

*The Arbitration agreement: The Doctrine of Revocability and Contract
of Adhesion in Armenian context*

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Preface

For centuries the law upon agreements to arbitrate- arbitration awards were held to be unenforceable and at best only the nominal damages were awarded for a breach¹. The situation is much different now, in a world where business is complex and many businessmen, for one reason or another, prefer to submit their differences to an arbitrator instead of resorting to the courts.

One suggested explanation of preferability of arbitration is that businessmen who arbitrate have less interest in the legal rules than in the customs of their trade, which they feel will receive more attention from arbitrators acquainted with those trade customs than from the courts. When businessmen choose arbitration, they do so because court trails often involve more delay and expense.

The core element of my topic is a domestic source of the Arbitration agreement of RA , The law on Commercial Arbitration which regulates the commercial arbitration in Armenia. I'm not going to concern to international character of Arbitration, and the main goal to represent the the nature of arbitrability on national level. I also tried to explore the possibility of revocation of arbitral award and arbitration agreement in Armenian context.

Agreement to arbitrate are of two kinds: those which refer an existing dispute to arbitration, and those which may arise in the future. In this topic we pertained with last one, because we are going to explore the existence of arbitration agreements in adhesion contracts.

Arbitration clauses have been included in standard construction contracts for many years. The clauses typically apply to disputes between all parties involved in a construction project. The rationale behind the broad use of arbitration provisions is that arbitration is a faster, cheaper and less business-disrupting alternative for resolving disputes than traditional litigation in the courts.

¹ International commercial arbitration: commentary and materials: Gary Born, Kluwer Law International , 2001 , NY , p. 156

Unfortunately I have not find any “national” precedent on this subject matter , and tried to analyse the possibility of the doctrine of revocability related to adhesion contracts on Hypothetical case.

I also tried the highlight the relations between state court and arbitral tribunal in Armenia, to show the possibility of intervention of the court in arbitral matters.

My goal is not to represent the advantages or disadvantages of arbitration as a whole, but to show the gaps, which stems from their functions.

The sources of law of arbitration in RA.

The commercial arbitration is regulated by broad spectrum of law and it can be separated by domestic and international statutes². As we are going to explore domestic arbitration agreement, we will represent the domestic sources.

Domestic Sources:

1. Legislation

In the set of domestic sources the main source is The Law on Commercial Arbitration of RA, which was adopted in 2006, and is in force since 2007. It contains 37 articles and wholly regulates the commercial arbitration.

This Law totally coincided with the UNCITRAL Model Law. In recent years the UN has taken the lead in developing more uniformity in International Commercial Law through various conventions and agreements primarily encouraged through the actions of the United Nations Commission on International Trade Law(UNCITRAL).³ Unlike UNCITRAL Model law, which regulates only international commercial arbitration, The Law on Commercial Arbitration of RA is extended on domestic arbitration. This broad scope is more expedient and emphasize the autonomy of domestic arbitration from domestic legal system: the article 28, part 2 of The Law on Commercial Arbitration of RA is stipulates that the arbitrator may choose the collision

² International Commercial agreements:agreements on drafting, negotiating and resolving disputes. Kluwer Law International, 2009, p 12

³ http://www.uncitral.org/pdf/english/texts/arbitration/ml-arb/07-86998_Ebook.pdf

norms, which he considers applicable. Consequently, the arbitrator, who examines the domestic dispute, is not obliged to apply the collision norms, stipulated by 12 Chapter of Civil Code of RA.

The Law on Commercial Arbitration of RA is extended on those arbitration procedures, which seat is RA, as well as on recognition and enforcement of awards of foreign arbitration. In case of controversy of between international treaties and The Law on Commercial Arbitration of RA , the treaties prevail. But sometimes international treaties give priority to domestic legislation. The New York Convention, Art. 7 stipulates ” *The provisions of the present Convention shall not affect the validity of multilateral or bilateral agreements concerning the recognition and enforcement of arbitral awards entered into by the Contracting States nor deprive any interested party of any right he may have to avail himself of an arbitral award in the manner and to the extent allowed by the law or the treaties of the country where such award is sought to be relied upon.*”⁴

As you can notice there is not mentioned about the validity of arbitration agreement. UNCITRAL makes 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, 10 June 1985. It states “... Taking into account also enactments of Domestic legislation, as well as case law, more favourable than the Convention in

⁴ <http://www.wipo.int/amc/en/arbitration/ny-convention/text.html>

respect of form requirement governing arbitration agreements, arbitration proceedings and the enforcement of arbitral award...”⁵

Despite The Law on Commercial Arbitration of RA is only legislative act, which regulates this field, other laws also can be applicable, which are Civil Code of RA, The law of the Republic of Armenia on Compulsory enforcement of court decree etc..

2) Precedent

The analysis of arbitration practice shows, that decisions of arbitral courts are not binding for other courts, the institution of binding precedent does not exist in the arbitration⁶

1. The main reason is a fragmentation of arbitration courts, there is no centralized judicial system as any arbitrator is appointed on ad hoc basis.

2. The other reason is a confidentiality of arbitration awards⁷.

⁵ http://www.uncitral.org/pdf/english/texts/arbitration/ml-arb/07-86998_Ebook.pdf

⁶ The issue was substantiated by Artashes Kakoyan

⁷ International contracts and national economic regulation: dispute resolution through international commercial arbitration, Mahmud Bagheri, Kluwer Law International, 2000, p. 105

Arbitrability

For an arbitration agreement to be effective, it must be the result of the valid consent of the parties. However, it must also be lawful. This means, first, that the agreement must relate to subject matter which is capable of being resolved by arbitration and, second, that the agreement must have been entered into by parties entitled to submit their disputes to arbitration. These considerations are founded on protection of the general interest, which is intended to protect the private interests of the parties to the arbitration agreement.

The question of the arbitrability of a dispute arises in two situations. The first is where certain individuals or entities are considered unable to submit their disputes to arbitration because their status or function. This essentially concerns states, local authorities and other public entities” subjective arbitrability ”or “arbitrability *ratione personae* ”⁸.The second situation where the question of arbitrability of a dispute arises is where the subject-matter of a dispute submitted to arbitration is not one which can be resolved by arbitration. This is known as “subjective arbitrability or” *arbitrability ratione materiae*”⁹. We are going to examine the last one.

The New York Convention imposes upon its Member States a general obligation agreements provided that they are intended to settle disputes that are arbitrable. This is a “*ratione materiae*” notion, which is normally referred to as “objective” arbitrability, which is concerned with the capacity of the parties to submit disputes to arbitration. Such exceptions to the general principle to recognize arbitration agreements is also reflected in the final paragraph of Article II of the

⁸ "Public Policy and Arbitrability," in ICCA Congress Series No. 3, at 177 (P. Sanders ed., Kluwer, 1987)

⁹ Fouchard, Gaillard, Goldman on International Commercial Arbitration (Kluwer International, 1999) eds. Emmanuel Gaillard, John Savage, p 313

New York Convention, dealing with the protection of arbitration agreements to be provided before state courts.¹⁰

The most legal systems recognize that disputes, which do not involve an economic interest can not be submitted to arbitration. For example, the 1987 Swiss Private Law Statute provides that any dispute, which can be assessed in monetary terms may be the subject matter of an arbitration. Even in international arbitration, it is inconceivable, that arbitrators could grant a divorce, hear an action contesting the validity of a marriage, an application to establish paternity, or a case relating human rights.

The Armenian legislation recognizes the disputes of commercial nature. According to RA legislation, to the arbitration can be submitted only commercial disputes. Although the law does not stipulate the “commercial” expression, “the commercial dispute” expression involves all legal relations of contractual and non-contractual nature. Article 2, point 4 of The Law on Commercial Arbitration of RA stipulates

”The concept of “commercial” involves all legal relations of contractual and non-contractual nature. Commercial relations involve following transactions: concluded between banks or financial organizations and consumers, the supply and exchange of goods and services, of commercial representation or agency, leasing, factoring, consultation, licensing, investment, funding, insurance, maintenance or concession ,industrial or joint venture, other kindsof entrepreneurship cooperation, marine ,air, ,rail, automobile transportation ”.

¹⁰ Arbitrability: International and Comparative Perspectives (Kluwer Law International,1999), Loukas A. Mistelis and Stavros L. Brekoulakis, p 91

Some legal relations from above mentioned fields may not be subject to a arbitration award. For instance in the banking or financial sphere, the relations with deposits of physical entities are not likely a subject to arbitration, which can be implemented being heard the case in the court. Armenian legislation gives a clear determination to this problem. As stipulated the RA law on Involvement of Bank Deposit, Article 10

"The depositors' prescribed rights are subject to protection by judicial order, and in case of statutory law , by arbitration , as well as by The Financial System Mediator.

The bank is not entitled to specify arbitration agreement by making of contract "

We can assume, that not commercial disputes can not be subject to arbitration. Consequently the , criminal, environmental, administrative, tax matters can not be submitted to arbitration. But it does not mean that the issues of public character can not be subject to arbitration . So, the concession disputes, which are administrative in nature, can be submitted to arbitration, as they can be considered as commercial, because in the result of maintenance of natural resources is expected a profit.

The marginalization of public policy, the growing trust in international arbitration and assimilation of arbitrators to judges, have allowed arbitration to extend to areas of economic activity involving significant public interest. These include antitrust, intellectual;l property, consumer and securities disputes.

Regarding the consumers' related disputes, RA law on "Protection of consumer rights" does not provide any restrictions , concerning the submission shuch kind of disputes to arbitration.

Although the contracts concluded with consumers can be considered as adhesion contracts .Civil Code of RA Article 444, Point 2 stipulates “The party adhering to the contract has the right to demand the rescission or change of the contract if the contract of adhesion, although does not contradict a statute or other legal acts, deprives this party of rights usually given under contracts of such type, excludes or limits the liability of the other party for the violation of obligations or contains other terms clearly burdensome for the adhering party, that it, on the basis of its reasonably understood interests, would not have accepted if it had the possibility of participating in the determination of the terms of the contract.” It means that the arbitration agreement in some situation can be revoked. But it is not unequivocal. The law on”Protection of Consumer Rights” does not prohibit to settle a consumable disputes by arbitration as well. Thus the consumers are deprived of judicial protection, which is aimed to protect weak parties, one feature which is lacking in case of arbitration. Besides , arbitration costs sometimes can be sufficiently high, which can cause difficulties for consumers with average income. So the consumer , concluding an arbitration agreement , is being deprived of judicial protection, as mentioned above, as well as the factor of inability to pay. Consequently , the consumer’s right is violated, as it is violated **Article 6 of the European Convention on Human Rights** ,which protects the right to a fair trial.

The Revokability of Arbitration award

The Law on Commercial Arbitration of RA does not stipulate the possibility of appeal of arbitration award. The Law also does not stipulate the issue, which relates to situation when after award new circumstances of case are revealed, which are not known in the course of determination of award, and can be affect on the context of it¹¹. In comperative law the reconsideration of award in similar situations is possible under Belgium Law (CJ, Art 1704), Datch law (CJ , Art 1068), Arbitration Act of England (Art 68(2)(g)) etc.¹²

Under the doctrine of *res judicata*, the final judgement on the merits of a case by court prevents an issue from being relitigating. This doctrine also applies to arbitration awards. While this doctrin has a few limitations in arbitration cases, in general, an arbitration award is final, and the matter cannot be litigated again and appealed. Once arbitration is agreed to, it is very rare to be allowed to reject it in favour of litigation¹³

For Recognition of arbitral award, the interference of competent state court is not required. The article 35 of Law on Commercial Arbitration of RA alleges :

¹¹ Comparative Law of International Arbitration, Jean-Francios Poudret, Sebastien Besson, Sweet & Maxwell, 2007, p 487

¹² See infra, p 893

¹³ The Legal Environment of Business. Roger E. Meiners, Al H. Reingleb, Frances L. Edwars, Cengage Learning, 2008, Musiness & Economics, p 66

“Arbitration award which is made in the territory of Armenia.....**may be recognized as compulsory and in the case of written motion to relevant court** in accordance with the present article”

It follows from the above mentioned article, that it is necessary to present written motion to the court only in case of enforcement of award and not in case of recognition. In fact the arbitral award is not subject to implementation without establishment of competent state court.

The party, making a motion for enforcement of award, may represent an award's original document or copy authenticated in due form, as well as the original document or authenticated in due form copy of arbitration agreement. By this act party executes its burden of proof.

The arbitral award can be revoked, if there are grounds stipulated by law and if the certain application is represented in 3 months after the award was made. If the court does not find the grounds for dismissal of enforcement, it provides an enforcement act (execution order), relying on the arbitral award; The law of the Republic of Armenia on Compulsory enforcement of court decree, Article 17 stipulates "The enforcement act is granted based on the decrees and decisions of foreign courts and mediation courts". The enforcement act is a ground for enforcement of arbitration award : The law of the Republic of Armenia on Compulsory enforcement of court decree, Article 4 provide "The enforcement act granted in accordance with procedures defined by this law serves as a basis for use of instrument of compulsory enforcement". The sole

jurisdiction of granting an enforcement act is possessed by Court of first instance Norq-Marash (The Law on Commercial Arbitration of RA, Article 6).

If Arbitration award is being revoked after its enforcement , it happens the reverse of enforcement of decree, according to the Article 26 of The law of the Republic of Armenia on Compulsory enforcement of court decree. The state competent court passes the court decree on partial or complete return of the property to the debtor, based on the new court decree. It is not clear, whether there is a need for making new arbitral award, which will vary from previous one. It seems that the law issue this necessity (Art 26):”If the enforced decree was later abandoned or declared invalid and a **new decree was passed on partial or complete refusal of the litigation**, or the case proceeding was stopped, then the court can pass the court decree on partial or complete return of the property to the debtor , based on the new court decree”.

The Model Law lists exhaustively the grounds on which an award may be set aside¹⁴ This list exhaustively the grounds on which an award may be set aside. Grounds which are to be proven by one party are as follows: lack of capacity of the parties to conclude an arbitration agreement; lack of a valid arbitration agreement; lack of notice of appointment of an arbitrator or of the arbitral proceedings or inability of a party to present its case; the award deals with matters not covered by the submission to arbitration; the composition of the arbitral tribunal or the conduct of arbitral proceedings are contrary to the effective agreement of the parties or, failing such agreement , to the Model Law. Grounds that a court may consider of its own initiative are as follows; non-arbitrability of a subject-matter of the disput or violation of public policy; last two

¹⁴ http://www.uncitral.org/pdf/english/texts/arbitration/ml-arb/07-86998_Ebook.pdf

issues relates to arbitrability of cases. This grounds on which an award may be set aside is coincided with grounds stipulated in law on Commercial Arbitration of RA.

Arbitration Agreement

“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 defined legal relationship, whether contractual or not. An arbitration agreement may be in the form of arbitration clause in a contract or in the form of a separate agreement. (Law on Commercial Arbitration of RA, Article 7).

Concluding an agreement parties exclude the jurisdiction of state courts. The Article 8 of Law on Commercial Arbitration stipulates “ A court before which an action is brought in a matter which is the subject of an arbitration agreement shall, if a party so requests not later than when submitting his first statement on the substance of the dispute, refer the parties to arbitration unless it finds that the agreement is null and void, inoperative or incapable of being performed”. Similarly, The Article 103 of Civil Procedure Code of RA alleges the arbitration agreement in the grounds for leaving action or complaint without consideration: “There is a consensus between the persons participating in the case on the transfer of the case for the consideration of an intermediate court, and possibility to apply to an intermediary court exists” (The Article 103, point 3 of Civil Procedure Code of RA).

Article 16(1) of the Law on Commercial Arbitration confirms the arbitral tribunal’s jurisdiction to decide on “any objections with respect to the existence or validity of arbitration agreement” and makes it clear that the arbitration clause shall be treated as an agreement independent of the other terms of the contract” adding that “a decision by an arbitral tribunal that the contract

is null and void shall not entail ipso jure the invalidity of the arbitration clause”. This last sentence appears to contradict the two previous ones, because it only mentions the nullity and not inexistence of the contract. If the inexistence of the contract deprived the arbitrator ipso jure of his jurisdiction, we do not see how he could decide on an objection related to this question, whereas the first sentence allows him to do. Therefore Art 16 can be interpreted as meaning that an arbitrator has jurisdiction even to decide whether the main contract exists or not. Article 16(1) adopt important principle: separability or autonomy of the arbitration clause, which means that arbitration clause shall be treated as an agreement independent of the other terms of the contract.

To submit a dispute to arbitration the arbitration agreement must be in sufficient degree of certainty. That’s why , forming an agreement , it must be excluded all ambiguities. The lack of certainty can be motivate one party to evade the arbitration procedure, by alleging the impossibility of execution of arbitration agreement, in result of which, the state court, being directed by the Article 8 of Law on Commercial Arbitration of RA, can determine the dispute independently.

The problems ,concerned with certainty of arbitration agreement, stem in case of pathological clauses. The expression “pathological clause” was first used in 1974 by Drederic Eismenn, then honorary secretary of the ICC¹⁵ . Arbitration agreement can be pathological for a variety of reasons, The reference to an arbitration may be inaccurate or totally incorrect, the agreement

¹⁵ Fouchard , Gaillard, Goldman on International Commercial Arbitration(Kluwer International,1999) eds. Emmanuel Gaillard, John Savage, p 262

may appear to allow submission of disputes to arbitration to be optional, it may contain defective mechanism for appointing arbitrators in that etc¹⁶.

Among other things, the validity of arbitration agreements can ordinarily be challenged under generally-applicable contract law principles for defects in formation, lack of capacity, fraud or fraudulent inducement, unconscionability, illegality. Basic principles of contract law in most jurisdictions provide that unconscionable agreements, or agreements obtained through duress, are unenforceable¹⁷. Let's examine *Brower v. Gateway 2000* case¹⁸. The plaintiff bought a PC from Gateway through direct sales. The PC box contained a "shrinkwrap agreement" which included an arbitration clause. The plaintiff sued, claiming breach of warranty among other things because they didn't get the service and support they were promised. Gateway moved to dismiss the suit based on the arbitration clause. The plaintiffs countered that the arbitration clause was unconscionable, in particular given the nature of the organization (the International Chamber of Commerce) that was to provide the rules. The ICC was based in France, and its costs of arbitration were prohibitively high. The trial court found for Gateway, and the plaintiffs appealed. The court finds that most of the plaintiff's claims about the arbitration clause don't hold water, but the court does find that the particular arbitrator chosen was not fair and was designed to deter individual customers from using the arbitration process. Appellants claim

¹⁶ Fouchard , Gaillard, Goldman on International Commercial Arbitration(Kluwer International,1999) eds. Emmanuel Gaillard, John Savage,p 263

¹⁷ International commercial arbitration: commentary and materials: Gary Born, Kluwer Law International , 2001 , NY , p. 217

¹⁸ See infra , p.219

that when they placed their order they did not bargain for, much less accept, arbitration of any dispute, and therefore the arbitration clause in the agreement that accompanied the merchandise shipment was a “material alteration” of preexisting oral agreement. The court then concluded, that the contract was not formed with the placement of telephone order or with the delivery of the goods. Instead an enforceable contract was formed only with the consumer’s decision to retain the merchandise. With respect the appellant’s claim that the arbitration clause is unenforceable as a contract of adhesion, in that it involved no choice or negotiation on the part of the consumer but was a “take it or leave it ” proposition. Although the parties clearly do not possess equal bargaining power, this factor alone does not invalidate the contract as one of adhesion. As the court observed, with the ability to make the purchase elsewhere and the express option to return the goods, the consumer is not in “take it or leave it” position at all; If any term of the agreement is unacceptable to the consumer, he or she can easily buy a competitors product instead- and reject Gateway’s agreement by returning merchandise. As a general matter unconscionability requires a showing that a contract is “procedurally and substantively unconscionable when made”. That is, there must be “some showing of an absence of meaningful choice on the part of one of the parties together with contract terms which are unreasonably unfavourable to the other party ”.

What Is an Adhesion Contract?

An adhesion contract is defined as a “standardized contract form of services on a ‘take it or leave it’ basis without affording the client realistic opportunity to bargain and under such conditions that the client cannot obtain desired service except by acquiescing in the form contract”¹⁹ .

Adhesion contracts involve the use of preprinted form contracts, produced in mass quantities: You just fill in a few blanks with the respective names, prices and quantities. Little room is left for negotiation.

Standardized preprinted form contracts contain **nonnegotiated terms** that are not discussed with the client at the time the contract is signed. Examples of nonnegotiated terms that are highly suggestive of unequal bargaining power is the clause of future dispute resolution which can be offered either by arbitration, or by litigation.

A contract with hidden or nonnegotiated clauses can be made unenforceable in many civil law countries through the main step. to actually cancel the adhesion contract, the agreement must be shown to be unconscionable.

By this way let’s consider the fact when client signed the contract unconscious as explanation is extremely difficult due to the nature of the contract.

Civil Code of RA, Article 444

¹⁹ Black, H.C. (Ed.). 1990. *Black’s Law Dictionary* (6th ed.). St. Paul: West.

Contract of Adhesion

1. A contract of adhesion is a contract whose terms are determined by one of the parties in printed forms or other standard forms and that may be accepted by the other party not otherwise than by adhering to the proposed contract as a whole.

2. The party adhering to the contract has the right to demand the rescission or change of the contract if the contract of adhesion, although does not contradict a statute or other legal acts, deprives this party of rights usually given under contracts of such type, excludes or limits the liability of the other party for the violation of obligations or contains other terms clearly burdensome for the adhering party, that it, on the basis of its reasonably understood interests, would not have accepted if it had the possibility of participating in the determination of the terms of the contract.

3. In the presence of the circumstances provided by Paragraph 2 of the present Article a demand for the rescission or change of the contract made by the party that adhered to the contract in connection with the conduct of its entrepreneurial activity is not subject to satisfaction if the adhering party knew or should have known on what terms it was concluding the contract.

As listed above, Adhesion contracts in Armenian legislation are vague, unequivocal and not descriptive, there is no clause which aimed to protect the right of the party who “adhere” the contract. What means Part 3 of Article, mainly” activity is not subject to satisfaction if the adhering party knew or should have known on what terms it was concluding the contract”. By

this means I want to draw a parallel with the Sweden law on adhesion contracts.(I want to indicate that there are 34 articles which mainly concerns adhesion contracts).

Article 3 ,Obligation to Specify and Explain Adhesion Contracts

- (1) In entering into a contract, an Enterprise shall explain to its Customers the content of an adhesion contract in a way that would generally be expected for the type of contract in question and shall, upon the request of the Customer, deliver a copy of the adhesion contract to the Customer to help the Customer understand the Adhesion Contract.
- (2) An Enterprise shall explain the important particulars of an Adhesion Contract so that Customers can understand them; provided, however, that this shall not apply where such explanation is extremely difficult due to the nature of the contract.

Although reference does not bear on our main issue, but the goal to introduce the legal acts to require amendment. Many Countries have been enacting legislation aimed at providing a general scheme aimed to provide a general scheme to deal with the potentially unfair terms in these contracts about 2-4 decades ago. For example, in West Germany, The Standard Terms Act, has been enacted, in Israel the Standard Contract Law, 1964, in Sweden, the Improper Contract Terms Act, 1977.

As Arbitration Agreements have grown more and more common, so have the challenges of them based on unconscionability. In fact, arbitration clauses have lately been the most common kind in unconscionability cases. Attacks on arbitration clauses by consumers and employees have often been successful. The rationales include lack of consent to the clause, the prohibitive expense of arbitration.

One prominent case is *Armendariz v. Foundation Health Psychcare Services*²⁰, where the Supreme court of California refused to enforce an arbitration agreement in an employment contract. The court emphasized that it was a contract of adhesion since employees generally can not decline an employment because of arbitration agreement. The arbitration agreement is a contract of adhesion. A court may exercise its discretion to refuse to enforce a contract or clause under the doctrine of unconscionability only where both procedural ("oppression" or "surprise" due to unequal bargaining power) and substantive ("overly harsh" or "one-sided" results) unconscionability are present. Here, signing the arbitration agreement was a condition of employment, and there was no opportunity to negotiate. Further, only the employees are required to arbitrate their wrongful termination claims against the employer; the employer does not have to arbitrate its claims against the employee. Given that the agreement was already one of adhesion, the court found that the agreement lacked basic fairness or mutuality by requiring the employee but not the employer to arbitrate all claims arising out of wrongful termination.

²⁰ *Armendariz v. Foundation Health Psychcare*, 99 Cal.Rptr.2d 745 (2000)

In a case involving a dispute over a franchise agreement, a hotel franchisee in Montana objected to arbitration because, inter alia, the proceeding would be conducted at the franchisor's headquarters in Maryland²¹. The Court of Appeals observed that lack of mutuality and unconscionability defenses were arguably limited to consumer contracts. However, the Court refused to enforce the arbitration agreement. As we can see, the lack of mutuality and unconscionability, which can be viewed as main features of adhesion contracts, can not be enforced by the courts,

²¹ Ticknor v. Choice Hotels, International, Inc., 256(9th Cir. 2001)

Is there a possibility to revoke an arbitration agreement in Armenian context

The common law long held that contract provisions controlling the resolution of future disputes between the parties were revocable until such a dispute was actually resolved by the forum designated in the agreement. In the context in which it evolved, this was a sound rule. It would today be a sound rule that such provisions are revocable when formed in contracts of adhesion, at least until a dispute to which they apply has been submitted in writing to the specified forum or procedure. In medieval England, arbitration was used primarily by guilds of traveling craftsmen and merchants as a means of resolving commercial disputes quickly, before the parties departed the communities in which their disputes arose and without the travail of a trial before a royal judge *Vynior's Case*²² in 1609 was the first major expression of the doctrine of revocability. At the time, the common law of contracts was in its infancy. It had become a common practice to secure performance of any agreement by putting the obligor under bond. Robert Vynior brought an action against William Wilde on a bond for a hundred pounds, demanding twenty pounds' damages as well as the penal sum of the bond. The court ruled that Vynior could recover on both his bond and his alleged damages. For this decision, Lord Coke set forth three reasons, one of which was that when there was a suit on a bond given for a submission to arbitration, the submission itself was revocable, but such revocation came at the price of the forfeiture of the bond. While a party had the power to revoke a submission, he was

²² (1609)77 Eng. Rep. 595, 597(K.B.)

still held liable on his bond. Nevertheless, the principle of revocability was widely accepted by nineteenth century U.S. courts, and it is perhaps still the law in some states²³.

Is there a possibility to set aside the arbitration agreement in adhesion contracts in Armenia

It is worth to consider a hypothetical case;

Plaintiff is a consumer , who engaged in the simplest transaction to enter into an adhesion contract, before the telephone service will be provided. This service contract between X company, which is a mobile provider, contained a mandatory arbitration provision, specifying that disputes under the contract be settled through binding arbitration, denying consumers any right to sue service provider for breach of contract;

Grounds to challenge arbitration agreement

1. Although the contracts concluded with consumers can be considered as adhesion contracts .Civil Code of RA Article 444, Point 2 stipulates “The party adhering to the contract has the right to demand the rescission or change of the contract if the contract of adhesion, although does not contradict a statute or other legal acts, deprives this party of rights usually given under contracts of such type, excludes or limits the liability of the other party for the violation of obligations or contains other terms clearly burdensome for the adhering party, that it, on the

²³ International commercial arbitration: commentary and materials: Gary Born, Kluwer Law International , 2001 , NY , p. 344

basis of its reasonably understood interests, would not have accepted if it had the possibility of participating in the determination of the terms of the contract.” It means that the arbitration agreement in some situation can be revoked. But it is not unequivocal. The law on “Protection of Consumer Rights” does not prohibit to settle a consumable disputes by arbitration as well,

2.As was mentioned above, Article 16(1)of the Law on Commercial Arbitration confirms the arbitral tribunal’s jurisdiction to decide on “any objections with respect to the existence or validity of arbitration agreement” and makes it clear that the arbitration clause”shall be treated as an agreement independent of the other terms of the contract” adding that “a decision by an arbitral tribunal that the contract is null and void shall not entail ipso jure the invalidity of the arbitration clause”. It means that even in case of establishing the invalidity of a contract, arbitration agreement does not cease to exist.

3.We have already mentioned that besides , arbitration costs sometimes can be sufficiently high, which can cause difficulties for consumers with average income. So the consumer , concluding an arbitration agreement , is being deprived of judicial protection, as mentioned above, as well as the factor of inability to pay. Consequently , the consumer’s right is violated, as it is violated **Article 6 of the European Convention on Human Rights** ,which protects the right to a fair trial can be considered as a legal ground for claiming the revocation of arbitration agreement

4.Another way to set aside the arbitration agreement is to prove the unconscionability of clauses, which is almost impossible in similar situations. During the interview²⁴, it was stated that ordinarily, a court normally will not inquire into the adequacy of consideration. Persons are

²⁴ Edward Mouradyan

assumed to be reasonably intelligent, and the court does not come to their aid just because they have made unwise and foolish bargains. As it was stated, procedural unconscionability has to do with how a term becomes part of a contract and relates to factors bearing on a party's lack of knowledge or understanding of the contract terms because of inconspicuous print, unintelligible language("legalese"), lack of opportunity to ask questions about the contract's meaning, and other factors. It is another issue that the consumer has not opportunity to negotiate, because there is a situation on a take-it-or-leave-it basis. But the consumer had the chance not to enter into contract.

5.To submit a disput to arbitration the arbitration agreement must be in sufficient degree of certainty. That's why , forming an agreement , it must be excluded all ambiguities. The lack of certainty can be motivate one party to evade the arbitration procedure, by alleging the impossibility of execution of arbitration agreement, in result of which, the state court, being directed by the Article 8 of Law on Commercial Arbitration of RA, can determine the disput independently. But this situation does not concern to adhesion contracts, because adhesion contracts involve the use of preprinted form contracts, produced in mass quantities, which has already been made in due form.

The implemented analyses shows that there is a very few possibility to revoke an arbitration agreement in Armenian context, there is not any appropriate law, which can substantiate the possibility of revocation of arbitration agreement on adhesion contracts.

Conclusion

The discussed Law on Commercial Arbitration of RA represent a significant advance in arbitration law in Armenia. It coincides with the UNCITRAL Model Law, and contemporary and international standards.

But there are many fields which must be protected, it concerns the protection of weak party- the consumers, whos disputes must be excluded from the submission to arbitration.

There is an issue , which also must be revised, which relates to Article 31 of the Law on The Commercial Arbitration: It relates to costs of arbitration. The Article stipulates that Arbitration award must regulate the expenses of arbitration, and allocations of those between parties. In fact the portion of the allocation is left to the discretion of the arbitral tribunal. It is missed the issue, whether the expenses , which are determined by arbitral award, are final and are subject to disput.

Problems stemming from inadequate arbitration laws(I mean the emplementation of UNCITRAL) or from the absence of specific legislation governing arbitration are aggravated by the fact that national laws differ widely. The problem can be resolved by adapting specific law, which can support and protect the rights of weak parties. As a sample to such kinds of law can be considered the RA law on Involvement of Bank Deposit, which perfectly aimed to protect the rights of depositors, in case of disput resolution.

What concerns the revocability doctrine, I think that this concept must receive attention, as revival of the revocability principle would not mean the end of arbitration. It would mean only the end of the many kinds of clauses, which are considered unconscionable. It would assure that arbitration is beneficial to all parties, and that arbitrators have the confidence of all the parties who appear before them. These objectives are worthy to consider.

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