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Research Article

ARBITRABILITY OF DISPUTES UNDER THE LEGISLATION OF UZBEKISTAN

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ABSTRACT

This article focuses on the issues of arbitrability of disputes on the territory of the Republic of Uzbekistan. The categories of disputes of contractual and non-contractual nature are considered in detail through the prism of their arbitrability in accordance with the current legislation of Uzbekistan with the introduction of precise regulatory legal acts. The article targets both law school students and practicing lawyers in the field of arbitration and state proceedings.

KEYWORDS

Arbitrability, international commercial arbitration, corporate disputes, investment disputes, insolvency disputes, crypto assets, futures trading, and e-commerce.

INTRODUCTION

The primary requirement for the consideration and resolution of a dispute in international commercial arbitration Is an arbitration agreement concluded between the disputing parties? The form, content of the arbitration agreement, its validity, force, and enforceability are subject to the law to which the parties have submitted it or, in the absence of such, to the law of the country where the arbitration verdict was made (lex arbitri) . Questions regarding the legal nature and meaning of the arbitration agreement have

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not been sufficiently researched yet, based on the chosen topic, it is advisable to directly discuss another legal phenomenon emanating from the arbitration agreement, namely the arbitrability of the subject matter of the dispute. After all, an arbitration agreement drawn up and concluded in accordance with all the requirements, on the one hand, will be reduced to zero if it provides for the transfer of a dispute that does not fall under the jurisdiction of arbitration. And on the other hand, the question of disputes that may (or may not) be considered by arbitration is also of interest to state courts when considering cases on recognition and enforcement of arbitral awards by Article 31 of the Economic Procedural Code (hereinafter referred to as the EPC), as well as by virtue of Article 29 of this Code. Without a doubt that in the context of what has been said, the theoretical and practical relevance of studying the issue of arbitrability of disputes – the possibility of submitting a dispute for consideration and resolution to arbitration is seen.

Both the norms of international law and the norms of the legislation of Uzbekistan do not contain the term "arbitrability". This institution is presented as a "subject of arbitration" (paragraph a, part 2. of Article 5 of the UN Convention on the Recognition and Enforcement of Foreign Arbitral Awards (hereinafter – the New York Convention)) .

As noted in the legal literature, in different legal systems, the degree of state participation in relations between individuals is different, therefore, the same issue in one country may be recognized as arbitrable, and in another – not. The more liberal, market-oriented the economy of a state is, the less likely it is that the subject of the dispute will be recognized as non-arbitrable in this country .

According to the general rules, and as it follows from Part 2 of Article 4 of the Law of the Republic of Uzbekistan "On International Commercial Arbitration" (hereinafter referred to as the Law), disputes arising from all commercial relations, including contractual and non-contractual obligations, are recognized as arbitrable in Uzbekistan. As can be seen from the above norm, a wide range of legal relations is given, aimed at extracting profit, arising between subjects of civil turnover: individuals, legal entities, and the state. This broad understanding is taken from Article 1 of the UNCITRAL Model Law on International Commercial Arbitration (hereinafter referred to as the Model Law) .

By all means, it is worth agreeing that the range of such relations is excessively broad, ignoring them is hardly possible, although such an attempt has been made in the Model Law. The author considers it expedient, without repeating the text of the footnote to Article 1 of the Model Law, to be in solidarity with this list of disputes that can be submitted to arbitration. All these or other similar disputes may be considered and resolved in arbitration under the legislation of the Republic of Uzbekistan.

Other related disputes:

- trading of crypto assets on the crypto exchange ;

- the implementation of futures trading on commodity exchanges and the organization of an electronic logistics trading platform for the transportation of products by road , in particular with exchange transactions, in general ;

- sale of highly liquid and monopolistic goods ;

- the activities of commodity exchanges ;

- implementation of e-commerce ;

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- external borrowing agreements can be reviewed and resolved through arbitration.

Additionally, business entities can submit a dispute to arbitration for consideration and resolution, even if their relations do not follow contractual obligations, for example, when it comes to protecting business reputation, causing harm, etc.

In this article, we contemplate it appropriate to consider some categories of popular disputes that, both in doctrine and in arbitration practice, lead to discussions and doubts about their arbitrability, that is, the possibility of their transfer for consideration and resolution to international commercial arbitration.

Corporate disputes. One of the categories of disputes is corporate disputes. Corporate disputes are assigned to the jurisdiction of economic courts based on Article 25 of the EPC and Article 30 of this Code provides a non-exhaustive list of cases of this category. It seems that these types of corporate disputes have been developed based on many years of judicial practice and are often found in the legal reality of Uzbekistan. These are disputes related to the creation, reorganization, and liquidation of legal entities, disputes related to shares, portions, dividends, and disputes of participants about the invalidity of transactions made by a legal entity, and disputes related to the issue of securities, and disputes about the convening of a general meeting, and disputes about appealing decisions of the governing bodies of legal entities, etc. Corporate disputes are an array of disputes concerning the emergence, modification, and termination of civil rights and obligations within the framework of the construction of a legal entity created by two or more persons. For example, when it comes to recognizing the contract of sale of a motor vehicle as invalid on the part of the buyer due to non-compliance with the requirements imposed on the form of such transactions based on Article 115 of the Civil Code of the Republic of Uzbekistan (hereinafter referred to as the Civil Code) , this dispute is not corporate due to its occurrence between various, independent persons – participants in civil-legal relations that are not related to each other. In the case when a participant of a limited liability company files a claim for recognition of the contract of sale of a motor vehicle invalid based on Article 125 of the Civil Code, then this dispute is corporate.

Within the meaning of Article 10 of the Civil Code, corporate disputes can be submitted for consideration and resolution to arbitration. And Article 25 of the EPC cannot lead to the erroneous opinion that these disputes can be considered only by economic courts. Such an indication in the procedural Code provides only a basis for determining the jurisdiction of cases to economic courts but does not in any way conclude that they cannot be considered in international commercial arbitration. Although paragraph 1 of Part 1 of Article 25 of the EPC contains disputes that undoubtedly fall under the jurisdiction of arbitration, that is, they are arbitrable.

An example of the possibility of transferring a corporate dispute to arbitration is the direct mention in the legislation that the contract of sale of the state share in the authorized capital of LLC Ferghana Oil Refinery should, in addition to other provisions, include provisions providing for the protection of the new owner from expropriation and dispute resolution through international arbitration .

As has been rightly noted in the literature, the regulation of arbitrability issues may vary from country to country and can be transformed over time. However, the basic principle of their interpretation remains unchanged – favor arbitri. The application of this principle means that, firstly, there is a general

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presumption in favor of recognizing commercial disputes, including corporate disputes, as arbitrable; secondly, there is a tendency to expand the scope of arbitration and the list of issues that can be submitted to the arbitration court .

Investment disputes. Investment disputes include disputes with foreign investments arising from the implementation of investment activities of a foreign investor in the territory of the Republic of Uzbekistan. It would seem that there are no questions here. What kind of dispute will be arbitrable, if not investment? After all, the participation of a foreign element, so close in spirit to international arbitration, is evident here. Moreover, Article 63 of the Law of the Republic of Uzbekistan "On Investments and Investment Activities" directly provides for the possibility of considering these disputes in arbitration . However, something else seems to be the cornerstone here. From the meaning of Article 63, the settlement of investment disputes is seen first through mediation, and then only in arbitration. There are various types of classifications of an arbitration agreement in the arbitration practice. Thus, according to the criterion of the procedural mechanism, arbitration agreements are divided into direct and multimodal. As a rule, standard arbitration clauses are direct, since recourse to arbitration is possible straight, direct, without any preliminary procedures. Multimodal arbitration agreements, on the other hand, provide for mandatory pre-trial dispute settlement procedures. To resolve an investment dispute in international commercial arbitration, from the meaning of Article 63 of the above-mentioned law, the conclusion of such a multimodal arbitration agreement is seen. Although, this phenomenon also contradicts the legal nature of both the arbitration agreement and the arbitration proceedings.

It should also be noted that the Regulation on the Procedure for concluding, amending, terminating, and implementing investment agreements between the Government of the Republic of Uzbekistan and foreign Investors provides that disputes between the parties to an investment agreement related to the provisions of an investment agreement may be submitted to international commercial arbitration. There is also a model investment agreement, where article 11 (Dispute Resolution) recommends the inclusion of an arbitration clause and a mention of institutional arbitration – the Tashkent International Arbitration Center (TIAC).

Along with the above, disputes arising from production-sharing agreements can also be submitted for consideration and resolution to arbitration.

For arbitration practice, investment disputes are of separate interest. In this regard, the Convention on the Procedure for Resolving Investment Disputes between States and Foreign Persons (hereinafter referred to as the Washington Convention) is in force, to which the Republic of Uzbekistan joined in accordance with the Resolution of the Supreme Council of the Republic of Uzbekistan No. 881–XII of May 7, 1993. Based on the Washington Convention, the International Center for Settlement of Investment Disputes was established, which is an authoritative institutional arbitration of our time.

Speaking about the practice of considering and resolving investment disputes in international commercial arbitration, it is worth remembering the mention of this in the legislation. For example, it is noted that during the entire period of activity of the Angren Gold Company Joint Venture, disputes between the Republic of Uzbekistan, its subjects, or the Uzbek side and the joint Venture, Newmont or Mitsui are resolved by international arbitration with

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the execution of its decisions in accordance with the Convention on the Procedure for Resolving Investment Disputes between States and Foreign Persons signed by the Republic Uzbekistan.

Disputes about bankruptcy (insolvency). Within the meaning of Article 6 of the Law of the Republic of Uzbekistan "On Insolvency" , bankruptcy cases are considered by the economic court according to the rules provided for by the EPC. This is perhaps the only case when the legislation of Uzbekistan indicates a lack of competence in international commercial arbitration. Such a dispute resolution mechanism is found all over the world. At the same time, there may be the following points in arbitration practice related to insolvency disputes.

For example, if an insolvency case is initiated in an economic court and an international commercial arbitration decision has been made by that time, then the writ of execution issued on its basis can be used as evidence in an insolvency case, along with other enforcement documents.

Another example is an insolvency case that has been initiated in an economic court, but a claim involving the subjects of the dispute is already being considered in international commercial arbitration. In this case, the arbitral tribunal leaves the application without consideration. As can be seen from the meaning of the law (Article 12), from the date of acceptance by the economic court of an application for initiation of insolvency proceedings against the debtor, creditors do not have the right to apply to the debtor in order to satisfy their claims individually. Accordingly, all claims against the debtor are considered in the economic court.

Disputes related to real estate. This category of disputes is of particular interest, since in connection with the legal regime of immovable property, arising from the meaning of Part 1 of Article 84 of the Civil Code on state registration of transactions and ownership of immovable property, may lead to confusion about the arbitrability of disputes related to such. Transactions related to real estate are also contractual obligations, and in principle, fall under part 2 of Article 4 of the Law, if it is neither an administrative-legal relationship, if the parties are equal and can conclude a civil contract and an arbitration agreement, which means they are arbitrable.

In the context of what is being considered, it is advisable to consider paragraph 2 of Part 1 of Article 240 of the EPC, indicating that the exclusive competence of economic courts includes cases involving foreign persons in disputes the subject of which is an immovable property if the such property (or the property right to it) is located on the territory of Uzbekistan. This rule establishes the exclusive competence of state courts to consider disputes related to real estate in relation to foreign state courts and does not relate in any way to the competence of international commercial arbitration. The EPC separates the concepts of a foreign court and arbitration, which follows from Chapter 33, in the meaning of Chapter 31, where Article 240 is located, arbitration is not assumed. According to logic and meaning, the EPC cannot contain norms regarding the non-arbitrability of the subject of the dispute, since it fixes in this chapter the competence of national courts that are part of the judicial system concerning the courts of a foreign state that is also part of the judicial power of a separate state. Non-State courts are not and cannot be affected here.

At the same time, the requirement for state registration of rights to immovable property and

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transactions concerning them is not an obstacle to the consideration of a dispute in international commercial arbitration. After all, the transfer of ownership of the real estate in a dispute is carried out on the basis of a court decision or a decree of the state executor . Accordingly, obtaining a writ of execution for an arbitration award, in this case, is mandatory for the state registration of a transaction or property right. However, it is advisable to improve this area of legislation by providing it with the possibility of registering rights to immovable property with the consent of both parties to the arbitration proceedings, that is, the voluntary execution of the arbitration award.

Disputes related to the protection of intellectual property and intangible assets. All categories of these disputes (protection of copyright, related rights, trademark, trade name, useful inventions, industrial design, model, business reputation, honor, and dignity, etc.) are considered arbitrable, provided that it is possible to conclude an arbitration agreement regarding them. Along with this, there is a precise approach in the legal literature that disputes affecting the status of registered intellectual property objects (for example, disputes on the protectability of an invention, on the legality of registration, or refusal of registration) are non-arbitrable since the main opposing party to these disputes will be a state agency as a person whose actions and decisions are disputed, even if the applicant (plaintiff) is not the copyright holder, but a third person .

At the moment, in order to further develop the field of intellectual property, the activities of the Center for Arbitration and Mediation of the World Intellectual Property Organization (WIPO) and the feasibility of its implementation in Uzbekistan are being studied .

Disputes involving public administration bodies. By virtue of Part 2 of Article 5 of the Law of the Republic of Uzbekistan "On Arbitration Courts" , state authorities and management bodies cannot be parties to an arbitration agreement. There is no similar provision in the Law "On International Commercial Arbitration". However, it should be borne in mind that administrative and legal relations, as well as tax, labor, and family legal relations are non-arbitrable in the territory of Uzbekistan.

Disputes involving an individual. There is no prohibition regarding the consideration and resolution of disputes involving an individual in international commercial arbitration. The arbitration legislation of Uzbekistan appeals to the term "parties". The parties to a dispute arising from contractual or non-contractual obligations can be both individuals and legal entities, and the State. Accordingly, disputes involving an individual are arbitrable. However, there is another question here. The fact is that the consideration and resolution of a dispute in international commercial arbitration are relatively more expensive than in state courts, even taking the absence of higher instances into account. Not every individual is ready for the cost of arbitration costs (fees, expenses, lawyers' expenses, travel expenses, etc.). In this connection, in the doctrine of arbitration proceedings, this issue is often considered as a misunderstanding, or delusion of an individual during the conclusion and signing of an arbitration agreement. That is, this person did not realize the essence of the arbitration clause included in the contract. Such an interpretation may also lead to the recognition of the arbitration agreement as invalid, since the party, an individual, was in error when signing the arbitration agreement.

To date, the legislation of Uzbekistan in the field of arbitration is undergoing serious changes. However,

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the ground for the application of alternative dispute resolution, including international commercial arbitration, has been prepared for decades. The Republic of Uzbekistan and Uzbek companies have managed to visit the arbitration arena repeatedly and modern realities show the need for further liberalization of legislation in this area. It is advisable to provide for the implementation of state registration of transactions related to real estate and rights not to it, on the basis of an arbitration award in the presence of a mutual statement of the parties to the arbitration agreement and amendments and additions to the Resolution of the Cabinet of Ministers of the Republic of Uzbekistan "On measures to improve the procedure for state registration of rights to real estate" dated 29.12.2018 №1060. As you know, although disputes related to insolvency are not arbitrable, it is advisable at the legislative level to give creditors the right to apply for debt collection to international commercial arbitration before certain bankruptcy procedures, for example, before external management. This kind of improvement of legislation will increase the attractiveness of the applicable law of Uzbekistan and will give a good impetus to support the institute of international commercial arbitration.

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