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FORMAL AND LEGAL BASIS FOR THE INSTITUTIONALISATION OF INTERNATIONAL COMMERCIAL ARBITRATION: 100 YEARS OF EXPERIENCE*

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Abstract. The article reveals the formal-legal basis for the institutionalisation of international commercial arbitration. It is found that states are still far from a unified understanding of the basic scope of human rights, but they have a clear common vision of the mechanism for protecting the interests of international commerce. Against the background of the economic and innovative successes of the EU and other countries in the world that have made human rights a priority, it would appear that the source of modern transnational trade problems lies precisely in another group of states in which commercial interests dominate human rights. This second type of state nourishes its development at the expense of the innovations of the first type of state, its constructive and passionate representatives. Innovative solutions are formulated by the freest people, whose freedom is legally and organisationally guaranteed, which becomes a source of release for their creative, productive existential energy. Therefore, the contradictions between these two types of entrepreneurs of nations give rise to commercial disputes regarding the path of development, as well as legal conflicts within each of these types of nations regarding the vector of development or decline. Strategically, it is an ontology of modern problems of international commercial disputes. It is emphasised that the institutionalisation of international commercial arbitration is conceived as the creation of legal models for interpretation, determination of cause-effect relations, assessment of all essential circumstances of commercial relations, about which the parties of this type of social interaction have not reached an agreement and are forced to turn to mediators, to whom they entrust jurisdiction over the dispute between them. It was noted that the legal reality of the institutionalisation of international commercial arbitration reflects the path of human development, which at the present stage is marked by crisis. Logical, rational, clear law is in a permanent process of critical evaluation of the synergy of creative, risky, adventurous, pragmatic entrepreneurship. Ideal legal models absorb the constructive activity of entrepreneurship, foreseeing its long-term prospects as positive. At the same time, it is the task of lawyers to reject those types of economic relationships that threaten common humanity. In conclusion, the UN Commission on International Trade Law is the only global body designed to ensure the optimal course of correlation processes between private international law and transnational commercial activity. At the same time, however, this Commission suffers from all the consequences of the UN's dysfunction. This is particularly evident in the UN's inability to prevent wars, famines, environmental disasters, military crimes and other global crises. It is advisable for the states to create a separate organisation in which they can coordinate their legal standards of joint entrepreneurship in the extractive industries, production, trade, finance, as well as the global environmental, national economic and other consequences of commercial projects. This organisation would become a convenient platform for honest parity in the unification of the legal practice of transnational entrepreneurship and the settlement of its disputes, based on the legal customs and traditions of different nations. This would provide a significant impetus for the healthy creation and application of international private law, capable of determining the vector both of global progress and of appropriate transformations in domestic national economic policies.

Key words: arbitration, commercial disputes, convention, entrepreneurs, institutionalisation, private law, trade, UNCITRAL.

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1. Introduction

Modern society continues to actively implement innovative solutions. The basic subject of this trend remains the entrepreneur, whose nature is determined by the desire to obtain material goods as a result of the implementation of his ideas. Entrepreneurial initiatives determined by profit are inherently risky, and without an organising influence they condemn humanity to crises critical to survival, such as the world economic crises of 1900–1903, 1929–1933, 1998, 2008. In this context, the question of premature influence on entrepreneurs by legal instruments becomes relevant, which in the current conditions of global markets show their effectiveness not so much at the national level, but at the international level of both public-legal and private-legal relations.

Transnational transformations of business life invented the institution of alternative administration of justice by arbitrators as opposed to state courts. As expected, this led to a higher degree of protection of the interests of business structures at the beginning of the XX century, when the first international documents appeared: Protocol on Arbitration Clauses of September 24, 1923 and Convention on the Enforcement of Foreign Arbitral Awards of September 26, 1927 (Protocol on Arbitration Clauses of 1923; Convention on the Enforcement of Foreign Arbitral Awards of 1927). Simultaneously, no special international legal institutions have emerged as an alternative to the relevant state bodies for the protection of workers' rights and the fair distribution of corporate profits in favour of socially vulnerable groups (children, women, the disabled, the elderly). In this way, the broken legal equilibrium is superimposed on other determinants of social contradictions and increases the tendency towards instability within society and between nations. Deprived of a fair distribution of benefits, workers and their families disintegrate and seek to integrate into those social structures that correspond to their level of spiritual development. The prognosticfunction of the behaviour of individuals and societies under these conditions is significantly weakened, as it is based on a greater number of variables not regulated by legal criteria, their quantitative indicators and probable deviations.

The essence of the jurisdictional mechanism of international commercial arbitration is to enforce the decision of a dispute arising between entrepreneurs in the sphere of their foreign economic interests. However, ontologically, the demand for this institution and its jurisdictional mechanism arises only due to the lack of a support resource from the employees of such entrepreneurs. The angle of attention of each businessman is narrowed exclusively by his own interests, the expansion of the base of such interests at the expense of the interests of the working masses makes it possible to obtain a larger area for joint decisions, mutual understanding and peaceful settlement of disputes without the involvement of third parties – arbitrators. The question of the institutionalisation of international arbitration is determined by the axiological basis of the businessmen's activity, which is strategically socially destructive without taking into account the interests of the employees and without observing the principles of the rule of law.

The century of the formal-legal institutionalisation of international commercial arbitration – 1923–2023 – is characterised by the dynamic development of the legal framework, organisational components and practices of the resolution of commercial disputes of entrepreneurs in their foreign economic activities. For example, the six-year statistics of cases considered by the Vienna International Arbitral Centre show a jump in the aggregate amount of disputes in 2022 compared to each of the previous 5 years: 2022 – 1,034,000,000.00 EUR (41 cases); 2021 – 554,169,491.00 EUR (41 cases); 2020 – 428,000,000.00 EUR (72 cases); 2019 – 450,000,000.00 EUR (79 cases); 2018 – 432,267,059.00 EUR (120 cases); 2017 – 622,573,318.00 EUR (84 cases) (The Vienna International Arbitral Centre (2017–2022); Altenkirch, Barros Mota, Rheinwald, 2023). The London Court of International Arbitration notes that while the number of cases referred from North American parties has declined (from 10% of parties in 2021 to 5% in 2022), the percentage of parties from Asia has tripled (from 8% of parties in 2021 to 24% in 2022) (Tevendale, Kantor, 2023).

Every year, the Arbitration Institute of the Stockholm Chamber of Commerce resolves nearly 200 disputes between parties from 40-50 different countries. In 2021, the total value of disputes amounted to 2 billion EUR (Better process and better resolution of commercial disputes). For comparison, in 2021, 27 local economic courts of Ukraine (the court of first instance in commercial disputes) considered 181,500 cases with claims for the total amount of 1,25 trillion UAH, of which they ordered the recovery of 491 billion UAH (39.3%) (Analysis of the justice administration state in the consideration of economic cases for 2021). At the exchange rate of the UAH to the EUR 30.7760 in 2021, the amount in EUR is 40,616,064,465.82. Mathematically, it turns out that in 2021 one state commercial court of Ukraine will consider claims for the total amount of 1,504,298,684.00 EUR.

2. Analysis of Recent Thematic Resources

The degree of scientific development of the problem raised in the work is determined by the achievements of scholars specialising in the theory of law, private international law, commercial procedure, judicial system and other legal sciences, as well as international economics, etc. A large number of scholars have made successful attempts to define the content of international commercial arbitration and its components, to identify the key concepts and components of this legal phenomenon. F. Bettencourt Ferreira, G. B. Born, M. Cavaleiro Brandão, M. Esperança Pina, A. Jan van den Berg, J. Miguel Júdice, C. Pimenta Coelho, A. Pinto Monteiro explained the various aspects of the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards; P. Costa e Silva, C. Friedrich Nordmeier, D. M. L. de Moura Vicente – the enforcement of national and foreign arbitral awards in Portugal; O. Frolov – ways to improve the regulation of international commercial arbitration; F. E. Klein – notes on private international arbitration law; V. Komarov – international commercial arbitration as a contractual jurisdiction; Z. V. Krasilovska – theoretical and legal aspect of the establishment of the institution of mediation in the system of public administration; S. Kravchuk – legal prerequisites for consideration and resolution of disputes in international commercial arbitration; P. Capper, J. Epstein, H. Gabriel, R. Garnett, L. Pinheiro, A. Ribeiro Mendes, S. Ribeiro Mendes, J. Waincymer – transnational arbitration; O. P. Podtserkovny – international commercial arbitration procedures and enforcement of arbitral awards as a new legal cluster; A. Sampaio Caramelo – interim and partial awards in arbitration proceedings (their subject matter and regime); A. Y. Yunus Emre – public policy of a refusal of recognition and enforcement of foreign arbitral awards; and other scientists. In view of the above, the subject of the study is those systemic links of international arbitration which have remained unaddressed by scholars.

3. Objectification of Knowledge on Commercial Arbitration in International Legal Acts

The objectification of law runs up against political expediency, economic utility and other non-legal factors. Its rejection of legal nature essentially denies human nature, since law is by definition anthropomorphic. The nature of man is measured by his virtues. The legal institution of international commercial arbitration does not become an exception to the established general pattern of creation and practical implementation of law. Furthermore, the contradiction between economic interests and legal values, between the state's desire to administer justice and private individuals' desire to resolve their economic disputes by means of international arbitration, is intensifying in this area. For instance, the Portuguese Voluntary Arbitration Law of 2011, which includes a Chapter X on the recognition and enforcement of foreign arbitral awards, reproduces the Convention rules on the subject and regulates enforcement procedures. The basic rules of the Convention have thus been incorporated into Portuguese domestic law and are now also applicable to the recognition and enforcement of foreign arbitral awards not covered by the Convention or by any other international convention. In the Portuguese Code of Civil Procedure 2013, the special rules on arbitration, arbitral judgement ('julgamento arbitral') are the provisions of Articles 1082–1085 of Volume 6 "Of the necessary arbitral tribunal" of the Code. The Article 152 defines: "Judges have the duty to administer justice by issuing orders ('despacho') or sentences ('sentença') in pending cases and by complying, in accordance with the law, with the decisions of higher courts. A 'sentence' is the act by which the judge decides the main case, or an incident that represents the structure of a case. The decisions of the collegiate courts are called judgments ('acórdãos'). Orders of mere expediency are intended to ensure the normal course of the proceedings without interfering with conflicts of interest between the parties; orders that resolve issues that are left to the judge's discretion are considered to be within the legitimate exercise of discretion." According to Part 3 of Article 85: "If the award was rendered by arbitrators in an arbitration held in Portuguese territory, the court of the district where the arbitration was held shall have jurisdiction to enforce the award." Under Portuguese law, an "arbitral award" is an act whereby one or more arbitrators decide, in whole or in part, on the merits of a dispute submitted to them. Portuguese-speaking countries have concluded a number of bilateral judicial cooperation treaties which provide for the enforcement of foreign arbitral awards. This is the case of the treaties with São Tomé e Príncipe (1976, amended 1998), Guinea-Bissau (1988), Mozambique (1990), Angola (1995) and Cape Verde (2003) (Lei da Arbitragem Voluntária Lei n.º 63/2011; O Código de Processo Civil 2013. Lei n.º 41/2013; Bermann, 2017).

Historically, arbitration has been essentially a judicial process whereby a dispute between two or more parties is decided by a tribunal (usually consisting of one or three persons) appointed pursuant to an agreement between the disputing parties. The agreement between the disputing parties is called an arbitration agreement. The usual way in which such a tribunal is constituted is for each party to appoint

its arbitrator and/or for the two arbitrators so appointed to appoint a third arbitrator who will act as chairman. There is, of course, control over who a party appoints as its arbitrator. Parties may spend a considerable amount of time and effort trying to identify the best person to appoint as an arbitrator, in the hope of influencing the eventual composition of the tribunal in a way that will favour their case. An arbitral tribunal appointed under an arbitration agreement will have jurisdiction or power to decide the disputes which the parties have expressly or impliedly reserved to it by agreement. After hearing the evidence and arguments of the parties, the tribunal will normally decide the disputes referred to it by issuing a decision in the form of an award. International commercial arbitration is often distinguished from investor-state or investment treaty arbitration. The latter are arbitrations between investors from different states for breach of obligations allegedly owed by one state to investors from another state. These obligations will typically arise from Free Trade Agreements (FTAs) or Bilateral or Multilateral Investment Treaties (BITs or MITs) between states. The law applicable to disputes between investors and a State under an FTA, BIT or MIT will usually be public international law, as opposed to the law of a particular country (Reyes, 2018). The unity of legal requirements and a special mechanism of their practical implementation in the field of international commercial arbitration, formalised in national and international legislation, as well as in relevant acts of the court and other judicial and/or administrative bodies, constitutes the essence of legal institutionalisation of the subject studied in this work. Its problems reflect both general challenges that are characteristic of the entire

Table 1
Formal definition of the institution of commercial arbitration in international legal acts of 1923–2023

№	Title of the international legal act on commercial arbitration
1.	PROCEDURAL LAW OF INTERNATIONAL COMMERCIAL ARBITRATION
2.	Protocol on Arbitration Clauses of 1923. Geneva. League of Nations, Treaty Series, Vol. 27, p. 157
3.	Convention on the Enforcement of Foreign Arbitral Awards of 1927. Geneva
4.	United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, June 10, 1958)
5.	The Rules of Arbitration of the United Nations Commission on International Trade Law were adopted on December 15, 1976 at the 99th plenary session of the United Nations General Assembly by Resolution No. 31/98, revised in 2010, 2013 and 2021 and supplemented by the following rules relating to: 1) multilateral arbitration and pooling, liability and objection procedures for experts appointed by the arbitral tribunal; improvement of procedural efficiency, including revised procedures for replacing arbitrators, the requirement of reasonableness of costs and a mechanism for reviewing arbitration costs; temporary measures (2010); 2) transparency of arbitration proceedings between investors and the State based on contracts initiated in accordance with the investment agreement (2013); 3) expedited arbitration with the express consent of the parties (2021) (Arbitration Rules of the United Nations Commission…)
6.	European Convention on International Commercial Arbitration. Geneva, April 21, 1961
7.	Multilateral Inter-American Convention on international commercial arbitration, January 30, 1975
8.	Amman Arab Convention on Commercial Arbitration, April 14, 1987
9.	UNCITRAL Model Law on International Commercial Arbitration (1985), with amendments as adopted in 2006, etc.
10.	Recommendation regarding the interpretation of article II, paragraph 2, and article VII, paragraph 1, of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done in New York, June 10, 1958 Adopted by UNCITRAL on July 7, 2006
11.	Resolutions of the UN General Assembly on arbitration in foreign economic activity with recommendations for the implementation of relevant legal templates into national legislation (Establishment of the United Nations Commission on International Trade Law)
12.	An international regional legal act, in particular, a statute, a charter of international commercial arbitration and arbitration rules (The Charter of the Commercial Arbitration Centre...; Arbitral rules of procedure and amendments...)
13.	National laws on international commercial arbitration (International Arbitration Act on October 31, 1994)
14.	Arbitral Rules of Procedure of international commercial arbitration, which allow parties and arbitrators to formulate effective procedures tailored to the specific case
15.	Arbitration clauses in foreign trade contracts, which constitute an obligation of the parties to the transaction to submit all disputes arising between them to international commercial arbitration and/or state courts.
16.	Awards and practice of international commercial arbitrations (Selected Austrian Supreme Court Decisions on Arbitration)
17.	Legal doctrine of procedural law of international commercial arbitration
	SUBSTANTIVE INTERNATIONAL COMMERCIAL LAW
18.	UNs' conventions, international agreements and other legal documents on the obligations of parties to commercial relations (UN Convention on Contracts for the International Sale of Goods on April 11, 1980; UN Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea)
19.	Foreign economic contracts
20.	Awards and practice of international commercial arbitrations (Selected Austrian Supreme Court Decisions on Arbitration)
21.	Legal doctrine on obligations in international commerce (Zheng, 2020; UNCITRAL Model Law on Electronic Commerce...)

spectrum of legal development, and unresolved issues that are specific to arbitration procedures for resolving legal disputes of entrepreneurs in their foreign economic activities.

Overall, developments in arbitration law can be seen as part of a trend towards unification and harmonisation of international commercial law in general, as tribunals apply increasingly similar legal principles. While arbitration is fundamentally a process for resolving a dispute between individual parties and must take into account their needs and wishes, the goal of party autonomy has proved surprisingly consistent with harmonisation: first, because most national laws have adopted the party autonomy approach, making it a "harmonised" principle, and second, because of the increasing use of institutional arbitration (Garnett, 2002). The substantive legal form of international commercial arbitration institutionalisation is a set of thematic legal acts. Its appearance is historically determined by the inability of the state to respond in a timely manner to all essential issues in any type of legal relations, and even more so in the field of foreign economic activity. The regularities of the development of this sphere were at best understood by its direct participants. These are businessmen and employees, especially consultants in the field of security, law, specialised production and other issues. The tax, currency and other benefits to the state of doing business in foreign markets are undeniable. The problems of fair pay and adequate labour protection, social protection of employees are transferred to the public authorities of the countries where foreign economic activity is carried out. The authorities will not gain political advantage from such entrepreneurs in domestic affairs, but in foreign policy they will gain additional levers of influence on other countries. For example, the growth of the political influence of the People's Republic of China in a number of African countries is determined by the foreign economic activity of its entrepreneurs; the same regularity of action in relation to the Kingdom of Belgium in Rwanda, the USA, the United Kingdom of Great Britain and Northern Ireland, the EU countries, the State of Japan, the Republic of Singapore and a number of other countries of the world in the XXI century.

There is a positive correlation between democratic progress, legal reform and economic development. The economic crisis affects legal protection, justice and security for the most vulnerable and marginalised. Laws and regulations governing finance and trade are not purely technical matters, but embody particular political preferences. Its effectiveness should not be measured in isolation, but in the context of the broader goals of sustainable, equitable and inclusive growth (para. 319). In this respect, UNCITRAL has an important role to play in ensuring that effective commercial law addresses the root causes of many international problems, such as migration caused by impoverishment, inequality and internal conflicts, or unequal access to common resources (para. 320) (Report of the United Nations Commission on International Trade Law, 43rd session).

As can be seen, states have not had, and do not have, any significant reasons to slow down the process of creating a system of international regulatory acts on arbitration. On the contrary, it is a great advantage for the states that not only their own businessmen gain economic advantages abroad, but also that they settle their commercial disputes among themselves independently. In fact, there is now an entire institution of commercial justice that resolves disputes between entrepreneurs in foreign economic activity, with the total cost of claims often exceeding the total cost of claims considered by national commercial courts.

4. Synergistic Impact of the Formal and Legal Component of Institutionalisation on its Organisational and Legal Component

All the above-mentioned conventions and other documents defining the rules of commercial arbitration represent a formal-legal mechanism for giving such arbitration a legal content of the international level. International commercial arbitration can be divided into two types according to the criterion of duration. The first type is an institutional permanent organisation, which is established and operates in accordance with its own statutes, regulations and other rules. The second type is the ad hoc international commercial arbitration (from the Latin "especially for this"), as a temporary organisation created by the parties to the dispute and which ceases to exist after its consideration. This type of arbitration is managed by the country's specialised arbitration institution for procedural rules, administrative support, guidance and supervision. It is considered more acceptable for resolving complex international commercial disputes. The choice of ad hoc arbitration may be appropriate in cases involving relatively small claims and/or disputes where the parties trust each other and are willing to work together for mutual success. The organisational institutionalisation of international commercial arbitration thus precedes its formal legal recognition. Although strictly speaking the London Court of Arbitration is a national body, it plays a special role in relations between British and foreign business people. Established in 1903 through the joint efforts of the Corporation of the City of London and the London Chamber of Commerce, the London Court of Arbitration evolved from the London Chamber of Arbitration founded in 1892. It is worth noting that, unlike the American practice,

the rules of the London Court of Arbitration provide for an arbitration clause which determines in advance the law applicable not only to the arbitration but also to the contract as a whole (Nestor).

The Arbitration Institute of the Stockholm Chamber of Commerce was founded in 1917 and operates entirely without commercial or political interest as a non-profit and independent entity within the Chamber (Better process and better resolution of commercial disputes), International Chamber of Commerce – 1919 within the general statutory mission of making business work for everyone, every day, everywhere by promoting open international trade and investment systems that foster peace, prosperity and opportunity for all (International Chamber of Commerce).

The American Arbitration Association (AA) was founded in 1926 to promote the practice of arbitration both within and outside the United States. The American AA was formed by the merger of the Arbitration Society of America (founded in 1922) and the Arbitration Foundation (founded in 1926) under the auspices of the New York Chamber of Commerce. It has had a considerable influence on the development and standardisation of arbitration law in the various American states and has contributed to the organisation of arbitral institutions in the Western Hemisphere. Under the rules adopted by the American AA, the place of arbitration was of little importance and the parties were free to choose any place other than New York. The Canadian-American system was established in 1943 as a result of an agreement between the American AA and the Canadian-American Commercial Arbitration Commission, with the cooperation of the Canadian Chamber of Commerce. The system consists of two sections, one attached to the Canadian Chamber of Commerce in Montreal and the other attached to the American AA in New York. A standard arbitration clause has been drawn up and recommended to businessmen in both countries. Although it cannot be said that the British Commonwealth has an arbitration system comparable to that in America, the Eleventh Congress of the Chambers of Commerce of the British Empire, held in Cape Town in 1927, adopted a resolution recommending that the various arbitral institutions should conform their rules to a model. The Rules for Commercial Arbitration within the British Empire were adopted by the London Court of Arbitration, the Sheffield and Southampton Chambers of Commerce, the Australian Chamber of Commerce and others. The Arbitration Commission for Foreign Trade was established as a permanent non-governmental body by a decree of the Central Executive Committee and the Council of People's Commissars on June 17, 1932. Its rules of procedure were approved by the Presidium of the Chamber of Commerce of the USSR (Nestor).

The five most popular seats for arbitration today (in order of preference) are London, Paris, Hong Kong, Singapore and Geneva, with "reputation" and "recognition" cited as the main factors for preferring a particular seat. The five locations were chosen on the basis of their established legal framework, the perceived fairness of their legal system, their arbitration law and the degree to which they were perceived to be arbitration friendly in terms of the enforcement of arbitration agreements and awards (Reyes, 2018). In the Asian region, which is a complex mix of common law, Romano-Germanic, Islamic and local legal traditions, the most developed legal frameworks and procedural jurisdictions have institutional forms of arbitration in the Republic of Singapore (Singapore International Arbitration Centre), Hong Kong (Hong Kong International Arbitration Centre), as well as the Japan Commercial Arbitration Association, the Korean Council for Commercial Arbitration and the China International Economic and Trade Arbitration Commission. The Arbitration Rules of the Kuala Lumpur Regional Arbitration Centre (Asian International Arbitration Centre) are effective in resolving commercial disputes using the principles of Islamic law. As the East Asian economies continue their dynamic growth, their importance as a key driver of the global economy continues to grow. With their economic development largely driven by cross-border trade and investment, the prospect of an ever-increasing number of disputes is inevitable. But until recently, arbitration was not a natural choice as a means of resolving disputes. Asian parties did not consider it, nor did they resort to it. This has changed in the last decade. Globally, Asian companies are responsible for a significant proportion of the growth in international arbitration, with the size and number of cases continuing to increase. Much of this success can be attributed to the ability of Asian countries and their institutions to rapidly establish a viable international arbitration architecture. The short period of time in which this has been achieved is unprecedented (Kim, 2014).

The issue of the influence of international commercial arbitration on the scope of state sovereignty in the administration of justice in economic matters is part of the general pattern of replacing the ineffectiveness of the state by effective institutions of private law. The functional scope of the state as a subject authorised by exclusive rights to administer justice is obviously constantly decreasing with the growth of professionalism and comprehensive competence of international arbitrators, especially the qualitative side of their work. At the same time, the fundamental issue of making commercial rules

and arbitral decisions binding remains the exclusive prerogative of the state. Without the possibility of using public coercion to enforce such decisions and rules, the legal basis and awards of international commercial arbitration remain wishful thinking. Only the state, represented by its authorised bodies, continues to make the formal requirements of the law a legal reality.

The application of the UNCITRAL Arbitration Rules or any other waiver provision shall not be construed as a direct or indirect waiver of the privileges and immunities of any State or intergovernmental organisation, including the United Nations and its subsidiary bodies. UNCITRAL noted that the study of the possibility of arbitration in the context of real estate, unfair competition and insolvency may lead to the development of useful recommendations for States. At the same time, the issue of the possibility of an arbitral settlement is linked to questions of public policy, which, as is well known, are extremely difficult to define in a uniform manner (United Nations Commission on International Trade Law Year Book). The New York Convention in no way allows the court hearing the application for enforcement to review the manner in which the arbitrators decided on the merits, subject only to public policy. Even a gross error of fact or law, even if committed by the arbitral tribunal, is not a ground for refusing exequatur (Stati, 2019).

5. Commerciality, Jurisdiction and Other Properties Inherent in the Structure of International Arbitration

The arbitration agreement of the parties has the form of a separate agreement or separate conditions in the contract, which constitutes the legal basis of the commercial relations of the parties. However, its provisions shall apply only to commercial disputes arising in legal relations between the parties. Anything that does not concern the profit and economic benefit of the parties is not included in the subject matter of international commercial arbitration. Relations of a commercial nature include, but are not limited to, the following transactions: any commercial transaction for the supply or exchange of goods or services; distribution agreement; commercial representation or agency; factoring; leasing; construction of works; consultancy; engineering; licensing; investment; financing; banking; insurance; exploitation agreement or concession; joint venture and other forms of industrial or commercial cooperation; carriage of goods or passengers by air, sea, rail or road (Reyes, 2018). The commercial nature of both the disputes themselves and the quasi-judicial bodies that hear them is at the heart of international commercial arbitration. Given their entrepreneurial nature, the parties to a dispute continue to pursue their economic interests – to derive the maximum benefit from their commercial activities. This pursuit, at the time of the application to commercial arbitration, acquires the characteristics of legal inertia, as the parties to the dispute have not reached an agreement and continue to try to satisfy themselves as much as possible. At the same time, they rely on their own idea of the law, the content of its generally binding requirements on the subject of their relationship, but their ideas are clearly different when they are finally forced to turn to a mediator, in this case arbitration, to resolve these differences. It turns out that the energy accumulated by both sides of the future commercial dispute was constructive at the stages when both sides sought, formulated and presented arguments to each other to defend their legal position. In fact, this is the pre-arbitration period for the parties to resolve their differences, which corresponds to the pre-litigation phase of the dispute in the case of an appeal to a state court. The inertia of this energy is given by the reluctance of the parties to listen to the validity of each other's arguments. The peak of this kind of misunderstanding between the parties eliminates the remnants of their legal energy and marks their absolute legal incapacity.

International commercial arbitration is consensual by nature, but to be truly effective it must be recognised and endorsed by a national legal system that places this dispute resolution mechanism within the normative system. This suggests that a degree of judicialisation is inevitable, as the alternative nature of international commercial arbitration has its limits. The judicialised approach to sources of law is not entirely consistent with the flexibility traditionally enjoyed by arbitrators, as it tends to lead to a strict adherence to the letter of the law. Instead, it is argued that arbitrators should adopt a flexible approach to sources of law and contract interpretation. One of the perceived advantages of international commercial arbitration is the commercial problem-solving approach of arbitrators in interpreting the contract and determining the applicable rules of law. Unlike common law judges, who view a contract as an objective record of the parties' intentions, arbitrators, like civil law judges, are quick to discern the parties' subjective intentions, or even the parties' "true intentions". To do so, arbitrators should not be quick to apply a set of rules of law, but should first carefully consider the facts of the case and the parties' legitimate expectations. In cases where the parties have chosen a particular national law to govern their contractual relationship, the arbitrators' approach to the sources of law, i.e., their binding force and authoritativeness, is to be determined according to the applicable law. Similarly, if the parties have agreed

on a choice of law provision, the arbitrators should interpret the contract in accordance with the rules of interpretation of the chosen law (Ilieva, 2016). The legal specificity of the dispute subject to international commercial arbitration is manifested in the transformation of the counterproductive legal energies of the parties to the dispute into productive legal energies formalised by the decision of this arbitration. The inertia of the disputants' intentions is manifested in the fact that they continue to seek more than they deserve. The arbitrators are called upon to point out the legal truth that the disputants do not want to recognise. It is well known that there is only one such truth, and it is more or less obvious to anyone who is familiar with the problem in question. Another thing is that the theoretical construction of business self-regulation, especially in matters of resolving disagreements between parties, is in constant conflict with the desire of every businessman to get the maximum benefit from his actions. The manifestation of the negative effects of this characteristic of entrepreneurship, which is inherent in its nature, is the determination of social crises. This is neutralised by the law, the nature of which is balanced. Accordingly, arbitrators assess claims based on the parameters of the interests of both sides of the case, as well as the criterion of the justification of these interests from the point of view of law, its principles – justice, equality, competition, freedom, openness to progress and other common human values. All these interrelations indicate that the legal specificity of international commercial arbitration has at least two components: substantive and procedural. Arbitrators have to deal with both dimensions of the judicial stage of the resolution of foreign economic disputes between entrepreneurs, which requires appropriate qualifications both in the subject matter of the dispute and in the procedures for its successful resolution.

The historical and legal movement of the institute of international commercial arbitration has gone from formalising the rules of arbitration of commercial disputes outside state courts to finding procedural and legal answers to the issues caused by the mediation of international trade by digital technologies. Information and computer technologies have developed various means to link information in electronic form to specific individuals or organisations, to ensure the integrity of such information, or to enable individuals to demonstrate their right or authority to access a particular service or information repository (UNCITRAL). Digitalisation in the algorithms of arbitration of international commercial disputes is a modern development trend that should be encouraged. In particular, the method of settling disputes using Internet technologies is the system of algorithms for online dispute resolution (further – ODR). It is currently used in domain name dispute resolution, internal complaint mechanism and online arbitration. These three types of ODR schemes represent the main trend in e-commerce dispute resolution. Other types of e-commerce disputes include sales disputes and payment disputes between sellers and buyers arising from electronic transactions. A domain name dispute is a special type of e-commerce dispute because it involves disputes between domain name registrants and trademark owners who have no direct contractual relationship before the dispute arises. The "first come, first served" nature of domain name registration has attracted speculators who buy domain names similar to the trademarks of famous companies ("cyber-squatting") and resell these domain names to the trademark owners for a profit. The unique structure of domain name dispute resolution has inspired ODR providers to develop a set of built-in dispute resolution rules and self-enforcement mechanisms. Examples of artificial intelligence in dispute resolution include knowledge-based systems, machine learning, natural language processing and sentiment analysis (Zheng, 2020). International commercial arbitration continues to be the preferred method of resolving cross-border disputes in international trade. The guaranteed enforceability of arbitral awards is considered to be the most valuable feature. The successful enforcement of foreign arbitral awards is essential for any foreign investor targeting emerging markets that can offer business opportunities, legal certainty and timeliness (Hathout, Abdul Rahman, Md. Nor, 2020). With the increasing complexity and globalisation of international trade, parties expect not only a final resolution of disputes, but also that their rights can be protected until a final award is rendered, which is one of the most challenging areas of international commercial arbitration (Zhang, 2020; Kurkela, Turunen, 2010).

6. Conclusions

So, this year, humanity is celebrating the centenary of the formal international legal settlement on 24 September 1923 at the level of a protocol for the institution of transnational commercial dispute settlement, an alternative to state justice. The first international document on fundamental human rights was agreed upon in the form of a declaration a quarter of a century later.

According to the criteria of both the historical moment of the state's emergence, the agreed will, and the legal status of the document, the priority of humanity is commercial interests, and not the only humanitarian standard of those who satisfy these

commercial interests. At present, states are still far from a common understanding of the scope of fundamental human rights, except for a more or less developed system of human rights protection in the countries of the European Union. In the light of the economic and innovative successes of the EU and other countries around the world that have made human rights a priority, it seems that the source of the problems of modern transnational commerce lies precisely in another group of states where commercial interests dominate human rights. This second type of state nourishes its development at the expense of the innovations of the first type of state, its constructive and passionate representatives. Innovative solutions are known to be formulated by the freest people, whose freedom is legally and organisationally guaranteed, which becomes a source of release of their creative, productive existential energy. Thus, the entrepreneurial contradictions of these two types of nations give rise to commercial disputes over the path of development, and legal conflicts within each of these types of nations over the vector of development or decline. In strategic terms, this is the ontology of the modern problems of international trade disputes.

The institutionalisation of international commercial arbitration is conceived as the creation of legal models for the interpretation, the determination of cause-and-effect relationships, the assessment of all the essential circumstances of commercial relations, on which the parties to this type of social interaction have not reached an agreement and are forced to turn to mediators to whom they entrust jurisdiction over the dispute between them. Accordingly, this legal phenomenon is distinguished by the following divergent features: 1) the transnational character; 2) the commercial content; 3) the legal procedure; 4) the constancy of the legal foundations (principles and other formally defined norms, customs) and their stabilising influence on the course of the judicial process; 5) the variability of dispute resolution practices, which is determined both by innovations in the content of commercial relations and by general social risks (corruption and other crimes, wars, environmental crises, etc.); 6) the composition of the arbitral tribunal is made up of impartial and competent arbitrators; 7) the parties to the dispute are represented by highly qualified representatives; 8) a relatively high demand for expert opinions on commodity science, specific direction of commercial activity, assessment of its environmental impact, technical components, technological process, logistics, etc. Representatives of international commercial disputes require knowledge, skills and practical experience in three areas at once, namely: commercial, financial, information and other institutions of private international law; rules of market economy and models of market relations management; and commercial procedural law.

The legal reality of the institutionalisation of international commercial arbitration reflects the path of human development, which is currently in crisis. Logical, rational, clear law is in a permanent process of critical evaluation of the synergy of creative, risky, adventurous, pragmatic entrepreneurship. Ideal legal models absorb the constructive activity of entrepreneurship, foreseeing its long-term prospects as positive. At the same time, it is the task of lawyers to reject those types of economic relationships that threaten common humanity. This ignores the positive side of such entrepreneurship in the near historical perspective and/or in relation to a certain circle of individuals, the nation. Although the adoption of all international legal acts on commercial arbitration in foreign economic activity has not caused any complaints from the states, it has been difficult for the states to achieve unity in the area of fundamental human rights. Not to mention the special institute of justice, which is authorised to settle disputes on violation of such fundamental rights, on a number of socio-economic and other human rights, which are objectively already determined by the level of development of human civilisation and need proper provision. However, states are in no hurry to find common legal standards in this matter, unify human rights norms, formalise these norms and assume relevant obligations. The lack of correlation between the perfect meeting of the needs of entrepreneurs through the institution of international commercial arbitration and the backward state of international human rights mechanisms is becoming a regularity. Globally and strategically, this contradiction hinders the development of humanity, as it revives the energy of some at the expense of others, rather than on the basis of the rule of law and the release of everyone's existential energy.

The UN Commission on International Trade Law is the only global body designed to organise and otherwise ensure the optimal course of correlation processes between private international law and transnational commercial activity. The economic imbalance in the world is a consequence of economic warfare, which neither the UN nor its Commission on International Trade Law can eliminate. The political and public-law nature of the UN diminishes the economic and private-law function of its own Commission on International Trade Law and subordinates its initiatives to its own objectives. In fact, it would be advisable for states to create a separate organisation within which they could coordinate their legal standards for joint entrepreneurship in the extractive industries, production, trade, finance, as well as the global

environmental, national economic and other consequences of commercial projects. This would provide a significant impetus for the healthy creation and application of international private law, capable of determining the vector of both global progress and the transformations appropriate to it in domestic national economic policy.

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