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**UKRAINE LEGAL AND POLICY SUPPORT
Documents on Legal Procedures of Market Members to
Defend Their Rights in Courts of Arbitration (Task A3)
NIS Institutional Based Services Under the Energy
Efficiency and Market Reform Project
Contract No CCN-Q-00-93-00152-00**

**Ukraine Power Sector Reform
Delivery Order No 18**

Final Report

Prepared for

U S Agency for International Development
Bureau for Europe and NIS
Office of Environment, Energy and Urban Development
Energy and Infrastructure Division

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EXECUTIVE SUMMARY

This report was prepared to comply with the tasks of the Delivery Order No 18 and represents the Legal and Policy Support Deliverable number 2 "Documents on legal procedures for Market Members to defend their rights in courts of arbitration", with its underlying Statement of Work item IV A (2)

Consultants of Hagler Bailly developed the tools for defending the Wholesale Electricity Market Members' rights in courts jointly with the representatives of the National Electricity Regulatory Commission (NERC) legal department, the National Dispatcher Center (its separate division "Energorynok" (Energy market) and the Wholesale Electricity Market Secretariat. The Ukrainian Law Company "Aktiv" developed the Draft Instruction on Claims and Legal Actions in the Wholesale Electricity Market according to the sub-contract with Hagler Bailly dated August 1st, 1998 # D-168-0050-P-8-932

Development of legal procedures for defending the rights of Wholesale Electricity Market Members (WEMM) included preparation of the Draft Agreement developed by the Working Group of the WEM Board, extracts from which are attached to this report as Appendix A. The Agreement between Members of the Wholesale Electricity Market (Wholesale Market Members' Agreement, hereafter referred to as WEMMA) of Ukraine signed on November 15th 1996

The WEMMA envisages a possibility for the Market Members to file claims of lawsuits against debtors who are also WEM Members. The Ukrainian legislation stipulates compulsory pre-court procedure for settlement of disputes. This procedure stipulates that the claim shall be of the standard format and be submitted within the time limits determined by the Arbitration Procedure Code of Ukraine. But it should be feasible to define certain specific procedures for claims and legal actions besides the existing procedure of the pre-court settlement of disputes. These specific procedures should take into account the legal structure of WEMMA, sphere of competence of the WEM Board and Settlement System Administrator. Another important feature of the procedure of claims and legal actions within the WEM is that the economically viable system of purchase of the electricity shall be based on the competitive production of energy and makes actually impossible any claims from Suppliers against Generators for insufficient or excessive production of the energy.

The procedure of claim preparation and initiation of legal actions against Debtors, i.e. Energy Suppliers, which fail to pay to the Market, is not perfect. Because of that reason it was decided that a separate Annex to the WEMMA in the form of appropriate Instruction should be drafted

The Draft Instruction on Claims and Legal Actions in the Wholesale Electricity Market is attached to this report as Appendix B

It is envisaged that the Instruction on Claims and Legal Actions will improve the procedure for claim preparation and initiation of legal actions in the Court of Arbitration. In order to simplify the procedure of claim consideration, it should be expedient to foresee in the WEMMA a provision, that the Parties agree to settle legal issues in the Court of Arbitration of Kyiv City, thus meaning that they chose to be subject to application of the Arbitration Procedure Code

The WEMMA does not stipulate clearly the role of the WEM Arbitration Commission. The role and sphere of competence of the WEM Arbitration Commission shall be defined in the future by the Law of Ukraine “On Basis for Functioning of the Wholesale Electricity Market”, which is being drafted by the group of experts including the representatives of the National Electricity Regulatory Commission (NERC), Ministry of Energy (Minenergo), Verkhovna Rada of Ukraine and other institutions

APPENDIX A
EXTRACT FROM THE DRAFT WHOLESALE ELECTRICITY MARKET
MEMBERS' AGREEMENT (WEMMA)

PART V - LEGAL TERMS AND CONDITIONS

18 LIABILITY OF THE PARTIES

18 1 Substantiation and forms

18 1 1 Legal liability in accordance with this Agreement means material and other liability for non-fulfillment or undue fulfillment of obligations by each of the Parties according to the Agreement

18 1 2 Debtor is a Party to this Agreement, which did not fulfill its obligations according to the Agreement or fulfilled them in undue order and is considered to be in default of this Agreement according to provision 4 3 3

18 1 3 Obligations emerge and responsibility comes into force as follows

- a) the Generators are responsible before the Suppliers for non-execution of the load schedule prepared by the Settlement System Administrator based on bids under the Market Rules,
- b) the Suppliers shall be responsible before the Commission Agent, or electricity Generators for non-payment or untimely payment for electricity purchased from them,
- c) the Suppliers shall be responsible before the Commission Agent or the Generators for non-performance of the declared electricity purchase under the Market Rules,
- d) the Commission Agent shall be responsible before the Consignors for improper execution of functions by the Commission Agent within the relevant system of payments to its account from the WEM account,
- e) the Dispatcher of the Integrated Energy System, shall be responsible for non-fulfillment of the load schedule developed by the Settlement System Administrator, except cases when such non-fulfillment is caused by the need to prevent emergencies in the Ukraine's Integrated Energy System and liquidate their consequences under the Market Rules,

- f) the Market Funds Administrator before the Parties to the Agreement for untimely or improper administration of funds received to the WEM account within the relevant system of payments to its account from the WEM account,

18 2 Claim and complaint presentation procedure

18 2 1 If a Debtor does not pay for electricity purchased by it, the Generators in their interests shall oblige the Commission Agent to serve a claim to such Debtor requiring him to pay off the debt, and notify the Board of the Wholesale Electricity Market about this

18 2 2 If the Debtor agrees to the claim, he shall send his reply to the claim to the Commission Agent within the term provisioned by the current legislation, in which he shall express his agreement with the claim

18 2 3 If the Debtor does not agree with the presented claim, he shall send his reply to the claim within the term provisioned by clause 18 2 2 whereby he shall list justified reasons for his disagreement with the claim requirements In case of Debtor's disagreement with the claim requirements or if his reply is not available, the Commission agent shall submit the dispute to the Arbitration Commission of the Wholesale Electricity Market

18 2 4 The Arbitrage Commission shall accept and consider a matter according to the Dispute procedure and make a decision

If such decision satisfies the Parties to the dispute, it is the subject to execution under the current legislation

If the Arbitrage Commission decision does not satisfy a Party to the dispute, it may apply to the Arbitrage Court of Ukraine

In this case, the Commission Agent shall pay from its settlement account the state tax based on the charges of interested persons to be protected by the claim The cash collections to pay the state tax and their return shall be carried out according to MFP

18 3 Mechanism for liability scope determination

18 3 1 Monthly electricity volume obtained from the Wholesale Electricity Market, its cost and calculation of the forfeit penalty shall be listed in the claim sent by the Commission Agent to the Debtor Electricity volume obtained but unpaid by the Supplier shall be determined based on data presented by the Chief of Commercial Metering and by the Market Fund Administrator Not only banking but also other forms of debt payment shall be taken into the account

18 4 Rules to determine Supplier's debt to the Generator

18 4 1 Determination of Supplier's debt to a specific Generator shall be carried out in terms of the following formula

$$C = X_n \cdot B$$

where **C** is the debt sum of Supplier against whom the claim (action) is brought for electricity purchased from the Commission Agent before the Creditor who has brought this claim (action),

B is the total sum of the debt to the Commission Agent for purchased electricity of the Supplier against whom the claim (action) is brought

X_n is a coefficient of Supplier's (B) debt to Generator (a) that is determined by

$$X_n = a / \Sigma ,$$

Σ is the total debt sum due to be paid to all Creditors from the account of the Wholesale Electricity Market

$$\Sigma = a_1 + a_2 + a_3 + \dots + a_n , \text{ where}$$

a₁ **a₂**, **a_n** are the sums due to be paid to each Creditor

a is the total debt sum due to be paid from the Wholesale Electricity Market's account to the Generator who has presented the claim (action)

18 5 Sharing of risk

18 5 1 Each Market Member (other than the Defaulting Market Member) shall be severally liable for its Contributory Share of all sums (including all relevant taxes) which the Defaulting Market Member is required to pay in respect of its electricity purchased from the Commission Agent as determined under the Market Rules. The Contributory Share shall be determined by the Market Funds Procedure. The Defaulting Market Member is required to pay a penalty equivalent to an interest charge on all sums owed which is incurred between the due date and the eventual payment date.

18 5 2 The Defaulting Market Member shall fully indemnify the Commission Agent, Dispatch and any other Parties affected against all liability, loss or damage which it may incur through disconnection.

18 6 Any suspension or termination of a Party under the terms of this Section shall not remove or reduce in any way its rights and liabilities under this Agreement accrued prior to such suspension or termination.

APPENDIX B

DRAFTED BY THE
LEGAL COMPANY "AKTIV"
SUB-CONTRACT No D-168-005-P-8-932
AS OF AUGUST 1, 1998

LEGAL OPINION ON LEGAL MECHANISMS TO DEFEND THE RIGHTS OF MEMBERS OF THE WHOLESALE ELECTRICITY MARKET IN ARBITRATION COURTS OF UKRAINE

This Legal Opinion has been prepared on the basis of Subcontract Agreement No D-168-005-P-8-932 of August 1, 1998 under the supervision of Hagler Bailly, Inc within the project in support of the power sector restructuring and legal reform in Ukraine. The Subcontract Agreement sets a task to develop legal mechanisms to protect the rights of Members of the Wholesale Electricity Market (hereinafter referred to as the WEM) in arbitration courts and provide recommendations on the ways of filing claims within the WEM Members' Agreement (hereinafter referred to as the WEMMA)

The Legal Opinion includes the following sections

- INTRODUCTION
- DRAFT INSTRUCTIONS FOR PROCEDURE OF COMPLAINTS AND CLAIMS SETTLEMENT
- CONCLUSIONS

INTRODUCTION

A legal analysis of the WEMMA allowed us to make a conclusion on the fact that relations between its Members are built under commission contracts between Generators and a Commission Agent (NDC) and the sale/purchase contract between the Commission Agent (NDC) and Suppliers

The objective of this conclusion is to study and propose the mechanism to defend the rights of Parties to the WEMMA in the event of non-fulfilment by Parties of their obligations under the WEMMA

While preparing this conclusion the following legislative and regulatory acts were considered

The Constitution of Ukraine, Laws of Ukraine “On Ownership”, “On Enterprises in Ukraine”, “On Entrepreneurship”, “On Businesses”, “On Electricity Sector”, the Civil Code of Ukraine, Arbitration Procedure Code of Ukraine, as well as relevant Decrees of the President of Ukraine, Resolutions of the Cabinet of Ministers of Ukraine and internal regulatory acts of the Ministry of Energy of Ukraine, the National Electricity Regulatory Commission of Ukraine and the National Bank of Ukraine

The rights of the Parties to the WEMMA can be defended following the established procedure of complaints and claims settlement

The mechanism of conducting cases on complaints and claims shall be set out in the form of Instructions on claims and legal actions settlement, which will be executed in a form of Annex to the WEMMA, i e adopted by all Parties

In our opinion, the Instructions shall include the following sections

Section I General Provisions

Section II Procedure of Complaints Settlement

A Statement of Complaint

B Reply to a Complaint

Section III Preparation for Filing a Claim

A Consideration of the Matter on Prosecuting Claims by the WEM Board

B Payment of the State Duty

Section IV Procedure of Claims Settlement

A Filing a Claim

B Reply to a Claim

C Procedure of Abiding by the Court Decisions

D Report on Work Performed in Respect of Claims

INSTRUCTION

ON PROCEDURE FOR COMPLAINTS AND CLAIMS SETTLEMENT

SECTION I GENERAL PROVISIONS

The Instruction determines principles and general provisions of settling complaints and claims between the Members of the Wholesale Electricity Market Members' Agreement (hereinafter referred to as the WEMMA) and has been developed in compliance with the civil law and Arbitration Procedure Code of Ukraine

The objective of this Instruction is to establish common rules and regulations with respect to the procedure of settling disputes, which may arise between the Members of the WEMMA, for all Members of the Wholesale Electricity Market (hereinafter referred to as the WEM)

The duty to settle complaints and claims in the WEM shall be imposed on the Commission Agent

Terms and definitions

Commission Agent

A Party to the Commission Agreement, which undertakes on behalf of the other Party (Consignor) to make, for remuneration, one or several agreements on its behalf and for account of the Consignor

Debtor

A Member of the WEM which fails to fulfill its obligations under the WEMMA or fulfilled them improperly

Creditor

A Party to the WEMMA to whom a Market Member fails to fulfill its obligations under the WEMMA or fulfilled them improperly

Ground for claims

Existence of an overdue debt

Right to a Claim

The right to claim for fulfillment of obligations under the WEMMA in due time

Origin of the right to a claim

The moment from which the right is given to claim for fulfillment of obligations under the WEMMA

Other terms used in this Instruction have the same meaning as in the WEMMA

SECTION II PROCEDURE OF COMPLAINTS SETTLEMENT

A Statement of Complaint

1 In the event of origin of the right to a claim, a Commission Agent as authorized by all Consignors, shall submit, within ten days, a complaint to all Debtors involved in arrears

2 The complaint shall state

(a) full names and addresses of the Commission Agent and Debtor, date of submission and number of the complaint,

(b) circumstances on the ground of which the complaint was submitted, proofs confirming these circumstances, references to relevant normative acts

Circumstances on the ground of which the complaint was submitted are a fact that the Debtor had received electricity and a fact of non-payment for this electricity Proofs that confirm these circumstances may be a reconciliation statement on debts signed by the Debtor, the Commission Agent and an organization performing electricity metering under the WEMMA, and/or a notice of the Market Funds Administrator and a person in charge of metering system devices

The complaint should contain references to the civil laws in part of non-fulfillment of obligations and to relevant clauses of the WEMMA,

(c) claims of the Commission Agent to force the Debtor to pay outstanding amount for electricity received and penalty, if it is specified

(d) the amount in dispute and its calculation, Commission Agent's requisites for payments The amount in dispute shall be determined as a size of debt for a particular period (one month) on the performances of which a reconciliation statement and calculation of penalty, if specified, have been made

The Commission Agent shall indicate the WEM Clearing account number,

(e) the list of documents enclosed with the complaint, as well as other evidences The stated documents shall be the originals or copies properly certified The Commission Agent may attach no documents that confirm the claim, if a Debtor holds them This shall be noted in the complaint

3 The Chief of the Commission Agent, its deputy or other authorized person shall sign the complaint

The complaint shall be sent to the Debtor by registered mail

4 The Commission Agent shall, every month, send a written report to the WEM Board on work performed in connection with submission of complaints to Debtors during the current month

B Reply to a Complaint

1 The Debtor shall consider the complaint within the term not exceeding one month from the date of the complaint receipt. If the Debtor admits the claims, it shall, within a month, send its reply to the complaint to the Commission Agent. Such reply shall state the acknowledgment of the claims and transfer of funds with reference to requisites of the payment document.

2 If the Debtor admits the claims but does not make transfers to the WEM Clearing account, the Consignor shall, twenty days after receipt of the reply to the complaint, have the right to give instruction to the bank on transfer of the sum acknowledged by the Debtor in an indisputable order. Indisputable recovery of funds shall be entered in the payment request blank to be then submitted by the Commission Agent to the bank it is served by. The bank shall accept the payment requests during ten calendar days from the date of their issuance. The date of filling out the payment request shall not be taken into account.

The payment request shall be accompanied by the Debtor's reply (original). If it does not indicate the sum of the acknowledged complaint, a copy of the complaint shall be also attached to. After writing off sums from the Debtor's account, the Debtor's original reply shall be kept in the documents of the payer's bank.

The Commission Agent shall bear responsibility for soundness and accuracy of data entered in settlement documents in the event of indisputable writing-off. For unsound writing-off of the sum in an indisputable order, it shall pay a penalty in the amount of 10 % of the sum written off.

3 In the event of non-admission of claims by the Debtor or absence of its reply to the complaint during a month, the Commission Agent shall bring an action against the Debtor in court in compliance with the procedure established by these Instructions.

SECTION III PREPARATION FOR FILING A CLAIM

A Consideration of the Matter on Prosecuting Claims by the WEM Board

1 In the event of partial or full non-acknowledgment of claims by the Debtor or leaving of the claim without answer during a month, the Commission Agent shall submit to the nearest meeting of the WEM Board an application for filing claims and prepare draft statements of claim to the Debtor along with all required documents.

An application to the WEM Board shall contain

- a) the calculation of debts of each Debtor,
- b) the report of the Commission Agent on the results of work it carried out on dispute settlement before arbitration,
- c) proposals on ways of repayment of arrears,
- d) petition for accumulation of funds to pay taxes

3 At the Board's meeting on issues of filing claims at the recourse of the Commission Agent, the WEM Secretariat shall summon the authorized representatives of the Debtor

4 With due account of objective circumstances and by the results of prosecution of application, the WEM Board can make decision, in each particular case, on

- a) delay in filing a claim, but not in excess of three months,
- b) allocations to the target fund to ensure payment of the state duty

B Payment of State Duty

1 To accumulate funds required to pay the state duty, the target fund shall be created The WEM Board shall make a decision on creation of such fund on the basis of the Commission Agent's application for necessity of filing a claim

The fund shall be created in the amount required for filing particular claims at the expense of deductions from funds payable to persons in interests of whom the claim is sued Deductions shall be made in proportion to parts of debts of the total sum

SECTION IV PROCEDURE OF CLAIMS SETTLEMENT

A Filing a Claim

1 The Commission Agent shall submit a claim to each Debtor pursuant to the decision of the WEM Board It shall, within ten days, notify the parties concerned to that effect

2 The statement of claim shall contain

- a) the name of arbitration court the statement of claim to be submitted to,

- b) names of Claimant and Respondent and their requisites. It is necessary to indicate full names, postal addresses, and accounts. If the Commission Agent represents the Claimant, it shall indicate in the statement the number of the WEM Clearing account,
- c) the claim cost. The claim cost shall comprise the sum of the principal debt and amount of penalty (if specified). The cost of the claim shall not include the sum of the state duty payable, but it shall be indicated by the Claimant in recalculation of sums to be collected from the Respondent,
- d) the content of claims. If the claim is submitted to several Respondents, the content of claims shall be given for each of them. Claims made in the statement shall meet claims made in the complaint,
- e) the explanation of circumstances on which claims are based, evidences confirming the claim, substantiated calculation of sums to be levied or disputed, laws on the basis of which the claim is filed. All these data shall meet data stated in the complaint,
- f) information on measures taken to settle the dispute before arbitration. The complaint number and date and results of its consideration shall be stated. If the complaint is rejected or acknowledged partially, the claim shall be filed for the part of the disputable sum rejected or not acknowledged,
- g) the list of documents and other evidences enclosed with the statement of claim. The statement of claim shall be accompanied by copies of necessary documents stating that the original documents will be submitted at the sitting of court. Evidence of sending a copy of the statement of claim to the Respondent, as well as evidence of paying the state tax shall be attached thereto.

3. A copy of the statement of claim shall be sent by registered mail to the Respondent. If the Respondent does not have documents to which references are made in the statement of claim, copies of the said documents should be attached thereto.

B Reply to a Claim

1. The Respondent shall, not later than three days from receipt of the court decision on taking action, be obliged to send

- a) to court, a reply to the statement of claim and all documents confirming its disagreement with the claim,
- b) to the Claimant and other respondents, a copy of its reply.

2. The reply shall be signed by the Chief of the Respondent or its deputy.

The reply shall state

- a) the name of the Claimant and number of the case,
- b) grounds for full or partial rejection of claims of the Claimant with reference to effective laws, as well as proofs which substantiate the rejection of the statement of claim,
- c) the list of documents enclosed with the reply (including copies of the reply and documents attached thereto that were sent to litigants)

C Procedure of Abiding by the Court Decisions

1 Abiding by the arbitration court decision shall be effected on the basis of the order issued by court, which is a writ of execution

The Commission Agent for execution not later than three months from the date of decision can submit the order issued

2 Indisputable recovery of funds shall be entered in the payment request blank to be then submitted by the Commission Agent to the bank it is served by The bank shall accept the payment requests during ten calendar days from the date of their issuance The date of filling out the payment request shall not be taken into account

The original order or a copy properly executed shall be enclosed with the payment request

3 After the transfer by the Debtor of funds, as decided by the court, to the Clearing account the amount of the tax paid shall be returned to persons at the expense of whom the target fund was created to pay the state tax

D Report on Work Performed in Respect of Claims

1 The Commission Agent shall, every month, inform the WEM Board about claims made and the results thereof

2, The Creditor shall be granted the right to make complaints and claims to Debtors on its authority if

- a) the Commission Agent fails to fulfill its obligations on conducting work connected with complains and claims,
- b) the WEM Board rejects the creation of the target fund to ensure the state tax payment

CONCLUSIONS

1 The current procedure for consideration of disputes is quite a protracted process and requires considerable expenses

2 Article 12 of Arbitration Code of Practice of Ukraine stipulates that enterprises and organizations shall have the right to refer a dispute within the jurisdiction of arbitrators for its settlement. At present the activity of the arbitration court is governed by the Provisions on Arbitration Court for Settlement of Economic Disputes approved by Resolution of the State Arbitration under the Council of Ministers of the USSR of December 30, 1975, No 121

In pursuit of reducing expenses for arbitration, we consider it necessary to establish the procedure of disposing of disputes arising in the power sector through the institution of umpires

2 The significance of the power sector in the economy of Ukraine, the necessity for dynamic power in settlement of disputes and the subject of the WEM activity (electricity) itself require the introduction of a time-reduced scheme for disposing of disputes arising in the power sector. This may be done by establishment of the institution of arbitrators specialization (specialized arbitration process). In the system of existing court offices shall be created a specialized subdivision - board. For this purpose it is necessary to make relevant changes in the current legislation

3 With the same purpose it is necessary to make changes in the active legislation on determination of the jurisdiction of disputes in the power sector at the location of the Claimant (Commission Agent). This promotes specialization and time saving for considering cases