# Kluwer Arbitration Blog

## New Perspectives and Challenges for International Arbitration in Armenia

Mushegh Manukyan (Office of the Ombudsman for United Nations Funds and Programmes ) · Friday, February 26th, 2016 · Three Crowns LLP

On 19 June 2015, the Armenian Parliament adopted a package of laws related to arbitration. This was the first arbitration reform since the adoption of the Law on Commercial Arbitration ("Law") in December 2006. The law package came into force on 7 July 2015. One of the reasons for the reform was the need for alignment of the Armenian laws with the latest version of the UNCITRAL Model Law. Another reason was the need for the improvement of arbitration unfriendly practice which was established by the Armenian Cassation Court, which I have discussed in my earlier blog post. However, most importantly, those reforms were envisaged in the presidential decree on the legal and judicial 2012-2016 reforms.

Before the reform, the Law allowed only commercial disputes to be arbitrated. As in many other jurisdictions, the Law defined "commercial disputes" very broadly. In order to make arbitration available for certain types of labor and family disputes as well, article 1.5 of the amendment to the Law prescribed that "*the present Law extends also to non-commercial disputes in cases where dispute settlement by arbitration is authorized by law*." Based on this provision, the possibility of arbitrating certain types of family and labor disputes was respectively envisaged by the Family and Labor Codes. In particular, a new part 4 of article 17 of the Family Code is inserted which provides that if the division of common property of spouses does not relate to the interests of third parties, spouses can agree to refer such disputes to arbitration. However, an arbitration agreement does not preclude either party to refer the case to the court, except when such an agreement was concluded after the dispute has arisen and parties have exclusively agreed to resolve their dispute by means of arbitration. Indeed, this new article may create certain problems in practice, especially when identifying whether the dispute relates to third parties or not. The tribunal may at the later stage determine that there is such a possibility, and if so, the tribunal will have to decline its jurisdiction. A post-dispute arbitration enablement approach indeed aims to prevent a stronger party from abusing its rights, and in arbitration emerging economies this approach is often required.

Similar logic is applied for labor disputes. In particular, a new part 3 of article 264 is inserted in the Labor Code which provides the possibility to go to arbitration if parties have agreed to it in the employment agreement, or in a collective bargaining agreement. However, an arbitration agreement does not preclude an employee to refer the case to the court, except when the arbitration agreement was concluded after the dispute has arisen and the parties have exclusively agreed to resolve their dispute by means of arbitration.

The reform made it possible to expand the arbitrability of certain categories of disputes, which also sets the venue for the enforcement of related foreign arbitral awards in Armenia. However, the reform also included limitations. In particular, a new part 4 of article 14 was inserted into the Law, on protection of consumer rights which envisages the following provision:

> "*A consumer has the right to refer a dispute arising out or in relation to a contract to the court if the contract concluded with it did not reasonably provide an opportunity for a consumer to negotiate its terms, except when an arbitration agreement was concluded after the dispute has arisen, and the parties have exclusively agreed to refer their dispute settlement to an arbitration tribunal. The requirements of this section extend to any mandatory process by which the right of consumer to refer to the court may be limited.*"

I have already discussed in the previous blog post the need for such regulation. It is still to be seen how this article will be applied to other mandatory processes. In all cases, it should not concern mediation. Part 3.1 of article 103 of the Civil Procedural Code, which came into force on 10 September 2015, establishes that "*the court shall leave the case unheard if one of the parties refers to the agreement on resolving the dispute through mediation, unless the court finds that the agreement is null and void, lost its force, or evidently incapable of being performed.*" Even though an agreement to resolve a dispute in mediation is binding and enforceable, and courts cannot hear the case until the parties exhaust the possibility to try to resolve such dispute via mediation, the process itself is not binding and it can be terminated at any time by either party or the mediator.

Furthermore, Article 28 of the Law previously was almost verbatim adoption of article 28 of the UNCITRAL Model Law, which relates to the determination of the applicable law. However, a new sentence was inserted into part 2 of article 28 which now reads as follows: "*Failing any designation by the parties, the arbitral tribunal shall apply the law determined by the conflict of laws rules which it considers applicable. In case when the law chosen by the arbitral tribunal is other than the law of the seat, the tribunal must substantiate its choice*" (emphasis added). Indeed, in many cases tribunals decide to apply conflict of laws rules of the seat; however, this provision now specifically creates a presumption that a choice of any other rules shall have the second phase – justification. The Law does not prescribe any requirement to such justification, whether it should be reasonable, adequate, or grounded. However, tribunals should approach this question with caution and ideally provide grounds for such a different choice, if applicable. Indeed, there may be a certain misapplication of this provision. In the new addition to this article, the phrase "*law chosen by the arbitral tribunal*," should probably be understood as "conflict of laws rules", and not the substantive law which was determined by the conflict of laws rules. In the opposite situation, upon the absence of choice of law, if the tribunal choses an applicable law based on conflict of laws rules and such law is not the law of the seat, the tribunal will need to substantiate its reasoning. It will not be reasonable at all, because in many cases the substantive law and the law of the seat may differ. If this "justification" requirement serves only as an artificial phase than it does not add any value to the process, because no reasonable tribunal will choose conflict of laws rules and, most importantly, a substantive law without adequate justification and grounds.

However, the most warning novelty is the new part 2.1 of article 28, which provides: "*Irrespective of the rules provided in part 2 […] upon absence of an agreement by the parties, if the seat of arbitration is in the Republic of Armenia and a party to the arbitration is a citizen of, or a legal*

*entity registered in the Republic of Armenia, the arbitral tribunal shall apply the norms of the law of the Republic of Armenia in deciding the dispute*" (emphasis added). The goal of the legislator may be understood as to serve the purpose of excluding the circumvention of the Armenian law for disputes only connected with Armenia with no international element. However, the current regulation does not consider the full spectrum of private international law. One major problem is the conflict between the Law and private international law section of the Civil Code which has substantially different provisions. In the discussed part 2.1, the legislator overlooked the fact that the choice of substantive applicable law based on conflict of laws rules is possible not only when a foreign subject is present, but also in cases when an object of the relations is in a foreign country, or when the legal fact takes place in a foreign country. Indeed, this situation may be avoided by choosing an applicable law to the contract by the parties which will automatically exclude the application of part 2.1. However, if the rational is to restrict Armenian parties to circumvent the application of Armenian law when no international element is present in the relationships, then an appropriate approach should be applied which will consider the full spectrum of private international law – 1) foreign subjects, 2) foreign objects, and 3) legal facts.

In conclusion, it should be mentioned that the reform indeed brought many positive changes to the arbitration laws in Armenia. It opened doors for family and labor specific disputes, it limited consumer arbitration, it broadened the application of interim measures, but it also created certain red flags for international arbitration. Those private international law issues discussed above will hopefully be resolved by the new private international law chapter of the Civil Code, and further amendments to the Law itself that have been drafted recently.

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