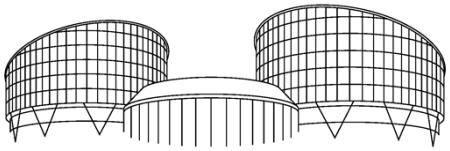

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FIFTH SECTION

CASE OF MONT BLANC TRADING LTD AND ANTARES TITANIUM TRADING LTD v. UKRAINE

(Application no. 11161/08)

JUDGMENT

Art 6 § 1 (civil) • Equality of arms • Consideration and decision in the absence of any evidence that the applicant company had been notified of the hearing • Other party twice granted an adjournment, with applicant company only informed of the hearings after the fact, and with no opportunity to reply to additional oral submissions • Fair hearing • Failure of court to reply to applicant's arguments, which was decisive for case outcome

STRASBOURG

14 January 2021

This judgment will become final in the circumstances set out in Article 44 § 2 of the Convention. It may be subject to editorial revision.

COUNCIL OF EUROPE
CONSEIL DE L'EUROPE

In the case of Mont Blanc Trading Ltd and Antares Titanium Trading Ltd v. Ukraine,

The European Court of Human Rights (Fifth Section), sitting as a Chamber composed of:

Síofra O'Leary, *President,*
Mārtiņš Mits,
Ganna Yudkivska,
Latif Hüseynov,
Jovan Ilievski,
Ivana Jelić,
Mattias Guyomar, *judges,*
and Victor Soloveytchik, *Section Registrar,*

Having regard to:

the application against Ukraine lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Mauritian company, Mont Blanc Trading Ltd ("MBT" – "the first applicant company") and a British company, Antares Titanium Trading Ltd ("ATT" – "the second applicant company"), on 15 February 2008;

the decision to give notice to the Ukrainian Government ("the Government") of the application;

the decision to inform the United Kingdom Government of the application in view of the second applicant company's place of incorporation (Article 36 § 1 of the Convention and Rule 44 of the Rules of Court) and the United Kingdom Government's decision not to intervene;

the parties' observations;

Having deliberated in private on 17 November 2020,

Delivers the following judgment, which was adopted on that date:

INTRODUCTION

1. The case concerns (i) an alleged failure on the part of the Ukrainian courts in civil proceedings to provide an adequate reasoning for their refusal to enforce an arbitral award, and (ii) parallel commercial proceedings, allegedly conducted in breach of the right to a fair hearing, as guaranteed under Article 6 of the Convention and Article 1 of Protocol No. 1 to the Convention.

THE FACTS

2. The first applicant company was registered in Port Louis, Mauritius, and the second applicant company was registered in London. The first applicant company held 51% of shares in the second applicant company. The

applicant companies were represented by Mr P. Landolt, a lawyer practising in Geneva.

3. The Ukrainian Government ("the Government") were represented by their Agent, Mr I. Lishchyna, of the Ministry of Justice.

4. The facts of the case, as submitted by the parties, may be summarised as follows.

5. On 2 December 2003, the applicant companies and Company A. (a company registered in Ukraine), entered into a complex set of agreements for the manufacture of titanium products in Ukraine and their sale "solely and exclusively through" the applicant companies. This was formalised in a contract between MBT, ATT and Company A. dated 2 December 2003, entitled "Exclusive Sale-Purchase (Off-Take) and Marketing Agreement" ("the Main Contract") and Additional Agreement no. 1 ("Additional Contract no. 1"). The Main Contract and (according to the applicant companies) Additional Contract no. 1 provided that any dispute in respect of those contracts should be submitted to the London Court of International Arbitration (LCIA) and considered under the LCIA Arbitration Rules and the 1996 Arbitration Act by the sole arbitrator in London, exclusively on the basis of the contracts. The governing law of the Main Contract was the substantive law of England and Wales.

6. According to the applicant companies, on 8 April 2004, MBT, ATT and Company A. entered into Additional Agreement no. 2 and a sales-purchase contract but backdated them to 2 December 2003.

7. According to the Government, on 8 April 2004 the applicant companies and Company A. entered into Additional Agreement Without a Number ("the Disputed Contract"), which changed those provisions of the Main Contract and of Additional Contract no. 1 that regulated, *inter alia*, the settlement of any disputes, so that (i) the applicable substantive law was to be the Ukrainian law and (ii) the Kyiv Commercial Court was to have jurisdiction to resolve any future disputes.

8. According to the applicant companies, they never entered into the Disputed Contract, which they assert is a forgery.

I. PROCEEDINGS BEFORE THE LONDON COURT OF INTERNATIONAL ARBITRATION

9. On 18 November 2004 the applicant companies instituted proceedings before the LCIA against Company A., seeking an award for breach of contract. Specifically, they asserted that Company A. had failed to comply with its contractual obligations concerning the production and exclusive sale of titanium products.

10. On 22 December 2004 by email and on 4 February 2005 by letter Company A. contested the LCIA's jurisdiction, referring to the Disputed

Contract, which amended the arbitration clause and shifted jurisdiction from the LCIA to the Ukrainian commercial courts.

11. On 10 March 2005 the sole arbitrator at the LCIA ordered Company A. to produce a copy of the Disputed Contract before 8 April 2005.

12. On 20 April 2005 (that is to say after the above-mentioned deadline) Company A. sent to the sole arbitrator a plea concerning the LCIA's alleged lack of jurisdiction to hear the case, attaching a photocopy of the Disputed Contract to it.

13. On 5 May 2005 the sole arbitrator appointed a British expert, seeking his advice on the authenticity of the Disputed Contract; the sole arbitrator ordered Company A. to deliver the original document to the expert by 27 May 2005.

14. Company A. never delivered the original copy of the Disputed Contract to the expert, who on 22 July 2005 issued his report, concluding that there was strong evidence that the representatives of the applicant companies had not signed the Disputed Contract.

15. On 12 September 2005 the sole arbitrator acknowledged his own jurisdiction to consider the case and issued an arbitral award, ordering Company A. to pay the first applicant company the amount of 4,006,961.17 United States dollars (USD) in compensation for breach of contract; he also ordered Company A. to pay the first applicant company's legal and other costs, and also to pay the costs of the arbitration proceedings.

II. PARALLEL PROCEEDINGS BEFORE THE UKRAINIAN COMMERCIAL COURTS

A. Proceedings before the first-instance court

16. On 7 February 2005 Company A. lodged a claim against the applicant companies with the Kyiv Commercial Court ("the Commercial Court"), seeking compensation for the alleged non-performance of the Disputed Contract dated 8 April 2004.

17. On 14 February 2005 the Commercial Court opened the proceedings, scheduling the hearing for 22 August 2005 and asking the parties to state whether the same dispute was being examined by another judicial body. Company A. did not inform the Commercial Court that the same dispute between the same parties was to be examined by the LCIA in London. Company A. did not inform the applicant companies that it had lodged a claim against them with the Commercial Court.

18. On 22 August 2005 the Commercial Court, having considered the case in the absence of the representatives of the applicant companies, ordered that the applicant companies each pay Company A. the amount of USD 685,794.53 in compensation for a breach of the Disputed Contract.

19. According to the applicant companies the date of that decision was in fact 26 December 2005, since allegedly on that date the Commercial Court issued the full text of its decision.

1. Delivery of judicial documents to the second applicant company

20. On 18 March 2005 the second applicant company changed its legal address in London.

21. According to the Government, on 18 March 2005 the Commercial Court transmitted the judicial documents to the Ministry of Justice of Ukraine for delivery to the second applicant company at its old address in London.

22. On 25 May 2005 the Ministry of Justice of Ukraine lodged a request SFP 2005-3799 with "the Supreme Court of England" for certain judicial documents to be served on the second applicant company, specifying the second applicant company's former address.

23. On 22 June 2005 a London "authority" issued a "certificate" following the request SFP 2005-3799, stating that the documents had not been served on the second applicant company, as no authorised officer had been available to accept delivery. The Government have not clarified which was that authority though its stamp on a copy of the document was illegible.

24. On 15 July 2005 the Commercial Court issued a ruling that stated, among other things, that the Ministry of Justice had "sent information relating to the fulfilment of the task of serving court documents on a representative of the second applicant company". The Commercial Court ordered Company A. to provide a translation into Ukrainian of the certificate issued on 22 June 2005.

2. Delivery of judicial documents to the first applicant company

25. On 22 June 2005 the Embassy of Ukraine in Germany requested the Embassy of Mauritius in Germany to send certain judicial documents to the respective authorities in Mauritius for delivery to the representatives of the first applicant company.

26. On 28 December 2005 the Supreme Court of Mauritius ordered that those documents be served on the first applicant company.

27. On 27 January 2006 the judicial documents were served on the first applicant company.

B. Proceedings before the appellate court

28. On 30 June 2006 the applicant companies lodged a notice of appeal with the Kyiv Commercial Court of Appeal ("the Commercial Court of Appeal"), asking it to restore the time-limit for lodging an appeal, quash the decision of the Commercial Court of 26 December 2005, and close the proceedings on the basis that there was the arbitral decision of 12 September

2005 on the matter and that the parties had never agreed upon the jurisdiction of the Ukrainian courts. In addition, they pleaded that under the Code of Commercial Proceedings the Ukrainian courts did not have jurisdiction to hear the case, as the applicant companies did not have any ties with Ukraine – that is to say they had no property or bank account there, nor an affiliate company registered there.

29. On 17 August 2006 the Commercial Court of Appeal issued a ruling restoring the time-limit for lodging an appeal. It scheduled a hearing for 22 September 2006.

30. The representatives of the applicant companies attended the 22 September 2006 hearing. Company A.'s representative applied for an adjournment of the proceedings. The Commercial Court of Appeal adjourned the proceedings until 13 October 2006.

31. On 13 October 2006 the representatives of the applicant companies and Company A. attended the hearing, where they presented their case. The hearing lasted ten minutes and was adjourned until 20 October 2006.

32. On 19 October 2006 Company A.'s representative lodged an application for an adjournment of the proceedings.

33. On 20 October 2006 the first applicant company's representative attended the rescheduled hearing. The representatives of Company A. and the second applicant company did not attend the hearing. The Commercial Court of Appeal decided to adjourn the hearing owing to the absence of the two other representatives, but did not set a date and time for the next hearing. The record of the 20 October 2006 hearing does not contain any such information.

34. Decision of the Commercial Court of Appeal dated from 20 October 2006 stated that the hearing was adjourned until 27 October 2006. According to the applicant companies, they were not informed of the decision to adjourn the hearing until 27 October 2006.

35. On 27 October 2006 the Commercial Court of Appeal examined the case in the absence of the applicant companies' respective representatives. Finding that the applicant companies' representatives had been duly informed of the hearing and that no application for an adjournment had been received, the court proceeded with the examination of the case in view of Company A.'s objection to any further adjournment of the hearing and possible violation of its right to have the case considered within the relevant procedural time-limit. The Commercial Court of Appeal upheld the decision of the first-instance court, dismissing the applicant companies' arguments that the LCIA's arbitrator had established the invalidity of the Disputed Contract and that the Ukrainian commercial courts lacked jurisdiction in view of the fact that on 12 October 2006 the Pecherskyy District Court of Kyiv (see paragraph 44 below) had refused to enforce the arbitral award and that the applicant companies had not provided evidence that the latter decision was being appealed against. The record of the hearing of 27 October 2006 notes that "the representative of Company A. submitted to the court his

additional explanations [by way of responding] to the [applicant companies'] objections".

36. On 31 October 2006 the applicant companies' representatives received notification of the summonses after the hearing of 27 October 2006 had taken place. The first applicant company provided the Court with a photocopy of the relevant envelope.

C. Proceedings before the highest courts

37. On 26 November 2006 the applicant companies appealed in cassation, asking the Higher Commercial Court of Ukraine (the "HCCU") to quash the decisions of the first-instance court and the appellate court and to close the proceedings on the basis that the Commercial Court of Appeal had not examined their key evidence contesting the validity of the Disputed Contract and that the applicant companies had not been present at the hearing of 22 August 2005 before the Commercial Court and the hearing of 27 October 2006 before the Commercial Court of Appeal and that the national courts of cassation did not have jurisdiction to examine the case.

38. On 27 February 2007 the HCCU quashed the lower courts' decisions and closed the proceedings, referring to the findings of the sole arbitrator that the Disputed Contract was null and void and that the Ukrainian courts had lacked jurisdiction to hear the dispute, because, *inter alia*, the applicant companies had not had any ties with Ukraine.

39. On 2 March 2007 Company A. lodged a cassation appeal with the Supreme Court of Ukraine ("the Supreme Court").

40. On 17 April 2007 the Supreme Court quashed the decision of the HCCU of 27 February 2007, referring to the finding of the lower courts that the Disputed Contract had amended the arbitration clause, shifting jurisdiction from the LCIA to the Ukrainian commercial courts. The Supreme Court also inferred that, since the arbitral decision had been rendered after the proceedings had opened before the Ukrainian commercial courts, it was for the Ukrainian courts to hear the case.

41. On 26 June 2007 the HCCU referred to the findings of the Supreme Court's decision of 17 April 2007 on the issue of jurisdiction and upheld the decision of the appellate and first-instance courts. The applicant companies appealed against that decision to the Supreme Court.

42. On 23 August 2007 the Supreme Court declined to open cassation proceedings.

D. Civil proceedings for the enforcement of the LCIA's decision

43. On 7 July 2006 the first applicant company lodged an application with the Pecherskyy District Court of Kyiv ("the Pecherskyy Court"), seeking leave to have the arbitral award enforced.

44. On 12 October 2006 the Pecherskyy Court issued a ruling, dismissing the application on the grounds that Company A. had not been properly informed of the arbitration or of the date and time of the hearing, and in view of the fact that on 22 August 2005 the Commercial Court had rendered a decision – which had already entered into force – in relation to the same dispute.

45. On 16 October 2006 the first applicant company appealed against the ruling of 12 October 2006.

46. On 11 June 2007 the Kyiv Court of Appeal found that Company A. had been duly informed of the arbitral proceedings; however, it declined to enforce the arbitral decision, on two grounds: firstly, because it held that the Ukrainian courts had "exclusive" jurisdiction to hear the dispute; and secondly, because either the national courts had already considered the case and issued a decision (which had then entered into force), or the ongoing proceedings before the Ukrainian courts had commenced prior to the international arbitration proceedings. The appellate court referred to the decision of the Supreme Court of Ukraine dated 17 April 2007 confirming the jurisdiction of the Ukrainian courts (see paragraph 40 above).

47. On 10 August 2007 the first applicant company lodged a cassation appeal against the decision of the Kyiv Court of Appeal. It argued that (i) the national courts had had no grounds for applying Article 396 of the Code of Commercial Procedure, as it was Article V of the New York Convention that had been applicable, (ii) at the time of the decision of the Pecherskyy Court, no final domestic decision had been delivered (or had entered into force) regarding the same dispute between the same parties, and (iii) the initiation of the arbitral proceedings had preceded the initiation of the commercial proceedings.

48. On 5 October 2007 the Supreme Court of Ukraine upheld the decision of the appellate court.

49. The second applicant company was dissolved on 30 June 2015.

RELEVANT LEGAL FRAMEWORK AND PRACTICE

I. RELEVANT INTERNATIONAL LAW

50. The relevant provisions of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (commonly known as the New York Convention) read as follows:

Article II

> "... 3. The court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed."

Article V

"1. Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that:

(a) The parties to the agreement referred to in article II were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made; or

(b) The party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case; or

(c) The award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced; or

(d) The composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or

(e) The award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made.

2. Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that:

(a) The subject matter of the difference is not capable of settlement by arbitration under the law of that country; or

(b) The recognition or enforcement of the award would be contrary to the public policy of that country."

51. The relevant excerpt from the Guide on the New York Convention of the United Nations Commission on International Trade Law (UNCITRAL) Secretariat of 2016 reads as follows:

Article V
Introduction

"1. Article V of the New York Convention sets forth the limited and exhaustive grounds on which recognition and enforcement of an arbitral award may be refused by a competent authority in the Contracting State where recognition and enforcement is sought..."

A. Court discretion under Article V

"The objective of the New York Convention is to facilitate the recognition and enforcement of arbitral awards to the greatest extent possible and to provide a maximum level of control which Contracting States may exert over arbitral awards. In accordance with this objective, the Convention grants courts of the Contracting States the discretion

to refuse to recognise and enforce an award on the grounds listed in article V, without obligating them to do so...”

II. RELEVANT DOMESTIC LAW

52. The relevant provisions of the Code of Commercial Procedure of 6 November 1991, as worded at the material time, read as follows:

Article 62. Refusal to accept a notice of claim

“A judge shall refuse to accept a notice of claim if:

... 2) a similar action between the same parties in relation to the same subject matter and on the same grounds is ongoing before a court or other competent body with jurisdiction to consider the commercial dispute [in question], or a decision exists rendered by that [court or] body in relation to the subject matter of the dispute.”

Article 80. Closing proceedings

“The commercial court shall close the proceedings in respect of the case, if:

... 2) a decision exists rendered by a commercial court or other body with jurisdiction in the case between the same parties in relation to the same subject matter and based on the same grounds.

... 5) the parties concluded an agreement submitting the dispute for settlement by an arbitral tribunal.”

53. The relevant provisions of the Code of Civil Procedure of 18 March 2004, as worded at the material time, read as follows:

Article 390. Conditions for recognition and enforcement of a foreign court decision subject to enforcement

“A foreign court decision shall be recognised and enforced in Ukraine, provided that recognition and enforcement are permitted under international treaties ratified by the *Verkhovna Rada* of Ukraine, or on the basis of the reciprocity principle under an *ad hoc* agreement with a foreign country whose court decisions shall be enforced in Ukraine.”

Article 396. Grounds for refusing an application for enforcement of a foreign court decision

“1. An application for enforcement of a foreign court decision shall not be allowed in the cases set out in the international agreements ratified by the *Verkhovna Rada* of Ukraine.

2. If the international agreements ratified by the *Verkhovna Rada* of Ukraine do not provide for the following events, an application may be dismissed:

1) if the decision of a foreign court has not yet become binding in accordance with the law of the state where it was rendered;

2) if the party against whom the decision was made was unable to present his case as a result of not being properly informed of the proceedings; and

3) if a decision was issued in the case, and the subject matter of [the case] falls under the exclusive jurisdiction of the courts or other competent bodies of Ukraine;

4) if there is a decision of a Ukrainian court in the case between the same parties, in relation to the same subject matter and on the same grounds, which came into force, or if litigation involving the same parties is ongoing in Ukrainian courts, in relation to the same subject matter and based on the same grounds, which was initiated prior to the proceedings in a foreign state.

5) if a time-limit for enforcing a foreign decision provided for in [both] the international agreements ratified by the *Verkhovna Rada* and this law has expired;

6) if, under the laws of Ukraine, the subject matter of the dispute shall not be adjudicated upon by a court;

7) if the recognition or enforcement of the decision would pose a threat to the interests of Ukraine;

8) in other circumstances as provided for in the laws of Ukraine."

54. The relevant provision of the International Treaties Act of 2004 reads as follows:

Section 19. Effect of international treaties of Ukraine in the territory of Ukraine

"1. International treaties that are in force, agreed to be binding by the *Verkhovna Rada* of Ukraine, are part of the national legislation of Ukraine and are applied in accordance with the procedure, provided for the provisions of the national legislation.

2. If an international treaty of Ukraine that is in force, establishes other rules than those stipulated by a respective legal act of Ukraine, the rules of international treaty shall apply."

55. The relevant provision of the Code of Civil Procedure reads as follows:

Chapter 3. Review of the court decisions under newly established or exceptional circumstances.

Article 423. Grounds for review

"1. Decisions, orders or rulings of a court, which have completed a case and have entered into legal force, may be reviewed on the grounds of newly discovered or exceptional circumstances.

2. The grounds for review of a court decision on the grounds of newly discovered circumstances are [the following]:

...

3) annulment of a court decision, which became the basis for the adoption of a court decision, which is subject to review.

3. The grounds for review of the court decisions in connection with exceptional circumstances are [the following]:

...

2) finding by an international judicial authority, whose jurisdiction has been recognised by Ukraine, that Ukraine had violated its international obligations when ruling on this case;

... ”

THE LAW

I. ALLEGED VIOLATIONS OF ARTICLE 6 § 1 OF THE CONVENTION

A. Commercial proceedings instituted by Company A. (2005-2007)

56. The applicant companies complained that the Ukrainian commercial courts had failed to notify them of the proceedings, thus affecting the equality of arms in the proceedings before the domestic courts. They also complained that the commercial courts had not provided adequate reasoning for their decisions regarding the applicant companies' argument that the Ukrainian courts lacked jurisdiction to consider the case. They relied on Article 6 § 1 of the Convention, which reads in its relevant part as follows:

> “In the determination of his civil rights and obligations ... everyone is entitled to a fair ... hearing ... by [a] ... tribunal ...”

1. Regarding the locus standi of the first applicant company to pursue the complaints of the second applicant company

57. As indicated above (see paragraph 49) the second applicant company was dissolved on 30 June 2015. The first applicant company expressed a wish to pursue its complaints before the Court.

58. The Government did not object.

59. As to the applicable legal principles, the Court reiterates that while, under Article 34 of the Convention, the existence of a “victim of a violation” is indispensable for putting the protection mechanism of the Convention into motion, this criterion cannot be applied in a rigid, mechanical and inflexible way throughout the whole proceedings. As a rule, and in particular in cases which primarily involve pecuniary and, for this reason, transferable claims, the existence of other persons to whom that claim is transferred is an important criterion, but cannot be the only one. Human rights cases before the Court generally also have a moral dimension, which it must take into account when considering whether to continue with the examination of an application after the applicant has ceased to exist (see *Spalldi D.O.O. v. Croatia*, (dec.), no. 39070/11, § 22, 26 September 2017 (Committee) with references therein). This is all the more so if the issues raised by the case transcend the person and the interests of the applicant (ibid.)

60. The Court observes that in the present case there was no connection between the impugned proceedings and the dissolution of the second applicant company (contrast, for example, *OAO Neftyanaya kompaniya YUKOS v. Russia* (dec.), no. 14902/04, § 443, 29 January 2009, and *Capital Bank AD v. Bulgaria*, no. 49429/99, § 80, ECHR 2005-XII (extracts)).

61. The Court furthermore notes that the first applicant company failed to provide evidence either of its status as legal successor to the second applicant company or of any legitimate interest in pursuing the complaints on behalf of the second applicant company. In accordance with Article 37 § 1 (c) of the Convention, the Court considers that it is no longer justified to continue the examination of the application to the extent that it was introduced by the second applicant company. Moreover, the Court finds no special circumstances relating to respect for human rights, as defined in the Convention and its Protocols that require it to decide otherwise. It will continue the examination of the complaints to the extent that they were raised by the first applicant company.

62. Accordingly, the application is to be struck out of the Court's list of cases in so far as it was introduced by the second applicant company.

2. Regarding the complaints raised by the first applicant company

(a) Failure to inform the first applicant company of the proceedings

(i) The parties' submissions

63. The first applicant company complained that it had not had an opportunity to present its defence before the commercial courts given that it had been notified of the hearing of 22 August 2005 before the first-instance court only on 26 January 2006. It also complained that its lawyer had received the respective letter informing the first applicant of the hearing on appeal of 27 October 2006 only on 31 October 2006.

64. The Government argued that an appeal to the Supreme Court of Ukraine constituted an extraordinary remedy, which was not to be used for the purpose of Article 35 § 1 of the Convention. Accordingly, the "final decision" in the commercial proceedings was the decision delivered by the HCCU of 26 June 2007, and the complaints with relation to commercial proceedings had to be rejected for failure to observe the six-month time-limit.

65. Additionally, the Government submitted that the first applicant company had been properly notified of the proceedings before the first-instance and the appellate courts and that the first applicant company was responsible for the fact that its representative had failed to appear at the hearing on 27 October 2006. The Government furthermore submitted that even if there had been any shortcomings regarding the proceedings before the first-instance court, they had been rectified at the appeal stage. Moreover, they argued that the first applicant company had known that (i) Company A. disputed the LCIA's jurisdiction, and (ii) during the LCIA arbitration the first applicant company had received a copy of the Disputed Contract; it should thus have foreseen that Company A. would defend its position before the Ukrainian courts. The Government asked the Court to dismiss this complaint as being manifestly ill-founded.

(ii) The Court's assessment

(α) Admissibility

66. The Court has already ruled that prior to the legislative changes of 2010 an appeal in cassation to the Supreme Court constituted an effective remedy in commercial cases (see *Cosmos Maritime Trading and Shipping Agency v. Ukraine*, no. 53427/09, § 61, 27 June 2019), and there are no grounds for departing from that finding in the present case. It accordingly rejects the Government's submission that the first applicant company failed to abide by the six-month time-limit.

67. The Court notes that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. It furthermore notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

(β) Merits

68. The Court reiterates that the Convention system requires the Contracting States to take the necessary steps to ensure the effective enjoyment of the rights guaranteed under Article 6 of the Convention. It is not the Court's task to indicate the preferred ways of communicating with litigants, the domestic courts being better placed to assess the situation in the light of practical circumstances. Nonetheless, it remains the responsibility of the Contracting States to ensure that the domestic authorities have acted with the requisite diligence in apprising the litigants of the proceedings so that their right to a fair trial is not jeopardised. That responsibility coexists with the duty on the applicants not to contribute to creating situations of which they complain before the Court, especially when proceedings in several jurisdictions are involved (see *Schmidt v. Latvia*, no. 22493/05, § 86, 27 April 2017, and the references therein). It is the responsibility of the Contracting States to ensure that the domestic authorities act with due diligence in ensuring that the defendants are informed of the proceedings against them and are given the opportunity to appear before the court and defend themselves (ibid., § 90). The Court considers that these principles also apply to the present case.

69. The Court notes that the first applicant company was informed of the hearing before the Commercial Court of 22 August 2005 only on 26 January 2006. Although the time-limit for the submission of the appeal was renewed, the first applicant company received the notification of summonses of the hearing before the Commercial Court of Appeal of 27 October 2006 on 31 October 2006 (see paragraph 36 above), again after the hearing had already been held.

70. The Court has previously held that national courts must identify any defect regarding notification prior to embarking on the merits of the case (see *Gankin and Others v. Russia*, nos. 2430/06 and 3 others, § 38, 31 May 2016).

The analysis that the Court expects to find in domestic decisions must go beyond a reference to a dispatch of judicial summonses, and must make the most of the available evidence in order to ascertain whether the absent litigant was in fact informed of the upcoming hearing sufficiently in advance (ibid.).

71. In the present case, the Court notes, firstly, that Company A. twice requested and was twice granted an adjournment of the hearings and, secondly, that the Commercial Court of Appeal – in the absence of any evidence that the first applicant company had been notified of the hearing – continued to consider the case and gave a decision (see paragraph 35 above). Moreover, as the record of the proceedings demonstrates, during the hearing of 27 October 2006, Company A. submitted additional oral submissions, to which the first applicant company did not have the opportunity to reply (*idem*).

72. The Court also notes that the courts of cassation did not comment on the issue of the notification procedure and did not respond to or remedy the applicant company's allegations regarding the consequent breach of their procedural rights (see paragraphs 40-42 above).

73. The foregoing considerations are sufficient to enable the Court to conclude that the principle of equality of arms under Article 6 § 1 of the Convention was not respected in the proceedings before the commercial courts.

74. There has accordingly been a violation of this provision in respect of the first applicant company.

(b) Lack of reasoning on the issue of jurisdiction

(i) Admissibility

(α) Parties' submissions

75. The Government submitted that the first applicant company had not exhausted the domestic remedies in that it had not lodged an application with the Commercial Court of Appeal asking for an expert to be appointed in order that the authenticity of the Disputed Contract could be verified nor did it lodge a separate claim against Company A. seeking the invalidation of the said contract. Moreover, they claimed that the national courts had had no grounds for examining the validity of the Disputed Contract, as the first applicant company had not challenged its authenticity before the national courts. In that regard they requested the dismissal as inadmissible (for non-exhaustion of domestic remedies) of the complaint regarding the alleged lack of jurisdiction of the Ukrainian commercial courts to consider the case.

76. The first applicant company disagreed. It argued that the arguments and evidence that it had submitted in defence of its position were sufficient to obtain a full investigation into the authenticity of the Disputed Contract. It maintained that the Convention did not require multiple courses of action seeking the same remedy when the action taken had been sufficient to obtain

that remedy. Furthermore, before the national courts it had invoked Article II of the New York Convention, asking that the commercial proceedings be terminated and the dispute referred to arbitration. The first applicant company submitted that it had duly contested the validity of the Disputed Contract before the national courts and that under Ukrainian law it had no grounds to seek the annulment of the Disputed Contract in separate proceedings, because one cannot ask the courts to declare a contract void, when it has never been entered into.

(β) The Court's assessment

77. The Court notes that the question of whether the requirement to exhaust domestic remedies has been satisfied is closely linked to the complaint about the alleged lack of adequate reasoning. It therefore considers that this objection should be joined to the merits of this complaint.

78. The Court furthermore considers that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention, and nor is it inadmissible on any other grounds. It must therefore be declared admissible.

(ii) Merits

(α) The parties' submissions

79. The first applicant company (i) complained that the national courts had ignored its main evidence (that is to say the expert report and the arbitral award, which had declared the Disputed Contract to be a forgery), and (ii) submitted in support of its argument that the Disputed Contract was null and void and that the Ukrainian courts had had no jurisdiction to examine the case. The above-mentioned evidence had been sufficient for the Commercial Court of Appeal to exercise its power and of its own motion appoint an expert in order to verify the authenticity of the Disputed Contract.

80. The Government objected, stating that the national courts had relied on national legislation which determined their jurisdiction and that the task of interpreting the national legislation, the rules of general international law and the relevant international agreements was to be undertaken by the national courts. They furthermore argued that mere dissatisfaction with the outcome of the proceedings could not raise an arguable claim under Article 6 of the Convention.

(β) The Court's assessment

81. The Court reiterates that it is not for it to deal with alleged errors of law or fact committed by the national courts unless and in so far as they may have infringed rights and freedoms that are protected by the Convention – for instance where it can, exceptionally, be said that they are constitutive of "unfairness" incompatible with Article 6 of the Convention (see *Bochan v.*

Ukraine (no. 2) [GC], no. 22251/08, § 61, ECHR 2015). The Court should not act as a court of fourth instance and will not therefore question under Article 6 § 1 the judgment of the national courts, unless their findings can be regarded as arbitrary or manifestly unreasonable (see *Zubac v. Croatia* [GC], no. 40160/12, § 79, 5 April 2018).

82. The Court also reiterates that, according to its established case-law concerning the proper administration of justice, judgments of courts and tribunals should adequately state the reasons on which they are based (see *García Ruiz v. Spain* [GC], no. 30544/96, § 26, ECHR 1999-I). The question whether a court has failed to fulfil the obligation to state reasons, deriving from Article 6, can only be determined in the light of the circumstances of the case. If, however, a submission would, if accepted, be decisive for the outcome of the case, it may require a specific and express reply by the court in its judgment (see, for instance, *Petrović and Others v. Montenegro*, no. 18116/15, § 41, 17 July 2018). The principle of fairness enshrined in Article 6 of the Convention would be disturbed where domestic courts ignore a specific, pertinent and important point made by an applicant (see, for instance, *Pronina v. Ukraine*, no. 63566/00, § 25, 18 July 2006, and *Mala v. Ukraine*, no. 4436/07, § 48, 3 July 2014).

83. In the present case, the Commercial Court of Appeal refused to consider the arbitral award and the expert report on the grounds that the Pecherskyy Court had not allowed the enforcement of the arbitral award (see paragraphs 35 and 44 above). The Court notes, however, that at the time of the judgment of the Commercial Court of Appeal, the judgment of the Pecherskyy Court had not entered into force and appeal proceedings were pending (see paragraph 45 above). No reasons were given as to why it was nevertheless possible to rely on the latter judgment. Moreover, no reply was given to the specific and important arguments of the first applicant company that the Ukrainian commercial courts lacked jurisdiction to consider the case. The first applicant company had referred to the arbitration clause and to Article II of the New York Convention and had submitted a copy of the arbitral award and an opinion issued by a British expert, who had found that the Disputed Contract was a forgery.

84. Given those circumstances, the Court considers that the Commercial Court of Appeal did not address the first applicant company's above-mentioned plea relating to the lack of jurisdiction of Ukrainian commercial courts, i.e. its key arguments that the arbitration clause was valid and that the Disputed Contract was null and void. Therefore, the decision of the Commercial Court of Appeal did not provide a reply to the first applicant company's argument which was decisive for the outcome of the case.

85. The Court therefore concludes that there has been a violation of Article 6 § 1 of the Convention in relation to the lack of adequate reasoning of the commercial courts' decisions. In view of this conclusion, the Court also

rejects the Government's objection concerning the non-exhaustion of domestic remedies.

B. Civil proceedings instituted by the first applicant company (2006 - 2007)

86. The first applicant company complained that that the courts involved in the proceedings had not given adequate reasoning for their decisions refusing to enforce the arbitral award. It relied on the provisions of Article 6 § 1 of the Convention mentioned above.

1. The parties' submissions

87. The Government argued that the first applicant company had abused its right to apply to the Court because it had only lodged an application for the recognition and enforcement of the arbitral award ten months after delivery of the decision making that award. In addition, the first applicant company had attempted to enforce the arbitral award, even after the Ukrainian commercial court of first instance had already delivered a decision that had not been in favour of the applicant companies. Thus, its actions had contradicted the principle of legal certainty.

88. The Government furthermore submitted that the first-instance court, when refusing to enforce the arbitral award, had applied the above-mentioned provision of the New York Convention narrowly and in a non-standard manner. The appellate court had made its decision on the basis of the Supreme Court's decision of 17 April 2007, which had held that the Ukrainian courts had had jurisdiction to examine the dispute. The Government submitted that the appellate court had set out the legal grounds of Article 396 of the Code of Civil Procedure, which corresponded to the provisions of Article V 2 (a) of the New York Convention. The Government concluded that the decision of the appellate court had been upheld by the court of cassation and that that decision had been well-reasoned.

89. The first applicant company disagreed, arguing that it had started enforcement proceedings once it had ascertained that Company A. would not voluntarily honour the arbitral award (that is to say ten months after its being ordered), which is not contrary to the three-year time-limit provided in the relevant Ukrainian legislation.

90. The first applicant company maintained its complaint, arguing that the civil courts had failed to give adequate reasons for not applying the New York Convention, which regulated, *inter alia*, the recognition and enforcement of arbitral awards and provided narrow grounds for refusing to enforce an arbitral award. Instead, the civil courts had applied Article 396 of the Code of Civil Procedure, which regulated the enforcement of foreign courts' judgments and provided much wider grounds than did Article V of the New York Convention for refusing to enforce an arbitral award.

2. The Court's assessment

91. The Court considers that it is not necessary to examine the question of an alleged abuse of the right of application, as this complaint is in any event inadmissible for the following reasons.

92. In the present case, the first applicant company's arguments, which were advanced before the Supreme Court, related to the facts and the applicable law – in particular, the argument that the national courts should have had applied the New York Convention instead of Article 396 of the Code of Civil Procedure (see paragraph 47 above). Before the Strasbourg Court the first applicant company complained that the civil courts had failed to give adequate reasons for not applying the New York Convention and for instead applying Article 396 of the Code of Civil Procedure (see paragraph 90 above).

93. The Court refers to the general principles noted above (see paragraph 81). It furthermore reiterates that it is primarily for the national authorities, notably the courts, to resolve problems of interpretation of national legislation (see *Perez v. France* [GC], no. 47287/99, § 82, ECHR 2004-I). This also applies where domestic law refers to rules of general international law or international agreements (see *Markovic and Others v. Italy* [GC], no. 1398/03, § 108, ECHR 2006-XIV, with references therein).

94. The Court further refers to its findings in relation to the commercial proceedings, which have led to a violation of Article 6 § 1 of the Convention – namely that the Commercial Court of Appeal failed to address the key arguments, which were decisive for the outcome of the case, that the arbitration clause was valid and that the Disputed Contract was null and void (see paragraph 84 above). The Court notes that the reference of the Kyiv Court of Appeal to the Supreme Court's decision of 17 April 2007 (see paragraph 46 above) in the commercial proceedings, which were found not to be fair, may have implications also for the civil proceedings, which it will be open to the first applicant company to pursue (see paragraph 55 above). However, in so as far as it is relevant for the purposes of the present complaint, in the civil proceedings the first applicant company did not complain about the validity of the arbitration clause and the invalidity of the Disputed Contract; rather, it disagreed with the law that was applicable in relation to the enforcement of the arbitral award, as established by the Kyiv Court of Appeal. The Court finds that the complaint before it, as it has been narrowly argued in relation to the civil proceedings, does not transcend the question of the interpretation of the applicable law, which primarily falls for the domestic courts to resolve.

95. In these circumstances, the Court finds that this complaint is manifestly ill-founded and must be rejected, in accordance with Article 35 §§ 3 (a) and 4 of the Convention.

II. ALLEGED VIOLATION OF ARTICLE 1 OF PROTOCOL NO. 1 TO THE CONVENTION

96. The first applicant company complained, on account of the refusal of the civil courts to grant it leave to enforce the arbitral award, of a violation of Article 1 of Protocol No. 1 to the Convention, which reads as follows:

> "Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.
>
> The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties."

97. The Government acknowledged that – when the Pecherskyy Court had given the ruling dismissing the first company's application for the enforcement of the arbitral award – there had been an interference with the first applicant company's right to the peaceful enjoyment of its possessions. However, they submitted that that interference had been lawful and had pursued a public-interest aim (namely, the protection of the rule of law and legal certainty). Moreover, the Government argued that the first applicant company could not be said to be bearing an excessive burden, as enforcement of the arbitral award would have violated the rights of others and the rule of law. They submitted that in the present case, there had been no violation of the first applicant company's rights under Article 1 of Protocol No. 1 to the Convention.

98. The applicant company maintained its complaint, arguing that the interference had been unlawful, as the civil proceedings had not been carried out in compliance with Article 6 of the Convention and that the civil courts had applied a law in a manner that had not been sufficiently accessible, precise and foreseeable.

99. The Court reiterates that a "claim" can constitute a "possession", within the meaning of Article 1 of Protocol No. 1, if it is sufficiently established as to be enforceable (see *Burdov v. Russia*, no. 59498/00, § 40, ECHR 2002-III). It furthermore reiterates that it is the State's responsibility to make use of all available legal means at its disposal in order to enforce a final court decision, even in cases involving litigation between private parties (see, *mutatis mutandis, Fuklev v. Ukraine*, no. 71186/01, §§ 89-91, 7 June 2005, and *Sovtransavto Holding v. Ukraine*, no. 48553/99, § 96, ECHR 2002-VII).

100. The Court observes that the present complaint rests on the hypothesis that the Ukrainian civil courts should have granted leave to the first applicant company to enforce the arbitral award, which had been issued following a dispute between the private companies.

101. The Court notes that the responsibility of the State lay in the obligation to provide a legal mechanism for the enforcement of arbitral awards. Such a legal mechanism was indeed available; the applicant used this legal mechanism and was not successful. The Court considers that although the State, through its judicial system, had provided a forum for the determination of the applicant company's rights and obligations, this does not automatically engage its responsibility under Article 1 of Protocol No. 1 (see, *mutatis mutandis*, *Zagrebačka banka d.d. v. Croatia*, no. 39544/05, § 250, 12 December 2013, and *Kahveci v. Turkey* (dec.), no. 21903/05, 9 January 2018). The State may be held responsible for losses caused by such determinations if court decisions are not given, in accordance with domestic law, or if they are flawed by arbitrariness or manifest unreasonableness, contrary to Article 1 of Protocol No. 1 (see *Zagrebačka banka d.d.* and *Kahveci*, both cited above). However, the Court reiterates the point made in paragraph 94 above, namely that the findings in relation to the commercial proceedings regarding the validity of the arbitration clause and the fact that the Disputed Contract relied on to oppose it is null and void, may be of relevance for subsequent attempts by the first applicant company to enforce the arbitral award.

102. In view of the above and given the Court's findings regarding the complaint about the alleged failure of the civil courts to provide adequate reasoning (see paragraph 94 above), the Court concludes that the present complaint is manifestly ill-founded and must be rejected, in accordance with Article 35 §§ 3 and 4 of the Convention.

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

103. Article 41 of the Convention provides:

> "If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

A. Damage

104. The first applicant company claimed 4,006,961.17 United States dollars (USD) – corresponding to the amount of the arbitral award, plus interest at 10% per annum, compounded monthly from 18 November 2004 until the payment of the above sum – in respect of pecuniary damage. The first applicant company did not lodge a claim in respect of non-pecuniary damage.

105. The Government asked that the claim for pecuniary damage be rejected because they considered that there had been no violation of the first

applicant company's rights under Article 1 of Protocol No. 1 to the Convention.

106. The Court considers that it cannot speculate as to what the outcome of the proceedings would have been if they had been in conformity with the requirements of Article 6 § 1 of the Convention (see *Milatová and Others v. the Czech Republic*, no. 61811/00, § 70, ECHR 2005-V). It, therefore, dismisses this claim.

B. Costs and expenses

107. The first applicant company also claimed USD 49,997 and 25,836.47 pounds sterling (GBP) for the costs and expenses incurred before the LCIA, together with interest at a rate of 10% per annum compounded monthly from 12 September 2005. It also claimed USD 59,666, GBP 1,570 and USD 2,425.75 for the costs and expenses incurred before the domestic courts, and 226,659 Swiss francs (CHF) and USD 21,307 for the expenses incurred before the Court. MBT did not submit the contracts for legal services concluded with its Ukrainian lawyer and its Swiss and British counsels. It submitted copies of invoices for legal services issued by its Ukrainian lawyer and British counsel. Those documents specify the total hours worked, the hourly rate and the total amount to be paid for the services provided. The invoices from Mr P. Landolt's Swiss law firm contain information regarding the time spent on a particular piece of work. Actual payment of those invoices was evidenced documentarily only in respect of the period between January 2007 and April 2009, for the total amounts of USD 35,541.85 (corresponded to around 23,813 euros (EUR) and CHF 33,717.30 (corresponded to around EUR 50,575), which were paid respectively to the Ukrainian lawyer and the Swiss counsel and in respect of the court fees in the commercial proceedings before the Supreme Court. No proof of payment of any other invoices was submitted.

108. The Government submitted that the first applicant company's claims relating to the arbitration proceedings and its claim for pecuniary damage should be dismissed, and that its claims relating to the domestic proceedings and proceedings before the Court were unsubstantiated, unreasonable and excessive.

109. According to the Court's case-law, an applicant is entitled to the reimbursement of costs and expenses only in so far as it has been shown that these have been actually and necessarily incurred and are reasonable as to quantum. In the present case, regard being had to the documents in its possession and the above criteria, the Court considers it reasonable to award the first applicant company the sum of EUR 8,000, covering costs and expenses in the domestic proceedings and for the proceedings before the Court. There is no call for the Court to order the reimbursement of costs and expenses incurred during the arbitration proceedings, as those proceedings do

not constitute "domestic proceedings" for the purposes of a claim for costs and expenses.

C. Default interest

110. The Court considers it appropriate that the default interest rate should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

FOR THESE REASONS, THE COURT, UNANIMOUSLY,

1. *Decides* to strike out of the list the application in so far as it was lodged by the second applicant company;

2. *Joins* to the merits the Government's objection of failure to exhaust domestic remedies in so far as it relates to the first applicant's complaints under Article 6 § 1 of the Convention that concern the proceedings before the commercial courts (2005-2007) and dismisses it, having examined the merits;

3. *Declares* the complaint under Article 6 § 1 of the Convention (in as much as it was lodged by the first applicant company) regarding the proceedings before the commercial courts admissible, and the complaints under Article 6 § 1 of the Convention regarding the proceedings before the civil courts and under Article 1 of Protocol No. 1 inadmissible;

4. *Holds* there has been a violation of Article 6 § 1 of the Convention in relation to equality of arms in the proceedings before the commercial courts;

5. *Holds* that there has been a violation of Article 6 § 1 of the Convention in relation to the lack of adequate reasoning of the commercial courts' decisions;

6. *Holds*
   (a) that the respondent State is to pay the first applicant company, within three months from the date on which the judgment becomes final, in accordance with Article 44 § 2 of the Convention, EUR 8,000 (eight thousand euros), plus any tax that may be chargeable to the first applicant company in respect of costs and expenses;
   (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amount at a

rate equal to the marginal lending rate of the European Central Bank during the default period, plus three percentage points;

7. *Dismisses* the remainder of the first applicant company's claim for just satisfaction.

Done in English, and notified in writing on 14 January 2021, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Victor Soloveytchik	Síofra O'Leary
Registrar	President