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"May" Means "Shall" in Georgia – Supreme Court of Georgia Upholds a Permissive ICC Arbitration Clause

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"May" means "Shall" in Georgia! – this was the telephone message I received on January 18, 2018 from a colleague who had just been informed in the courtroom that the ICC arbitration clause he was relying upon was upheld by the Supreme Court of Georgia. I had been following this case [Supreme Court of Georgia Case #as-148-140-2017] since 2016 and kept my fingers crossed for the survival of the arbitration clause. The progress that was made in this case – from the "unfriendly" decision of the Batumi City Court in 2016 on to the "turning point" decision of the Kutaisi Court of Appeals in 2017 and ending gloriously with the final "pro-arbitration" statement of the Supreme Court of Georgia – is telling of the progress arbitration has made in Georgia over the last several years.

Court of First Instance

It all started with the claim lodged with the Batumi City Court in April 2015 on a matter, which under the contract between the parties, was subject to ICC arbitration. The clause read: "*If within 30 (thirty) days since the beginning of […] negotiations the Purchaser and the Supplier have not managed to settle the dispute, either of the party is able to apply for the arbitration of law to the International Chamber of Commerce (ICC) to resolve the dispute. The arbitration will take place in Tbilisi, Georgia, the language will be English and will be subject to the ICC regulations.*"

Respondent, in its first statement of defense, brought up existence of the arbitration clause and requested the Court to terminate the proceedings and refer the parties to arbitration. In its surprising and scarce reasoning, Batumi City Court read the arbitration clause as referring to ICC Rules of arbitration, and found it insufficient to determine parties' will to refer their disputes to a specific arbitration institution.

This reasoning is similar to the recent decision of the Supreme Court of the Russian Federation [No. A40-176466/17] affirming refusal to enforce an ICC Award on the basis that the arbitration clause only referred to the Rules of Arbitration of the ICC and not a specific arbitration institution. Unlike the Russian case, however, where the issue was raised at the enforcement stage and the reasoning was confirmed by the highest court, the issue in the Georgian case was raised in the context of article 8.1 of the Model Law (Article 9.1 of the Georgian Law on Arbitration) and, fortunately, it was only the Court of First Instance which erred in its finding. Batumi City Court found the arbitration clause invalid, proceeded with full review of the case and on July 15, 2016

rendered its decision on the merits.

Court of Appeals

Kutaisi Court of Appeals turned the approach towards arbitration clauses to a sensible angle. The Court analyzed provisions of the Law of Georgia on Arbitration (which is based on the UNCITRAL Model Law) *vis-a-vis* the language of the arbitration clause. It noted that the parties' agreement was clear on their will to refer their disputes to arbitration under the ICC Rules and its administration. It held that choosing the place and language of arbitration was allowed under the legislation. Court of Appeals reversed the decision of the Batumi City Court, upheld the validity of arbitration clause and referred the parties to arbitration under the ICC Rules.

It is noteworthy that by this time Tbilisi Court of Appeals had considered a similar issue with respect to model GIAC (Georgian International Arbitration Center) arbitration clause, which likewise referred to the rules, rather than the institution itself. In its decision dated November 24, 2016 Tbilisi Court of Appeals explained why reference to the Rules of Arbitration was sufficient to find the will of the parties to refer their disputes to the administration of the respective institution. The Court even brought an example of the standard ICC clause in support of its argument and noted: "Model/standard clauses of some arbitration institutions make reference precisely to the Rules and not to the institution. For example, the model clause of the International Chamber of Commerce (ICC) […]". Thus, both Courts of Appeals of Georgia have now ruled that reference to institutional Rules suffices to hold the respective arbitration clauses valid.

Supreme Court of Georgia

The saga continued as both parties appealed the decision of the Kutaisi Court of Appeals to the Supreme Court of Georgia. Claimant, among others, argued that the clause only granted parties the right to refer their disputes to arbitration. Such right, in Claimant's view, gave the discretion, but could not oblige the unwilling party to go to arbitration and therefore, could not be the basis for the Court to decline its jurisdiction (this argument was never raised at earlier stages). Respondent appealed the decision on another ground: that the court did not grant them full costs of futile litigation (specifically, attorney's fees) which Respondent had to incur at Batumi City Court.

In a long-awaited decision of the Supreme Court of Georgia, the Justices confirmed the finding of the Court of Appeals with respect to validity of the arbitration clause. In justifying the binding nature of the arbitration clause, the Supreme Court noted: "*the agreement, pursuant to which either party is entitled to refer the dispute to arbitration, means that the arbitration agreement grants a right to either party to commence arbitration; however, if such right is exercised by either one of the parties, then both parties are obliged to submit to arbitration […].*" The court further noted: "*If the term of the contract gives more than one possibility of interpretation, it is generally reasonable to apply the interpretation which corresponds to the essence of the agreement; therefore, in the present case, the word 'is able' should be interpreted in such a way, that if such choice is exercised, the parties are obliged to refer the dispute to arbitration under the Rules of arbitration of the International Chamber of Commerce (ICC).*"

In addition, the Supreme Court reversed Court of Appeals' decision with respect to the attorney's fees. It emphasized that the Respondent from the outset tried to object to the jurisdiction of the Batumi City Court, however was forced to employ lawyers and defend its interests due to Claimant's insistence on litigation. The Court stated that "*[…] such costs should be reimbursed by*

the party whose actions have triggered these costs" and ordered the Claimant to reimburse full attorney's fees incurred by Respondent in litigating the case in the court of first instance.

Conclusion

This decision of the Supreme Court reinforces the consensual nature of arbitration and the pro-arbitration spirit of the laws in Georgia. It also clarifies the standards of construction of the arbitration clauses. The reasoning of both Kutaisi Court of Appeals and the Supreme Court are particularly significant in this respect, as they send a clear message to lower courts (which are in charge of enforcing arbitration agreements under the New York Convention) that arbitration clauses must be construed with pro-enforcement spirit and upheld when parties' intention to refer their disputes to arbitration is clear. Such intention is clear even when arbitration is stipulated as a right to be exercised by one of the parties. This is now the case law in Georgia as well (joining the approach of English, Singapore, Canadian courts).

It is not yet clear, how this decision will affect the practice of the Georgian courts with respect to unilateral option clauses (there is an established case law finding clauses calling for arbitration or litigation invalid). An approach in line with the reasoning of the Supreme Court would be to say that it equally applies to unilateral option clauses (provided it is a B2B context). Whether a clause refers solely to arbitration, as a right or an option, without noting litigation as another option, or whether it explicitly stipulates a choice between arbitration and litigation – in both cases the choice is between arbitration and litigation. In either case, providing for a possibility/an option of arbitration means that at the time of conclusion of the contract both parties acknowledged and agreed that either of them could opt for arbitration; as the Supreme Court stated, "*[…] if such right is exercised by either one of the parties, then both parties are obliged to submit to arbitration […]*". The decision of the Supreme Court widens the door for such interpretation.

This decision sends yet another signal to the parties and their representatives: the party who "breaches" the arbitration agreement shall be responsible for the consequential costs of "futile" litigation.

The approach taken by the Supreme Court is particularly timely today when Georgia strives to prove itself as an "arbitration-friendly" jurisdiction and become an attractive seat for international arbitrations. If before we were talking about the progress we had made by adopting the UNCITRAL Model Law based legislation, organizing annual GIAC Arbitration Days in Tbilisi and declaring Government's desire to promote ADR (the significance of all of which is not to be undermined!), the Supreme Court has acted and demonstrated that arbitration agreements shall be respected and enforced in Georgia.

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