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Arbitration Agreement in the Digital Environment: Issues of Written Form and Expression of Consent of the Parties

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Abstract: The article seeks to evaluate the present legal framework for arbitration on the international and national levels (on the example of the countries of the Eurasian Economic Union) with respect to concluding arbitration agreements in writing with the use of informational technologies. It is argued that such a use is admissible as a whole and it is necessary to distinguish three main requirements to arbitration agreements, such as to be valid, operative and enforceable (capable of being performed), that reflect different legal grounds for their challenge. Particular attention is paid to the specifics of the conclusion and performance of arbitration agreements in investment disputes with the participation of host states related to their consent given in international investment treaties and national legislation, as well as the application of the most favored nation treatment in jurisdictional issues.

Keywords: Arbitration Agreement. Written Form. Exchange of Electronic Documents. Informational Technologies. Arbitration. Parties' Consent. Investment Dispute with a State. Most Favored Nation Treatment. International Centre for Settlement of Investment Disputes. Eurasian Economic Union.

Introduction

As it is well known, legal disputes arising from contractual and other civil legal relations can be resolved not only in courts, but also arbitral tribunals.[1] Arbitration has some advantages (such as the autonomy of the will of the parties, the confidentiality of the procedure and the possibility of determining its rules

[1] KELLY, D.; HAMMER, R.; HENDY, J. *Business Law*. London; New York: Routledge, 2018, p. 72-73.

by the parties to the dispute themselves, the impartiality and independence of arbitrators, the inadmissibility of reviewing the decision on the merits by courts, compliance with the public order,[2] etc.), thanks to which it has become an effective and a widely spread method of dispute resolution. Legally, it is based on an arbitration agreement where parties of a dispute agree to submit it to arbitration according to the applicable rules of international and national law.[3]

As arbitration is usually performed under a non-governmental organization that is not included in the state judicial system, it is recognized as a form of dispute resolution alternative to litigation[4] where an arbitral tribunal is endowed with such a publicly significant function as the implementation of a judgment.[5] The legal framework for its establishment and functioning is presented on both international and national levels, including the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of December 29, 1958 (the New York Convention)[6] and the European Convention on Foreign Trade Arbitration of April 21, 1961 (the European Convention).[7]

It is worth noting that these legal instruments have been adopted lately before emerging new informational technologies currently applied in different spheres.[8] They all require a written form for an arbitration agreement, which is usually a document signed by the parties. It might also be an arbitration clause embodied in the text of a principal contract. From this regard, it is interesting to estimate the admissibility to use different informational technologies while making an arbitration agreement under international and national law.[9] In addition, the

2 RUSSIAN FEDERATION. The Resolution of the Plenum of the Supreme Court of the Russian Federation of December 10, 2019 No. 53 "On the Performance by the Courts of the Russian Federation of the Functions of Assistance and Control Concerning Arbitration Proceedings, International Commercial Arbitration", para. 1. *Bulletin of the Supreme Court of the Russian Federation*, n. 3, 2020.

3 KANASHEVSKII, V.A. *Private International Law.* Moscow, 2019, p. 980-1004 (in Russian).

4 GOODE, R.; KRONKE, H.; McKENDRICK, E. *Transnational Commercial Law: Text, Cases, and Materials.* Oxford, 2011, p. 622-627.

5 RUSSIAN FEDERATION. The Resolution of the Constitutional Court of the Russian Federation of May 26, 2011 No. 10-P. *The Collection of Legislation of the Russian Federation*, n. 23, art. 3356, 2011.

6 UNITED NATIONS. The New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of December 29, 1958. URL: https://uncitral.un.org/en/texts/arbitration/conventions/foreign_arbitral_awards (accessed August 12, 2023).

7 UNITED NATIONS. The European Convention on International Commercial Arbitration of April 21, 1961. URL: https://www.trans-lex.org/501600/_/european-convention-on-international-commercial-arbitration-of-1961-european-commission-for-europe/ (accessed August 12, 2023).

8 MINBALEEV, A.V.; EVSIKOV, K.S. Alternative Dispute Resolution in Digital Government. *Revista Brasileira de Alternative Dispute Resolution – RBADR*, v. 4, n. 7, p. 119-146, 2022.

9 On the use of videoconference in arbitration hearings see FERREIRA, D. B.; GIOVANNINI, C.; GROMOVA, E.; DA ROCHA SCHMIDT; G. *Arbitration chambers and trust to technology provider: Impacts of trust technology intermediated dispute resolution proceedings*. Technology in Society, v. 68, 2022. DOI: 10.1016/j.techsoc.2022.101872. On the use of digital evidence in arbitration proceedings see: FERREIRA, Daniel B.; GROMOVA, Elizaveta A. *Electronic evidence in arbitration proceedings: empirical analysis and recommendations*. Digital Evidence and Electronic Signature Law Review, v. 20, p. 30-39, 2023. DOI: https://doi.org/10.14296/deeslr.v20i.5608. FERREIRA, Daniel B.; GROMOVA, Elizaveta A. Digital Evidence: *The Admissibility of Leaked and Hacked Evidence in Arbitration Proceedings.* International

determination of the expression of the will of the parties in the absence of a particular signed document has remained a significant legal issue arising before arbitral tribunals and then courts under arbitration and further litigation on the recognition and enforcement of rendered arbitral awards.

The article aims to evaluate the present legal framework for arbitration on the international and national levels with respect to concluding arbitration agreements in writing with the use of informational technologies. It implies the application of legal methods of research, including the critical analysis and doctrinal interpretation of different universal and other international treaties (the New York Convention, the European Convention, the ICSID Convention, etc.), UNCITRAL model laws and other similar international law instruments, national legislation of the countries of the Eurasian Economic Union (such as the Republic of Armenia, the Republic of Belarus, the Republic of Kazakhstan, the Kyrgyz Republic, and the Russian Federation), as well as the international commercial arbitration and judicial practice of their enforcement. Based on the comparative legal research, the paper examines the international and national legal regulation of the use of informational technologies under concluding arbitration agreements and scrutinizes different legal problems of expressing the parties' consent in case of invalid, unenforceable and inoperative arbitration agreements, as well as the excess of scope of arbitration agreements and the application of the most favored nation treatment in jurisdictional matters.

1 International Legal Regulation of Arbitration

The New York Convention is a universal international treaty, in which 172 states currently participate.[10] According to the Convention, each contracting state shall, *firstly*, 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*" (Article II (1)). It might be an arbitral clause in a contract or any agreement signed by the parties or contained in an exchange of letters or telegrams (Article II (2)). If an arbitration agreement is valid, operative and capable of being performed, a court is obliged, at the request of one of the parties, to refer the parties to arbitration (Article II (3)) and to not settle the case between them on its merits. *Secondly*, each contracting

Journal for the Semiotics of Law, 2023. DOI: https://doi.org/10.1007/s11196-023-10014-1. On Online Dispute Resolution in Latin America see ELISAVETSKY, Alberto; MARUN, María V. *La tecnología aplicada a la resolución de conflictos. Su comprensión para la eficiencia de las ODR y para su proyección en Latinoamérica.* Revista Brasileira de Alternative Dispute Resolution – RBADR, v. 2, n. 3, p. 51-69, 2020.

[10] UNITED NATIONS. URL: https://uncitral.un.org/en/texts/arbitration/conventions/foreign_arbitral_awards/status2 (accessed August 12, 2023).

state of the Convention shall recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon, under the conditions laid down in the Convention (Article III).

Similar provisions can be found in the European Convention. It applies to arbitration agreements concluded for the purpose of settling disputes arising from international trade between physical or legal persons as well as to arbitral procedures and awards based on such agreements (Article I (1)). It also defines an arbitration agreement as either an arbitral clause in a contract or an agreement signed by the parties, or contained in an exchange of letters, telegrams, or in a communication by teleprinter. In contrast to the New York Convention, it additionally provides that an arbitration agreement might be concluded in the form authorized by laws of states which do not require that an arbitration agreement be made in writing (Article I (2 (a))).

Thus, as it can be seen, both the New York Convention and the European Convention usually imply any document or an exchange of documents signed by the parties regarding the form of an arbitration agreement. However, the use of informational technologies, such as telegraph, is also admissible. Such a broad interpretation may be met in legal literature.[11] Mainly it is true when specific additional provisions on such issues are directly enshrined in the UNCITRAL Model Law on International Commercial Arbitration[12] adopted on June 21, 1985 at the 18th session of UNCITRAL and recommended by the UN General Assembly for use by states as a national law. In particular, Article 7 (3-6) specifies that, *firstly*, an arbitration agreement is recognized to be in writing if its content is recorded in any form, whether or not the arbitration agreement or contract has been concluded orally, by conduct, or by other means. *Secondly*, the requirement of the written form is met by an electronic communication if the information contained therein is accessible to be useable for subsequent reference. In the given provision, such an electronic communication means any communication that the parties make by means of data messages which imply the information generated, sent, received or stored by electronic, magnetic, optical or similar means, including, but not limited to, electronic data interchange, electronic mail, telegram, telex or telecopy. *Thirdly*, an arbitration agreement is recognized to be in writing if it is contained in the exchange of statements of claim and defense in which the existence of such an agreement is alleged by one party and not denied by the other. *Fourthly*, the reference in a contract to any document containing an arbitration clause constitutes

[11] KAZACHENOK, S.Y. Development of Lex Electronica as the Background for Inclusion of the Online Arbitration Terms into the Arbitration Agreement. *Vestnik of Volgograd State University: Jurisprudence*, n. 4 (25), p. 104-107, 2014 ((in Russian).

[12] UNITED NATIONS. URL: https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/19-09955_e_ebook.pdf (accessed August 12, 2023).

an arbitration agreement in writing, provided that the reference is such as to make that clause part of the contract.

It is interesting to note that the mentioned list of making an arbitration agreement in writing is not exhaustive. It can be added under the practice of settlement of investment disputes with the participation of a state under the Convention on the Settlement of Investment Disputes between States and Nationals of Other States of October 14, 1966 (the ICSID Convention).[13] It provides facilities for conciliation and arbitration of such investment disputes under the International Centre for Settlement of Investment Disputes (the ICSID) if the parties *inter alia* have the consent to submit their dispute to the ICSID in writing (Article 25 (1)). Although it is not directly named as an arbitration agreement, it is such that it is correctly emphasized in legal literature.[14]

The ICSID practice recognizes an arbitration agreement concluded in writing if a foreign investor applies to the ICSID for the settlement of an investment dispute and the host state has earlier expressed its consent to this by including the relevant provision on the jurisdiction of the ICSID in the text of an international treaty or an act of national legislation. This way of reaching an agreement resembles the acceptance of an offer where the offer to submit a case to a particular arbitral tribunal is granted by the host state to a foreign investor, and the acceptance of such an offer is performed by filing a claim before the ICSID.

For example, in *Tradex Hellas S.A. v. Republic of Albania* (ICSID Case No. ARB/94/2),[15] the Government of the Republic of Albania challenged the jurisdiction of the ICSID because there was no written agreement between the Government of Albania and the claimant Tradex Hellas S.A. on the submission of their investment dispute to the ICSID. It noted that, *firstly*, the ICSID Convention does not require that the parties' consent be expressed in any separate document. *Secondly*, the inclusion in the text of an international treaty or national legislation of a provision on the ICSID jurisdiction indicates the state's consent to submit possible investment disputes to the ICSID. Nevertheless, in that case, the ICSID denied its competence by virtue of another legal ground. It referred to the fact that the request for consideration of the dispute at the ICSID was received before the entry into force of the bilateral international agreement between Greece and Albania on the promotion and mutual protection of investments, which enshrined

13 INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES. The Convention on the Settlement of Investment Disputes between States and Nationals of Other States of October 14, 1966. URL: https://icsid.worldbank.org/resources/rules-and-regulations/convention/overview (accessed August 12, 2023).

14 LAMM, C.B.; SMUTNY, A.C. The Implementation of ICSID Arbitration Agreements. *ICSID Review – Foreign Investment Law Journal*, v. 11, n. 1, p. 64–85, 1996.

15 INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES. *ICSID Review — Foreign Investment Law Journal*, v. 14, n. 1, p. 197–249, 1999.

the competence of the ICSID. Such jurisdictional provisions contained in bilateral investment treaties or national legislation providing for the ICSID jurisdiction were applied in many cases, such as *Asian Agricultural Products Limited v. the Republic of Sri Lanka* (ICSID Case No. ARB/87/3),[16] *Ceskoslavenska Obchodni Banka, A.S. v. Slovak Republic* (ICSID Case No. ARB/97/4),[17] etc.

Special rules on admissibility to use informational technologies in different spheres, including arbitration, can be found in other international treaties and instruments, for instance, the United Nations Convention on the Use of Electronic Communications in International Contracts of November 23, 2005[18] in which so far only 18 states, including the Russian Federation, participate. It aims to facilitate the use of electronic communications in international trade by assuring that contracts concluded, and other communications exchanged electronically are as valid and enforceable as their traditional paper-based equivalents. There are also some more international legal instruments adopted under UNCITRAL. They are the UNCITRAL Model Law on Electronic Commerce of June 12, 1996,[19] the UNCITRAL Model Law on Electronic Signatures of July 5, 2001,[20] the UNCITRAL Model Law on Electronic Transferable Records of July 13, 2017,[21] etc.

On the regional international level, for instance, under the Eurasian Economic Union uniting the Republic of Armenia, the Republic of Belarus, the Republic of Kazakhstan, the Kyrgyz Republic, and the Russian Federation, the Treaty on the Eurasian Economic Union of May 5, 2014[22] contains Protocol on Information and Communication Technologies and Information Interaction within the Framework of the Eurasian Economic Union which also implies the use of different informational technologies and means, such as an electronic document (a document in the electronic form certified by an electronic digital signature and meeting the requirements of the general infrastructure for documenting information in the electronic form) and electronic type of document (information or data presented in a format suitable for human perception using electronic computers as well as

16 INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES. *ICSID Reports*. Cambridge, v. 4, p. 246–251, 1997.

17 INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES. *ICSID Review — Foreign Investment Law Journal*, v. 14, n. 1, p. 251–283, 1999; v. 15, n. 2, p. 544–557, 2000.

18 UNITED NATIONS. The UN Convention on the Use of Electronic Communications in International Contracts of November 23, 2005. URL: https://uncitral.un.org/en/texts/ecommerce/conventions/electronic_communications (accessed August 12, 2023).

19 UNITED NATIONS. URL: https://uncitral.un.org/en/texts/ecommerce/modellaw/electronic_commerce (accessed August 12, 2023).

20 UNITED NATIONS. URL: https://uncitral.un.org/en/texts/ecommerce/modellaw/electronic_signatures (accessed August 12, 2023).

21 UNITED NATIONS. URL: https://uncitral.un.org/en/texts/ecommerce/modellaw/electronic_transferable_records.

22 EURASIAN ECONOMIC UNION. URL: https://docs.eaeunion.org/docs/en-us/0003610/itia_05062014 (accessed August 12, 2023).

for transmission and processing with the use information and communication technologies in compliance with the established requirements for its format and structure).

2 National Legal Regulation of Arbitration

2.1 Russia

In Russia the legal framework on arbitration[23] includes two special legislative acts, such as Federal Law of December 29, 2015 No. 382-FZ "On Arbitration (Arbitration Proceedings) in the Russian Federation" (the Federal Law on Arbitration),[24] and the Law of the Russian Federation of July 7, 1993 No. 5338-1 "On International Commercial Arbitration" (the Law of Russia on International Commercial Arbitration)[25] which are based on the provisions of the UNCITRAL Model Law on International Commercial Arbitration.

The Federal Law on Arbitration regulates the procedure for the formation and operation of arbitral tribunals and permanent arbitration institutions on the territory of the Russian Federation, as well as arbitration proceedings. It applies not only to the arbitration of internal disputes but, to some extent, also to international commercial arbitration, the seat of which is the Russian Federation (Article 1 (1, 2)). This Federal Law directly enshrines that an arbitration agreement can be concluded as an arbitration clause in a contract or a separate agreement. Still, in any case it shall be in writing (Article 7 (1, 2)).

Unlike the New York Convention and the European Convention, the Federal Law on Arbitration in Article 7 (3-7) stipulates other ways to make an arbitration agreement in writing. *Firstly*, it may be concluded by exchanging letters, telegrams, telexes, telefaxes and other documents, including electronic documents transmitted through communication channels, if it can be reliably established that the document originates from the other party (Article 7 (3)). Such documents are considered the information prepared, sent, received or stored by electronic, magnetic, optical or similar means, including electronic data exchange and e-mail.

In addition, it is worth noting that the Civil Code of the Russian Federation[26] in Articles 160 (1) and 434 (2) also enables the conclusion of a contract in writing by not only drawing up one document (including electronic) signed by the parties, but

[23] It is necessary to note that Russia has the system of state arbitration courts, which are embodied in the judicial system of the Russian Federation. They should be distinguished from arbitral tribunals, which perform arbitration in its usual understanding.

[24] RUSSIAN FEDERATION. *The Collection of Legislation of the Russian Federation*, n. 1, art. 2, 2016.

[25] RUSSIAN FEDERATION. *The Collection of Legislation of the Russian Federation*, n. 32, art. 1240, 1993; n. 49, art. 5748, 2008.

[26] RUSSIAN FEDERATION. *The Collection of Legislation of the Russian Federation*, n. 32, art. 3301, 1994.

also exchanging letters, telegrams, electronic documents, or other data where the commitment of a transaction with the use of electronic or other technical means allows the content of the transaction to be reproduced unchanged on a tangible medium. In such a case, the requirement for a signature is deemed to be fulfilled if any used method enables to identify the person who expressed the will reliably.

For instance, under the settlement of one case, the International Commercial Arbitration Court at the Chamber of Commerce and Industry of the Russian Federation found that the contract sent by the plaintiff was signed by the defendant and then sent to the plaintiff by e-mail. Having applied the mentioned legislative provisions, it recognized such a contract and the arbitration clause contained therein concluded.[27]

Secondly, an arbitration agreement is recognized to be made in writing if it is concluded by exchanging procedural documents (including a statement of claim and a response to it) in which one of the parties declares the existence of an agreement, and the other does not object to it (Article 7 (4)).

Thirdly, a reference in the contract to a document containing an arbitration clause can be considered an arbitration agreement in writing, provided that the specified reference allows such a clause to be considered part of the contract (Article 7 (5)).

Fourthly, an arbitration agreement may be concluded by including it in the rules of organized trading or clearing rules, which are registered in accordance with the legislation of the Russian Federation. Such an agreement is deemed an arbitration agreement of the participants of the organized trades, the parties to the contract concluded at the organized exchanges under their rules, or participants of clearing (Article 7 (6)).

Fifthly, an agreement to submit to arbitration of all or part of the disputes of participants of a legal entity established in the Russian Federation and the legal entity itself for which the rules of arbitration of corporate disputes apply may be concluded by including it in the charter of the legal entity. However, this provision does not apply to joint-stock companies with one thousand or more shareholders and public joint-stock companies (except for an international company if its charter provides for the application of foreign law to such an international company as well as the rules of foreign exchanges) (Article 7 (7)).

[27] INTERNATIONAL COMMERCIAL ARBITRATION COURT AT THE CHAMBER OF COMMERCE AND INDUSTRY OF THE RUSSIAN FEDERATION. The Decision of the Board of Arbitrators of the ICAC at the CCI of the Russian Federation of April 22, 2021 in Case No. M-66/2020. URL: https://www.consultant.ru/cons/cgi/online.cgi?req=doc&cacheid=A61D713EE9B08972EBBCE4D56F4F159A&mode=backrefs&SORTTYPE=0&BASENODE=ARB002-5&ts=312416917738961753 5&base=ARB&n=720383&rnd=CCnq-g#TAa7emTGukyj7xcm (accessed August 12, 2023).

The Law of Russia on International Commercial Arbitration applies to international commercial arbitration if, as a rule, the place of arbitration is located on the territory of the Russian Federation. It has similar provisions about the written form of an arbitration agreement. Moreover, it specifies that such a form is deemed to have been complied with if the arbitration agreement is concluded in a format that allows for the fixation of the information contained therein or the availability of such information for subsequent use (Article 7 (3)). An arbitration agreement can also be recognized in writing in the form of an electronic message if the information contained therein is available for subsequent use and the arbitration agreement is concluded in accordance with the requirements of the law provided for a contract concluded by exchanging documents via electronic communication (Article 7 (4)).

In addition, there are a number of legislative acts that provide the use of different informational technologies, such as Federal Law of July 27, 2006 No. 149-FZ "On Information, Information Technologies and Information Protection",[28] Federal Law of April 6, 2011 No. 63-FZ "On Electronic Signature",[29] etc. In particular, they deal with an electronic document as documented information presented in the electronic form (i.e., a form suitable for human perception using electronic computers as well as for transmission over information and telecommunication networks or processing in information systems) and an electronic signature used to identify the person signing the information under making transactions, rendering state and municipal services, performing other legally significant actions.

Thus, in comparison with the New York Convention and the European Convention, the Russian legislation stipulates some specific provisions developing the requirement of the written form of an arbitration agreement regarding the use of informational technologies. It is concluded that such a form can be achieved by electronic documents and other information if it is fixed on a tangible medium and available for later use.

2.2 The Other Countries of the Eurasian Economic Union

The Eurasian Economic Union is an international organization of regional economic integration established under the Treaty on the Eurasian Economic Union of May 5, 2014. The members of the Eurasian Economic Union are the Republic of Armenia, the Republic of Belarus, the Republic of Kazakhstan, the Kyrgyz Republic and the Russian Federation. They have special legislation on arbitration, which is mainly based on the UNCITRAL Model Law on International Commercial Arbitration, and have a lot of similar provisions.

[28] RUSSIAN FEDERATION. *The Collection of Legislation of the Russian Federation*, n. 31, art. 3448, 2006.
[29] RUSSIAN FEDERATION. *The Collection of Legislation of the Russian Federation*, n. 15, art. 2036, 2011.

In particular, like the Russian Federation, the Republic of Belarus has two legislative acts on arbitration. They are the Law of the Republic of Belarus of July 18, 2011 No. 301-Z "On Arbitral Tribunals"[30] and the Law of the Republic of Belarus of July 9, 1999 No. 279-Z "On International Arbitral Tribunal".[31] The first law in Article 8 stipulates that an arbitration agreement shall be in writing, and it may be in the form of an independent agreement of the parties to submit the resolution of all or individual disputes that have arisen or may arise from the legal relationship binding the parties to the selected arbitral tribunal, or in the form of an arbitration clause – a separate provision contained in the contract. It is also considered concluded by exchanging messages using postal communication or other types of communication that provide a written record of the will of the parties, including sending a statement of claim and a response to it, in which, respectively, one party proposes to resolve the dispute in the arbitral tribunal, and the other one does not object to it. A reference in a contract to a document containing an arbitration clause is also to be an arbitration agreement, provided that this contract is concluded in writing and the content of the reference makes such a clause part of the concluded contract. Similar provisions are embodied in Article 11 of the Law of the Republic of Belarus of July 9, 1999 No. 279-Z "On International Arbitral Tribunal".

Compared with the Republic of Belarus and the Russian Federation, the other countries of the Eurasian Economic Union – Armenia, Kazakhstan and Kyrgyzstan have one special legislative act on arbitration. For instance, the Republic of Kazakhstan enacted the Law of the Republic of Kazakhstan of April 8, 2016 No. 488-V of April 8, 2016 "On Arbitration".[32] In Article 9 it provides that an arbitration agreement shall be concluded in writing. It may be an arbitration clause in a document signed by the parties or concluded by exchanging letters, telegrams, telephone messages, faxes, electronic documents or other documents defining the subjects and the content of their will. An arbitration agreement is also considered concluded in writing if it is made by exchanging a statement of claim and a response to it in which one of the parties claims the existence of an agreement and the other does not object to it. A reference in the contract to a document containing a condition for the submission of a dispute to arbitration is also an arbitration agreement if the contract is concluded in writing, and this reference is such that it makes the arbitration agreement part of the contract.

[30] REPUBLIC OF BELARUS. URL: https://pravo.by/document /?guid=3871&p0=H11100301 (accessed August 12, 2023).

[31] REPUBLIC OF BELARUS. URL: https://pravo.by/document/?guid=3871&p0=h19900279 (accessed August 12, 2023).

[32] REPUBLIC OF KAZAKHSTAN. URL: https://online.zakon.kz/Document/?doc_id=35110250 (accessed August 12, 2023).

Such provisions are enshrined in the Law of the Republic of Armenia of January 22, 2007 No. ZR-55 "On Commercial Arbitration"[33] (Article 7) and the Law of the Kyrgyz Republic of July 30, 2002 No. 135 "On Arbitral Tribunals in the Kyrgyz Republic"[34] (Article 7). After comparing them, it is interesting to note that the latter law does not stipulate that an arbitration agreement may be concluded by exchanging messages or statements of the plaintiff and respondent of a dispute in which one party testifies the existence of an arbitration agreement and the other party does not object to it. Meanwhile, it directly specifies the essential terms of an arbitration agreement. It must contain provisions that any dispute, disagreement or claim arising from a dispute between the parties is subject to settlement by an arbitral tribunal, and clearly define the name of such an arbitral tribunal as well.

The special national legislation on the use of informational technologies in transactions and other activities is also adopted in the countries under consideration. For instance, they are the Law of the Republic of Armenia of August 13, 2005 No. ZR-176 "On Electronic Communications",[35] the Law of the Republic of Belarus of December 28, 2009 No. 113-Z "On Electronic Document and Electronic Digital Signature",[36] the Law of the Republic of Kazakhstan of January 7, 2003 No. 370-II "On Electronic Document and Electronic Digital Signature",[37] The Law of the Republic of Kazakhstan of November 24, 2015 No. 418-V "On Informatization",[38] the Law of the Kyrgyz Republic of December 22, 2021 No. 154 "On Electronic Commerce",[39] etc.

3 Legal Problems of Expressing the Parties' Consent

The parties' consent to arbitration is the essential element of an arbitration agreement. It should have no legal defects that can make such an agreement invalid, inoperative or unenforceable (incapable of being performed) and, therefore, remove the necessary legal ground for arbitration. Thus, an arbitration agreement shall be valid, operative and enforceable.

33 REPUBLIC OF ARMENIA. URL: http://parliament.am/legislation.php?sel=show&ID=2887&lang=rus (accessed August 12, 2023).

34 KYRGYZ REPUBLIC. URL: http://cbd.minjust.gov.kg/act/view/ru-ru/1092?ysclid=lkzjj3nccc102188015 (accessed August 12, 2023).

35 REPUBLIC OF ARMENIA. URL: http://parliament.am/legislation.php?sel=show&ID=2385&lang=rus (accessed August 12, 2023).

36 REPUBLIC OF BELARUS. URL: https://pravo.by/document/?guid=3961&p0=H10900113 (accessed August 12, 2023).

37 REPUBLIC OF KAZAKHSTAN. URL: https://online.zakon.kz/Document/?doc_id=1035484 (accessed August 12, 2023).

38 REPUBLIC OF KAZAKHSTAN. URL: https://online.zakon.kz/Document/?doc_id=33885902 (accessed August 12, 2023).

39 KYRGYZ REPUBLIC. URL: http://cbd.minjust.gov.kg/act/view/ru-ru/112333?ysclid=ll3lmmn7bz205262027 (accessed August 12, 2023).

3.1 Invalid and Unenforceable Arbitration Agreements

The difference between invalid and unenforceable agreements was well shown by, for instance, the Supreme Court of the Russian Federation. It noted that an invalid arbitration agreement is concluded in case of a defect of the will of the parties (deception, threat, violence) and with non-compliance with the form or contrary to other mandatory requirements of applicable law. An unenforceable arbitration agreement does not allow determining the will of the parties to the arbitration procedure chosen by them (for example, it is impossible to determine whether a specific institutional arbitration or *ad hoc* arbitration has been selected) or cannot be executed in accordance with the will of the parties (for example, an agreed arbitration institution does not have the right to administer arbitration under the requirements of applicable law). In particular, under interpreting an arbitration agreement that contains an inaccurate name of an arbitration institution or applicable arbitration rules, such an arbitration agreement may be deemed unenforceable only if it is impossible to establish the true will of the parties, for example, if there are two or more arbitration institutions whose names are very similar to the name indicated by the parties, provided that such a shortage in the arbitration agreement cannot be eliminated using appropriate legal mechanisms. If there are doubts about the validity and enforceability of an arbitration agreement, not only the text of the arbitration agreement should be evaluated, but also any other evidence that allows to establish the true will of the parties (including negotiations and correspondence preceding the arbitration agreement, subsequent behavior of the parties).[40]

It is worth noting that the mere mention of arbitration as a possible mechanism for resolving a legal dispute (especially along with litigation) does not mean the parties' consent to arbitration. Specifically, it is truthful for investment disputes with a state that can enshrine its consent to arbitration in international treaties or national legislation, as it was shown *supra*. If a text suggests the conclusion of an agreement between the parties on the choice of a competent court or arbitral tribunal, it shall not be considered as the state's consent to arbitration.[41] Therefore, it is extremely significant to carefully analyze and duly interpret a particular legislative or contractual provision to determine the presence or absence of the state's and the other party's consent to be bound by their arbitration agreement.

For example, according to Article 10 of the Federal Law of the Russian Federation of July 9, 1999 No. 160-FZ "On Foreign Investments in the Russian

[40] RUSSIAN FEDERATION. The Resolution of the Plenum of the Supreme Court of the Russian Federation of December 10, 2019 No. 53 "On the Performance by the Courts of the Russian Federation of the Functions of Assistance and Control Concerning Arbitration Proceedings, International Commercial Arbitration", para. 26, 29. 30. *Bulletin of the Supreme Court of the Russian Federation*, n. 3, 2020.

[41] SCHREUER, C.H. *The ICSID Convention: A Commentary*. Cambridge, 2001, p. 204-205.

Federation",[42] "*a dispute of a foreign investor that has arisen in connection with the implementation of investments and business activities on the territory of the Russian Federation is resolved in accordance with international treaties of the Russian Federation and federal laws in a court or arbitral tribunal or international arbitration (arbitral tribunal).*" A similar statement is also enshrined in Article 22 of the Federal Law of the Russian Federation of December 30, 1995 No. 225-FZ "On Production Sharing Agreements":[43] "*Disputes between the state and the investor related to the execution, termination and invalidity of agreements are resolved under the terms of the agreement in court, arbitration court, or arbitral tribunal (including international arbitration institutions).*" These provisions do not mention the ICSID or any other specific arbitral tribunal, so they do not mean the consent of the Russian Federation to submit an investment dispute to arbitration.

The judicial and arbitration practice usually confirms such a conclusion. For instance, in one case, a claimant applied to a state arbitration court in Russia. However, the contract for the international sale of goods between the parties contained an arbitration clause stating that "*all disagreements arising from obligations under this agreement would be settled at the Paris Institute*". During the proceedings, the court determined that the plaintiff and defendant could not specify the content of this clause. In particular, they did not name the exact name of the international arbitration institution or give any explanations about it. As a result, the court found the arbitration clause unenforceable and declared itself competent to hear the case.[44]

A completely different wording is set out in Article 1120 of the North American Free Trade Agreement of December 17, 1992 (the NAFTA)[45] or Article 26 (3a) of the Energy Charter Treaty of December 16-17, 1994.[46] The latter expressly provides that each state of the Treaty "... *gives its unconditional consent to the submission of a dispute to international arbitration or conciliation in accordance with the provisions of this Article*". In such a case, if any investor prefers to submit a dispute for resolution in this way, he shall further provide its consent in writing for the dispute to be submitted to ICSID, a sole arbitrator or *ad hoc* arbitration tribunal

42 RUSSIAN FEDERATION. *The Collection of Legislation of the Russian Federation*, n. 28, art. 3493, 1994.

43 RUSSIAN FEDERATION. *The Collection of Legislation of the Russian Federation*, n. 1, art. 18, 1996.

44 RUSSIAN FEDERATION. The Information Letter of the Presidium of the Supreme Arbitration Court of the Russian Federation of February 16, 1998 No. 29 "Review of Judicial Practice of Dispute Resolution in Cases Involving Foreign Persons", para. 13. *The Herald of the Supreme Arbitration Court of the Russian Federation*, n. 4, p. 38–56, 1998.

45 NORTH AMERICAN FREE TRADE AGREEMENT in JACKSON, J.H.; DAVEY, W.J.; SYKES, A.O. (ed.) *Legal Problems of International Economic Relations: 2002 Documents Supplement*. St. Paul, 2002, p. 512-734.

46 ENERGY CHARTER TREATY. URL: https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/2427/download (accessed August 12, 2023).

established under the UNCITRAL Arbitration Rules,[47] or an arbitral proceeding under the Arbitration Institute of the Stockholm Chamber of Commerce (Article 26 (4)).

It is deemed that in these cases, the state's consent required was given that is confirmed, for example, in *Waste Management, Inc. v. United Mexican States* (ICSID Case No. ARB(AF)/98/2)[48] where the ICSID appointed out that in virtue of Article 1122 of the NAFTA, any contracting state agreed to submit investment disputes to ICSID. However, in the given case, the plaintiff did not fully comply with the requirement of Article 1121 of the NAFTA; in particular, he did not fully express his consent to arbitration in the ICSID in writing and did not waive his right to protection in other judicial and arbitration institutions. On this ground, the ICSID found itself incompetent to resolve the dispute.

Under Article 26 of the Energy Charter Treaty in famous investment disputes, such as *Hulley Enterprises Limited v. the Russian Federation,*[49] *Yukos Universal Limited v. the Russian Federation*[50] *and Veteran Petroleum Limited v. the Russian Federation,*[51] *three shareholders of the Russian Yukos Oil Company initiated arbitration proceedings against the Russian Federation. The ad hoc* arbitral tribunal established under the auspices of the Permanent Court of Arbitration in the Hague on November 30, 2009 recognized itself competent to settle such cases and subsequently awarded a significant compensation to foreign investors in the amount of about US $ 50 billion, despite the objections of the Russian Federation which signed, but not ratified the Energy Charter Treaty. They have been challenged before appropriate state courts in the Netherlands since their adoption, but the final decision has not been made yet.

3.2 Inoperative Arbitration Agreements

The existence of an arbitration agreement does not mean an irrevocable refusal of the parties to submit a dispute for resolution to another jurisdictional body. The matter is that an arbitration agreement can be amended or terminated later by the parties, including in court, where one party applies to it, and the other party does not object to it. So, it can be declared inoperative or ineffective (having no more legal effect) during the time by a court under applicable law.

47 UNITED NATIONS. UNCITRAL Arbitration Rules. URL: https://uncitral.un.org/en/texts/arbitration/contractualtexts/arbitration.

48 INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES. *ICSID Review — Foreign Investment Law Journal*, v. 15, n. 1, p. 214–240, 2000.

49 PERMANENT COURT OF ARBITRATION. URL: https://italaw.com/cases/544 (accessed August 12, 2023).

50 PERMANENT COURT OF ARBITRATION. URL: https://italaw.com/cases/1175 (accessed August 12, 2023).

51 PERMANENT COURT OF ARBITRATION. URL: https://italaw.com/cases/1151 (accessed August 12, 2023).

On the whole, the judicial practice confirms such a provision. For example, the Russian customer and the Japanese contractor concluded a contract that provided that all disputes and disagreements of the parties were subject to arbitration in Stockholm without the intervention of general courts. Later, the parties made an amendment to it according to which their disputes arising from the contract were subject to resolution in the Arbitration Court of Primorskiy Krai under the procedures established by the legislation of the Russian Federation. In this case, the Presidium of the Supreme Arbitration Court of the Russian Federation concluded that if there is an agreement between the disputing parties on the submission of disagreements to a Russian arbitration court, the latter has the right to settle a dispute under its jurisdiction, if the claim is filed with the appropriate arbitration court of the Russian Federation and the defendant does not challenge it before its first statement on the merits of the dispute. After his first statement on the merits of the dispute, the defendant can no longer refer to the existence of an arbitration clause.[52]

3.3 The Scope of Arbitration Agreements

The scope of an arbitration agreement should be clearly defined by indicating a particular dispute to be submitted to arbitration. The matter is that there can be a lot of claims arising from a contractual or another legal relationship. It is especially important to distinguish claims related to the violation of rules of international investment law from contractual ones. Both of them might be between the same parties and be connected to the fulfillment of the same economic activity. However, the contents and nature of such cases are deemed not to be the same.[53] For instance, in *Robert Azinian and others v. United Mexican States* (ICSID Case No. ARB(AF)/97/2)[54] Desechos Solidos de Naucalpan S.A. de C.V. (DESONA) concluded a concession agreement for the collection and disposal of waste with the municipality of Naucalpan in the area of Mexico City. It stipulated the jurisdiction of the Mexican courts concerning disputes between the parties. In this case, it is interesting to note that the ICSID found that the choice of a competent court in the concession agreement did not mean that a dispute could not be subject to other institutions on a different legal basis (in particular, the

[52] RUSSIAN FEDERATION. The Resolution of the Presidium of the Supreme Arbitration Court of March 21, 2000 No. 6084/99. URL: https://sudbiblioteka.ru/as/text1/vassud_big_3746.htm?ysclid=ll196q2thk554980940 (accessed August 12, 2023).

[53] LISITSA, V. Responsibility of a Host State in Transnational Investment Disputes. *Journal of Advanced Research in Law and Economics*, v. 31, n. 1, p. 139-146, 2018.

[54] INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES. *ICSID Review — Foreign Investment Law Journal*, v. 14, n. 2, p. 1–36, 1999.

provisions of the NAFTA, rather than the contract under consideration). Since the plaintiff filed claims against the violation by the municipality of Naucalpan of the terms of the concession agreement, which were under the scope of the arbitration clause to be considered by the Mexican courts and not on the recognition of court decisions contrary to international law, the ICSID rejected its jurisdiction. Hence, it can be concluded that if a foreign investor had claimed a violation by a state of the provisions of an international treaty, the ICSID could have recognized its competence to hear the case.

3.4 Application of the Most Favored Nation Treatment in Jurisdictional Matters

It is investment law where there are a massive number of international treaties stipulating, *firstly*, the most favored nation treatment to foreign investors and, *secondly*, jurisdictional provisions on the settlement of investment disputes. Many current international investment treaties do provide the right of a foreign investor to apply to the ICSID and other international commercial arbitral tribunals that, as shown *supra*, amount to the state's consent to arbitration. That is why the question of extending the most favored nation treatment to jurisdictional issues and the problem of "treaty shopping"[55] lead to legal uncertainty and instability in investment disputes.[56]

In legal literature, one can find a critical attitude to applying such a regime to procedural relations,[57] while arbitration practice differs on this issue. In some decisions, for example, in *Vladimir Berschader and Moïse Berschader v. the Russian Federation,*[58] *the arbitral tribunal of the Stockholm Chamber of Commerce concluded that the most favored nation treatment does not apply to jurisdictional issues. However, in others, for instance, in RosInvestCo UK Ltd. v. the Russian Federation,*[59] *it declared itself competent to settle an investment dispute involving an English company by virtue of the most favored nation treatment, having applied the provisions of Article 8 of the Agreement between the Government of the Russian Federation and the Government of the Kingdom of Denmark on the*

55 DOLZER, R.; KRIEBAUM, U.; SCHREUER, CH. *Principles of International Investment Law*. Oxford, 2022, p. 390.

56 COLETO, I.L. Most-Favoured-Nation Clauses and Pre-Conditions for ISDS: the Argentinian Experience. *Revista Brasileira de Alternative Dispute Resolution – RBADR*, v. 1, n. 2, p. 159-178, 2019.

57 ZYKIN, I.S. Investment Arbitration: Problems and Prospects. *The Arbitral Tribunal,* n. 6, p. 10-13, 2010 (in Russian).

58 STOCKHOLM CHAMBER OF COMMERCE. URL: https://italaw.com/cases/140 (accessed August 12, 2023).

59 STOCKHOLM CHAMBER OF COMMERCE. URL: https://italaw.com/cases/923 (accessed August 12, 2023).

Promotion and Mutual Protection of Investments of November 4, 1993[60] *on the investor's right to apply to arbitration under the Stockholm Chamber of Commerce. In Emilio Agustín Maffezini v. Kingdom of Spain* (ICSID Case No. ARB/97/7),[61] the ICSID also concluded that the plaintiff, an Argentine investor, when carrying out his investment activities in Spain, had the right to use the provisions on the most favorable jurisdiction provided for in the international investment treaty between Spain and Chile. Nevertheless, it was noted that the operation of the most favored nation clause does, however, have some crucial limits arising from public policy considerations.

Therefore, in order to avoid such legal uncertainty, it is extremely vital for any host state to directly resolve it while concluding international investment and other treaties, especially if they contain their consent to be bound by the jurisdiction of the ICSID or other arbitration institutions. In this situation, it is advised for them to expressly exclude the jurisdictional issues from the scope of the most favored nation treatment. Otherwise, such legal vagueness increases the legal risks related to improperly imposing not only private but also public law responsibility on the participants of economic activities and, as a result, restrains the economic development.[62]

Conclusion

At present, the necessary legal framework for arbitration, including the issues of the use of informational technologies, has been developed as a whole. It includes universal and regional international treaties (such as the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958) and the European Convention on Foreign Trade Arbitration (1961)), the UNCITRAL model laws as well as national legislation. In particular, the countries of the Eurasian Economic Union have special legislative acts on arbitration and application of informational technologies, which are mostly similar and based on the UNCITRAL Model Law on International Commercial Arbitration. Moreover, they further develop it and specify the ways how to recognize an arbitration agreement in writing.

An arbitration agreement, as the necessary legal ground for arbitration, shall contain the consent of the parties to be appropriately expressed in respect of its contents and in writing. This form of the agreement can be achieved not

60 RUSSIAN FEDERATION. *The Collection of Legislation of the Russian Federation*, n. 14, art. 1604, 1997.

61 INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES. *ICSID Review — Foreign Investment Law Journal*, v. 16, n. 1, p. 1–32, 2001.

62 LISITSA, V.N.; PARKHOMENKO, S.V. Some Aspects of Improving the Efficiency of Criminal Law in the Sphere of Economy: Developing the Categories. *Russian Journal of Criminology*, v. 12, n. 2, p. 190-198, 2018 (in Russian).

only by signing or exchanging relevant paper documents between the parties but also with the use of electronic documents and other digital instruments (letters, messages, any other information by teletype, telegraph or using other means of telecommunication, ensuring the fixation of such information on a tangible medium and available for the later use). Moreover, especially in investment disputes under international investment law, it is also recognized to be concluded when a foreign investor applies for settlement of an investment dispute involving a host state in a specific arbitral tribunal and the host state has earlier expressed its consent to it by including the provision on the jurisdiction of the ICSID or another arbitral tribunal into the text of an international treaty or an act of national legislation.

There are three main requirements for arbitration agreements. They should not be invalid, inoperative, and unenforceable (incapable of being performed), reflecting their possible different legal defects. In particular, an invalid arbitration agreement is concluded in case of a defect of the will of the parties (deception, threat, violence), non-compliance with the form or contrary to other mandatory requirements of applicable law. An inoperative arbitration agreement has no more legal effect by the moment in virtue of its termination on different grounds. An unenforceable arbitration agreement does not allow determining correctly the will of the parties concerning arbitration chosen by them or cannot be executed under the will of the parties.

It is also important to clearly define the scope of arbitration agreements and to differentiate claims arising from violation of rules of international law and contractual obligations, especially under international investment law. The issue of extending the most favored nation treatment to jurisdictional issues in multilateral and bilateral investment international treaties continues to be controversial, so it is strongly recommended for host states to exclude it there directly.

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