VALIDITY REQUIREMENTS OF ARBITRATION AGREEMENT UNDER CASE LAW OF SUPREME COURT OF GEORGIA

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INTRODUCTION

The Supreme Court is in charge of recognition and enforcement of the foreign arbitral awards.[1] Although Georgia is the arbitration friendly forum as it is the UNCITRAL Model Law country on International Commercial Arbitration (the Model Law) and it is the contracting state to the New York Convention, the interpretations made by the Supreme Court is not fully consistent with the Model Law and the New York Convention.[2] One of the frequently citied grounds for refusal to recognition and enforcement of the foreign arbitral award is the invalidity of the arbitration agreement under Article V.1.a of the New York Convention. Recent judgment dated on August 26, 2016 once again affirmed the Supreme Court's controversial reasoning on the issue.[3] The Supreme Court's approach on the interpretation of validity of the arbitration agreement may jeopardize the enforcement of the foreign arbitral awards as well as call into question the smooth operation of the domestic arbitration cases. Even though Georgia is a civil-law country and the doctrine of stare

1 The Law of Georgia on Arbitration, Article 44. Available at: https://matsne.gov.ge/
2 Georgia ratified the New York Convention on June 2, 1994. Available at: http://www.newyorkconvention.org/
3 The Judgment of the Supreme Court of Georgia, dated on August 26, 2016 (#ა-887-შ-21-2016). Available at: http://www.supremecourt.ge/

decisis is not applicable, its interpretations have a huge impact on the legal stability and predictability and the lower courts usually follow the interpretations established by the Supreme Court. Furthermore, the Supreme Court's approach on the validity of the arbitration agreement may discourage the international arbitration in Georgia.

The article intends to identify the problems in the Supreme Court's interpretations of validity of the arbitration agreement and provides the right way to the issue in question. The article is divided into two parts. In the first part, it provides the facts of recent case and the analysis on the validity of the arbitration agreement; the second part of the article sets forth two problems, which can be seen in the judgment: firstly, the Supreme Court's failure to identify the applicable law to the arbitration agreement, which should have been paramount importance for the validity of the arbitration agreement and the Supreme Court's legal reasoning should have been started from that point; secondly, whether the substantive validity of the arbitration agreement depends on the specific reference to the arbitration institution, what are the criteria prescribed in the Law and whether the Supreme Court relied on any legal ground in its judgment. The article is finished with the concluding remarks and the suggested solution to the problem.

PART I. Interpretation by the Supreme Court

The article does not assert incorrectness of the final decision. However, the interpretation, which leads to the judgment of the Supreme Court, is not adequate and does not consistent with the Law as well as the international practice, the New York Convention and the Model Law. In fact the Supreme Court's reasoning in this judgment is the continuation of the wrong practice, which is already established in the Georgian jurisprudence.

1. Factual Background

The Supreme Court in the judgment, dated on August 26, 2016, refused to recognize and enforce the ad hoc tribunal' award rendered in London, UK.[4] In this case, the parties concluded the sales agreement, according to which a seller had to provide certain amount of sugar and a buyer had to pay an agreed price.[5] Article 5.2 of the agreement stated that in case of the disagreement, the dispute should be resolved in accordance with the English legislation, place of jurisdiction – London. The title of the provision referred to "Arbitration."[6] In addition, there was a difference between the Russian and the Georgian version of the provision. The Georgian version was referring that all matters relating to the performance of the agreement were subject to Article 5.2 whereas 2the Russian version was referring to the interpretation and clarifications of the agreement.[7] Both versions were authentic.[8] After the dispute arose on the non-performance of the agreement, the arbitrator was appointed and he rendered the award in favor of a seller.[9] After the seller tried to enforce the award in Georgia, the buyer opposed it and based its position on several grounds under the New York Convention including invalidity of arbitration agreement under Article V.1.a, the party was not given a proper notice for arbitration under Article V.1.b, arbitration procedure was not in accordance with the agreement under Article V.1.d and public policy exception under Articles V.2.b. Since the Supreme Court found that the arbitration agreement was not valid, it did not make any finding on other grounds under the New York Convention.

2. Legal Reasoning

The Supreme Court did not allow the enforcement of the award and made the following reasoning: firstly, the Supreme Court stated that broad interpretation of the grounds for refusal

4 Ibid.
5 Ibid. paragraph 4.1.
6 Ibid. paragraph 9.2.1.
7 Ibid. paragraph 13.1.
8 Ibid.
9 Ibid. paragraph 1-2.

under the New York Convention is restricted;[10] secondly, the Supreme Court stated that the arbitration agreement should precisely identify the arbitration institution, which administers the dispute or they shall explicitly specify that it is ad hoc arbitration; the arbitration clause should not be drafted in a way, which makes it impossible to determine the competent institution;[11] in addition, the Supreme Court stated that one arbitration clause cannot grant jurisdiction to two institutions or the institution and a national court. According to the Supreme Court, such clause will be invalid.[12] Based on that reasoning, the Supreme Court stated that the arbitration clause was invalid since it failed to expressly identify the institution or ad hoc tribunal that would have the competence. Even if the arbitrator was competent, one of the versions was referring to the interpretation of the agreement and the dispute was about the secondary obligations such as granting the damages. Thus, the tribunal would not still enjoy the jurisdiction.[13] The Supreme Court deemed the arbitration clause was invalid and did not allow the enforcement. It did not make the reasoning neither on the applicable law to the arbitration agreement nor the validity requirements under the Law. Similar approach on the validity of arbitration agreement can be found in case dated on June 15, 2011.[14] In that case, the Supreme Court deemed invalid the arbitration clause, which stated that any disputes between the parties arising out of the agreement should be resolved by the private arbitration consisting of one arbitrator. The Supreme Court stated that this clause gave the jurisdiction to more than one arbitration institutions and it failed to identify the competent one.[15]Other judgments of the Supreme Court share same reasoning on the validity of arbitration agreement and similarly lack a reference to any concrete provisions in the Law.[16]

PART II. Problems in Interpretations

General trend, which can be seen in the Supreme Court's approach on the validity of the arbitration agreement, is that the arbitration clause or the agreement should explicitly identify the competent institution, which administers the dispute or it shall specifically mention word 'ad hoc', which might qualify as valid arbitration clause. Moreover, the Supreme Court's the 2011 Judgment revealed difficulty to enforce ad hoc arbitration agreements when it was stated that the agreement should specifically identify the arbitration institution and thus it impliedly excluded ad hoc arbitration clauses from the scope of the Law. The approach deserves criticism since no such requirements can be found anywhere in the legislation or in the Model Law. Most importantly, the Supreme Court somehow avoided the question what was the applicable law to the arbitration agreement even though the respondent was referring to the English law as the proper law to determine whether the arbitration clause was valid or not. Proper way to deal with this issue would be if the Supreme Court identified the applicable law to the arbitration agreement according to the New York Convention and then determined whether the arbitration agreement was valid or not under the applicable law.

1. Applicable Law to Arbitration Agreement

One of the cornerstone principles of the commercial arbitration is the recognition of the arbitration agreement as separate from the main contract.[17]This implies that invalidity of the main contract does not necessarily cause invalidity of the arbitration agreement.[18]This principle has an-

10 Ibid. paragraph 18.
11 Ibid. paragraph 21.
12 Ibid.
13 Ibid. paragraph 25.
14 The Judgment of the Supreme Court of Georgia, dated on July 15, 2011 (# ას-809-862-2011). Available at: http://www.supremecourt.ge/
15 Ibid.
16 Validity of the arbitration agreement was a subject matter of the following cases: The Judgment of the Supreme Court of Georgia, dated on June 27, 2011 (ას-804-858-2011) and the Judgment of the Supreme Court of Georgia, dated on June 28, 2010 (#ას-416-389-2010). Available at: http://www.supremecourt.ge/
17 Born G. B., 2001. International Commercial Arbitration: Commentary and Materials. Transnational Publishers & Kluwer Law International, The Hague p. 56.
18 Born G. B., 2010. International Arbitration and Forum Selection Agreements: Drafting and Enforcing. Wolters Kluwer,

other consequence. As much as arbitration and main agreements are separate, applicable law to the arbitration agreement is not necessarily the applicable law to the main contract.[19] Principle of autonomy gives parties the freedom to specify whether they wish to subject the arbitration agreement to specific law. It is not infrequent when the parties choose different law to the arbitration agreement since they want the predictability, especially in the enforcement of awards in different jurisdictions. Therefore, determining the validity of the arbitration agreement without first assessing what is the applicable law is not logical. The New York Convention, on which the Supreme Court was relying, envisages and directs the enforcing court to determine the validity of the arbitration agreement by the law, which is chosen by the parties in a first place.[20] The article provides the New York Convention's position on the applicable law to the arbitration agreement, reviews the international approach how to identify the applicable law and finally explains why the Supreme Court failed to determine the applicable law to the arbitration agreement, which might have had a significant effect on the enforcement of the foreign award.

a) The New York Convention and Model Law on applicable law to arbitration agreement

The New York Convention and the Model Law both rest on the principle of separability of the arbitration agreement and thus recognize the possibility of different applicable law to it.[21] Article II of the Convention sets the formal validity of the arbitration agreement.[22] It obliges the contracting states to recognize the arbitration agreement in writing and in case of seizing the court with a matter that is subject to arbitration, the court should refer parties to the arbitration, unless the arbitration agreement is null and void, inoperative or incapable to be performed.[23] It is argued that although this Article does not mention the choice of law rule, it sets the validity principles of the arbitration agreement, which implies the substantive different legal regime to the international arbitration agreements.[24]Choice of law and a way to determine the substantive validity of the arbitration agreement is mentioned in Article V.1.a on grounds for refusal of recognition and enforcement of the awards.[25] Article V.1.a provides that recognition and enforcement of the award may be refused if the arbitration agreement is not valid under the law to which the parties have subjected it or failing any indication thereon, under the law of the country where the award was made. So, the New York Convention

The priority to the parties' choice of the applicable law to the arbitration agreement and after that, if the parties failed to identify the applicable law – the law of the place where the arbitral award is rendered.[26] While there is a debate whether the national court is still authorized to apply its domestic law to the substantive validity of the arbitration agreement, this article supports the position that when the recognition and enforcement is sought the national court should apply the choice of law rule mentioned in Article V.1.a for the substantive validity of the arbitration agreement– either law that is chosen by the parties or in case of absence, the law of the place where the award is rendered. As for the formal validity of the arbitration agreement, case law proved that Article II of the New York Convention still plays a role in the enforcement stage.[27]

the Netherlands p. 128.

19 Ibid.

20 Bermann G. A., 2017. Recognition and Enforcement of Foreign Arbitral Awards: The Interpretation and Application of the New York Convention by National Courts, in: Bermann G.A., (ed). Recognition and Enforcement of Foreign Arbitral Awards: The Interpretation and Application of the New York Convention by National Courts. Springer International Publishing, New York p. 25.

21 Born G. B., 2014. The Law Governing International Arbitration Agreements: An International Perspective. Singapore Academy of Law Journal, 26, p. 819.

22 Kaufmann-Kohler G., Rigozzi A., 2015. International Arbitration: Law and Practice in Switzerland. Oxford University Press, Oxford paragraph 8.254-8.255.

23 The New York Convention, Article II, subparagraph 3.

24 Born G. B., 2014. p. 819.

25 Kaufmann-Kohler G., Rigozzi A., 2015. paragraph 8.258.

26 Berg A. J. V. B., 1981. The New York Arbitration Convention of 1958. Kluwer Law and Taxation Publishers, The Hague p. 282.

27 There is a debate if the national courts are authorized to apply Article II with Article V.1.a of the New York Convention, which set the formal requirement for validity of the arbitration agreement. There is a case from the Italian jurisprudence, which stated that Article II is applicable only when a national court needs to recognize the valid arbitra-

This approach is justified since it gives the priority to the parties' choice and establishes pro-enforcement approach. If the arbitration agreement is valid under the law, which is chosen by the parties, there is no real value not to recognize such awards in other jurisdictions under the New York Convention, which itself gives a priority to the parties and establishes autonomy of the arbitration agreement. Similarly, Article 8 and Article 36.1(a)(i) of the Model Law is reflection of Article II and Article V.1.a of the New York Convention respectively. Thus, when the substantive validity of the arbitration agreement is in question, the Supreme Court first needs to determine the applicable law to the arbitration agreement and then assess whether the agreement is valid or not.

b) The ways to determine the applicable law to arbitration agreement

The New York Convention and the Model law refer that the arbitration agreement can be subject to the different legal regime; however it does not say how to determine it. There are number of ways to determine the applicable law to arbitration agreement developed by the scholars and the case law.[28] Most notable ones relate to the governing law to the main agreement as applicable to arbitration agreement and the law of the seat as applicable to arbitration agreement.[29]

Talking about the applicable law to the arbitration agreement is impossible without Sulamerica case.[30] In that case the judge employed three-step enquiry to determine the applicable law: (i) if the parties expressly specified it in the agreement; (ii) in case of absence of the express choice of law, the parties still impliedly agreed on applicable law and (iii) if there is neither express nor implied choice of law, a court should employ the closest and most real connection test.[31]The court stated that if the parties choose the governing law to the substantive contract, this would be strong indication that it is implied applicable law to the arbitration agreement since the parties as the reasonable prudent persons want to subject both agreements to same system of laws.[32]So, the court made the assumption that both main and the arbitration agreement will be subject to same substantive law unless parties choose specific governing law to the arbitration agreement. Applying this test, the court found that the law of the seat of arbitration was governing law to the arbitration agreement.[33]This test was accepted some of the subsequent cases as well.[34]

Different line of reasoning on implied choice of law to the arbitration agreement was developed by the Singapore High Court.[35]The court did not agree on the argument that reasonable prudent persons would subject main and arbitration agreement to same system of laws.[36]It was stated that when commercial relationships break down and parties descent into the realm of dispute resolution, the parties' desire for neutrality comes to a fore.[37] Substantive governing law will be superseded by the neutral law, which will be the law of the seat of the arbitration.[38] Then, the court emphasized the importance of the seat, which is the legal connection to the arbitration rather than mere physical location of the proceedings.[39]Thus, the Singapore High Court deemed law of the seat as the implied choice

tion agreement. But, when the court is asked to enforce the foreign arbitral award, they shall only take into account Article V.1.a of the New York Convention, which set forth choice of law rule and the ground for refusal to recognition and enforcement of arbitral award. See Berg A. J. V. B., 1981. p. 286.

28 Born G., 2014. p. 826.

29 Ibid.

30 Sulamerica CIA Nacional de Seguros SA and others v. Enesa Engenharia SA and others [2012] EWCA Civ 638.

31 Drlickova K., 2013. The Law Applicable to Arbitration Agreements – "Lex Arbitri" or "Lex Causae" of the Principle Contract?, in: Belohlavek A. J., Cerny F., Rozehnalova N., (eds). Czech & Central European Yearbook of Arbitration. Juris Publishing, Huntington p. 75.

32 Ibid. p. 76.

33 Ormsby H., 2014. Governing Law of the Arbitration Agreement: Importance of Sulamerica Case Reaffirmed where Choice of Seat was agreed without Actual Authority. Kluwer Arbitration Blog. Accessed 15 October 2017.

34 The same test can be found in Asranovia Ltd & Ors v. Cruz City 1 Mauritius Holdings [2012] EWHC 3702 and Habas Sinai Ve Tibbi Gazlar Istihsal Endustrisi AS v. VSC Steel Company Ltd [2013] EWHC 4071.

35 FirstLink Investments Corp Ltd v GT Payment Pte Ltd and others [2014] SGHCR 12.

36 Ibid. paragraph 13.

37 Ibid.

38 Ibid. paragraph 14.

39 Ibid.

instead of substantive governing law as elaborated by the English court in Sulamerica case.[40] Although there might be the different perspective on how to determine the applicable law to the arbitration agreement and what is the implied choice of law, one thing is clear – the parties are reasonable enough to somehow subject their arbitration agreement to the applicable law – either by express choice or by implied which most likely would be the place of the arbitration.

c) The Supreme Court's failure to identify the applicable law

Irrespective of one's preference to employ a way to determine the applicable law to the arbitration agreement, one thing is clear that the Supreme Court should have analyzed what was the applicable law. Issue in the case was whether the parties validly agreed on the arbitration agreement – i.e. whether the arbitration agreement was substantively valid. The Supreme Court should have started analysis from the scope of Article V.1.a of the New York Convention and determine the applicable law for the substantive validity. The respondent was referring that this arbitration agreement was valid under English law, which was the governing law. However, one cannot find one sentence on this argument in the judgment. As it was provided in the article, the clause was referring to English legislation as applicable law. This reference would be most likely qualified as substantive governing law to the main agreement rather applicable law to the arbitration. As much as the parties did not have any express choice of law to the arbitration agreement, the Supreme Court should have analyzed what would be the implied choice of law to the arbitration agreement. Even though whether this type of arbitration clause is valid under English legislation is beyond the scope of this article, the Supreme Court at least should have provided why it did not employ the choice of law rule prescribed in Article V.1.a.

2. The Law allows *ad hoc* arbitration

The article argues that even if the Supreme Court did not identify the applicable law to the arbitration agreement, it still failed to apply correct test for validity of arbitration agreement under the Law. The Supreme Court in its 2011 Judgment impliedly excluded ad hoc arbitration clause from the scope of the Law when they stated that "all controversies shall be resolved by arbitration consisting of one arbitrator" was not valid arbitration clause. Similar approach was employed in the 2016 Judgment. In response to that, the article submits that firstly, the Law does not prescribe the requirement of the explicit choice of the arbitral institution in the arbitration clause and secondly, general agreement to submit the disputes to the arbitration means that the parties agreed on ad hoc arbitration mechanism and such clause is neither pathological nor invalid contrary to the Supreme Court's consistent although is erroneous position.

a) Validity requirements under the Law

The definition of the arbitration agreement can be found in Article 8.1 of the Law, which is the incorporation of Article 7.1 of the Model Law. Article refers that "arbitration agreement" is an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not."[41] Thus, the substantive validity criteria of the arbitration agreement consist of the binding commitment of the parties to refer the dispute to the arbitration, consent of the parties and the defined legal relationship as subject matter of the arbitration clause.[42] In addition the subject matter of the dispute should be arbitrable.[43] As for the formal validity, the Law prescribes writing requirement for the arbitration agreement.[44] The Law does not set forth any obligation to expressly identify the

40 Lee S., 2014. Case Update: Seat of Arbitration and Implied Choice of Governing Law of Arbitration Agreement. Singapore International Arbitration Blog. Accessed 15 October 2017.

41 The Law of Georgia on Arbitration, Article 8, subparagraph 1.

42 UNCITRAL 2012 Digest of Case Law on the Model Law on International Commercial Arbitration, pp. 26-27.

43 Ibid. p. 40.

44 Ibid. p. 25.

arbitral institution or employ the word "ad hoc". In addition, there is no requirement to specify information such as the place of arbitration, number of arbitrators, language or applicable law.[45] Such information is not mandatory and it can be determined by the tribunal or the institution itself when the tribunal will be constituted.[46] In case of ad hoc arbitration, when the parties refuse to appoint the arbitrators to jeopardize the process, the court is the competent to appoint and constitute the tribunal.[47] Unfortunately, the Supreme Court constantly repeats that the parties are required to put the specific arbitration institution in the clause and by saying that, they excluding the possibility of ad hoc arbitration, which is perfectly allowed under the Law and the Model Law. There is a whole provision in the Law, which gives the power to the court to appoint the tribunal or decides the challenges on the conflict of interests with the arbitrators.[48]

The problems, which may arise from the validity of arbitration agreement are usually connected to the interpretation of the binding commitment of the parties, when they choose both arbitration and the court or when there is the asymmetrical arbitration clause, giving option to either parties for arbitration or the court or issue might be the multi-step arbitration clause, which requires parties to undertake consultations or the mediation before the arbitration.[49] However, there is no Model Law country, which requires express choice of arbitral institution in their arbitration clause or agreement for the substantive validity. It should be stressed that the Supreme Court did not really base its reasoning on any legal ground. Rather it was referring to the past practice as the justification of its argument, which is simply wrong. The Supreme Court clearly made up this requirement out of nothing and the approach should be changed because it impliedly excludes the possibility of ad hoc arbitration.

b) General agreement on arbitration means ad hoc arbitration

As it was mentioned the Supreme Court in the 2011 Judgment deemed invalid arbitration clause, which stated that the dispute should be resolved by the commercial arbitration with one arbitrator. In the 2016 Judgment the Supreme Court somehow stated that if the parties' wanted ad hoc arbitration, they should have explicitly mentioned words "ad hoc" in their arbitration clause. However, this is not correct. The Supreme Court treats the clauses referring to arbitration without any specific arbitral institution or mentioning word "ad hoc" as the pathological arbitration clauses. In fact, such clause is merely the agreement on ad hoc arbitration and there is nothing pathological about it. Common features of the pathological clauses include non-existent arbitration institution or when the name of the institution is not correct, for instance references to "the official Chamber of Commerce in Paris, France" and "a Commission of arbitration of French Chamber of Commerce, Paris" or similar clauses were upheld as valid arbitration clauses by the International Chamber of Commerce (ICC) even though the reference was not correct.[50] Pathological clause includes when the appointing authority refuses to act and appoints the members of the tribunal.[51]General trend is that pathological clause is invalid if the pathology cannot be cured.

However, there is a completely different situation when the arbitration clause simply says that the dispute will be resolved by the private arbitration. This type of clause is valid under the Law – it conforms to substantive validity requirements. It clearly expresses the binding commitment of the parties to refer any controversies between the parties to the arbitration, which itself will be ad hoc arbitration. The UNCITRAL Model Arbitra-

45 Ibid. p. 28.
46 Houtte H., 1989. Conduct of Arbitral Proceedings, in: Sarcevic P., (ed). Essays on International Commercial Arbitration. Graham Trotman & Martinus Nijhoff, London p. 116.
47 Redfern A., Hunter M., Blackaby N., Partasides C., 2004. Law and Practice of International Commercial Arbitration. Sweet & Maxwell, London paragraph. 4-24.
48 The Law of Georgia on Arbitration, Article 11 on the appointment of the arbitrators and the Law of Georgia on Arbitration, Article 13 on the challenges of the arbitrators.
49 UNCITRAL 2012 Digest, p. 27.
50 Lee S., 2013. Pathological Arbitration Clauses. Singapore International Arbitration Group. Accessed 15 October 2017.
51 Ibid.

tion Rules have model arbitration clause, which specifies that "Any dispute, controversy or claim arising out of or relating to this contract, or the breach, termination or invalidity thereof, shall be settled by arbitration in accordance with the UNCITRAL Arbitration Rules."[52] Difference between this clause and the clause, which was deemed invalid in the 2011 Judgment, is reference to UNCITRAL Arbitration Rules and this reference is not mandatory for the validity of the arbitration agreement. In practice no one really says words "ad hoc" in their arbitration agreement. When the parties do not specify the arbitral institution and the agreement simply says that dispute shall be resolved by arbitration, such clause indeed is ad hoc arbitration clause.

c) The Supreme Court's failure to apply relevant validity requirements

In the 2016 Judgment the Supreme Court deemed invalid the arbitration clause, which stated that the dispute should be resolved in accordance with the English legislation, place of jurisdiction – London. The title of the provision referred to "Arbitration." This clause may or may not be invalid but not because what the Supreme Court stated. The Supreme Court said that this clause is invalid because it did not refer to any specific institution or it failed to explicitly stated words "ad hoc." This is not correct. As it was mentioned there are no such requirements in the Law. There is more obvious case in the 2011 Judgment, where the Supreme Court did not recognize the clause, which stated the controversies should be resolved by arbitration. The Supreme Court's argument that this type of clause gives jurisdiction more than one arbitral institutions is wrong. In reality it does not really give jurisdiction to any arbitral institutions. Rather it is ad hoc arbitration clause, which excludes the jurisdiction of the national courts. The Supreme Court failed to identify it.

Conclusion

The New York Convention was adopted to have the same approach on the enforcement procedure in different jurisdictions. It needs to be stressed that the New York Convention's idea is the enforcement of the foreign arbitral awards and not the refusal to the recognition and enforcement. The grounds, which are listed in Article V, are exceptions and it shall be applied with cautious and pro-enforcement basis. Invalidity of the arbitration agreement should be accepted only in the manifest cases.

The Supreme Court came up with the requirement for the validity of the arbitration agreement, which does not really come from any legal provision in the Law or the New York Convention. The Supreme Court seems to employ the legal test, which narrows the scope of the Model Law by implicitly excluding ad hoc arbitration clauses. When the Supreme Court is faced to decide on the enforcement of the foreign arbitral award, they need to identify what is the applicable law to the arbitration agreement. By doing that the Supreme Court will respect the provisions of the New York Convention and autonomy of the arbitration agreement. Secondly, the Supreme Court needs to abandon the approach by which it is required to have a specific reference to the arbitration institution. Substantive and formal validity of the arbitration agreement, which is prescribed in the Law, does not contain such requirement.

Resume

The cornerstone of the international commercial arbitration is an agreement, by which the parties undertake to submit the disputes to an institutional or ad hoc arbitral tribunal. The arbitration agreement is the first step for formation of the arbitral tribunal and rendering the arbitral award. The validity of the arbitration agreement also plays a pivotal role during the enforcement stage in different jurisdictions. Article V.1.a of the New York Convention 1958 on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention) provides the possibility to refuse recognition and enforcement of the foreign arbitral award if "the

52 UNCITRAL Arbitration Rules, Annex.

parties to the agreement referred to in article II were, under the law applicable to them, 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 the country where the award was made." The Supreme Court of Georgia (the Supreme Court) has established the practice by which the substantive validity of the arbitration agreement depends on the specific reference to the arbitration institution. That approach does not correspond to any legal provision in the Law of Georgia on Arbitration (the Law) and the New York Convention. The present article provides critical analysis of recent judgment of the Supreme Court and explains the right approach for determining the substantive validity of the arbitration agreement under the New York Convention.

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საარბიტრაჟო შეთანხმების ნამდვილობის წინაპირობები საქართველოს უზენაესი სასამართლოს პრაქტიკის მიხედვით

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საკვანძო სიტყვები: შეთანხმება, ნამდვილობა, კონვენცია

რეზიუმე

საერთაშორისო კომერციული არბიტრაჟის ქვაკუთხედს წარმოადგენს შეთანხმება, რომლის მიხედვითაც მხარეები იღებენ ვალდებულებას მათ შორის წარმოშობილი დავა გადასცენ ინსტიტუციურ ან ad hoc საარბიტრაჟო ტრიბუნალს. საარბიტრაჟო შეთანხმება არის ტრიბუნალის შექმნისა და საარბიტრაჟო გადაწყვეტილების მიღების პირველი ნაბიჯი. საარბიტრაჟო შეთანხმების ნამდვილობა აგრეთვე მნიშვნელოვან როლს ასრულებს სხვადასხვა იურისდიქციაში საარბიტრაჟო გადაწყვეტილების აღსრულების დროს. უცხო ქვეყნის საარბიტრაჟო გადაწყვეტილებების ცნობისა და აღსრულების შესახებ ნიუ იორკის 1958 წლის კონვენციის V.1.ამუხლი განსაზღვრავს, რომ საარბიტრაჟო გადაწყვეტილების აღსრულებაზე უარი დასაშვებია თუ „მე-2 მუხლში მითითებული შეთანხმების მხარეები, მათ მიმართ მოქმედი კანონის მიხედვით, ქმედუუნარონი იყვნენ, ან საარბიტრაჟო შეთანხმება ბათილია იმ სამართლის მიხედვით,

რომელსაც მხარეებმა ეს შეთანხმება დაუქვემდებარეს, ხოლო ასეთი მითითების არარსებობისას, იმ ქვეყნის კანონმდებლობის მიხედვით, სადაც გამოტანილი იქნა საარბიტრაჟო გადაწყვეტილება." საქართველოს უზენაესი სასამართლოს პრაქტიკის მიხედვით საარბიტრაჟო შეთანხმების ნამდვილობა დამოკიდებულია იმ ფაქტზე თუ რამდენად უთითებს შეთანხმება კონკრეტულ საარბიტრაჟო ინსტიტუტზე. აღნიშნული მიდგომა არ შეესაბამება არბიტრაჟის შესახებ საქართველოს კანონს და ნიუ ორკის კონვენციას. წინამდებარე სტატიის მიზანია უზენაესი სასამართლოს პრაქტიკის კრიტიკული ანალიზი ნიუ იორკის კონვენციით გათვალისწინებული საარბიტრაჟო შეთანხმების ნამდვილობის წინაპირობების მიხედვით.