

АРБИТРАЖНАЯ ОГОВОРКА: КЛЮЧЕВЫЕ ПОЛОЖЕНИЯ И ПРАВОО ПРИМЕНИТЕЛЬНАЯ ПРАКТИКА

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В статье рассматриваются понятие и правовая природа арбитражной оговорки в соответствии с Федеральным законом от 29.12.2015 N 382-ФЗ «Об арбитраже (третейском разбирательстве) в Российской Федерации», ее ключевые положения, соответствующая правоприменительная практика, а также дается сравнительный анализ арбитражной оговорки в контексте российского и англо-американского права.

The arbitration clause is a kind of juridical agreement which, by its nature, is a judicial construction that permits the parties to an agreement set forth their own rights and duties subject to the law.

«Arbitration clause is an agreement of the parties to refer to the arbitration all or some disputes arising or which may arise between them concerning certain legal relation regardless whether such legal relation is contractual or no» [1] – such definition is given in the lately adopted Russian Law on arbitration. For Russian legislation the arbitration clause is a comparably young provision, the creation of which is connected with the legislator's intention to respond to the problems arising among the law enforcers. The newness of such institution begets the problems of drafting and further application of the arbitration clause.

The above given definition shows the common approach of Russian and Common law systems to the concept of the arbitration clause. The main thing about the arbitration clause is that the parties are free to choose the body, to which the parties may apply in case of the default or breach of the other party. It is extremely important to understand that the freedom of choice of the arbitration court, to which the parties trust the hearings of their disputes under the agreement, is restricted by the law be-

cause in the majority of cases the law regulates the questions of court jurisdiction of certain disputes (so called “Exceptional court jurisdiction”). That's why in case of a conflict between the provisions of the contract and the law on the court jurisdiction, there is a legal rule about the priority of the latter. The arbitration clause may be either included on the text of a contact or be a separate document which is called ‘Arbitration agreement’ in the above mentioned Law. The clause must be in written form. The preferable one is the first situation as the lack of the arbitration clause in the signed agreement may close such possibility to the seeking-judicial-protection party as the other party, foresee the failure in court, would hardly resist the temptation of avoidance to signing the separate document, i.e. arbitration agreement.

The wording of the arbitration clause must unambiguously specify the question of solving the possible dispute. The classical arbitration clause includes the following:

- the specification of the arbitration body;
- the country or a town of arbitration i.e. the place;
- the procedure of formation of the arbitration (if the parties to a contract chose the “ad hoc” arbitration);
- the possibility and the procedure of the pre-arbitration settlement;

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- under which country's laws the dispute is to be solved;

- other issues.

There are two bodies which may solve the disputes if there is an arbitration clause – 'ad hoc' arbitration or permanent arbitration.

Arbitration can be binding (which means the participants must follow the arbitrator's decision and courts will enforce it) or nonbinding (meaning either party is free to reject the arbitrator's decision and take the dispute to court, as if the arbitration had never taken place). Binding arbitration is more common [2].

One of the main issues concerning the drafting of the arbitration clause is the process of reaching harmony between the parties' interests.

Another great problem is inattention and inaccuracy during the process of drafting. The most common mistakes are:

- the indication of a non-existing tribunal;
- the note about a tribunal which is to solve the disputes without its name;
- inaccurate specification of the disputes to be solved in the arbitration tribunal;
- the inconsistency and haziness of the clause in general.

To help the future parties to an agreement form an arbitration clause properly, some permanent arbitral tribunals suggest the certain recommended wording of the arbitration clause (for example, the recommended arbitration

clause of the International Commercial Arbitration Court at the Russian Federation Chamber of Commerce and Industry).[3] Compliance with it will unambiguously exclude the possibility of court's adjudication of parties' claims. Anyway, the parties must be extremely careful while formulating the arbitration provisions.

Accuracy of forming the arbitration clause is exceedingly important because of the following: subject to Article 42 of Federal Law on Arbitration Courts (dated 24.07.2002. № 102 FZ), the arbitral tribunal's decision may be discharged by a competent court, if:

- the arbitration clause (agreement) is invalid subject to the law;
- the arbitration decision is passed on a dispute which is not provided by the arbitration clause (agreement);
- the decision of the arbitral tribunal contains the rulings on the issues which overstep the agreement.

The current Russian legislator has made a notable amend in the laws on arbitration. It concerns the fact that now commercial organizations cannot have the arbitration bodies 'inside' or 'about' themselves. It is made to avoid the situation where one party to a contract is in worse conditions ab initio. This means that the unfair party takes advantage of having a 'lured' court under its wing which would always pass the decisions which are beneficial to this party or its affiliated commercial companies.

ARBITRATION CLAUSE: KEY ISSUES AND PRACTICES

The article focuses on the concept of "arbitration clause" subject to the Federal Law № 382-FZ "On Arbitration (Mediation Proceedings) in the Russian Federation" dated December 29, 2015, its key issues and practices as well as the comparative analysis

of the doctrine at issue in Russian and Anglo-American law.

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Ключевые слова:

арбитраж, арбитражная оговорка, спор, российская правовая система, система общего права.

Keywords:

arbitration, arbitration clause, dispute, Russian legal system, Common law system.

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