

Case Note

THE VALIDITY, EFFECTIVENESS, AND ENFORCEABILITY OF ARBITRATION AGREEMENTS: ISSUES AND SOLUTIONS

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To cite this note: *O Surzhenko, S Kravtsov, N Golubeva* ‘The Validity, Effectiveness, and Enforceability of an Arbitration Agreement: Issues and Solutions’ 2021 4(12) *Access to Justice in Eastern Europe* 116–130. DOI: <https://doi.org/10.33327/AJEE-18-4.4-n000088>

To link to this note: <https://doi.org/10.33327/AJEE-18-4.4-n000088>

Submitted on 12 Jul 2021 / Revised 20 Aug 2021 / Approved 18 Oct 2021

Published online: 01 Nov 2021 [View data](#)

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ACKNOWLEDGEMENTS

The authors would like to express their gratitude to the reviewers and editors of the journal and to the English editor, Sarah White.

CONTRIBUTORSHIP

The authors contributed jointly to this study and its results. Serhii Kravtsov is responsible for the exploration of sources and for the data collection, analysis, and writing; *Olga Surzhenko and Nelli Golubeva* are both responsible for analysis and interpretation; all the co-authors take responsibility for the content of the paper. The content of the paper was translated with the participation of third parties under the authors' oversight.

THE VALIDITY, EFFECTIVENESS, AND ENFORCEABILITY OF AN ARBITRATION AGREEMENT: ISSUES AND SOLUTIONS

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Abstract *The main reason for dispute in international commercial arbitration is the existence of an arbitration agreement concluded between the parties to a foreign trade agreement. The procedure of dispute resolution in international commercial arbitration will depend on the extent to which this arbitration agreement is concluded correctly in accordance with the norms of international and national law. Quite often, in the law enforcement activities of both national courts and arbitrations, there are questions about the validity, effectiveness, and enforceability of an arbitration agreement. In different countries, this issue is addressed ambiguously. In one case, national law takes precedence, and, accordingly, national courts are empowered to consider the validity, effectiveness, and enforceability of an arbitration agreement. In other cases, however, the autonomy of the arbitration agreement is a priority aspect of the consideration of any procedural issues by international commercial arbitration as the only and indisputable body authorised by the parties to the foreign trade agreement to consider a particular dispute. The article analyses doctrinal and legislative approaches to this issue, in which the authors come to the logical conclusion that national courts do not consider the validity, effectiveness, and enforceability of an arbitration agreement.*

Keywords: *international commercial arbitration, arbitration agreement, autonomy of arbitration agreement.*

1 INTRODUCTION

The arbitration agreement is the cornerstone of any arbitration proceedings. It is the legal basis for application to international commercial arbitration, and recognition of its competence determines all subsequent arbitration proceedings and, ultimately, the fate of the arbitral decision. These are its positive (prorogation) and negative (derogation) effects, as the consequence of the arbitration agreement is the removal of the dispute from the jurisdiction of state courts.

An arbitration agreement may be included in the text of the foreign trade contract ('arbitration clause') or concluded as a separate agreement ('arbitration agreement'), thus separated from the main contract.

The concept of an arbitration agreement is contained in Art. 7 of the Law of Ukraine 'On International Commercial Arbitration'. It states that an arbitration agreement is an agreement between the parties to submit to arbitration all or certain disputes that have arisen or may arise between them in connection with any specific legal relationship, regardless of whether they are contractual or not.

In some countries (Belarus, Great Britain, Denmark, Canada, Norway, Russia, the USA, Ukraine, China, France, Germany), there is the same approach to the legal definition of the arbitration clause and the arbitration agreement. In some European countries, such as Spain, Portugal, Lebanon, and a number of Latin American countries (Argentina, Brazil, Venezuela, El Salvador, Ecuador), there is a special relationship with the arbitration agreement. According to Art. 5 of the Venezuelan Commercial Arbitration Act, an 'arbitration agreement' is an agreement by which the parties submit to arbitration all or certain disputes that have arisen or may arise between them concerning a particular legal relationship. In addition, the arbitration agreement is possible in the form of an arbitration clause in the contract or in the form of a separate agreement. Art. 6 of this Act stipulates that the arbitration agreement must be established when writing any document or set of documents that are confirmed by the will of the parties to link themselves to the arbitration. The reference made in the agreement to the document containing the arbitration clause shall be set out in the arbitration agreement, provided that such agreement is established in writing.¹

In accordance with the law and based on the legislative practice of the second group of these states, an arbitration agreement is not a sufficient basis for arbitration. Parties wishing to submit a civil dispute to international commercial arbitration are obliged, even if there is an arbitration agreement in the foreign trade agreement, to enter into a written agreement aimed at resolving the dispute that arose in arbitration, which must be notarised in some countries. Such legislative requirements, as noted by A.I. Minakov, lead to failure to comply with this condition, which entails the invalidity of the arbitration agreement, and the case may be considered by a national court. The arbitration agreement is considered in this case exclusively as a contractual condition, as a result of which the parties, in the event of a dispute, are obliged to enter into an arbitration agreement.²

The legal regime of the arbitration agreement is enshrined in various fundamental regulations of international commercial arbitration.³ As noted, the first multilateral international legal act to regulate arbitration agreements in the field of international commercial relations was the Geneva Protocol of 1923. It enshrined the right of the parties to conclude agreements on the transfer to arbitration both in relation to existing disputes and to disputes that may arise in the future. The provisions of the 1923 Protocol applied to those arbitration agreements, the parties of which belonged to different states-parties of the Protocol.⁴

In international law, the basic provisions of the arbitration agreement, its concept, form, basic requirements, and consequences of its violation are contained in the New York

1 Kuro Unofficial Translation of the new Venezuelan Commercial Arbitration Act <<http://www.zur2.com/fcjp/articulos/arbitraje.htm>> accessed 20 August 2021.

2 AI Minakov, 'Arbitration agreements and the practice of resolving foreign economic disputes' in idem, *Law literature* (Yurkniga 1985).

3 IO Izarova, *Theory of the EU civil procedure* (VD Dakor 2015).

4 Protocol on arbitration clauses signed at a meeting of the assembly of the league of nations held on the twenty-fourth day of September, nineteen hundred and twenty-three <http://interarb.com/vl/g_pr1923> accessed 20 August 2021.

Convention of 1958 (Arts. II, V), as well as in the European Convention of 1961 (Arts. I, V, IX), the UNISTRAL Model Law. According to Art. II of the New York Convention of 1958, an arbitration agreement is a written agreement under which the parties undertake to arbitrate all or certain disputes that arise or may arise between them in connection with a specific contractual or other legal relationship, the objects of which may be the subject of arbitration.⁵ The European Convention of 1961 interprets the concept of an arbitration agreement somewhat differently, stating that an arbitration agreement is an agreement in the contract itself or a separate arbitration agreement signed by the parties or contained in an exchange of letters, telegrams, or teletype messages, and in relations between states none of the laws requires a written form for an arbitration agreement, any agreement is set out in a form permitted by those laws (Art. 1).⁶

2 GENERAL REQUIREMENTS FOR THE VALIDITY OF AN ARBITRATION AGREEMENT IN THE CONTEXT OF CONVENTION REGULATION

Requirements for the validity of an arbitration agreement formulated in para. 3 of Art. II of the New York Convention of 1958 are quite generalised, which has both advantages and disadvantages. The advantage can be found in the ability to cover the maximum possible number of cases in the application of this rule. On the other hand, the lack of specificity makes the application of this rule in practice unclear. The lack of reference to the law applicable to the validity of the arbitration agreement, as well as the question of who should decide the dispute – the ICA or the state court – remain acute issues.

The answer to these questions depends on the stage of the dispute and in what body it is considered. However, from a legal point of view, it seems more important to consider who actually has the authority to decide on the validity of an arbitration agreement

According to the New York Convention of 1958, the state court decides on the validity of the arbitration agreement only if it considers the claim on the merits and finds the existence of an arbitration agreement (para. 3 of Art. II). The role of the court, in this case, is to implement a valid arbitration agreement. Only when the arbitration agreement is invalid for some reason can the court continue the proceedings on the merits. If the court does not make such a conclusion, it shall refer the parties to arbitration.

The situation is more complicated when the question of the validity of the arbitration agreement arises during the arbitration proceedings. In these cases, the arbitral tribunal decides these issues independently.

There are two points of view in Western doctrine. The first was formed under the influence of the concept of autonomy of the arbitration agreement and the concept of *competence – competence*.⁷ Its logic is as follows: the arbitration agreement is autonomous from the contract in which it is contained. In this case, the arbitral tribunal is empowered to decide on its own competence independently. To establish their own competence, arbitrators need to assess the issue of arbitrability of the dispute, as well as all issues of validity and conclusion of the arbitration agreement.

5 Convention on the Recognition and Enforcement of Foreign Arbitral Awards <http://www.uncitral.org/pdf/07-87406_Ebook_ALL.pdf> accessed 20 August 2021.

6 European Convention on Foreign Trade Arbitration <http://zakon.rada.gov.ua/cgi-bin/laws/main.cgi?nreg=995_069> accessed 20 August 2021.

7 A Redfern, *Law and Practice of International Commercial Arbitration* (Sweet & Maxwell 2004) 667.

According to the second point of view, which, in general, does not dispute the effect of the concept of *competence – competence*, in determining the validity of the arbitration agreement from among the issues to be considered, the question of the very existence of such an agreement is excluded. Such an issue should be referred to the jurisdiction of the state court.⁸ The idea of such an approach is quite simple: if the parties have not concluded an agreement on the transfer of the dispute to arbitration, the arbitrators do not have the opportunity to decide on their own competence. As stated in one of the court decisions, the question of the very existence of the contract containing an arbitration agreement is covered by the concept of 'conclusion of an arbitration agreement' and requires consideration by a state court.⁹

In this aspect, the questions of forgery of the signature of the person on whose behalf the arbitration agreement was signed and whether the parent company that did not sign the agreement can be liable for the obligations of the subsidiary can be considered.

The French experience seems interesting here. The courts of this country are generally deprived of the opportunity to decide the validity of the arbitration agreement until the arbitral tribunal decides on the same issue.¹⁰

The study of the validity of the arbitration agreement is the starting point for refuting the existence of international commercial arbitration jurisdiction to consider the dispute and, accordingly, attempts to refer the dispute to a state court. Both the arbitrators themselves and the state court to which one of the parties refers at the initiation of the arbitration proceedings or in the course of such proceedings must decide whether the arbitration agreement really exists and remains in force.

Despite the importance of this issue, in Art. II of the New York Convention of 1958, which sets out the requirements for the form of the arbitration agreement, there are no mandatory requirements on the basis of which rules should be decided on the validity, maintenance, and enforceability of an arbitration agreement. At the same time, the New York Convention of 1958 contains a rule according to which the recognition and enforcement of an arbitral decision may be denied if the arbitration agreement is invalid in accordance with the law to which the parties subject the agreement, and under the law of the country where the decision was made in the absence of such an instruction (subpara. 'a' of para. 1 of Art. V). In the absence of a similar rule in Art. II of the New York Convention of 1958, the question is raised of the possibility of applying the provisions of Art. V of the Convention on the basis of which arbitrators or a state court must conclude on the validity of the arbitration agreement to resolve the issues enshrined in Art. II of the New York Convention of 1958. Different views have been expressed on this issue at different times, but recently, there has been a trend according to which the state courts of the states-parties to the New York Convention Art. II of the New York Convention of 1958 must use the conflict rules of subpara. 'a' of para. 1 of Art. V of the New York Convention of 1958. Although this trend is dominant, in some countries (for example, in the USA), state courts apply national law to address this issue.¹¹

For countries that are parties to the European Convention in addition to the New York Convention of 1958, a solution to this issue is facilitated: para. 2 of Art. VI of the European Convention of 1961 not only proposes to apply the question of the validity, maintenance, and enforceability of the arbitration agreement rules similar to the rules of subpara. 'a' of para. 1 of Art. V of the New York Convention of 1958, but also the rules that provide that when ruling on the existence or

8 E Mezger, *Competence des arbitre et independence de la convention arbitrale dans la Convention dite Europeene sur l'Arbitrage Commercial International, Arbitrage Commercial Eugenio Minoli* (Milan 1974).

9 JG Frick, *Arbitration and complex international contracts* (Kluwer Law International 2001).

10 II Dore, *Arbitration and conciliation under the UNCITRAL rules: a textual analysis* (Martinus Nijhoff Publisher 1986).

11 J Stalev, *Law on International Commercial Arbitration* (Sofia 1991).

validity of the said arbitration agreement, the state courts of the contracting states in which the issue is raised shall be governed by the law applicable to them, and, on other issues:

- a) the law to which the parties subjected the arbitration agreement;
- b) in the absence of instructions in this regard – the law of the state in which the decision must be made;
- c) in the absence of references to the law to which the parties subjected the arbitration agreement, and if at the time when the matter arose before the state court, it is impossible to determine in which state the arbitral decision should be made – the law applicable by a conflict of law the court in which the case was initiated.

Cited provisions of the European Convention of 1961 in no way contradict the New York Convention of 1958. They only enshrine the tendency to apply the rules of subpara. 'a' of para. 1 of Art. V of the New York Convention to address the issues of Art. II of the New York Convention and specify which law should be applied if the arbitration agreement does not specify in which country the decision should be made.

3 THE RATIO OF 'AUTONOMY OF WILL' AND THE VALIDITY OF AN ARBITRATION AGREEMENT

The practice of establishing the rules used to resolve the issue of the validity of an arbitration agreement is based on the general recognition of the principle of autonomy of the arbitration agreement. In fact, although the New York Convention of 1958 does not explicitly enshrine this principle, it would not be possible to speak separately of the validity of the arbitration agreement and the law applicable to the settlement of the issue without its recognition. Then the question of the validity of the arbitration agreement would be decided together with the question of the validity of the contract in which it is included and in accordance with the rules of law governing the 'basic' contract.

F. Fushar, E. Gaillard, and B. Goldman argue that the principle of autonomy of the arbitration agreement is, without a doubt, the first stage of the process, as a result of which arbitrators can decide on their own competence. It is through the autonomy of the arbitration agreement that any argument against the validity of the main agreement will not have a direct impact on the arbitration agreement and, consequently, on the jurisdiction of the arbitration. Such autonomy allows arbitrators to consider jurisdictional objections based on the assertion of the invalidity of the disputed contract. In such a situation, the autonomy of the arbitration agreement and the rule of *competence – competence* are mutually supportive.¹²

However, despite the almost universal recognition of the principle of autonomy of the arbitration agreement, which implies the possibility of applying to the validity of the arbitration agreement legal rules other than substantive law applicable to the substance of the dispute, in practice, there are almost no agreements in arbitration agreements in which the law applicable to the arbitration agreement would be specifically addressed.¹³ As a rule, the parties enshrine in the contract the choice of substantive law applicable to the relationship between them, refer to one or another arbitration rule, and establish the place of arbitration, but remain silent about the law that should govern the validity, effectiveness, and enforceability of the arbitration agreement, although the choice of such a right by the parties is expressly provided for in both the 1958 New York Convention and the 1961 European Convention.

12 F Fouchard, E Gaillard, B Goldman, *International Commercial Arbitration* (Kluwer Law International 1999).

13 SN Lebedev, *International cooperation in the field of commercial arbitration. International conventions, agreements and other documents on arbitration* (Torg-prom, Chamber of the USSR 1979).

Moreover, none of the recommended arbitration agreements included in the rules of known institutional arbitrations or in the UNCITRAL Arbitration Rules, not surprisingly, provides for a separate choice of law applicable to the validity, maintenance, and enforceability of the arbitration agreement, although some arbitration regulations explicitly enshrine the principle of autonomy of the arbitration agreement. Thus, the ICC Arbitration Rules of Arbitration Court provide that where one party makes one or more claims as to the existence or validity of an arbitration agreement and the International Court of Arbitration is assured that such an agreement exists, the court may, without deciding whether the claim (claims) is admissible or valid, to take the case to arbitration.

Thus, if the agreement does not specify to which national law the parties have subordinated the arbitration agreement included in the treaty, then, to resolve the question of the validity of the arbitration agreement, as a rule, the law of the country where the arbitration decision is applied (*lex arbitri*).¹⁴ In practice, arbitrators, when hearing a case in which, in addition to the actual dispute over the right, there are also jurisdictional objections, first have to study the laws of the country where the arbitral decision will be made (to determine the validity, effectiveness, and enforceability of the arbitration agreement), and then norms of the substantive law chosen by the parties to be applied (to resolve the issue of the validity of the contract in which the arbitration agreement was included). At the same time, the automatic extension of substantive law chosen by the parties to resolve the issue of the validity, effectiveness, and enforceability of the arbitration agreement is unacceptable due to the principle of autonomy of the arbitration agreement. Only if the contract signed by the parties explicitly states that the substantive law chosen by the parties is applicable to matters relating to the validity, maintenance, and enforceability of the arbitration agreement may the arbitrators assess both the validity of the agreement itself and the validity, effectiveness, and enforceability of the arbitration agreement under the same rules.¹⁵

However, some authors believe that the substantive law chosen by the parties to regulate the rights and obligations under the contract may automatically apply to the regulation of the arbitration agreement included in this contract. We believe that this position contradicts the New York and European conventions, as well as the principle of autonomy of the arbitration agreement because if both the contract and the arbitration agreement are subject to the same law, it is unlikely to maintain the validity of the arbitration agreement with invalid 'basic' agreement. To confirm the correctness of the statement, Art. 48 of the Swedish Law on Arbitration of 1999 can be referred to, which distinguishes between the law chosen by the parties to regulate the rights and obligations under the contract and the law governing the arbitration agreement.¹⁶ It should be noted that Sweden is not a party to the 1961 European Convention, so the inclusion in Swedish law of rules similar to those set out in the 1961 European Convention cannot be considered a duplication of Sweden's international obligations in its domestic law.

4 THE CHOICE OF LAW WHEN CONCLUDING AN ARBITRATION AGREEMENT

In connection with the above, it seems appropriate to include in the arbitration agreement instructions on the choice of law, which is used in resolving the issue of validity, effectiveness,

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- 14 J Lew, 'The law applicable to the form and substance of the arbitration clause' (1998) 14 ICCA Congress Series 130.
 - 15 YD Prityka, AV Amborsky, 'On the concept and components of arbitrability: A theoretical analysis' (2016) 2 (1) Scientific Bulletin of Kherson State University. Legal Sciences Series 10-13.
 - 16 Swedish Arbitration Act <http://www.chamber.se/arbitration/english/laws/skiljedomslagen_eng.html> accessed 20 August 2021.

and enforceability of the arbitration agreement. This will avoid a situation where state courts examining the validity, effectiveness, and enforceability of a particular arbitration agreement will be able to determine the law on the basis of which the issue is resolved, i.e., when an arbitration agreement can be resolved differently in state courts of different countries. Moreover, if the state courts of any country are faced with the need to adhere to the choice of law chosen by the parties, then the possibility of applying the issue of validity, effectiveness, and enforceability of the arbitration agreement *lex fori* of the relevant court will be excluded, which will increase the predictability of the arbitration agreement by state courts of different countries.

It should be noted that in addition to establishing the law to which the arbitration agreement is subject and on the basis of which the validity of this agreement should be assessed, the arbitrators or the state court in accordance with subpara. 'a' of para. 1 of Art. V of the New York Convention of 1958 are obliged to decide on the 'capacity' of the parties to the arbitration agreement, and by the law to which the parties are subject to this agreement, and in the absence of such instructions, by the law of the country where the decision was made. A similar idea is included in para. 2 of Art. VI of the European Convention, according to which the state court must decide on the legal capacity of the parties to the arbitration agreement 'under the law applicable to them', i.e., under their personal law (*lex societatis*) and not under the law to which the arbitration agreement is subject.

Despite some terminological differences, these rules require the same thing: arbitrators or state courts must clarify the legality of signing an arbitration agreement based on the personal law of the party, which cannot be changed on the basis of its will. However, such clarification should be made taking into account the specifics of the principle of autonomy of the arbitration agreement, which distinguishes between the legal fate and analysis of the validity of the contract as a whole and the arbitration agreement that is part of it. For example, if an arbitral tribunal or a state court concludes that a 'basic' agreement is invalid due to the party's representative not having the authority to sign the agreement (if the 'basic' agreement is such an agreement), the arbitration agreement will still remain valid because the obligation to the transfer of a dispute to arbitration cannot be considered an agreement at all.

The issue of the law governing the arbitration agreement has been repeatedly reflected in the practice of courts of different states. It can be noted that in the countries of the continental legal system, it is decided in the same way: if the parties themselves have not chosen separately the law governing this arbitration agreement, it is considered subject to the law of the place of arbitration. The most liberal courts also point out that due to the principle of autonomy of the arbitration agreement, there is no need to refer to the national law of any state when deciding on its validity. In England, however, it is likely that the court will take into account the substantive law to which the contract is subject unless the parties establish that it is governed by the law of the place of arbitration.¹⁷

A.Y. Van den Berg, in his commentary on the 1958 New York Convention, acknowledged that although there are other decisions in practice, the right to a place of arbitration is clearly the most appropriate for resolving the validity of an arbitration agreement.¹⁸

The question of the validity of the arbitration agreement is not regulated in detail in the Ukrainian legislation. This distinguishes the Law of Ukraine 'On International Commercial

17 K Hober. 'Arbitration reform in Sweden' (2004) 1 *International Commercial Arbitration* 60-61; S Heger, *Commentary on the new Austrian arbitration legislation* (Walters Cloover 2006).

18 Consolidated Commentary Cases Reported in Volumes XXII (1997) – XXVII (2002); A-J Van den Berg, *The New York Arbitration Convention of 1958: Towards a uniform judicial interpretation* (Kluwer Law and Taxation 1981).

Arbitration', for example, from similar acts in Swiss law or from the Restatement (Second) of Conflict of Laws of the USA,¹⁹ where this issue is regulated in detail. The only thing that establishes the Ukrainian law regarding the validity of the arbitration agreement is the provisions on its form, which are contained in Art. 7 of the Law of Ukraine 'On International Commercial Arbitration'.

The explanation for this feature is quite simple. The Law of Ukraine 'On International Commercial Arbitration' is completely based on the UNCITRAL Model Law, which did not contain detailed regulation of the validity of the arbitration agreement. The lack of detailed regulation, in turn, is due to the compromising nature of the UNCITRAL Model Law. Based on the content of preparatory materials (*travaux préparatoires*) for the UNCITRAL project, during the discussion of Art. 7, the idea of transferring the decision on the validity of the arbitration agreement, including its proper form, to the national legislator has been repeatedly expressed. In addition, in the course of the same discussion, the idea was expressed to abandon the use of the term 'agreement in writing' to exclude possible conflicts with the provisions of para. 2 of Art. II of the New York Convention, which also defines the scope of this concept.²⁰

Interestingly, the new version of the UNCITRAL Model Law of 2006 already offers two versions of the wording of Art. 7. One of them is a further development of the original version and clarifies the list of requirements for the form of the arbitration agreement. Thus, taking into account the remark that in some cases in international trade, a written fixation of the arbitration agreement is not possible, the developers of the new version of the UNCITRAL Model Law decided to equate the content of such an agreement expressed in any way to the arbitration agreement ('an arbitration agreement is in writing if its content is recorded in any forms'). At the same time, the explanatory note emphasises that such an approach removes the requirement that each of the parties must agree to accept the arbitration agreement in one form or another. Art. 7 of the UNCITRAL Model Law also takes into account the development of modern electronic means of communication, finally equating the messages received with them to the messages received in writing.²¹

The second option is based on the fact that the need to regulate the validity of the arbitration agreement has disappeared in connection with the development of legislation and law enforcement practices of individual countries. According to the developers, each country should evaluate its own practice and make a choice in favour of more detailed regulation of the formal validity of the arbitration agreement at the level of national law on international commercial arbitration.

Thus, the general direction of international regulation is to ensure that each state independently determines the rules applicable to the decision on the validity of the arbitration agreement. At the same time, this does not mean that national courts should not take into account international practice when applying their own national law.

This conclusion is based on the following. The legal basis of international commercial arbitration is largely formed by international treaties, the main of which today is the New York Convention of 1958. This Convention is an international treaty of Ukraine, and by virtue of Part 1 of Art. 9 of the Constitution of Ukraine, the rules of this Convention take precedence over the norms of domestic law.

19 Restatement (Second) of Conflict of Laws §187-188, 218.

20 Convention on the Recognition and Enforcement of Foreign Arbitral Awards <http://www.uncitral.org/pdf/07-87406_Ebook_ALL.pdf> accessed 20 August 2021.

21 Explanatory Note by the UNCITRAL secretariat <http://www.uncitral.org/pdf/english/texts/arbitration/mlarb/07-86998_Ebook.pdf> accessed 20 August 2021.

It should be emphasised that the subject of the New York Convention of 1958 includes two basic elements:

- 1) recognition of arbitration agreements (Art. II of the New York Convention of 1958);
- 2) recognition and enforcement of foreign arbitral decisions (Art. III of the New York Convention of 1958).

5 THE STAGED NATURE OF REGULATION OF THE VALIDITY OF AN ARBITRATION AGREEMENT

According to these elements, the New York Convention of 1958 regulates the validity of an arbitration agreement in two stages:

Stage 1: assessment of the arbitration agreement by the state court when the parties apply to it to resolve the dispute, to consider which the parties agreed in arbitration (para. 3 of Art. II of the New York Convention of 1958);

Stage 2: assessment of the arbitration agreement by the competent authority of the state in the execution of the arbitral decision (subpara. 'a' of para. 1 of Art. V of the New York Convention of 1958).

As for the law applicable in the first stage, i.e., in the assessment of the arbitration agreement by the state court before the arbitral decision, in this case, there is a clear gap in the Convention. The Convention stipulates that the court must refer the parties to the arbitration agreement to arbitration court if it does not find that the agreement is invalid, has lapsed, or cannot be enforced. The Convention does not specify what the court should be guided by when deciding on the validity of an arbitration agreement.

The range of rules to be applied in the second stage is clearly defined in the Convention. Such rules include the rules of law to which the parties have submitted an arbitration agreement (which in practice is rare) or the rules of law of the state where the arbitral decision was made.

This gap is not accidental. An analysis of the draft New York Convention of 1958 shows that the representatives of the participating states expressed different ideas as to how the issue of the law applicable to the arbitration agreement under para. 3 of Art. II of the Convention should be resolved.²² The idea was expressed to subordinate the arbitration agreement to the law of the court itself, the law of the place of arbitration, or to extend to it the rules of conflict of law. However, none of them was accepted.²³

Therefore, the control over arbitration proceedings on the basis of a valid arbitration agreement is multi-stage. When initiating court or arbitration proceedings, the validity of the arbitration agreement may be verified by both the ICA and the state court. It is possible to apply different laws at different stages of verification of the validity of the arbitration agreement. That is, the parties must consider the risk that even if the arbitral tribunal finds the arbitration agreement valid and the state court of the place of arbitration does not

22 BR Karabelnikov, 'New York Convention of 1958 on the Recognition and Enforcement of Foreign Arbitral Decisions: Problems of Theory and Practice of Application' (PhD Thesis Abstract, candidate of law, University of Saratov 2001); BR Karabelnikov, *Execution and contestation of decisions of international commercial arbitrations. Commentary on the New York Convention of 1958 and Chapters 30 and 31 of the APC of the Russian Federation in 2002* (3rd ed, Statute 2008).

23 Summary record of the thirteenth meeting <<http://www.uncitral.org/pdf/english/travaux/arbitration/NY-conv/e-conf-26-sr/13-N5814372.pdf>> accessed 20 August 2021.

revoke the arbitral decision made under such agreement and thereby confirm the validity of the arbitration agreement, the court of the country of the recognition and enforcement of the arbitral decision may recognise, by applying another right, that the arbitration agreement is invalid.

In the scientific literature, as well as in the practice of the ICA, attempts have been repeatedly made to justify one or another approach to the validity of the arbitration agreement.²⁴ The most interesting and also final version is set out in the decision of the Court of Appeal of the 3rd District of the United States in the case of *Rhone Mediterranee Compagnia Francese di Assicurazioni e Riassicurazione v. Achille Lauro*. In this decision, the Court concluded that the arbitration agreement in the context of para. 3 of Art. II of the New York Convention of 1958 will be invalid only if it meets the grounds for invalidity of the agreement, such as coercion, error, deception, or a previously stated waiver, or if such an agreement is contrary to the fundamental principles of the state where the arbitration takes place. In addition, the Court of Appeal noted that one of the purposes of the New York Convention of 1958 was to unify the rules under which arbitration agreements must be complied with. According to the court, the parties to the Convention jointly expressed the presumption of the enforceability of arbitration agreements, regardless of the formal features of national law.²⁵

On the one hand, this presumption can be considered as confirmation of the specifics of arbitration of American courts, the pro-arbitration orientation of which has been known since the decision of the Supreme Court in the case of *Prima Paint*. Then, it could be concluded that the mentioned interpretation of the norms of the New York Convention of 1958 in the Ukrainian realities should be perceived as a phenomenon rather than as a reference point for practice.²⁶ On the other hand, it must be acknowledged that the approach of the American court is fully consistent with the principles of interpretation of international treaties enshrined in the Vienna Convention on the Law of Treaties of 1969.²⁷ According to Art. 31 of this Convention, the interpretation of the treaty, together with the context, must take into account the object and purpose of the international treaty, as well as the practice of applying international norms.

In this case, if these means of interpretation leave the provisions of the international agreement ambiguous and unclear, it is possible to refer to the preparatory materials and the circumstances of the conclusion of such an international agreement (Art. 32 of the Convention).

- 24 F Bortolotti, *International arbitration*. In *Drafting and negotiating international commercial contracts* (ICC 2008); XCB Vásquez, 'The mediated settlement agreement: The Ecuadorian experience' (2011) *Journal of international arbitration* 315; D Campbell, *International dispute resolution: the comparative law yearbook of international business, special issue* (Kluwer 2010).
- 25 *Rhone Mediterranee Compagnia Francese Di Assicurazioni Eriassicurazioni, Appellant, v Achille Lauro, D/b/a Achille Lauro Armatore, A/k/a Achillelauro, D/b/a Flotta Lauro, A/k/a Achille Lauro, d/b/a Lauro Lines, X Company and Antonioscotto Di Carlo*: United States Court of Appeals, Third Circuit – 712 F.2d 50 Argued April 27, 1983 <<http://cases.justia.com/us-court-of-appeals/F2/712/50/415183>> accessed 20 August 2021.
- 26 *PrimaPaintCorp. v Flood&ConklinMFG. Co.* 388 US 395 (1967) <<http://supreme.justia.com/us/388/395/case.html>> accessed 20 August 2021.
- 27 IM Sinclair, *The Vienna Convention on the Law of Treaties, cmg, Second Legal Adviser to HM Foreign and Commonwealth Office* (The Melland Schill Lectures) (Oceana Publications Inc 1973).

6 THE UKRAINIAN EXPERIENCE OF THE VALIDITY OF THE ARBITRATION AGREEMENT

In interpreting the provisions of para. 3 of Art. II of the New York Convention of 1958 on the invalidity of the arbitration, agreement should not be based on local law and take into account the object and purpose of the Convention, as well as international practice. This approach is the only true approach by virtue of the international treaties of Ukraine, which are part of its legal system.

In this regard, it is necessary to note two important features of Ukrainian procedural law. The first feature is that the New York Convention of 1958 extends its effect to two types of arbitral decisions: 1) to decisions rendered in the territory of the state, where recognition and enforcement of such decisions are not required; 2) to decisions rendered in the territory of the same state where their recognition and enforcement are required but which are not considered to be domestic decisions in that state (para. 1 of Art. I of the Convention). That is why it is extremely important to determine whether there is a second type of arbitration decision in Ukraine. This is relevant, in particular, for the decisions of the ICAC at the CCI of Ukraine in the event that these decisions are made outside of Ukraine. They will be fully subject to the New York Convention of 1958, and therefore the above regarding the rules for determining the validity of arbitration agreements must also be valid for them.

The Law of Ukraine 'On International Commercial Arbitration' does not provide an answer to this question. It is unclear whether the decisions taken by the ICAC at the CCI of Ukraine should be considered as decisions taken outside Ukraine in accordance with the New York Convention. In accordance with Art. 35 of the Law of Ukraine 'On International Commercial Arbitration', an arbitration decision, regardless of the country in which it was made, is binding, and when submitting a written request to the competent court, it is executed in accordance with this article and Art. 36, thus not giving a clear answer to issues of implementation of decisions made by the ICAC at the CCI of Ukraine.

The second feature is that the problem of the validity of the arbitration agreement inevitably necessitates an analysis of the extent of the intervention of state courts in assessing this reality in different circumstances. There are two situations: 1) the party has already applied to arbitration, and the case is pending arbitration, but the other party filed a lawsuit in state court, despite the arbitration agreement; 2) the arbitration proceedings have not yet been initiated, and one of the parties, despite the existence of an arbitration agreement, applies to the state court.

Both of these situations are quite common in practice. Based only on the provisions of the New York Convention of 1958, in both cases, the state court must verify the validity and enforceability of the arbitration agreement, and, depending on the request of the other party and the outcome of the review, refer the parties to arbitration or accept the claim.

7 CONCLUSIONS

The question of the validity of the arbitration agreement is multifaceted. It concerns not only the assessment of an arbitration agreement itself in terms of its compliance with the formal criteria and applicable law but also the definition of the powers of state courts and arbitration to assess the arbitration agreement. National legislation and practice on these issues are constantly changing, so each analytical material on this topic only captures the current situation. Its formation, as well as the formation of the practice of international

commercial arbitration, has always been influenced by two opposite trends: pro-arbitration, aimed at strengthening the position of arbitration and liberalisation of its use by economic entities, and conservative, whose supporters are in favour of limiting private dispute resolution, which is the international commercial arbitration.²⁸ The level of legal culture in a given state determines which of the positions is dominant. It is important to note that the basic normative act in the field of international commercial arbitration, the New York Convention, fully takes this dynamic into account, giving the state court the opportunity to recognise and enforce the arbitral decision, even if there are grounds for refusing such recognition and enforcement.

Summarising the above, we can conclude that there is a steady trend according to which state courts do not prevent arbitrations from ruling on the nature of the arbitration agreement, reserving the right to reconsider this issue in the case of arbitration, which will be presented for execution in accordance with the New York Convention. At the stage of application of Art. II of the Convention, state courts, as a rule, interpret all doubts about the arbitration agreement in favour of its validity, preservation of force, and enforceability.

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