

Список литературы:

- 1 Федосеева Г.Ю. Вопросы защиты некоторых социальных прав женщин в международном праве и национальном законодательстве РФ // Государство и право.- 2015.- № 2.- С.88-96.
- 2 Ногойбаева Э., Лейтон М. и др. Действующее международное право. – Бишкек, 2012. – 705с.
- 3 Конституция Республики Казахстан от 30 августа 1995г. (с изменениями и дополнениями от 7 октября 1998 г, 21 мая 2007 г, 2 февраля 2011 г, 10 марта 2017 г) // <http://constitution.kz/>
- 4 Конвенция о ликвидации всех форм дискриминации в отношении женщин от 18 декабря 1979г. // <http://www.un.org/ru/documents/index.html>
- 5 Гендерная политика в Казахстане: оценка реализации Стратегии гендерного равенства Республики Казахстан на 2006-2016гг. от 2016г. // <http://businesswomen.kz/>

THE WORDING AND MEANING OF THE ARBITRATION CLAUSE AND THE ARBITRATION AGREEMENT

*Kim Ye.A., 1st year master's student of Law Faculty of Y.A.Buketov Karaganda State University
Starozhilova N.P., Senior Lecturer of Constitutional and International Law Department of
Y.A. Buketov Karaganda State University*

Today, the existence of arbitration agreements is the standard in foreign economic contracts, and international commercial arbitration is the dominant instrument in settling disputes between companies of different states. It is generally known that for submitting the dispute to consideration in institutional arbitration or ad hoc arbitration, the existence of an arbitration agreement is mandatory.

To understand the nature of the arbitration agreement and its purpose, we should turn to the doctrine of international law. According to B.R. Karabelnikov the arbitration agreement is the agreement of the parties on the transfer to arbitration of all or certain disputes that have arisen or may arise between them because of any specific legal relationship, whether it was of a contractual nature or not [1, 85]. G.K. Dmitriyeva defines the arbitration agreement as «an agreement expressing the agreed will of the parties to submit the dispute between them to arbitration» [2, 30]. Thus, the arbitration agreement is the agreed intention of the parties to refer the dispute to arbitration.

The practice knows three types of arbitration agreements: arbitration clause, arbitration reference and arbitration agreement. All three types of arbitration agreements are essentially the same; they are three forms of the same phenomenon - the parties' agreement on arbitral proceedings. The objectives of concluding an arbitration clause, arbitration agreement or arbitration reference are identical: to refer the dispute to arbitration. The differences between them are due to a temporary factor and a way of formulating the reached agreement.

Thus, the arbitration clause is included directly in the text of the main contract at the time of its conclusion. Today, the arbitration clause is the most common type of arbitration agreement. Moreover, the inclusion of an arbitration clause in the contract itself is a certain disciplining factor, being a kind of security mean for the parties to carry out their obligations under the treaty.

The arbitration agreement is concluded either immediately after the conclusion of the main contract, or after a certain time period. The main condition is that the arbitration agreement must be concluded before the dispute arises, as well as the arbitration clause. The arbitration agreement is an independent agreement and may provide for the possibility of transferring disputes that may arise out of not one specific contract, but from a group of specific contracts. Today, in practice, arbitration agreements meet quite rarely. As a rule, such an agreement is concluded either if it is required by the domestic legislation of the state (it is referred to an agreement under one contract), or if there are stable and diverse foreign economic relations between the parties).

The arbitration reference is drawn up after the dispute has already arisen. In practice it is very rare in view of the difficult attainability, the inability of the parties to reach a common decision or to reach a consensus on such key points that any arbitration agreement should contain. Among them, the arbitral tribunal (the number of arbitrators), the place of the proceedings and the applicable law. As a rule, a party that has not carried out its obligations under the contract would intend to avoid transferring the dispute to arbitration, and the affected party often does not have any means that could upon the party to come to agreement for submitting the dispute to arbitration. The arbitration reference is a separate agreement from the contract, which, as a rule, is written on plain paper and must be signed by each side of the dispute.

As a rule, both domestic legislation and international treaties use the general concept of «arbitration agreement» without specifying a specific type. Thus, in accordance with paragraph 1 of Article 2 of the New York Convention of 1958, each member state «... shall recognize an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration» [3]. The term «agreement in writing», according to paragraph 2 of Article 2 of the Convention, includes «an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams» [3].

The Kazakh legislator has followed the same path and consolidated the general concept of «arbitration agreement» in the Law of the Republic of Kazakhstan «On arbitration». So, according to paragraph 4 of Article 2 of the Law on arbitration, «the arbitration agreement is a written agreement of the parties on the transfer to arbitration of a dispute that has arisen or may arise out of civil relations» [4]. Paragraph 1 of Article 9 of the Law on arbitration specifies that «the arbitration agreement shall be concluded in writing ... and shall be considered as concluded if it is contained in the form of an arbitration clause in a document signed by the parties or concluded by exchanging letters, telegrams, telephone messages, faxes, electronic documents or other documents that determine the subjects and the content of their will expression» [4].

The European Convention of 1961 retained the approach to the definition of an arbitration agreement, but, unlike the New York Convention, enshrined the full definition of an arbitration agreement in one article, instead of several. Thus, the «arbitration agreement» means «either an arbitral clause in a contract or an arbitration agreement being signed by the parties, or contained in an exchange of letters, telegrams, or in a communication by teleprinter and, in relations between States whose laws do not require that an arbitration agreement be made in writing, any arbitration agreement concluded in the form authorized by these laws» [5].

From the examples mentioned above, it can be seen that the terms «written agreement» or «arbitration agreement» imply all three types of arbitration agreements and they all give the parties to the dispute an equal right to apply to arbitration.

Earlier we found out that the arbitration clause is the most common type of arbitration agreement at the present time. This is confirmed by the fact that each institutional arbitration even proposes the wording of the recommended arbitration clause.

Thus, the London Court of International Arbitration recommends two types of clauses: for the future and the existing dispute. For the future dispute, the following clause is proposed: «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. The number of arbitrators shall be (one/three). The seat, or legal place, of arbitration shall be (City and/or Country). The language to be used in the arbitral proceedings shall be (...). The governing law of the contract shall be the substantive law of (...).» [6]. Concerning the existing dispute, the clause is formulated as follows: «A dispute having arisen between the parties concerning (...), the parties hereby agree that the dispute shall be referred to and finally resolved by arbitration under the LCIA Rules. The number of arbitrators shall be (one/three). The seat, or legal place, of arbitration shall be (City and/or Country). The language to be used in the arbitral proceedings shall be (...). The governing law of the contract [is/shall be] the substantive law of (...).» [6].

The Arbitration Institute of the Stockholm Chamber of Commerce formulates the arbitration clause as follows: «Any dispute, controversy or claim arising out of or in connection with this contract, or the breach, termination or invalidity thereof, shall be finally settled by arbitration in accordance with the Arbitration Rules of the Arbitration Institute of the Stockholm Chamber of Commerce» [7]. The recommended additions are: the composition of the arbitral tribunal (three arbitrators or a sole arbitrator); the seat of arbitration and language to be used in the arbitral proceedings; the applicable substantive law.

In the Arbitration Rules of the International Arbitration «IUS», the arbitration clause is formulated as follows: «All disputes, disagreements, claims arising in connection with the contract or relating to its breach, termination, invalidity thereof, shall be settled by the International Arbitration «IUS», in accordance with its current Rules. The arbitral award of the International Arbitration «IUS» is final» [8].

The Kazakhstan International Arbitration proposes the following formulation of the arbitration clause: «Any disputes and/or disagreements arising out of this contract (agreement) or in connection with it, shall be finally settled by the Kazakhstan International Arbitration in accordance with the current Rules» [9]. Moreover, a standard clause on the applicable law is given: «This contract (agreement) is governed by substantive law (...).» [9]. As required, the Kazakhstan International Arbitration recommends the following

additions to the clause, namely: the arbitral tribunal (one or three arbitrators), seat of arbitration and language of the arbitral proceedings.

As we see, the recommended arbitration clauses listed above certainly include such points as the exact name of the arbitration body and the applicable substantive law. Hence it can be concluded that inclusion of such points in the arbitration clause is a compulsory condition for its validity. Such points as the arbitral tribunal (one or three arbitrators), the seat of arbitration and language of arbitral proceedings may be either mandatory for inclusion in the arbitration clause (for example, as proposed by the London Court of International Arbitration), or optional, additional (on the example of arbitration clauses, recommended by the Arbitration Institute of the Stockholm Chamber of Commerce, the Kazakhstan International Arbitration, the International Arbitration «IUS»). Therefore, the parties intending to refer the dispute to a specific arbitration should draw up an arbitration clause in accordance with the requirements of certain arbitration.

A slightly different situation is with ad hoc arbitration. Parties, when referring a dispute to ad hoc arbitration, must additionally determine the applicable rules (a kind of procedural law) under which the arbitral proceedings will be held. Mostly such document is the UNCITRAL Arbitration Rules. The model arbitration clause in the Annex to the UNCITRAL Arbitration Rules is set out as follows: «Any dispute, controversy or claim arising out of or relating to this contract, or the breach, termination or invalidity thereof, shall be settled by arbitration in accordance with the UNCITRAL Arbitration Rules» [10]. In addition, the UNCITRAL Arbitration Rules provide that the parties may also include information on the appointing authority (name of institution or person); the number of arbitrators (one or three); the place of arbitration (town and country); the language(s) to be used in the arbitral proceedings at will.

One of the important theoretical questions is the question of the co-relation of the arbitration clause to the main contract, in the text of which it is included. In juridical science, the doctrine of separability of the arbitration clause has been formulated long ago. In accordance with this principle, the fate of the arbitration agreement, including the arbitration clause included in the text of the international commercial contract, its legal validity does not depend on the validity of the underlying contract. Moreover, the recognition of the contract as invalid does not lead to the annulment of the arbitration agreement and does not deprive the arbitrator of the right to consider all disputable issues related to the invalidity of the contract and the consequences arising out of it [11, 65]. The principle is currently enshrined in the legislation of many countries (for example, in paragraph 1 of Article 13 of the Federal Law of the Russian Federation «On arbitration (Arbitral proceedings) in the Russian Federation» of December 29, 2015). In the Law of the Republic of Kazakhstan «On arbitration» the principle of autonomy (separability) of the arbitration clause is fixed in paragraph 1 of Article 20: «The arbitration clause being a part of the contract is interpreted as an agreement that does not depend on other contract terms. Rendered arbitral award on the invalidity of a contract does not entail the invalidity of the arbitration clause» [4].

From the principle of autonomy (separability) of the arbitration clause follows the principle of «competence-competence». In the practice of international commercial arbitration, it often happens that one of the parties attempts to block the arbitral proceedings even before the start, or delays it, stating that the contract, and therefore the arbitration agreement is invalid, for example, because it was concluded under the influence of fraud. However the question arises, who will decide the validity of the contract – the court or the arbitration? The defendant can state that he never signed an arbitration agreement. Is he entitled to apply to the court at the very beginning of the arbitration process or should he wait for its outcome and then try to prevent the execution of the arbitral award?

These and other similar issues are resolved on the basis of the principle of «competence-competence», the essence of which is that the arbitral tribunal has the right to make a judgment on whether the arbitration clause is valid in the dispute referred to it independently. In the Law of the Republic of Kazakhstan «On arbitration» the principle of «competence-competence» is fixed in paragraph 1 of Article 20: «Arbitration decides independently whether it has or does not have the power and authority (jurisdiction) to consider the dispute submitted for its resolution, including in cases where one of the parties objects to the arbitral proceedings because of the invalidity of the arbitration agreement» [4].

The outstanding specialists Fouchard, Gaillard and Goldman in their classic work published in 1999 explained the interaction of the principle of autonomy (separability) of the arbitration clause and the principle of «competence-competence»: «The principle of autonomy (separability) is undoubtedly the first stage of the process, as a result of which arbitrators can make a judgment on own competence. It is exactly due to the autonomy (separability) of the arbitration clause that any argument against the validity of the main contract will not have a direct effect on the arbitration agreement and, therefore, on the jurisdiction of arbitration. Such autonomy allows arbitrators to consider jurisdictional objections based on the assertion of

the invalidity of the contested contract. In such situation, the autonomy (separability) of the arbitration clause and the rule of «competence-competence» overlap and support each other» [12, 214].

The arbitration agreement, being an expression of free choice by the parties of an alternative and autonomous method of dispute resolution, has great importance not only for determining the choice of the method of dispute resolution, competence of the corresponding center of international commercial arbitration, but also for ensuring its subsequent implementation both at the stage of dispute settlement and at the stage of execution of the award rendered by international commercial arbitration. In this regard, it is so important to draw up an arbitration agreement as a working mechanism for resolving disputes, avoiding the grounds for its invalidation.

References:

- 1 Karabelnikov B.R. *Mezhdunarodnyy kommercheskiy arbitrazh*: Textbook. - M.: Infotropik Media, 2013. - 541 p. (in Russian)
- 2 Dmitrieva G.K. *Mezhdunarodnyy kommercheskiy arbitrazh*: Teaching practical manual. - M.: Prospekt, 1997. - 227 p.
- 3 Convention on the Recognition and Enforcement of Foreign Arbitral Awards. New York, 10 June 1958. Register of texts of conventions and other instruments concerning international trade law. Vol. 2. - New York: United Nations, 1973. - pp. 24-33
- 4 The Law of the Republic of Kazakhstan No.488-V of April 8, 2016 «On arbitration» (last amended on February 27, 2017) // *Kazakhstanskaya pravda*. - 2016. - April 9. - No.67. Amendments: *Kazakhstanskaya pravda*. - 2017. - March 1. - No.42. (in Russian)
- 5 European Convention on International Commercial Arbitration. Geneva, 21 April 1961. Register of texts of conventions and other instruments concerning international trade law. Vol. 2. - New York: United Nations, 1973. - pp. 34-42
- 6 London Court of International Arbitration. Recommended Clauses - [Available at]: <http://www.lcia.org>
- 7 The Arbitration Institute of the Stockholm Chamber of Commerce. Model Clauses - [Available at]: <http://sccinstitute.com>
- 8 International Arbitration «IUS». Recommended Arbitration Clause - [Available at]: <http://www.iusea.com> (in Russian)
- 9 Appendix No.01 to the Protocol of General Meeting of the Participants of «Kazakhstan International Arbitration LLP» No.01 dated April 24, 2017 - [Available at]: <http://www.arbitrage.kz> (in Russian)
- 10 UNCITRAL Arbitration Rule (as revised in 2010). United Nations: United Nations Commission on International. - Vienna: United Nations, 2011. - 30 p.
- 11 W. Laurence Craig & others. International Chamber of Commerce Arbitration. New York: Oxford University Press Inc. - 1990. - 110 p.
- 12 Fouchard, Gaillard, Goldman. On International Commercial Arbitration. New York: Kluwer Law International. - 1999. - 1320 p.

КОНСТИТУЦИОННО-ПРАВОВОЙ СТАТУС НЕСОВЕРШЕННОЛЕТНИХ В РЕСПУБЛИКЕ КАЗАХСТАН

Абикенова Г.Б., м.ю.н., докторант юридического факультета КарГУ им. академика Е.А. Букетова

С 16 февраля 1994 года Республика Казахстан является участницей Конвенции ООН «О правах ребенка». Она рассматривает несовершеннолетнего как личность, наделенную соответствующими правами, способную в определенной мере их самостоятельной реализации и защите [1].

Закон Республики Казахстан от 8 августа 2002 года № 345-III «О правах ребенка в Республике Казахстан» (с изменениями и дополнениями по состоянию на 01.10.2017 г.) последовательно закрепил данный подход к ребенку в соответствии с положениями Конвенции ООН «О правах ребенка», Конституцией Республики Казахстан и принятыми Республикой Казахстан обязательствами обеспечивать всемерную защиту прав и законных интересов несовершеннолетнего [2].

Соответственно, с середины 90-х годов нормативная правовая база по вопросам защиты прав детей в Республике Казахстан начала претерпевать значительные изменения прогрессивного