

INTERNATIONAL COMMERCIAL ARBITRATION AS A MODERN SELF-REGULATION TOOL IN HYBRID WAR

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Abstract: One of the tools of self-regulation, which helps to settle a dispute between commercial counterparties from different states is international commercial arbitration. International commercial arbitration is an alternative to the dispute resolution process in state courts, that is – it is an alternative to the mechanisms of the state process. The problem of considering international commercial arbitration through the prism of self-regulation has not been studied from all perspectives and diversity. This issue is especially relevant when businesses seek protection of their violated rights to international commercial arbitration in a hybrid war. It is important to examine: how a self-regulatory instrument is able to implement protection when war is waged. The question arises whether private jurisdiction can provide adequate protection to commercial entities. What is the role of international commercial arbitration? How the public authorities will implement the decisions made by the arbitration against the aggressor state (the state violating investment obligations). Settlement of disputes in a hybrid war can be called “hybrid investment disputes” or “hybrid commercial disputes” depending on the object of the dispute.

Keywords: international arbitration; hybrid investment disputes; commercial disputes; businesses seek protection; international chambers of commerce

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1. INTRODUCTION

International commercial arbitration is a special “pseudo-judicial” dispute settlement mechanism, which is applied exclusively by the agreement of the parties. An exception to this rule is a special category of investment disputes, which is regulated on the basis of the so-called “umbrella agreements”, that is, special international treaties in which the state agrees to be bound by arbitration. Thus, international commercial arbitration is the main institutional mechanism for the settlement of disputes between the parties, and cannot be additional to the state judicial process or precede it. Mediation, negotiation, and other alternative dispute resolution methods may be a mandatory preliminary basis for resolving a dispute between the parties if agreed upon. In the case of no possibility of settling disputes with their help, the parties can turn to the main mechanisms: state court litigation or international commercial arbitration.

Transnational trade law is an alternative normative system of substantive law with respect to the rules created by the state. At the same time, the *lex mercatoria* rules can be a supplement to the substantive law in the settlement of the conflict, as well as be applied as the main source of law by agreement of the parties. International commercial arbitration courts are established mainly under self-regulatory organizations. Self-regulatory organizations vary according to different criteria according to: industry (sphere, market or cross-industry), level (international, national, local), name, organizational form, etc. Typically, the major self-regulatory organization in its structure include the organs of dispute settlement, including arbitration courts. Powerful international chambers of commerce, chambers of commerce and industry, foreign trade commissions, and specialized business associations as a self-regulatory organization create in their structure international commercial arbitration courts, with the aim of qualified and objective settlement of disputes between participants of commercial disputes. Because of the importance and role played by international commercial arbitration courts, they are generally registered as a separate legal entity from the chamber of commerce.

The essence of the self-regulation is the potential and real possibility for the subjects to create their own rules of the behaviour and act without any external influence.¹ International commercial arbitration is an instrument of self-regulation. It is noted that public private partnership covers four different types: cooptation, delegation, co-regulation, and self-regulation in the shadow of hierarchy;² if there is a choice between state and alternative regulation to solve regulatory problems, self and co-regulation are chosen as an “ideal solution” that are supposed to have certain advantages over state regulation.³ The existence of international commercial arbitration is explained by the factor of international Barberic.⁴ V. Haufler examines the self-regulation of the industry in the globalization dimension through a republic role for the private sector.⁵ It should be noted that one of the effective tools for self-regulation of the industry will be the construction of a dispute settlement system, which includes international commercial arbitration. International commercial arbitration is also referred to as international private justice, delegated justice, or paralegal justice, that is, private justice. Yves Dezalay and Bryant G. Garth refer to international commercial arbitration as private arbitration, an autonomous legal field.⁶ Therefore, international commercial arbitration is a tool of self-regulation, through which private legal regulation can be carried out. Today there is a tendency that the rate of change, which is attributed to self-regulatory processes, will

1 GONCHARENKO, O. – NESKORODZHENA, L. Self-regulation of culture: the role of public associations and electronic communication. *Herald National Academy of Managerial Staff of Culture and Arts*. 2018, Vol. 4, pp. 121–126.

2 SOWMAN, M. – SUNDE, J. Social impacts of marine protected areas in South Africa on coastal fishing communities. *Ocean and Coastal Management*. 2018, Vol. 157, pp. 168–179.

3 PIASNA, A. – BURCHELL, B. – SEHNBRUCH, K. Job quality in European employment policy: one step forward, two steps back? *Transfer*. 2019, Vol. 25, No. 2, pp. 165–180.

4 APPELBAUM, R. P. – FELSTINER, W. L. F. – GESSNER, V. *Rules and networks: the legal culture of global business transactions*. Portland: Hart Pub, 2001.

5 HAUFLER, V. *A public role for the private sector: industry self-regulation in a global economy*. Washington: Carnegie Endowment for International Peace, 2001.

6 DEZALAY, Y. – GARTH, B. G. *Dealing in virtue: international commercial arbitration and the construction of a transnational legal order*. Chicago: University of Chicago Press, 1996.

only increase and state regulation will lag behind.⁷ Consequently, businesses can defend their interests in the event of a modern hybrid war using a variety of jurisdictions, including private international arbitration as a means of self-regulation at the global level.

2. A HISTORICAL ASPECT OF INTERNATIONAL COMMERCIAL ARBITRATION AS A SELF-REGULATORY INSTRUMENT

Self-regulation is a property of a complex social system, which is a society that is personified by specific individuals.⁸ Self-regulation can be viewed through the prism of an epistemological understanding of all its manifestations, synergetic-dialectical relationship with close, related legal phenomena. Counterparties who seek to arbitrate a dispute may exercise their ability to self-regulate through choice. The choice is a moment of mutual determination of the type, place of arbitration, language, number of arbitrators, etc. The parties shall enter into an arbitration agreement in writing or orally, depending on the legislature's perception of the origin of the counterparties. And this manifests the functional purpose of self-regulation as a regulator of social relations: to carry out activities at its own discretion and using its own forces to resolve a commercial dispute.

Interaction between counterparties in arbitration is based on the principle of optional equality within the limits defined by law and international treaties, the rules of the relevant arbitration institution. The agreement between the parties to the arbitration process, which is the primary source of relations between the parties, plays a key role. All subjects of commercial relations have the potential for self-regulation. The initiative and independence of doing business are the key to that. The entrepreneur at the initial stage of self-regulation chooses a counterparty, determines the terms of the contract, and determines the procedure for dispute settlement. At the secondary level the subjects of commercial activity create the appropriate self-regulatory organization for representation and protection of their interests. Under such self-regulatory organizations, the relevant arbitration courts are established. International commercial arbitration is an element of the institutional system of self-regulation. It operates within the preemptory norms of the state and on the basis of international treaties. At the same time, international commercial arbitration is an autonomous, unique system with special laws of origin, formation, and development. This tool was created as a unified dispute settlement mechanism, which is understandable and convenient for representatives of the business environment of all states. The objectivity of the consideration of disputes and the independence of arbitrators is a clear advantage. International commercial arbitration has a sign of adaptability, which is emphasized by the speed and flexibility of improving the legal regulation of its activities by the relevant self-regulatory organizations.

⁷ VINNYK, O. M. – SHAPOVALOVA, O. V. – PATSURIIA, N. B. – HONCHARENKO, O. M. – YEFREMOVA, K. V. Problem of ensuring the social direction of the legislation of Ukraine on the digital economy. *Asia Life Sciences*. 2020, Vol. 22, No. 1, pp. 142–145.

⁸ Decision of the Supreme Arbitration Court of the Russian Federation No. A40-169144/17 [online]. 2013 [cit. 2021-09-03]. Available at: <https://cisgw3.law.pace.edu/cases/980715r1.html>.

Business entities need an effective dispute resolution procedure in a rapidly changing environment. Arbitration is a mechanism that will take into account the needs of the business community and defines a special procedure for protecting their interests. This shows the functional purpose of international commercial arbitration as a self-regulatory organization: to change quickly and at the same time to be a universal and understandable procedure for business that comes from different countries. Therefore, despite the flexibility of the procedure, the basic principles for arbitration remain unchanged: the conclusion of an autonomous arbitration agreement, the choice of elements of the arbitration procedure, the credibility of the arbitration, and the admissibility of enforcement of the arbitral award, in case of refusal of voluntary execution. According to the Interinstitutional agreement on better law-making (2003/C 321/01) self-regulation is defined as the possibility for economic operators, the social partners, non-governmental organisations, or associations to adopt amongst themselves and for themselves common guidelines at the European level (particularly codes of practice or sectoral agreements) (Interinstitutional agreement 2003/C 321/01).⁹ Elements of such joint practices and sectoral agreements are the ability of the parties to settle the dispute through international commercial arbitration.

Institutionalizing self-regulation is not a new phenomenon. A. Fiadjoe studied the problem of alternative dispute resolution. In his book, he notes that traditional societies, without the trappings and paraphernalia of the modern state, had no coercive means of resolving disputes.¹⁰ Alternative dispute resolution methods arose earlier than the judicial system, and it is through self-regulatory properties that are now used as effective methods. F. Kellor also argues that people turned to arbitration to resolve disputes long before the right appeared, or courts were created.¹¹ Arbitration, as well as other methods for resolving a dispute, where an intermediary appears, was a precursor to the judicial system, and it is thanks to him that later the state court appears, that is, a procedure that resembles arbitration. Homer cites such an example of a dispute over blood vengeance through a public arbiter process in the 8th century BC: the parties to the dispute, by mutual agreement, turned to a man who “has experience in law” to preside over the elders’ trial. Similar situations were described in the historical chronicles of Ancient Rome, Asia, Africa, Kievan Rus, and other ancient countries.

Medieval guilds practiced self-regulation in the form of establishing trade rules, checking markets, assessing the quality of goods, and determining the methods by which the dispute was settled. The courts of markets, fairs, and ports, courts of merchant guilds of cities and their unions tried to make their decisions in accordance with the principles of *ex aequo et bono* (that is, as “friendly mediator”, in fairness) and in the shortest possible time. In Ukraine, the first associations of artisans were formed during the times of Kievan Rus and were called “hundreds” or “hundred”.

⁹ Interinstitutional agreement on better law-making (2003/C 321/01). The European Parliament, the Council of the European Union and the Commission of the European Communities [online]. 2003 [cit. 2021-09-03]. Available at: www.legislationline.org/.../EU%20Interinstitutional%20Agre.

¹⁰ FIADJOE, A. *Alternative dispute resolution: a developing world perspective*. Abingdon: Routledge Cavendish, 2013.

¹¹ KELLOR, F. *American arbitration: its history, functions and achievements*. Washington: BeardBooks, 1999.

Prototypes of self-regulatory organizations in the states of the European region existed for quite some time. The resolution of such disputes has remained an inheritance for us. The adaptation of certain systems of self-regulation to historical conditions gave rise to a variety of its historical forms and instruments. As part of contemporary self-regulatory organizations, arbitral tribunals are formed. As you can see, this became an inherited tradition from medieval self-regulating organizations. During the Soviet era, the activities of self-regulating institutions were suppressed. With the restoration of independence, processes of revival of the mechanism of self-regulation, including the creation of self-regulatory organizations and arbitration courts, are taking place. An International Commercial Arbitration Court at the Chamber of Commerce and Industry of Ukraine is being set up in Ukraine.¹²

It should be noted that the structure of self-regulatory organizations may include not only arbitration courts, which regulate issues solely with regard to disputes residents. International commercial arbitration courts that settle disputes with a foreign element are a sign of a contemporary understanding of the establishment of a dispute settlement system, which also includes mediation, expertise, conciliation, business ombudsman, and others. Alternative ways of resolving disputes are a combination of various procedures aimed at overcoming a legal conflict, are carried out, as a rule, by a non-state body or a private individual based on the principles of voluntariness, neutrality, confidentiality, discretion, and equality.¹³ Whether their dispute can be resolved by agreement (directly or with the help of a third party) or by judicial proceedings,¹⁴ the parties should be able to decide on the legal basis of any state. A common feature of alternative dispute resolution methods is the presence of the obligatory consent of the parties to the dispute about resolving it in this way, the confidentiality, and the flexibility of the proceedings.¹⁵ Arbitral tribunals can be created with appropriate self-regulatory organizations. What they consider as internal disputes and disputes with a foreign element. The role of arbitral tribunals that are created by non-state organizations is of paramount importance in settling disputes, where the need for specialized knowledge arises. Therefore, arbitration courts arise not only in trade, chambers of commerce and industry, representing the interests of the entire business community, but also in specialized non-state organizations.

For example, the Arbitration Court under the Association of Grain and Fodder Trade (GAFTA), the Arbitration Court at the Federation of Wool Trade in Gdynia, the Arbitration Court at the Federation trade in oilseed crops and fats (FOSFA), Arbitration at the Committee on Trade in Grains in Rotterdam, Arbitration at the Exchange for Leather and Leather Products in Genoa, International Association of Consultants Engineers

¹² INCHAKOVA, A. – KAZACHENOK, S. To principles in the jurisprudence of international commercial arbitration: a comparative study of the London Court of international arbitration and the international commercial arbitration court at the chamber of commerce and industry of the Russian Federation. *Journal of Legal, Ethical and Regulatory Issues*. 2018, Vol. 21, No. 3, article number 12.

¹³ JEMIELNIAK, J. Comparative analysis as an autonomization strategy in international commercial arbitration. *International Journal for the Semiotics of Law*. 2018, Vol. 31, No. 1, pp. 155–173.

¹⁴ MAZARAKI, N. A. Effective system of commercial disputes resolution as a prerequisite of economic progress. *Scientific Bulletin of Polissia*. 2018, Vol. 2, pp. 181–187.

¹⁵ HONCHARENKO, O. M. *International commercial arbitration*. Nizhyn: Nizhyn Mykola Gogol State University Publishing House, 2014.

(FIDIC), and Arbitration at the Dutch Coffee Trade Association. Despite the fact that these institutions are created with non-governmental organizations and actually are part of them, they are usually registered as separate legal entities. For example, the SCC (Stockholm Chamber of Commerce) was established in 1917 and is a part of the Stockholm Chamber of Commerce,¹⁶ but independent of it.¹⁷ However, there may be other situations. For example, the American Arbitration Association (AAA), a non-profit organization with offices throughout the U.S.¹⁸ The AAA provides administrative services in the U.S. as well as abroad through its International Center for Dispute Resolution (ICDR).¹⁹ In this example, we are witnessing a situation in which a separate arbitration centre was set up to settle disputes outside the self-regulatory organization.

It is the arbitral tribunals that have received separate international approval and recognition at the level of international treaties, as compared with other structural elements of self-regulatory organizations. The importance of improving and unification of the legal regulation of international commercial arbitration has attracted the attention of the United Nations. This largest international organization has mandated the Commission on International Trade Law to develop rules on international trade in general and international commercial arbitration, in particular. The most well-known in the field of international commercial arbitration are the following UNCITRAL (United Nations Commission on International Trade Law) documents: Arbitration Rules of UNCITRAL (1976); UNCITRAL Model Law on International commercial arbitration (1985) with amendments and supplements.

The decision of the arbitral tribunal can be recognized and enforced in accordance with the Convention on the recognition and enforcement of foreign arbitral awards of 1958, a universal international treaty. There is no international treaty that recognizes the power of decisions of state courts at the global level. Consequently, the international community has reaffirmed confidence in non-state self-regulating institutions. The arbitral tribunal, which is part of the system of institutionalization of self-regulatory mechanisms, has taken an important place and points to the ability of business to resolve disputes on its own, without resorting to state instruments. Such international assistance to the work of arbitration courts has led to the fact that they are perceived as separate from self-regulatory organizations and at the national level of an individual state. Consequently, arbitral tribunals can be recognized as an independent mechanism for settling disputes between economic entities. Appeals against decisions of international commercial arbitration courts are possible only on the grounds clearly defined by the New York Convention in state courts. Therefore, in essence, these decisions are not disputed.

¹⁶ About the SCC [online]. 2020 [cit. 2021-09-03]. Available at: <https://sccinstitute.com/about-the-scc/>.

¹⁷ Decision No. A41-15132/2018 [online]. 2019 [cit. 2021-09-05]. Available at: https://sudact.ru/vsrf/doc/QDufuquWk15u/?vsrf-txt=международный+коммерческий+арбитраж&vsrf-case_doc=&vsrf-lawchunkinfo=&vsrf-doc_type=&vsrf-date_from=&vsrf-date_to=&

¹⁸ American Arbitration Association International Centre for Dispute Resolution [online]. 2020 [cit. 2021-09-04]. Available at: <https://www.adr.org/about>.

¹⁹ Ibid.

3. THE ROLE OF INTERNATIONAL COMMERCIAL ARBITRATION IN PROTECTING OF INVESTMENTS

The activities of international commercial arbitration as an institutional form of self-regulation are often associated with the use of *lex mercatoria* to settle the dispute. It can be said that in many cases, in the settlement of commercial disputes with a foreign element, *lex mercatoria* is used as a normative self-regulation tool. In this case, there is a combination of two means of self-regulation: institutional and normative. This is the highest degree of self-regulation development: when the choice of international commercial arbitration, both institution and type of self-regulatory process, is based on a self-regulating regulatory system, an international commercial dispute is settled. The laws of *lex mercatoria* (foreign trade law) include the Principles of International Commercial Agreements UNIDROIT (International Institute for the Unification of Private Law), the Principles of European Contract Law, the Acts of the International Chamber of Commerce, the Code of Principles, Rules and Requirements of *lex mercatoria* CENTRAL (Center for Transnational Law), etc. Despite the informal and advisory nature of these codifications, they have high authority and widespread use in the contractual practice of international commercial relations, as well as in the resolution of disputes by international commercial arbitrations and judicial authorities of states.

Historically, trade arbitration courts emerged and functioned as a quick means of resolving disputes that used trading practices. For example, such courts also called “pepoudrous cours” or “piepowder courts”, “from day to day”, “from tidal to tidal” (maritime arbitration courts). In most cases, disputes were settled through the customary rules of *lex mercatoria*, or the parties could use the principle of *ex aequo et bono*, that is, in good and kind conscience. The judge was empowered to settle the dispute on the basis of evidence and an understanding of justice without using the rules of law. Today *lex mercatoria* is a globalized system of self-regulatory norms (trade practices), codified at the level of well-known international governmental and non-governmental organizations and research institutes. A self-regulatory norm is a rule created independently by subjects of certain relations outside state influence. Business entities can choose and apply self-regulatory norms in the form of *Lex mercatoria*. It is an opportunity to realize the potential of self-regulation. In this case, the self-regulatory norms from the potential-soft ones become rigidly binding for the parties that have chosen them.

The issue of criminal responsibility in conditions of modern wars was considered by Lara Barberić, Davorka Čolak, and Jasmina Dolmagić: criminal prosecution as one of the elements of transitional justice is essential not only for establishing the accountability of war crime perpetrators, but also as a warning that such violations shall not be tolerated in the future.²⁰ New manifestations of the hybrid war have their peculiarities on the territory of Ukraine. Yevhen Pysmenskyi pays attention to the factors affecting the dynamics and development of crimes in the area of professional activity of

²⁰ BARBERIĆ, L. – ČOLAK, D. – DOLMAGIĆ, J. Prosecuting war crimes and meeting obligations under the convention for the protection of human rights and fundamental freedoms at the same time – the case of Croatia. *Croatian International Relations Review*. 2015, Vol. 21, pp. 41–46.

journalists, which mainly includes the environment on hybrid war.²¹ A hybrid war is inherently transnational, featuring transnational crime networks, migrant warriors, transnational diaspora links, legitimate international trade, and foreign intervention.²²

A hybrid war encompasses a set of hostile actions whereby, instead of a classical large-scale military invasion, an attacking power seeks to undermine its opponent through a variety of acts including subversive intelligence operations, sabotage, hacking, and empowering proxy insurgent groups. It can also spread disinformation (in target and third countries), exert economic pressure, and threaten energy supplies.²³ Moscow seeks to use hybrid war to ensure compliance with a number of specific policy issues; to divide and weaken NATO (North Atlantic Treaty Organization); to subvert pro-Western governments; to create pretexts for war; to annex the territory; and to ensure access to European markets on its own terms. Studying the issue of counteraction and defence against hybrid war with the help of international commercial arbitration is an important direction of modern scientific research. It differs from other remedies in conditions of hybrid war which have already become as “traditional”: informational, organizational, and purely military. International commercial arbitration is in fact a private remedy, which, however, has an important political and public effect. This direction is rather multidimensional and conventional by the peculiarities of international commercial arbitration.

In particular, the following features:

- 1) The object of the relations which are protected. Under the conditions of Russia’s hybrid war against Ukraine, investment disputes will be the object of consideration by arbitration, first of all. An investment dispute is a special category of disputes between the state and legal entities and individuals of other states regarding investment relations. Such disputes may occur in the case of nationalization, expropriation of foreign private property, unilateral termination of treaties between state and foreign company, and so on. However, the category of commercial disputes between subjects of economic activity of the aggressor state on the one hand and the subjects of economic activity of the state against which there is a hybrid war on the other side is not excluded.
- 2) The legal basis of protection. Investment relations will be protected by international commercial arbitration with the help of so-called “umbrella agreements” (international agreements in which the state and the recipient have agreed to arbitration and therefore it is not necessary to conclude separate arbitration agreements within a separate dispute). Commercial relations on the basis of international treaties, national legislation, and an arbitration agreement concluded between contractors on transferring the dispute to international commercial arbitration.

²¹ BANTEKAS, I. Equal treatment of parties in international commercial arbitration. *International and Comparative Law Quarterly*. 2020, Vol. 69, No. 4, pp. 991–1011.

²² FARAH, A. Q. – HATTAB, R. M. The application of shariah finance rules in international commercial arbitration. *Utrecht Law Review*. 2020, Vol. 16, No. 1, pp. 117–139.

²³ CAMERON, P. *International energy investment law: the pursuit of stability*. Oxford: Oxford University Press, 2017.

- 3) Participants of the dispute. The defendant in investment disputes is always a state-recipient of investments. Participants in “hybrid investment disputes” are subjects of the economy of the state-aggressor and the state that is suffering from aggression.
- 4) Global recognition and enforcement of decisions made by international commercial arbitration. The Convention on the recognition and enforcement of foreign arbitral awards of 1958 is a guaranteed opportunity of the enforcement of an international commercial arbitration, regardless of the state place of arbitration award and the place of execution.

The competence and independence of arbitrators, the possibility of arbitration courts being established at self-regulatory organizations, which are trade, chambers of commerce, and industry, have facilitated the consideration of investment disputes. In addition, in the case of arbitration an ad hoc dispute can be administered by the Permanent Court of Arbitration (International public arbitration) in accordance with the UNCITRAL Arbitration Rules. Protecting investors are being tried as arbitrators to develop new notions of legitimate expectations and to provide content to fair and equitable treatment while more precisely mapping the duties which investors have to host states.²⁴ It is important to focus on the adoption of so-called “umbrella agreements” between the states that actually certify the consent of the state to arbitration. Umbrella clauses have become a regular feature of international investment agreements and have been included to provide additional protection for investors by covering contractual obligations in investment agreements between host countries and foreign investors.²⁵

For Ukraine and the states of the European Union, indicative cases are the consideration of arbitration disputes aimed at protecting investments in which the respondent is the Russian Federation. The legal basis for the jurisdiction of international commercial arbitration in cases of nationalization and expropriation of property in Crimea is an agreement between the Cabinet of Ministers of Ukraine and the Government of the Russian Federation on encouragement and mutual protection of investments from 27.11.1998. This international treaty provides for such a mechanism. Initially, the parties to the dispute will try to resolve the dispute through negotiation if possible. In the event the dispute cannot be resolved through negotiations within six months from the date of the written notification as we mentioned in paragraph 1 of this agreement, then the dispute will be handed over for consideration to: a) a competent court or arbitration court of the Contracting Party on whose territory the investments were carried out; b) the Arbitration Institute of the Chamber of Commerce in Stockholm; c) an “ad hoc” arbitration court, in conformity with the Arbitration Regulations of the United Nations Commission for International Trade Law (UNCITRAL).²⁶

This international agreement allows the party to choose a dispute resolution procedure: an institutional arbitration in the form of the Arbitration Institute of the Stockholm

²⁴ FERREIRA, A. Intertwined paths of globalization and international investment law. *Journal of International Trade Law and Policy*. 2020, Vol. 19, No. 2, pp. 85–99.

²⁵ Agreement between the Government of the Russian Federation and the Cabinet of Ministers of Ukraine on the Encouragement Mutual Protection of Investments [online]. 1998 [cit. 2021-09-05]. Available at: https://zakon.rada.gov.ua/laws/show/643_101.

²⁶ The Administration of Investment Disputes. SCC [online]. 2019 [cit. 2021-09-04]. Available at: <https://sccinstitute.com/dispute-resolution/investment-disputes/>.

Chamber of Commerce or an ad hoc one-time arbitration. In cases where the defendant is the Russian Federation, consideration of disputes before the competent court or arbitration of the Contracting Party in whose territory the investments are made is absolutely inappropriate in view of the legislation adopted and the negative practice in recognition and enforcement of decisions of international commercial arbitration and even of the European Court of Justice. Quite frequently, investment disputes involving the Ukrainian side are considered by the Arbitration Institute of the Stockholm Chamber of Commerce. According to the statistics of this arbitration institution: “Sweden and the SCC serve as a forum for disputes between investors and states in at least 120 BITs and in the ECT. Of the 120 BITs, 61 agreements stipulate that the SCC Arbitration Rules will apply to disputes arising out of the agreement. The remaining 60 BITs, stipulate that the SCC shall act as Appointing Authority under the UNCITRAL Arbitration Rules or that Sweden shall be the legal seat of the dispute.”²⁷

Proceedings concerning nationalization and expropriation of property in Crimea, which are considered by arbitration courts ad hoc, established in accordance with the Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL) and administered by the Permanent Court of Arbitration, are as follows Aeroport Belbek LLC (Limited Liability Company) and Mr. Kolomoisky, LLC Lugzor, Stabil LLC, JSC Oschadbank, PJSC Ukrnafta v. The Russian Federation. Other cases are considered by arbitration in accordance with the Agreement between the Government of the Russian Federation and the Cabinet of Ministers of Ukraine on the Encouragement and Mutual Protection of Investments dated 27 November 1998 (the Russia-Ukraine BIT or BIT) is: Everest Estate LLC, Liberty, Aberon LTD, Kirovograd-Oil, Pirsan, Crimea-Petrol, Trade-Trust, VKF Satek, Eleftheria, Rustel, Stemv Group, Rubenor, Novel – Estate “Ukrinterinvest”, “Dneproazotom” v. the Russian Federation; NJSC Naftogaz of Ukraine, PJSC State Joint Stock Company Chornomornaftogaz, PJSC Ukrtransgaz, Subsidiary Company Likvo, PJSC Ukrgasvydobuvannya, PJSC Ukrtransnafta, and Subsidiary Company Gaz Ukrainy v the Russian Federation;²⁸ PJSC CB PrivatBank and Finance Company Finilon LLC v. The Russian Federation, PCA Case No. 2015-21.²⁹ In a number of cases, final positive decisions have already been taken in favour of Ukrainian companies by different arbitrations:

- 1) In the arbitration case *Everest Estate LLC and others v. The Russian Federation Arbitration Tribunal* in The Hague, the Netherlands, decided to charge Russia US \$159 million for the benefit of Ukrainian investors for the confiscation of their real estate in Crimea (Decision of 2 May 2018).³⁰

²⁷ NJSC Naftogaz of Ukraine, PJSC State Joint Stock Company Chornomornaftogaz, PJSC Ukrtransgaz, Subsidiary Company Likvo, PJSC Ukrgasvydobuvannya, PJSC Ukrtransnafta, and Subsidiary Company Gaz Ukrainy v the Russian Federation [online]. 1998 [cit. 2021-09-03]. Available at: <https://www.italaw.com/cases/4381>.

²⁸ Arbitration Between JSC CB Privatbank and the Financial Company Finillon LLC as Claimants by The Russian Federation [online]. 2019 [cit. 2021-09-04]. Available at: <https://www.italaw.com/sites/default/files/case-documents/italaw10354.pdf>.

²⁹ BERMAN, G. A. *Recognition and enforcement of foreign arbitral awards: the interpretation and application of the New York convention by national courts*. New York: Springer International Publishing, 2017.

³⁰ PERRY, S. *Enforcement of Crimea award upheld in Ukraine* [online]. 2019 [cit. 2021-09-04]. Available at: <https://globalarbitrationreview.com/article/1180117/enforcement-of-crimea-award-upheld-in-ukraine>.

The Ukrainian Supreme Court has enforced an investment treaty award that requires Russia to pay US \$159 million to Ukrainian investors in Crimea – while limiting the scope of attachments previously granted against the assets of three Russian state-owned banks.³¹

- 2) The decision to satisfy the claim for compensation of the losses suffered by the Oschadbank through the annexation of Crimea by the Russian Federation was adopted by the Arbitration Court in Paris on 26 November 2018. The amount of compensation will be US \$1.3 billion plus interest, which will accrue from the moment the decision is made up to the moment of actual compensation.³²
- 3) The Permanent Court of Arbitration in Hague, the Netherlands, has ruled that Russia should compensate for the Ukrainian oil monopoly Naftogaz for the assets that the company has lost control since the beginning of the Russian occupation of the Ukrainian territory of Crimea in 2014.³³
- 4) A tribunal seated in The Hague has found Russia liable in a billion dollar claim over the seizure of banking operations in Crimea, as well as in a separate case over an airport connected with Ukrainian businessman Igor Kolomoisky.³⁴

The list of investment cases which are considered by international commercial arbitration, plaintiffs with Ukrainian companies v. the Russian Federation is quite large. It can be predicted that as a result of decisions already made in favour of Ukrainian companies, such a list will be significantly supplemented by claims from other Ukrainian companies as well as individuals. In addition, such a positive experience of Ukrainian companies is indicative for other states that lost part of the territory as a result of contemporary Russian aggression. In particular, companies from Georgia, Moldova, and other countries, based on positive precedents, as well as international treaties, can apply to international commercial courts. Thus, there is an agreement between the Government of the Russian Federation and the Government of the Republic of Moldova on the promotion and mutual protection of investments of 17 March 1998.³⁵ The agreement provides for a similar mechanism for choosing an arbitration court as in an international treaty where the party is Ukrainian state. The main issues that unite all these disputes are the need to prove that: 1) the dispute concerns investments; 2) there was a violation of the agreement between the Cabinet of Ministers of Ukraine and the Government of the Russian Federation on the Promotion and Mutual Protection of Investments of 27 November 1998; 3) international

³¹ Oschadbank Wins in International Arbitration USD 1.3 Billion from Russia as Compensation of Losses from Crimea Annexation [online]. 2018 [cit. 2021-09-05]. Available at: <https://ukranews.com/en/news/598200-oschadbank-wins-in-international-arbitration-usd-13-billion-from-russia-as-compensation-of-losses>.

³² Naftogaz Wins Case in Hague Arbitration over Property Lost due to Crimea Occupation [online]. 2019 [cit. 2021-09-03]. Available at: <https://www.kyivpost.com/ukraine-politics/naftogaz-wins-hague-arbitration-over-property-lost-in-crimea-annexation.html>.

³³ JONES, T. *Russia held liable again over Crimean assets* [online]. 2019 [cit. 2021-09-05]. Available at: <https://globalarbitrationreview.com/article/1180413/russia-held-liable-again-over-crimean-assets>.

³⁴ Agreement between the Government of the Russian Federation and the Government of the Republic of Moldova on the Encouragement and Mutual Protection of Investments [online]. 1998 [cit. 2021-09-04]. Available at: <http://docs.cntd.ru/document/901788244>.

³⁵ ORLOV, M. *Protecting investments in the occupied territories* [online]. 2018 [cit. 2021-09-06]. Available at: <http://yur-gazeta.com/publications/practice/inshe/zahist-investitsiy-na-okupovanih-teritoriyah.html>.

commercial arbitration which is competent to consider the dispute (issues of jurisdiction of the International Commercial Court); 4) the Russian Federation as a state is solely responsible for the loss of investment by Ukrainian enterprises in annexed Crimea.

The peculiarity of these investment disputes is precisely the proof of Russia's responsibility for the loss of investment by Ukrainian enterprises, as the territory of Crimea is occupied, on one hand, and at the same time, the territory of Ukraine in the international sense, on the other. Therefore, the establishment of a precedent for recognition by international commercial arbitration of that Russia temporarily carries out "effective control" over the territory of Crimea and grossly violates the rights of investors, their absolute right to inviolability of property rights is fundamental in the process. The normative grounds for the recognition of "effective control", "change of effective sovereign" over the territory of Crimea is a federal constitutional law on the admission of Crimea to the RF, which was approved by the Federation Council of the Russian Federation. Also, on 30 April 2014, the State Council of the Republic of Crimea adopted a resolution "On the management of the property of the Republic of Crimea", according to which all property of the state of Ukraine, as well as other property, provided for in the annex to the decree, became property of the Republic of Crimea until the time of its distribution between Russia, Republic of Crimea itself, and territorial communities. As a result of such a decision, illegitimate authority of the Crimea carries out nationalization of the property of Ukrainian enterprises.

In addition, questions remain unsolved regarding of the determination of time limits of loss of investments. That is, from what moment investments have become not from within Ukraine, but foreign ones. And in this case, for the confirmation of certain time limits, the normative background may be the documents specified above. M. Orlov argues: "*In their letters to the certificate of title for a vehicle, the Russian Federation denied the temporal jurisdiction of the arbitral tribunal because investments in the Crimea were implemented before it became a territory of the Russian Federation.*" However, according to the Article 12 BIT, it applies to "*all investments made by investors of one of the Contracting Parties in the territory of the other Contracting Party since 01.01.1992*".³⁶ So, taken into account that in BIT there is no requirement that an investment was made in the territory of another state *ab initio* (from the beginning), the arbitration courts have concluded that the plaintiffs meet the *ratione temporis* criteria. Therefore, today we have some positive solutions for Ukrainian enterprises.

4. THE PROBLEM OF CHALLENGE, RECOGNITION, AND ENFORCEMENT OF DECISIONS

Decisions made by international commercial arbitration may be challenged at the place of removal, as well as enforcement. In all these cases, the mechanism of state courts is involved. The reaction to the positive decisions of the arbitration courts

³⁶ Russia Refuses to Recognize the Hague Arbitration Court Decision on Ukraine's Assets in Crimea [online]. 2019 [cit. 2021-09-04]. Available at: <https://uawire.org/russia-refuses-to-recognize-the-hague-arbitration-court-ruling-on-ukraine-s-assets-in-crimea/>.

for Ukrainian enterprises from the side of the Russian Federation is rather predictable: Russia does not recognize the decision for the loss in annexed Crimea, and also points out the lack of jurisdiction of the arbitral tribunal over these disputes. However, the Ukrainian side in the *Naftogaz of Ukraine* case states that the Permanent Court of Arbitration in The Hague acknowledged that Russia had violated the agreement on investment protection by seizing assets of Naftogaz of Ukraine and its subsidiaries in annexed Crimea,³⁷ and also that that Russia, as a state, is liable.³⁸ Therefore, Russia will initially try to cancel the decision of international commercial arbitration. For example, in the national courts of state of the seat of each arbitration, it will be argued that the arbitral tribunal has exceeded its jurisdiction and was not entitled to consider the dispute. According to P. Sanders, in case of cancellation of the arbitral award, the courts must refuse to execute, because there is no longer an arbitral award, and the execution of a non-existent arbitral award is impossible or contrary to the public policy of the country of the place of performance.³⁹

Russian companies have also opposed Ukraine on the basis of the Agreement between the Cabinet of Ministers of Ukraine and the Government of the Russian Federation on the promotion and mutual protection of investments (signed 27 November 1998). This is the well-known case of *Public-Joint Stock Company Tatneft v Ukraine*. Judgment was entered against Ukraine for US \$112 million (the total amount awarded against Ukraine by the Merits Award) plus interest. Ukraine wanted to cancel that order on two grounds: (1) That Ukraine has not lost the state immunity to which it is otherwise entitled under §1 of the State Immunity Act 1978 (the SIA) by virtue of § 9 of the SIA, because it did not agree to submit the disputes (alternatively, all the disputes) in respect of which the Merits Award was made, to arbitration. The Ukrainian side further concludes that this court has no jurisdiction over Ukraine in this matter (alternatively, no jurisdiction over it in relation to the part of the Merits Award).⁴⁰

However, a cancellation decision can even be implemented due to an ambiguous interpretation of Article 5 of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards. For example, the courts of France (the *Hilmarton* case), the US (the *Chromalloy* case) allowed the execution of such decisions. In this regard, you can also recall the *Yukos* case. Thus, the decisions of the International Commercial Arbitration Court at the Chamber of Commerce and Industry of the Russian Federation, which were repealed in Russia, were recognized, and enforced in the Netherlands and the United States on the grounds of the impartiality of the judges who considered the question of the abolition and mistrust of the judicial system of

³⁷ Ukraine's Naftogaz Achieves Interim Victory in the Crimean Asset's Lawsuit against Russia [online]. 2019 [cit. 2021-09-06]. Available at: <http://uawire.org/ukraine-s-naftogaz-achieves-interim-victory-in-the-crimean-assets-lawsuit-against-russia>.

³⁸ SANDERS, P. New York convention on the recognition and enforcement of foreign arbitral awards. *Arbitration*. 1959, Vol. XXV, No. 3, pp. 109–110.

³⁹ England and Wales High Court (Commercial Court) Decisions [online]. 2018 [cit. 2021-09-06]. Available at: [https://www.bailii.org/cgi-bin/format.cgi?doc=/ew/cases/EWHC/Comm/2018/1797.html&query=\(Ukraine-Russia\)+AND+\(BIT\)](https://www.bailii.org/cgi-bin/format.cgi?doc=/ew/cases/EWHC/Comm/2018/1797.html&query=(Ukraine-Russia)+AND+(BIT)).

⁴⁰ HELLERSTEIN, J. *United states district court southern district of New York* [online]. 2009 [cit. 2021-09-04]. Available at: <http://www.pravo.ru/store/interdoc/doc/131/Yukos.pdf>.

the Russian Federation.⁴¹ In addition, the court's discretion in some countries is quite a broad category. So, recognition and enforcement of cancelled arbitration awards can also take place at the discretion of the court. Thus, the UK court found that even if the grounds for refusal were established, the court retains the right to discretion in executing the decision. The United States' courts hold the same position. The party requesting the recognition and enforcement of an international commercial court judgment may justify the impossibility of refusing to issue the latter. This capability is supported by the States Parties to the New York Convention.

In case of a refusal to cancel the decision of the International Commercial Arbitration Court, it is possible to recognize and enforce decisions in all participating states of the New York Convention. Of course, it is not about enforcing decisions on the territory of Russia itself. The practice of recognition and enforcement of decisions made by international commercial arbitration in favour of Ukrainian companies in Russia is negative in recent years. Russian courts, referring, as a rule, to non-compliance with public order, refuse recognition and enforcement of arbitration awards. For example, in the case of a LLC "Agroprodeksport" (Ukraine) to LLC "Vikate Plus" in execution of the decision was denied on the grounds of non-compliance with public order, which did not indicate what this mismatch was. Another case of a JSC (Joint-Stock Company) Termolife (Ukraine) to Termolife RUS was also denied recognition and enforcement of the decision of the International Commercial Arbitration Court at the Chamber of Commerce of Ukraine on the grounds of non-compliance with public order. However, from the point of view of international and national law, the argument about understanding the content of "public order" is interesting.

At first, the court refused to satisfy the application for the enforcement of a foreign commercial arbitration court at the CCI (Chamber of Commerce and Industry) of Ukraine. The Moscow Arbitration Court has been argued that the 1980 Vienna Convention on Contracts for the International Sale of Goods (CISG or the Vienna Convention), which was agreed to by the parties in paragraph 6.12 of the contract, was used, but the substantive law of Ukraine was not used, as well as the lack of evidence of proper notification to the defendant at his current address. Although, this convention is a part of Ukraine's national legislation. Then the Supreme Court of the Russian Federation did not agree with this argument and presented a new, no less absurd: *"According to the decision of the foreign arbitration court, the claimant has submitted a letter (28 September 2016) signed by the General Director of Termolife RUS and addressed to this arbitration court in which the defendant confirmed the existence of the debt, to the ICAC (International Commercial Arbitration Court) at the CCI of Ukraine.*

These circumstances indicate that there is no actual dispute between the above parties. Such behavior of participants in civil turnover is a way to illegally use arbitration proceedings, because they are not aimed at appealing to an arbitration court as a means of resolving a dispute according to its legal nature, but at using arbitration

⁴¹ England and Wales High Court (Commercial Court) Decisions [online]. 2011 [cit. 2021-09-06]. Available at: <http://www.bailii.org/ew/cases/EWHC/Comm/2011/1957.html>.

proceedings for the purpose of abuse of the right. Such interests violate the public order of the Russian Federation and are not subject to judicial protection.”

Such examples have become the usual practice of Russian courts regarding enterprises from Ukraine. Furthermore, they are a part of hybrid warfare in private law, in which the state authorities (courts) are involved. Consequently, taking into account the peculiarity of international commercial arbitration as a global self-regulatory institution, whose implementation is based on a universal international treaty, the execution of decisions in investment disputes is possible in different countries of the world.

5. CONCLUSIONS

In fact, international commercial arbitration in certain categories of disputes is the only real instrument for protecting the rights of economic entities affected by hybrid warfare. The obvious benefits are the availability of international “umbrella” agreements on mutual protection of investments and a universal mechanism for ensuring the enforcement of decisions. In accordance with this mechanism, decisions can be made in any state where there is property of the guilty party. This allows you not to limit execution in any state, but to look for the property of the defendant all over the world. This is as long as the international community is considering protecting the interests of victims (both individual and legal) from hybrid warfare through the system of international public law, in international commercial arbitration as a self-regulating system of private justice, investment disputes, to which the aggressor state is party, are being resolved.

The aggressor state is being prosecuted for conducting hybrid warfare in private law, which is very closely interwoven with public law. Therefore, the resolution of such disputes under the hybrid war can be called “hybrid investment disputes” or “hybrid commercial disputes”. International commercial arbitration as a private remedy, that has an important political and public effect, has the following peculiarities: 1) the object of protected relations (investment and other commercial disputes between the subjects of economic activity of the state-aggressor, on the one hand, and the subjects of economic activity of the state against which is hybrid warfare, on the other hand); 2) the legal basis for the protection (the presence of “umbrella agreements” is in most cases); 3) parties to the dispute (the respondent in investment disputes is always the recipient state of investment); and 4) global recognition and enforcement of decisions made by international commercial arbitration.

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