розгляді можливе винесення рішення третейського судді (арбітра) без участі однієї із сторін. В медіації це неможливо. Крім того, медіатор не виносить рішення по спору. Угода за результатами медіації має бути добровільно підписаною всіма сторонами спору згідно з приписами цивільного законодавства. В цьому разі така угода набуває статусу цивільно-правового або господарського правового договору, або може бути затвердженою судом в якості мирової угоди. І виконання такої угоди нічим не відрізняється від виконання інших цивільно-правових договорів або мирових угод і не несе більше ризиків, ніж звичайний договір, адже ніхто не може заборонити громадянам домовлятися.

Таким чином, викладені вище принципові підходи до врегулювання медіації в Україні, якщо вони будуть втілені в законодавство, а саме в закон про медіацію, допоможуть гармонійно інтегрувати медіацію в правову і судову систему України через інститути громадянського суспільства за мінімальної участі держави.

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PRROBLEMS OF HARMONIZATION OF INTERNATIONAL COMMERCIAL ARBITRATION

The spread of international commercial arbitration resulted in the need to unify procedural - legal regulation of its activities. First of all it led to the conclusion of bilateral agreements containing provisions on arbitration. But the increasing importance gained collective efforts of the Unification of Arbitration multilateral agreements at the regional and universal levels. Therefore, the objective of regulation of international commercial arbitration was carried out in two areas: domestic legislation and in international relations.

Assessing positively legislate regarding ICA should be noted that there is a need for a special international treaty regulating the recognition of arbitration agreements, recognition and enforcement of arbitral awards on the basis of multilateral or bilateral agreements.

International standardization of contract is a way to unify the international legal regulation of foreign economic relations, the essence of which is to provide general

legal norms by signing multilateral both international and local conventions. International negotiated the unification of legal regulation of relations with foreign elements can be implemented and conflict of substantive way.

Today scientists supported is the need to unify procedural regulation of international commercial arbitration. However, different patterns of arbitration vision of nature are the basis for different approaches to unification and the limits of its methods. Recently, private international law tends to unification, that is the only way to develop the legal regulation of certain relations with a foreign element. Proponents of this approach point out that the benefits of such regulation is, firstly, that the production of unified legal approach yedynounifikovanoyi system of law will allow to make regulation of certain relations the least biased avoid some kind of one-sided, that considering the interests of only one party in the relationship; second, that the unification of international legal regulation of certain relationships will provide clarity and certainty this relationship the participants about the consequences which they can expect engaging in such relationships[29].

On the other hand, there are some negative aspects related to the harmonization of legal regulation of foreign economic relations. Above all, she is extremely difficult unification law. The legal system of each country is so unique phenomenon that even removing certain common principles is an extremely complicated process. For example, in some of the decisions of the ICA, as well as the literature on international law is a manifestation of the tendency to avoid the application of any national legislation which has the international private law and procedural nature, and to provide some general principles of private international law, supported by all legal systems found elsewhere[30].

The essence of the contract is to unify the creation and adoption of a multilateral international treaty containing uniform law governing certain relations. It should be noted that such agreements based on territorial location of States Parties can also share the universal and local.

Along with the development of international arbitration contractual regulation between countries in the late XIX - early XX century. There are attempts to unify the legal regulation of arbitration on a multilateral basis[31]. Initially, these documents are accepted countries of the American continent: in 1889 the Treaty on International

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[29] Логуш Л. В. Міжнародно-договірна уніфікація процессуальних норм, що регулюють міжнародний комерційний арбітраж / Л. В. Логуш // Наукові записки. Том 53. – Юридичні науки, К. – 2006. – С. 261-265.

[30] Мосс Дж. К. Автономия воли в практике международного коммерческого арбитража / Дж. К. Мосс; под ред. А. А. Рубанова. – М. : Ин-тут гос. и права РАН, 1996. – 84 с.

[31] Мосс Дж. К. Автономия воли в практике международного коммерческого арбитража / Дж. К. Мосс; под ред. А. А. Рубанова. – М. : Ин-тут гос. и права РАН, 1996. – 84 с.

Procedural Law stipulated rules on the Recognition and Enforcement of Foreign Arbitral Awards[32].

In 1925 in Havana on the sixth Conference of American States adopted the Code of Private International Law (Code «Bustamonte» – in honor of the Cuban lawyer Antonio Bustamonte), which included the terms of Foreign Arbitral Awards. Compared with the above agreements, the Code applied in many countries (Brazil, Cuba, Costa Rica, Haiti, Nicaragua, Panama, etc.)[33].

The most ambitious attempt to international contractual unification arbitration disputes at the international level are two instruments developed under the auspices of the League of Nations – Geneva Protocol on arbitration clauses from 24 September 1923 and the Convention on the Recognition and Enforcement of Foreign Arbitral Awards on September 26, 1927[34].

The Geneva Protocol of 1923 became an international act of conventional character in international commercial arbitration. The purpose of the Protocol was to achieve international recognition of the legal validity of arbitration agreements. According to Art. Protocol 1 states pledged to recognize the validity of contracts for arbitration of disputes, both existing and those that arise in the future, if the agreement concluded between the parties, subject to the jurisdiction of different countries participating in the Protocol.

Thus, although the adoption of the Geneva Convention was a significant development in international arbitration, some of its provisions are nonetheless made difficult enforcement of foreign arbitral awards.

Thus, the scope of the Geneva Convention was limited because it was distributed only to the subjects participating States, and only in arbitration decisions taken in the territory of these states.

In addition, the side that drew with the application for recognition and enforcement of foreign arbitral decision, the burden of proof lay down the conditions for such recognition or enforcement of the Geneva Conventions. In particular this applies to the fact that the decision has become final in the country and its removal was issued in accordance with the laws of that country.

Finally, the Convention provides the possibility to refuse recognition and Enforcement of foreign arbitral award if the decision was contrary not only to the public policy of the country's performance but also the principles of law of that country. Since the Convention does not disclose what is meant by the principles of

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[32] Tratado de Derecho civil internacional, Montevideo 12 de febrero de 1889, 18 Martens (2nd). – p. 443 (Spanish).
[33] Convention sorbe derecho international privado (CODIGO BUSTAMANTE) [Електронний ресурс]. – Режим доступу: http://www.oas.org/juridico/spanish/firmas/a-31.html.
[34] League of Nations, Treaty Series, vol. XCII (1929–1930). – No. 2096. – p. 337.

law, it gave enough opportunities for refusing recognition and enforcement of foreign arbitral awards.

However, the Geneva Protocol in 1923 and the Geneva Convention 1927, being the first multilateral international instruments in the field of arbitration, made a huge impact on the development of national legislation on arbitration. Thus, in France in 1925 has made changes to its Commercial Code, according to which recognized as valid arbitration agreements in commercial transactions. In the same year, the US adopted a federal law of arbitration, which was the first act of the federal legislation governing arbitration.

Examples of universal unification relating directly to international arbitration is the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, adopted in New York in 1958 and ratified by Ukraine in 1960.

It should be noted that since the adoption of the New York Convention took considerable time, whereby some provisions of the Convention, in particular regarding the written form of the arbitration agreement required adjustments. In addition, since the adoption of the New York Convention have been significant changes in the practice of international trade on the use of electronic communication. These changes are reflected both in the international regulation and national legislation of many countries.

In this regard, the United Nations Commission on International Trade Law (UNCITRAL) at its thirty-ninth session, on 7 July 2006, adopted a recommendation on the interpretation of § 2 of art. II § 1 and Art. VII New York Convention.

In particular, according to the recommendations of UNCITRAL circumstances referred to in § 2, Art. II New York Convention should not be construed as exhaustive. This means that the written form of the arbitration agreement is not considered to be complied only when there is an arbitration clause in a foreign trade contract or arbitration agreement signed by the parties or contained in an exchange of letters or telegrams. The requirement of the written form of arbitration agreement also considered met if the arbitration agreement is concluded through the exchange of electronic messages, including messages transmitted by email.

Given the fact that this recommendation is not an addition to the New York Convention, but the interpretation of its provisions, it operates automatically on the territory of all States Parties to the Convention since its adoption.

Examples of regional unification was the European Convention on International Commercial Arbitration, adopted in Geneva in 1961 and ratified by Ukraine in 1963 (local Convention). The work that led to the signing of the European Convention began even before the signing of the New York Convention. In the early 50-ies of XX century of the UN Economic Commission for Europe has established a special working group whose aim was to promote the development of trade between the

capitalist and the socialist bloc in Europe by developing uniform rules of trade. Part of this work was to establish common rules applicable to international arbitration, which, in fact, led to the signing of the European Convention. Currently, members of the Convention have 28 states. Although the composition of the European Convention is not as wide as New York, it is of great importance regarding the regulation of international arbitration, adding many of the New York Convention.

The most important result of the efforts of the United Nations Commission on International Trade Law at the unification of law in the regulation of international commercial arbitration was the development and adoption June 21, 1985 the Model Law «On International Commercial Arbitration»[35]. UN Commission on International Trade Law (UNCITRAL) was established pursuant to General Assembly resolution number 2205 of December 17, 1966 to promote the harmonization and unification of the law of international trade, in particular by ensuring uniform interpretation and application of international conventions and model laws in international trade.

In 1976 adopted the UNCITRAL Arbitration Rules, which was developed in collaboration with the International Council for Commercial Arbitration. This regulation was not the first attempt to create arbitration rules that are advisory in nature.

Thus, in 1963 the Commission prepared the European Economic Arbitration Rules, the annex to which contained a list of chambers of commerce and other institutions that can act as a body that appoints arbitrators. In 2010 was adopted a new edition of the Regulation.

UNCITRAL Arbitration Rules applicable in case of disputes arbitration composition specially created to consider the dispute (arbitration ad hoc).

The main problem that arises from ad hoc arbitration in practice is the formation of arbitration in the event a party refuses to appoint an arbitrator or arbitrators selected by the parties can not agree on the head. UNCITRAL Arbitration Rules decided the issue, pointing out that in this case the appointment shall be made by the body that appoints arbitrators agreed by the parties or, failing such agreement, this body is determined by the Secretary General of the Standing Court of Arbitration in The Hague.

The second problem with the ad hoc arbitrations due to the fact that the parties agreeing to arbitration ad hoc, the arbitration agreement shall prescribe all the arbitration proceeding. Otherwise, this procedure is completely determined by the composition of the arbitration, and the parties were in the dark about the procedure

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[35] Типовой закон ЮНСИТРАЛ о международном торговом арбитраже (в вариантс, принятом Комиссисй Организации Объединснных Наций по праву международной торговли 21 июня 1985 года) [Електронний ресурс]. – Режим доступу: http://www.uncitral.org/pdf/russian/texts/arbitration/ml-arb/MAL_Rus.pdf.

for future consideration until the formation of the arbitration. This gap was eliminated as the UNCITRAL Arbitration Rules.

Thus, despite the fact that the Arbitration Rules were adopted by UNCITRAL, it is a recommendation, is valid only if the parties expressly refer to its use.

UNCITRAL Arbitration Rules was a great success. This is evidenced by the fact that more than 20 arbitration institutions have adopted special regulations for which they act as a body that appoints arbitrator in disputes with the UNCITRAL Rules.

Following the Arbitration Rules in 1996 UNCITRAL adopted the «UNCITRAL Notes on the organization of the arbitration». This document is a recommendation also contains a number of practical recommendations to the parties and arbitrators with the organization and conduct of arbitration proceedings.

However, the most significant document developed by UNCITRAL in international trade, is the Model Law «On international commercial arbitration», the text of which was approved in 1985 and recommended the General Assembly of the United Nations as a model for the adoption of national law on regulation of international arbitration.

It should be noted that the adoption of the UNCITRAL Model Law was not the first attempt to unify national legislation. In 1966, the Strasbourg Convention was signed model law, but only Austria and Belgium have signed and ratified the mere Belgium. Thus, the first attempt to unify national legislation in the field of international arbitration ended very badly.

Unlike its predecessor, the UNCITRAL Model Law had undeniable success. He was accepted in one form or another 40 states. Several states, such as the Russian Federation and Ukraine have adopted the Model Law in practically unchanged even numbers coincide articles.

Some countries, although not adopted the Model Law in the form in which it was recommended by UNCITRAL changed their national legislation, bringing it in line with the basic principles of the Model Law. For example, Germany and Austria have made changes in their procedural codes, England in 1996 adopted the Law on Arbitration. These laws, though its structure continues the tradition of national regulation of arbitration, largely account for the provisions of the UNCITRAL Model Law.

Despite the fact that the name of the Model Law indicates that it is intended to regulate is «shopping» arbitration, the definition of «trading», which it is given, is so wide that essentially refers to him any economic relationship, the subject in the production, transmission or circulation of goods and services related to these products, or financial or banking. UNCITRAL Model Law does not require that parties to commercial arbitration were «merchants» and thus formally required by law falls under almost any deal in international trade.

UNCITRAL Model Law contains 36 articles and aims to regulate all stages of the arbitral tribunal. It regulates the content, form and validity of an arbitration agreement procedure of the arbitration proceedings, grounds and procedure for applying the abolition of the award or denial of recognition and Enforcement of foreign arbitral award.

As the UNCITRAL Model Law was intended to be used as a model national law on arbitration in countries with different legal systems, some of its provisions is a kind of compromise between different traditions.

UNCITRAL Model Law, following the trends in the development of arbitration law has incorporated some new provisions previously adopted international documents contained no arbitration.

In particular, the Model Law specifies that the written form of the arbitration agreement is considered to be complied if the arbitration agreement is contained not only in a document signed by the parties, but concluded by exchange of letters, telex, telegrams or other means of telecommunication, providing a record of the agreement. Thus, the UNCITRAL Model Law was reflected by the fact that the message can be transmitted not only by sending email letters or telegrams, as envisaged in the New York Convention (as at the time other means of transmission of the documents did not exist), but also by means of telecommunications.

In addition, the Model Law included an important provision that the arbitration agreement may be concluded by exchange of claim and denial of the claim, in which one party asserts the existence of the agreement and the other against the no objection.

UNCITRAL Model Law for the first time at the international level «legalized» the doctrine of the autonomy of the arbitration agreement according to which the arbitration agreement is treated as an agreement independent of the underlying contract, even if it is part of this contract.

It should be noted that the doctrine of the autonomy of the arbitration agreement has limited application, that the arbitration agreement is seen as autonomous from the host contract only for the purpose of examining the validity of that agreement and treaty. Yes, there are cases where state courts in some countries, commonly treating the autonomy of the arbitration agreement, believed that, for example, a power of attorney to conclude foreign trade agreements should also contain special powers for the conclusion of the arbitration agreement. Or, for example, in some cases, courts do not recognize the transfer of rights for the arbitration agreement, as the agreement on the assignment contract did not contain specific guidance on the assignment of rights and the arbitration agreement. However, there are no grounds for such an application of the principle of «autonomy of the arbitration agreement».

However, the UNCITRAL Model Law at the time of the adoption did not realize he could not take into account the broad development of electronic document boom which came at the end of XX century. Therefore, the definition of the written form of the arbitration agreement required major revision.

On the day of today, focuses on international arbitration at the regional level in the framework of international organizations such as the League of Arab States, the Organization of American States, the Organization of African Unity, the Council of Europe. For example March 22, 1945 in Cairo held a General Arab Conference, which was attended by seven Arab countries (Syria, Lebanon, Jordan, Iraq, Saudi Arabia, Yemen and Egypt), and the same day the signing of the Covenant of the League of Arab State representatives of six Arab countries (Yemen representative signed the pact later, May 5, 1945). Covenant of the League of Arab States came into force May 10, 1945[36]. Also striking example is the Organization of American States. In Art. 7 Inter-American Treaty Organization of American States meeting provides an opportunity for consultations states – members of the Organization of American States to discuss measures to resolve the conflict between two or more American states. Advisory body under Art. 11 of the Treaty, acts meeting of foreign ministers[37].

Broad prospects towards the settlement of disputes opened a Convention on Conciliation and Arbitration within the OSCE in 1992 work on the creation of a European system of dispute settlement began in 1973 to review the Swiss draft convention on the peaceful settlement of disputes, and then continued at regular meetings of states - participants of the OSCE as well as four special meetings of experts (Montreux – 1978 p., Athens – 1984, Valetta – 1991 p., Geneva – 1992 p.).

The essence of the draft Convention was to create an OSCE permanent jurisdiction, which aims to prevent and resolve conflicts flexible way: through conciliation and arbitration. Opened for signature 15.12.1992 p., (In the course of the meeting of ministers in Stockholm) and entered into force on 12.05.1994 g. In April 1995 was the opening of the headquarters of the Court in Geneva. The Convention is, in fact, actually the first legal text, which was signed in the framework of the political nature of the organization, which is the OSCE has entered a new stage of development[38].

Institutionalization binding arbitration OSCE was not supported by a sufficient number of states and therefore the status it became regional. The Convention on Conciliation and Arbitration determined that the arbitration tribunal will deal with the

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[36] The charter of the arab league [Електронний ресурс]. – Режим доступу: http://profrpanand.info/sites/default/files/salient/17-Regional%20Organization/04-Arab.pdf.

[37] Charter of the Organization of American States [Електронний ресурс]. – Режим доступу: http://avalon.law.yale.edu/20th_century/decad062.asp.

[38] Convention On Conciliation and Arbitration Within The CSCE [Електронний ресурс]. – Режим доступу: http://www.likumi.lv/doc.php?id=44308#saist_8.

matter by mutual agreement. Under the Convention, States parties at any time by notification to the depositary that can recognize the compulsory jurisdiction of the arbitral tribunal on the basis of reciprocity (Art. 26 of the Convention).

The first attempt of international legal regulation of ICA in the territory of the CIS countries was the agreement on the settlement of disputes related to economic activities, signed by the governments of states - participants of CIS March 20, 1992 in Kyiv. The Agreement provides that each of the business entities of the CIS countries have legal and judicial protection of their property and interests, with equal economic entities of the State, the right to freely turn to state courts, arbitration, commercial, arbitration and other orhanyiv, competent to resolve commercial disputes (art. 3). There are also mutual recognition and vykonannyarishen competent courts yakinabraly force (Art. 7).

It should be noted that along with unification ICA currently actively discusses his delocalization, understood as the separation of the national arbitration law of the place of arbitration, including its substantive and procedural rules.

Most researchers and practitioners are in general traditionally the view that the activities of international arbitration is carried out only within the domestic legal order. However, they point out the following: a) international commercial arbitration is a national legal institution which falls under national law; b) even special rules regarding arbitration between parties from different countries and established international conventions have legal force only to the extent that these conventions are found to have the power within each national legal systems; c) the legal validity of the decision of international arbitration and the possibility of its implementation in a specific country depends on whether or during its removal was followed relevant procedures stipulated in this state[39].

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ДІЯЛЬНІСТЬ ТРЕТЕЙСЬКИХ СУДІВ В УКРАЇНІ: ПРОБЛЕМНІ ПИТАННЯ ТА ТЕНДЕНЦІЇ РОЗВИТКУ

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[39] Mann, F. England Rejects «Delocalized» Contracts and Arbitration, 33 Intil & Comp. L.Q. (1984). – 193 p.