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OVERVIEW OF THE RECOGNITION AND ENFORCEMENT OF INTERNATIONAL COMMERCIAL ARBITRATION DECISIONS

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The subject. This informational article is devoted to the peculiarities of recognition and enforcement of international commercial arbitration decisions according to different countries' legislation and international legal regulation.

The purpose of the article is to identify legal patterns of recognition and enforcement of international commercial arbitration decisions in different countries.

Methodology. The study is based on comparative law and formal law methods, analysis and synthesis.

Results, scope of application. Enforcement of arbitral decisions in foreign countries is ensured and guaranteed by multilateral conventions, bilateral treaties and national legislation. The New York Convention 1958 in a certain way limits the scope of legal protection of arbitral decisions and leaves the procedure for recognition and enforcement of arbitral decisions for consideration of the state court. The author analyses of differentiation of the recognition and enforcement regime of so-called "domestic" and "foreign" solutions of international commercial arbitration in terms of doctrinal approaches and practice of foreign countries. Special attention is given to the analysis of foreign arbitral decisions of recognition and enforcement procedures is given to a denial of recognition and enforcement of foreign arbitral decisions and their reasons. In spite of the explicit grounds for refusal of recognition and enforcement of foreign arbitral decisions in New York Convention 1958, some countries try to establish certain exceptions to the rule in the national legislation. Results may be applicable in improvement of international legal regulation.

Conclusions. The courts of the countries - participants of the New York Convention 1958 cannot cancel the foreign arbitral decision or revise it substantially. The refutation of this decision is possible only in the court of the state in whose territory the relevant arbitral decision was made, and such court is not formally bound by the rules of the New York Convention 1958, when deciding whether to cancel or modify the decision.

Key words: *international commercial arbitration, "domestic" arbitral decision, a foreign arbitral decision, recognition of arbitral decisions, the enforcement of arbitral decisions, the New York Convention 1958.*

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1. The value of the recognition and enforcement of international commercial arbitration decisions

Recognition and execution of decisions of International commercial arbitration (further - ICA) is the most important issue in the arbitration dispute settlement mechanism. If an arbitral decision rendered in one country cannot be recognized and performed in another country, this negates the effectiveness of the ICA. Therefore, if the losing party does not comply with the decision made by the arbitrator voluntarily, then it is necessary to apply coercive means of implementation of this decision in the state courts.

2. Importance of the New York Convention 1958

Execution of arbitration decisions in foreign countries is guaranteed by multilateral conventions, bilateral treaties and national legislation. New York Convention 1958 is the most globally accepted and successful instrument among these conventions and treaties. In order to ensure the effectiveness of the dispute the settlement system of the Contracting States must comply with the rules set forth in the New York Convention 1958.

Despite the importance of the New York Convention 1958, it should be noted that it is a certain way to limit the scope of the legal protection of arbitral decisions and reserves to the state court procedure for recognition and enforcement of an arbitral decision. Accordingly, the state courts in the examination of applications for recognition and enforcement of arbitral decisions are entitled to refuse recognition and enforcement of arbitral decisions. In this regard, addressing such issues may be the problem of correlation of the New York Convention in 1958 and the domestic law of the countries where the relevant decision is executed.

3. Criteria for the recognition and enforcement of the ICA.

The problem of recognition and enforcement of decisions of the ICA, in addition to determining the actual mechanism of recognition and enforcement procedures, also addresses the recognition and enforcement regime of the so-called "domestic" and "foreign" ICA solutions. The history of international legal regulation of decisions recognition and enforcement of evidence that was at first a fixed obligation of States to carry out decisions made in their territory. This duty was fixed in Art. 3 of the Geneva Protocol of 1923.

According to Geneva Convention of 1927, the participating States have committed themselves to implement arbitral dcisions made in the territory of other member states of the Convention and on the basis of arbitration agreements, which are subject to the Geneva Protocol of 1923.

Unfortunately, neither the New York Convention nor the international conventions on ICA contain any definition of an "internal" arbitral decision or any recommendations on the issue of criteria be used in such an arbitration decision.

3.1. Decision-making criteria in the territory of the other state

The scope of the 1958 New York Convention is very broadly defined. So, according to paragraph 1 of Art. I of the Convention, any arbitral decisions rendered outside the territory of the State in which such recognition and enforcement is required must be recognized and enforced. In preparing the text of the 1958 New York Convention, proposals to narrow the scope of the Convention were rejected noting that disputes submitted to arbitration should necessarily include foreign elements. Thus, the parties to the Convention have voluntarily agreed to the possibility of limiting the powers of their national courts to consider a large number of disputes that may be related to the activities of citizens and commercial enterprises that have close ties to their territory. It is sufficient that the decision was made in the territory of another state - this is the first and main criterion for inclusion in the scope of the decision of the New York Convention 1958

Moreover, even the arbitration decision, taken on the territory of the same State, which requires their recognition and execution, will be covered under the New York Convention 1958, only if they will not be considered as "domestic" - this is the second criterion, which is complementary to the first.

3.2. Criterion of the "internal" solution

If the application of the first criterion - the conditions of acceptance of the decision in the territory of another state does not cause too much difficulty, the second criterion - the position that the decision should not be "inside them", - is less regulated.

3. 2. 1. "Internal solutions" under US law

Some countries, in contrast to Ukraine, made an attempt to clearly define the scope of the New York Convention 1958 and domestic national law on arbitration on the basis of the second criterion, which provides that the Convention applies to arbitral decisions made in the territory of the state other than the state where the recognition and enforcement of such decisions were

made. In the US there was a precedent when the US Supreme Court has recognized that the New York Convention 1958 is to be applied in respect of a dispute between the two US companies (with respect to the contract for the supply of equipment to Guinea), the decision to be taken by the ICA in Geneva [1, from. 313]. The court did not refer to the fact that the arbitral decision under the Convention by virtue of h it imposed foreign (in this case - a non-US) arbitration, and said the US law that requires the presence of I 'd cleverly relations with foreign countries. "

3. 2. 2. "Domestic solutions" according to Italian law

The Italian court cited the performance of the arbitration decision in the case between the two Italian companies, imposed in Germany, referring to the fact that this decision is in a foreign language and as a result, subject to the execution of the first criterion of Art. I of the New York Convention. This precedent was very resonant, due to the fact that the Italian court recognized the provisions of Art. Art. 2 and 800 CCP Italy, prohibiting transfer agreement disputes between the Italian companies to the foreign arbitral decisions are not subject to the application of conductive because of their contradiction to the New York Convention, 1958. Thus, the adoption of the decision outside the territory of the country is a sufficient reason for the inclusion of such Decisions within the scope of the Convention in Italy.

3. 2.3. "Domestic solutions" according to the laws of England

In England, the Arbitration Act 1975 the concept of "internal (domestic) arbitration decision" was introduced, defined as the arbitration decision made on the basis of internal arbitration agreement in full compliance with the second criterion of Art. I of the New York Convention.

During the preparation of the law "On arbitration" in 1996, its acting in England with certain conditions, as well as in Northern Ireland and Wales, an attempt was made to formulate a definition of "domestic" decision. According to Art. 85 of the Act the decision recognizes "internal" under two conditions: a) its sides are UK residents or entities incorporated in the UK; b) the seat of arbitration is the United Kingdom. Thus, the British law, unlike the US, does not contain any reasonable criterion of relations with foreign countries, necessary to assign an arbitration decision made in the UK.

However, unlike the American legislation adopted directly in the performance of the New York Convention, the Convention of 1958, and the UNCITRAL Model Law, it is aimed at the international arbitration of the Arbitration Act 1996, the UK is a comprehensive act regulating the issues of both domestic and international Arbitration (including implementation of decisions relevant to the scope of the Convention). In this definition of domestic arbitral the decision is included in the section of the Act, dedicated exclusively to domestic arbitration. Moreover, Art. Art. 85 - 87 of the Law of England "On Arbitration" 1996 did not enter into force, since the definition of the "internal" arbitral decision was found to be inconsistent with the legislation of the European Union, taking into account the fact that according to this definition, the boundary between residents of England and residents of other countries is drawn.

3.2.4. "Domestic solutions" under the laws of Germany

It should be noted that in different countries, decisions are classified as "internal" (the second criterion of Art. I of the New York Convention in 1958 in different ways. The most liberal approach to this issue demonstrates the German legislation, which provides that a decision can be rendered on its territory, however it will not be considered as internal if the parties have subordinated arbitration to the foreign law.

3.2.5. Conclusions about domestic decisions in national legislation

So, after analyzing the approaches to understanding arbitration decisions, we can conclude that the scope of the New York Convention was defined in such a way to maximize the possibility of further intervention to limit the state court in making decisions (subject to the following provisions of the New York Convention, especially in Art. V). As a result, the courts of countries-participants of the New York Convention 1958 can neither cancel the foreign decision nor review it.

4. Voluntary implementation of ICA decisions.

As a general rule, the arbitral decision, irrespective of the country in which it was pronounced, is subject to voluntary execution by the parties. The voluntariness of the performance of the arbitral decision is fully consistent with the legal nature of international commercial arbitration, since the parties voluntarily chose arbitration as a way of settling the dispute, providing the voluntary implementation of the arbitration decision at the stage of concluding the arbitration agreement. However, very often the party against whom the decision is made evades voluntary fulfillment.

5. Relation of enforcement of foreign arbitral decisions and foreign judgments

In the modern doctrine of the ICA there is a certain number of problematic issues regarding the recognition and enforcement of foreign arbitral decisions. The first and, in our opinion, the key problematic issue is an attempt to identify the recognition and enforcement of foreign arbitral decisions and foreign judgments.

The issue of recognition and enforcement of foreign arbitral decisions as a prototype of a foreign judicial decision finds radically opposite answers in various legal systems and in the ICA doctrine.

Thus, Council Regulation (EC) 44/2001 of December 22, 2000 "On Jurisdiction, Recognition and Enforcement of Judgments in Civil and Commercial Matters" before the Brussels Convention of 1968, as well as the Lugano Convention of 1988, excluded the notion of "arbitration" from the sphere of execution and recognition of foreign judgments.

Practice varies in different states. Under English law, if a party receives a foreign judgment by which a foreign arbitral decision made in pursuance of, respectively, such a solution in England can be performed in accordance with the rules, which are used to execute foreign judgments.

Under German law, the exequatur procedure cannot be recognized or executed in Germany. However, if the decision merged with the decision of a foreign court, the creditors at their own discretion can choose the performance of a "united" decision or decision on the so-called procedure of "double exequatur". But the German Federal Supreme Court gave a final solution to this issue, believing that only the decision is entitled to recognition and enforcement [2, p. 172].

In accordance with § 1 (e) of the US Federal Law "On the Recognition and Enforcement of Foreign Judgments," the law does not apply to " ... (III of) foreign arbitral decisions and court decisions related to the arbitration decision,". This position is similar to the Brussel Convention.

6. Refusal of Recognition and Enforcement of Foreign Arbitral Decisions

Another problematic issue of Foreign Arbitral Decisions of recognition and enforcement procedures is the refusal of recognition and enforcement of foreign arbitral decisions. Although the New York Convention, 1958 identifies the same grounds for refusing recognition and enforcement of foreign arbitral decisions in all Contracting States, their use can lead to contradictory results in different states.

The New York Convention of 1958 established two exhaustive grounds for refusing recognition and enforcement of arbitral decisions. The first reason includes cases where: a) the parties to the agreement are recognized as incapable, or the agreement is not valid under the law to which the parties have subjected it or, contradict the law of the country where the decision was made; b) the party against whom the decision is invoked was not given proper notice of the appointment of the arbitrator or of the arbitral proceedings or was otherwise unable to present his case; c) the decision deals with a dispute not contemplated by or not falling within the terms of the arbitration agreement or arbitration clause in the agreement, or contains decisions on matters beyond the scope of the arbitration agreement or arbitration clause in the contract; g) the composition of the arbitration body or arbitration process does not conform to the agreement of the parties or the absence thereof does not conform to the law of the country where the arbitration took place; e) the decision has not yet become binding on the parties or its execution has been set aside or suspended by the competent authority of the country where it was made, or the country whose law applies.

The second group includes the situations when: a) the subject matter may not be subject to arbitration under the laws of that country; b) the recognition and enforcement of decisions is contrary to the public policy of that country.

C. Besson noted that, although the wording of Article V is permissive, the discretionary power of the court should not be overestimated. If the court finds that there has been a failure or abuse of the arbitration process, the court does not satisfy the request of the parties on the recognition and enforcement[3] .

Despite a clear consolidation of the grounds for refusing recognition and enforcement of foreign arbitral decisions in the New York Convention of 1958 city of some countries in the national legislation are trying to establish some exceptions to the rule.

So, the Swiss Law "On International Private Law" provides that any dispute in the presence of economic interest may be subject to arbitration (Art. 177). All arbitration proceedings with the definition of the external economic disputes to arbitration in Switzerland are governed exclusively by lex arbitri. In practice, there were questions as to whether the arbitrators should take into account the rule of law likely place recognition and enforcement of a foreign arbitral decision, in order to reduce the risk of failure of such decisions. The Swiss Federal Court has ruled that they should not. In accordance with the Swiss definition of arbitrability, the dispute shall be deemed duly submitted to arbitration, even if it can prove that the decision will not be carried on in execution in another Member State whose law considered the dispute to be unarbitrable. Federal Court reasoned that, in enacting Art. 177 the Swiss legislator decided to ensure that the parties were able to assess the risk of possible non-recognition solutions .

7. Principles of recognition and enforcement of arbitral decisions

According to Art. III of the New York Convention 1958 the recognition and enforcement procedure for the enforcement of foreign arbitral decisions relating to the scope of the Convention, each State participating has to establish its own set based on the following principles:

1. The procedure of recognition and enforcement of arbitral decisions relating to the scope of the Convention shall comply with the basic rules laid down in Art. IV - VII of the Convention, that is, you must fulfill the requirements of the Convention , to

a) the composition from the documents necessary for the recognition and enforcement of arbitral decisions;

b) the grounds for refusing recognition and enforcement of, or the basis of these deposits in the enforcement of arbitral decisions;

c) the ratio of the rules established by the Convention, the laws and international treaties of the countries participating in the Convention.

2. Recognition and enforcement of an arbitral decision should not apply "substantially more burdening conditions" than the conditions that must be met for the enforcement of domestic arbitral decisions.

3. The fees or charges charged in connection with the recognition and enforcement of foreign arbitration decisions should not exceed fees or fees charged in the enforcement of internal arbitration decisions.

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