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YURISPRUDENSIYA

HUQUQIY ILMIY-AMALIY JURNALI

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MUNDARIJA

12.00.01 – DAVLAT VA HUQUQ NAZARIYASI VA TARIXI. HUQUQIY TA'LIMOTLAR TARIXI

12.00.02 – KONSTITUTSIYAVIY HUQUQ. MA'MURIY HUQUQ. MOLIYA VA BOJXONA HUQUQI

12.00.03 – FUQAROLIK HUQUQI. TADBIRKORLIK HUQUQI. OILA HUQUQI. XALQARO XUSUSIY HUQUQ

12.00.06 – TABIIY RESURSLAR HUQUQI. AGRAR HUQUQ. EKOLOGIK HUQUQ

12.00.07 – SUD HOKIMIYATI. PROKUROR NAZORATI. HUQUQNI MUHOFAZA QILISH FAOLIYATINI TASHKIL ETISH. ADVOKATURA

12.00.08 – JINOYAT HUQUQI. HUQUQBUZARLIKLARNING OLDINI OLISH. KRIMINOLOGIYA. JINOYAT-IJROIYA HUQUQI

12.00.09 – JINOYAT PROTSESSI. KRIMINALISTIKA, TEZKOR-QIDIRUV HUQUQ VA SUD EKSPERTIZASI

12.00.10 – XALQARO HUQUQ

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ABSENCE OF JURISDICTION AND CONSEQUENCES IN ARBITRAL PROCEEDINGS

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Abstract. *The Arbitration Act 1996 states that a request for a stay must be conceded before the individual against whom the procedures were brought has made any move to respond substantively to the case and no sooner than after fitting technical advancements (assuming any) are made to recognize the lawful procedures. The ZPO provides that the challenge must arise prior to the start of the oral hearing on the matter of the dispute. When raising an issue with the courts of law, jurisdiction is of the utmost important for the assurance of whether the option to arbitrate may be postponed. Noncompliance may result in the court continuing to consider the subject of the dispute and, for the most part, make a choice that will exert jurisdiction upon the parties. Despite the fact that the arbitral tribunal may not be limited by the court's choice, it is, on a basic level, necessary to contemplate upon a protest by one of the parties, regardless of whether the option to arbitrate has been postponed.*

Keywords: *the UNCITRAL Arbitration Rules, the Private International Law Act (PILA), the New York Convention, the Stockholm Chamber of Commerce, the oil organization Yukos.*

ARBITRAJ MUHOKAMASIDA YURISDIKSIYANING MAVJUD EMASLIGI VA UNING HUQUQIY OQIBATLARI

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Annotatsiya. *1996-yildagi "Arbitraj to'g'risida"gi Qonunga ko'ra, sud ishini to'xtatib turish to'g'risidagi so'rov unga nisbatan ish qo'zg'atilgan shaxs ishi bo'yicha asosli javob berish uchun har qanday choralar ko'rgunga qadar va tegishli texnik yutuqlar (har qanday taklif) huquqiy tartib-qoidalar bilan tan olingandan keyin amalga oshirilishi kerak. ZPO nizo mavzusi bo'yicha og'zaki tinglash boshlanishidan oldin e'tiroz bildirilishi kerakligini ta'minlaydi. Sudda masalani ko'tarayotganda, arbitrajni kechiktirish mumkinligini ta'minlash uchun yurisdiksiya muhim ahamiyatga ega. Shartnomaga rioya qilmaslik nizoni sudda ko'rib chiqishga va ko'pincha tomonlarga yurisdiksiya beradigan tanlovlarga olib kelishi mumkin. Arbitraj sudi sudning tanlovi bilan cheklanishi mumkin bo'lmasa-da, asosiy darajada, arbitraj muhokamasi kechiktirilgan yoki qoldirilmaganligidan qat'i nazar, tomonlardan birining e'tirozi masalasini ko'rib chiqish kerak.*

Kalit so'zlar: *UNCITRAL arbitraj qoidalari, Xalqaro xususiy huquq qonuni (PILA), Nyu-York konvensiyasi, Stokgolm savdo palatasi, Yukos neft tashkiloti.*

ОТСУТСТВИЕ ЮРИСДИКЦИИ И ЕЕ ПОСЛЕДСТВИЯ В АРБИТРАЖНОМ РАЗБИРАТЕЛЬСТВЕ

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Аннотация. *Закон об арбитраже 1996 года гласит, что просьба о приостановлении действия должна быть удовлетворена до того, как лицо, против которого были возбуждены процедуры, предприняло какие-либо шаги для того, чтобы дать существенный ответ по делу, и не раньше, чем после соответствующих технических достижений (предполагающих их наличие), которые будут признаны законными процедурами. ZPO предусматривает, что отвод должен возникнуть до начала устного слушания по предмету спора. При поднятии вопроса в суде юрисдикция имеет первостепенное значение для гарантии того, может ли быть отложен вариант арбитража. Несоблюдение может привести к тому, что суд продолжит рассмотрение предмета спора и по большей части сделает выбор, который будет оказывать юрисдикцию сторонам. Несмотря на то, что состав арбитража не может быть ограничен выбором суда, на базовом уровне необходимо рассмотреть вопрос о протесте одной из сторон, независимо от того, был ли отложен вариант арбитража.*

Ключевые слова: *Арбитражный регламент ЮНСИТРАЛ, Закон о международном частном праве (PILA), Нью-Йоркская конвенция, Торговая палата Стокгольма, нефтяная организация ЮКОС.*

The rules of arbitration, as a complement to the arbitration arrangement, are provided by the selected organisation of the parties and apply in the case of the formal arbitral proceedings. The parties agree to arbitrate within the context of a certain organisation and adhere to the laws of this organisation, which are compulsory for both parties and the tribunal. The parties may simply opt to comply with the UNCITRAL Laws in the case of ad hoc arbitration or may decide to select the arbitration guidelines themselves. In these instances, such principles refer to the arbitration clause as an extension of the main agreement.

Law practitioners Boon and Flood claim that there is no time limit for the application of the New York Convention. The UNCITRAL Model Law, on the other hand, specifies that the parties can apply after the submission of the initial declaration concerning the subject of the dispute [1, p. 77].

The Private International Law Act (PILA) is, to some extent, excellent in this regard; it does not require a supplication by one of the parties. Rather, a Swiss court of law will decrease its jurisdiction ex officio unless the respondent continues the proceedings without challenging jurisdiction. This is an example of a common standard of Swiss law, as indicated by the ability of Swiss courts of law to apply government rules ex officio and, specifically, examine their jurisdiction ex officio [2, p. 66].

Professor of law Geo [3, p. 90] believes that an arbitral court must comply with the decided agreements that are material to it: (i) the arbitral proceeding agreement; (ii) the pertinent arbitral instructions (in the event of official negotiation, these are provided by the establishment of the case in which the procedures are composed; in the event of specially appointed mediation, the parties may embrace the UNCITRAL Arbitration Rules that are composed to give a legitimate structure to improvised mediation, agree on explicit guidelines in an understanding between them, or leave it to the arbitral council to decide the practical standards); (iii) the principles of the relevant arbitration regulations (generally, as observed previously, the rule of the point of intervention); and (iv) the New York Convention. These grounds maintain a proper order of importance among one another: the intervention understanding between the parties is of the least degree of importance; the discrete selected rules are associated with the arbitration agreement and can, in this way, be considered as possessing the same level of importance; the appropriate arbitration laws have a higher degree of importance and, because they are compulsory, supersede the discrete selected

rules and institutional intervention instructions; and the New York Convention maintains the utmost degree of significance, beating the various aforementioned grounds, as it contains obligatory arrangements. The underlying investigation would demonstrate that, regarding the decision of the regulations pertinent to the benefits of the dispute, the impacts of the parties' concurrence on the relevant law are significantly upgraded through affirmation by every single appropriate source, even those with an officially heightened position. There are, in any case, a few restrictions.

Equally official arbitral rules and the UNCITRAL Arbitration Rules consist of necessary considerations involving the advantages of the dispute, and they all state that the arbitral tribunal will apply the regulations selected by the parties to the advantage of the dispute [4, p. 21].

The Rules of 1976 do not include a time restriction for the arbitral award. Throughout the development of the Rules, the enforcement of a timeframe for the making of an award has been questioned. The presence of time limitations was well established in the institutional laws, and variations on these time limitations were regularly granted in practice. The arbitral tribunal has the unusual choice of expanding the term to cover further intervention. Concerns were expressed regarding this plan, as no organisation should be willing to cope with future changes in time period in unadministered arbitrations. Logistical issues were also pointed out in states with time constraints under their tribunal rules, and this clear resistance was articulated in a timetable. Instead of implementing an unreasonable amount of time, it was proposed that consistency should be preserved through the incorporation of a basic guideline that there will not be unnecessary pauses in arbitral awards. As a matter of fact, Article 17(1) of the revised Rules (revising Article 15(1) of the 1976 Rules) provides that 'the arbitral tribunal, in exercising its discretion, shall conduct the proceedings so as to avoid unnecessary delay and expense and to provide a fair and efficient process for resolving the parties' dispute' [5, p. 34].

According to Jean Francois, [6, p. 44] hearings under the UNCITRAL Arbitration Rules shall begin by providing the defendant with a notice of arbitration from the claimant. In compliance with the amended Rules, the party has 30 days to respond, and a new clause in the Rules allows for a reference to the Notice of Arbitration. It is worth pointing out that Article 4(3) of the amended Rules specifies that 'the constitution of the arbitral tribunal shall not be hindered by any controversy with respect to the respondent's failure to communicate a response to the notice of arbitration, or an incomplete or late response to the notice of arbitration, which shall be finally resolved by the arbitral tribunal'.

Article 17(2) of the amended Rules is an essential clause for the time frame of the hearings following the start of the adjudication and the creation of an arbitral tribunal. It stipulates that 'the arbitral tribunal may, at any time, after inviting the parties to express their views, extend or abridge any period of time prescribed under these Rules or agreed by the parties' [7, p. 12]. Article 25 provides a general clause on 'term limits', whereby 'the periods of time fixed by the arbitral tribunal for the communication of written statements (including the statement of claim and statement of defence) should not exceed 45 days. However, the arbitral tribunal may extend the time limits if it concludes that an extension is justified' [8, p. 14].

Such clauses highlight the contrast between the values of parties' rights and the administrative specialisation of the arbitral tribunal to regulate, considering the conditions of the situation and how the action may be better regulated.

I) Arbitration and case allocation plan

Drafters of arbitration agreements gave a great deal of thought to the wording utilised when characterising the extent of the arbitration agreement. This appears to have been a response to several English law court choices in particular, which applied incredible significance to the language of the arbitration agreement and illustrated (out of disputes that were not expected to limit the extent of the arbitration agreement) surprising ends to which disputes may have been referred to arbitration. To refer to one model, a court established a provision identifying that arbitration of any disputes 'emerging under' a specific agreement covers only questions as to the rights and commitments made in the agreement itself, while a condition alluding to questions 'in connection to' the agreement or 'associated with'

the agreement may be more extensive in scope. This prompted an increasing amount of specific details aimed at explaining that the arbitration agreement covers every possible dispute between parties. These acceptable qualifications have been abandoned by English judges; in the words of the House of Lords, these differentiations 'reflect no credit upon English commercial law. It may be a great disappointment to the judges who explained so carefully the effects of the various linguistic nuances if they could learn that the drafter obviously regarded the expressions "arising under this charter"... and "arisen out of this charter" as mutually interchangeable [9, p. 90]. The time has come to draw a line under the authorities to date and make a fresh start'. The House of Lords avowed that the parties 'are unlikely to trouble themselves too much about [the clause's] precise language or to wish to explore the way it has been interpreted in the numerous authorities, not all of which speak with one voice.If the parties wish to have issues as to the validity of their contract decided by one tribunal and issues as to its meaning or performance decided by another, they must say so expressly' [10, p. 32]. A fundamental arbitration condition is intended to balance prohibitive agreements that might be forced by material arbitration law. A basic proviso may presumably have a similar impact in numerous jurisdictions, including those considered previously. What a specific mediation provision may not accomplish, regardless of how obvious and exact it is, is the expansion of the extent of what the relevant discretion regulations consider to be arbitrable.

II) Partnership parties: apportion personae association

The tribunal will undoubtedly adhere to the parties' guidelines, as it is not influenced by any forces outside of the parties' agreement. Consequently, tribunals are largely, accurately and extremely hesitant to stray from the guidelines of the parties [11, p. 96].

This point-by-point description extends even beyond the scope of English rule; the typical Convention provision suggested by the Arbitration Institute of the Stockholm Chamber of Commerce alludes to 'any question, discussion or case emerging out of or regarding this agreement, or the break, end or shortcoming thereof'. Additionally, the typical provision of Swiss guidelines alludes to 'any debate, contention or guarantee emerging out of or according to this agreement, consisting of the legitimacy, deficiency, break or end thereof', and the exemplary proviso of the UNCITRAL Arbitration Rules refers to 'any question, controversy or guarantee emerging out of or identifying with this agreement, or the penetration, end or shortcoming thereof'. Similarly, albeit concisely, the model proviso of the Global Assembly of Trade alludes to 'all questions emerging out of or regarding the current agreement' [12, p. 25].

In any case, the power of the parties' understanding should be facilitated with material guidelines on legitimacy and implement ability of the arbitral. It is conceivable that parties' guidelines negate definite necessities for the award's legitimacy in the relevant arbitration guidelines or particular prerequisites for the award's practicability in the New York Convention [13, p. 22]. In this circumstance, if the arbitral tribunal follows the wishes of the parties, it might face the possibility of an award that is not or cannot be upheld. To maintain a strategic distance from these unfortunate outcomes, the arbitral court might be enticed to ignore the parties' guidelines, including their decision of law. In any case, this might be done under uniquely constrained conditions and indicated by prohibitive measures so as to abstain from subjecting the award to the dangers of being invalidated or denied implementation, depending on whether the arbitral court surpasses the extent of the force that parties have applied to it. The grounds for refuting an award and the practicability of the case might, in a roundabout way, confine the materiality of the parties' decision by the arbitral court of law, which might have originated in Article 34(2)(b)(ii) of the UNCITRAL Model Law and Article V(2)(b) of the New York Convention and depends on the current referenced standard for open arrangements [14, p. 88].

In the event that the guidelines picked by the parties drive the arbitral tribunal to render an award and struggle with the open arrangement of the nation where the award is rendered or authorisation is sought, the award risks becoming unacceptable or ineffectual. Subsequently, the arbitral tribunal may be inclined to limit the pronouncement of law made by the parties and, along these lines, abstain from ruining or rendering

ineffectual the award. Does the arbitral tribunal, in this situation, risk surpassing its capacity, and is the arbitral tribunal compelled to choose between two reasons for weakness or unenforceability of the award – for example, overabundance of intensity or struggles with the open approach? As I see it, there is space to contend that the arbitral tribunal is not influenced by the decision of the parties to the extent that it is important to consent to Article V(2)(b) of the New York Convention and the related arrangement.

III) Whether the discretion proviso is 'unworkable or unfit to be executed'

The lex arbitri is additionally pertinent with regards to the authorisation of an award. We have just observed that the regulation of the place of arbitration decides the legitimacy of the arbitral agreement and that a worthless arbitration agreement renders the award ineffectual under Article V(1)(a) of the New York Convention. In addition, the regulation of the place of arbitration decides the consistency of the arbitral technique and the standards for the composition of the arbitral court, which are likewise models for the practicability of an award under Article V(1)(d) of the New York Convention.

Furthermore, in Article V (1)(e), the New York Convention considers it adequate grounds to reject implementation of an award if the award has been put aside by a qualified expert in the field where the award was performed. The New York Convention, be that as it may, does not indicate on what grounds an award might be saved; this is for the arbitral court to decide. Along these lines, regardless of whether authorisation is consistently directed by the New York Convention, the revocation of an award opens complexities the implementation of an award and inconsistent reasons for dissolution of the lex arbitri. As a rule, Article V(1)(e) is requested if an award that has been repealed on the condition of its inception is considered to have no lawful impact; in any case, French courts implement grants that have been saved, and there are additionally a few points of reference, though not undisputed, in various nations – for example, the USA. As of late, a Dutch court chose to uphold an award regardless of its dissolution in the nation of inception: Russia. This choice, be that as it may, cannot legitimately be contrasted with an authorisation choice in a standard business case, put together as it was with respect to contemplations of fairness and autonomy of the Russian courts for a situation including the interests of the Russian nation. The award had been rendered in a contest on venture insurance with respect to penetrations by the Russian Federation of its open universal regulation commitments subsequent to what the arbitral court had established, which was an illegitimate behaviour of the oil organisation Yukos.

Arbitration is represented by the arbitration law of the nation in which the court is located (territoriality rule). The territoriality rule is avowed, for instance, in Article 46 of the Swedish Arbitration Act, Article 176 of the Swiss Private International Law Act, Section 2 of the English Arbitration Act and Article 1(2) of the UNCITRAL Model Law. The territoriality rule applies only to the regulation administering the interventional method and does not extend to further cover the law overseeing the benefits of the question. Ignoring an invalidation made in the award's nation of origin is, however, the exemption instead of the standard, and it is absolutely controversial [15, p. 99].

A few states allow the parties to select the laws overseeing the arbitration process. Consequently, in these circumstances, the parties may discredit the territoriality rule; see, for instance, Article 182(1) of the Swiss Private International Law Act and Article 1494 of the French Code of Civil Procedure. That the parties have selected a particular regulation to oversee their dispute, however, is not sufficient to make the selected law pertinent in addition to the methodology. On the off chance that the parties want the arbitral proceedings to be managed by a law unlike the law of the place in which the arbitral council is situated, they must make this explicit, according to the negotiation strategy and granted that the arbitration regulations of the place of arbitration allow them to settle on this kind of decision.

It has been definitively remarked that 'the decision of an outside practical regulation is very abnormal (and frequently not recommended), just as subject to questions with respect to its legitimacy'. In England, a High Court judge remarked that, in principle, it is conceivable to submit arbitration to a particular bureaucratic law in relation to the law of the government of the

arbitral tribunal's location; however, the outcome will be exceptionally unacceptable or ludicrous.

Arbitration laws are, as a rule, very liberal in their guidelines of intervention [16, p. 65]. The parties, however, want as much adaptability as can be expected from a method of dispute resolution that is selected unequivocally on the grounds that it leaves adequate space for private assurance. On the off chance that state law begins to thoroughly control the intervention procedures, this dispute resolution strategy would most likely lose quite a bit of intrigue among business parties. Nonetheless, if there were no guidelines at all, the parties might expect major standards of fair treatment to be disregarded. Thus, fruitful arbitration law is an instrument that can guarantee a serious degree of adaptability while providing certain standards with which to ensure fair treatment.

The 1976 Rules do not contain a time limitation for rendering an award. An inquiry was raised during the revision of the Rules regarding whether a period cutoff ought to be forced for the rendering of an award. It was noted that the presence of time limits was common in institutional guidelines and that, therefore, expansions of such time limits should be given. Reservations were communicated on this proposition, given that, in non-directed interventions, there would be no establishment to manage potential augmentations as far as possible. Moreover, it was demonstrated that in states containing time limits in their arbitration laws, common sense issues additionally existed, and subsequently, solid restrictions were communicated to time limits [17, p. 54]. It was proposed that, as opposed to forcing an arbitrary timespan, adaptability ought to be held through the incorporation of a general rule that there ought not to be undue deferral in rendering an award. Actually, Article 17(1) of the overhauled Rules (updating Article 15(1) of the 1976 Rules) provides that '[t]he arbitral council, in practicing its tact, will lead the procedures to dodge superfluous postponement and cost and to give a reasonable and proficient procedure for settling the parties' dispute'.

The arbitration procedures under the UNCITRAL Arbitration Rules begin with the correspondence by the inquirer of the notification of arbitration to the respondent [18, p. 76]. Under the overhauled Rules, the respondent has 30 days to answer to the notification of arbitration, and the arrangement on the reaction to the notification of arbitration is another provision in the Rules. It ought to be noted that Article 4(3) of the revised Regulations provides that '[t]he structure of the arbitral council will not be thwarted by any discussion regarding the defendant's inability to convey a reaction to the notification of assertion, or a deficient or late reaction to the notification of discretion, that will be at long last settled by the arbitral tribunal' [19, p. 38]. These provisions are a representation of the parity that the changed Rules attempt to accomplish between the principle of party self-sufficiency and the optional authority of the arbitral court to settle on the most proficient method to best lead the proceedings, considering the circumstances of the case.

Afterwards the initiation of the arbitration and the foundation of the arbitral tribunal, a significant arrangement with regard to the time span of the procedures is Article 17(2) of the revised Rules [20, p. 66]: it provides that '[a]s soon as attainable after its establishment and in the wake of welcoming the parties to communicate their perspectives, the arbitral council will set up the temporary plan of the arbitration. The arbitral tribunal may, whenever, in the wake of welcoming the parties to communicate their perspectives, expand or shorten any timeframe endorsed under these Rules or concurred by the parties' [21, p. 12]. A general provision on 'timeframes' is contained in Article 25, which states that timeframes fixed by the arbitral court for the correspondence of composed articulations (counting the announcement of case and explanation of defense) ought not to surpass 45 days. Notwithstanding, the arbitral council might broaden as far as possible on the off chance that it infers that a revision is suggested.

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