ESTABLISHMENT OF RULE OF LAW AND JUSTICE THROUGH ARBITRATION

FINANCIAL ARBITRAGE OF UNION OF BANKS OF ARMENIA

INTRODUCTION

Starting from November 2013 to April 2014 we explored the peculiarities of an arbitral institutional center named the Court of Financial Arbitration (hereinafter FA) of the Union of Banks of Armenia (hereinafter UBA) in the context of international practice. The aim is to foster establishment of arbitration culture in Armenia according to international standards.

The research question has four main limbs: a) how bank customers are deal-forced to enter into a contractual agreement to arbitrate b) whether FA procedure of selecting and appointing an arbitrator complies with the requirements and principles of impartiality as perceived in the practice of international arbitration; c) whether the legal regulations of challenge of an arbitration clause (hereinafter AC) and an arbitrator serve as an effective remedy for the protection of rights; d) whether the procedure of recognition, enforcement and challenge of the decisions of arbitral tribunal (hereinafter AT) is efficient.

Taking into consideration the coincidence of aims of FA and international arbitral centres, the principles of international commercial arbitration are examined and a parallel is drawn between the rules of national and international arbitral centres[1]. Since FA is established in the Republic of Armenia (hereiafter RA), the requirements of the European Court of Human Rights[2] are applicable to the practice of the FA as stated in the RA Constitution[3] .

Ultimately, the answer to the question if FA may be an efficient alternative forum to RA courts in the field of financial dispute resolution is provided.

FA AS AN INSTITUTIONAL ARBITRAL CENTRE – ITS PREHISTORY, PURPOSE AND SCOPE OF THE SUBJECTS, CONSUMING ITS SEVICE

Arbitration, aiming to reach justice[4] through a non-ordinary judicial system, is still in its “infancy [in Armenia] and remains, largely, a mystery[5]”.

As RA Constitution states, everyone has the right to protect his/her rights by all means not prohibited by law[6]. In legal practice arbitration is perceived as an effective method of protecting rights. If the place of arbitration is within Armenia, it should be regulated by the Law on Commercial Arbitration of RA (hereinafter Law)[7]. The Law, without distinguishing ad hoc from institutional arbitration[8] uses the term “arbitral tribunal”[9]. In 2010, FA was established as an institutional arbitral center. Initially, it aimed at solving financial disputes through quick, qualified and independent arbitration, being an alternative forum to the courts, and lastly, helping banks to recover unsettled loans during the financial crisis[10].

FA has jurisdiction over disputes arising from commercial relationships thereupon the parties have concluded arbitration agreements[11]. Such agreements may be included in the main contract or comprise a separate document. At present, most of Armenian banks (Ardshininvestbank, Armenian Developmen Bank, AMERIABANK, Armeconombank, VTB-Bank Armenia and Inecobank)[12] and loan offices (Farm Credit Armenia and PMDz Investments Universal Loan Office)[13] have recently amended their consumer agreements to include an arbitration provision of the FA. Aneliqbank, HSBC Bank, Conversebank, Panarmenian Bank, and Pro-Credit-Bank do not refer their disputes to FA. ACBA-Credit-Agricole Bank, AREXIMBANK-GASPROMBANK, ARARATBANK, Byblos Bank Armenia, MELLAT BANK ARMENIA, UNIBANK, Prometey Bank, ARMBUSINESSBANK did not answer our questions. BTA Bank and Armswissbank refused to respond, claiming that the requested information constitutes a banking secrecy.

The founders of FA chose its organizational-legal form as an institution based on the purposes[14] of FA. As the President of FA explains, FA being established during the financial crisis was trying to help the disputants to save their money and time[15]. According to her, the disputants could also save in litigation costs by making use of FA services instead of going through the court system. Another essential factor of creating FA was to provide more specialized services in comparison with courts[16].

The issue of whether an institution, pursuing a non-commercial interest and being established by UBA (UBA itself is established by financial companies) can operate independently from its founders while solving disputes against the latter’s will be discussed in Chapter 4 (Impartiality and Independence of an Arbitrator).

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[4] Shahal F.Ali, Consumer Financial Dispute Resolution in a Comparative Content: Cambridge University Press 2013. Pages 190-192, 196
[5] Zaven A. Sargsyan, A Practical Guide to International Commercial Arbitration in the Post-Soviet States: Republic of Armenia. JEL 2012 Vol. 5, No. 3, August 2013.
[6] RA Constitution, Article 18
[7] RA Law on Commercial Arbitration (adopted on 25 Dec., 2006), Article 156
[8] ibid, Article 2.1
[9] ibid. The Law does not distinguish ad hoc and institutional arbitration, but provides general regulations.
[10] Interview with FA President
[11] FA Charter, Article 2.1
[12] Banks established within the territory of RA. Available at https://www.cba.am/am/SitePages/fscfobanks.aspx
[13] Loan offices estabied within the territory of RA. Available at` https://www.cba.am/am/SitePages/fscfocreditorganizations.aspx accessed on 16 December 2013
[14] Interview with the President of FA. FA is not-for-profit organization.
[15] ibid
[16] ibid

ARBITRATION AGREEMENTS

Throughout this paper we will be referring to "mandatory, binding arbitration"[17]. In mandatory arbitration, contracts contain clauses that designate arbitration as the exclusive remedy to resolve disputes after the contract takes force; if a dispute arises, the complainant can pursue only arbitration[18]. "Mandatory, binding arbitration" is of particular concern to us. In the context of a customer and business provider disputes, a mandatory, binding arbitration clause is a clause in a contract requiring two parties (a service provider and a customer) to arbitrate the disputes that may arise from the contract in future[19]. Such clauses are drafted before conclusion of the contract by the service provider without any opportunity for the customer to influence the substance of the contract[20]. The parties, by signing such contracts, commit themselves to using arbitration to resolve future disagreements.The arbitrator's decision is final.

Because mandatory, binding arbitration is so conclusive, it may be a credible means of resolving disputes only when all parties enter into the agreement with full knowledge and idea of the consequences of their agreement. They must know and understand the ramifications of agreeing to mandatory, binding arbitration and freely choose to waive their constitutional right of recourse to state courts.

Hence, where one party does not understand the consequences of his/her choices, or lacks the bargaining power to negotiate other dispute resolution terms, mandatory, binding arbitration contracts raise the question of voidability of such agreement. Particularly, the non-consensual nature of pre-dispute arbitration agreement turns such agreement into an 'unfair deal'.

2.1. Mandatory, Binding Arbitration in Other Countries

The US is the only country where arbitration agreements in consumer contracts are widely used[21], but it has faced serious criticism.

In other jurisdictions, including the European Union, mandatory consumer arbitration agreements are heavily restricted[22]. The European Union's (EU) 1993 Directive on Unfair Terms in Consumer Contracts[23] (hereinafter - Directive) requires member states to enact laws that invalidate any term in a consumer contract it considers to be unfair. Unfair terms are defined as:

"A contractual term which has not been individually negotiated shall be regarded as unfair if, contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer."

Specific examples of unfair terms appended to the Directive, include mandatory arbitration. A pre-dispute arbitration clause, which has not been individually negotiated, appears to be void under the Directive[24]. A Recommendation[25] issued by the European Commission[26] in 1998 declares that "out-of-court alternatives may not deprive consumers of their right to bring the matter before the courts unless they expressly agree to do so, in full awareness of the facts and only after the dispute has materialized[27]."

Given the strong direction provided by the EU on mandatory arbitration, specific European countries have legislation or practices limiting or prohibiting the use of mandatory pre-dispute arbitration clauses. Pre-dispute arbitration clauses are generally prohibited in consumer transactions in Britain[28] and expressly banned in France.

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[17] Deborah R. Hensler, (1990) Court-ordered arbitration: an alternative view, Rand Corporation - Arbitration can be either "binding" or "non-binding". Senator Russel D. Feingold (2002) Policy Essay. Mandatory Arbitration: What Process Is Due? Harvard Journal on Legislation, Vol. 39, pp. 281-298 - In "non-binding" arbitration the arbitrator's decision takes effect only if the parties agree to the resolution after they know what the decision is. In "binding arbitration" parties agree in advance to abide by the arbitrator's decision, whatever that decision may be.
[18] Id.
[19] Report prepared by the Public Interest Advocacy Centre (PIAC) and Option consommateurs. Available at http://www.option-consommateurs.org/ November 2004. Accessed on 03 March 2014
[20] Id.
[21] Haris, 183 F.3d at 173 - In 1995, the Supreme Court enforced a mandatory arbitration clause in a consumer contract in the case of Allied Bruce Terminix Companies v. Dobson. In this case, the Court also declared that the FAA pre-empted all state laws that didn't favour arbitration.
[22] David Collins, Compulsory Arbitration Agreements in Domestic and International Consumer Contracts, 19 K.L.J. 335 No.2 (2008)
[23] http://old.eurlex.europa.eu/smartapi/cgi/sga_doc?smartapi!celexapi!prod!CELEXnumdoc&lg=EN&numdoc=31993L0013&model=guichett accessed on 03 March 2014
[24] Id. at 845 (quoting Council Directive 93/13, Annex (1)(q), 1993 O.J. (L 95) 29).
[25] It is not binding law but has a strong practical effect on member states and is a strong indicator of how member states treat this issue.
[26] The European Commission is the European Union's executive branch and is responsible for implementing the decisions of the Parliament and the Council- European Commission, http://europa.eu/institutions/inst/comm/index_en.htm
[27] Sternlight, U.S. Out on a Limb, supra note 4, at 845 (citing Commission Recommendation 98/257, 30 March 1998, Principles Applicable to the Bodies Responsible for Out-of-Court Settlement of Consumer Disputes, 1998 O.J. (L 115) 31, WL OJ 1998 L1 15/13.
[28] The EU's 1993 Directive on unfair terms in consumer contracts and the accompanying Regulations forced changes in the UK's domestic law. In 1996, the UK Parliament repealed the Consumer Arbitration Agreements Act and introduced the Arbitration Act, 1996. - PIAC and Option consommateurs, page 43 - The net effect of the change is that pre-dispute consumer arbitration clauses are deemed to be unfair when the amount of potential claim is less than £5,000, thus removing the court's discretion. In all other cases, pre-dispute consumer arbitration clauses are invalid if they are found to be unfair in accordance with the Unfair Terms in Consumer Contracts Regulations, which are an incorporation of the EU Directive into British law. In the latter circumstance, judges have complete discretion on a case-by-case basis to determine whether it is unfair under the European Union Directive. However, in determining whether the clause is enforceable or not, the courts must draw upon the EU Directive.

2.2 Mandatory, Binding Arbitration in Armenia

Currently a customer, a consumer of financial service[29], might not get a credit card, bank account or mortgage without agreeing to pre-dispute arbitration clauses by FA offered on a "take it or leave it" basis, and does not have adequate bargaining power to negotiate changes to standard form contracts[30]. Although a customer is usually informed of the existence of the arbitration clause at the time of conclusion of the contract[31], few bank customers sufficiently understand the implication of the arbitration agreement that they had consented to. Moreover, in the city of Vanadzor (this assumption may also be true for other regional cities) bank customers inquiring about arbitration agreements are directed to banks' head offices[32].

The results of our query show that those mandatory, binding arbitration clauses are becoming more common in consumer financial/credit contracts in Armenia[33].

In this context, customers are often unaware of the arbitration agreements, or lack bargaining power to either disagree with this method of dispute settlement or revise/refine the relevant pre-drafted arbitration clause to better protect their rights while securing credit[34]. Consequently, in many cases either unknowingly or unwillingly customers are barred by contract from taking a dispute to court. Thus, "customer protection is in jeopardy…in the important areas of credit and finance[35]."

Arbitration can be undoubtedly a fair and efficient way to settle disputes. Alternative methods of dispute resolution ought to be encouraged. Their effectiveness, however, will increase, only when arbitration agreement is signed after the dispute has arisen, especially in the settings where bargaining power is inherently unequal.
Meanwhile, bearing in mind that arbitration culture is not sufficiently developed in Armenia, following the above policy, if continued, may put alternative dispute resolution practices in serious jeopardy. Therefore, for the purposes of protection of the rights of natural person-customers it is recommended that the customers are not just informed of the method of dispute settlement, but rather be offered arbitration as a more effective alternative method to resolve disputes only after being fully informed of the consequences of agreeing to mandatory, binding arbitration, and not on a take-it-or-leave-it basis".

[29] RA Law on Consumer Right Protection (1991), Article 1
[30] Cillins, D. A. (2008). Compulsory Arbitration Clauses in Domestic and International Consumer Contracts. King's Law Journal, 19(2), pp. 335-355.
[31] During interviews/surveys conducted amongst bank or loan office representatives, all of the participants claimed that they have well-established policies and guidelines of informing all the customers of the existence of arbitration clauses in their contracts.
[32] According to our interviews with the branches/offices of Armenian banks in Vanadzor, Armenia.
[33] See Appendix 1
[34] None of the customers surveyed had sufficient idea of arbitration; they claim that the essence of arbitration clause/agreement was not clarified to them, and they have never been informed about arbitration in any way.
[35] Hearing, at 44 (statement of Patricia Sturdevant, Executive Director and General Counsel, National Association of Consumer Advocates).

PARTY AUTONOMY OF COMPRISING THE ARBITRAL TRIBUNAL

Party autonomy is the primary element of arbitral culture. It is a fundamental principle, and limits the authority of arbitrators[36].

In Scherk v. Alberto-Cuver Co. case the US Supreme Court stated that "party autonomy is an almost indispensable precondition to achievement of the orderliness and predictability essential to any business transaction[37]".

The primary source from which the jurisdiction of an arbitral tribunal emanates is the free will of the parties to recourse to arbitration[38]. Moreover, as Dr. Steingruber correctly states, the concept of the freedom of will, which implies the existence of mutual consent, free choice, and absence of external pressure, also lies on the bases of the contractual relations[39].

The rationale behind granting parties such autonomy is arbitrators' characteristics such as being well aware of all issues of the case, having profound knowldege in the field of the subject of the case, accessibility, and experience[40]. According to some specialists, when parties compose the tribunal they make arbitral procedure predictable[41]. The history of arbitration shows that the possibility of selecting an arbitrator draws difference between the courts and arbitral tribunal[42].

Thus, the claim that an arbitrator, being chosen by one party, may be prone to solve the dispute in favor of that party is not justified, since the other characteristics of arbitrator (reputation, the ability to work within the tribunal) balance this inclination[43].

3.1. Constitution of the Arbitral Tribunal under the Rules of International Arbitral Centers

- **International Chamber of Commerce (ICC)**

The ICC Court of Arbitration ensures the application of ICC Rules[44]. Absent an agreement between the parties upon the number of arbitrstors, the Court appoints a sole arbitrator[45]. In some cases, the Court may confirm the nomination of an arbitrator[46].

- **London Court of International Arbitration (LCIA)**

The tribunal is formed by the Court[47]. Yet, the parties may agree upon selecting an arbitrator, and the LCIA shall confirm the appointment[48]. LCIA may provide the parties a list of arbitrators amongst which they make their choice[49].

- **The US Practice**

At least four arbitral institutions are known in the US[50].

According to **ICDR Rules** parties may directly choose an arbitrator or request the Center to appoint[51]. Upon such request, the Center appoints a case manager, who provides the parties a list of arbitrators. The parties express their preference, and the case manager appoints the nominee as an arbitrator who has received the mutual preference[52].

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[36] Joshua Karton. The Culture of International Arbitration and the Evolution Of the Contract Law ; Oxford University Press, 2013 Pages 77-78, 85

[37] Scherk v. Alberto-Cuver Co., 417 U.S. 506, 516 (1974)

[38] Andrea M. Steingruber, Consent in International Arbitration, Oxford University Press, 2012, available at http://books.google.am/books?id=EacyqvPBEFQC&pg=PT29&dq=notion+of+party+autonomy+in+arbitration&hl=en&sa=X&ei=AUT6UtrLDqWqyAOOoIHQCA&ved=0CE4Q6AEwBw#v=onepage&q=notion%20of%20party%20autonomy%20in%20arbitration&f=false accessed on 11 February 2014. para. 2-04

[39] ibid.

[40] Gary Born, International Commercial Arbitration, Volume 1, 2009, Kluwer Law International the Netherlands. Available at: http://books.google.am/books?hl=en&lr=&id=5GNIyRPd9NUC&oi=fnd&pg=PR7&dq=impartial+arbitrator&ots=uYcy6Z44De&sig=Bnka0Cl0TEm-juTnWijKepGIbFA&redir_esc=y#v=onepage&q=impartial%20arbitrator&f=false accessed on 19 February, 2014, pp 1359-1360, 1463; Christian Konrad, Philippe Peters; Konrad & Partners, Arbitration: the method of choice in construction?/ 06 December, 2012/ CDR (Commercial Dispute resolution). Published by Global Legal Group. Available at http://www.cdr-news.com/categories/arbitration-and-adr/arbitration:-the-method-of-choice-in-construction, accessed on 19 February, 2014

[41] Id., Joshua Karton (2013). The Culture of International Arbitration and the Evolution of Contract Law: OXFORD, UK – p. 75

[42] Andrea M. Steingruber, para 2:13-2:14; Gary Born pp. 1365-1367

[43] Joshua Karton (2013). էջեր 49-56, 75-76

[44] ICC Rules, Appendix 1, Article 1. Retrieved in http://www.iccwbo.org/products-and-services/arbitration-and-adr/arbitration/icc-rules-of-arbitration/ accessed on 20 January, 2014

[45] ibid, ICC Rules, Article 12,

[46] ibid, Article 13

[47] LCIA Rules, Article 5. Retrieved on http://www.lcia.org/Dispute_Resolution_Services/lcia-arbitration-rules-2014.aspx# accessed on 20 January, 2014

[48] ibid, Article 7.

[49] http://www.lcia.org//Frequently_Asked_Questions.aspx#List accessed on 20 January, 2014

[50] ICDR (International Center for Dispute Resolution), established in 1996 as a division of the American Arbitration Association; FINRA – forum specialized in solving disputes in the securities industry, founded in 2007, Washington D.C.

[51] Mark E. Appel, Senior Vice President, ICDR. Taking Your Case to the International Center for Dispute Resolution.

[52] ibid

FINRA[53] has an interesting method of qualifying arbitrators[54]: once FINRA is requested to constitute the tribunal, it provides the parties with a list of 10 candidates who do not have conflicting interests. The parties are to eliminate 4 from the list, and make preferred choices. According to the mutual preference, FINRA appoints the arbitrators to hear the particular case[55].

According to **JAMS Rules**, in the absence of an agreement on the arbitrator nominee, JAMS provides a list of arbitrators to the parties[56]. Parties may eliminate two or three nominees [57], and rank the remaining nominees in accordance with their preference. JAMS appoints the highest ranking nominee(s) as arbitrator(s)[58].

The American Arbitration Association (hereinafter AAA) Rules set a similar procedure for appointing an arbitrator. Particularly, parties are to eliminate a nominee from the list of AAA arbitrators and then express their preference. The mutually preferred nominee is appointed as arbitrator by AAA[59].

3.2. Choice of FA Arbitrators

The principle of party autonomy is enshrined in the Armenian legislation[60]. The LCA entitles the parties to either select an arbitrator themselves, or agree upon the appointing institution, or set their requirements for an arbitrator[61]. Moreover, it specifies the court that acts as appointing authority in case the parties fail to agree or appoint their arbitrator, as the case may be[62].

As the analysis of the rules of different national and international institutional arbitral centers shows, some centers (LCIA, FINRA, JAMS) have a list of arbitrators. Yet, parties may choose an arbitrator not included in those lists.

However, FA approach is somewhat different: the parties to the dispute are prohibited from choosing an arbitrator not included in the FA list[63]. FA President justifies such prohibition on the grounds that this method of selection of arbitrators eliminates the possibility of having an arbitrary arbitral award on behalf of FA by an unqualified person, which later may be challenged in court. Such awards may be damaging for the reputation of FA[64]. Thus, FA reaches one aim by sacrificing another one- by protecting the FA reputation, it limits party autonomy. Meanwhile, limitation of a fundamental principle, such as party autonomy, can put FA's reputation in jeopardy as well.

FA Rules provide two options for selecting an arbitrator: either the parties agree upon the nominee or the FA President acts as sole arbitrator in the case[65]. Here, the problem may arise because of the absence of an agreement between the parties, since appointment of FA President as sole arbitrator is automatic and is not subject to the consent of the disputing parties. Although removal of the sole arbitrator is possible by challenging, the FA Rules on challenging an arbitrator may also be problematic. This issue will be discussed in Chapter 6.

These rules which contradict the fundamental principle of party autonomy are also in contradiction with the Law, which provides for the right of the parties to apply to the appointing authority for appointment of an arbitrator(s) in the circumstances provided by the Law.

Considering the analysis above and the public nature of FA, it is suggested to revise the FA Rules by providing the parties with the right of selecting their arbitrator either from or outside of the FA List. To avoid arbitrary awards made by unqualified persons, appointment from outside the FA List should be confirmed by FA as an institutional arbitral center.

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[53] FINRA Dispute resolution, available at http://www.finra.org/ArbitrationAndMediation/, accessed on 19 February 2014 FINRA is specialized in the dispute resolution in the securities. It mostly solves disputes arising from monetary and business relations between investors, brokerage firms and individual brokers

[54] ibid. A person striving to serve as arbitrator has to pass the following procedure; first of all he submits his application which verifies his 5 year working experience, whether or not at the field of security markets, and at least two years of college level education. Once the FINRA approves the application as successful, the candidate has to take the FINRA Basic Arbitrator Training Program. After taking the course the candidate is capable to serve as arbitrator. Interestingly, FINRA arbitrators are not FINRA employees, but are independent contractors. Arbitrator that is elected to be the chairperson must have completed the FINRA course for chairpersons, FINRA, Arbitration Rulles, 12400 – 12402, available at http://finra.complinet.com/en/display/display_main.html?rbid=2403&element_id=4140 accessed on 19 February, 2014:

[55] ibid, FINRA, Arbitration Rules,

[56] JAMS Rules, Article 15. Retrieved in http://www.jamsadr.com/rules-comprehensive-arbitration/#Rule%2016.1 accessed on 10 April, 2014. In case of sole arbitrator the list includes 5 nominees, and in case the tribunal consists of three arbitrators, JAMS provides a list of 10 nominees

[57] ibid. In case of sole arbitrator they eliminate two nominees, and in case the tribunal consists of three arbitrators, Parties eliminate three nominees.

[58] ibid.

[59] American Arbitration Assossiasion, Rules, Article 12. Retrieved in https://www.adr.org/aaa/faces/rules/searchrules/rulesdetail?doc=ADRSTG_004130&_afrLoop=377735757389796&_afrWindowMode=0&_afrWindowId=135kn0pypy_121#%40%3F_afrWindowId%3D135kn0pypy_121%26_afrLoop%3D377735757389796%26doc%3DADRSTG_004130%26_afrWindowMode%3D0%26_adf.ctrl-state%3D135kn0pypy_181 accessed on 10 April, 2014.

[60] Civil Code of RA, Article 437 sets the freedom of contract. Compulsion to conclusion of a contract is not allowed with the exception of cases when the obligation to conclude a contract is provided by the present Code, a statute, or a voluntarily accepted obligation; Law on Commercial Arbitration of RA, Article 1prescribes the possibility of choosing the method of dispute resolution as an element of party autonomy, which is one of the corestones of the Law.

[61] RA Law on Commercial Arbitration, Article 11.1

[62] ibid, Article 11.4

[63] Interview with the FA President

[64] ibid

[65] FA Rules, Point 13, retrieved in http://uba.am/upload/9104.pdf accessed on 25 April 2014

IMPARTIALITY AND INDEPENDENCE AS CORE PRINCIPLES OF ARBITRATION

Partiality is acting in favour of one party[66] , and impartiality is elimination of such prejudice [67]. As the authors state, impartiality is a state of mind, hence difficult to prove[68].

The European Court of Human Rights has a similar approach while assessing impartiality of a tribunal[69]. It distinguishes subjective[70] and objective impartiality[71].

ICC Rules directly set impartiality as one of the governing rules of the proceedings. They precisely distinguish impartiality of an arbitrator (both before the appointment of a prospective arbitrator and as a ground for challenging already appointed one) from that of the tribunal[72]. Moreover, ICC has the right to confirm the nominees that the parties have chosen by taking into consideration the impartiality of the agreed arbitrator or the tribunal[73].

LCIA Rules require from a nominee to confirm the absence of any circumstance that may give rise to justifiable doubts in impartiality or disclose any of such probable grounds[74]. Impartiality is also considered a ground for arbitrator challenge[75].

Both **UNCITRAL Rules[76]** and **the UNCITRAL Model Law**[77] consider a tribunal to be impartial provided that arbitrators have disclosed any circumstance giving rise to justifiable doubts before appointment. Grounds for challenge are also stated.

The U.S. Federal Arbitration Act is less precise in the requirements of impartiality provided that partial treatment is a ground for vacating the arbitral award[78]. The seminal case setting the standard of impartiality is Commonwealth Coating case, where the Supreme Court ruled that 'arbitrators are to **be more scrupulous to safeguard impartiality'** than judges, although they cannot cut all their connections[79]. The policy behind such stringent level is supported by the fact that arbitrators have greater discretion in deciding the law, and fewer review. Therefore, they are expected to be more honest by disclosing their business relations with one of the parties[80].

In 2012, **The Highest Arbitral Court of Russia** stated that in case where one of the contracting parties or its affiliate establishes and finances a forum for solving its contractual disputes with third parties, such forum cannot be impartial, and, therefore, the principle of party autonomy is violated[81].

Impartiality in FA

Both the Law and FA Charter[82] enunciate impartiality as a fundamental principle to be maintained during the arbitral proceedings. The Law also directly sets partiality as a ground for challenging an arbitrator(s). Yet there seems to be a gap in the provisions of the law and the practice exercised in FA.

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[66] Joseph F. Morrissey and Jack M. Graves. International Sales Law and Arbitration, Kluwer Law International BV, The Netherlands – 2013. p. 363
[67] Gary Born, (2009), p 1465
[68] Henry Gabriel & Anjanette H. Raymond, (2005). Ethics for Commercial Arbitrators.Wyoming Law Review.University of Wyoming 453(5)
[69] Piersack v. Belgium App. no. 8692/79, (ECtHR, 1 October, 1982) - the court explained the term of impartiality by stating that the absence of bias or prejudice constitutes the essence of the notion.
[70] Hauschildt v. Denmark, App. no. 10486/83, (ECtHR, 24 May, 1989), para. 46 - Bias based on personal conviction vis-à-vis parties. Since it is difficult to prove subjective impartiality judges are presumed to be impartial unless proved otherwise.
[71] De Cubber v. Belgium, App. no. 9186/80, (ECtHR, 26 October, 1984), para. 24, notes 9 and 10 - appearance of bias or legitimate doubt of a lack of bias that a reasonable observer may have suffice to consider the judge as objectively partial. In De Cubber (App. no. 9186/80 (ECtHR, 26 October, 1984)) case the Court stresses the appearance of impartiality falling within the ambit of the objective test. It continues explaining that since the objects of activity of the pre-trial and trial bodies are different a person engaged in the pre-trail body then sitting in the bench may be impartial. Yet this may incur fear of lack of impartiality for the accused seeing the same person at the investigating stage then at the court. Therefore such intertwining of judicial and prosecutorial functions constitutes a violation of the requirement of impartiality of the tribunal. Yet in Padovani v. Italy (App. no. 13396/87, (ECtHR 26 February 1993) para 27, note 13, para 48) it provides that mere fear of lack of impartiality that the accused may have towards the tribunal is not decisive, the fear should be objectively justified. And such objective grounds are to be assessed based on the facts of each case. It does not list the possible objective grounds.
[72] ICC Rules, Articles 11, 14. Available at file:///D:/My%20Documents/Downloads/ICC_865_ENG_Arbitration-Mediation.pdf accessed on 10 March 2014
[73] ibid, article 13.2
[74] LCIA Rules, article 5.3. Available at: http://www.lcia.org//Dispute_Resolution_Services/LCIA_Arbitration_Rules.aspx#article5 accessed on 10 March 2014.
[75] ibid, article 10.3
[76] UNCITRAL Arbitraion Rules, Article 11. Retrieved in http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/2010Arbitration_rules.html accessed on 10 March 2014.
[77] UNCITRAL Arbitration Law, Retrieved in http://www.uncitral.org/pdf/english/texts/arbitration/ml-arb/06-54671_Ebook.pdf accessed on 10 March, 2014.
[78] Federal Arbitration Act, The U.S., Article 10 (a)(2). Available at http://www.law.cornell.edu/uscode/text/9/10 accessed on 20 January, 2014
[79] Commonwealth Coating Corp. v. Cont'l Ca Co., 393 U.S. 145 (U.S. Ct. 1968), available at http://supreme.justia.com/cases/federal/us/393/145/case.html accessed on 20 January, 2014.
[80] Gonzales v. Interinsurance Exchange of Automobile Club, Californian approach provides that relation with personal element is insufficient to create an impression of bias, but it has to include business-related connection.
[81] ПОСТАНОВЛЕНИЕ Президиума Высшего Арбитражного Суда Российской Федерации № 16541/11 Москва 22 мая 2012 г retrieved in http://arbitr.ru/bras.net/f.aspx?id_casedoc=1_1_7fcbc163-c0ee-4895-ba19-4f8020513ef8 accessed on 26 April, 2014. «ЛУКОЙЛ» Open Stock Company established an arbitration court. A dispute arisen from a contract between a subsidiary company of «ЛУКОЙЛ», named «ЛУКОЙЛ-ЭНЕРГОСЕТИ» LLC and «МК» LLC was referred to the same arbitration court to solve. The Highest Arbitration Court of Russia held such relation as violating impartiality.
[82] FA Charter, Article 3.1

Issue 1. Whether roles of bank employee and arbitrator are intertwined.

The functional and organizational link of an arbitrator with any bank may raise the fear of lack of impartiality. Prima facie fear as such may be objectively justified, since half of the arbitrators in the FA List are currently employed by different banks of Armenia.

To separate these two roles, FA prohibits choosing an arbitrator in the disputes against the latter's employer bank. Unfortunately nowhere can this prohibition be seen as a legally binding rule. Moreover, one of the arbitrators in reply to our request for interview[83] asked to accept the answer provided by his employer bank as his own answers as an arbitrator.

In this context, the *Salov v. Ukraine* case may be cited where the HCtHR stated that a given judge has an obligation to provide **sufficient procedural guarantees** to exclude any doubt on his objective impartiality[84].

Issue 2. Whether UBA as residual interests in and influence on FA as the founder of the institution[85].

Commercial organisations have a right to create unions to protect/represent property interests[86]. Liability for the obligations of an institution shall be borne by the legal entity that created the institution[87].

UBA members are those banks that have established UBA to protect their interests. Taking into consideration that UBA bears liability for the obligations of FA, it can be concluded that UBA is interested in the proper performance of FA and may intervene in the FA activities[88]. On the other hand, it may be reasonable to assume that FA will not act to the detriment of its founder, i.e. UBA, whose primary purpose of the establishment was (and is) to protect the interests of its members.

Therefore, trust and confidence between UBA and FA, and the legal regulations let us conclude that FA may be partial while solving disputes against the financial institutions whose union has created it. Hence, UBA may have residual interests in FA activities[89].

It is also worth emphasizing that the Highest Arbitral Court of Russia considered such connection to be in contradiction with the principle of impartiality[90].

Sub-issue 1: Whether UBA has influence on FA arbitrators.

The Board of the UBA is the body deciding who is to be included in the list of the arbitrators[91]. The Board is elected by the General Meeting composed of the chairmen (executive directors) of Union member banks[92]. The Board of the UBA has a wide discretion on adopting and amending the Charter and the Statute of the FA,[93] and making changes in the FA list of arbitrators[94] as well.

The Board of UBA, comprised of 21 members from the high-ranking employees of Armenian banks[95], approves and amends the list of arbitrators who are to settle disputes involving the banks and brought mostly by them. Such function of the Board bears the threat for the latter to behave in favor of its creators. Since the interest and influence that UBA may have in FA proceedings are not attenuated enough, it can be concluded that UBA may have an impact on the arbitrators' behaviors.

The solution suggested rests on the premise that FA has the safe-harbor in practice. It would be better to have an interpretation of the standard available in the FA web-site by emphasizing that the arbitrators are presumed to be subjectively impartial[96] unless evidence proves the contrary. It is also suggested including the safe-harbor regulation in the FA Rules so that disputing parties may get familiar beforehand.

[83] By taking into account the difference between the role of arbitrator and that of bank employee we prepared different questions for interviews with the respondent groups.

[84] Salov v. Ukraine, App. no. 65518/01, (ECtHR, 06 December, 2005), para. 81

[85] Mattew David Disco (1993). The impression of possible bias: What a neutral arbitrator must disclose in California, Hastings Law Journal. In case of JAMS-Farg relations the impression of possible bias standard is interpreted as follows: the shareholders of JAMS have residual interest in the Fargo, inasmush as JAMS arbitrators served as arbitrators for Fargo. Therefore, there exist trust and confidence, and business relations between JAMS and Fargo. Such business relations may create an impression of partiality. Besides, the residual interest of JAMS shareholders may lead them to influence on the arbitrators as employees of JAMS.

[86] Civil Code of RA, Article 125

[87] ibid, Article 62.4

[88] FA Charter, Articles 6, 5.2 5.3, FA Rules, Article 14

[89] As the FA President states, all steps are taken to eliminate doubts on impartiality and UBA influence on FA activities

[90] See footnote 81

[91] Charter of the FA, available at http://uba.am/upload/1073.pdf, accessed on 05 November, 2013, provision 5.3

[92] UBA history, available at http://uba.am/about/board/?lang=EN&pageid=3&childid=117, accessed on 05 November, 2013

[93] Charter of the FA, available at http://uba.am/upload/1073.pdf, accessed 24 November, 2013

[94] ibid

[95] See more at http://www.uba.am/about/board/?pageid=3&childid=117

[96] Hauschildt v. Denmark, App. no.10486/83, (ECtHR, 24 May, 1989), para. 46 - Bias based on personal conviction vis-à-vis parties. Since it is difficult to prove subjective impartiality judges are presumed to be impartial unless proved otherwise.

4.2. Independence of Arbitrators

As it will be shown, independence and impartiality of arbitrators are interchangeably connected. In some jurisdictions the requirement refers to both[97] ; in others, only independence is mentioned [98].

The commentary to the **UNCITRAL Rules** gives a similar explanation by stating that an impartial arbitrator does not treat in favor of one party while, an independent one is free from control of one of the parties[99].

Some factual circumstances are generally accepted as grounds opening doors for arbitrator dependence (and/or partiality). Those factual circumstances are:

a) Being engaged in *business dealings* with one of the parties[100] , even indirect commercial or financial relations, constitute grounds for removal of an arbitrator[101].

b) *Interviews of arbitrators and ex parte communication* : Any discussion of the subject matter of the dispute between an arbitrator and one of the parties before appointment may cast doubt on the independence of the arbitrator. Before appointment only questions regarding the accessibility, experience and conflicting interests of the nominee may be discussed[103]. According to the Rules of some arbitral centers, communication with only one party entails dependence[104].

4.3. Independence of FA Arbitrators

The Law sets independence as a ground for challenging arbitrators[105] , and the FA Charter considers independence a fundamental principle of arbitration[106]. Yet, rules governing the practical application of independence are absent.

a) **Business dealings**: In practice banks are rivals. They receive income from services that they provide to their customers. The terms of such services may include business secrets which the banks will strive to conceal from their rival banks. Yet, a FA arbitrator, who also is a bank employee, in examination of the case brought against a rival bank is bound to gain information with details of the dispute which could also include business secrets of the rival bank. The following question, therefore, arises: how can a bank trust in the neutrality of its rival's employee who serves as arbitrator? Are banks safeguarded against the risk that a current bank-employee, who is the arbitrator will be independent and will not use information constituting banking secrecy and internal financial information against his/her employer's rival bank?

b) **Interviews of arbitrators and ex parte communication**. Results of interviews conducted[107] reveal that neither FA, not banks possess guidelines on communicating with arbitrators before and after appointment. On the subject, a representative of one of the banks stated that 'all arbitrators are lawyers; they are professionals and need no guidelines'. This rather simplistic assumption lacks justification as the functions and ethical principles governing attorney-client relations are very different from those applied to arbitrators. It is submitted that clarification of the scope of the questions that can be discussed with the nominee arbitrator(s) may reduce doubts on possible lack of independence of arbitrators.

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[97] U.S. Federal Arbitration Act, English Arbitration Act, Gary Born, pages 1474. According to English interpretation impartiality is linked with independence, as dependence is a ground for challenging the arbitrator only if the doubd on impartiality is absent. Otherwise impartiality is the criterion.

[98] French New Code of Civil Procedure Gary Born, pages 1471-1472 Appellate Court of Paris interpreted independence as « one of the most important characteristics of arbitrator ». In some cases the material connection between arbitrator and one of the parties may lead the former to be partial

[99] Gary Born. note 620

[100] Gary Born, pages 1515-1520

[101] Joseph F. Morrissey and Jack M. Graves. International Sales Las and Arbitration, Kluwer Law International BV, The Netherlands – 2013. p. 363, Gary Born pages 1519-1520

[102] International Bar Association, Rules for Ethics of International Arbitrators, Article 5.1 available at file:///D:/My%20Documents/Downloads/publications_Ethics_arbitrators.pdfb accessed on 17 January, 2014; American Arbitration Association, The Code of Ethics for Arbitrators in Commercial Disputes, Canon III (b) available at https://www.adr.org/aaa/faces/arbitratorsmediators/aboutarbitratorsmediators/codeofethics;jsessionid=2hJQTn2GvhpNhxXTzp0W780TndR96GI2TCW8BPnNrhhQCPGC66T6!1121530366?_afrLoop=1079052231457952&_afrWindowMode=0&_afrWindowId=null#%40%3F_afrWindowId%3Dnull%26_afrLoop%3D1079052231457952%26_afrWindowMode%3D0%26_adf.ctrl-state%3D17iml9sh5j_4 accessed on 17 January, 2014.

[103] ibid

[104] ibid

[105] Law on commercial Arbitration of RA, Article 12

[106] FA Charter, Article 3

[107] Interviews with FA President, arbitrators, bank representatives, customers and attorneys

CHALLENGE OF AN ARBITRATION AGREEMENT ON FINANCIAL COTRACTS WITH CUSTOMERS

It is hardly possible for consumers to challenge mandatory, binding arbitration agreements[108] because of the *nature* of such agreements[109] and difficulty in proving *duress, fraud or unconscionability* under Contract Law[110]that may be used to invalidate unfair contracts. Under "separability doctrine" the arbitration clause is a separate contract in and of itself. Consequently, a party challenging the contract cannot simultaneously attack the arbitration clause[111]. Therefore, on a motion to compel arbitration, the court may only consider whether the arbitration clause is enforceable. For these reasons, in avoiding mandatory, binding arbitration agreements consumers have two barriers RA Law on Commercial Arbitration and contract law.

CHAPTER 6

CHALLENGE OF AN ARBITRATOR

Parties may have doubts regarding impartiality and/or independence of an arbitrator after the arbitral proceeding has commenced. Therefore, they have the right to the challenge arbitrator even after commencement of the arbitration process[112]. According to the rules of various institutional arbitral centres[113], reasonable doubt on impartiality and/or independence of an arbitrator is a ground for challenging the latter. Other objective grounds also exist for disqualifying an arbitrator[114].

ICC Rules[115] require the arbitrator to disclose any fact which may give rise doubts towards his independence. Then a party may challenge an arbitrator after the arbitral proceeding is commenced by informing the Secretary. The final decision on the challenge makes the Court, and this decision is not susceptible to review.

According to **Arbitraion Law of Taiwan**, a party may challenge an arbitrator, *inter alia*, if there exist employment or agency relations between the arbitrator and the counterparty regardless in past or present.

6.1. Challenge of an Arbitrator under RA Laws and FA Rules

The Law sets rules relating to challenge of an arbitrator that are very similar to those of international centers'. The challenge application is heard by the tribunal or by the court specified in the Law[116].

[108] A contract of adhesion is a standard from contract and 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. – RA Civil Code, Article 444, Section 2 and 3.

[109] Agreements to arbitrate are contractual by nature, and therefore the "contract must be enforced"- Joanna Harrington, at page 6

[110]RA Civil Code, Chapter 18, §2. Invalidity of Transactions

[111] Law on Commercial Arbitration of RA, Article 8, "the court must refer the parties to arbitration if a party sues in court with respect to a dispute covered by a valid arbitration agreement save a case when it finds that the agreement is void, or cannot be enforced".

[112] Gary Born, International Commercial Arbitration, Volume 1, 2009, Kluwer Law International the Netherlands. pp 1552-1553; Radka Zahradnikova, Challenge procedure in Institutional and Ad Hoc Arbitration under the New Regulation in the Revised UNICITRAL Arbitration Rules. Czech (& Central European) Yearbook of Arbitration. 24 February 2014: Institutional arbitral centres have clear rules governing challenge. Moreover, the challenging process is supervised by the centre itself. The rational behind such supervision is to eliminate unnecessary delays of arbitral proceedings.

[113] ICC Rules, LCIA Rules, UNCITRAL Rules

[114] Radka Zahradnikova, Special qualification of arbitrator, nationality, faulty behaviour, capacity.

[115] ICC Rules, Articles 7 and 11

[116] Law on Commercial Arbitration of RA, Article 13

i. According to Article 14.1 of FA Rules the grounds for a challenge to arbitrator are the following two:

(1) there exist grounds to believe that arbitrator is interested in the outcome of proceeding;

(2) lack of necessary qualifications, as agreed by the parties.

The issue of impartiality has already discussed in the choice of arbitrators section where we conclude that the way Rules are drafted and operate, impartiality of arbitrators who are bank employees and, therefore, connected to the banking sector is arguable, to say the least. At least appearance of impartiality is entirely lacking which results in lack of trust in the FA by bank customers.

In connection with lack of qualifications, there the Rules include no criteria.

(1) If the only criteria for qualification are those included in Article 5.4 of the FA Charter, it is unclear on what ground can the qualifications of an arbitrator be challenged.

(2) If the parties agree to qualifications that differ from those specified in Article 5.4 of the FA Charter, what happens, considering that FA insists that arbitrators can be selected only from the approved list.

ii. In accordance with Article 14.4:

1. If the challenged arbitrator does not accept the challenge and resign:

(a) In case of single arbitrator (except the FA President), the challenge is decided by FA President;

(b) In case of an arbitration panel, the challenge is decided by other members of the panel but if they do not reach agreement, the decision is made by the FA President.

The powers given to the FA President in the above two cases raise also lack of impartiality questions as the FA President is appointed by the UBA Board (see Article 5.2 of UBA Charter).

2. If the challenged arbitrator is the FA President, the decision on the challenge is made by other mem bers of the arbitration panel. Consequently, if the President acts as single arbitrator or the two other members of the arbitration panel do not agree with the decision, according to the last sentence of Artcle 14.4 the challenge is decided by the President of UBA. Lack of impartiality is more than evident in such circumstances.

The *next forum* hearing the issue of challenging arbitrator is *the court*[117]. According to the same Article 14.5, while the challenge is pending in court, the arbitrator(s) proceeds with arbitration and makes a decision. It is unclear (as it is in case of the Commercial Arbitration Law) what happens to the Award if the court decides in favor of the challenge after the Award is issued (which is more likely to be the case as FA is required to decide the case within one month[118] (see Art. 6.1 of the Rules)), in the following circumstances.

It is worth highlighting that no case on challenging FA arbitrator had been heard by the time this research was conducted[119]. Yet the dissatisfied/claiming party may want to delay the process of making the decision of the tribunal and challenge an arbitrator in the court[120]. It is assumed that in such cases if the grounds for challenging exist the arbitrator himself will resign[121].

In conclusion, the FA regulation on challenging arbitrator may be problematic, although they have not occurred in practice yet.

[117] FA Rules, Article 14.5 – Kentron and Noq-Marash District Court of Yerevan; LCA, Article 6ղված 6, – Kentron and Noq-Marash District Court of RA
[118] FA Rules, Article 6.1
[119] Interviews with FA President and judges form Kentron and Noq-Marash District Cour
[120] Interview with a judge
[121] ibid.

RECOGNITION AND ENFORCEMENT OF ARBITRAL AWARD

The enforcement of a court judgment is an integral part of the fundamental human right to a fair trial within a reasonable time[122]. The same pertains to the enforcement of arbitral awards[123].

According to **ICC Arbitration Rules** every award shall be binding on the parties[124]. **ECtHR** also considers the enforcement of final awards/decisions as an integral part and requisite of the right to fair trial[125].

The Committee of Ministers of the Council of Europe states in its recommendation that member states have a duty to ensure that all persons who receive a final and binding court judgment have the right to its enforcement[126].

The domestic legislation of some countries provide statute of limitations for recognition and enforcement of judicial and non-judicial, including arbitral awards[127]. In others, such limitations are absent[128].

7.1. Regulations of RA legislation

In RA awards of arbitral tribunals are subject to recognition and enforcement if there are no grounds for refusal[129]. In cases where FA award is not complied with voluntarily, it would qualify for compulsory enforcement in accordance with the Law and international treaties[130].

The writ of enforcement of an arbitral award shall be presented for enforcement within one year after the issuance of the award. Whereas the period within which application for enforcement of judicial decisions may be made commences from the date such decision enters into legal force[131].

Thus, it appears that if due to some objective reasons the winning party fails to acquire and submit the execution writ for enforcement of the award on time, within one year after making the award, such party will be deprived of his right to have the award enforced and, consequently, to have his rights, as recognized by the award, restored. There is, of course, an opportunity to have the expired term reinstituted by court order [132], if found justified. However, this cannot be considered as an unequivocal and comprehensive solution to the above mentioned situation, as the reinstitution of the missed term is at the sole discretion of the court.

A party can apply to court to set aside the award of the arbitral tribunal within three months after receiving service of the award[133]. If a party has applied to the court for setting aside or suspending the execution of the award, the court is entitled to delay its decision upon request of the parties or by its own initiative. Thus, in case of suspension of making a decision on recognition and enforcement of the award, the winning party has to wait until the court decides the issue of setting aside. It is only after the decision to recognize the award that the court can issue a writ of execution. This raises the very realistic possibility that in cases where an application to set aside an award is made by the losing party the statute of limitation for enforcement of the award may expire.

[122] Recommendation Rec(2003)17 of the Committee of Ministers to member states on enforcement, Committee of Ministers of Council of Europe, 9 September 2003 - This recommendation applies to the enforcement of judicial decisions, as well as of other judicial or non-judicial enforceable titles.

[123] The right to fair trial implies that the case shall be heard by an independent and impartial tribunal established by law (ECHR p. 1, Art 6). Tribunal has an (autonomous meaning in the scope of ECHR (H. v. Belgium, §50-55): The body need not be part of the ordinary judicial machinery for being a tribunal (H. v. Belgium, §50-55). The term "established by law" is intended to ensure that the tribunal does not depend on the discretion of the executive, but is regulated by the law. The members of the tribunal does not necessarily have to be lawyers or qualified judges (Ettl v. Austria, §36-41). Besides such body must have the power to make binding decisions. (Sramek v. Austria, §36-42).

[124] ICC Rules of Arbitration Art 34, p. 6

[125] Hornsby v. Greece, no. 18357/91 (ECtHR, 1997) para. 40: to construe Article 6 (art. 6) as being concerned exclusively with access to a court and the conduct of proceedings would be likely to lead to situations incompatible with the principle of the rule of law. Right would be illusory if a Contracting State's domestic legal system allowed a final, binding judicial decision to remain inoperative to the detriment of one party. It would be inconceivable that Article 6 para. 1 (art. 6-1) should describe in detail procedural guarantees afforded to litigants - proceedings that are fair, public and expeditious - without protecting the implementation of judicial decisions.

[126] Recommendation Rec (2003)17 of the Committee of Ministers to member states on enforcement. Considering that member states have a duty to ensure that all persons who receive a final and binding court judgment have the right to its enforcement. The non-enforcement of such a judgment, or a delay in it taking effect, could render this right inoperative and illusory to the detriment of one party. Any legislation should be sufficiently detailed to provide legal certainty and transparency to the process, as well as to provide for this process to be as foreseeable and efficient as possible.

[127] UK Limitation Act 1980, Chapter 58, Art. 7. There are certain limitations provided in the legislation of Great Britain. Particularly "An action to enforce an award, where the submission is not by an instrument under seal, shall not be brought after the expiration of six years from the date on which the cause of action accrued". Art. 321 of the Code of Arbitration Procedure of Russian Federation stipulates that the writ of execution can be presented to the enforcement within three years after judicial act becomes effective or after the day the judicial act which shall be implemented immediately is adopted (In this Code "judicial" pertains to arbitration tribunal.

[128] Prof Dr Richard Kreindler, Dr Anna G. Tevini, Alexander Dolgorukow. Arbitration Guide.Germany, February 2012. There are no time limits for initiating proceedings to have an award declared enforceable in Germany. Ontario's Limitations Act, 2002, Chapter 24, Art. 16 (1) - There is no limitation period in respect of a proceeding to enforce an award in an arbitration to which the Arbitration Act, 1991 applies

[129] RA Law on Commercial Arbitration, Article 35 and 36

[130] FA Rules (Statute), Point 33.3

[131] RA Law "On compulsory enforcement of judicial acts", Article 23, Point 1, Section 2

[132] RA Civil Procedure Code, Article 77, Point 1

[133] RA Law on Commercial Arbitration, Article 34, Part 3.

Art.19 of the RA law on Compulsory enforcement of judicial acts (CEJA Act) stipulate that following its examination of the application for enforcement of an award, the court makes a “decision”. On the other hand, under the Civil Procedure Code of RA, a “judicial decision” is also recognized as a “judicial act”. Therefore, it appears that by recognizing and enforcing the arbitral award the court of first instance adopts a decision which is regarded as a judicial act in the sense of Civil Procedure Code of RA. Considering this circumstance, the term envisaged for submitting the writ of execution can be calculated starting from the date of the court “decision” on recognition and enforcement of the arbitral award, thus applying point 1 of article 23 of CEJA Act instead of point 2.

To conclude, a broader interpretation of the law by courts could avoid situation where e.g. because of applying for setting aside the award and procrastination of the judicial process, the one year term from the date of making the award may expire thus depriving the beneficiary of the award of his legal rights.

CHAPTER 8

SETTING ASIDE THE ARBITRAL AWARD

Various arbitration rules provide the arbitral award as final and binding[134] , at the same time setting forth the exhaustive grounds which allow setting aside the award. It is necessary to emphasize that domestic courts do not review an award on its merits, but consider the compatibility of the award with the stipulated grounds.

In several countries as a result of examination of a setting aside application, the court can set aside an award and remit the case to the arbitral tribunal for a new decision[135]. According to the German Code of Civil Procedure “the reversal of the arbitration award will result in the arbitration agreement once again entering into force concerning the subject matter of the dispute[136]”.

8.1. Setting Aside an Arbitration Award in RA

In RA arbitration awards can be reversed by submitting an appropriate application to the court to set aside[137]. The same pertains to the setting aside of the awards of FA. In cases where an application to set aside the award is made, the court may, upon request of a party or by its own initiative, suspend consideration of the issue by providing an opportunity to the arbitral tribunal to restart the arbitration process[138]. In such cases it is safe to assume that, based on Section 3 of Art. 32 of the Law, the arbitration tribunal shall continue to exercise the authority parties have granted it in their arbitration agreement[139].

As it is mentioned above, the arbitration award can be set aside within three months after it is made[140]. However, a situation can occur where the application to set aside the award is submitted after the court decision on recognition is made and a writ of execution is issued. The Law is silent on the issue what the actions of the court should, in such circumstances, be; i.e. whether or not it is legally authorized to reverse its earlier decision on recognition and enforcement of the award. Obviously there is a gap in the law which is a subject of a separate analysis.

ICC Rules, Art. 30; Code of Civil Procedure of Germany, Art. 1055; Code of Civil Procedure of Austria, At. 607; Ա Swiss Civil Procedure Code, Art. 387. Once notice of the award has been given to the parties it has the effect of a legally-binding and enforceable judicial decision.

Swiss Civil Procedure Code, Art. 399. German Code of Civil Procedure, point 4, part 2, Art 1059

German Code of Civil Procedure, point 5, part 2, Art 1059

RA Law on Commercial Arbitration, Article 34, Section 1

Id., Section 4

Id., Article 32, Section 3

Id. Article 34, Section 3

CONCLUSION

This policy paper attempts to demonstrate a new policy approach aimed at developing FA.

Arbitration, a form of alternative dispute resolution, is perceived as an effective method of resolving disputes. In Armenia, FA as alternative to courts, is an active forum and has been relatively successful in achieving its goals. However, there are some problematic issues, and to resolve those issues FA Charter, Rules and policies of applying these rules in practice ought to be amended to the extent possible.

More problematic issues are:

- customers agreeing upon arbitration through a standard contract without understanding the obligations emanating from such contract and its legal effects is problematic from the perspective of party autonomy and free will;
- party autonomy is restricted while choosing FA arbitrators, since parties are obliged to make a choice from an exhaustive list of arbitrators;
- the guarantees ensuring impartiality and independence of FA arbitrators are insufficient. Particularly, although both FA Charter and the Law set these principles, their application may be doubtful in practice.
- the provisions of relevant laws relating to recognition and enforcement of arbitral awards, if not amended by new legislation or by court established precedence, may render arbitration, in particular in case of FA decisions, practically inefficient.

As part of this research and following detailed analysis of the problems discussed above, Rules of Ethics of Arbitrators are drafted. Furthermore, an improved policy on notifying customers about arbitration in banks is suggested. It is also suggested making amendments of the FA Charter and Statute. The solutions can be summarized as follows:

- while explaining arbitration clause to the customers bank employees should fully explain their customers that by agreeing to arbitration they waive their constitutional right to refer their disputes to court;
- broaden the list of FA arbitrators, the requirement for arbitrators to have banking work experience set by the FA Charter should not be perceived as a privilege, considering the FA arbitrators' concurrent employment with a bank. The parties should be allowed to choose an arbitrator not included in the FA list of arbitrators, and at the same time grant FA the right to confirm such a nominee as arbitrator;
- specifically provide, in the FA Charter that an arbitrator is prohibited from hearing disputes against his/her employer-bank;
- provide an explanation of impartiality and independence by FA, make it available to the public by including the relevant information in the FA official web site;
- it is suggested that in cases where the award is contested, the period within which application for writ of execution may be made should be calculated from the date of the court 'order' recognizing the award (instead of the date when the award is made) thus applying Point 1 of Article 23 of CEJA Act instead of Point 2.