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Enforcement of Arbitral Awards in Uzbekistan: Challenges and Uncertainties

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The national courts in Uzbekistan have not commonly been noted by arbitration lawyers and foreign investors for having a pro-arbitration judicial attitude. However, since President Mirziyoyev took office in 2016, Uzbekistan has been trying to build a reputation as an investment-friendly country. It was hoped that the reforms in various sectors would extend as far as changing courts' attitude towards enforcement of foreign arbitral awards. However, recent case law demonstrates that the enforcement of foreign arbitral awards in Uzbekistan is still unpredictable because Uzbek courts seem to interpret and apply the New York Convention ('NYC') using a 'pick and choose' approach.

Application of Article III of the New York Convention

In the unreported *A v B* case, claimant '*A*', a UK-based company, filed an application for the recognition and enforcement of an LCIA award against respondent '*B*', a Russia-registered entity, at the place where the respondent's assets were located, *i.e.* in Uzbekistan. The Court of First Instance, Appeal Court and ultimately the Supreme Court all refused even to accept the claim[1)] based on jurisdictional grounds, under Article 249 of Economic Procedural Code ('EPC'), and returned it to the claimant without conducting the hearing, let alone recognizing and enforcing the award. The courts held that, notwithstanding Uzbekistan's accession to the NY?, the mere fact that the respondent is a foreign-registered entity precluded the claimant from applying to Uzbek national courts for recognition and enforcement as, according to the courts, they lack jurisdiction. To support this dubious position, the courts referred to Article III of the NYC, quoting that *'each contracting state shall recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon, under the conditions laid down in the following articles'*.

More specifically, the courts found that, under Article 249 of the EPC, the application for the recognition and enforcement of foreign court decisions or arbitral awards shall be filed either (i) in the courts at the place of a debtor's actual location, (ii) in the courts at the place of a debtor's residence, or, alternatively, (iii) in the courts at the place of the debtor's registered office if the debtor's location or residence place is unknown. Since the respondent, as a foreign-registered entity, did not have an actual location, place of residence or registered office in Uzbekistan, the courts refused to accept the claim and hear it because of their alleged lack of jurisdiction. The

claimant's submission that all of the respondent's tangible assets were located in Uzbekistan did not convince the courts otherwise.

Inconsistency of Domestic Rules

Notably, while Article 249 of the EPC does not provide for the enforcement of foreign arbitral awards where the respondent has its assets, it seems other domestic legislation permits enforcement of domestic awards (Article 37 of the Economic Procedural Code) and foreign arbitral awards (Article 365 of the Civil Procedural Code). In such a situation, one may argue that Article 249 contravenes the NYC in the first place. Another interesting question is why the courts did not refer to academic sources,[2)] practical guidelines and well-established case law on enforcement of foreign arbitral awards which are widely available free of charge in the public domain.

Cherry-picking Approach

As can be seen in *A v B*, the Uzbek courts appear to have interpreted the NYC out of context. In the courts' logic the wording '*in accordance with the rules of procedure of the territory where the award is relied upon*' is separate from and prevails over the rest of the article, *i.e.* '*shall recognize arbitral awards as binding and enforce them*' and '*under the conditions laid down in the following articles'*. It appears that the courts focused on one clause of the article and disregarded Article III as a whole, hence not giving effect to the aims and principles of the NYC and its whole spirit.

Although they referred to the EPC, the courts failed to refer to its relevant provisions pertaining to the supremacy of international law over domestic law in its entirety. Specifically, none of the courts referred to the very first article of the Code, which unequivocally states that the provisions of international treaties prevail over national law in case of discrepancy between them. Effectively, this means that the NYC supersedes the provisions of the EPC to the extent any provisions of the EPC are inconsistent with it. The courts, however, seem to be of a different opinion as no analysis of the interplay between international and domestic law was provided.

In the same vein, it appears that the court should have considered that Uzbekistan is also a party to the Vienna Convention on the Law of Treaties. Pursuant to Article 27 of the Convention, '*A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty*'. Notwithstanding the provisions of the Vienna Convention, the courts refused to accept the claim and to hear the case, with reference to domestic law restrictions. In this vein, the fact that the courts refused to accept the claim *de jure* may amount to a refusal to recognize and enforce the foreign arbitral award on grounds not stipulated under the NYC. This may be seen as a violation of Uzbekistan's obligations under the NYC.

Same Jurisdiction, Different Approach

In a similar case, Case No. 4-11-1912/222, a Danish party, ?Alliance Capital ?/S", applied to the Tashkent regional Economic Court for recognition and enforcement of an ICC award against a Spanish party, "Corsan Corviam Construccion S.A.". The regional court transferred the case to the

Tashkent city Economic Court as the court having jurisdiction to decide the case. That court accepted jurisdiction and heard the case. Surprisingly, unlike in *A v B*, the court cited Article III of the NYC in full. The court also cited Article VII of the NYC, emphasizing that an interested party cannot be deprived of the rights to avail himself of an arbitral award in the manner and to the extent allowed by the law or the treaties of the country where such award is sought to be relied upon. In doing so, the court acknowledged the role of the NYC in the legal system of the country and refused to apply domestic law to the extent it was inconsistent with the NYC.

Interestingly, despite quite similar factual circumstance with *A v B*, the court in Case No. 4-11-1912/222 did not confirm whether it had jurisdiction under Article 249 of the EPC and did not discuss the respondent's actual location or place of residence at all. Unlike in *A v B*, the court also did not mention the fact that the respondent's registered office was in Spain as a potential ground for refusing to accept jurisdiction as had been done in the *A v B* case. Quite to the contrary, neither the respondent's nationality nor the claimant's failure to identify the respondent's assets in Uzbekistan was found to be of any importance to the court in deciding that it *had* jurisdiction over the claim. Even though the court ultimately refused recognition and enforcement on different grounds, the claimant at least was able to present its position on recognition and enforcement in the courtroom.

Lack of Capacity or Lack of Established Practice

It is quite surprising that, despite being a court of first instance, Tashkent city Economic Court seems to be more competent and familiar with the interplay of the NYC and domestic laws than the Supreme Court, but it is too early to make snap judgments on this phenomenon at this point. Quite worrying, however, is that the Supreme Court decision comes at a time when Uzbekistan is trying to become more arbitration-friendly and is trying to become a regional arbitration hub. Moreover, the Supreme Court's decision may send a negative message to the lower courts that in Uzbekistan arbitral awards against non-resident entities are generally not enforceable.

The Supreme Court's position might seem even more surprising bearing in mind that both the *A v B* and *Alliance* enforcement claims were filed just one month apart but ended with drastically different rulings. The positive mood in Uzbekistan from the numerous arbitration seminars, training sessions for judges with the participation of some of the world's preeminent arbitration lawyers, as well as arbitration conferences held in Uzbekistan with speakers and participants from pro-arbitration jurisdictions, may be dampened by this decision of the Uzbek Supreme Court.

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References

?1 Subject to Article 253 of the Economic Procedural Code of the Republic of Uzbekistan, the court returns the claim to the claimant if the court finds that such a claim is served in breach of Articles 249-252 of the Code.

?2 *See, e.g.*, ICCA's Guide to the Interpretation of the 1958 New York Convention: A Handbook for Judges.

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