ABSTRACT
The article assesses the potential risks associated with the problem of recognizing the arbitration clause as inconsistent or invalid. The main scientific research method used in this article is the comparative legal method, which makes it possible to most accurately determine the common and different features in the approaches of different jurisdictions. This article discusses the main conditions and essential circumstances requiring attention when working with contracts in the foreign economic activity in terms of validity of the arbitration agreements. In order to achieve the goal set in the article, we analyzed: the legislation of the Russian Federation on international commercial arbitration, the UNISTRAL rules, the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958), the international arbitration rules, the judicial practice related to the recognition and enforcement of arbitral awards. As a result of analysis, the article provides provisions aimed at increasing the efficiency of conclusion of such arbitration clauses in the foreign economic activity of Russian companies.

Keywords: Arbitration agreement. Arbitration clause. Interpretation of the arbitration agreement. Comparative legal method. Autonomy of the arbitration agreement.

ACORDOS DE ARBITRAGEM NA ATIVIDADE ECONÔMICA ESTRANGEIRA DE EMPRESAS RUSSA

ACUERDOS ARBITRALES EN LA ACTIVIDAD ECONÓMICA EXTERIOR DE LAS EMPRESAS RUSAS

RESUMO
O artigo avalia os riscos potenciais associados ao problema de reconhecimento da cláusula compromissória como inconsistente ou inválida. O principal método de investigação científica utilizado neste artigo é o método jurídico comparativo, que permite determinar com maior precisão as características comuns e diferentes nas abordagens das diferentes jurisdições. Este artigo discute as principais condições e circunstâncias essenciais que requerem atenção ao se trabalhar com contratos na atividade econômica estrangeira em termos de validade das convenções de arbitragem. Para atingir o objetivo estabelecido no artigo, analisamos: a legislação da Federação Russa sobre arbitragem comercial internacional, as normas UNISTRAL, a Convenção sobre o Reconhecimento e Execução de Sentenças Arbitrais Estrangeiras (1958), as normas de arbitragem internacional, prática judicial relacionada ao reconhecimento e execução de sentenças arbitrais. Como resultado da análise, o artigo fornece disposições destinadas a aumentar a eficiência da conclusão de tais cláusulas compromissórias na atividade econômica estrangeira de empresas russas.


RESUMEN
El artículo evalúa los riesgos potenciales asociados con el problema de reconocer la cláusula de arbitraje como inconsistente o inválida. El principal método de investigación científica utilizado en este artículo es el método jurídico comparativo, que permite determinar con mayor precisión las características comunes y diferentes en los enfoques de las distintas jurisdicciones. Este artículo analiza las principales condiciones y circunstancias esenciales que requieren atención al trabajar con contratos en la actividad económica exterior en términos de vigencia de los acuerdos arbitrales. Para lograr el objetivo planteado en el artículo, analizamos: la legislación de la Federación de Rusia sobre arbitraje comercial internacional, las reglas de UNISTRAL, la Convención sobre el reconocimiento y ejecución de laudos arbitrales extranjeros (1958), las reglas de arbitraje internacional, la práctica judicial relacionada con el reconocimiento y ejecución de laudos arbitrales. Como resultado del análisis, el artículo proporciona disposiciones destinadas a aumentar la eficiencia de la conclusión de tales cláusulas de arbitraje en la actividad económica extranjera de las empresas rusas.

INTRODUCTION

The authors chose the topic of this work due to an increase in the number of international contracts concluded, caused by an increase in the foreign investment flows, an increase in the number of international transactions, the opening and operation of joint ventures, international commercial projects, which naturally leads to an increase in the number of disputes that can be referred to the state courts or international arbitration for resolution.

The relevance of this study is expressed in the fact that the international arbitration is the most popular and practical tool for resolving potential and existing controversial issues in the international business. When choosing between a state court and arbitration, the parties more often give priority to the latter, including arbitration agreements in the international treaties, which are the basis for transferring the arisen disagreements to the permanent international arbitration institutions or ad hoc arbitration for resolution (VALEEY, ZAITSEV, FETYUKHIN, 2016). The choice in favor of international arbitration in recent years is explained by the following:

1. pluralism of choice, that is, the parties can choose the most compromise option of arbitration based on economic, geographical and procedural considerations, while the arbitration itself can be located outside the borders of the states of the contracting parties;

2. closed nature of the proceedings, that is, the parties may be protected from the data dissemination regarding confidential information, commercial conditions of the company, financial indicators, transaction conclusion conditions and much more, which can become public and have a negative impact on the business reputation;

3. consideration terms of the proceedings: arbitrations consider disputes within the framework of one instance, which significantly speeds up the decision-making time, in contrast to the state courts, where the processes may be artificially delayed during the consideration of cases in the appeal and cassation courts;

4. relative high probability of enforcement of an arbitration award over state judicial acts, where enforcement often requires an international treaty on legal assistance governing the recognition and enforcement of judicial decisions between and compliance with the principle of reciprocity by the countries participating in such legal relations.

The choice of arbitration is also explained by the fact that the parties often have a mutual distrust of the state courts of the counterparty’s country in modern conditions. In addition, a number of scholars associate the choice of arbitration with a certain level of development of legal awareness and legal culture in society (VALEEY, ZAGDULLIN, SITDIKOV, 2019).

As part of the current research, the authors investigated indicators and conditions aimed at ensuring that the arbitration clauses are valid and the decisions of the arbitration courts may subsequently be enforced. At the same time, we touched upon the factors that make it possible to minimize potential disputable issues related to the content of the arbitration agreements themselves, in order to avoid additional costs by the parties, as well as unreasonable delay in dispute consideration.

METHODS

When writing this article, we used the general scientific methods of scientific cognition, which include: systemic, comparative legal, analogy and structural-functional. However, the greatest attention was paid to the analogy method and the comparative legal method. The need to use the analogy method is expressed in the extensive practice of concluding and executing arbitration clauses by the international transaction participants of various states. This method makes it possible to use the established practice and experience of the foreign states, as well as transpose them into foreign economic relations with the participation of Russian companies, if possible.

The inclusion and work with the comparative legal method is explained by the need to collect and compare the arbitration practice, as well as the courts executing their decisions on the territory of the states of the parties to the disputes, which allows consolidating the well-established approaches to the practice of execution and actions of arbitration clauses within different jurisdictions (GRIGORIEV, KOLOMIETS, 2017). Moreover, the theoretical basis of the problems of arbitration agreements is largely based on the practice of comparing various arbitration decisions.
The above methods are of particular value for the consideration of issues of arbitration agreements within the framework of researching issues with the companies from Russia, since the experience of Western countries is more extensive and adjusted today.

RESULTS AND DISCUSSION

The legal definition of the concept of an arbitration agreement is set out in Article 7 of the Law of the Russian Federation No. 5338-1 dated July 7, 1993 "On International Commercial Arbitration": "Arbitration agreement – an agreement of the parties to refer to arbitration all or certain disputes that have arisen or may arise between them with regard to any particular legal relationship or part thereof, regardless of whether such a relationship was of a contractual nature or not" (KOLOMIETS, 2017). The above definition is a unified and actual analogue of the definition of an arbitration agreement stipulated by the UNCITRAL Model Law (1985) (clause 1 of Article 7) (KOLOMIETS, 2016).

The arbitration agreement may be concluded in the form of: an arbitration clause, that is, be an integral part of the contract itself; a separate arbitration agreement; an arbitration record, that is, an agreement to refer the dispute to arbitration, when there is already a dispute between the parties.

When concluding the arbitration agreement itself, it is necessary to take into account a number of features that may be of significant importance in case of a dispute between the parties.

1. Thus, it is necessary to make sure that the counterparty’s country is a party to the New York Convention on the Recognition and Reduction of Arbitral Awards (1958), otherwise the likelihood of the execution of such an award becomes small. Moreover, the Convention (1958) itself establishes an exhaustive list for the refusal to recognize and enforce arbitral awards, which include: lack of proper notification of the other party of the arbitration time and place; incapacity of one of the parties under personal law; an arbitration agreement is invalid under the law chosen by the parties, or under the law of the state where the award was made; there is a material violation of the arbitration procedure; arbitration went beyond its competence (RUBINO-SAMMARTANO, 2014; GUSY & HOSKING, 2019).

2. In case of conclusion of an arbitration clause within the framework of the contract itself, it is important to keep in mind that the concept of autonomy of such an agreement applies to the arbitration agreements and is expressed in the further validity presumption of such agreement. Thus, it follows that invalidation of the contract concluded between the counterparties does not automatically entail the invalidity of the arbitration clause. The concept of autonomy of an arbitration clause is contained in various institutional and international arbitration rules and regulations. In particular, Article 21.2. of the UNCITRAL Rules (1976) regulates that an arbitration clause, which is part of a contract and which provides for the dispute submission to international arbitration in accordance with the Rules, shall be treated as a separate agreement, independent of other terms and conditions of the contract.

Also, Article 16 (1) of the UNCITRAL Model Law provides that “…an arbitration clause that is part of a contract shall be construed as an agreement independent of other terms and conditions of the contract. The arbitration court ruling on the contract’s invalidity does not ipso jure entail the invalidity of the arbitration clause”.

At the same time, the Russian law or the UNCITRAL Model Law does not contain direct grounds for recognizing the arbitration agreement as invalid. However, if we refer to the comments of the UNCITRAL Model Law, as well as to the New York Convention (1958), it can be concluded that the arbitration agreement is invalid, if there are defects in the will of the parties. These may include deception, coercion, misleading. Other grounds for recognizing an arbitration agreement as invalid are non-compliance with its written form and its recognition as such on the grounds of applicable law chosen by the parties (BALTHASAR, 2016; MOSES, 2017).

3. The arbitration agreement itself shall contain the terms of the arbitration specifically chosen by the parties and the list of disputes that can be referred to such arbitration. Otherwise, the arbitration clause may not be agreed. This issue is very relevant in the domestic practice of state courts. Thus, in the Decision of the Supreme Court of the Russian Federation n. 305-ES17-9241 dated November 16, 2017 in the case n. A40-190431/2016, the court, interpreting the arbitration agreement on the basis of Article 431 of the Civil Code of the Russian Federation, came to the conclusion that the dispute went beyond the agreement on arbitrability concluded by the parties (LOBODA, 2019).

In its Ruling n. VAS-8147/12 dated July 9, 2012 in the case n. A40-211197/11-68-183, the Supreme Arbitration Court of the Russian Federation came to the conclusion that the arbitration clause was inconsistent, since it contained a
direct reference to the ICAC as arbitration: “...all disputes not settled by the parties peacefully shall be referred for final settlement in accordance with the ICAC Rules at the Chamber of Commerce and Industry of the Russian Federation.”

4. In addition to the fundamental aspects, when concluding an arbitration agreement, it is important to determine:

- applicable law and applicable rules of arbitration to the relationship of the parties;
- number of arbitrators considering the dispute;
- language of the proceedings.

The above provisions will help to predict the potential costs of arbitration proceedings, optimize the timing of its consideration, as well as allow building business relationships, taking into account a possible arbitration dispute.

CONCLUSIONS

Within the framework of the research carried out, we come to the following conclusions:

1. The counterparty’s country of origin shall be taken into account when concluding an arbitration agreement and choosing an arbitration.

2. The arbitration agreement is subject to the presumption of a separate stand-alone agreement, which keeps it valid, if the underlying contract is invalid.

3. The arbitration agreement shall contain a specific condition on the choice of arbitration, since the opposite may lead to the invalidity or unenforceability of such an agreement.

4. To ensure the optimal terms of the award and optimize costs, it is necessary to initially determine the applicable law, the language of proceedings and the number of arbitrators when considering disputes.

SUMMARY

Based on the foregoing, it is worth concluding that the necessity, validity and expediency of a detailed study of the issues of concluding and executing arbitration agreements by Russian companies within the framework of foreign economic activity is comparable in materiality with the subject matter of such an international agreement. At the same time, it is necessary to conduct the necessary agreement on its conditions to minimize the recognition of such an agreement as inconsistent or invalid, as well as in order to optimize financial and time losses in case of referring a dispute to arbitration.

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