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CONCEPT OF ARBITRATION AGREEMENT AND DOCTRINE OF SEPARABILITY

Abstract

International trade is one of the factors of economic welfare in the world. In order to preserve this welfare, it is important to effectively resolute disputes in foreign economic relations. One of the most common methods of resolving international commercial disputes is international arbitration. The starting point of the arbitration process is an arbitration agreement concluded by the parties to a commercial contract. Thus, the general practice is that the arbitration agreement is a refusal from the national court. The following article will discuss the concept and doctrine of separability arbitration agreement. At the same time, both the theoretical foundations and the practical meaning of these categories will be noted.

Key words: *arbitration agreement, arbitration clause, autonomy of arbitration agreement, doctrine, national courts, jurisdiction*

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Arbitraj sazişin anlayışı və müstəqillik doktrinası

Xülasə

Beynəlxalq ticarət dünyada iqtisadi rifah amillərindən biridir. Bu rifahın qorunması üçün xarici iqtisadi əlaqələrdə mübahisələrin səmərəli həlli vacibdir. Beynəlxalq kommersiya mübahisələrinin həlli üçün ən geniş yayılmış üsullardan biri beynəlxalq arbitrajdır. Arbitraj prosesinin başlanğıc nöqtəsi kommersiya müqaviləsinin tərəfləri arasında bağlanmış arbitraj razılaşmasıdır. Beləliklə, geniş yayılmış təcrübə ondan ibarətdir ki, arbitraj sazişi kommersiya müvaviləsinin tərəflərinin milli məhkəmələrin yurisdiksiyasından imtinasını müəyyən edir. Məqalədə arbitraj sazişinin anlayışı və müstəqillik doktrinası nəzərdən keçiriləcəkdir. Eyni zamanda, bu kateqoriyaların həm nəzəri əsasları, həm də praktiki mənası qeyd olunacaq.

Açar sözlər: *arbitarj sazişi, arbitarj qeyd-şərti, müqavilələr, arbitarj sazişin müstəqilliyi, doktrina, milli məhkəmələr, yurisdiksiya*

Introduction

Arbitration agreements are essentially the procedural basis of International Commercial Arbitration. The arbitration takes the case into production only if there is a certain agreement of the parties that has a form that meets the requirements of the arbitration legislation. Unlike state courts, where it is possible to apply for the protection of a violated or disputed right at almost any time, without any preliminary procedure (except in cases of mandatory pre-trial mediation proceedings), in order for the emergence of the right to appeal to international commercial arbitration and transfer the dispute for resolution, the parties must agree on this in advance, that is to conclude an arbitration agreement on the transfer of a particular dispute to the international commercial arbitration court for settlement. Doctrine of separability on other hand defines the independence of the arbitration agreement from the main contract. In other words, the fate of the arbitration agreement is essentially unrelated to the fate of the main contract, even if this agreement is drawn up in the form of an arbitration clause. Doctrine of separability is the principle on which the legal force of the arbitration agreement is generally based.

Concept of arbitration agreement

If we try to give the most general definition of international arbitration, we will get the following statement - this is an institution of private law specifically designed for resolution of the certain category of civil law disputes (international commercial disputes) between parties of different nationalities in non-state arbitration courts. The main feature of arbitration agreements is their binding nature for the

parties who are not able to avoid submitting the dispute to arbitration. According to the established practice in international private legal relations, a court of general jurisdiction has no right to cancel an arbitration agreement, nor can it review the merits of an arbitration award. "At the same time, sometimes the jurisdiction of arbitration is based on the rules of an international treaty - an arbitration agreement between States. Such an interstate agreement is mandatory both for the parties to a commercial dispute and for the arbitration body specified in the contract. If there is a contract, the parties cannot avoid submitting the dispute to arbitration, and precisely to the arbitration specified in the contract; on the other hand, the arbitration cannot refuse to consider the dispute, citing the lack of private agreement of the parties to the commercial contract" (Dmitriyeva, 2017: 630). Before giving a comprehensive definition of an arbitration agreement, it is necessary to understand the origins of this legal phenomen. In fact, the arbitration agreement, so widely used by the parties to international commercial relations, originates from the case of Scott v. Avery.

The circumstances were as follows: respondent Avery was dissatisfied with the award, remunerated to him by the other party. At the same time, the contract contained the following clause: in case of any dispute about remuneration, the issue must first be submitted to arbitration. Despite this, the respondent refused to refer the case to arbitration and instead referred it directly to the court. At the same time, the House of Lords supported the concept of submitting to arbitration in the presence of a corresponding clause and in 1856 adopted the respective decision. The Scott v. Avery clause was explained as follows: "While the parties cannot contractually override the jurisdiction of the courts, they can agree that no right of action will arise in respect of any differences that may arise between them until such differences are resolved by an arbitrator." This provision is often referred to as the Scott vs. Avery Clause. The most popular is the statement of Lord Cranworth: "I can see not the slightest ill consequences that can flow from such an agreement, and I see great advantage that may arise from it" (5). "All contracts concluded with the Grain and Feed Trade Association (GAFTA) include the "Scott-Avery clause", which states: neither party shall bring any claims or other legal proceedings against the other in respect of any such dispute until such dispute is first considered and determined by an arbitrator in accordance with the Arbitration Rules, and the decision of the arbitrator(s) is a condition preceding any claim or other legal proceedings"(6). "The case of Scott v Avery involved a clause which was drafted to overcome the objection to ousting the court's jurisdiction" (13).

Thus, the general definition of an arbitration agreement can be formulated as it follows from the Uncitral Model Law on International Commercial Arbitration (the Model Law): "Arbitration agreement" — is an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal with any particular legal relationship, whether contractual or not"(14). It should be noted that the definition of the concept of an arbitration agreement in Azerbaijani legislation fully coincides with that given in the Model Law.

The arbitration agreement is the cornerstone of the entire arbitration process as a whole. "The essence of the arbitration agreement in the international private law is expressed in the fact that it fixes the mutually agreed will of the parties to an international commercial contract to transfer the dispute that has arisen or may arise between them to international commercial arbitration for resolution" (Yerpylyova, 2004: 6). As we know, international commercial arbitration – doesn't matter if it is the institutional arbitration ("proceeding where the parties designate an institution to administer the arbitral process in accordance with its arbitration rules" (4)) or ad hoc arbitration ("a proceeding that requires the parties to select the arbitrator(s), and the rules and procedures" (4) - is an alternative to judicial settlement of foreign economic disputes. Accordingly, we can conclude that the object of arbitration agreement is directly a dispute between the parties to the contract, and the subject of arbitration agreement is the terms of the arbitration itself, such as the language, place, applicable law and the procedure of the arbitration process. "Arbitration begins with the mutual will of the parties to transfer their dispute to a special non-governmental body for consideration. This is its positive (or prorogative) effect. A properly fixed expression of the will of the parties has another effect — negative (or derogatory), because it entails the withdrawal of the dispute from the jurisdiction of the general courts" (Shelkoplyas, 2016: 1). By virtue of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958, in which more than 110 States participate, the court of a contracting State is obliged, at the request of one of the parties, to refer the parties to arbitration. Thus, the Convention establishes guarantees for the execution of the arbitration agreement as a special agreement

with procedural effect (since it establishes the procedure for dispute resolution) and establishes the private rights and obligations of the parties to the agreement. The Republic of Azerbaijan has been adopted to convention on 29 february 2000 year.

The consensus of the parties to choose a private method of dispute settlement is fixed in the arbitration agreement. Only if there is an agreement between the parties to submit the dispute to arbitration, the state court gives way to the arbitration court. The arbitration agreement is the basis and source from which arbitrators derive their competence and authority to resolve a dispute. The parties themselves determine the limits of the competence of the arbitration court both in relation to the range of disputes that it is authorized to consider, and in relation to the functions and methods to which arbitrators can resort when considering a dispute. Taking into account the foreign economic nature of the relations amenable to arbitration, the requirements concerning its subject matter must be applied to the arbitration agreement: for example, one of the parties or both parties must be complicated by a foreign element (an enterprise with foreign investments, an international association or organization), that is, a controversial or potentially controversial agreement must be related to the implementation of foreign trade or other types of international economic relations. Such an arbitration agreement is a direct provision for the transfer of the dispute to arbitration.

From the point of view of the definition of an arbitration agreement, the question of its legal nature is quite controversial. Studying the specific features of the arbitration agreement and the limits of its impact, at the moment it can be concluded that “the nature of the arbitration agreement is actually mixed (sui generis): “this is a substantive contract with procedural content and procedural legal consequences” (Getman-Pavlova, 2017:163). The arbitration agreement is undoubtedly a civil contract, despite the fact that it concerns procedural issues. Let's look at the definition of the contract in the Civil Code of the Republic of Azerbaijan: “A contract shall mean an agreement between two or several parties on the establishment, modification or termination of the civil rights and obligations” (12). The dual nature of the arbitration agreement is expressed in the fact that, on the one hand, it is a legal fact, on the basis of which the parties who concluded it have the obligation to submit the dispute to arbitration for resolution, as well as the obligation to voluntarily execute the decision that will be made by such a court. On the other hand, it regulates the procedural issues of dispute resolution: types of arbitration the place and language of dispute resolution, the procedure for the formation of the arbitral tribunal.

Doctrine of separability

The doctrine of separability of the arbitration agreement is one of the key principles in relation to arbitration agreements and all international commercial arbitration. The name "doctrine of separability (severability)" is most common in the anglo-american legal system. At the same time, the continental legal system of Europe gives this principle the name "autonomy of the arbitration agreement". In fact, both of these expressions are identical. The nature of the autonomy of the arbitration agreement mainly comes from its recognition within the framework of the main arbitration rules, most arbitration laws, arbitration case law and early decisions of international courts. Moreover, the fact that an arbitration agreement can be formalized not only in the form of a separate document, but also in the form of a so-called arbitration clause in a commercial contract does not affect the legal regime of such an arbitration agreement, since we are talking about the formal documentationing of the agreement. However, it should be noted that the principle of autonomy of the will of the parties is seriously tested when concluding an arbitration agreement in the form of an accession agreement.

It should be noted that despite the fact that opinions on the legal force of the autonomy of the arbitration agreement mostly coincide, many scientists interpret it in completely different ways and there is no consensus on the nature of this doctrine to this day. The doctrine of separability itself states that an arbitration agreement, regardless of the form of conclusion in the form of an arbitration clause or a separate contract, remains in force after the termination of the main contract. There are different views regarding the theoretical explanation of the legal nature of the doctrine of separability. Thus, there is an opinion that “the main contract mediates the economic essence of the legal relations of the parties, determines the content and scope of their substantive rights and obligations, while the arbitration agreement is aimed at establishing a method of dispute resolution and therefore does not concern the material rights and obligations of the parties. So by signing a foreign trade contract containing an arbitration clause, the parties seem to sign two separate contracts, each of which has its own legal

regime" (Yuryev, 2006: 237). In my opinion, this interpretation of the doctrine of separability is fundamentally wrong, because the arbitration agreement, on the one hand, ensures the right of the parties to consider their disputes in an arbitration court, on the other hand, obliges them to apply to this court when a relevant dispute arises. Thus, the materiality of the arbitration agreement is justified. On the other hand, almost all countries recognize the arbitration clause as part of the main contract. Accordingly, the arbitration clause should be considered as a condition of the contract, which has a special status and legal force relative to the rest of the content of the contract. The situation is different when it is claimed that "the arbitration clause itself arose as a result of fraud or error, or when it is stated that the parties did not agree at all on the inclusion of an arbitration clause in the main contract. The final decision on the validity of the arbitration clause itself, from which the arbitrator draws his jurisdiction, can only be made by the court. Entrusting his decision to an arbitrator means giving him the opportunity to decide on his own jurisdiction" (Schmithoff, 1993: 344). This interpretation also seems to be incorrect, because firstly, the uncitral arbitration act directly indicates that the arbitration court has the right to make a decision on the existence and validity of the arbitration agreement, and secondly, if a state court makes a decision on the validity of the arbitration agreement, the whole meaning of the independence of commercial disputes from judicial jurisdiction is lost. The explanation of doctrine of separability from "the point of view of the provisions of the Civil Code of Azerbaijan is very interesting: "Invalidity of one part of agreement shall not result in invalidity of the rest of agreement only in the event if agreement could have been concluded without inclusion of its invalid part" (Mustafayeva, 2015: 97). Apparently, the author implies that if the main contract is declared invalid, the arbitration clause initially may be signed in the form of a separate agreement in principle. This point of view is insufficiently substantiated, since the arbitration clause itself is intended to resolve disputes regarding the contract in the content of which it is included. In other words, without the main contract, the conclusion of an arbitration agreement is meaningless. As we can see, "the meaning of the principle of autonomy of the arbitration agreement is not that the arbitration agreement is interpreted as a kind of legal phenomenon that is absolutely unrelated to the fate and form of fixing the main contract, but that it has additional "survivability" aimed at limiting the ability of an unscrupulous party to create obstacles to arbitration proceedings" (Rashidovna, 2015: 521). "The development by one party of the conditions that make up the content of the future contract, obviously puts it in a more advantageous position compared to the contracting party, and as we know, recourse to international commercial arbitration is possible if there is a corresponding agreement" (Anurov, 2015: 105). The doctrine of separability should be understood to mean that an arbitration agreement in itself is a provision for the parties to apply to arbitration without the need for the assistance of any additional legal mechanisms.

The practical significance of the autonomy of the arbitration agreement is clear: the arbitration agreement, including the arbitration clause included in the text of the international commercial contract, is considered independently of the main contract, and the recognition of the contract as invalid does not lead to the cancellation of the arbitration agreement and does not deprive the arbitrator of the right to consider all disputed issues related to the invalidity of the contract and the consequences resulting from this. Regarding the theoretical component of this legal mechanism, it should be recognized that the independent status of the arbitration agreement is most clearly manifested in the context of disagreements between the contractual parties. Being connected with the main agreement, the arbitration agreement in this case acts as a guarantor of the parties appeal to arbitration and, consequently, independent out-of-court consideration of the dispute that has arisen. Due to this, it is the arbitration that gives a legal assessment of the validity of the arbitration agreement itself. Based on this, in exceptional cases, the reverse effect of the doctrine of separability is also possible, when the main contract is valid, but the arbitration agreement is separately invalidated. So, there is a case when "an english judge, despite the jurisdictional objections of the defendant, refused to send the parties to arbitration, and considered the case on the merits, referring to the fact that sending the parties to arbitration would infringe on the interests of the plaintiff individual. Such a decision of the english judge was based on the provisions of the Arbitration Act of England of 1996 and Unfair Terms in Consumer Contracts Regulations of 1994" (Kotelnikov, 2008: 110).

"The issue of the legal formalization of the doctrine of separability was so important for the developers of the Model Law that they considered it necessary to fix this principle in law" (Kotelnikov, 2008: 108), which they did in article 16. Accordingly, the purpose of the doctrine of separability is to

guarantee the jurisdiction of the arbitral tribunal by ensuring that the parties comply with the agreement to apply to arbitration, and not to fundamentally consider the arbitration agreement separately from the main agreement, because this does not make practical sense. The laws of some countries directly point to this purpose of the autonomy of the arbitration agreement. Thus, article 7 of the Arbitration Act of England states: Unless otherwise agreed by the parties, an arbitration agreement which forms or was intended to form part of another agreement (whether or not in writing) shall not be regarded as invalid, non-existent or ineffective because that other agreement is invalid, or did not come into existence or has become ineffective, and it shall for that purpose be treated as a distinct agreement.. In addition, the autonomy of the arbitration agreement is not limited only to the role of an independent guide of the parties to arbitration. Many legal scholars, including Gary Born, Boguslavsky and Dmitrieva, point out that "the autonomy of the arbitration agreement plays an exceptional role in determining the law applicable to the arbitration agreement itself regarding the determination of the number of arbitrators, the procedure for their selection, the place of the language and the nature of the arbitration proceedings. "Most often, a reference is provided either to the law that regulates the main contract, or to the law that the parties have chosen, or to the law of the State in whichs territory the decision was made" (Dmitriyeva, 2017: 635).

Conclusion

Summing up all of the above, we can come to the final practical designation of an arbitration agreement: a civil contract concluded between the parties to a foreign economic transaction on the establishment of procedural rights and obligations aimed at transferring possible or already arisen disputes to the non-governmental arbitration institution or ad hoc arbitration chosen by mutual consent, consisting in the intention of the parties to subordinate the resolution of disagreements it is the arbitration court, excluding the competence of other judicial bodies. This statement is further reinforced by the fact that doctrine of separability gives the arbitration agreement a special status, which determines the legal force of the arbitration agreement and gives it freedom from the consequences of the invalidity of the main contract. In the absence of doctrine of separability, there was a clear risk of circumvention of the arbitration agreement in favor of the consideration of commercial disputes in national courts. Thus, if an arbitration agreement is a guide to international arbitration, then the doctrine of separation is a necessary barrier in the way of applying to State courts in the presence of this arbitration agreement.

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