UDC 341.6

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IMPORTANCE OF INTERIM MEASURES FOR THE DEVELOPMENT OF THE INTERNATIONAL COMMERCIAL ARBITRATION AS INDEPENDENT DISPUTE RESOLUTION METHOD

Наукові праці МАУП, 2016, вип. 51(4), с. 101–104

Article provides an overview of the importance of further development and enforcement of the interim measures in International commercial arbitration procecures. A conclusion to view interim measures as a "separate award" is made.

Evolution of arbitration as a method of dispute resolution can be counted back to the early days, when traders looked to a third party to solve disputes between them. The whole process depends on a contractual agreement between parties to resolve their dispute before a select group of non-governmental body and accepting its decision as binding.

As companies all over the world have started conducting business on an international scale. International transactions are based on contracts between the parties and therefore there are bound to be questions on interpretation of contractual terms among the parties. Arbitration has frequently been the choice of these companies in dealing with their counterparts. It has become the dominant methods of settlement of international commercial disputes [3].

Arbitration has obtained a world wide acknowledgement as one of the most efficient dispute settlement method. The key features of the arbitration among others are:

1) clear, straightforward and time efficient proceeding;

2) high level of confidentiality (hearings are not public like any other judicial proceedings);

3) harties have a right to choose related material and procedural law;

4) harties have ability to adjust the procedural items according to their mutual will.

Though, arbitration is a process outside the court structure, it needs strong legislations and court assistance for its effective functioning.

Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958) (the "Convention") has provided a substantial background for a world wide recognition and enforcement of Arbitral awards within member states

of the Convention. Convention seeks to provide common legislative standards for the recognition of arbitration agreements and court recognition and enforcement of foreign and non-domestic arbitral awards.

New York Convention has set out its scope in Article 1 "This Convention shall apply 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, and arising out of differences between persons, whether physical or legal. It shall also apply to arbitral awards not considered as domestic awards in the State where their recognition and enforcement are sought".

Article 2 of the New York Convention provides a clear definition of the trigger mechanism for arbitration process, namely existence of "agreement in writing", which "shall include an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams".

Further more, New York Convention sets out a clear procedure for the "courts of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed" (Article 2).

As arbitration in itself is a voluntary submission to the tribunal based on an agreement between parties, the enforcement of the provisional relief ordered by the tribunal relies heavily on voluntary compliance of the parties. But the problem arises when a party refuses to comply with these orders. One of the obvious limitations in approaching an arbitral tribunal for provisional measure is their inability to enforce such orders. Most of the state legislations do not give any power to the arbitrators in the issue of enforcement. But the arbitrators do have certain ways of enforcing their orders in practice. For example in matters relating to evidence, the tribunal may presume negative inference if a party refuses to produce evidence before the tribunal. Likewise, it can also use sanctions to force the compliance or if it has control over any property involved in the dispute, it may possess the same to enforce its orders. All these are subject to judicial challenge in the national courts [1, *28*].

When deciding whether to grant interim measures arbitrators should examine different criteria. Among these criteria the most important is proportionality. When assessing the criteria, arbitrators should take great care not to prejudge or predetermine the merits of the case itself. Arbitrators may require a party applying for an interim measure to provide security for damages as a condition of granting an interim measure [2, *6*].

In light of the importance of the interim measures we propose to view such measures as a separate arbitral award on a specifc matter brought to arbitration by the Party or Parties and thus such award can be executed and enforced as such. In light of the above national courts should be providing assistance for the enforcement of such "interim award" based on the conditions and terms of New York Convention. Such mechanism may provide further development of the International commercial arbitration as independent dispute resolution method.

References

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Given the importance of interim measures in arbitration proceedings, asked to consider such measures as a separate award for each question, which led to the arbitration and the Party or Parties so, such a decision can be awarded and executed. In this regard, the national courts must provide assistance for the implementation of such an "interim solution" on the basis of terms and definitions of the New York Convention. Such a mechanism could ensure the further development of international commercial arbitration as an independent method of dispute resolution.

З огляду на важливість тимчасових заходів в арбітражному провадженні, запропоновано розглядати такі заходи як окреме арбітражне рішення з кожного питання, яке привело до арбітражу Сторону або Сторони і, таким чином, таке рішення може бути присуджено і виконано. В цьому відношенні національні суди повинні надавати допомогу для здійснення такого "проміжного рішення" на підставі умов і визначень Нью-Йоркської конвенції. Такий механізм може забезпечити подальший розвиток міжнародного комерційного арбітражу як самостійного методу вирішення спорів.

Учитывая важность временных мер в арбитражном производстве, предложено рассматривать такие меры в качестве отдельного арбитражного решения по каждому вопросу, который привел в арбитраж Сторону или Стороны и, таким образом, такое решение может быть присуждено и выполнено. В этом отношении национальные суды должны оказывать помощь для осуществления

такого "промежуточного решения" на основании условий и определений Нью-Йоркской конвенции. Такой механизм может обеспечить дальнейшее развитие международного коммерческого арбитража в качестве самостоятельного метода разрешения споров.

Надійшла 28 грудня 2016 р.