РАЗРЕШЕНИЕ СПОРОВ С МЕЖДУНАРОДНЫМ ЭЛЕМЕНТОМ: НЕКОТОРЫЕ ПРОБЛЕМЫ*

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Споры между участниками международных сделок по поводу применения частного международного права неизбежны. В отличие от внутренней деловой активности, международный бизнес развивается в достаточно нестабильной и часто непредсказуемой среде. Поэтому споры и конфликты неизбежны даже в том случае, если стороны прилагают все усилия для выполнения контрактных обязательств.
Практика показывает, что нет общепризнанного и применимого во всех случаях закона, касающегося международных коммерческих споров, нет особого международного суда, а также международной процедуры для решения таких споров.
Однако в международном праве существует механизм, называемый международным коммерческим арбитражем. В статье рассматривается данный феномен.

Ключевые слова: международный коммерческий арбитраж, разрешение споров, юрисдикция, арбитражное решение.

A dispute between participants in international business activities within the scope of application of the rules of private international law is inevitable. In contrast to the national, international business is developing very extensively and sometimes in unstable unpredictable environment. Therefore, the emergence of conflicts and disputes between business entities in different countries will be inevitable even in cases where the parties genuinely and consistently strive to fulfill contractual obligations.

Practice shows that there is no recognized and generally applicable law to address international commercial disputes, there is no special international court, as well as other international procedure to address international business disputes.

In these circumstances international law has a special mechanism for dealing with international business disputes which is called international commercial arbitration. International Commercial Arbitration is needed when trials consider international treaties signed by the owners, that is, when international commercial interests are affected.

Compared to the national courts international commercial arbitration courts are not public entities and not part of the judiciary.

Thus, in accordance with Art. 4 of the Federal Constitutional Law of the Russian Federation of December 31, 1996 № 1-FKZ "On the Judicial System of the Russian Federation"[1] in the Russian Federation there are federal courts, constitutional (statutory) courts and magistrates of the Russian Federation, which form the judicial system of the Russian Federation.

The growing popularity of international commercial arbitration is associated with significant benefits and advantages provided to parties of external economic transactions in resolving disputes. Arbitrators in commercial arbitration are administered parties that have the ability to provide independent and competent resolution of the dispute; the arbitration procedure is simple and informal, eliminating the need for the study and performance of complex procedural rules and regulations in the state courts and giving the possibility of doing things on your language or languages commonly spoken, and not the official language of the country of the dispute and even the timing of the arbitration proceedings, the choice of applicable law. The arbitration award is final and is not subject to appeal on the merits.

As noted by S.N. Lebedev, opposed to state forms of justice having power inherent in it by virtue of the law, and independent of the will of the parties,

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the arbitration proceedings can take place only by agreement of the parties, from which the court derives its jurisdiction[2].

Legal facts form the basis of excitation of arbitration proceedings before the arbitration agreement. Only if the parties agree, the dispute may be referred to the international commercial arbitration.

As noted by V. Gavrilov, the arbitration agreement raises two main legal implications of competencies that relate to the field of procedural law, namely, the positive effects that recognize the competence of the court of arbitration to resolve a dispute referred to the arbitration agreement and the adverse effects, based on the exclusion of the dispute from the jurisdiction of the state court, if, contrary to an arbitration agreement prosecuted in state court and the defendant prior to the resolution of the dispute on the merits in state court declares that the jurisdiction to resolve the dispute to arbitration[3].

The legal regulation of international commercial arbitration has two levels: international law and civil law. They determine the content of the mechanism of legal regulation in this area as a whole. In this case, the international legal regulation of arbitration is made, first, through the unification of the rules of civil procedure legislation of various states for arbitration to ensure consistent approaches to the relevant relationships, including, the arbitration procedure, secondly, through the creation of recommendation rules of arbitration and third, through the creation of an international legal framework for the legal recognition and enforcement of international commercial arbitration in various states. The scale of civil regulation of relations in the field of international commercial arbitration is established by state regulations.

Currently, arbitration and civil procedure legislation of the Russian Federation establish common criteria for dispute settlement acceptable for the arbitration courts. These general criteria are:

- dispute arising from civil law may be referred to arbitration before the Court of the first instance court decision that ends the trial on the merits, unless otherwise provided by federal law (Part 3. 3, Part 6, Article 4 of the Code of Civil Procedure RF[4] and Part 6, Article. 4 APC) [5];

- disputes arising from administrative and other public-law relationship are subjected to special proceedings for the establishment of the facts of legal significance.

An arbitral tribunal of civil disputes can only be the case, unless otherwise provided by federal law.

In the Russian Federation, the legal basis for the organization and operation of international commercial arbitration is the law of the Russian Federation dated July 7, 1993 № 5338-1 «On International Commercial Arbitration" (hereinafter - the Law on ICA), passed with two annexes: Regulations on International Commercial Arbitration Court at the Chamber of Commerce of the Russian Federation (hereinafter referred to ICAC) and the Regulations of the Maritime Arbitration Commission at the Chamber of Commerce of the Russian Federation (hereinafter - ICAC). In accordance with Art. 1 of the ICA it applies to international commercial arbitration, if the place of arbitration is on the territory of the Russian Federation.

The ICAC is competent to deal with the following disputes:

- international economic relations, provided that the business of at least one party is outside the territory of the Russian Federation;

- between the parties, one of which is an enterprise with foreign investment or international organization set up in Russia, regardless of the nature of the dispute.

"Civil-law relations, disputes of which may be referred to the Tribunal, including, in particular, the relations between the purchase and sale (supply) of goods, works and services in the exchange of goods and (or) services, transport of goods and passengers, sales and Mediation lease (leasing), scientific and technological exchange, exchange of other results of intellectual activities, construction of industrial and other facilities, licensing transactions, investments, credit and settlement operations, insurance, joint Ventures and other forms of industrial and business cooperation"[6].

The competence of the IAC, in contrast to the ICAC, has a special character. ICA jurisdiction over disputes arising from contractual and other civil law relationships arising out of merchant shipping, no matter if parties to such relations are Russian and foreign entities or only Russian or foreign. In particular, the ICA resolve all disputes arising out of the following:

- chartering services, maritime transport, as well as transportation of goods in mixed swimming (river - sea);

- marine towing vessels and other floating objects;

- marine insurance and reinsurance;

- related to the sale, the guarantee and repair of ships or other floating objects;

- pilotage and ice wiring, servicing of vessels and inland vessels, since the corresponding operations connected with the sailing ships of the waterways;

- associated with the use of vessels for scientific research, mining, hydro works and other works;

- salvage ships or marine vessels, inland vessels as well as the salvage seawater inland waterway vessel or other inland vessel;

- lifting of sunk ships and other property from sea;

- collision of ships, ship and inland vessel of inland vessels in marine waters, as well as causing damage to the ship port facilities, navigational aids and other facilities;

- causing damage to fishing nets and other fishing gear, as well as with any other injury to the implementation of the marine fisheries.

ICA also deals with disputes arising in connection with the sailing vessels and inland navigation on international rivers, as well as disputes relating to the implementation of inland vessels, overseas shipments.

However, it should be noted that international commercial disputes can be considered as ordinary arbitral tribunals. Thus, according to the Federal Law of July 24, 2002 № 102-FL "On Arbitration Courts in the Russian Federation"[7] arbitral tribunal may, by agreement of the parties of the arbitration proceedings be transferred to any dispute arising from civil law, unless otherwise provided by federal law (Section 2 tbsp. 1). It is clear that such disputes can have an international character.

According to M. Kleandrov, "Legislative establishing procedures for the settlement of legal disputes and other cases in bankruptcy court would seek to ensure making lawful, reasonable and reasoned judicial decision." [8] In the absence of precise rules of such a procedure proceedings can turn to become endless disputes over due process rights and the duties imposed by procedural law, i.e. to consider procedural issues rather than to resolve the case on the merits. Since the application of legal rules to particular cases initially carried by a number of institutions and individuals, in order to avoid collisions between each of them set aside a certain range of activities within the boundaries of which there has been granted the right and at the same time obliged to perform certain actions.

To sum it up we would like to review features of arbitration (arbitration) review of international commercial disputes:

1) openness and diversity of the activities of Russian economic entities in the system of international economic relations significantly increase the commercial and non-commercial risks. Therefore, improving the level of protection in terms of legal disputes between subjects of private law relations in different countries is vital. The study of how arbitration resolution may affect the substantial rights of the parties, and, consequently, predictability of international business;

2) usually created in accordance with the will of the parties it withdraws international arbitration dispute arising as to the interpretation and execution of the contract, from the jurisdiction of the national courts of general and special jurisdiction, and therefore under the influence of a national panel of judges, which may affect the dispute in favor of "a "subject, significantly increasing the chances for a fair resolution of the dispute in favor of the injured party;

3) if dispute arises and international commercial arbitration is used, the parties have the opportunity to influence the determination of the composition of the arbitral tribunal, venue, applicable law and the language of the arbitration. "Depending on the type of arbitration (institutional or ad hoc) side effect partially or fully on the arbitration procedure"[9]. From this point of view the problem of the use of international arbitration as an alternative and more effective means of resolving commercial disputes significantly update;

4) arbitration procedure for the consideration of international commercial disputes has significant advantages over the court. Arbitration is particularly democratic, because it is a social formation that is not included in the system of courts, administrative and other state bodies. "The parties have an opportunity to influence all stages of the arbitration agreement between the parties to determine the language of the arbitration. Therefore appeal to arbitration in commercial disputes in international economic activity is the preferred"[10];

5) globalization of the world economy actualize the transfer of part of the domestic jurisdiction of States in respect of international business and dispute resolution on her international organizations, without prejudice to its sovereignty. Therefore, the role of the arbitration method of resolving international commercial disputes within the competence of international organizations such as the International Centre for Settlement of Investment Disputes (ICSID), International Investment Guarantee Agency (IIGA) and the World Trade Organization (WTO) is increasing;

6) international commercial arbitration in the truest sense of the word is not part of the state judicial

system and its activity is not dependent on it. But, however, it can not be completely isolated from the national government jurisdictions. Courts can carry out in this respect, at least two procedural steps: first, the implementation of coercive measures for provisional remedy in the case of treatment of an interested party to a judicial authority, which is not considered incompatible with the arbitration procedure, and secondly, the performance of award, when only the national court has the authority to enforce the decision of an international arbitration.

[1] The Federal Constitutional Law of the Russian Federation of 31.12.1996 № 1-FKZ (amended on 06.08.2012) "On the Judicial System of the Russian Federation" // Collected Legislation of the Russian Federation. 1997. 06.01 (№ 1). P. 1.

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[4] Civil Procedure Code of the Russian Federation of 14.11.2002 № 138-FZ // Collected Legislation of the Russian Federation. 2002. № 46. Art. 4532 (as amended on 2009. 5.04).

[5] Arbitration Procedure of the Russian Federation of 24.07.2002 № 95-FZ // Collected Legislation of the Russian Federation. 2002. № 30. P. 3012 (as amended on 2008. 3.12).

[6] *Luntz L.A., Marysheva N.I.* Course of private international law: a 3t. Moscow, 2002. P. 986.

[7] Federal Law of 24.07.2002 № 102-FL "On Arbitration Courts in the Russian Federation" // Collected Legislation of the Russian Federation. 2002. № 30. Art. 3019.

[8] *Kleandrov M.I.* Arbitration process: Textbook. 2nd ed., Rev. and added. Moscow, 2003. P. 381.

[9] *Goyhbarg A.* Commercial courts // New Collegiate Dictionary / Ed. Acad. K.K. Alexeev. Edition of JSC "Brockhaus - Efron". Petrograd. P. 358.

[10] Ibid. P. 360.

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