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Phantom Arbitral Institution: Lessons from Iran

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Iran. The country with enormous trade potential and a juicy market for many foreign companies around the globe. Following partial lifting of sanctions in Iran, it is expected that more and more businesses from different industries will enter the Iranian market. Needless to say, along with the development of international trade in Iran more disputes and arbitrations involving Iranian companies will emerge.

In the meantime, the author of this post has already faced the case where the arbitration clause with Iran-based company provided for arbitration at the non-existent Iranian arbitral institution. This case is a good illustration of what problems and dilemmas arise when the parties agree on such a pathological clause.

Arbitrating or litigating?

Imagine you are instructed to bring a claim. You look at the relevant arbitration clause in the contract, but you realize that it refers to a non-existent Iranian arbitral institution. What are your first thoughts? – One of the first questions that crosses the lawyer's mind is whether this clause is enforceable. In simpler terms, the question is whether to arbitrate or litigate.

The positions of Iranian lawyers in this respect differ significantly. Some lawyers think that such an arbitration clause is unenforceable in Iran. According to them, provided the parties do not agree on another arbitral institution, they are left with no other choice than to litigate. On the other extreme, there are practitioners who believe that the parties should arbitrate in existent Iranian arbitral institutions. There are also Iranian lawyers who do not conclude whether the clause is valid or not, but who, nevertheless, advice to resort to litigation.

It can be said that the practice in many countries points towards arbitration since there are plenty of cases where arbitration clauses that refer to non-existent arbitral institutions were enforced. For instance, in the case HKL Group Co Ltd v Rizq International Holdings Pte Ltd [2013] SGHCR 5 the arbitration clause referred to the non-existent "Arbitration Committee at Singapore under the rules of The International Chamber of Commerce" (paras. 1-2). Despite the absence of this arbitral institution, Singapore High Court stayed court proceedings in favour of arbitration on

> "[…] the condition that parties obtain the agreement of the SIAC or any other arbitral institution in Singapore to conduct a hybrid arbitration applying the ICC rules, with liberty to apply should they fail to secure any such agreement." (para. 37).

Judge Jordan Tan AR has explained the enforceability of the arbitration clause by referring to the following reasons (para. 27):

> "[f]irst, it clearly evinces the intention of the parties to resolve any dispute by arbitration. Second, it provides for mandatory consequences in that if a dispute arises, the matter has to be referred to arbitration. Third, it states the place of the arbitration, namely, Singapore. Fourth, it provides that the arbitration is to be governed by a particular set of rules, namely, the ICC rules."

In contrast with the Singapore case, the arbitration clause in the case at hand does not specify seat of arbitration. The fact that the parties agreed on a non-existent Iranian arbitral institution does not mean that they have selected Iran as the place of arbitration. This is because the choice of the arbitral institution cannot be regarded as the choice of the seat. However, the arbitration clause is enforceable because it clearly records parties' intention to arbitrate. This intention is not prejudiced by the mere fact that the selected arbitral institution does not actually exist. This is the main argument in favour of commencing arbitral rather than court proceedings. Undoubtedly, enforceability of such arbitration clauses is in full conformity with the pro-arbitration spirit of the New York Convention.

Even though the pro-arbitration practice with regard to such arbitration clause is far more evident, you are still exposed to the certain risks. On the one hand, if you choose arbitrating, there is always a risk that you will fail in your attempt to commence arbitral proceedings. On the other hand, you definitely run a risk that the court will stay proceedings in case you decide to litigate. This situation plainly causes much uncertainty. Is that a threat to the claimant's right to a fair trial? – It is not the question of who to blame for such an uncertainty, but rather the issue (along with the main question of the enforceability of the arbitration clause) for the arbitrator's or for the judge's (as the case may be) attention.

Which arbitral institution?

Reference to a non-existent arbitral institution creates not only a dilemma whether to initiate court or arbitral proceedings. The next important issue is the arbitral institution which shall substitute the non-existent one. Of course, there will be no problem if the parties select the existent arbitral institution by mutual agreement. But obviously, that is highly unlikely scenario after the dispute has arisen.

One may suggest that the parties' intentions were to arbitrate at the Iranian arbitral institution. Therefore, it should be the existent Iranian arbitral institution: either the Arbitration Center of the Iran Chamber of Commerce or the Tehran Regional Arbitration Centre. However, given the absence of the choice of the seat of arbitration, it may also be argued that possible options are not restricted only to Iranian arbitral institutions. But what shall the claimant do in such a situation? File a claim in any arbitral institution in any country of the world hoping that it will hear the case?

Ideally, the claimant should select the arbitral institution which will most likely accept its jurisdiction. The problem is how to identify this arbitral institution. First of all, the potential claimant should look for the arbitral institution(s) that is the most closely connected with the case or the arbitration agreement. Once the claimant has identified such an arbitral institution, he should then conduct a proper investigation in order to find out (through relevant practice and the case law)

whether it has previously accepted jurisdiction to hear the dispute under similar circumstances and whether it has pro-arbitration approach. Indeed, in Iran the advice should be sought from local lawyers who should assess the prospects of commencement of arbitration there.

First step: court or the arbitral tribunal?

Even if you decide to go to arbitration in Iran and determine the particular arbitral institution, you still have the issue of whether to go to the Iranian court for the appointment of the tribunal or directly submit the dispute to arbitration. In practical terms going to the national court would be an unreasonable waste of time with unpredictable result. For this reason, it is better to have recourse to arbitration directly. Especially, given that arbitral tribunal has a power to rule on its own jurisdiction. But this issue is something that Iranian lawyers also do not have a common opinion on.

Conclusion

Arbitration agreement that refers to a non-existent arbitral institution is always a headache for potential claimants and a room for maneuvers for potential respondent. It creates a number of dilemmas that need to be resolved prior to bringing the case. Iran – is not an exceptional jurisdiction when it comes to solving those dilemmas there, especially given controversial views regarding such arbitration agreements among local lawyers. However, you cannot have a 100% correct recipe for dealing with the issues such arbitration clauses cause. It is very much a matter of the strength of your arguments that the parties' intention to arbitrate is maintained despite the absence of contractually agreed forum and the pro-arbitration views of the court seized or of the arbitral tribunal (as the case may be). The story in Iran is not over yet. It remains to be seen how it will develop…

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