

## **Inadequate Arbitration Clause as the Reason for Refusal of Recognition and Enforcement of International Commercial Arbitration Award**

As we know, foreign economic activity is governed by international law and national laws of states involved in such relationships. Sometimes in international trade contentious situations occur which require prompt and impartial resolution. Thus, international arbitral tribunals have become basic and universal mechanism for resolving such conflicts. One of the main difficulties of settling international trade disputes is that even after the actual decision by the court in favor of the plaintiff: there is no firm guarantee of compulsory recognition and enforcement of the decision. That an international commercial arbitration award has been completed, it is necessary to recognize and execute the same in due course in the appropriate court of the State where the respondent is located.

### **The Perfect Form of Arbitration Clause**

Which of arbitration clauses is correct, one can often determine once the arbitration in accordance with such clause is open. The reservation that is best suited for the contract as a whole, may be not the best when it is used in a particular dispute.

The ideal form of an arbitration clause in fact does not exist, but there is the correct form, which guarantees the expected result when adverse legal consequences are there. However, which clause is wrongly composed and not enforceable one should understand before writing such a clause.

The main purpose of the arbitration clause is to establish an unambiguous choice of the parties for the arbitration procedure for dispute resolution and to lay an effective mechanism for the implementation of this option. No need to specify in the arbitration agreement unnecessary details of the arbitration process, which will be indicated in the course of the dispute or which may be adopted by the arbitrators themselves. Correctly composed arbitration agreement should avoid both extremes. The arbitration clause should be fairly short, non-conflicting, clear and consistent.

### **Elements of Arbitration Clause**

Using a list of specific questions is the best way to set and check whether all the required elements are present in the composition of the arbitration clause. Among the basic list of issues to consider when drafting an arbitration clause, you can specify the following elements, which can be divided into groups: essential elements; type of arbitration (including the correct name of institutional arbitration, if the parties choose this); range of disputes referred to the arbitration; the place of arbitration (arbitration clause in ad hoc); Elements which are desirable and recommended in the arbitration clause - the number of arbitrators, their nationality and qualification requirements; the law applicable to the merits of the dispute; language of the proceedings; the law applicable to the arbitration agreement; items that may be present in the arbitration clause, depending on such factors as the specifics of the contract, the relationship of the parties and the type of arbitration - the rules of procedure; powers of arbitrators to resolve disputes fairly or as amiable (possibility to deviate from the law); other matters (clauses on excluding challenging the award, order of the distribution of the arbitration costs, etc.).

## **Recommended Arbitration Clauses (examples)**

An international commercial arbitration Court at Ukrainian Chamber of Commerce and Industry recommends to plug in a contract next arbitration clause: "Any dispute that arises up in relation to this agreement or in connection with him is subject to the transmission for consideration and final decision in the International commercial arbitration court at the Commercial and industrial chamber of Ukraine. Parties accede to that in the process of consideration and decision of dispute will be used Regulation of the International commercial arbitration court at the Commercial and industrial chamber of Ukraine. A right that regulates this agreement is a material right (countries). An arbitration court consists of individual (whether three) arbiter (arbiters). Place of holding session of the Arbitration court (city). Language (languages) of arbitrage consideration - (Ukrainian, Russian, other)". London Court of International Arbitration (LCIA,) recommends: "Any dispute arising out of or in connection with this contract, including any question regarding its existence, validity or termination, shall be referred to and finally resolved by arbitration under the LCIA Rules, which Rules are deemed to be incorporated by reference into this clause". International Chamber of Commerce, Paris (ICC): "All disputes arising out of or in connection with the present contract shall be finally settled under the Rules of Arbitration of the International Chamber of Commerce by one or more arbitrators appointed in accordance with the said Rules".

## **The Situation in Ukraine**

Law of Ukraine "On International Commercial Arbitration" contains a single requirement on the form of an arbitration clause – it must be concluded in writing. Arbitration clause is deemed to be concluded not only by signing the document, but also by exchange of letters, telex, telegrams or other means of communication that secure the existence of such an agreement. Parties' reference to an arbitration agreement in another document is also deemed as arbitration agreement.

With a not clear arbitration clause in a contract, the International Commercial Arbitration Court (ICAC) at the Ukrainian Chamber of Commerce and Industry (UCCI) acknowledges his competence on condition that a plaintiff, putting an action in the Arbitration court, asserts that parties meant consideration of dispute in ICAC at the UCCI, and a defendant in his arguments, though having traversed the claim, does not deny the competence of ICAC at the UCCI.

Law of Ukraine "On International Commercial Arbitration" provides that an arbitration clause that is a part of a contract shall be construed as an agreement independent of the other terms of the contract. The decision of the arbitral tribunal that the contract is null and void shall not entail invalidity of the arbitration clause by operation of law. If disputes arising from the contractual relationship are resolved, an arbitration clause binds only parties who have signed a contract. In this regard, the validity of an arbitration agreement may be questioned in case of improper agreement on assignment of contract or cession, that is, when rights and obligations, or just claims under the contract are assigned. According to Art. 197 of the Civil Code of Ukraine assignment of claims from the creditor to another person is permitted if it is not contrary to law or contract or if the claim is not related to an individual creditor.

## **Mistakes at Arbitration Clauses and their Consequences**

Practice shows that the main reason of the invalid arbitrational clauses is inattention and negligence at their conclusion. As a result arbitration clause is to be deemed null and void and as a rule the dispute will be considered at the place where defendant is located. The most common mistake in arbitration clause is the incorrect name of the arbitration body empowered to resolve the dispute.

In the case which was considered by Commercial court of Odessa region, the defendant objected to the proceedings as under the terms of agreement all disputes should have been considered by the Moscow International Court of Arbitration. However the claimant provided documentary evidence that arbitration court with such name did not exist (the correct name of the arbitration – Arbitration Court of Moscow). The court decided that the arbitration clause was null and void and did not entail any obligations. In another case the parties defined London Chamber of Commerce as the place of arbitration, obviously having in mind the London Court of International Arbitration. The court also recognized the arbitration award as void and null.

Another common mistake is an agreement that all disputes will be solved in arbitration according to the legislation of the state. In particular, in the case which was solved by the Commercial court of Lviv region, the arbitration clause was as follows: "Disputable issues shall be resolved in arbitration according to the effective legislation of Ukraine and Poland". Commercial Court in its decision pointed out that the parties did not agree on the place of arbitration, in particular, they did not choose the specific arbitration institution which prevents enforcement of the arbitration clause.

It is worth noting that if despite of the abovementioned mistakes the arbitration tribunal takes a case to proceedings, the decision of such arbitration may be reversed by the state court at the request of the defendant.

In particular, Shevchenko District Court of Kyiv reversed the decision of the International Commercial Arbitration Court at the Ukrainian Chamber of Commerce and Industry (ICAC at the UCCI), as the arbitration clause referred parties to the Arbitration Court at the Chamber of Commerce in Kyiv.

In addition, the court may also reverse the decision of the arbitration, if arbitration fails to comply with or violate the terms of the arbitration clause. For example, Shevchenko District Court of Kyiv reversed the decision of the ICAC because of the parties' failure to comply with requirements on preliminary negotiations as a compulsory condition for resolving a dispute in arbitration. The position of the trial court was supported by the appeal and cassation instances.

## **Conclusions**

Thus, shortcomings of arbitration clause may not only lead to the nullity of such clause, but also to the further reverse of the decision of the arbitration. As a result, the parties lose time and money spent on trial in arbitration. Therefore, we strongly encourage you to avoid negative consequences contact the professionals at the stage of concluding contracts.

**Nikolay Melnykov**

melnykov@interlegal.com.ua

Partner,

***Interlegal, Law firm***

GMAA member

**Alexander Chebotarenko**

[chebotarenko@interlegal.com.ua](mailto:chebotarenko@interlegal.com.ua)

Senior Lawyer

***Interlegal, Law firm***

[www.interlegal.com.ua](http://www.interlegal.com.ua)