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DEVELOPMENT AND IMPACT OF ON-LINE SYSTEM ON INTERNATIONAL COMMERCIAL ARBITRATION

The paper gives the analysis of international commercial arbitration sphere on the basis of newly submitted cases to arbitration institutions. The analysis showed that European arbitration institutions have a decline in the statistics. As the result, the paper suggests, that the best option to increase the level of newly submitted cases and to improve quality of the dispute resolution it would be necessary to develop the system of online arbitration. Such a system could be developed as a universal one, or it could be developed by permanent arbitration institutions on their own. Currently, an online dispute resolution system is enshrined in several states, however, the functionality of such a system is limited. The paper provides guidelines for the development of a full-fledged system, within which the parties and arbitration institution could resolve a dispute from the moment of registration of arbitration agreement (clause) to the adoption of a final award.
Keywords: international commercial arbitration, dispute resolution, arbitration agreement, anti-suit injunctions, online dispute resolution.

International commercial arbitration is a constantly and actively developing system as it has shown its effectiveness and convenience to the parties of arbitration over the years of its existence. Numbers of cases submitted to different arbitration institutions reflect the enduring popularity of arbitration. For example, caseload of the International Chamber of Commerce has increased from 353 cases submitted in 1993[1] to 810 new cases filed in 2017[2], which involved 2,316 parties from a record 142 countries. The ICC figures also showed that the 1,548 pending cases at the end of 2017 represented an average value in dispute of US$ 137,325, 630 with newly registered cases in 2017 representing an aggregate value in dispute of over US$ 30.85 billion[3].

Nevertheless, statistics shows that majority of the most popular European permanent arbitration institutions have a decline in the number of newly submitted cases in last few years (see Figure 1[4]). Such figures can be explained by several factors:

1. Arbitration institutions in the Asian region are gaining in popularity. As shown in Figure 1, SIAC statistics increased by 31.7% and CIETAC by 35.6%. At the same time, ICC numbers decreased by 16.1%,

[1] Born, Gary B. (2009). International Commercial Arbitration. *Volume 1.* The Netherlands: Kluwer Law International, 69.
[2] International Chamber of Commerce. *ICC announces 2017 figures confirming global reach and leading position for complex, high-value disputes*. <https://iccwbo.org/media-wall/news-speeches/icc-announces-2017-figures-confirming-global-reach-leading-position-complex-high-value-disputes/> (2019, March, 18).
[3] International Chamber of Commerce. *ICC announces 2017 figures confirming global reach and leading position for complex, high-value disputes*. <https://iccwbo.org/media-wall/news-speeches/icc-announces-2017-figures-confirming-global-reach-leading-position-complex-high-value-disputes/> (2019, March, 18).
[4] Altenkirch, M., Frohloff, J. International Arbitration Statistics 2016 – Busy Times for Arbitral Institutions. *Global Arbitration News.* <https://globalarbitrationnews.com/international-arbitration-statistics-2016-busy-times-for-arbitral-institutions/> (2019, March, 18); For ICC 2017: International Chamber of Commerce. *ICC announces 2017 figures confirming global reach and leading position for complex, high-value disputes.* <https://iccwbo.org/media-wall/news-speeches/icc-announces-2017-figures-confirming-global-reach-leading-position-complex-high-value-disputes/> (2019, March, 18); For SIAC 2017: Singapure International Arbitration Center. *SIAC Announces New Records for 2017.* <http://www.siac.org.sg/69-siac-news/560-siac-announces-new-records-for-2017> (2019, March, 18); For LCIA 2017: *Facts and Figures. Casework report* 2017. (London Court of International Arbitration). <https://www.lcia.org/LCIA/reports.aspx >(2019, March, 18); For CIETAC 2017: China International Economic and Trade Arbitration Commission. *CIETAC Annual Caseload(Foreign-Related and Domestic).* <http://www.cietac.org/index.php?m=Page&a=index&id=40&l=en> (2019, March, 18); For SCC 2017: Stockholm Chamber of Commerce. *SCC Statistics 2017.* <https://sccinstitute.com/statistics/> (2019, March, 18);
For ICAC: International Commercial Arbitration Court at the Ukrainian CCI. *The ICAC is one of the most reputable arbitration institutions in Central and Eastern Europe.* <https://icac.org.ua/en/statystyka-ta-praktyka/statystyka/> (2019, March, 18).

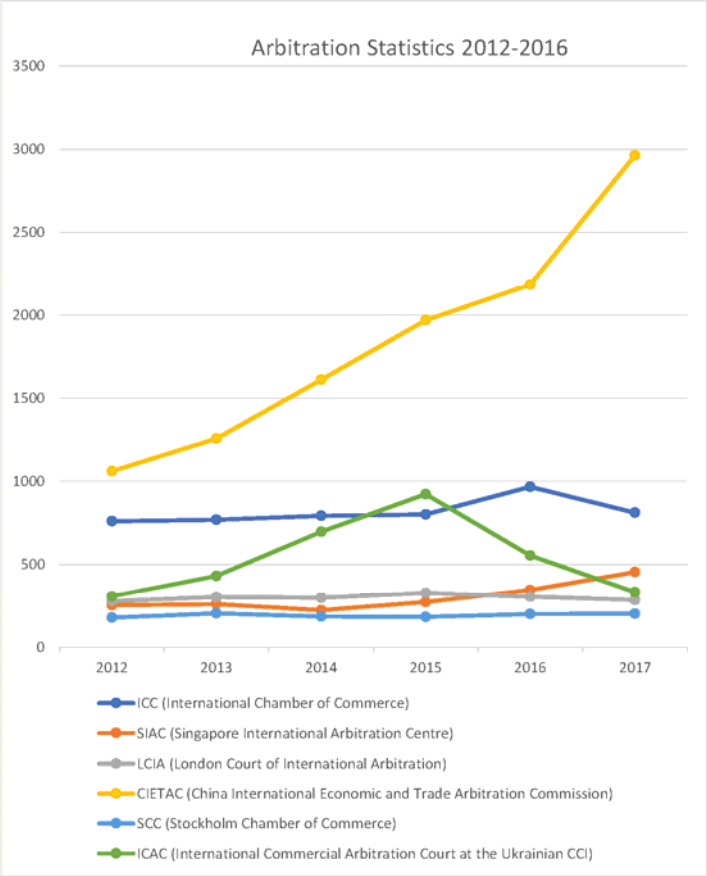

Fig. 1. Arbitration Statistics 2012 - 2016

LCIA by 5.9%, ICAC by 40.1%. SSC data remained almost unchanged. However, CIETAC statistics (2,183 new cases in 2016 year), also includes purely domestic cases. In 2016, 483 cases were international cases from 57 countries[1]. Thus, the popularity of Asian arbitration institutions leads to a decline in the statistics of European arbitration institutions.

2. International trade participants prefer to solve their disputes in national courts instead of arbitration, even though the final decisions of international commercial arbitration are subject to compulsory enforcement as if they are the decisions of the state courts. This could be explained by high price for submission of the case to arbitration and by unsolved issues in arbitration system. Such issues include the risk of parallel proceedings in arbitration and national courts, the difficulty in recognizing and enforcing interim measures issued by international commercial arbitration, criteria for establishing the validity of an arbitration agreement, the problem of determining jurisdiction, etc.

The above-mentioned challenges in the international commercial arbitration system can be eliminated by the development of on-line system for arbitration institutions. The effectiveness of this system can be proved on the example of parallel proceedings. Today, British and American courts use the practice of anti-suit injunctions in order to protect their own jurisdiction from a foreign non-competent court. The fact is that British and American courts have a long history of issuing injunctions that forbid parties to file a case to foreign courts bypassing an existing arbitration agreement, and recognize the issuing of such injunctions by other courts. This approach is clearly illustrated by the *Aggeliki Charis Compania Maritima v Pagnan* judgment[2]. Under this decision, the court issued anti-suit injunctions to prevent parties from continuing the trial in an Italian court, since the same case was considered between the same parties

[1] China International Economic and Trade Arbitration Commission. *贸仲委2016年业务工作总结和2017年业务工作计划*. <http://www.cietac.org/index.php?m=Article&a=show&id=14107> (2019, March, 19).

[2] Aggeliki Charis Compania Maritima v Pagnan (the Angelic Grace) [1995] CA UK. <http://swarb.co.uk/aggeliki-charis-compania-maritima-sa-v-pagnan-spa-the-angelic-grace-ca-1995/>. (2019, March, 20).

in the English court. This logic is not supported in continental law countries. Anti-suit measures of protection are especially criticized in the European Union. The EU Court in *Turner v Grovit*[1] case ruled that a court of a Member State cannot deprive the party of the right to continue the trial in a court of another EU Member State.

Based on the foregoing, anti-suit measures of protection are not the best option for avoiding parallel proceedings. In this case, it is important for courts to find a compromise.

The most effective solution of the parallel proceedings issue would be the development of online system, that would accept and process applications submitted to international commercial arbitration or national courts. Whit application of such system, it would be impossible to file the case between the same parties on the same issues both to national court and international commercial arbitration.

There are two ways:

1. The development of a global system, which will include all national courts and international commercial arbitrations. It is the most efficient project of improvement all litigation system, but, in the same time, this option is the most difficult for practical implementation.

2. The development of such a system within the framework of the ongoing international commercial arbitration. This option is easier for implementation and is fully depends on opportunities of the arbitration institutions.

It should be noted that several states have already launched a system for online litigation or declared in their national law about the development and enforcement of such system. For instance, Ukraine in its Act «On Amendments to the Commercial Procedural Code of Ukraine, the Civil Procedural Code of Ukraine, the Code of Administrative Legal Proceedings of Ukraine and other legislative acts»[2] declared the development of the Unified Informational Telecommunicational System for courts, which should enable document circulation in electronic system. In accordance with the Act, the system should become available at March 1, 2019. However, The State Judicial Administration of Ukraine, taking into account the proposals of the courts, and in accordance with the decision of the High Council of Justice, sent revocation notice on March 1, 2019, so Unified Informational Telecommunicational System still unavailable in Ukraine[3].

Today, two countries have working e-court systems, namely, India and Australia. The functionality of these systems is at completely different levels. For elaboration of a model system for arbitration institutions it is important to consider each system in detail.

The access to eCourts system in India is available at http://www.ecourts.gov.in/ecourts_home/, or via the eCourts Services mobile application. The online court system in India was called eCourts and was developed under the «National Policy and Action Plan for Implementation of Information and Communication Technology (ICT) in the Indian Judiciary – 2005»[4], which was approved by the eCommittee and the Supreme Court of India. The eCommittee in its turn was created by the Government of India. The purpose of the eCourts system is to establish a Pan-Indian system for district courts, which is supervised and funded by the Justice Department of the Ministry of Justice of India. Today, the system works as follows: a unique number assigned to each court case that will be heard in the district court. By case number, it is possible to get information about the status of the case, and view the entire history of document circulation. The system allows to search for court cases not only by number, but also by type of case, by parties of the process, date of submission. If several cases should be tracked, they can be stored in the «My Cases» list, so it becomes convenient for the party to receive any notification concerning a particular case. Unfortunately, the functionality of the online court in India is limited to search and statistics.

In Australia, the online court system is more advanced. In this country, it is possible to conduct some procedural steps without leaving your home or office through the eCourtroom system, which is available at: http://www.fedcourt.gov.au/online-services/ecourtroom. eCourtroom is an online courtroom that is used

[1] Gregory Paul Turner v Felix Fareed Ismail Grovit [2001] CJEU. <http://curia.europa.eu/juris/liste.jsf?language=en&num=C-159/02>. (2019, March, 20).

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[3] ДСА відтермінувала повноцінний запуск електронного суду. *Українське право.* <http://ukrainepravo.com/news/ukraine/dsa-vidterminuvala-povnotsinnyy-zapusk-yesits-/> (2019, March, 22).

[4] eCourts Services App. *About Us*. <https://services.ecourts.gov.in/App/appaboutus.html.> (2019, March, 22).

by judges and registered users of the system for resolution of a specific category of cases by the Australian Federal Court or the Australian Federal Circuit Court. The procedures that can be considered online include:

1) ex parte applications for substituted service in bankruptcy proceedings;
2) applications for examination summonses;
3) giving of directions and other orders in general federal law matters eCourtroom is also linked to the eLodgment system, which gives the parties an opportunity to exchange electronic documents[1].

The final judgment to a case in the eCourtroom system is equivalent to the judgment in the regular courtroom[2]. «This means that:

1. the eCourtroom must only be used for issues requiring consideration and determination by the Court or a Judge;
2. the eCourtroom is not to be used for communications solely between the parties or their representatives, particularly where the communications are confidential or otherwise sensitive;
3. the language and modes of address used on the eCourtroom must be same as that used if the matter were being dealt with an ordinary courtroom;
4. undertakings given on the eCourtroom by a party or their representative to the Court or a Judge or other parties are binding as if the undertaking were given in an ordinary courtroom;
5. the rules of contempt apply to proceedings conducted using the eCourtroom; and
6. a copy of the discussion thread for each topic dealt with on the eCourtroom will, unless the Court or a Judge otherwise orders, be publicly available as read-only text on the Court's web site».

When a case is held through the eCourtroom system, the judge or the court may decide to terminate the use of the system for the given case or for a part of the case at any time on its own initiative or at the request of the parties.

The Court or a Judge may give directions as to:

– the issue or issues that will be discussed through the system;
– participants of the eCourtroom;
– maximum length of messages and applications;
– maximum time to send messages (including replies) to eCourtroom.

As to the documents related to the case, they must be submitted to the Court in original form. However, during communication via eCourtroom, when a party refers to a document, this document should be attached in electronic form to the message.

Thus, developing an online system for international commercial arbitration, Australian system of eCourtroom should be taken into consideration.

By reason that international commercial arbitration is based on the lex voluntatis principle, it is possible to develop an online dispute resolution system, which would give the opportunity to resolve a case starting from the moment of conclusion of arbitration agreement and ending by giving the final award. For the purposes of this paper, let's call the system eArbitration.

First of all, if parties want to resolve their case in international commercial arbitration, they should conclude the arbitration agreement or they should include the arbitration clause in the contract, so that the arbitral institution has the competence to resolve the dispute between the parties. At this stage, the parties could registrar their contracts with arbitration clause or arbitration agreement in the system of eArbitration. The eArbitration system may be developed in each arbitration institution separately, in such case parties should register their agreement or contract in that arbitration institution, that is specified in the agreement or contract. In global eArbitration system, parties may register without regard to the reference of the arbitration institution. Such registration will avoid the problem of parallel proceedings and the problem of the non-validity of an arbitration agreement.

Further, in eArbitration system at the moment of registration of the agreement (clause) the parties would receive an individual login and password to access the functions of the system. The login and password should automatically expire after a certain period after the termination of the contract (for example, after 1 year). If the termination of the contract is due to the performance of certain actions (for example, with the delivery of the goods to the buyer), then the party in whose favor the event occurs

[1] Federal Court of Australia. *eLodgment*. <https://www.elodgment.fedcourt.gov.au/eLodgment/login.aspx?ReturnUrl=%2felodgment%2fdefault.aspx> (2019, March, 22).
[2] Federal Court of Australia. *eCourtroom Protocol*. <http://www.fedcourt.gov.au/online-services/ecourtroom> (2019, March, 22).

must enter into the eArbitration system the date of the occurrence of such an event, and from that date would start the limitation period (for example, 1 year).

To initiate a case, the party will need to submit an online application, which should be signed by the digital signature. As regards the information to be contained in the application, it should be the same, as for the regular application and it should be set forth in arbitration rules of each institution.

Together with the application, the applicant must file the relevant documents to the case and confirmation of payment of the registration fee. In the eArbitration system, it is proposed to make a separate section "Documents" where the parties and the arbitral tribunal will download all documents, including procedural ones and evidence in the case. In addition to online versions of documents, the parties must send each other and to the court original documents or their certified copies.

After the claim is filed, the defendant must have time to file counterclaims. For this reason, the eArbitration system should have the "Submit counterclaims / response" field which would be activated within 20 days, for the respondent to file the counterclaims. The deadline for filing counterclaims may be set shorter than the one currently set in the arbitration rules, as the respondent would receive a notification via email and through the mobile application about the initiation of the case. Accordingly, the defendant's response will also be received by the applicant and to the court in a matter of seconds.

Sometimes it is important to add additional participants to the procedure, such as third parties and witnesses. To do this via eArbitration the party should fill the form of the corresponding application in the section "Application for Joinder".

The templates for all applications submitted by the parties must be in the relevant sections above.

In addition, if claims that arose on the basis of or in connection with more than one contract, they may be reviewed within the same arbitration proceeding. To do this, at the time of filing an application, the party should have to specify on the basis of which agreements (clauses) the application was filed in the system. Moreover, it would be possible to consolidate arbitration proceedings with the application of the party (parties) and with the consent of the other party (parties) of the dispute. The advantage of working in the eArbitration system is that all the procedure will be conducted as fast as possible, in the most convenient place to all the parties and the history of every procedural stage and exchanging of messages could be tracked through the online system or mobile application.

It will also be convenient for the parties to make an appointment of arbitrators. Each arbitration institution has a recommended list of arbitrators, and if the party to the dispute chooses an arbitrator from the list, the appointment takes place instantly. In addition, the system should automatically remove those arbitrators who are in contact with the party to the dispute. After the appointment of an arbitrator, the system must run a timer for the party to replace an arbitrator if it is necessary. If the party seeks for interim measures before appointment of arbitration court, it is possible to make the application for the appointment of an emergency arbitrator. If application is accepted, the system will automatically appoint an arbitrator in random. Accordingly, due to the application of the system, the extra time would not be spent.

However, while using the online system of arbitration, the place of arbitration will be under the question. Therefore, the place of arbitration should be established by the place of conclusion of the contract, if it is not indicated, at the place of registration of the permanent arbitration institution.

The online arbitration system has many advantages. For all participants of the arbitration process it would be convenient to view the procedural schedule, exchange messages and written evidence, and, if necessary, to hold oral hearings in the program through a video conference. All these functions should be available at the mobile application. The main requirement for the program will be high security of communication channels because all cases that are considered in arbitration institutions are confidential. Through the program, it will also be possible to monitor the compliance with the terms for conducting procedural actions. This feature is useful when the parties are located in different time zones. For arbitration institutions application of the system will allow to shorten the deadlines for procedural actions. Accordingly, it will be possible to collect statistics for which period of time the dispute is resolved in one or another arbitration institution, thus such institutions could submit more new claims.

As a result, the advantages of using the online system during arbitration are the following:

– avoidance of parallel proceedings, since the parties would not be able to deny the existence of an arbitration clause and submit the application to the court. The court in its turn would not be able to state that the arbitration clause was concluded in the absence of the agreement of one of the parties and consequently recognize it as inapplicable;

– acceleration of the dispute resolution procedure in arbitration. It would be possible to conduct all the procedural actions through the system from the registration of the arbitration agreement to the publication of the final award;

– convenience in the dispute consolidation. This is especially important when other parties join to the arbitration process;

– transparency in the election of the emergency arbitrator. Since an emergency arbitrator would be randomly chosen by system, the human factor eliminates on which parties may have an influence;

– convenience for the parties and arbitrators. Since it would become possible to review all the procedure history and receive notifications about updated information, to see the exchange of all communications, all documents and materials of the case, to get information about how much time left to perform certain procedural actions, it is very convenient for the parties and the court to track the state of dispute resolution.

Thus, by creating an online system for the dispute resolution, arbitration institutions will receive a number of benefits that will increase the number of newly submitted cases in those arbitration institutions that develop such system. In addition, it is easier to develop such system within international commercial arbitration sphere, rather than in interstate, or in state levels.

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