UDC 341.63

Ye.A. Kim, K.S. Mussilimova

Ye.A. Buketov Karaganda State University, Kazakhstan
(E-mail: yevgeniya.kim1995@gmail.com)

International legal regulation of commercial disputes resolution in arbitration

In this article, the sources of international commercial arbitration from the moment of its formation to the present time are considered in detail. In particular, the similarities of international treaties in the field of commercial arbitration are examined and their distinctive features are singled out. In addition to the main international conventions andprotocols in the field of international arbitration, which are binding for all countries of their signatories, there have been considered international instruments that are not legally binding, but have had a significant impact on the formation and development of international commercial arbitration. These include: the UNCITRAL Model Law and the UNCITRAL Arbitration Rules. It should be noted that at present the UNCITRAL Arbitration Rules are often applied by international arbitral institutions as aprocedural lawin resolving specific disputes. Of course, the history of international commercial arbitration is not limited to the conventions and other international documents considered in the article, but they were the milestones on the way to arbitration and had the most significant impact on the development of arbitration legislation and arbitration practice throughout the world.

Keywords: the UNCITRAL Arbitration Rules, the UNCITRAL Model Law, institutional arbitration, ad hocarbitration, a written agreement, an arbitration clause, an exclusionagreement, the principle of «competence-competence», the separability of the arbitration clause.

Legal regulation of international commercial arbitration is carried out at the international level through the conclusion of international conventions and bilateral treaties, and at the domestic level by adopting laws regulating international commercial arbitration. In addition, there is a number of international non-normative documents that, nevertheless, have a significant impact on the arbitration legislation of many countries (for example, the Principles of International Commercial Contracts developed by the International Institute for the Unification of Private Law (UNIDROIT) [1; 84, 85].

International conventions governing commercial arbitration differ in the scope of their territorial validity (multilateral and regional) and in the field of their application (general and special).

The international conventions of a general nature include the Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958 (the New York Convention), the European Convention on International Commercial Arbitration of 1961 (the European Convention) and the Inter-American Convention on International Commercial Arbitration of 1975 (the Panama Convention) because they are intended to regulate matters relating to any arbitration agreements, arbitral proceedings and arbitral awards falling within the category of commercial. An example of a special international convention is the Convention on the Settlement of Investment Disputes between States and Nationals of Other States of 1965 (the Washington Convention), which regulates only specialized arbitration designed to resolve investment disputes.

The first truly international agreements dealing specifically with commercial arbitration were *the Protocol on Arbitration Clauses of 1923 (the Geneva Protocol)* and the Convention for the Execution of Foreign Arbitral Awards of 1927.

The Geneva Protocol of 1923 was prepared on the initiative of the International Chamber of Commerce under the aegis of the League of Nations. Paragraph 1 of the Protocol provided: «Each of the Contracting States recognizes the validity of an agreement whether relating to existing or future differences between parties subject respectively to the jurisdiction of different Contracting States by which the parties to acontract agree to submit to arbitration all or any differences that may arise in connection with such contract relating to commercial matters or to any other matter capable of settlement by arbitration, whether or not the arbitration is to take place in acountry to whose jurisdiction none of the parties is subject» [2]. Thus, the Geneva Protocol was applied only to parties originating from different states. The sphere of its application was further narrowed by the possibility of signing the Protocol with a «commercial reservation», which conditioned its application only to disputes of acommercial nature, as they were understood in the legislation of the respective countries.

With regard to the enforcement of arbitral award, the Protocol provided in paragraph 3 the obligation of the contracting parties «to ensure the execution by its authorities and in accordance with the provisions of its national laws of arbitral awards made in its own territory under the preceding articles» [2]. Thus, the Protocol did not apply to arbitration awards rendered in other states.

The limitations of the sphere of the Geneva Protocol application became evident almost immediately, and soon the League of Nations prepared a new document that became known as *the Convention for the Execution of Foreign Arbitral Awards of 1927 (the Geneva Convention)*. Only the countries that signed the Geneva Protocol could become parties to the Geneva Convention, designed to supplement it, and most of them did so.

From the title of the Geneva Convention follows that it regulates the execution of foreign arbitral awards. According to Article 1, the arbitral award shall be recognized as binding and shall be enforced «in accordance with the rules of the procedure of the territory where the award is relied upon, provided that the said award has been made in a territory of one of the High Contracting Parties … and between persons who are subject to the jurisdiction of one of the High Contracting Parties» [3]. Thus, the restriction provided in paragraph 3 of the GenevaProtocol was eliminated. The arbitral award became executable not only in the territory of the state where it was pronounced, but also in the territory of any state party to the Protocol and the Convention.

The Geneva Convention outlined a number of requirements that an arbitral award must satisfy in order to be executed. These include: the award has been made in pursuance of a submission to arbitration which is valid under the law applicable thereto; the subject-matter of the award is capable of settlement by arbitration under the law of the country in which the award is sought to be relied upon; the award has been made by the Arbitral Tribunal provided for in the submission to arbitration or constituted in the manner agreed upon by the parties and in conformity with the law governing the arbitration procedure; the award has become final in the country in which it has been made, in the sense that it will not be considered as such if it is open to appeal, review or recourse (in the countries where such forms of procedure exist) or if it is proved that any proceedings for the purpose of contesting the validity of the award are pending; the recognition or enforcement of the award is not contrary to the publicpolicy or to the principles of the law of the country in which it is sought to be relied upon (Article 1) [3]. In addition, the Convention has established in Article 2 three grounds for refusing to enforce the arbitral award: the award has been annulled in the country in which it was made; the party against whom it is sought to use the award was not given notice of the arbitral proceedings in sufficient time to enable him to present his case; or that, being under a legal incapacity, he was not properly represented; the award does not deal with the differences contemplated by or fading within the terms of the submission to arbitration or that it contains decisions on matters beyond the scope of the submission to arbitration [3]. However, the burden of proving the absence of appropriate grounds lay on the party demanding the execution of the arbitral award. This led to the emergence of aproblem known as the «double exequatur». In order for the arbitral award to become final in the country where it was rendered (which according to the Geneva Convention is necessary for the execution of this decision), the prevailing party must have received confirmation of this decision in the court of the country where the arbitration took place. Then followed the application to the court of another country to obtain an order to execute this decision. The execution process, therefore, remained lengthy and costly, and provided for the application to the courts at least of two states.

The Geneva Protocol of 1923 and the Geneva Convention of 1927 provided a basis for modern international regulation of commercial arbitration. Their main provisions, inclusive of gained experience and in the new conditions, were continued and developed in *the Convention on Recognition and Enforcement of Foreign Arbitral Awards of 1958 (the New York Convention)* — the most comprehensive and fundamental international agreement on international commercial arbitration. In the preparation of the New York Convention, the International Chamber of Commerce which initiated its drafting and signing, and the United Nations Economicand Social Council (ECOSOC) which took over all organizational and technical work played a significant role.

The adoption of the New York Convention was a decisive step forward in comparison with the Geneva documents of 1923 and 1927. It provides for a much simpler and more effective procedure for the recognition and enforcement of arbitral awards made in the territory of the member countries of the Convention. One of the merits of the New York Convention is that it not only regulates the execution of foreign arbitral awards, butalso partially regulates the validity of arbitration agreements [4; 115].

The scope of the Convention, in comparison with the Geneva Protocol of 1923, has also expanded: it refers to the recognition and enforcement of arbitral awards «made in the territory of a State other than the State where the recognition and enforcement of such awards are sought», as well as to arbitration awards «not considered as domesticawards in the State where their recognition and enforcement are sought» (Article 1) [5]. Thus, unlike the Geneva Protocol of 1923, the Convention does not contain an indication that the parties to the arbitration agreement must be subject to the jurisdiction of different states.

In accordance with Article 2 of the New York Convention, each Contracting State shall 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.Also, the Convention provides a definition of a term «agreement in writing», which includes an arbitral clause in acontract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams.

Articles 3–6 of the New York Convention are devoted to the recognition and enforcement of foreign arbitral awards. They provide that the execution of foreign arbitral awards is based on rules of the procedure of the territory where the recognition and enforcement of such awards are sought. Thus, this order is diverse in different countries. However, the grounds for recognition and enforcement of the award may be refused for all parties to the Convention are uniform. Paragraph 1 of Article 5 provides for five grounds on which the party against whom the award was made may refer. The grounds are the same as in the Geneva Convention of 1927, but twoadditional grounds are specified in paragraph 2 of Article 5. So, recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that: a) the subject matter of the difference is not capable of settlement by arbitration under the law of that country; or b) the recognition or enforcement of the award would be contrary to the publicpolicy of that country [5].

The New York Convention admits of the possibility of acceding to it with one or both of the reservations contained in paragraph 3 of Article 1. The first reservation provides for the recognition and enforcement of only those arbitral awards that are made in the territory of another member country of the Convention. The second reservation (so-called commercial one) refers to the application of the Convention only to those legal relationships that are considered as commercial (in the official translation of the Convention — trade) under the laws of the state that makes such a reservation.

It is important to note that there is no universally accepted definition of the term «commercial», but the UNCITRAL Model Law gives the following interpretation in the footnote to paragraph 1 of Article 1: «The term «commercial» should be given a wide interpretation so as to cover matters arising out of all relationships of acommercial nature, whether contractual or not. Relationships of acommercial nature include, but are not limited to, the following transactions: any trade transaction for the supply or exchange of goods or services; distribution agreement; commercial representation or agency; factoring; leasing; construction of works; consulting; engineering; licensing; investment; financing; banking; insurance; exploitation agreement or concession; joint venture and other forms of industrial or business cooperation; carriage of goods or passengers by air, sea, rail or road» [6].

The Convention on the Recognition and Enforcement of Foreign Arbitral Awards was ratified by the Republic of Kazakhstan on October 4, 1995. It replaced the operation of the Geneva Protocol of 1923 and the Geneva Convention of 1927 in relations between the member countries of both the Convention and the Protocol. According to information on 2017, its participants are about 157 states and the success is huge. International arbitration was developed in the second half of the 20th century and the first half of the 21st century precisely due to of the wide dissemination of the New York Convention.

The European Convention on International Commercial Arbitration (the European Convention) developed under the auspices of the United Nations Economic Commission for Europe, was signed in Geneva on April 21, 1961. The Republic of Kazakhstan ratified the European Convention on October 4, 1995. It is designed to remove some of the difficulties in the functioning of foreign commercial arbitration in the relations between natural and (or) juridical persons of various European countries. In fact, the geography of the participants of this convention is broader and includes Cuba and Burkina Faso.

One of the most important provisions of the European Convention is fixed in Article 2, which provides for legal persons of public law the opportunity to enter into arbitration agreements (although the contracting states have the right to declare restriction of this possibility). In relations between the member states of this Convention, it eliminates the possibility of the party refusing to participate in arbitral proceedings on grounds of prohibition to state organizations and enterprises to enter into arbitration agreements [7].

In general, the European Convention has no significant impact on the development of international commercial arbitration and is rather acomplement to the New York Convention. Nevertheless, paragraph 2 of Article 9 of the European Convention limits the application of certain norms of the New York Convention, namely subparagraph «e» of paragraph 1 of Article 5. Thus, in the recognition and enforcement of an arbitral award, States that are simultaneously parties to the European and New York Conventions can not be refused when the decision has not yet become final for the parties or has been cancelled or suspended by the competent authority of the country where it was made, or Country, the law of which has been applied. The shortcomings of the European Convention were noted almost immediately and on December 17, 1962 the Agreement relating to Application of the European Convention on International Commercial Arbitration was signed in Paris.

The Convention on Settlement of Investment Disputes between States and Nationals of Other States (the Washington Convention) was signed on March 18, 1965. The Republic of Kazakhstan acceded to the Convention on June 26, 1992.

The Washington Convention regulates the creation and activity of the arbitral tribunal within the framework of the International Center for Settlement of Investment Disputes (ICSID), establishes the limits of its competence, determines the procedure for making decision as well as its interpretation, revision and cancellation. The International Center for Settlement of Investment Disputes is a self-sufficient system in the sense that it excludes any appeal to the courts or other bodies, except as a requirement for execution of the award. Therefore, the Washington Convention in Article 52 provided for system of internal control which is unique in the practice of the world commercial arbitration: eitherparty has the right to apply to the Secretary General of the ICSID for an annulment of the award. This requirement may be based only on strictly defined grounds (primarily procedural violations), and for its consideration a special committee is created that has the right to cancel the award in whole or in part [8]. At present, the Washington Convention includes 152 states, including the Republic of Kazakhstan. A large number of participants of the Convention, first of all, are due to the inextricable connection with the World Bank and its influence on the governments of many countries.

Speaking about the international legal regulation of commercial arbitration, besides the abovementioned international conventions, it is necessary to name some documents of a non-normative nature, which, nevertheless, have a significant impact on international commercial arbitration around the world. They are related to the work of the United Nations Commission on International Trade Law, UNCITRAL. Among them are the UNCITRAL Arbitration Rules (as revised in 2010), the UNCITRAL Conciliation Rules of 1980 and the UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration of 2014.

The New York Convention of 1958 did not aim to regulate all aspects of arbitration. In institutional arbitration, arbitral proceeding sare regulated by the rules of the relevant arbitral institution. As for ad hocarbitration (arbitration created «for this case» to resolve aparticular dispute and not related to any arbitral institution) there have been no unified rules of procedure in this area till relatively recent times. *The UNCITRAL Arbitration Rules*, prepared by the United Nations Commission on International Trade Law were designed to fill this gap.

The UNCITRAL Arbitration Rules consist of 6 sections, 43 Articles and the Annex. The Rules cover all aspects of the arbitration process: it provides for a standard arbitration clause (Annex), describes the procedural rules for the appointment of arbitrators (Articles 7–16) and arbitral proceedings (Articles 17 to 32), and establishes rules regarding form, validityand interpretation of arbitration award (Articles 33–43). It is necessary to pay special attention to certain articles, which, in our opinion, have particular importance. Article 16 of the Rules establishes the parties waive, to the fullest extent permitted under the applicable law, any claim against the arbitrators, the appointing authority and any person appointed by the arbitral tribunal based on any act or omission in connection with the arbitration [9]. Therefore, the parties should approach very responsibly and conscientiously to the selection of arbitration and arbitrators. Paragraph 2 of Article 34 of the Rules establishes that all awards shall be final and binding on the parties and the parties shall carry out all awards without delay [9]. Also, attention should be drawn to paragraph 1 of Article 42, according to which the court can oblige not only the non-prevailing party to pay arbitration costs, but may apportion each of such costs between the parties if it determines that apportionment is reasonable, taking into account the circumstances of the case [9].

It is noteworthy that the Annex to the Arbitration Rules contains not only a model arbitration clause for contracts, but also apossible waiver statement. Apossible waiver statement is drawn upif the parties wish to exclude the possibility of appealing an arbitral award in any court or other competent body. In the doctrine of

international law, this statement was called the «exclusion agreement». In addition, the Annex presents model statements of independence. So, the arbitrator appointed by the party must confirm in writing his independence (impartiality) and the intention to remain so, to assure the parties about the absence of past and current professional, commercial and other relationships with the parties. In addition, the arbitrator shall promptly notify the parties and the other arbitrators of any such further relationships or circumstances that may subsequently come to its attention during the arbitration [9].

Currently, arbitration clauses referring to the UNCITRAL Arbitration Rules are fixed in contracts around the world. The Rules served as acommon ground on which it was possible to reach an agreement between the states. It is to be recalled that the purpose of the Rules was precisely the regulation of ad hocarbitration, but not the institutional one.

The UNCITRAL Model Law on International Commercial Arbitration (the Model Law) was adopted by the United Nations Commission on International Trade Law at its 18th session on 21 June 1985. The UN General Assembly, in its resolution No. 20/72 of 11 December 1985, recommended all states to «take into account the Model Law on International Commercial Arbitration, bearing in mind the desirability of uniformity in the law on arbitration procedures and the specific needs of international commercial arbitration practice» [10].

The prerequisite for the development and adoption of the Model Law was the lack of uniformity in the application of the New York Convention, as well as in the approaches of national courts to the enforcement of arbitral awards. Arbitration legislation in some countries was hopelessly outdated, in others — had significant gaps, in the third ones - mainly focused on the practice of internal arbitration and, therefore, applied local criteria to international arbitration. In general, national laws on arbitration of two neighboring countries even, differed significantly from each other and generated problems for both arbitrators and parties, which led to infringement of their interests and reflected in the functioning of arbitration. To eliminate the imperfection of national laws, to narrow the gapand unify them as far as possible was the objective of the UNCITRAL Model Law.

Typical features of the Model Law are:

1) the establishment of a special legal regime for international commercial arbitration within the framework of the relevant national legislation and, for this purpose, aclear definition of the concept of «international arbitration»;

2) the broad interpretation of the term «commercial» in order to allow arbitration to consider the widest possible range of disputes;

3) the delineation of the functions of the courts in assisting and supervising the arbitration;

4) the expansion of the term «written agreement»;

5) the consolidation of the principles of «competence-competence» and «separability of the arbitration clause» from the underlying contract;

6) the legislative consolidation of the basicprinciples of arbitral proceedings;

7) broadening the possibilities of the parties in choosing the law applicable to the merits of the dispute;

8) making of the arbitral award by a majority of the votes of the arbitrators;

9) the determination of the grounds for theannulment of the arbitral award at the place where it was made and, thus, filling the gap existing in Article 5 of the New York Convention [4; 118].

Of course, abovementioned circumstances do not exhaust all the features and innovations of the Model Law. They are spread throughout the text of this document and allow solving many issues that arise both for the parties and the arbitrators, and for the courts of different countries.

In two examples given above, there is apractice where international institutions accept documents which are not legally binding in principle (in the first case, the UNCITRAL Arbitration Rules and the UNCITRAL Model Law on International Commercial Arbitration). International practice is that their legal significance is strengthened by specially adopted resolutions of the UN General Assembly, which recommend to all states «to use» or «to take into consideration» these documents in their law-making activity.

There is no state in the world which may ignore the UNCITRAL Model Law while deciding on the adoption of its arbitration law. With adoption of the Model Law, the UN Commission on International Trade Law has not lost its interest in international commercial arbitration. In 1993–1996 it developed the UNCITRAL Notes on Organizing Arbitral Proceedings, adopted at the 29th session of the Commission in June 1996. As the name suggests, this document is of advisory nature and aims to assist arbitrators and parties by listing and briefly characterizing the issues that need to be addressed during the preparation for

arbitral proceedings. They include, among other issues, the choice of rules, language and place of arbitration, unless the parties have not fixed these matters in their agreement, the covering administrative costs of arbitration, the procedure for exchanging information, the determination of disputable issues on which a decision is to be made, the procedure for presenting evidence and conducting a hearing of the case.

At present, particular significance is attached to the uniformity of the application of the legislation adopted in the development of the New York Convention and the uniformity of the interpretation of the terms used in the Convention, as well as the uniformity of its application by the courts of various states and arbitrators considering disputes whose awards are related to the scope of application of the Convention.In the unification of law in the field of international commercial arbitration such institutions as the International Chamber of Commerce (ICC), the International Institute for the Unification of Private Law (UNIDROIT) and the United Nations Commission on International Trade Law (UNCITRAL) play an important role.

The Institute of International Commercial Arbitration was developed not only at the universal level, butalso at the regional one. Thus, the Republic of Kazakhstan is aparty to a number of international treaties concluded by countries in acertain region, such as the Agreement on the Procedure of Settlement of Disputes Related to the Implementation of Economic Activities of 1992, Agreement on the Procedure for Mutual Enforcement of Decisions of Arbitration, Commercial and Economic Courts in the Territories of the Commonwealth Member States of 1998 and others. The above-mentioned documents regulate the resolution of disputes arising out of contractual or civil legal relations between economic entities, as well as determine the procedure for mutual enforcement of the decisions of the arbitration, economiccourts of the participating states that have entered into legal force in the cases subordinate to them.

In addition, the Republic of Kazakhstan has signed a number of bilateral international treaties providing for dispute resolution procedure by the arbitration court. These include the Agreement between the Government of the Republic of Kazakhstan and the Government of the United Kingdom of Great Britain and Northern Ireland on the Promotion and Protection of Investments of 1995, the Agreement between the Government of the Republic of Kazakhstan and the Government of the Kingdom of Sweden on the Promotion and Mutual Protection of Investments of 2004, the Agreement on the Promotion and Mutual Protection of Investments between Government of the Republic of Kazakhstan and the Government of the Republic of Koreain 1996 and others.Thus, in accordance with paragraph 1 of Article 8 of the Agreement between the Government of the Republic of Kazakhstan and the Government of the United Kingdom of Great Britain and Northern Ireland on the Promotion and Protection of Investments «disputes between citizens or companies of one Contracting Party and the other Contracting Party in respect of the latter's obligations under this agreement in relation to the investments that were not settled amicably, shall be submitted to the institutional body of international arbitration and three months after delivered written notification of claims, if the citizen or the company wills so» [11]. In paragraph 3 of Article 9 of the Agreement on the Promotion and Mutual Protection of Investments between the Government of the Republic of Kazakhstan and the Government of the Republic of Korea it is stated that «in case of disagreement of the Parties to the dispute on settlement procedure provided in paragraph (2) of this Article, the dispute shall be submitted to international arbitration on request of any of the Parties» [12]. In addition, subparagraphs a), b) and c) of paragraph (2) of Article 9 contain specificarbitration bodies to which the dispute should be submitted, namely: a) the International Center for Dispute Resolution, b) the Subsidiary Body of the International Center for Dispute Resolution, c) the special arbitration board at the request of any party to the dispute in accordance with the Arbitration Rules of the United Nations Commission on International Trade Law [12].

According to the dataprovided by Ministry of Foreign Affairs of the Republic of Kazakhstan, today the Republic of Kazakhstan has 48 signed agreements on the promotion and mutual protection of investments 42 of which are in force [13]. The possibility of settling the dispute by international commercial arbitration, an independent and impartial body, which, as we found out, has a number of advantages over the national courts, creates a favorable atmosphere for attracting foreign investments and the conditions for legal protection for investors.

The history of international commercial arbitration as of today, of course, is not limited by the above conventions and other documents. However, they have been the milestones in the path of establishment of arbitration and had the most significant impact on the development of arbitration legislation and practice throughout the world.

References

1 Комаров А.С. Роль Третейского суда в развитии гражданского права Российской Федерации применительно к предпринимательской деятельности / А.С. Комаров // Гражданское право современной России / Сост. О.М. Козырь и А.Л. Маковский. — М.: Статут, 2009. — С. 75–86.

2 Протокол об арбитражных оговорках. Женева, 24 сентября 1923 г. Регистр текстов международных конвенций и других документов, касающихся права международной торговли. Т. II. — Нью-Йорк: Организация Объединенных Наций, 1973. — С. 9–13.

3 Конвенция об исполнении иностранных арбитражных решений. Женева, 26 сентября 1927 г. Регистр текстов международных конвенций и других документов, касающихся права международной торговли. Т. II. — Нью-Йорк: Организация Объединенных Наций, 1973. — С. 14–19.

4 Умирзахова Д. Правовые основы организации и деятельности международного коммерческого арбитража / Д. Умирзахова // Вестн. КазНУ. Сер. юридическая. — 2012. — № 2. — С. 113–118.

5 Конвенция о признании и приведении в исполнение иностранных арбитражных решений. Нью-Йорк, 10 июня 1958 г. Регистр текстов международных конвенций и других документов, касающихся права международной торговли. — Т. II. — Нью-Йорк: Организация Объединенных Наций, 1973. — С. 28–38.

6 Типовой закон ЮНСИТРАЛ о международном торговом арбитраже 1985 г. с изменениями, принятыми в 2006 г. — Вена: Издание Организации Объединенных Наций, 2008. — 40 с.

7 Европейская конвенция о внешнеторговом арбитраже. Женева, 21 апреля 1961 г. Регистр текстов международных конвенций и других документов, касающихся права международной торговли. — Т. II. — Нью-Йорк: Организация Объединенных Наций, 1973. — С. 39–50.

8 Конвенция об урегулировании инвестиционных споров между государствами и физическими или юридическими лицами других государств. Вашингтон, 18 марта 1965 г. Регистр текстов международных конвенций и других документов, касающихся права международной торговли. — Т. II. — Нью-Йорк: Организация Объединенных Наций, 1973. — С. 54–77.

9 Арбитражный регламент ЮНСИТРАЛ (пересмотрен в 2010 г.). Организация Объединенных Наций: Комиссия Организации Объединенных Наций по праву международной торговли. — Вена: Организация Объединенных Наций, 2011. — 30 с.

10 Пилехина Е.В. Мировое соглашение в практике арбитражного суда и суда общей юрисдикции: автореф. дис. … канд. юрид. наук / Е.В. Пилехина. — СПб.: СПб ГУ, 2001. — 25 с.

11 Закон Республики Казахстан от 22 ноября 1996 г. № 44-I «О ратификации Соглашения о поощрении и защите инвестиций между Правительством Республики Казахстан и Правительством Соединенного Королевства Великобритании и Северной Ирландии». — [Электронный ресурс]. — Режим доступа: http://egov.kz

12 Закон Республики Казахстан от 22 ноября 1996 г. № 45-I «О ратификации Соглашения о поощрении и взаимной защите инвестиций между Правительством Республики Казахстан и Правительством Республики Корея». — [Электронный ресурс]. — Режим доступа: http://egov.kz

13 Министерство по инвестициям и развитию Республики Казахстан. Соглашения о поощрении и взаимной защите инвестиций, заключенные Республикой Казахстан. — [Электронный ресурс]. — Режим доступа: http://invest.mid.gov.kz

Е.А. Ким, К.С. Мусилимова

Коммерциялық дауларды төрелікте шешуді халықаралық-құқықтық реттеу

Мақалада коммерциялық төреліктің қалыптасу кезінен қазіргі уақытқа дейінгі қайнар көздері қарастырылды. Атап айтқанда, коммерциялық арбитраж саласындағы халықаралық келісімдердің ұқсастықтары зерттелді және олардың ерекшеліктері бөлінді. Халықаралық арбитраж саласындағы халықаралық конвенциялар мен хаттамалардан басқа, барлық елдер үшін міндетті болып табылатын, сонымен қатар заңды түрде міндетті болып табылмайтын, бірақ халықаралық коммерциялық арбитраждың қалыптасуына және дамуына айтарлықтай әсер ететін халықаралық құжаттар да қаралды. Бұл ЮНСИТРАЛ үлгі заңын және Арбитраждық ЮНСИТРАЛ регламентін қамтиды. Ол қазіргі уақытта Арбитраждық ЮНСИТРАЛ регламентін жиі нақты дауларды шешуге процессуалдық заң ретінде халықаралық төрелік мекемелер пайдаланылады. Халықаралық коммерциялық арбитраж тарихы, әрине, мақалада талқыланған конвенциялар мен басқа да халықаралық құжаттармен сарқылмайды, бірақ олар арбитраж жолында маңызды кезең болды және бүкіл әлемде арбитраждық заңнама мен төрелік практиканың дамуына айтарлықтай әсер етті.

Кілт сөздер: ЮНСИТРАЛ төрелік ережесі, ЮНСИТРАЛ үлгі заңы, институционалдық арбитраж, аралық сот төрелігі, жазбаша келісім, келісімді алып тастайтын арбитраждық тармақ, «құзыреттілік-құзыреттілік» қағидаты, төрелік талқылаудың бөлінуі.

Е.А. Ким, К.С. Мусилимова

Международно-правовое регулирование разрешения коммерческих споров в арбитраже

В настоящей статье подробно рассмотрены источники международного коммерческого арбитража с момента его становления до настоящего времени. В частности, показаны сходства международных договоров в области коммерческого арбитража и выделены их отличительные черты. Помимо основных международных конвенций и протоколов в области международного арбитража, которые являются обязательными к исполнению для всех стран, их подписавших, также рассмотрены международные документы, не обладающие обязательной юридической силой, но оказавшие значительное влияние на становление и развитие международного коммерческого арбитража. К ним относятся: Типовой закон ЮНСИТРАЛ и Арбитражный регламент ЮНСИТРАЛ. Следует отметить, что в настоящее время Арбитражный регламент ЮНСИТРАЛ часто применяется международными арбитражными учреждениями в качестве процессуального права при разрешении конкретных споров. История международного коммерческого арбитража, разумеется, не исчерпывается конвенциями и другими международными документами, рассмотренными в статье, однако именно они явились вехами на пути становления арбитража и оказали наиболее существенное влияние на развитие арбитражного законодательства и арбитражной практики во всем мире.

Ключевые слова: арбитражный регламент ЮНСИТРАЛ, Типовой закон ЮНСИТРАЛ, институциональный арбитраж, арбитраж adhoc, письменное соглашение, арбитражная оговорка, исключающее соглашение, принцип «компетенции-компетенции», отделимость арбитражной оговорки.

References

1 Komarov, A.S. (2009). Rol Treteiskoho suda v razvitii hrazhdanskoho prava Rossiiskoi Federatsii primenitelno k predprinimatelskoi deiatelnosti [The Role of the Arbitration Court in the development of Civil Law of the Russian Federation in relation to business activity]. *Grazhdanskoe pravo sovremennoi Rossii — Civil law of modern Russia*. O.M. Kozyr', A.L. Makovskiy (Ed.). Moscow: Statut, 75–86 [in Russian].

2 Protokol ob arbitrazhnykh ohovorkakh, Zheneva, 24 sentiabria 1923 hoda. Rehistr tekstov mezhdunarodnykh konventsii i druhikh dokumentov, kasaiushchikhsia prava mezhdunarodnoi torhovli [Protocol on arbitration clauses, Geneva, 24 September 1923. Register of texts of conventions and other instruments concerning international trade law] (1973). New York: Orhanizatsiia Obedinennykh Natsii [in Russian].

3 Konventsiia ob ispolnenii inostrannykh arbitrazhnykh reshenii, Zheneva, 26 sentiabria 1927 hoda. Rehistr tekstov mezhdunarodnykh konventsii i druhikh dokumentov, kasaiushchikhsia prava mezhdunarodnoi torhovli [Convention for the Execution of Foreign Arbitral Awards, Geneva, 26 September 1927. Register of texts of conventions and other instruments concerning international trade law] (1973). New York: Orhanizatsiia Obedinennykh Natsii [in Russian].

4 Umirzakhova, D. (2012). Pravovye osnovy orhanizatsii i deiatelnosti mezhdunarodnoho kommercheskoho arbitrazha [Legal basis for the organization and operation of international commercial arbitration]. *Vestnik KazNU. Seriia yuridicheskaia — Bulletin of KazNU. Legal Series, 2,* 113–118 [in Russian].

5 Konventsiia o priznanii i privedenii v ispolnenie inostrannykh arbitrazhnykh reshenii, Niu-York, 10 iiunia 1958 hoda. Rehistr tekstov mezhdunarodnykh konventsii i druhikh dokumentov, kasaiushchikhsia prava mezhdunarodnoi torhovli [Convention on the Recognition and Enforcement of Foreign Arbitral Awards, New York, 10 June 1958. Register of texts of conventions and other instruments concerning international trade law] (1973). New York: Orhanizatsiia Obedinennykh Natsii [in Russian].

6 Tipovoi zakon IuNSITRAL o mezhdunarodnom torhovom arbitrazhe 1985 hoda. S izmeneniiami, priniatymi v 2006 hodu [UNCITRAL Model Law on International Commercial Arbitration 1985. With amendments as adopted in 2006] (2008). Vienna: Izdanie Orhanizatsii Obedinennykh Natsii [in Russian].

7 Evropeiskaia konventsiia o vneshnetorhovom arbitrazhe, Zheneva, 21 aprelia 1961 hoda. Rehistr tekstov mezhdunarodnykh konventsii i druhikh dokumentov, kasaiushchikhsia prava mezhdunarodnoi torhovli [European Convention on International Commercial Arbitration, Geneva, 21 April 1961. Register of texts of conventions and other instruments concerning international trade law] (1973). New York: Orhanizatsiia Obedinennykh Natsii [in Russian].

8 Konventsiia ob urehulirovanii investitsionnykh sporov mezhdu hosudarstvami i fizicheskimi ili iuridicheskimi litsami druhikh hosudarstv, Vashinhton, 18 marta 1965 hoda. Rehistr tekstov mezhdunarodnykh konventsii i druhikh dokumentov, kasaiushchikhsia prava mezhdunarodnoi torhovli [Convention on Settlement of Investment Disputes between States and Nationals of Other States, Washington, 18 March 1965. Register of texts of conventions and other instruments concerning international trade law] (1973). New York: Orhanizatsiia Obedinennykh Natsii [in Russian].

9 Arbitrazhnyi rehlament YuNSITRAL (peresmotren v 2010 hodu). Orhanizatsiia Obedinennykh Natsii: Komissiia Orhanizatsii Obedinennykh Natsii po pravu mezhdunarodnoi torhovli [UNCITRAL Arbitration Rule (as revised in 2010) United Nations: United Nations Commission on International] (2011). Vienna: Orhanizatsiia Obedinennykh Natsii [in Russian].

10 Pilekhina, Ye.V. (2001). Mirovoe sohlashenie v praktike arbitrazhnoho suda i suda obshchei yurisdiktsii [Settlement agreement in the practice of the arbitral tribunal and the court of general jurisdiction]. *Extended abstract of candidate's thesis*. Saint Petersburg: SPb HU [in Russian].

11 Zakon Respubliki Kazakhstan ot 22 noiabria 1996 hoda No. 44-I «O ratifikatsii Sohlasheniia o pooshchrenii i zashchite investitsii mezhdu Pravitelstvom Respubliki Kazakhstan i Pravitelstvom Soedinennoho Korolevstva Velikobritanii i Severnoi

Irlandii» [The Law of the Republic of Kazakhstan No. 44-I «On ratification of the Agreement on the Promotion and Protection of Investments between the Government of the Republic of Kazakhstan and the Government of the United Kingdom of Great Britain and Northern Ireland»]. *egov.kz*. Retrieved from http://egov.kz [in Russian].

12 Zakon Respubliki Kazakhstan ot 22 noiabria 1996 hoda No. 45-I «O ratifikatsii Sohlasheniia o pooshchrenii i vzaimnoi zashchite investitsii mezhdu Pravitelstvom Respubliki Kazakhstan i Pravitelstvom Respubliki Koreia» [The Law of the Republic of Kazakhstan No. 45-I of November 22, 1996 «On Ratification of the Agreement on the Promotion and Mutual Protection of Investments between the Government of the Republic of Kazakhstan and the Government of the Republic of Korea»]. Retrieved from http://egov.kz [in Russian].

13 Ministerstvo po investitsiiam i razvitiiu Respubliki Kazakhstan. Sohlasheniia o pooshchrenii i vzaimnoi zashchite investitsii, zakliuchennye Respublikoi Kazakhstan [Ministry for Investment and Development of the Republic of Kazakhstan. Agreements on the promotion and mutual protection of investments, concluded by the Republic of Kazakhstan]. Retrieved from http://invest.mid.gov.kz [in Russian].