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International investment disputes in the conditions of a pandemic

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ABSTRACT

This article discusses theoretical and practical issues of investment disputes, as well as the role and role of arbitrators in dispute resolution. The legal significance of online arbitration in the context of a modern pandemic in resolving disputes, the scientific views of representatives of this field and some aspects of practice have been studied. Also, a scientific and practical analysis of the issue of enforcement by states and individuals of arbitration decisions on the settlement of international investment disputes, as well as international legal aspects was carried out.

Пандемия шароитида халқаро инвестициявий низолар

Калит сўзлар:
Халқаро инвестициявий низолар
Арбитраж
Халқаро марказ (ICSID)
Арбитраж қарорлари
Онлайн-арбитраж
ЮНСИТРАЛ.

АННОТАЦИЯ

Ушбу мақолада инвестициявий низоларнинг назарий ва амалий масалалари ҳамда низоларни ҳал этишда арбитражларнинг ўрни ва роли ёритиб беришга ҳаракат қилинган. Низоларни ҳал этишда онлайн-арбитражларнинг бугунги пандемия шароитида ҳуқуқий аҳамияти, ушбу соҳа вакилларининг илмий қарашлари ҳамда амалиётдаги баъзи жиҳатлари ўрганилган. Шунингдек, ҳалқаро инвестициявий низоларни ҳал қилиш бўйича арбитраж қарорларининг давлатлар ва шахслар томонидан ижро этиш масаласи ҳамда ҳалқаро ҳуқуқий жиҳатлари илмий-амалий таҳлил қилинган.

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Международные инвестиционные споры в условиях пандемии

Ключевые слова:
Международные инвестиционные споры
Арбитраж
Международный центр (ICSID)
Арбитражные решения
Онлайн-арбитраж
UNITSRAL.

АННОТАЦИЯ

В данной статье рассматриваются теоретические и практические вопросы инвестиционных споров, а также роль и роль арбитров в разрешении споров. Изучено правовое значение онлайн-арбитражей в условиях современной пандемии в разрешении споров, научные взгляды представителей этой сферы и некоторые аспекты практики. Также был проведен научно-практический анализ вопроса исполнения государствами и физическими лицами арбитражных решений по урегулированию международных инвестиционных споров, а также международно-правовых аспектов.

Today international investment disputes are regulated on the basis of norms and rules of national and international law. The regulation of investment disputes at these two levels helps to resolve the problem in a timely manner. In recent years, the most effective mechanism for resolving investment disputes is the courts and arbitration, which has become one of the guarantees of protection of the rights and interests of foreign investors. However, there are a number of ways in which a foreign investor can defend his or her interests in resolving a dispute over investment activities, such as appealing to the competent authorities of the place where the investment is made in accordance with national law, taking action under the bilateral agreement and the 1965 Washington convention [1].

International investment disputes fundamentally differ from other legal aspects in terms of its scope and coverage, the study of the concept, subject, object, subjects and legal framework of international investment disputes from the theoretical and practical point of view is one of the current issues.

It should be noted that investment disputes in the legal sciences have been scientifically studied by many scholars. In particular, Uzbek scientists Rakhmonkulov H.R., Islamov Z.M., Saidov A.H., Saidova L.A., Samarkhodjaev B.B., Rustambekov I.R.; Russian scientists Bogatyrev A.G., Boguslavskiy M.M., Velyaminov G.M., Voznesenskaya N.N., Volova L.I., Doronina N.G., Evteeva M.S., Ispolinov A.S., Kabalkin A.Yu., Krupko S.I., Labin D.K., Semilyutina N.G., Silkin V.V., Trapeznikov V.A., Farkhutdinov I.Z. and foreign scholars Bedjik T, Broches A, Brooks S, Wagner M, Gaylard E, Denza E, Roll Sh, Crawford Dj, Reisman V.M., Sornaraya M, Horn N, Schwarzenberger G, Shroer K. [2] can be found in scientific works.

According to the ancient Greek philosopher Aristotle “The arbitrator (judge) uses justice, the judge the law; the arbitrator (judge) is created to carry out justice” [3].

Thus, arbitration is one of the institutions required to resolve disputes. In ancient Rome, the general rules of arbitration were set out in the Justinian Code (eighth chapter of the Fourth Book of Digests) and the powers of the arbitrator and other matters were defined by a *“compromissum” (in a bilateral agreement)* [4].

The legal nature of arbitrations in the legal literature is controversial, and so far there is no single approach. It is important to study the legal essence of this institution, determine its main elements and determine its role in the legal system and its relations with national courts. Currently, there are several approaches to understanding the legal essence of arbitrations. In

the legal literature, there are four main approaches that reveal the legal nature of Arbitration: contractual, prosessual, mixed and autonomous.

However, the naming of arbitrations varies in different countries of the world. In France, for example, there are three main arbitration centers, the International Court of Arbitration under the International Chamber of Commerce in Paris, the Center for Arbitration and Mediation in Paris, and the French Arbitration Association. The only arbitrator in South Korea is the Korean Chamber of Commerce Arbitration (KCAC), which operates under the South Korean Ministry of Justice. The largest arbitration center in Japan is the Japan Trade Arbitration Association (JCAA). The main arbitration institution in Singapore is the Singapore International Arbitration Center (SIAC). There are more than 140 local arbitration commissions in China, which can consider any disputes by agreement of the parties. The most well-known local arbitration commission is the Beijing Arbitration Commission (VAC) [5].

Today, when considering international investment disputes, the foreign citizenship of the investor means that the dispute has the right to refer the dispute to international arbitration tribunals. The procedure for determining citizenship to establish the jurisdiction of a dispute is traditionally determined by the jurisdiction of ratione personae. Although public international law has developed general mechanisms for determining a person's citizenship, the Hague Convention on Citizenship states that citizenship is determined in accordance with the domestic law of each state [6]. It is also common in practice to determine the citizenship of an individual by the criteria of blood law *(ius sanguinis)* and land law *(ius soli)*.

In international relations, the Republic of Uzbekistan actively cooperates with many countries of the world on economic and investment issues. Due to the fact that the majority of political and economic relations of Uzbekistan with foreign countries are investment issues, many agreements and arrangements in this area are being concluded and implemented. At the same time, the legal regulation of investment activities in national legislation is leading to a positive change in the investment climate in the country.

According to the Law of the Republic of Uzbekistan dated December 25, 2019 №LRU-598 “On investments and investment activities”, “The state guarantees the rights of investment entities. Government agencies and their officials have no right to interfere in the activities of investment entities in accordance with the law” [7].

In international law, investment disputes between states and states and foreign investors play an important role in international conventions and agreements, with “*ad hoc”* arbitrations based on the Washington Conventions of 1965 and the Seoul Conventions of 1985 and the UNITSRAL Arbitration regulations [8]. Uzbekistan is a party to these two conventions and serves as a key tool in resolving international investment disputes.

At the same time, in November 2018, the Tashkent International Arbitration Center was established under the Chamber of Commerce and Industry of the Republic of Uzbekistan. The main task of the Center is to resolve disputes arising from contractual and other civil relations between commercial organizations through arbitration [9].

Also, there are a number of disputes that have been and are currently involved in Uzbekistan, including “Romak” (Switzerland) – Uzbekistan (2006, resolved in favor of Uzbekistan), “Metak-tek” (Israel) – Ministry of internal affairs of the Republic of Uzbekistan (2010, most of which was resolved in favor of Uzbekistan), “Oxuz Gold” (England) – Ministry of internal affairs of the Republic of Uzbekistan (resolved in favor of investor), “Spentex” (Netherlands) – Ministry of internal affairs of the Republic of Uzbekistan (2013, resolved in favor of Uzbekistan), “KIM”(Kazakhstan) – Such investment disputes as Uzbekistan (2013 year,

the case continues to be seen), "Federal Electric Power Yaririm" (Turkey) – Uzbekistan (2013 year, which was solved in favor of the investor), "Bursel Tekstil" (Turkey) – Uzbekistan (case continues to be seen) can be listed [10].

Proceeding from the above, one of the main problems in this area is the emphasis on the part of the investment treaty on the settlement of disputes, as well as the inability to go to the conflict processes with foreign investors as much as possible. Because conflict takes excessive time and cost for the parties. Therefore, in the national legislation it is established that disputes should be resolved in accordance with the procedure specified in Article 63 of the Law "On investments and investment activities". In particular, initially negotiations will be carried out through mediation. If the above two procedures are not resolved, such a dispute may be resolved through international arbitration, if the international agreement of the Republic of Uzbekistan and (or) the agreement between the investor and the Republic of Uzbekistan provides for an appropriate and valid arbitration condition.

In addition, as a result of the study of many investment disputes in the world today, it can be seen that the number of appeals to investment arbitrations has increased. In 2013 alone, 57 lawsuits were filed by investors in international commercial arbitration, more than half of which were settled by the United States, Canada and the European Union [11]. These include "Wattenfall AB" lawsuits against Germany [12], "Metalclad" lawsuit against Mexico, "Loewen" lawsuit against the United States and others.

There has also been a lot of talk in recent years about investment arbitration in international relations. In particular, the confidentiality of arbitration proceedings and the publication of decisions with the consent of the parties are considered barriers to the establishment of a holistic and consistent dispute resolution practice. In particular, according to A. Palma, "Arbitration meetings are held in secret, their decisions are not made public" [14].

According to the lawyer scientist I. Rustambekov, in practice arbitrations were held not in an open session, but behind closed doors, which in certain cases became a clear advantage [15].

At present, discussions on the reform of arbitration, which deals with investment disputes in international law, can be seen in various directions. The first is the establishment of a permanent appellate instance similar to the appellate body of the World Trade Organization [16]; the second is the creation of a specialized international investment court to resolve disputes arising from investment agreements between investors and states [17].

Enforcement of investment arbitration decisions is also a major problem today. It is acknowledged by many experts that the issue of control over arbitration courts established under the 1965 Washington Convention remains problematic. In particular, the American international legal scholar Yu. Powellina in her works has identified many problems in international investment arbitration [18].

The Republic of Uzbekistan acceded to the New York convention "On the recognition and enforcement of foreign arbitral awards" of 10 June 1958 by a resolution of the Oliy Majlis of the Republic of Uzbekistan on 22 December 1995 and entered into force on 7 February 1996.

At present, the procedure for hearing this category of cases is reflected in the Code of Economic Procedure of the Republic of Uzbekistan and is regulated by national courts.

As a general rule, the arbitral award must be enforced voluntarily by the parties to the dispute, regardless of the country in which it is located. The voluntariness of the enforcement of an arbitral award is fully consistent with the legal nature of international commercial arbitration, as the parties who voluntarily choose arbitration as a method of dispute resolution

imply the voluntariness of the arbitral award at the stage of concluding the arbitration agreement.

Also, the issue of the recognition of decisions of foreign arbitrators and the rejection of the enforcement procedure is also problematic today. It is indicated that the object of the dispute, as the basis of the issue of the recognition and rejection of the order of execution by the majority of participants or states, may not be the subject of arbitration under the laws of this country, and the recognition and enforcement of this decision contradict the law of this state [19].

Given the current pandemic situation in the world, the need to implement international commercial arbitration procedures and arbitration decisions online is very important and creates many opportunities. The most current trend in both commercial and public courts in many countries around the world is to strive to optimize legal dispute resolution procedures, including providing the parties with new technological opportunities to take advantage of the latest advances in electronic document management. The development and promotion of information technology has a significant impact on the practice of global arbitration institutions on the active use of remote communication technologies.

Online dispute resolution is an arbitration settlement procedure or arbitration dispute resolution tool that is understood to use online technology to facilitate the resolution of a dispute between the parties [20].

Arbitration agreements also have a special place in the consideration of international investment disputes, and arbitration agreements are an integral part of the conditions for the settlement of disputes in arbitration. An arbitration agreement is a means of legal protection of these parties and is reflected in bilateral or multilateral agreements as well as in mutual agreements.

According to Article 1, paragraph 2, of the European Convention of 1961, an arbitration agreement is a separate agreement available in writing or in exchange for letters, telegrams, teletypes signed by the parties.

In practice, letters and telegrams and teletypes referred to in Article II of the 1958 New York Convention were equated with “other means of electronic communication” [21].

Courts and arbitral tribunals do not always interpret this requirement in the same way in the application of international conventions or national legal norms that provide for the need for a written form of arbitration agreement. For example, a Geneva court refused to enforce an arbitration award in the Netherlands in Switzerland under the 1958 New York Convention. According to the Court, the notion of “exchange of letters” introduced in the 1958 New York Convention refers to a proposal by one of the parties to enter into an arbitration agreement and a response by the other party to that proposal. In this case, the answer was given by opening a letter of credit, indicating that the requirement of mandatory writing in the New York Convention had been violated.

Pursuant to Article IV of the Convention, the parties to arbitration agreements are to ensure that disputes are voluntarily referred to permanent arbitral tribunals and that disputes are dealt with in accordance with the rules of such body or, in this case, to *ad hoc* arbitration.

However, while the requirement for the form of arbitration agreement set out in the New York Convention can be broadly interpreted, an arbitration agreement drawn up in electronic form must meet specific requirements to ensure the enforcement of an online arbitration award.

One of the peculiarities of online dispute resolution is that it is reflected in the form of an arbitral award made as a result of an arbitration procedure.

The New York Convention does not set requirements for an arbitral award. Based on Article III of the Convention, the form of the decision is determined by the procedural law of the state of which it is adopted.

If the arbitration proceedings are conducted in an electronic environment, the signature of the representative of the arbitral tribunal in the document may be sufficient to confirm the validity of the arbitral award. This approach has been used in U.S. court practice, including *Continental Grain Co. and Foremost Farms Inc.* used in the arbitration case [22].

Therefore, in practice, it is necessary to create a regulatory framework that provides for the implementation of online arbitration decisions to ensure the dissemination and development of information technology in the field of dispute resolution.

In conclusion, from the above, it is necessary to reconsider international legal instruments that provide for the possibility of enforcement of online arbitration decisions to ensure the dissemination and development of information technology in the field of investment dispute resolution. The ability to enforce an online arbitration award is fully guaranteed only if every country in the world adopts legislation on the use of electronic documents and electronic signatures.

References

1. Tynel A., Funk Ya., Khvalei V. Course of international trade law. - Minsk: Amalfeya, 2000. - S. 587-588.

2. Kotov A.S. International legal regulation of investment disputes. Abstract of the dissertation for the degree of candidate of legal sciences. Moscow. 2009.https: //static.freereferats.ru/_avtoreferats/01004377562.pdf

3. Aristotel. Retorika. Unireks, 2008. 1, 13, 1374b, p. 420.

4. Digests of Justinian. http://www.gumer.info/ bibliotek_Buks / Pravo / digest / 04.php

5. Rusakova E.P. International commercial arbitration in China. RUDN Bulletin, Juridical Science Series, 2012, No. 4

6. Convention on Certain Questions relating to the Conflicts of Nationality Laws (1930) // 179 LNTS 89.

7. Law of the Republic of Uzbekistan dated December 25, 2019 No. LRU-598 "On investments and investment activities". Website of the National Database of Legislation of the Republic of Uzbekistan: https://www.lex.uz/docs/4664142

8. UNCITRAL: United Nations Commission on International Trade Law [Электронный ресурс]. URL: http://www.uncitral.org

9. Website: https://globalarbitrationnews.com/wp-content/uploads/2019/04/Uzbekistan-1.pdf

10. Website:https://kun.uz/uz/news/2019/10/25/investorlar-bilan-sudlashuvlar-tarixiga-nazar-nizolardan-saqlanish-uchun-nimalarga-etibor-berish-kerak

11. Recent development in investor-state dispute settlement (ISDS) //UNCAD. 2013. № 1.

12. Vattenfall AB v. Federal Republic of Germany. ICSID. Case № ARB/09/6.

13. Mexico v. Metalclad Corp. Reasons for Judgment of the Honorable Mr. Justice Tysoe // B.C.L.R.2001. № 39. P. 389, 393.

14. Palma A. De. NAFTA's Powerful Little Secret; Obscure Tribunals Settle Disputes, But Go Too Far, Critics Say // N. Y. Times. 2001. March 11.

15. Rustambekov I. Prospects for the development of mechanisms for the preparation of personnel in the field of international arbitration. Legislative analysis of Uzbekistan. 4/2018. B 95.

16. Possible Improvements of the Framework for ICSID Arbitration // Discussion paper. 2004. October 22. Part VI and Annex «Possible Features of an ICSID Appeals Facility»; Tams C. An Appealing Option? A Debate about an ICSID Appellate Structure // Essays in Transnational Economic Law. 2006. № 57.

17. Harten G. Van. A Case for International Investment Court. Inaugural Conference of the Society for International Economic Law. 2008. July 16 // URL: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1153424

18. Pauwelyn J. At the edge of chaos? Foreign Investment Law As A Complex Adaptive System, How It Emerged And How It Can Be Reformed // ICSID Review – Foreign Investment Law Journal. 2014. Vol. 29. P. 372–418.

19. Overview of the recognition and enforcement of international commercial arbitration awards. Law Enforcement Review 2017, vol. 1, no. 2, pp. 212–218

20. Possible future work on online dispute resolution in cross-border electronic commerce transactions (A/CN.9/A706) [Electronic resource] // United Nations Commission on International Trade Law Forty-third session. New York, 2010. URL: https://documents-dds-ny.un.org/doc/UNDOC/GEN/V10/531/00/PDF/V1053100.pdf (access date: 02.02.2017).

21. Yearbook Commercial Arbitration. Vol. XII. P. 427.

22. Kronke, H., Nacimiento, P. Otto, D. et al. (eds) (2010) *Recognition and enforcement of the foreign arbitral awards: A Global commentary on the New York Convention. Kluwer law International.*

23. Galkovskaya N.G., Vutyn V.E. Online arbitration as a means of resolving transgender economic disputes. Problems of prinuditelnogo ispolneniya online-arbitrajnyx resheniy. Bulletin of Tomsk State University. Right. 2017. № 24.