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Legislation and Practice of Commercial Arbitration in Azerbaijan

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I address the regulation and practice of arbitration in Azerbaijan, a topic which has not been discussed widely on an international level.

While there is a significant uniformity in international arbitration legislations around the world due to the New York Convention on Recognition and Enforcement of Foreign Arbitral Awards (hereinafter the "New York Convention") and UNCITRAL Model Law on International Commercial Arbitration (hereinafter the "UNCITRAL Model Law"), there are some differences in how national arbitration laws and courts implement and apply the New York Convention.

In Azerbaijan, the national procedural law of the Republic of Azerbaijan on international arbitration includes the Civil Procedural Code and the Law on International Arbitration. Azerbaijan is also a party to inter alia New York Convention, Washington Convention on the Settlement of Investment Disputes Between States and Nationals of Other States – International Centre for Settlement of Investment Disputes of 1965 and European Convention on International Commercial Arbitration of 1961.

Domestic arbitration in Azerbaijan

The Civil Procedural Code of the Republic of Azerbaijan ("Civil Procedure Code" or "Code") states that a dispute may be submitted to arbitration by agreement of the parties[1)]. When there is such agreement and the respondent objects to the jurisdiction of the court before the court starts reviewing the case, such claim shall not be considered and shall be dismissed[2)]. The Code also states that when there is an arbitral award in force concerning the same subject matter involving the same parties, a court shall reject accepting such claim[3)] and/or terminate the court proceedings[4)].

As the above listed provisions of the Civil Procedural Code refer to arbitration in general, they apply to both domestic and international arbitration. However, the procedure for domestic arbitration and legal force and enforcement of resulting arbitral awards are not specifically regulated under the legislation of Azerbaijan. Accordingly, an award resulting from a domestic arbitration will not have the same legal force that an international arbitral award has. Therefore, these provisions of the Code seem impracticable. For instance this impracticality is reflected in a case, where Baku Court of Appeals refused to enforce an arbitration agreement and refer a case to arbitration and instead held that there is no domestic arbitration in Azerbaijan[5)]. Such approach of

the court is in line with the view of most legal practitioners in Azerbaijan and international publications, including Doing Business report by the World Bank, that no domestic arbitration is permitted in Azerbaijan.

I believe the prevalent approach in Azerbaijan is to choose litigation in domestic disputes and as a matter of practice commercial parties do not refer disputes to domestic arbitration in their contracts[6]. To the best of my knowledge, I am not aware of any domestic arbitration cases.

Peculiarities of the international arbitration legislation in Azerbaijan

The Law of Azerbaijan Republic on International Arbitration ("Law on International Arbitration") is based on the 1985 edition of the UNCITRAL Model Law. The only major differences between these two documents are found in Articles 34 ("Application for setting aside as exclusive recourse against arbitral award") and 36 ("Grounds for refusing recognition or enforcement") of the Law on International Arbitration. Unlike the UNCITRAL Model Law, which through these Articles authorizes courts to annul or refuse enforcement of an arbitral award if it is against public policy, the Law on International Arbitration provides such authority to courts where an arbitral award violates the Constitution of Azerbaijan Republic, not Azerbaijani public policy, as is stipulated in the Model Law.

Under both the Civil Procedural Code and the Law on International Arbitration, annulment of international arbitral awards rendered in the territory of the Republic of Azerbaijan and recognition and enforcement of foreign arbitral awards are performed by the Supreme Court, the highest court in the Republic (10, article 464). These judicial proceedings are not subject to regular appeal.

When talking about peculiarities of international arbitration in Azerbaijan, it is certainly worth noting that there is an important lexicological inaccuracy in the Azerbaijani legislation, which may cause confusion. Throughout the Code it refers to "münsif" and "arbitrazh" ("arbitraj") both meaning essentially arbitration, but the latter also meaning specific type of economic court, existing in post-Soviet countries at the time of adoption of the Code in 1999.[7] In most articles of the Code these terms are used as synonyms. However, in Section 47 of the Code when using the term "arbitrazh" in connection with recognition and enforcement of foreign decisions it seems that the Code refers to decisions of foreign economic courts.

The reason for such lack of uniformity within the same Code is the fact that at the time of its adoption state economic courts called "arbitrazh" existed in Azerbaijan. When Azerbaijan adopted the Civil Procedural Code the Law on *Arbitrazh* Court was in force and regulated the status and activities of the state economic court named *arbitrazh* court. Accordingly many other laws also referred to such courts as *arbitrazh* courts. On the other hand, at the time of adoption of the Civil Procedural Code Azerbaijan ratified the New York Convention and adopted the Law on International Arbitral based on UNCITRAL Model Law (1985 ed.). The term "arbitration" in the latter 2 documents has also been translated as "*arbitrazh*". Accordingly, at the time of the adoption of the Code the term "*arbitrazh*" might have meant both arbitration and state economic court. The above-mentioned lexicological inaccuracy also caused some conflicting decisions by the judges and in some cases the courts referred to Section 47 (which is designed for recognition and enforcement of foreign court decisions, including arbitrazh courts) when considering recognition and enforcement of foreign arbitral awards.

This lexicological inaccuracy is not the only source of confusion and contradiction in the Civil

Procedural Code concerning arbitration. Assuming that Section 47 refers to recognition and enforcement of foreign economic court decisions as opposed to arbitration (which is not quite obvious from the wording of the Code), two other articles of the Code specify when a foreign arbitral award may be refused enforcement. Article 476 of the Civil Procedural Code lists grounds for refusing recognition and enforcement of a foreign award, and another article of the Code explicitly states that the recognition and enforcement of foreign arbitral awards are regulated under the New York Convention (10, article 477). Accordingly, it is not very clear whether the Code requires application of Article 476 or Article 477 (i.e. the New York Convention provisions) for recognition and enforcement of foreign arbitral awards in Azerbaijan.

Further, while Article 476 of the Civil Procedural Code, Article 36 of the Law on International Arbitration and Article V of the New York Convention all regulate recognition and enforcement of foreign arbitral awards, there are some differences between these provisions. For instance, unlike the New York Convention, which authorizes courts to annul or refuse enforcement of an arbitral award if it is against public policy, the Law on International Arbitration provides such authority to courts where an arbitral award violates the Constitution of Azerbaijan and the Civil Procedural Code provides such authority to courts when a foreign arbitral award is in contradiction with the sovereignty and fundamental principles of the legislation of the Republic of Azerbaijan. On the other hand, the Civil Procedural Code does not clarify which party bears burden of proof in challenging the recognition and enforcement of foreign arbitral awards. In addition, as the overall wordings of these 3 documents are different (mostly due to translation from foreign sources), in practice this may also cause differences in their interpretation and application.

Judicial practice

From studying the recognition and enforcement of foreign arbitral awards in Azerbaijan, it becomes clear that there is no uniformity in practice of recognition and enforcement proceedings in Azerbaijan. This may be due to the conflicting articles of the Civil Procedural Code, due to the inaccurate submissions of the parties or due to the absence of knowledge about the applicable provisions of the New York Convention or its interpretation.

In most cases reviewed by me the Supreme Court in Azerbaijan decided to recognise and enforce foreign arbitral awards. Out of the cases studied, in two cases arbitral awards were refused recognition and enforcement. In one case where the Court refused the recognition and enforcement of the foreign arbitral award, it decided that the respondent was not given proper notice of the arbitration.[8)] In the other case, the Court decided that the arbitration proceedings were not in accordance with arbitration agreement: arbitration proceedings were instituted at the seat of claimant, while the arbitration agreement required the arbitration to be held at the seat of respondent.[9)]

Having said that, the Court’s reasoning in decisions where the Court recognised and enforced foreign awards was not completely accurate.

For example, in most of these cases the grounds under New York Convention were not applied and the Supreme Court instead analyzed whether the arbitral awards were in compliance with the Civil Procedural Code. This was done despite the fact that courts should have applied the Convention directly, as the international conventions acceded by the Republic are part of the legislation and prevail over national legislation. In some other cases the Court applied Section 47 of the Civil

Procedural Code, which is intended for the recognition and enforcement of foreign court decisions.[10)]

In another case the foreign arbitral award was recognized and enforced with a reasoning that it was in compliance with both the New York Convention and with the legislation of the Republic of Azerbaijan,[11)] which is not completely accurate as it is not clear whether the court would have recognized the arbitral award, if it had been in line with the New York Convention, but not with the legislation of the Republic of Azerbaijan.

As already mentioned the Republic of Azerbaijan has joined the New York Convention without any reservation. The above-mentioned court decisions with the said reasoning do not comply with the grounds of the New York Convention. Although in conclusion the Supreme Court decided to recognize and enforce foreign arbitral awards in most cases, in all of the studied cases the reasoning was misleading, which causes unpredictability in recognition and enforcement of foreign arbitral awards.

Conclusion

After studying all the above-mentioned issues, we can conclude that while Azerbaijan has very liberal and pro-arbitration legislation concerning recognition and enforcement of foreign arbitral awards, in practice there are inaccuracies in application of this legislation.

References

?1 Civil Procedural Code, Art. 29.

?2 Ib. Art. 259.0.5

?3 Ib. Art. 153.2.3.

?4 Ib. Art. 261.0.5

?5 Decision of the Baku Court of Appeals No.2-1(103)-376/2014 dated July 31, 2014. The Supreme Court of the Republic of Azerbaijan held that the arbitration agreement in question concerned international arbitration, not domestic arbitration, and eventually the courts ruled in favor of the enforcement of the arbitration agreement.

?6 The Baker & McKenzie International Arbitration Yearbook 2009, p. 100

?7 See e.g. Protection of foreign investment in Azerbaijan Republic: legislation and practice. *Beyn?lxalq hüquq v? inteqrasiya probleml?ri (elmi-analitik v? praktiki jurnal)*, 2010, ?3 (23), s. 53-58.

?8 Decision of the Collegium of the Supreme Court on Economic Disputes No. 10-1(102)-08/2018

?9 Decision of the Collegium of the Supreme Court on Economic Disputes No.10-1(102)-01/2008

?10 Supra footnote 8.

?11 See e.g. Decision of the Collegium of the Supreme Court on Economic Disputes No. 7i-03/07

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