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Legal Infrastructure of Commercial Arbitration in CIS countries

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1. Introduction

The transition to a market economy currently taking place in the former Soviet Union is a very dynamic process in its substance. It is connected not only with the fundamental changes in the economic relationships within the states that emerged after the dissolution of the Soviet Union, but it also presupposes substantive adjustments of the legal environment that concerns almost every aspect of day-to-day life. The most important aspect of this development is the fact that all economic activity in the countries which are now part of the Commonwealth of Independent States (CIS) has been conducted for many decades on the basis of a mandatory state planning system: it excluded any kind of free competition or private initiative.

One of the immediate results of abandoning the centralised economic system in these countries was the rapid growth of the number of private enterprises involved in business activity, including cross-border transactions. The old legal infrastructure was practically inadequate to effectively deal with problems arising from business relationships. New forms of business organisations and commercial practice that had not been known before had become an important factor of every-day life in economic activities.

The speed and extension with which the new developments have penetrated economic life of new independent states were not the same in each new state due to the varying differences in economic levels. In addition to this, the political situation in the country played a significant role that also determined the passing of the reforms. But in spite of this, there is and will be still much in common in the current situation relating to legal environment of business activities in CIS countries. Major events which take place in the field of legal development in one of these states may to a great extent be looked upon as reflecting the situation in other parts of what was previously a unitary economic and legal organism.

One of the major aspects of legal surroundings which might be now considered equally relevant in practically all CIS countries is the role of arbitration as a means of business dispute settlement as a means of achieving a civilised market-oriented relations. Long-standing traditions of extensive use and positive attitudes towards international commercial arbitration which were characteristic of the Soviet legal system have been, in principle, inherited by business communities in the new independent states. International arbitration is clearly recognised as the most adequate dispute settlement mechanism in the field of international trade and commerce, including foreign investment.

On the other hand, arbitration in domestic business activities does not have a very long history since Soviet times, this legal tool had never been used for purposes of solving disputes arising in the course of economic activities. In Soviet times, the special system of state agencies combining adjudication and management functions dealt exclusively with economic disputes. In other words the role of an arbitrator in disputes between economic operators which were mainly state-owned enterprises was played by the State itself. Its role was not only to solve the disputes but to exercise the regulatory power in the interests of the national economy as a whole.

Introduction of a market economy and the possibility to carry out private business had given rise to the use of arbitration in domestic dealings. Immediately after the adoption in the Russian Federation in 1992 of regulations providing a legal basis for arbitration of domestic economic disputes, permanent arbitration institutions began to appear in different parts of the country. At the present time, there are several hundred of such institutions, which are attached mainly to regional chambers of commerce and industry, commodity or stock exchanges and various other business organisations. The development of this process in other CIS countries was not as extensive as in the Russian Federation

and it was much more centralised. As a rule, there are a few institutions in each country set up to deal mainly with international disputes.

The major factors, which might be considered as having a significant impact on the future development of arbitration within the legal framework of business in CIS countries, include the following:

- traditional formalistic approach of the state courts in dealing with commercial disputes
- limited experience of state judges in application of new substantive rules regulating business activities based on private law
- lack of necessary of skills in adversarial court procedure within the judiciary
- lack of modern business experience of economic operators and the existence of undeveloped self-regulating mechanisms in the business community
- rapid growth of case load of commercial disputes in state courts

Against this background, the development of arbitration and other means of ADR deserves special attention in the process of building up the legal infrastructure for business relationships, including corporate governance. Arbitration, with its flexibility and dynamism, has significant potential as a legal means of dispute settlement that would help to overcome difficulties inherent to the building of a sound foundation of the new legal environment. There are practically no doubts that it should be extensively encouraged and promoted in order to ensure successful transition to a developed market economy.

Obviously, one of the main goals of countries in transition is to integrate their national economies into the current process of globalisation of the world economy. This could hardly be achieved by relying only on one's own resources, without taking advantage of foreign investment. As regards expectations on the part of foreign investors, they also hope that arbitration will play an important role in creation of a favourable legal environment in the countries in economic transition. The following opinion on this point seems to reflect quite objectively the generally accepted view on this problem in the Western business and legal circles:

"One important aspect of a country's investment and business infrastructure is the quality and effectiveness of the commercial dispute resolution mechanisms that are available. Because investment risks are often perceived to be higher in transition economies, access to dispute-resolution systems that investors believe to be efficient and impartial are particularly important. However, for various reasons, the court systems in these countries often do not provide prospective investors with sufficient confidence. Therefore, arbitration and mediation take on an even greater importance than in western Europe and North America, where arbitration is primarily valued because of its abilities to preserve confidentiality, speed up the process and reduce costs. Indeed, many countries with economies in transition have strong judicial standards in arbitration. Yet these strong standards do not always ensure a strong arbitration mechanism, often due to problems arising out of enforcement, a shortage of adequately trained arbitrators and judges, and a lack of awareness in the business community regarding the use of arbitration and its potential benefits."[1]

[1] Cram-Martos, V. *Journal of International Arbitration*. Vol. 17, No. 6 (2000), pp.137-154.

2. Legal Infrastructure for Conducting Arbitration

2.1 International instruments

2.1.1 The United Nations Convention on recognition and enforcement of foreign arbitral awards (New York, 1958)

One of the most successful international instruments in the field of unification of international trade law is the New York Convention on recognition and enforcement of foreign arbitral awards. It has been working successfully for more than four decades for the benefit of international business relations. The purpose of the Convention is to provide a sound and transparent legal foundation for the development of international commercial arbitration by creating favorable regime ensuring the effectiveness of international arbitration in member-countries.

At present almost all members of the CIS, excluding Turkmenistan, are Contracting States of the New York Convention. They include Armenia, Azerbaijan, Belarus, Georgia, Kazakhstan, Kyrgyzstan, Moldova, Russian Federation, Ukraine, and Uzbekistan. The Soviet Union was amongst those states that had joined the New York Convention shortly after it was opened for ratification. The Convention was ratified by the Soviet Union in 1960 together with two Soviet republics – members of the UN: Ukrainian SSR and Belarusian SSR. From 24 December 1991, the Russian Federation continued with its membership in the Convention as the former Soviet Union. Other CIS states joined the Convention in due course after they had gained independent status.

The application of the Convention on the territories of Belarus, Russian Federation and Ukraine is conditioned by the declaration which was made by the ratification of the Convention in 1960, pursuant to corresponding articles of the Convention. That means that they will apply the Convention only to recognition and enforcement of awards made in the territory of another Contracting State. With regard to awards made in the territory of non-Contracting States, the Convention will be applied only to the extent to which these States grant reciprocal treatment. Armenia, according to its declaration, will apply the Convention only to recognition and enforcement of awards made in the territory of another Contracting State and only to differences arising out of legal relationships whether contractual or not, and which are considered as commercial under the national law. Other CIS participants to the New York Convention made none of declarations provided by the Convention and relating to its application.

The most extensive practice of the application of the New York Convention now takes place in the Russian Federation although this only started less than a decade ago. In the period before the dissolution of the Soviet Union, there were no cases of enforcement of foreign arbitral awards either on the basis of the Convention or non-conventional awards. This fact could be probably explained by the existence of the state monopoly in the field of foreign trade where all international commercial transactions were carried out by state agencies.

The courts in the Russian Federation are nowadays gaining experience in application of the Convention in accordance with internationally recognised standards although it is too early to say that the court practice with regard to recognition and enforcement of international arbitral awards is stabilised in a definite direction.

Cases of application of New York Convention in the court practice of other CIS countries are so far quite rare and are hardly ever reported. This cannot give sufficient cause for analysis of these practices.

2.2 European Convention on International Commercial Arbitration (Geneva, 1961)

This international instrument which has regional application is not as well known as the New York Convention. But, it can play a vital role in jurisdictions where there is no modern legislation on international commercial arbitration like in some CIS countries. The Contracting States of this Convention include the following countries from the CIS area: Belarus, Kazakhstan, Moldova, Russian Federation, and Ukraine.

The Convention provides for a number of provisions that can be treated as a minimum set of standards for arbitration of commercial disputes involving the parties from different countries. The important provisions in the Convention include those on the procedures for appointing arbitrators when the parties do not come to an agreement on the procedure relating to establishing the arbitral tribunal.

The Convention contains rules for determining arbitral jurisdiction and applicable law when those have not been specified in the contract. It provides for the right of any party in dispute to appoint foreign arbitrators, to set the rules with regard to legal actions relating to the arbitral award and the conditions for its enforcement and other provisions necessary for effective conduct of arbitration proceedings.

The functions of a competent authority in support of arbitration according to the Convention are performed by central chambers of commerce and industry in these countries.

2.3. Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID Washington Convention, 1965)

All CIS countries are Contracting States to the Washington Convention, except the Russian Federation and Turkmenistan. The Russian Federation signed the Convention in 1992 but has not yet ratified it at the present time. References to dispute-settlement mechanism provided by the ICSID Convention are usually referred to in bilateral investment treaties concluded by the CIS states participating in the Washington Convention.

Russian Federation in its BITs also provides, as a rule, for arbitration of investment disputes involving private investors usually under UNCITRAL Arbitration Rules in a third country.

2.4. Convention on the Settlement by Arbitration of Civil Law Disputes Resulting from Relations of Economic and Scientific-technical Co-operation (Moscow, 1972)

The Moscow Convention 1972 was worked out and adopted by the countries than were member states of COMECON, an international organisation created in 1949 for economic co-operation among the socialist states. The purpose of this organisation was to take greater advantage of the permanent courts of international arbitration attached to national chambers of commerce and industry in these countries. In previous years these institutions proved in practice to be effective instruments for the solving of disputes connected with foreign trade transactions between foreign trade organisations in these countries.

According to the Convention, commercial disputes arising out of relations of all kinds of economic and scientific-technical co-operation were transferred into their exclusive competence. In absence of agreement by the parties relating to the place of arbitration in a third country – party to the Convention, the place of arbitration was designated as the country of the defendant. The Convention

provides also rules relating to the enforcement of arbitral awards rendered in accordance with the Convention.

From the initial number of member states of the Moscow Convention, now only Cuba, Bulgaria, Romania, Russian Federation and Mongolia continue to be officially bound by the Convention. But, the distinctive feature of current practice of application of the Convention in these countries consists in a very narrow interpretation of its field of application. The attitude towards the Convention in the afore-mentioned countries includes a clear tendency not to extend the scope of application beyond the disputes between state organisations. There is also tendency to treat the Moscow Convention as either obsolete or unconstitutional since it provides for mandatory arbitration, which is contrary to its legal nature.

2.5. Convention on the procedure of settling disputes connected with economic activity (Kiev, 1992)

The above Convention was concluded among the CIS countries for the purpose of providing a legal framework for the system that replaced previous mechanisms for economic dispute settlement in the unitary economic space that formally ceased to exist after the fall of the Soviet Union.

The Kiev Convention may be characterised as an analogy of the 1968 Brussels Convention (in corresponding cases – Lugano Convention) on the jurisdiction in commercial matters. It deals mainly with the jurisdiction of state courts of the member-states and the choice of law rules in economic disputes between the enterprises having the place of business in member countries.

It also contains an important provision that concerns arbitration: the Convention confirms the right of economic subjects to refer their disputes to arbitration courts.

3. National laws relating to arbitration

3.1. Characteristic Features of Legal Sources relating to arbitration

Legislative structure. Consistent with the Soviet legal practice, international and domestic arbitration in some CIS countries are regulated by separate law. New legislation relating to arbitration appearing during the last decade in other states concerns arbitration in general. In those cases where the new legislative acts relate only to international arbitration, they are based on the UNCITRAL Model Law.

Without any doubt, international arbitration acts of Azerbaijan (1999), Belarus (1999), Russian Federation (1993), and Ukraine (1994) belong to the UNCITRAL Model Law countries. The texts of the national acts in these states are very close to the original contents of the Model Law. This situation may be explained by the fact that practically speaking, there was no previous legislation in these countries on the subject and therefore there was nothing to be adjusted or reformed in accordance with model rules. But, in spite of this situation, and due to the specifics of the historical legal developments in general, there is still a different approach to be found in the national texts that indicates a certain departure from the text of the Model Law in some points. There are minor variations between the national laws of different states as well.

The legislative acts on arbitration now in force in Armenia (1998), Georgia (1997) and Moldova (1994) that are supposed to be applicable both to domestic and international arbitration may in substance be described as not very consistent with the basic principles of arbitration on which the UNCITRAL Model Law is built up. Moreover, the present practice of application of these laws can

hardly be called as treating arbitration in a manner that corresponds to the approach widely recognised in economically developed countries. It relates especially to the situation with the development of arbitration in domestic relationships. Nevertheless, there is also good news; work on improving regulation in this field is now ongoing in these countries. The basis of the new law is supposed to be upon the UNCITRAL Model Law.

A less optimistic situation with regard to the legal infrastructure for arbitration of commercial disputes is now present in Central Asian CIS member states. None of them have so far adopted modern special legislation on arbitration. In these states, the basis of regulation of arbitration still reflects the approach represented in civil-procedure legislation based on legal acts adopted when they were part of the Soviet Union. These acts contain only basic rules applicable to arbitration.

In spite of the fact that in these states new civil procedure legislation was adopted quite recently, the attitude towards arbitration has not changed. In Kazakhstan, for instance, the enactment of new civil procedure code in 1999 made the situation for arbitration even worse when compared with the governmental regulations of 1993.

Discouraging administrative and judicial policies towards domestic arbitration in these countries is frequently founded on erroneous belief that arbitration seeks to usurp the judicial authority that should be the exclusive competence of the State. One of the practical consequences of this treatment is that the state courts refuse to enforce arbitral awards rendered by domestic institutional or *ad hoc* arbitration court.

Scope of Application. In CIS states which adopted the UNCITRAL Model Law, one of the points of difference with the uniform text is the determination of the scope of application of the law on international commercial arbitration.

The Model Law defines arbitration as “international” if “the parties to an arbitration agreement have, at the time of the conclusion of that agreement, their places of business in different States.” Besides, the arbitration is considered as “international” in the following situations: if the place of arbitration, the place of contract performance, or the place of the subject matter of the dispute is situated in a State other than where the parties have their places of business. According to the Model Law if the parties have expressly agreed that the subject matter of the arbitration agreement relates to more than one country it may be considered as international as well.

In Russian and Ukrainian Acts on international commercial arbitration, slight different rules are provided for relating to the scope of application. These legislative acts prescribe in this respect the following rules:

“Pursuant to an agreement of the parties, the following may be referred to international commercial arbitration:

- disputes resulting from contractual and other civil law relationships arising in the course of foreign trade and other forms of international economic relations, in more than one country

- disputes arising between enterprises with foreign investment, international associations and organisations established in the territory of the Russian Federation (correspondingly, the Ukraine); disputes between the participants of such entities; as well as disputes between such entities and other subjects of the Russian Federation (correspondingly, the Ukraine) law.

As it can be seen from the above text, the Russian and Ukrainian acts on international commercial arbitration have not followed exactly all the criteria for the definition of the "international" character of arbitration. They are using only "subjective" (personal jurisdiction) criteria, i.e. the place of business of the participants in the dispute. They do not refer to "objective" criteria, i.e. the subject matter of the arbitration agreement which could relate to more than one country.

However at the same time the scope of application of the law on international commercial arbitration in Russian Federation and Ukraine is expanded to the disputes that from the "subjective" point of view should be treated as "domestic", i.e. between legal entities created on the territory of the enacting state. The precondition to such application is foreign participation (or full ownership) in the capital of one of the parties involved in the dispute.

This solution seems quite reasonable for a country in transition where the judicial system is not fully adjusted to the new economic conditions. This approach seems to serve the interests of forming a friendly legal environment for foreign investments. Regulation of international commercial arbitration in CIS countries traditionally is more liberal and corresponds more to widely recognised principles and rules of commercial dispute settlement when compared with regulation of domestic arbitration. On the other hand, regulation of domestic arbitration, as a rule, is more rigid as compared with alternative dispute settlement of the disputes arising out of cross-border transactions.

The Azerbaijan Act on International Commercial Arbitration in determination of its scope of application, has followed closely the rules provided in the UNCITRAL Model Law having included both "subjective" and "objective" criteria.

Institutional and *ad hoc* arbitration. During previous decades, commercial arbitration in the Soviet Union was connected almost entirely with foreign trade and was practiced exclusively in the form of institutional arbitration. This attitude was influenced by the view that institutional arbitration is the most reliable kind of dispute settlement and is more predictable as *ad hoc* arbitration. This way of thinking was inherited by the new states.

As regards international arbitration, the law in CIS countries that have enacted the UNCITRAL Model Law formally provides for the regulation of *ad hoc* arbitration. The authority to exercise the functions in support of arbitration, for instance, appointment of an arbitrator on behalf of the party that fails to do is vested in the central chambers of commerce and industry in these countries.

Presently, in practice of the CIS countries this kind of arbitration does not often take place on the territory of these states. In cases where *ad hoc* arbitration had been practiced in Russian Federation, the most up-to-date UNCITRAL Arbitration Rules were used. The Russian Federation Chamber of Commerce and Industry has adopted the Rules for assistance rendered to the parties when they have agreed on the application of UNCITRAL Arbitration Rules and the place of arbitration is in the Russian Federation. The functions of the appointing authority under the UNCITRAL Rules are being performed by International Commercial Arbitration Court attached to the Chamber (ICAC).

The relative insignificance of *ad hoc* arbitration practice in CIS countries results from lack of experience and by rather insufficient logistical and infrastructure conditions for the organisation of effective arbitration proceedings. One example in this respect is strict currency control regulation that makes it sometimes difficult to fund arbitration proceedings.

On the other hand, in national legislation and in court practice, domestic *ad hoc* arbitration is not looked upon as favourably as *ad hoc* arbitration in an international setting. The Russian Federation is

the only CIS country that has a special act on domestic arbitration which was adopted in 2002. The bulk of this law, like many other relevant legislative acts, was drafted with institutional arbitration in mind. Notwithstanding that the main purpose of this law is the development and promotion of the law of arbitration for the settlement of economic disputes, the law expressly permits *ad hoc* arbitration, the law nevertheless, does not contain rules in support of *ad hoc* arbitration. In particular, legal uncertainty exists in situations connected with the enforcement of an arbitration agreement where one of the parties fails to agree on the composition of arbitral tribunal. The law does not provide for any competent authority that may act on behalf of the failing party in order make the arbitration agreement operational.

In light of the above, it would not be a great exaggeration to say that at this present time the courts in practically all of the CIS countries seem to be very reluctant to give full legal force to the effects of *ad hoc* arbitration, and they deal somewhat mistrustfully with the activities of *ad hoc* arbitration tribunals. In current practice, it often happens that courts dealt with arbitration first and foremost and concentrated on finding minor deficiencies relating to the composition or acts of the arbitral tribunal in order to deny enforcement of the award.

3.2. Admissibility of Arbitration

One of the most significant aspects of regulation relating to the practice of arbitration is the definition of the disputes that may be referred to arbitration. The UNCITRAL Model Law does not provide for strict rules for determining of admissibility of arbitration leaving this problem for national legislation. It provides no hard and fast definition of the term "commercial" in relation to arbitration. But it is necessary to stress that Art. 1 of the Model Law contains a note calling for "a broad interpretation so as to cover matters arising from all relationships of a commercial nature, whether contractual or not." The footnote to the article also provides an illustrative list of relationships that are to be considered commercial, thus emphasising the breadth of the suggested interpretation and indicating that the determinative test is not based on what the national law may regard as "commercial."

In the Russian Federation, as in Belarus, Moldova and Ukraine, the broad interpretation of the term "commercial" is supported by an approach confirmed in new civil law legislation to the effect that the arbitration courts besides the state courts are recognised as a means of protecting civil rights and interests. Obviously the complex problems connected with the shareholder's relationship and in a wider scope relating to corporate governance may be referred to arbitration since the activities of the corporation are directly connected with business and commerce.

The interest in referring such disputes to arbitration may be also supported by the following facts. The reform of civil and *arbitrazh* procedural law that took place in 2002 had confirmed that in the Russian Federation, the competence to deal with disputes involving shareholders now belongs to the *arbitrazh* courts. But formulation of corresponding legislative provisions suggest that this solution would not exclude contradictory situations in shareholder's relationship whereby the courts of both jurisdictions might be dealing with this category of disputes. So, for the sake of procedural economy, it would be reasonable for the parties in such disputes provide for a particular arbitration court to avoid unnecessary litigation over the jurisdiction of different state courts.

Speaking of admissibility of arbitration in economic disputes, it is necessary to draw attention to another problem which has appeared following the adoption of the new procedural legislation concerning commercial arbitration in the Russian Federation. The new rules on exclusive jurisdiction of state *arbitrazh* courts, which were introduced by the new version of *Arbitrazh* Procedure Code, have considerably reinforced the position of these courts in economic dispute settlement *vis-a-vis* the

courts of general jurisdiction. The jurisdiction of a*rbitrazh* courts covers all matters connected with the practice of commercial arbitration (for instance, setting aside and enforcement of arbitral awards). The new regulation has also expanded also the rules on exclusive competence of the *arbitrazh* courts in economic disputes involving foreign participants as compared with the previous regulation.

The current practice of *arbitrazh* courts in matters relating to commercial arbitration has exposed quite a rigorous attitude on their part pertaining to the activities of arbitration courts. And the point of concern in this relation is the great probability of the development of the practice when these rules might be applied to commercial arbitration notwithstanding that the primary purpose of these rules is to provide rules determining territorial jurisdiction *vis-à-vis* the courts of foreign states.

Apparently, if such approach would take place in *arbitrazh* court practice, it would lead to unjustified limitation of the scope of application of commercial arbitration. Among the disputes belonging to the exclusive jurisdiction of *arbitrazh* courts in accordance with current legislation are primarily disputes which have a public law element. But at the same time they now also include disputes which for the long period have been considered admissible to commercial arbitration, i.e. disputes connected with the state and municipal property and real estate located or registered in Russian Federation.

3.3. Arbitration Agreement (requirements as to the form and the substance)

The acts on international commercial arbitration of the CIS countries that are based on the UNCITRAL Model Law have not departed from the provisions of the Model law relating to the form and the ways of making arbitration agreements. Article 7(1) of the Model Law provides for the validity and effect of a commitment by the parties to submit to arbitration an existing dispute ("compromise') or a future dispute ("clause *compromissoire*"). The latter type of agreement is presently the most wide-spread in the practice of international commercial arbitration and the arbitral tribunals usually deal mostly with arbitration clauses included into the contract and agreements.

The situation where the parties come to an arbitration agreement with regard of an existing dispute is quite rare in the practice of foreign trade. But the situation can be rather different in the sphere of corporate governance where arbitration agreements may occur after a dispute between shareholders as a reasonable alternative to litigation which could be unexpectedly time consuming and costly.

Oral arbitration agreements are not recognised by any of the national laws in the CIS. In law and court practice, it has been clearly established that a simple written form of arbitration agreement is admissible i.e. an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams. The mandatory written form of an arbitration agreement is considered to comply with all parties once it has been concluded by telex or other means of telecommunication which provides a record of the agreement.

Moreover, arbitration agreements may arise as a result of an exchange of statements of claim and defense in which the existence of an agreement is alleged by one party and not denied by another. The parties are considered to be bound by an arbitration agreement once they have made the reference in a contract to a document (e.g. general conditions) containing an arbitration clause, provided that the contract is in writing and the reference is such as to make the clause part of the contract.

3.4. Delimitation of court assistance and supervision

The trend in favour of limiting court involvement in international commercial arbitration that is characteristic of the development of arbitration in recent legislation in some countries does not seem to be much followed in current court practice in CIS countries. There are many instances in modern practice where the courts have been very reluctant to accept the concept that the parties to an arbitration agreement make a conscious decision to exclude court jurisdiction and, in particular in commercial cases, prefer expediency and finality to protracted battles in court.

On the other hand, at least in the Model Law states such as the Russian Federation and Ukraine, the courts have to take into account in the application of provisions of their national laws on international commercial arbitration that their involvement should be limited, and these limits are established by the law itself. These limits concern the following: challenge and termination of the mandate of an arbitrator, jurisdiction of the arbitral tribunal and setting aside of the arbitral award. A second group comprises court assistance in taking evidence, recognition of the arbitration agreement, including its compatibility with court-ordered interim measures of protection, and recognition and enforcement of arbitral awards.

Beyond the instances in these two groups no court shall intervene, in matters governed by the law on international commercial arbitration. This is stated expressly in the law although by itself, it does not take a stand on what is the appropriate role of the courts in matters of arbitration.

3.5. The Legal Effect of an Arbitration Agreement

The aspects of the relationship between the arbitration agreement and the right of the parties to this agreement to resort to courts are regulated in the present legislation of the Model Law CIS countries in full conformity with the original text.

The Model Law obliges any court to refer the parties to arbitration if seized with a claim on the same subject matter unless it finds that the arbitration agreement is null and void, inoperative or incapable of being performed. This referral is dependent on a request which a party may make not later than when submitting his first statement on the substance of the dispute. While this provision, where adopted by a State when it adopts the Model Law, by its nature binds merely the courts of that State, it is not restricted to agreements providing for arbitration in that State and, thus, helps to give universal recognition and effect to international commercial arbitration agreements.

It is necessary to underline that in those CIS states where there are now in existence two systems of jurisdiction in accordance with the current law, the competence to deal with matters relating to commercial arbitration belongs not to the courts of general jurisdiction but to the special economic courts (e.g. *arbitrazh* courts in the Russian Federation).

In spite of clear legal provisions, the problem of interrelations between the state courts and arbitration has become quite sensitive in recent years in the court practice of the Russian Federation. The *arbitrazh* courts often show a very strict attitude when dealing with arbitration agreements. They feel very reluctant to accept arbitration jurisdiction in the cases where they find even little doubt with regard to the contents of arbitration agreement. The lack of knowledge and inexperience of the judges in arbitration problems aggravates such practice, especially when it relates to international transactions.

3.6. Interim measures of protection

The UNCITRAL Model Law expressly provides for the principle that any interim measures of protection that may be obtained from courts under their procedural law (e.g. pre-award attachments) are compatible with an arbitration agreement. Apparently, this provision is addressed to the state courts, insofar as it determines their granting of interim measures as being compatible with an arbitration agreement, irrespective of the place of arbitration. Insofar as it declares it to be compatible with an arbitration agreement for a party to request such measure from a court, it would be applied irrespective of whether the request is made to a court of the state of the place of arbitration or of any other country. Wherever such request may be made, it may not be relied upon as an objection against the existence or effect of an arbitration agreement.

Until recently, none of the CIS legal systems provided for such a possibility. The situation changed with regard to the Russian Federation in 2002 after the adoption of the new *Arbitrazh* Procedure Code. The Code now contains the rules stipulating the procedure with respect to the right of the party to arbitration agreement apply for interim measures of protection relating to its claim referred to arbitration. The request may be brought to the court when arbitration proceedings have been officially started as well as before the claim was filed with the arbitration court.

It would be interesting also to mention that according to the Russian Law on International Commercial Arbitration, interim measures of protection equivalent to the court measures may be ordered by the presidents of arbitration institutions attached to the Chamber of Commerce and Industry of the Russian Federation, i.e. International Commercial Arbitration Court and Maritime Arbitration Commission. This can be effective in cases where these arbitration institutions have the jurisdiction with regard to the claim to be protected by the corresponding interim measure.

In other CIS countries, even in those that have adopted the UNCITRAL Model Law that provides for the theoretical possibility of the court taking the decision on interim measures relating to arbitration, this practice have never taken place because the courts refuse to deal with such applications, since it is not expressly provided for in civil procedure legislation that they have to follow in their practice.

3.7. Arbitration procedure

The law on international arbitration now in force in some particular CIS countries guarantees the parties freedom to agree on the procedure to be followed by the arbitral tribunal in conducting the proceedings. There are a limited number of mandatory provisions on the procedure to ensure that the arbitration procedure would be conducted in accordance with its fundamental principles. The law empowers the arbitral tribunal, failing agreement by the parties, to conduct the arbitration in such a manner as it considers appropriate. The power conferred upon the arbitral tribunal includes the power to determine the admissibility, relevance, materiality and weight of any evidence.

Autonomy of the parties to determine the rules of procedure is of special importance in international cases since it allows the parties to select or tailor the rules according to their specific wishes and needs, unimpeded by traditional domestic concepts and without the earlier mentioned risk of frustration. The supplementary discretion of the arbitral tribunal is equally important in that it allows the tribunal to tailor the conduct of the proceedings to the specific features of the case without restraints of the traditional local law, including any domestic rules on evidence. Moreover, it provides a means for solving any procedural questions not regulated in the arbitration agreement or the applicable procedural law.

In addition to the general provisions on arbitration procedure, there are some special provisions using the same approach of granting the parties autonomy and, failing agreement, empowering the arbitral tribunal to decide the matter. For example, it may concern the determination in respect of the place of arbitration or the language of the proceedings the questions that very often play vital a role in international arbitration.

In the CIS, the parties' autonomy to determine the rules of arbitration procedure is realised by referring the dispute to a particular arbitration institution. In this case, the rules of this institution that usually regulate the arbitration procedure in detail should be applicable.

The distinctive feature of procedure employed by arbitration institutions in CIS countries is that they all have lists of persons who may be appointed as arbitrators under the rules of respective arbitration institution. The list of arbitrators that includes well-known specialists in the field is usually confirmed in regular periods of time by the chamber of commerce and industry to which the arbitration institution is attached.

In some arbitration institutions the list is not mandatory for the parties, they are free to appoint any person as an arbitrator. Only the chairman of the tribunal must be a person from the list. For example, this is the case under the Rules of International Commercial Arbitration Court at the Russian Federation Chamber of Commerce and Industry. In other institutions (for instance International Arbitration Court at the Ukrainian Chamber of Commerce and Industry) the parties should chose arbitrators from the list only.

3.8. Applicable procedural and material law

With regard to the rules on applicable substantive law there is no deviation in current legislation on international arbitration from the provisions of the Model Law. The arbitral tribunal decides the dispute in accordance with such rules of law as may be agreed by the parties. It grants the parties the freedom to choose the applicable substantive law. Practically all national laws in the CIS sphere recognise that right in corresponding provisions of their rules on conflict of laws.

The significance of this provision referring to the choice of "rules of law" instead of "law" is hardly recognised so far. By using this expression, the Model Law had the intention to provide the parties with a wider range of options as regards to the designation of the law applicable to the substance of the dispute in that they may, for example, agree on rules of law that have been elaborated by an international forum but have not yet been incorporated into any national legal system. One can find an example of such rules of law in the UNIDROIT Principles of International Commercial Contracts. In practice of International Commercial Arbitration Court (ICAC) in Moscow, there have been cases where the tribunal has applied these Principles since the parties had referred to them in their contract as the applicable law.

The power of the arbitral tribunal in this respect follows more traditional lines. When the parties have not designated the applicable law, the arbitral tribunal shall apply the law, i.e. the national law, determined by the conflict of law rules which it considers applicable. Arbitral tribunals in CIS usually have no difficulties in applying to the dispute widely recognised usage and customs of international trade applicable to the transaction even in cases when the parties have not made reference to them in their agreement.

In the CIS legal area the law in force does not provide the rule that the parties may authorise the arbitral tribunal to decide the dispute *ex aequo et bono* or as *amiables compositeurs*. This type of arbitration had never been known in the Soviet Union and practically it is currently not used in legal

systems of CIS countries. In post Soviet business practices it is unlikely that the parties would provide in the arbitration agreement, specific authorisation to the arbitral tribunal to act in such capacity. But one cannot exclude that in the future business circles will not avail themselves of this opportunity since the desire to take advantage of non formalistic procedure for dispute settlement is noticeable in contemporary business life.

3.9. Setting aside of the award and Enforcement of the award

The problem, which is of considerable concern to those involved in international commercial arbitration is the possibility provided by the law with regard to recourse against arbitral awards. The acts on international commercial arbitration adopted in Belarus, the Russian Federation and Ukraine reproduce corresponding provisions in full conformity with the Model Law.

Only one type of recourse is allowed according to the Law. Recourse to a competent court against an arbitral award may be made only by an application for setting aside. An arbitral award may be set aside only if: (a) the party making the application furnishes proof that:

i) a party to the arbitration agreement referred to in article 7 was under some incapacity; or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of corresponding State; or

ii) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or

iii) the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, only that part of the award which contains decisions on matters not submitted to arbitration may be set aside; or

iv) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of the law regulating international commercial arbitration from which the parties cannot derogate, or, failing such agreement, was not in accordance with this law. The award may also be set aside if the court finds that: (i) the subject matter of the dispute is not capable of settlement by arbitration under the law of corresponding State; or (ii) the award is in conflict with the public policy of this state.

It is worth mentioning that in a ruling of the Constitutional Court of the Russian Federation, it was confirmed that the limited number of the grounds for setting aside of the arbitral award rendered in international commercial arbitration including only grounds relating to the procedure but not to the merits, is not in contradiction with the fundamental rights of a person provided in the Constitution.

An application for setting aside must be made within three months of receipt of the award. It should be noted that “recourse” means actively “attacking” the award; a party is, of course, not precluded from seeking court control by way of defence in enforcement proceedings. In the Russian Federation, the rules concerning setting aside domestic awards, even though they are stipulated separately from identical rules applicable to international awards, do not differ in principle from them.

The list of grounds on which an award may be set aside has an exclusive character. This list essentially corresponds to Article V of the 1958 New York Convention on the recognition and

enforcement of foreign arbitral awards. They include such grounds as lack of capacity of parties to conclude arbitration agreement or lack of valid arbitration agreement; lack of notice of appointment of an arbitrator or of the arbitral proceedings or inability of a party to present his case; award dealing with matters not covered by submission to arbitration; composition of arbitral tribunal or conduct of arbitral proceedings contrary to effective agreement of parties or, failing agreement, to the law; non-arbitrability of subject matter of dispute and violation of public policy, which would include serious departures from fundamental notions of procedural justice.

The present court practice of setting aside of arbitral awards in the CIS region varies from state to state. But, probably, one very important common feature of this practice is the tendency on the part of the state courts to scrutinise the arbitral award on its merits. By and large, it could not be characterised as pro-arbitration although the degree of the severity of the court's attitude to arbitration in particular states is not the same in different states. Unquestionably, this process is a part of general development connected with formation of contemporary legal system in the countries in transition. Obviously, it would be possible to solve the problems of creating adequate legal environment for the new economic conditions only step by step.

One of the problems relating to contemporary court practice of setting aside of the arbitral awards is connected with the clear tendency to wide-ranging interpretation by the courts of the grounds relating to public policy.

3.10. Recognition and enforcement of arbitral awards

For the recognition and enforcement of arbitral awards, the most important source of regulation is to be found in international agreements to which a particular member-state of CIS belongs. The law on international commercial arbitration in the states where it is adopted in accordance with the UNCITRAL Model Law reflects a significant policy decision that the same rules should apply to arbitral awards whether made in the country of enforcement or abroad, and that those rules should follow closely the New York Convention.

By treating awards rendered in international commercial arbitration in a uniform manner irrespective of where they were made, the Model Law draws a new demarcation line between "international" and "non-international" awards instead of the traditional line between "foreign" and "domestic" awards. This new line is based on substantive grounds rather than territorial borders, which are inappropriate in view of the limited importance of the place of arbitration in international cases. The place of arbitration is often chosen for reasons of convenience of the parties and the dispute may have little or no connection with the State where the arbitration takes place. Consequently, the recognition and enforcement of "international" awards, whether "foreign" or "domestic", should be governed by the same provisions. Based on these considerations of the limited importance of the place of arbitration in international cases and the desire of overcoming territorial restrictions, reciprocity is not included in the law as a condition for recognition and enforcement.

Any arbitral award, irrespective of the country in which it was made, shoud be recognised as binding and enforceable, subject to the provisions that set forth the grounds on which recognition or enforcement may be refused. The grounds on which recognition or enforcement may be refused under the current regulation in force in major CIS countries are identical to those listed in Article V of the New York Convention.

Procedural details of recognition and enforcement of arbitral awards are laid down in respective codes of civil procedure (*arbitrazh* procedure in the Russian Federation). Very few of them were

adopted in post Soviet-time and contain a very scarce set of general rules that do not reflect the specifics of the enforcement of arbitral awards.