for a municipality in Ukraine to agree to arbitration conducted abroad – for example, in Stockholm, Vienna, or London – (although nothing in the law would bar it from doing so if the other party has foreign investment), virtually all international commercial arbitration involving a municipal PPP would fall under this law.

Arbitration under this law has worked reasonably well. About 500 cases per year are heard. It is potentially a promising method for final dispute resolution under PPP agreements in Ukraine, but there are several drawbacks or areas of concern.

First, there is a lack of clarity in the law about the types of dispute that are not permitted to be resolved by arbitration (i.e. are "nonarbitrable"). This creates some risk for people using international commercial arbitration in their contracts.

According to the Commercial Procedure Code, disputes relating to "public contracts ensuring state needs" cannot be referred to arbitration. It is not entirely clear what this includes. Some people interpret this to mean "public procurement"; others think the meaning is narrower.

At present, the use of arbitration in any type of *concession* (i.e. arrangements falling under the concession law) is limited to situations in which a party itself is a foreign entity; and so a Ukrainian special purpose company with foreign investors would not qualify. Since most PPPs involve *local* PPP companies, regardless of the shareholding, arbitration could not be used in this case for concessions. A proposal to amend PPP-related legislation would broaden the applicability to include *companies with foreign investment*, thus bringing the concession law into harmony with the PPP Law in this respect.

According to one interpretation (based on the law "On International Private Law"), disputes concerning real property (real estate) fall under the exclusive jurisdiction of the courts and cannot be referred to arbitration. PPPs often involve land or rights of way and related property rights. But the decision of the courts so far suggests that only the narrow property-related issues would not be able to be decided in arbitration.

Another area of concern is the selection of arbitrators. There is nothing in the law that states that the parties must use arbitrators from ICAC's recommended list. But in practice ICAC requires that parties select arbitrators from the list of persons maintained by ICAC. Any arbitrator that a party nominates can be challenged by the other party, and it is ICAC that decides the challenge. There is a question whether the parties can find arbitrators in that list who have high competence and experience in many of the issues likely to arise in PPPs – a specialized skill. Most practitioners in Ukraine are of the opinion that selecting arbitrators outside the ICAC list can pose difficulties and is in practice impossible.

One way around this problem might be for the parties to choose the arbitrators themselves using the ad hoc procedure (permissible under the law) and to select an appropriate local organization to play a purely administrative role – i.e. to provide administrative support (notices, minutes of meetings, document control, facilities and logistics for the hearings, etc.) – but to play no role in the choice of arbitrators, this function being left to the free choice of the parties. This might work but would require careful drafting of the arbitration clause in the contract between the parties.

One problematic area is the *enforcement* of the arbitral award by a court, which is not always straightforward. Many Ukrainian courts do not have a friendly attitude towards international arbitration. The judges at the first-instance courts lack relevant experience, and the process can be time-consuming.

The winning party must go first to a first-instance court to enforce the arbitral award (unlike in many other countries where the party would go immediately to a higher level court). Judges at this level are too ready to accept challenges to the award for a variety of reasons. Various procedural issues are raised, some of them based on highly strained arguments. For example, the losing party may claim that proper notice was not given or that there is a defect in the wording of the arbitration clause itself. The courts often take an excessively strict and highly formalistic approach in deciding these cases. In some cases, the winning

party in effect has to show that there are no grounds to *refuse* enforcement of the award. Sometimes the courts, contrary to the law and to good practice, will even re-consider the case on its merits.

Sometimes Ukrainian courts use the "public policy" rationale for not enforcing the arbitral award. The law states that a court may refuse to enforce the award if enforcement would be "contrary to the public policy of Ukraine". This is not a Ukrainian novelty but simply reflects the provisions of the UNCITRAL Model Law and the New York Convention. But the intention of this provision, as used in these international texts, was very limited. It is clear from the history of its enactment (confirmed by later interpretation by many national courts) that the public policy exception in the New York Convention was meant to be used only in the most exceptional circumstances, when there would be a violation of the forum state's deepest notions of morality and justice, not just *any* law of the country.

The provision, very broadly interpreted, was a common ground for non-enforcement in Ukraine – at least in the past. There was a tendency of courts to assume that if the court found that the award did not comply with any Ukrainian law, then enforcing it would be contrary to public policy.

An extreme example (2008) is a case in which the arbitration clause referred to the "Arbitration Court at the Kyiv Chamber of Commerce and Industry" which does not exist. Presumably the parties' intention was to use the "International Commercial Arbitration Court at the Ukrainian Chamber of Commerce and Industry". A Ukrainian district court refused enforcement on grounds of public policy.

The saving factor is that these flawed decisions in the first-instance courts, as described above, are often rectified on appeal to the next level.

A final non-legal but extremely important drawback to using international commercial arbitration for *municipal*-level PPPs is that, although there is nothing barring municipalities in Ukraine from using this law (when the PPP company has foreign investment and in all cases except for concessions), most municipalities would not feel comfortable and would not want to use arbitration – and even less, arbitration under the auspices of the Ukrainian Chamber of Commerce and Industry. It would seem highly unusual and unnatural to them. Municipal officials feel familiar using the national court located just down the road. Moreover, they would be worried about the high cost of arbitration – and this concern might well be justified in many cases.

3. DOMESTIC ARBRITRATION

Ukraine also has a law on domestic arbitration ("Law on Courts of Arbitration"), enacted in 2004.

Arbitration may be carried out under the auspices of privately created "arbitration courts" that have been registered with the authorities. (Although referred to as "courts", these are not courts in the usual sense of the term.) Each of these organizations has a closed list of arbitrators.

Arbitration under this law can also be carried out by ad hoc tribunals. There is considerable flexibility as to the choice of arbitrators and procedures.

Once a decision is reached, enforcement is carried out by a writ of execution issued by a national court. The grounds for not issuing the writ are very narrow – e.g. that the arbitral tribunal was not composed in accordance with the law. The judicial court cannot look at the substance (merits) of the decision of the arbitral tribunal.

Over 400 arbitration courts have been set up under the law on domestic arbitration. Most practitioners agree that many of these courts are biased, some having been set up by the companies that will be parties to the proceedings (and sometimes even operating from the premises of the company), with arbitrators highly sympathetic to the companies' position.

Domestic arbitration is therefore viewed with some suspicion. In the past, there has been considerable criticism of the use of domestic arbitration, but the criticism was directed at the practice of requiring poorly informed consumers to sign arbitration agreements that involved biased arbitration courts. Consumer disputes were subsequently removed from the jurisdiction of domestic arbitration in 2011. Nevertheless, these experiences have left a lingering sense of distrust of domestic arbitration, and this is something that would have to be overcome if the procedure were to be considered acceptable for PPPs.

An interesting point is that, at least on paper, the grounds for challenging the arbitral decision in domestic arbitration appear narrower than under the international arbitration law. In domestic arbitration, the court cannot look at the arbitrator's decision on the merits. In contrast, as noted above, the international arbitration rules include the "public policy" challenge.

The reality, however, is somewhat different. First-instance courts do not always make a strict distinction between the procedural aspects and substantive aspects of the arbitral proceedings in deciding whether to enforce the arbitral award. Moreover, procedural grounds of some kind, however shaky, are sometimes used to justify the refusal to enforce an arbitral decision; in any case, procedural issues are used by the opposing party to cause long delays. Practitioners, however, say that such mistakes of the lower courts will generally be corrected upon appeal.

A critical obstacle, in the context of PPPs, is that neither the state nor a municipality can be a party to domestic arbitration (Article 6, point 6). At present, this closes the door to the use of this procedure in PPPs. Some municipal *enterprises*, however, use domestic

arbitration. One arbitration court, the Arbitration Court under the League of Legal Protection of Consumers' Interest (registered in 2004), handles many cases involving municipal enterprises. Moreover, a court has recently confirmed that municipal *enterprises* (as opposed to municipalities themselves) can be parties to domestic arbitration.[1]

However, even if a municipal enterprise and a private sector company could use domestic arbitration to resolve a dispute concerning a PPP agreement, the arbitral award would not be binding on the municipality itself and could be appealed by the municipality to a judicial court if, say, the municipality had guaranteed the payments to be made by the municipal enterprise.

The argument could be made that the inability of municipalities to use domestic arbitration should be removed, but then some way would have to be devised to prevent the abuses that can arise in domestic arbitration. One idea might be to require that arbitration under the domestic arbitration law must be held under the auspices of the national or regional chambers of commerce, to give more credibility and move away from the "wild west" character of some of these forums.

In principle, the domestic arbitration mechanism could work well for PPPs at the municipal level (even if the PPP company has "foreign investment"). Since there is no restriction on who can set up an *arbitration court* for this purpose (so long as they become registered as such), it may be possible in the future (once more municipal PPP agreements have been signed) to make this procedure more acceptable to municipalities by creating a special body oriented mainly for disputes concerning municipal PPPs. But this is not a solution for the immediate future.

[1] Kyiv Economic Court of Appeal, Case № 910/20070/13 (25 February 2014).

4. USE OF EXPERTS TO RESOLVE DISPUTES IN PPPS

4.1 The Need for Fast-Track Dispute Resolution Mechanisms in the PPP Agreement before Reaching Arbitration

When it first began to be commonly used in many countries, arbitration may have seemed to offer a quick and cheap way to resolve disputes, but over time it has become highly judicialized in the way it functions, and at least *international* commercial arbitration is far from being fast and inexpensive. In a long-term contract, it tends to be used when the relationship has broken down between the parties and it often signals the end of the PPP. It is sometimes referred to as the "nuclear" option for PPP dispute resolution.

It has become more apparent that PPPs (inherently long term in nature) need, in addition, mechanisms that are lighter, quicker, and less expensive for the resolution of many kinds of disputes that arise in the normal course of project implementation.

4.2 Binding Use of Expert Determination

It has become accepted practice in a number of countries to make use of specialized "experts" to decide certain issues and disputes that arise in contracts, often long-term contracts. This is a purely contractual mechanism: the parties agree that if they cannot resolve a certain issue, then a selected expert will resolve it, and the parties agree *in advance* to accept the decision of the expert just as if the result was written by them in their contract. If one party does not accept the decision of the expert, the other party can go to court to enforce their rights (based on the expert's decision), just as they would for any breach of contract.

Legal systems that defer largely to the will of the parties as expressed in a contract (e.g. common law systems) do not have much difficulty with this method. There are a few contentious issues, but ways can be found to resolve them. For example, it has to be made very clear that the expert is technically not an "arbitrator", because specific laws in most countries govern the procedure of arbitration. Also, the question of what to do if the expert makes an egregious mistake should be addressed. One solution is to allow the court to disregard the expert's decision if it contains a material error that is so obvious that no one could deny it (e.g. the expert gives an answer to the wrong question).

There can also be tricky questions about whether the expert can decide questions of *law*, as opposed to questions of *fact*. Courts might consider this to be their special expertise and power. But if the expert looks only at narrow technical or financial issues – e.g. involving the measurement or determination of a *value* – then many legal systems would have no problem with expert determination. It might be good, in this connection, to include in the expert determination clause a provision that the expert is entitled to decide any issue involving the interpretation of the contract terms – to discourage a court from concluding that this is an inherently judicial function.

Disputes can often arise in PPPs about the value of certain things. For example, penalties or deductions may be linked to the PPP company's performance based on objective indicators

("key performance indicators" – "KPIs"). If there is a disagreement about how the company scored on a KPI, this is a perfect occasion where an appropriate technical expert can come in and investigate and take a decision about what the correct value is. Another example – slightly more complicated – would be to determine how the service fee should be adjusted (pursuant to the contract) in response to an extraordinary event of a defined kind, or how a "termination payment" should be calculated if one is specified in the contract.

When a dispute over a narrow issue like this arises (and where there is no dispute over the law and no significant dispute over *legal* aspects of the interpretation of the contract), it really does not make sense to be forced to take the claim to a court or to an arbitral tribunal. Ultimately the court or arbitral tribunal will listen to experts in any case, because they do not have the necessary expertise themselves.

An interesting example of this arose in one of the two Manila (Philippines) water system concessions. In 1998, the private-sector concession company submitted a claim against the public authority to a three-member arbitral tribunal. There were several issues; an important one was to determine what *discount rate* should be used in the financial model for the project, in accordance with the terms of the concession contract, which gave vague and confusing instructions about how to determine the rate. Each of the parties engaged a different British-based economic consulting firm to advise them and present arguments to the arbitrators. Then the arbitral tribunal itself decided to appoint an expert – an Australian professor of finance – to assist it in understanding the arguments and assessing the testimony presented by the other two experts. This was clearly an issue for *experts* to decide. It would have been simpler and much less costly and time consuming if a procedure for expert determination had been written into the concession contract.

The PPP agreement needs to spell out in considerable detail how the expert determination will be conducted. One common way to do this is to write all the provisions into the PPP agreement. Another way relies on there being a respected organization that has published rules for expert determination.[2] Then the PPP agreement could simply make reference to these institutional rules.

The provisions (whether contained in the agreement itself or in the rules published by a respected organization) need to cover many matters, the main ones being:

- How a party should initiate the process if there is a dispute.
- What the parties must do if they cannot agree on the name of an appropriate expert. For instance, there could be an "appointing authority" that submits several names to the parties and then a procedure for how the parties will rank or score the names to arrive at the single jointly chosen expert.
- How the expert should determine the exact scope of the determination.

[2] For example, the World Intellectual Property Organization (WIPO) has issued a set of rules for expert determination.

- The procedures that will govern the process. It is very important to make it clear that the expert is not obliged to follow strict court-like procedures of due process. The whole purpose is to permit more flexibility than would be allowed in litigation or arbitration. Nevertheless, it is important to require some standards. It is often useful to include a statement to the effect that the expert is to act fairly and impartially and ensure that each party has a reasonable opportunity to present its case.
- The form of the expert's decision, and whether or not it must include an explanation.
- Who will pay the costs of the expert. Often the parties share the cost equally.
- Under what conditions a party is permitted to take the dispute to arbitration (or to court) if it disagrees with the decision of the expert.

Expert determination can be conducted with different degrees of finality. This will sometimes depend on what is permitted under the laws of the country. Two common possibilities are as follows:

(A) One possibility would be to state that the expert's decision is binding and final and it cannot be taken to a higher level of dispute resolution.

(B) Another possibility is to say that if a dissatisfied party does not take the dispute to a higher level (be it arbitration or courts) within, say, 30 days, then it becomes final. But in any event, until it is decided by the higher level, the parties have to respect the decision (i.e. it is provisionally *binding,* even if not final).

Experience with method (B) shows that, more often than not, both parties in a long-term contract will assess the result and will conclude that it is not worth "appealing" the issue to a higher level – unless it is a fundamental issue and they are deeply dissatisfied – and so they will not act and the decision will therefore become final. This is the aim of expert determination.

A third possibility is to say that the determination is *advisory* only; either party can take it to a higher level anytime. But use of experts in that way – however useful it may be in some circumstances – is not the subject of the present note.

4.3 Expert Determination in Ukraine

Expert determination is not commonly used in Ukraine, and one might expect a guarded and even antagonistic attitude from the judicial system. The general consensus of Ukrainian lawyers is that approach (A), above, would not be permitted under Ukrainian law. This would be viewed as the parties' attempt to take away the inherent power of Ukrainian courts to decide disputes. A change in primary legislation would be needed to make (A) permissible.

There might be more hope for the acceptability of approach (B), where the parties have a certain period – say, 30 days – during which they can decide not to accept the decision of the expert. It might be possible to interpret the non-objection of both parties during the 30-

day period as a tacit agreement between them to accept the decision of the expert, just as if they had written an amendment to their contract.

Some Ukrainian lawyers believe this could work. If true, it would probably be good to state this assumption explicitly in the expert determination clause in the contract to encourage a court to interpret the effect of the clause in the intended way – e.g.: "If neither party initiates proceedings in arbitration [*assuming that arbitration is the dispute resolution mechanism under the contract*] to resolve the claim that was decided by the expert within 30 days after the issuance of the expert's decision, the parties will be deemed to have agreed to the decision of the expert and to have made it a binding amendment to the contract."

An additional way to give more certainty could be for the Supreme Court to issue a clarification that explains that such language should normally be sufficient to create a valid amendment to the contract.

Other Ukrainian lawyers, however, believe that courts would not accept silence as tacit acceptance in this case. The parties would need to sign a statement agreeing to amend their contract in such a way that it conforms to the decision taken by the expert. But this might defeat the purpose: it is often much easier (psychologically and administratively) for a party to say nothing, even if it knows what the result of its silence will be, than for the party to take an affirmative action.

5. CONCLUSIONS

Although people and companies sign detailed written contracts for many different reasons (there is certainly a value in just setting out clearly and precisely what the common understanding is), a large part of the value of a long-term contract is lost if the contract cannot be enforced effectively against a party that breaches its terms.

At the moment, if the final dispute resolution mechanism is the Ukrainian judicial system, parties to a PPP contract in Ukraine have little confidence that their contractual rights will always be upheld in court. This adds substantial risk, especially for the private partner, and it constitutes a major constraint now to a private partner being willing to make significant investments in the PPP project and to banks being willing to lend large amounts. Dispute-resolution risk of this kind is an important constraint that holds back the development of a sound PPP program in Ukraine.

Conditions are somewhat better for PPPs in which there is *foreign* investment; they can make use of the provisions of the law on international commercial arbitration. But improvements are needed even here, as noted in section **Error! Reference source not ound.**.

For the moment, most PPPs in which there are no foreign shareholders cannot be structured as best-practice PPPs at all; instead, they should be thought of more as "relational contracts", dependent for their enforcement on incentives and influences beyond the contract itself. This severely limits their scope and impact.

Even if doubts about the impartiality and effectiveness of the ultimate dispute resolution forum can be resolved, this would not address the question of how to incorporate mechanisms for more specialized dispute resolution of narrower, technical issues as they arise – mechanisms that are being seen as essential for the stability of long-term PPP arrangements and that are commonly used now internationally in PPP contracts. "Expert determination" and similar mechanisms are rarely used in Ukraine, and there are legal obstacles to their easy adoption.