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AS TO THE RELATIONS BETWEEN THE PARTIES IN ARBITRATION PROCEEDINGS

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SUMMARY

The article is devoted to research of relations of the parties in the arbitration process. It is noted that despite the fact that there are free contractual relations between the parties, there is no such agreement between the parties and the composition of the arbitral tribunal, as the composition of the arbitral tribunal carries out a quasi-judicial function and is independent in its essence. The article analyzes the various arbitration rules of chiefly the most influential commercial arbitration courts. The impossibility of absolute freedom of parties has been substantiated, since by passing a dispute to an arbitration institution or tribunal established ad hoc, the parties voluntarily place themselves within the limits stipulated by the rules of such an institution or established previously.

Key words: dispute resolution, international commercial arbitration, New York Convention, limits of party autonomy in arbitration proceedings, independence of an arbitrator.

КАСАТЕЛЬНО ОТНОШЕНИЙ СТОРОН В АРБИТРАЖНОМ ПРОЦЕССЕ

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АННОТАЦИЯ

Статья посвящена исследованию отношений сторон в арбитражном процессе. Отмечается, что несмотря на тот факт, что между сторонами существуют свободные договорные отношения, между сторонами и составом арбитражного суда нет такого соглашения, так как состав арбитражного суда исполняет квазисудебную функцию и является независимым по своей сути. В статье проанализированы различные арбитражные правила преимущественно наиболее влиятельных коммерческих арбитражных судов. Обоснована невозможность наличия абсолютной свободы сторон, так как передавая спор на рассмотрение арбитража или трибунала, созданного ad hoc, стороны добровольно ставят себя в рамки, обусловленные правилами такой организации, или такие, которые установлены заранее.

Ключевые слова: разрешение споров, международный коммерческий арбитраж, Нью-Йоркская конвенция, свобода сторон в арбитражном процессе, независимость арбитров в арбитражном процессе.

Theme actuality. Arbitration is a universal way of resolving disputes, which avoids formalism and confrontation while considering, providing the necessary confidentiality. Today the number of cases considered by the International Commercial Arbitration Court at the Chamber of Commerce and Industry of Ukraine is constantly increasing, however, in practice many issues still remain unresolved and require further improvement.

International commercial arbitration is the most preferred alternative dispute settlement in recent years. One of the reasons behind this popularity is flexibility of the arbitral process. Such popularity made possible for International Arbitration to become rather idiosyncratic area of study and practice: in continental Europe it started as an area of practice populated predominately by academics while in the common law was embraced mainly by practitioners, who manifested academic aspirations and credibility. Moreover, it is an area of legal practice, where the proliferation of academic and legal writing in the last twenty-five years is rather unparalleled both in terms of quantity and quality [1].

State of development of the declared topics. Problems of the relations of the parties in the arbitration process have repeatedly become the object of scientific research of both domestic and foreign lawyers. Among them are Ye. Boiarskyi, G. Born, A. Dovgert, S. Dursun, Ar. Gör, E. Gaillard , J. Savage, M. Pryles, Y. Prytyka , L. Stavros, C. Walsh and many others, however, in practice many issues still remain unresolved and require further improvement.

The purpose of the article is to analyze the relations of the parties at all stages of the arbitration process, which is based on the will of the parties that have concluded the arbitration agreement, as well as the definition of the limits of freedom in the arbitration process since by referring the dispute to an arbitration institution or tribunal created ad hoc, the parties voluntarily put themselves within the framework of the rules of such an institution or established in advance.

The main chapter. Contractual theory states that the competence and authority of international commercial arbitration is the result of the common consent of the parties expressed in the arbitration agreement. That is,

contractual theory generally considers arbitration at all its stages as a single process, based on the will of the parties that have entered into an arbitration agreement. Arbitration agreement and arbitration award are considered as two parts of the arbitration agreement, combined with the will of the parties. The most arbitral proceedings are defined as an intermediate target for achieving the ultimate goal – the final settlement of the dispute [2].

International arbitration is also an area of law with very few absolutes. Sources of substantive law have a different dynamic than in domestic litigation and arbitration: in addition to traditional positive law, soft (transnational) rules of law have firmly established themselves as applicable norms for arbitral decision-making. Arbitral procedural rules are an anthology of international treaty rules, arbitration rules (soft law) and domestic rules, which are mainly enabling default rules for the organization and conduct of proceedings and in rare occasions mandatory.

Once a dispute has arisen, arbitration has been commenced and the tribunal has been established, the freedom of the parties to determine the arbitral procedure may be circumscribed. Any freedom cannot be forfeited without a reason. So in order to understand the various limits to party autonomy in arbitration procedure we need to establish *status* of the arbitration tribunal as a branch of power, which apply some limits to the most basis of arbitration itself.

In particular, the constitution of an arbitral tribunal brings into existence a new set of contractual relationships concerning the arbitrators themselves.

There has been some debate as to whether the rights and obligations of arbitrators stem from their "status" as arbitrators and arise directly from law or whether they arise from a contract, which is entered into when they accept their appointment, which is crucial. Because finding a source of power of an arbitrator will help us to determinate an ability to adopt decisions, which goes against the exercising of party autonomy.

One view is that a contract does necessarily exist between the parties and the arbitrators; the contract is bi-lateral and creates rights and obligations for both the arbitrators and the parties. However, where arbitration is administered by an arbitral institution, the contractual relationships become triangular [3].

According to another view in order to proceed by finding a contract and then applying to it the ordinary principles of the law of contract will not produce a reliable answer unless a contract really exists to be found. Even in the case of a massive reference, employing a professional arbitrator for a substantial remuneration, there is a doubt what a business man would, if he stopped to think, concede that he was making a contract when appointing the arbitrator. Such an appointment is not like appointing an accountant, architect or lawyer. Indeed, it is not like anything else at all.

From this point of view, courts will recognise this, and will not try to force the relationship between the arbitrator and party into an uncongenial theoretical framework, but will proceed directly to a consideration of what rights and duties ought, in the public interest regarded as attaching to the status of arbitrator.

English courts, however, appear to disagree with the Mustill and Boyd view. In two cases it has been found that the arbitrators become parties to the arbitration agreement itself. In "Compagnie Européene de Cerelas SA" court made such a ruling, "It is the arbitration contract that the arbitrators become parties by accepting appointments under it. All parties to the arbitration are as a matter of contract (subject always to the various statutory provisions) bound by the terms of the arbitration contract".

While the arbitrators become parties to the arbitration agreement, the judge stated that the arbitrators were not parties to the commercial contract and were not in the proper sense of that word bound by it.

A similar conclusion reached in "K/S Norjarl A/S v. Hyundai Heavy Industries Co. Ltd" [4]. In that case Mr Justice Phillips, after reproducing the comment of Mustill and Boyd, above, said that, "[i]n the present case I do not find the contractual framework an uncongenial one within which to consider the position of the arbitrators and shall proceed upon the premise, common to both parties, that contractual principles should be applied.

The basic rights and obligations of the arbitrators can be simply stated. By accepting their appointments [they] undertook, in the words of s. 13(3) of the Arbitration Act 1950, 'to use all reasonable dispatch in entering on and proceeding with the reference' – a due diligence obligation. Having accepted appointments as arbitrators [they] have become entitled to reasonable remuneration for their services. These are conventional features of a contract to provide services".

An appeal to the Court of Appeal was dismissed with each of the three judges giving reasons. The Vice Chancellor said that, "[f]or myself, I find it impossible to divorce the contractual and status considerations: in truth the arbitrator's rights and duties flow from the conjunction of those two elements. The arbitration agreement is a bilateral contract between the parties to the main contract. On appointment, the arbitrator becomes a third party to that arbitration agreement, which becomes a trilateral contract: the arbitrator undertakes his quasi-judicial functions in consideration of the parties agreeing to pay him remuneration. By accepting appointment, the arbitrator assumes the status of a quasi-judicial adjudicator, together with all the duties and disabilities inherent in that status".

But in case we will assume (as English courts do) that arbitrators are parties to the arbitration agreement or contract, so it follows that after the tribunal is constituted, the parties themselves cannot unilaterally change the terms of the arbitration agreement without the consent of the arbitral tribunal. Thus, if the arbitration agreement itself specified certain times for the taking of procedural steps the parties could not agree to change those times without the consent of the arbitral tribunal. This result must follow, if the view is accepted that the arbitrators become parties to the arbitration agreement.

While there is no unanimous view in the source of arbitration power, in order to understand problem, which can defiantly rise in practice it would be reasonable to address to the article by Michael Pryles, where he described problem as follows, "Recently I was involved in an ICC case, where an interesting question arose concerning party autonomy and the freedom of the parties to designate time limits. The arbitration in question had been proceeding for some time.

After drawing up the Terms of Reference, the arbitral tribunal, after consultation with the parties, had prepared a Procedural Timetable. This specified the various procedural steps to be followed in the arbitration including the provision of submissions, the lodging of witness statements, requests for documents and a hearing. Dates were a scribed for each of these steps. Unfortunately, there was considerable slippage in the adherence to the due dates and it became necessary to set new dates for the remaining steps in the arbitral procedure. The parties had already provided their major submissions (memorials) and the remaining submissions comprised a Reply and a Rejoinder. The arbitral tribunal conscious of its obligation to proceed with reasonable expedition and also bearing in mind that the arbitration was proceeding much slower than anticipated, considered that the remaining two submissions should be provided within a short time. However, the parties had conferred and had agreed that nine months should be allowed for the Reply and a further nine months for the Rejoinder. The question for the arbitral tribunal was whether it was obliged to accept the parties' agreement as to these new dates or whether, assuming it was not so obliged, it should accept them nonetheless" [4].

Problem which is basically arises is Article 19 (1) of the UNCITRAL Model Law [5], which establishes, "Subject to the provisions of this Law, the parties are free to agree on the procedure to be followed by the arbitral tribunal in conducting the proceedings".

A broad and general provision is also found in section 1(b) of the Arbitration Act 1996 (UK) [6], which states that the provisions of Part 1 of the Act are founded on stated principles including: "(b) the parties should be free to agree how their disputes are resolved, subject only to such safe guards as are necessary in the public interest".

In relation to procedure section 34(1) achieves a similar result to Article 19(1) of the Model Law [4]. Section 34(1) provides, "It shall be for the tribunal to decide all procedural and evidential matters, subject to the right of the parties to agree any matter".

What then are the limits to party autonomy, if any? Can the parties agree on any matters they please, or are there restrictions? Is the tribunal always bound to follow the agreement of the parties?

In considering the limits to party autonomy in arbitration procedure, it is necessary to distinguish the situation prior to the commencement of an arbitration and post the commencement of arbitration [7].

Let's assume, that the parties have agreed, on an extension of time for the provision of a submission, or on the time required for a hearing. Let us further assume that the case involves arbitration under the ICC Rules, where the arbitrators are paid on an ad valorem basis.

In this situation lets us assume that the parties have agreed that there will be brief memorials, no witness statements but a long hearing of say 12 months. ICC arbitrations typically involve relatively short hearings and instead there are extensive memorials and the provision of evidence prior to the hearing in the form of production of documents and witness statements.

Mr Pryles came to conclusion that the arbitrators' interests in the allocation of their time and in having reasonable remuneration for their services outweighs the parties' desire to conduct the arbitration in the form of a traditional common law trial. In such a case the arbitrators could well exercise their discretion against granting a hearing of the duration sought and agreed by the parties [4].

In other words, arbitrators must concern reasonableness of any of these actions, and in case finding such parties' will unreasonable, they can overrule parties' agreement.

Author of this work sees such problem from another angle. Problem must be stated whether all arbitrators have a right to doubt/disregard any agreement of the parties'. As it was previously mentioned Article 19(1) of Modern Law give wise discretion of rights to the parties. But the parties' freedom to agree on an arbitration regime of their choice and to prescribe the procedure to be followed is subject to few limitations. The arbitration agreement must be a valid one according to the law, which governs it. This will usually be the law governing the substantive contract, in which the arbitration clause is embedded, but is not necessarily that law.

In addition, the arbitral procedure itself should comply with the mandatory rules of law of the lexarbitry. The lexarbitry is often the law of the place of the seat of the arbitration, but not invariably so.

Some of Model's Law provisions are mandatory therefore be excluded or modified by the parties. For example, Article 11(2) provides that the parties are free to agree on a procedure of appointing the arbitrator or arbitrators, subject to the provision of paragraphs (4) and (5). Thus paragraphs (4) and (5) of Article 11 are mandatory. While it does not expressly say so, it is almost certain that a court would construe Article 18 as mandatory. It provides, "the parties shall be treated with equality and each party shall be given a full opportunity of presenting his case".

This principle gives a full opportunity of presenting case by the nature abstract guidelines of due process. Therefore, whether due process has been violated would depend on the specific factual circumstances of a case. It could be argued though that the principle of 'equality of the parties' would not necessarily be determined on a simple quantitative basis: for example, the fact that a party was not given exactly the same amount of time as the other party, but was nevertheless given enough time to present its case, it would not mean that the principle of equality has been violated. Similarly, 'full opportunity of a party to present his case' cannot be abused to result to dilatory tactics. It has been held the fact that a tribunal dismissed a claim, despite the fact that this claim had been partially acknowledged by the respondent, did not amount to a violation of the principle due process (CLOUT Case No. 146, Russian Federation, Moscow City Court, 10 November 1994). The court noted that a tribunal is not bound by the acknowledgment of the claim by a respondent. In another case, one of the parties challenged the award on the basis, inter alia, that the tribunal violated due process as it failed to compel a witness to testify (CLOUT Case No. 391, Superior Court of Justice, Canada, 22 September 1999). The court rejected the challenge holding that the arbitral tribunal had no power under Art. 27 to compel witnesses to testify. The court noted that the applicant should have had resorted to national courts to compel testimony; failure of the applicant to seek judicial assistance cannot be imputed to the tribunal, as

the purpose of Art. 18 is to protect a party from egregious and injudicious conduct by an arbitral tribunal, rather than to protect a party from its own failures or strategic choices [5].

Accordingly to a well-known position: [t]he freedom of the parties [under the Model Law] is subject only to the provisions of the Model law, that is, to its mandatory provisions. The most fundamental of such provisions, from which the parties may not derogate, is the one contained in paragraph (3) of Art. 18 [8].

Likewise section 33 of the Arbitration Act 1996 (UK) provides:

"1) The Tribunal shall: a) act fairly and impartially as between the parties, giving each party a reasonable opportunity of putting his case and dealing with that of his opponent; b) adopt procedures suitable to the circumstances of the particular case, avoiding unnecessary delay or expense, so as to provide a fair means for the resolution of the matters falling to be determined.

2) The tribunal shall comply with that general duty in conducting the arbitral proceedings, in its decisions on matters of procedure and evidence and in the exercise of all other powers conferred on it".

Hence, counting that Art.18 of Model Law, supported by is obviously mandatory, in case parties would have agreed that only the claimant would be heard in the arbitration, this agreement would be struck down as invalid. So, as we can see, parties' autonomy on establishing rules of procedure is not absolute. Thus brings a question, where such limits are.

Other restrictions on party autonomy might arise where the parties select institutional arbitration, but attempt to alter the rules of the administering body in a way, which is unworkable or is not accepted by the administering body. Thus, for instance, if the parties provided for arbitration in accordance with the ICC Rules of Arbitration (ICC Rules), but provide that Article 27 of the ICC Rules (which deals with scrutiny of awards by the ICC Court) will not apply, it is probable that the ICC Court would not accept the case as an ICC case. Court scrutiny of awards is an important feature of ICC arbitrations and the administering body is unlikely to agree to waive it [5].

Apart from mandatory provisions of the law governing the arbitration agreement and the lexarbitry, and subject to "unacceptable" amendments to institutional rules, the parties enjoy very broad freedom in selecting the arbitration regime they desire and in prescribing the procedure to be followed.

Also as it mentioned above under Art. 18, procedural party autonomy is only limited by due process. A question that is pertinent here is whether the parties may go as far as to contractually exclude review of the arbitral award by national courts under Art. 34. Canadian courts answered this question in the affirmative, holding that Art. 34 is not a mandatory provision *(Noble China v Lei Kat Cheong)*. While party autonomy is limited only by due process, arbitrators are additionally limited by the agreement of the parties, including any arbitration rules agreed therein. Thus, arbitrators cannot adopt any procedure (even one that is generally applied in arbitration practice) that deviates from the wishes of the parties, or the award will be set aside by virtue of Art. 34(2) (a)(iv) [5].

But can we say that Article 19(1) of Model Law is as mandatory as Art. 18 of the Model Law? As noted above, Article 19(1) states, "subject to the provisions of this Law, the parties are free to agree on the procedure to be followed by the arbitral tribunal in conducting the proceedings". Is this freedom limited to an agreement reached by the parties before the arbitral tribunal agrees to be appointed, or also afterwards? This issue was discussed during the drafting of the Model Law: "one matter that was considered at some length during the drafting of Article 19 was whether there should be a limitation on when the parties could agree on a procedural point. The Secretariat suggested that the Working Group amend draft Article 19 so as to require that any agreement on the arbitral procedure be reached before the first or sole arbitrator was appointed. The rationale for the proposal was that the rules of procedure should be clear from the outset and that any arbitrator should know from the beginning the rules under which he or she is expected to perform his or her functions.

Group rejected this idea, finding instead that the freedom of the parties to agree on a procedure "should be a continuing one"; the Working Group interpreted paragraph 1 to provide for such a continuing freedom. The matter was raised again before the Commission, where conflicting proposals were offered, one that the Working Group's understanding be made explicit and the other that it be reconsidered. After extended discussion, the Commission decided not to change the Working Group's draft. There was some sentiment in favour of each proposal, but it was noted that in any case the arbitrators could not be forced to accept any procedures with which they disagreed, since they could always resign rather than carry out the unwanted procedural stipulations. Moreover, if the matter was of strong concern, the timing of any agreement on procedure could be regulated by agreement between the parties and the arbitrators [8].

In an arbitration conducted under the Model Law, the parties therefore have freedom to agree on the procedure even after the tribunal has entered into its contract with the parties.

The question that arises next is whether Article 19(1) is mandatory and continuing or can be fettered by the parties themselves. If it is mandatory then, regardless of whether the arbitration agreement specifies the procedure to be followed, or nominates a set of procedural rules, the parties would remain able to agree on, and direct the tribunal to follow, procedural steps including in relation to time limits. The correct answer, it suggested, that Article 19(1) is not mandatory. Holtzmann and Neuhaus take the same view [9], "[a]s was noted by the Working Group, the freedom of the parties under paragraph (1) to agree on the procedure is a continuing one throughout the arbitral proceedings and not limited, for example, to the time before the first arbitrator is appointed.

It is submitted however, that the parties themselves may in their original agreement limit their freedom in this way if they wish their arbitrators to know from the start under what procedural rules they are expected to act" [5].

To hold otherwise, it suggested, would defeat policy goals underpinning the Model Law. It may for example permit the parties to agree after arbitration has been commenced on the removal of elements of an institutional arbitration, which the administering body could not accept. An illustration would be an agreement to remove ICC Court

scrutiny of awards in arbitration under the ICC Rules, as it was discussed previously.

Such an agreement be included in the original arbitration agreement itself the ICC Court would doubtless decline to accept the arbitration. Another consequence would be that parties could vary express terms of any contract they sign with the arbitral tribunal. This could lead to undesirable friction or conflict with the arbitral tribunal and possibly even the resignation of its members. Conferring a power to over-ride contractual relationships is hardly compatible with the sanctity of contracts, which is a fundamental tenet of international trade and dispute resolution. Section 34(1) of the Arbitration Act 1996 (UK) which is similar in effect to Article 19 of the Model Law is not mandatory because it is not listed in Schedule 1 to the Act. Accordingly a similar position would appertain to that which exists under the Model Law [8].

Conclusions. Returning then to the notion, that arbitrators become parties to the arbitration agreement or contract, it is suggested that this idea needs some elaboration. We doubt whether the arbitrators could become parties to the arbitration agreement or contract itself. In the case of an arbitration agreement inserted into a substantive contract, it will usually provide for the submission of future disputes to arbitration. This could include several disputes over a period of time, each of which could be referred to a separate arbitration. It could not be the case that arbitrators appointed in a first dispute become parties to the arbitration agreement, and therefore somehow involved in the reference of future disputes to arbitration.

Rather, the principle espoused in the cases cited above must mean that when a particular dispute arises, and is referred to arbitration, a contract comes into existence between the parties and the arbitrators, which includes the terms of the arbitration agreement or contract.

In conclusion, where the arbitration agreement deals with the procedural point in question the parties cannot unilaterally change their agreement without the consent of the tribunal. Where the arbitration agreement is silent and does not deal with the procedural point Article 19 of the Model Law enables the parties to make an agreement at any time during the arbitral proceedings. However even here that there may be some limits. As it was noticed above Art. 19 of Model Law gives no unlimited rights to the parties', and tribunal have every right to intrude, whether he feels it is necessary, as long as this interventions goes along with national arbitration law, arbitral rules or rules of law.

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