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Reflections on the Waiver of the Right to Challenge an Arbitration Award: the Practice of Uzbekistan

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Abstract: The research examines in detail one of the most interesting and relevant aspects of international commercial arbitration – the waiver of the right to challenge an arbitral award, leading to the blocking of this act. This study considers the legislation and legal reality of the Republic of Uzbekistan.

Study finds that the waiver of the right to challenge is fundamentally different from the waiver of the right to object, and from the waiver of the enforcement of an arbitral award. The author develops scientific and theoretical provisions regarding the general and distinctive features of these definitions, and makes conclusion about the legal nature of the institution of waiving the right to challenge an arbitral award, which in the doctrine was called estoppel.

This article will be useful for the scientific community and practicing lawyers, including judges of state courts, and will have a beneficial effect on the institution of international commercial arbitration in the Republic of Uzbekistan, which is new to our country.

Keywords: estoppel, act, objection, legal nature, constitutional law.

The concept of “renunciation of the right” in modern society sounds like an oxymoron. After all, the origin of the state and law implied the implementation, provision, security, protection of the rights and legitimate interests of the individual. The refusal of such a right would seem to be something contrary to the natural nature of the inalienable rights of man and citizen. Is it possible to give up the right to life, the right to appeal against the actions of state bodies when everyone is guaranteed judicial protection of the rights and freedoms, addressing the court and appealing the actions or acts of specific individuals and organizations? This has already become a part of our civilization.

Despite such manifestations of the law, some of its branches still contain the concept of “renunciation or the waiver of the right”. Based on the scientific and professional interests, such a legal institution as the waiver of the right to challenge an arbitration award by the participants in the arbitration proceedings turned out to be in the field of our study.

By virtue of article 3 of the Economic Procedural Code, the waiver of the right to appeal to the court is invalid. Any interested person has the right to apply to the economic court for the protection of their violated or disputed rights or legally protected interests. At the same time, it is possible to waive the right to challenge an arbitration award in an economic court. This article aims at shedding light on the study of the seemingly contradictory issues regarding the waiver of the right to appeal an arbitration award in an economic court.

The relevance of the chosen topic comes from the fact that arbitration practice is an innovation for Uzbekistan. Hence, problematic questions will arise from the judges of state courts on the cancellation of the arbitration award and from the disputing parties themselves. It is known that the categories of such cases are growing every year, while the preparedness of the scientific community in finding answers that help prevent judicial error is topical and necessary for the further development of international commercial arbitration in Uzbekistan.

Volume: 3 Issue: 8 | Aug–2024 ISSN: 2720-6882
http://journals.academiczone.net/index.php/jiphr

International commercial arbitration, which is an alternative form of dispute resolution, considers contractual and non-contractual disputes arising between civil matters. The UNCITRAL Model Law on International Commercial Arbitration [1]describes which disputes can be submitted to arbitration. The arbitrability of disputes is also determined by the legislation of a particular country. In this sense, today the legal practice of many developed countries is moving in an ascending line towards a more democratic approach to this issue, and an increasing range of property and non-property relations fall under the jurisdiction of international commercial arbitration.

However, the primary issue for the arbitrability of a dispute is not the applicable law, and not the UNCITRAL Model Law, but the existence of an arbitration agreement between the parties implying the possibility of transferring the dispute that has arisen or may arise in the future to international commercial arbitration for consideration and resolution.

By submitting a dispute to international commercial arbitration, the parties trust the members of the arbitration, and as a rule, agree with the legal nature of the arbitration verdict (by default, when signing an arbitration agreement or performing other actions equivalent to concluding an arbitration agreement) regarding its finality and the impossibility of appeal. However, only the signing of the arbitration agreement does not mean that the party to the arbitration clause waives the right to challenge the final act that resolved the dispute on the merits.

The following institutions are known to the doctrine of international commercial arbitration and arbitration law enforcement practice regarding an arbitration award: “recognition”, “cancellation”, “enforcement”, “appeal”, “challenge”. We think it is not necessary to say separately that an arbitral award is a final procedural act adopted on the merits of consideration and resolution of a dispute in international commercial arbitration. However, it should be borne in mind that the party to the arbitration proceedings has the right (often it is the party against whom the arbitration decision was made) to challenge, appeal the decision to the state court at the place of its issuance and thereby cancel the arbitration decision on procedural objections or regarding the jurisdiction of the arbitration. As a rule, here we are talking about both the cancellation of the arbitral award and the refusal to enforce the arbitral award.

For the purposes pursued by this article, we will not dwell separately on the grounds of cancellation or refusal to enforce an arbitration award. The rules on them are contained in the relevant laws on international commercial arbitration and procedural codes[2]. It should only be noted that the grounds are not as important as the verification of the party's competence to file an application for the annulment of an arbitration award. After all, the party could have refused such right, and judges of state courts for various reasons, may have mistakenly consider such statements without having studied the circumstances.

It was rightly noted by L.Guglya (2012) that in the case of annulment of an arbitration award, three important aspects are mainly affected:

a) the existence of the right to initiate cancellation, which belongs exclusively to the party to the arbitration proceedings (and in some exceptional cases also to the third party affected by the decision);

b) the period during which a claim may be filed for cancellation;

c) The scope of the grounds that may be considered for annulment.

[1] https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/ru/mal_rus.pdf
[2] For example, for Uzbekistan, this is the Law of the Republic of Uzbekistan "On International Commercial Arbitration" (National Database of Legislation, 17.02.2021, No. 03/21/674/0123), the Economic Procedural Code of the Republic of Uzbekistan (National Database of Legislation, 25.01.2018, No. 02/18/EPC/0623, 27.07.2018).

Volume: 3 Issue: 8 | Aug–2024 ISSN: 2720-6882
http://journals.academiczone.net/index.php/jiphr

The cancellation procedure, according to this author, can be considered as a two-stage process. The first stage of the process concerns the admissibility of the cancellation action, in particular, with regard to the timing of the submission of the relevant request, its scope, the authority of the party submitting such an application, as well as the circumstances that may exclude such a submission. Only in case of passing the first stage, the court will consider the grounds for cancellation. The refusal usually affects the first stage of the cancellation procedure, making such a procedure unacceptable with respect to all or some of the grounds for cancellation (depending on the scope of the refusal).

It is difficult to disagree with the above said notion. Speaking about the cancellation of an arbitration award, we immediately have in mind the grounds for cancellation and study them exclusively. However, before studying the question of the presence or absence of these grounds, it is necessary to investigate the issue of the competence of the party to the arbitration proceedings to declare the annulment of the award. Whether she has such a right or the right to challenge the final arbitration act was lost by her as a result of her own active actions. It is especially advisable to be aware of the refusal of the right to challenge by state courts, since, not knowing about the existence of such a circumstance, economic judges, ignoring the refusal to challenge, may consider an application for the cancellation of an arbitration award made on the territory of Uzbekistan. In this regard, the purpose of this study is to clarify the application of refusal to challenge an arbitration award when considering an application for annulment of an arbitration award and its features for the Republic of Uzbekistan.

The activity of arbitration in Uzbekistan is regulated not so long ago by the Law of the Republic of Uzbekistan of 02/16/2021 No. LRU-674 “On International Commercial Arbitration”[3]. Prior to the adoption of this law, the Law of the Republic of Uzbekistan "On Arbitration Courts" dated 16.10.2006 No. LRU-64 was in force in the country[4], which still regulates the creation and functioning of internal arbitration. The Law “On International Commercial Arbitration” is the main regulatory legal act regulating the activities of arbitrations, which is in many ways similar to the UNCITRAL Model Law on International Commercial Arbitration, its adoption has become a starting point in the introduction of arbitration procedure into the practice of Uzbekistan. It is known that today the legislation, including on arbitration, is being reformed and updated in the republic. The adoption of the Law of the Republic of Uzbekistan “On International Commercial Arbitration” gave rise to heated discussions on the merits of arbitration, the place and role of arbitration in creating convenience in resolving legal disputes between entrepreneurs and forming a warm investment climate in the country, improving the business environment, prospects for further development of arbitration in Uzbekistan. Many authors raise the question of how much the adoption of the law will accelerate the real introduction of arbitration into the legal system of Uzbekistan, when arbitration will become for us the same common and frequent concept as arbitration court, mediation.

All over the world, arbitration occupies a worthy place in the legal system of developed countries and has declared itself as a cross-border authoritative tool for resolving legal conflicts between companies of various profiles and levels, whether they are representatives of small, medium or large businesses. The oil and gas industry, industry, the provision of works and services, production, purchase and sale of other industries boldly submit disputes to arbitration - a non–governmental court specially designed to consider disputes between participants in international commercial transactions, the parties to which are persons of different nationality. To date, the largest of them are the International Arbitration Court at the International Chamber of Commerce, the London International Arbitration Court, the International Dispute Resolution Center of the American Arbitration Association, the Singapore

[3] National Database of Legislation, 17.02.2021, No. 03/21/674/0123
[4] Collection of Legislation of the Republic of Uzbekistan, 2006, No. 42, Article 416; 2014, No. 20, Article 222; 2017, No. 37, Article 978

Volume: 3 Issue: 8 | Aug–2024 ISSN: 2720-6882
http://journals.academiczone.net/index.php/jiphr

International Arbitration Center, the Hong Kong International Arbitration Center, the International Center for Settlement of Investment Disputes of the World Bank and others.

Tashkent International Arbitration Center under the Chamber of Commerce and Industry of the Republic of Uzbekistan (TIAC) has been established and operates in Uzbekistan[5]. It operates an Arbitration Court, which is a fully autonomous and the only body that considers and resolves disputes in accordance with the TIAC Arbitration Rules. The Uzbek arbitration institution has considered a considerable number of disputes in a short time since its establishment, which indicates the gradual popularization of arbitration in our country.

The status of arbitration, regulated by both national and international law, provides an alternative for the parties to consider a dispute that has arisen or may arise between them. The parties have the right to choose a judicial body – state or arbitration. In the latter case, an agreement must be reached between the parties to refer the dispute to arbitration for consideration and resolution – an arbitration agreement (article 12 of the Law).

Arbitration proceedings are conducted on the basis of Chapter 5 of the Law and according to the rules of the Arbitration Rules of the arbitration court itself. The arbitration award made on the basis of Chapter 6 of the said law is the final procedural act by which the dispute is resolved on its merits. The cancellation of an arbitration award or its enforcement on the territory of the Republic of Uzbekistan is carried out in accordance with the procedure provided for by Law, the Economic Procedural Code[6].

The grounds for cancellation or refusal to enforce an arbitral award are similar to the grounds provided for in the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards[7]. However, before analyzing the question of the presence or absence of certain grounds for annulment of the award, as mentioned above, it is necessary to study the question of the competence of the party submitting the application. And retrieve whether it has the right to do this under the national law of Uzbekistan or not? Has its right to challenge the arbitration award been lost?

A detailed study of the norms of the legislation on arbitration of the Republic of Uzbekistan showed that this institution is not directly structured, as it is done in the laws of France, Switzerland, etc. At the same time, there is no direct ban, as can be seen in the example of Egypt. However, it is advisable to include it in the Law “On International Commercial Arbitration” as on the example of developed European countries.

Considering the issue of legal regulation of the institution of refusal of the right to challenge an arbitration award, it is worth paying attention to article 34 (Definition of the rules of procedure) The Law, which provides “that, subject to the provisions of this Law, the parties may, at their discretion, agree on the procedure for conducting proceedings by an arbitration court”. In the theory of international commercial arbitration, it has already been suggested that this rule cannot be considered as imperative. If we elaborate the idea, it is proposed to proceed from the fact that this article is not a mandatory norm, and therefore the parties can deviate from the rules of this article and, among other things, completely exclude by their agreement the possibility of challenging the decision of international commercial arbitration. That is, the parties to the arbitration agreement on the basis of Article 34 may introduce a special clause that the parties waive their right to file an application for annulment of the arbitration award.

Since the law resembles Article 34 of the UNCITRAL Model Law on International Commercial Arbitration, the following interesting notion can arise. During the preparation of the draft Model Law, the issue of the admissibility of the parties' exclusion of the application of Article 34 was not

[5] https://www.tiac.uz/
[6] National Database of Legislation, 25.01.2018, No. 02/18/EPC/0623, 27.07.2018
[7] https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/ru/new-york-convention-r.pdf

Volume: 3 Issue: 8 | Aug–2024 ISSN: 2720-6882
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specifically considered. At a certain stage, the developers of the Model Law attempted to identify all the dispositive norms of the Model Law. There was no reference to Article 34 in the compiled list of dispositive norms. However, at the final stage of work on the Model Law, it was decided to abandon the clear distinction between imperative and dispositive norms due to the complexity and ambiguity of this task. At the same time, the working group specifically noted that the absence of the words "unless otherwise agreed by the parties" in a rule of the Model Law should not be interpreted as unambiguous evidence of the mandatory nature of the rule.

The existence of Article 34 of the Law “On International Commercial Arbitration” does not cast doubt on the statement that the waiver of the right to challenge a decision is prohibited in Uzbekistan, as it was done, for example, in Egypt. This rule only calls into question whether it is allowed or not. And referring to the opinions of scientists, we come to the conclusion that article 34 of the Law of the Republic of Uzbekistan “On International Commercial Arbitration” can be interpreted as an opportunity for the parties to indicate in the arbitration agreement the waiver of the right to challenge the arbitration award. Accordingly, we are not dealing with the limitation of the circle of persons entitled to conclude an arbitration agreement excluding the right to challenge, as it is provided for, for example, in Swiss law.

International commercial arbitration, as mentioned above, is an alternative way to resolve disputes. This is a kind of choice of the parties to apply to a state court or a non-state court for the final resolution of a commercial dispute that has arisen between them, regardless of whether it is contractual or not.

On the basis of article 9 of the Civil Code of the Republic of Uzbekistan, [8]judicial protection of civil rights is carried out by a civil court, an economic court and an arbitration court. Historically, international commercial arbitration has been one of the types of arbitration court, which allows us to assert that the norm of civil legislation on judicial protection also covers international commercial arbitration and represents judicial protection.

Based on the authority, popularity, efficiency, advantages of arbitration, the subjects of private-legal relations very often opt for it. Not the last criterion in such a choice is the possibility of enforcement of an arbitration award on the territory of more than two hundred and fifty states of the world. The latter becomes particularly relevant when a dispute is complicated by a foreign element and it is difficult to enforce a decision of a state court on the territory of another state in the absence of a bilateral agreement on recognition and enforcement of decisions of foreign courts.

Along with this, among the particularly striking advantages of international commercial arbitration is the finality of its final act. The parties, having chosen arbitration to settle a dispute that has arisen or may arise in the future, give their consent to the "conditions" as to say the rules and the legal nature of the arbitration. Since the finality of the arbitration award is its signature feature, the parties thereby understand and realize the importance of irrevocability of the decision and the impossibility of its appeal on the merits. Since there is no higher instance in arbitration. At the same time, if the law of the place where the arbitration award is made allows the parties to waive the right to challenge it, they can do so by specifying in the arbitration agreement a clause stating that the arbitration award is not subject to challenge.

As it is rightly noted in the scientific literature by Guglya L. (2012), the waiver or cancellation of their right allows the parties, by mutual consent, to abandon the claim for cancellation related to their decision, on the basis of adding a separate provision to their arbitration clause or by means of an agreement concluded at a later stage, presumably – even during the consideration of the cancellation procedure. The concept that takes the autonomy of the parties in arbitration to a new level is more

[8] Bulletin of the Oliy Majlis of the Republic of Uzbekistan, 1996, appendix to No. 2; 1997, No. 2, Article 56.

Volume: 3 Issue: 8 | Aug–2024 ISSN: 2720-6882
http://journals.academiczone.net/index.php/jiphr

widely known in relation to international arbitration, but may also apply to domestic arbitration proceedings.

According to Gary B. Born. (2021), in all developed legal systems, it is obvious that international arbitral awards are not preliminary recommendations or optional "advisory" opinions. Instead, they are final and binding legal documents, usually having immediate legal consequences and creating immediate legal rights and obligations for the parties. At the same time, many national arbitration statutes provide that arbitral awards are binding on the parties and have the force of res judicata from the moment they are drawn up and transmitted to the parties. Although such legislative provisions do not exist in all jurisdictions, court decisions usually interpret arbitral awards in a similar way, giving them binding legal consequences (including res judicata and related consequences for the parties) from the moment they are rendered, the New York Convention leads to similar results, requiring Contracting States to make international arbitral awards binding. Moreover, many institutional arbitration rules oblige the parties to immediately implement the arbitral awards made in accordance with the rules. By submitting a dispute to arbitration in accordance with its Rules, the parties undertake to immediately enforce any arbitration award.

As can be seen from the above opinions, the refusal to challenge an arbitration award is legitimate for the legal nature and essence of arbitration proceedings, and does not contradict the basic human rights to judicial protection, since the very consideration and resolution of a dispute in international commercial arbitration is judicial protection.

At the same time, the parties to the arbitration agreement still have the right to enforce the arbitration award and, within the framework of this procedural action, to receive a refusal to execute it.

The study of the institution of refusal of the right to challenge an arbitration award led us to the following conclusions and recommendations:

1. The waiver of the right to challenge is indicated in the arbitration agreement by recognizing by the parties the finality of the arbitration award and the absence of the party's right to challenge it (an agreement excluding challenge).
2. When it comes to the waiver of the right to challenge, there is a purely one procedural action, namely the cancellation of the arbitration award. It is erroneous to claim that it also includes a refusal to enforce an arbitration award.
3. The recognition by the parties to the arbitration proceedings of the finality of the arbitration award and thereby their waiver of the right to challenge it is not contrary to the constitutional right to judicial protection, since the losing party has the right to object to the arbitration award during enforcement. At the same time, the grounds for cancellation of the arbitration award are almost identical with the grounds for refusal to issue a writ of execution.
4. Waiver of the right to object and refusal to challenge an arbitration award are two different legal institutions that, although related to arbitration proceedings, can be applied at various stages of arbitration proceedings. These categories differ both on the grounds and on the legal characteristics of their application.

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Volume: 3 Issue: 8 | Aug–2024 ISSN: 2720-6882
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