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COMPETENCE OF INTERNATIONAL COMMERCIAL ARBITRATION

Abstract. ***The purpose of the article*** is to analyze the norms of international legislation and current legislation of Ukraine on the competence of international commercial arbitration, scientific literature and publications to study the available doctrinal approaches to the competence of international commercial arbitration, its legal nature, content and correlation with such related categories as "jurisdiction", "admissibility", "arbitrability". ***Research methods.*** The paper is based on general scientific and special methods of scientific cognition: analysis, synthesis, formal-legal, system-structural, and comparative-legal methods. Results**.** The author has specified the relevance of the issue under study taking into account the trends towards extending a range of issues which can be submitted to international commercial arbitration, analyzed the rules of international legislation and current legislation of Ukraine in terms of the availability of the definition of the concept "competence of international commercial arbitration", studied basic doctrinal approaches to the determination of competence, and analyzed the correlation of such concepts as "competence", "jurisdiction", "arbitrability", "admissibility", and "exclusive jurisdiction". ***Conclusions.*** The concept "competence of international commercial arbitration" is currently quite ambiguous given the lack of a statutory and unified doctrinal approach to its definition. At the same time, the statutory use of such concepts as "competence" and "jurisdiction" allows stating that the study of the mentioned issues is relevant and needs the engagement of scientists to avoid interpretation collisions in practice. In the author's opinion, thorough differentiation between the above institutions allows avoiding interpretation collisions in legislative rules. In addition, the study of the arbitrability of disputes, including the correlation of arbitrability and competence as well as a range of disputes which can be submitted to international commercial arbitration, appears urgent.

Key words: arbitrability, arbitration clause, accessibility, competence, jurisdiction, exclusive jurisdiction.

1. Introduction

The study of the competence of international commercial arbitration is one of the most topical issues of both science and practice. The identification of availability or lack of competence of international arbitration is a milestone stage in recognizing an agency which is entitled to settle a dispute arisen between the parties. The reference of statutory norms to the concept "competence", while there is no statutory or unified doctrinal definition, can become a reason for erroneous interpretation of procedural rules and regulations that, in its turn, can result in considering cases by an unauthorized body.

According to the National Economic Strategy until 2030 approved by the Resolution of the Cabinet of Ministers of Ukraine dated March 3, 2021, № 179, one of the tasks under the strategic goal "To guarantee fair justice in Ukraine which is based on the rule of law, protection of rights and freedoms of man, physical and legal entities" is to improve the laws on international arbitration and procedural codes for a broader support of international courts, courts of arbitration and arbitrations by state courts. The Action Program of the Cabinet of Ministers of Ukraine approved by the Resolution № 471 dated June 12, 2020, also marks the need to enhance a role of alternate dispute resolutions, i. e., the implementation of effective systems of mediation and arbitration courts (third-party arbitration). In previous Programs, the government repeatedly emphasized that the formation of the operating system of arbitration courts will unload the judiciary system and raise the level of confidence in justice actors.

The amendments to procedural codes, which were made during the 2017 reform, resulted in the specification of:

– a range of disputes which can be submitted to international arbitration;

– a range of disputes which cannot be submitted to international arbitration;

– a range of disputes the individual civil aspects of which can be submitted to internal commercial arbitration (due to the lack of statutory definition of the concept "civil aspect of a dispute" – the mentioned issue needs a separate study).

The initiative of the Cabinet of Ministers of Ukraine represented in the Draft Law № 5347 "On amending some legislative acts of Ukraine on improving arbitration activities" confirms further extension of a range of disputes which can be submitted to international arbitration; given the above, the issue under consideration is of great relevance.

The following scientists delt with the subject are of the present article: O.N. Astanina, L.F. Vynokurova, O.S. Danylevych, M.A. Dubrovina, S.A. Kurochkin, B.R. Karabelnikov, T.S. Kyselova, S.O. Kurochkin, M.V. Kuptsova, K.K. Lebediev, L.A. Lunts, A.I. Minina, Yu.D. Prytyka, O.Yu. Skvortsov, T.V. Slipachuk, H.A. Tsirat, K.A. Chudinovskykh et al.

2. Statutory definition of the concept "competence of international commercial arbitration"

The competence of international commercial arbitration is currently one of the most topical taking into account the trends towards extending a range of cases which can be submitted to international commercial arbitration. The study of the term "competence" from the scientific and practical viewpoint and the analysis of its correlation with such concepts as "jurisdiction", "accessibility" and "arbitrability" are of both scientific and practical importance. At the same time, there is no statutory and unified doctrinal definition of the concept "competence of international commercial arbitration" to this date.

In international laws, the term "competence" is used in the UNCITRAL Model Law on International Commercial Arbitration, but there is no a definition in the Model Law.

In Ukrainian legislation, section IV of the Law of Ukraine "On International Commercial Arbitration" covers the competence matters – it regulates the procedure for ascertaining by the arbitral tribunal of the availability or lack of its competence to arbitrate in a dispute.

The Commercial Procedure Code of Ukraine also mentions the competence of international arbitration. Art. 175 of the CPC appoints that a reason for refusal to initiate proceedings is an award of international commercial arbitration adopted within its competence in Ukraine towards a dispute between the same parties on the same subject-matter and on the same basis, except when the court refused to issue an executive document on judgement enforcement. In other words, the availability of the competence of international commercial arbitration is a decisive criterion when dealing with admissibility of its involvement in considering a particular case.

Regulations and Rules of the international arbitral institutions also refer to the term "competence". Thus, for instance, art. 23 of Arbitration Rules of the London Court of International Arbitration (as amended on October 1, 2014) points at the competence and authority of the arbitral tribunal. It is worthy of note that the term "competence" is used in the official Russian translation, while the English-language version of the LCIA Arbitration Rules includes the term "Jurisdiction". The competence of the arbitral court is also covered by article 24 of Arbitration Rules and Mediation Rules (the VIAC Rules of Arbitration (Vienna Rules) and the VIAC Rules of Mediation). Arbitration Rules of the Arbitration Institute of the Stockholm Chamber of Commerce uses the term "jurisdiction", not "competence".

Moreover, understanding and univocal interpretation of the concept "competence" has significant practical value given that justification of the competence of the International Commercial Arbitration Court is one of the necessary elements of a request for arbitration under the Rules of the International Commercial Arbitration Court at the Ukrainian Chamber of Commerce. In addition, article 3 of the Rules fixes a list of disputes which fall within the competence of the ICAC at UCC. It is also important to mention that the Rules were amended on November 1, 2020: the authority of the International Commercial Arbitration Court was extended, and thus, competence covers the disputes arising from:

– concession agreements;

– relations related to the exercise and protection of property rights or other real rights, including intellectual property rights;

– corporate relations, including disputes between the participants (founders, shareholders, members) of a corporate entity, or between a legal entity and its participant (founder, shareholder, member);

– agreements on shares, land parcels, other corporate rights or securities.

3. Doctrinal definitions of the concept "competence of international commercial arbitration"

Scientists put forward different approaches to the doctrinal definitions of the concept "competence".

Some scientists understand the competence of international commercial arbitration as a set

of their powers for settling disputes on merits as well as powers for running case hearing, which guarantee meeting the requirements for a fair procedure (Voronov, 2018, pp. 227).

H. A. Tsirat defines "competence" generally and properly. Generally, competence of the third-party arbitration court is encompassed by the fact whether it is authorized to consider particular matters when dealing with a dispute per se; properly, competence means is encompassed by the fact whether arbitral panel is authorized, based on the will of the disputing parties indicated in an arbitration agreement, to consider a particular dispute and whether the dispute falls under the conditions of the arbitration agreement (Tsirat, 2002, pp. 49–50).

Yu. K. Osipov regards competence as a range of statutory authoritative powers of the court which are concurrently its obligations. F. P. Yeliseikin considers competence as a legal phenomenon the structure of which embraces the matters of authority and title (Kovalenko, 2016, pp. 129).

According to the author of this article, competence can be deemed in two aspects. On the one hand, it is about competence of international commercial arbitration as a general category which comprises:

– a range of disputes which can be considered by international commercial arbitration;

– rights and obligations of the arbitration court when dealing with disputes.

On the other hand, the competence issue obligatorily emerges in relation to every individual dispute, and therefore, it also includes:

– reasons for the origin of competence of international commercial arbitration;

– the power of the arbitration court to deal with a matter of availability or lack of its competence to resolve a specific dispute.

4. The correlation of "competence" with other concepts

It is worth paying attention to the correlation of "competence" and "subject-matter jurisdiction", "arbitrability" and "jurisdiction".

The correlation between "competence" and "subject-matter jurisdiction" is most studied in scientific literature.

O. Yu. Skvortsov states that the concept "competence" is wider than the concept "subject-matter jurisdiction" as competence of a competent body involves not only considering legal disputes but also settling other matters. The scientist notes that the institution of subject-matter jurisdiction is one of the institutions which define and fix the competence of the arbitration courts (Skvortsov, 2005).

M. A. Dubrovina expresses the opinion that the term "subject-matter" is applied only to the determination of object competence of state judicial authorities and proposes to use the term "admissibility" in relation to the arbitration courts (Voronov, 2018, p. 33).

M. A. Karpyshev also shares the above position stating that the term "subject-matter jurisdiction" is used to establish object competence of state judicial authorities, subject-matter jurisdiction is directly fixed by the law. The author also specifies that the term "subject-matter jurisdiction" is not commensurate with the competence of international arbitration for which the use of the term "admissibility" or "arbitrability" is more precise (Karpyshev, 2017).

T. V. Slipachuk draws attention to the fact that the institution of subject-matter jurisdiction is not applicable regarding the third-party arbitration courts in its classical form as one of its essential features is "admissibility" of conventional submission of a dispute to the specific third-party arbitration court (Slipachuk, 2010, p. 134).

The opinion of H. V. Sevastianov merits attention: he believes that object competence of the third-party arbitration court doesn't compete with subject-matter jurisdiction of state courts but is fundamentally concurrent or alternate jurisdiction that calls in doubt the use of general distributing mechanism in the form of jurisdiction over cases for non-state solution of cases (Sevastianov, 2013, p. 107).

V. V. Yeromin holds that in the context of subject-matter jurisdiction, one should assume that it exclusively refers to state courts (Yeromin, 2019, p. 101).

Other scientists call into doubt the theory that the term "subject-matter jurisdiction" only touches upon state judicial authorities and reckon that admissibility as a legal category outlines a range of disputes which can be subject to conventional subject-matter jurisdiction under the law (Yeromin, 2019, p. 101).

K. A. Chudynovskykh adheres to the same position by extending boundaries of the institution of subject-matter jurisdiction and attributing to it the powers of both juridical and executive authorities and alternate (non-state) jurisdictional bodies. The scientist notes that the law may appoint subject-matter jurisdiction of particular cases to other state or non-state bodies. At the same time, an appeal to a non-state jurisdictional body to resolve a case under its jurisdiction usually depends on the will of the person concerned or the consent of the parties to the dispute, i.e., subject-matter jurisdiction of non-judicial bodies has an alternative (contractual) nature (Chudynovskykh, 2004, p. 52).

According to V. Ya. Muziukin, subject-matter jurisdiction covers entirely subject powers of a body, and another part of its competence consists of functional powers. The scientist believes that the concept of competence is wider than the concept of subject-matter jurisdiction (Sevastianov, 2013, p. 87).

As for case law, when studying the issues of jurisdiction over cases and admissibility of cases, the Supreme Economic Court of Ukraine defined subject-matter jurisdiction as a statutory set of powers of commercial courts towards considering cases, which fall under their competence, in the Resolution of the Plenum of the Supreme Economic Court of Ukraine № 10 dated 24.10.2011 "On some issues of jurisdiction over cases and admissibility of cases in commercial courts".

At the same time, it is important to mention that after the new version of the procedural codes was shared in 2017, the concept "subject-matter jurisdiction" was substituted with the concept "jurisdiction", so the correlation between the concepts "competence" and "jurisdiction" needs further consideration.

Section 2 of the Commercial Procedure Code of Ukraine encompasses the jurisdiction matters, but there is no its definition in the law.

The ICAS jurisdiction is discussed in the Regulations on the International Commercial Arbitration Court at the Ukrainian Chamber of Commerce and Industry (Appendix № 1 to the Law of Ukraine "On International Commercial Arbitration"): paragraph 3 states that International Commercial Arbitration Court also considers disputes fallen into its jurisdiction under the international agreements of Ukraine. In addition, article 3 of the Rules of ICAC at UCCI provides a list of reserved disputes. In other words, "competence" and "jurisdiction" are applied to the International commercial arbitration and, in fact, are equated, as they are used to characterize the powers of the arbitration court to consider a particular range of disputes which it can consider.

As for case law, the Grand Chamber of the Supreme Court of Ukraine marks in its decisions many times that court jurisdiction is the law institution which is aimed at differentiating competence of different branches of the judiciary system and various types of procedures – civil, criminal, commercial, and administrative. Thus, as one can see jurisdiction and competence are neither identified nor regarded as unlike law institutions.

Most scientists assert that "jurisdiction" is a narrower concept. Thus, in N. M. Bessarab's opinion, "competence" is divided into functional, object and territorial. At the same time, the scientist marks that the very object competence of the court regarding the consideration of legal disputes and settlement of other legal matters is its jurisdiction. K. V. Husarov, in his turn, specifies that competence is a broader concept, since it primarily defines the court's functions while executing justice. According to the scientist, jurisdiction is an element of competence and authoritative powers of the court to consider and solve cases that also involves the institution of admissibility, as a component (Lymar, 2017).

The author of the present article believes "competence" and "jurisdiction" of the international commercial arbitration court can't be equated, as well as it is impossible to uniquely identify which concept is broader and which is narrower, because none of these institutions fully includes another institution. International court of arbitration can be discussed only in terms of object and subject jurisdiction, while the system of state courts falls under territorial and instance jurisdiction. In regard to competence, submission of certain disputes to the ICAC is one of the components of its competence along with such a component as the will of the parties to refer the matter to arbitration.

Another legal category that is to some extent related to the category of competence is arbitrability.

As for today, the law and science don't have a unified definition of the concept "arbitrability". Some scholars suggest considering arbitrability in a broad and narrow sense. In a narrow sense, arbitrability is understood as a category of disputes admissible for consideration by international commercial arbitration. In a broad sense, arbitrability encompasses the issues related to the validity of arbitrage transaction.

Yu. D. Prytyka states that "arbitrability" is the correspondence of a dispute arisen between the parties with a category of disputes which can be a subject-matter of the settlement by arbitration based on law that is used during dispute resolution (Kovalenko, 2017, p. 30).

The concept of arbitrability is also widely studied by foreign scholars. For instance, M.A. Karpyshev indicates that the term "arbitrability" is used to refer to disputes that can be considered on the merits and resolved by the thord-party arbitration courts and international commercial arbitrations (Karpyshev, 2017). O. Yu. Skvortsov defines arbitrability as a feature of the dispute that allows it to be a subject-matter of arbitration (Skvortsov, 2005, p. 99). V. V. Yeromin identifies arbitrability as the correspondence of a dispute submitted to arbitration (third-party arbitration court) or international commercial arbitration (arbitration tribunal) based on an arbitration

agreement (arbitration clause) with categories of the disputes which can be considered by such a court by law and/or point in discussion as civil, competence of the court and validity of the arbitrtion agreement (arbitration clause). In the scientist's opinion, arbitrability consists of the correspondence of a category of disputes which can be submitted to arbitration, court competence and validity of the arbitration agreement (Yeromin, 2019, p. 100). Therefore, court competence is actually regarded as one of the components of the term "arbitrability" along with such a component as the existence and validity of the arbitration agreement (Chudynovskykh, 2004, p. 35).

S. A. Kurochkin states that arbitrability is a general condition for recognizing competence of arbitral panel to deal with specific cases. Yu. A. Skvortsov indicates that the institution of arbitrability is applied to determine the object competence of third-party arbitration courts (Chudynovskykh, 2004, p. 35).

Some scientists discuss dispute arbitrability (an option for a dispute to become subject-matter of arbitration) as an objective form of arbitration competence, while a subjective form of competence which identifies the availability and scope of powers of arbitrators towards a particular dispute submitted to their consideration (Bilak, 2019; Prytyka, 2019; Spektor, 2019; Khomenko, 2019, p. 229).

The author of the present article reckons that the concepts "competence" and "arbitrability" partially meet in the following context: objective arbitrability specifies those types of disputes which may be a subject-matter of an arbitration agreement, and the competence of the arbitration court, among other aspects, indicates that its powers are extended only to those disputes which may be considered by that sort of court. Therefore, the concepts "arbitrability" and "competence" can't be equated given that arbitrability concerns characteristics of the very dispute (including whether it is subjected to the consideration of arbitration court and whether there is the relevant duly completed will of the parties), and "competence" characterizes the powers and functions of international arbitration court. However, the concepts under study meet in the part that touches upon the specification of a range of disputes which can be settled by the ICAC.

6. Conclusions

Summarizing and generalizing the above, one can conclude that the concepts "competence of international commercial arbitration are currently ambiguous taking into account the lack of statutory and unified doctrinal approach to its definition. At the same time, the statutory use of such terms as "competence" and "jurisdiction" allows highlighting that the studies of the specific topic are relevant and require the attention of scientists to avoid collisions when interpreting them in practice. The author believes that a detailed differentiation of the mentioned institutions assists in eliminating controversies while interpreting statutory rules.

In addition, the study of arbitrability of disputes, incl. in terms of examining a range of disputes which can be submitted to international arbitration, remains topical.

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КОМПЕТЕНЦІЯ МІЖНАРОДНОГО КОМЕРЦІЙНОГО АРБІТРАЖУ

Анотація. ***Метою статті*** є аналіз норм міжнародного законодавства та чинного законодавства України щодо компетенції міжнародного комерційного арбітражу, аналіз наукової літератури й публікацій із метою дослідження наявних доктринальних підходів щодо компетенції міжнародного комерційного арбітражу, її правової природи, змісту та співвідношення з такими суміжними категоріями, як «підвідомчість», «юрисдикція», «допустимість», «арбітрабельність». ***Методи дослідження.*** Робота виконана на підставі загальнонаукових і спеціальних методів наукового пізнання, наприклад методу аналізу й синтезу, формально-юридичного, формально-логічного, системно-структурного та порівняльно-правового методів. ***Результати.*** Визначено актуальність обраної теми з огляду на тенденції щодо розширення кола питань, які можуть бути передані на розгляд міжнародного комерційного арбітражу. Проаналізовано норми міжнародного законодавства та законодавства України стосовно наявності визначення поняття «компетенція Міжнародного комерційного арбітражу». Досліджено основні доктринальні підходи до визначення компетенції та проаналізовано співвідношення таких понять, як «компетенція», «підвідомчість», «арбітрабельність», «допустимість», «виключна підсудність». **Висновки.** Поняття «компетенція Міжнародного комерційного арбітражу» нині є неоднозначним з огляду на відсутність законодавчого та єдиного доктринального підходу до його визначення. Водночас використання в законодавстві термінів «компетенція» та «юрисдикція» дає змогу говорити про те, що дослідження цієї теми є актуальним і потребує уваги з боку науковців задля уникнення колізій у трактуванні зазначених понять на практиці. На нашу думку, детальне розмежування вказаних інститутів дасть змогу уникнути колізійних трактувань законодавчих норм. Крім того, актуальним залишається дослідження арбітрабельності спорів, зокрема щодо співвідношення арбітрабельності та компетенції, а також дослідження кола спорів, які можуть бути передані на розгляд до міжнародного комерційного арбітражу.

Ключові слова: арбітрабельність, арбітражна угода, допустимість, компетенція, підвідомчість, юрисдикція, виключна підсудність.

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