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Issues of definition the applicable law to an arbitration agreement under the law of the Republic of Kazakhstan

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Abstract- *The article reveals the topical issues of definition the applicable law to an arbitration agreement based on the legislation of the Republic of Kazakhstan.*

Keywords: *applicable law, arbitration agreement, doctrine of autonomy of arbitration agreement.*

I INTRODUCTION

The one of the most important issues is applicable legislation, not only for the substantive resolution of a dispute in arbitration, but also for the solution of a number of matters. The literature notes that the issue of applicable legislation arises in arbitration proceedings in at least four aspects: 1) the arbitration procedure; 2) the arbitration agreement; 3) merits of dispute (substantive statute); 4) the conflict of laws rules (rules of law choice) for each of these categories /1, p. 707/. Among the aspects, the issues of determining the applicable legislation to an arbitration agreement occupy a special place, primarily due to the impact on the jurisdiction of the arbitral tribunal.

II MAIN PART

One of the consideration peculiarities of a dispute by commercial arbitration in the Republic of Kazakhstan (thereinafter - "RK") is the necessity to conclude an arbitration agreement between the parties. In accordance with paragraph 1 of Art.8 of the Arbitration Act allowed the transfer the dispute to arbitration in the presence of an arbitration agreement between the parties /2/. For that matter, the question of the applicable legislation to such an agreement is of paramount importance, since such legislation determines the validity and conclusion of the arbitration agreement, the grounds, procedure and consequences of making changes to it or its termination (loss) /3/.

Determining the applicable law to an arbitration agreement is due to the doctrine of autonomy of the arbitration agreement. According to 7) art. 5 of the Arbitration Act, the principle of the arbitration agreement autonomy means the annulment, modification or invalidation of an arbitration clause does not result in the termination, modification or invalidation of the underlying agreement. Accordingly, the annulment, modification

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or invalidation of the basic agreement does not result in the termination, modification or invalidation of the arbitration clause. Such doctrine also proceeds from the provisions of paragraph 1 of Art. 20 of the Arbitration Act, according to which, in determining the jurisdiction of arbitration, an arbitration clause that is part of the contract shall be interpreted as an agreement independent of other terms of the contract. The award by the arbitration tribunal on the invalidity of the contract does not entail the invalidity of the arbitration clause.

Previous legislation of the RK on arbitration did not explicitly provide for the principle of autonomy of the arbitration agreement. This was the reason for the adoption of judicial acts in Kazakhstan, which refuted such doctrine /4, p. 503/. At the same time, we believe that on the basis of the previous legislation, which in relation to the arbitration agreement provided for special provisions on the concept, form, content, meaning of the arbitration agreement, it may be concluded that such an agreement is an independent agreement /5, p. 372/.

The establishment of the autonomy principle of the arbitration agreement in Kazakh law is in line with international practice. The doctrine of the arbitration agreement autonomy had long been formulated in legal theory. In most countries, the doctrine of the arbitration agreement autonomy initially appeared in court practice and only then became a rule of law /6, p. 78/. As N.G. Vilkova rightly points out, the international treaties and the UNCITRAL Model Law on the ICA have created the basis for the international regulation of an arbitration agreement, which is used by States when forming their national laws on commercial arbitration /7, p. 21/.

At the same time, the literature, referring to the research written by Professor Neil Andrews, one of the renowned experts of Cambridge University notes that, unlike in continental Europe, English law has been, and partly continues to be, the practice whereby an arbitration agreement is treated as a normal contract condition. It is also noted that, on the basis of that concept, English courts had, until the early 1990s, refused to recognize the autonomous character of an arbitration agreement /1, p. 355 /.

The principle of the arbitration agreement autonomy supposes that the question of the applicable law to the arbitration agreement is also relevant. The parties may determine the applicable law for the arbitration agreement. However, this principle allows the parties to indicate as the law applicable to the arbitration agreement the law other than that chosen by the parties as applicable to the main contract /8, pp. 45-46; 1, p. 352/. It should be noted, however, that the parties may not always choose the applicable law to the arbitration agreement. Thus, if it is concluded between individuals and/or legal entities of Kazakhstan to resolve a dispute arising from civil law relations not complicated by a foreign element, and the place of arbitration is Kazakhstan, the applicable law to the arbitration agreement is Kazakhstan law.

To resolve disputes arising out of civil law relations complicated by a foreign element, when the rules of foreign law may apply to the arbitration agreement concluded in Kazakhstan, the parties may define such law by their agreement.

However, it should be noted that in cases where, on the basis of the provisions of article 10 of the Law on Arbitration in the Kazakh court where the subject matter of the arbitration is claimed, if any of the parties so requests, the question of invalidity, loss of force or enforceability of the arbitration agreement, regardless of what right is to be applied to such agreement, the court should determine the requirements to the form of the arbitration agreement under certain conditions on the basis of the rules of Kazakh law. So, according to paragraph 1 of Art. 1104 of the Civil Code of the RK, the form of transaction is subject to the right of the place of its execution. However, a transaction made abroad may not be considered invalid due to non-compliance with

the form, if the requirements of the law of the RK are observed /9/. So, if the place of the arbitration agreement is Kazakhstan, the form of such agreement, regardless of applicable law, must meet the requirements of Kazakh law.

Defining the requirements for the arbitration agreement form is important, as national laws of different countries set different requirements for the form of such agreement. So, the literature notes that in addition to the written form of the arbitration agreement, five other ways of concluding the agreement are presumed /1, p. 324/. Moreover, in some countries, the law does not set out strict requirements for the form of an arbitration agreement. For instance, the laws of Sweden and Norway do not set out any specific form of such agreement /1, p. 326/. Moreover, there are countries where an arbitration agreement can be accepted in the form of silence. So, according to Section 1031 (2) of the German Code of Civil Procedure, the form requirement is deemed to be satisfied if the arbitration agreement is contained in a document transmitted from one party to the other party or from a third party to both parties and the content of that document is considered as the content of the contract /1, pp. 325-326; 10, pp. 177-178/ in the absence of a timely objection under customary turnover.

Kazakh law requires that an arbitration agreement is concluded in writing. Under Art. 9 of the Arbitration Act, such an agreement may be entered into by way of a written arbitration agreement: 1) signing by the parties of one document (the main contract, which contains an arbitration clause, or a separate arbitration agreement; 2) exchange of letters, telegrams, telephones, faxes, electronic documents or other documents that determine the subjects and the content of their expression of will; 3) exchange of statement of claim and revocation of the claim, in which one party claims the existence of an agreement and the other does not object to it; 4) reference in the contract to a document containing a condition for the transfer of the dispute for arbitration, but if the other party does not object to the agreement, the contract shall be signed by the parties /11, p. 30-31/.

The analysis shows that Kazakhstan law does not allow arbitration agreements to be concluded verbally or in the form of silence on the part of the acceptor.

Arbitration agreement in Kazakhstan is usually concluded by including an arbitration clause in the main contract. At the same time, there is also the use of other methods envisaged. For instance, in Kazakhstan's arbitration practice, there was a case when an analysis of documents revealed the existence of an arbitration clause to refer a dispute to arbitration at the International Chamber of Commerce in Paris. However, the applicant submitted an e-mail to the arbitration, addressed to the debtor, proposing that the dispute be considered by the IUS International Arbitration Court and a response, which had the debtor's consent to the proposed arbitration /12, p. 85/.

A condition on the applicable law to an arbitration agreement is not essential for such an agreement, unless it is a condition on which an agreement is to be reached at the request of one of the parties (Article 393 of the RK Civil Code) /13/. Accordingly, the arbitration agreement may not contain a provision on the applicable law. The parties may, however, determine the applicable law to the main contract. In such a case, as noted in the literature, in practice the default law indicated as applicable to the contract also applies to the arbitration clause contained in that contract /8, p. 46/. We believe that such practice is contrary to the doctrine of autonomy of the arbitration agreement, since in the event of invalidity of the main contract, which has provisions on the applicable law, uncertainty arises as to the applicable law to the arbitration agreement. In addition, there is a dependency of the applicable law to the arbitration agreement on the validity of the underlying contract, which in our view

contradicts the doctrine of autonomy of the arbitration agreement. But no matter what law is chosen by the court, the law of the country will necessarily apply to arbitrability. (lex fori) /14, p. 218/.

A. Kostin, the Russian author, pointing out the differences in motives for determining the law applicable to an arbitration agreement, as well as the procedural nature of such an agreement, notes that in the theory of international commercial arbitration there emerged a concept according to which an arbitration agreement has a "close connection" with the law of the country of arbitration /15, pp. 140-141/. The other authors have also argued that, subject to national and international regulations, the validity of an arbitration agreement is determined by the law to which the parties have subordinated it and, failing that, by the law of the country where the award was made /1, pp. 353/. The Kazakh authors also acknowledge that the New York and European Conventions, in the absence of a choice of law applicable to the arbitration agreement, allow for the assessment of the existence and validity of the arbitration agreement under the law of the country where the award was rendered /16/.

In Kazakhstan, in accordance with the provisions of the Sub-Clause 2) paragraph 1 of Art. 52 of the Arbitration Act, the validity of the arbitration agreement in considering the case for the annulment of an arbitral award is determined by the law to which the parties have subordinated it, and in the absence of such instructions - according to the legislation of the RK. An application to set aside an arbitral award in accordance with paragraph 2 of article 464 of the RK Civil Procedure shall be filed with the appropriate court of the RK: 1) at a place of dispute consideration by arbitration, if the arbitration award is made in territory of RK; 2) at a place of a permanent arbitration, if the arbitration award is made under the law of RK in a foreign state; 3) at a place of formation of arbitration in RK, if the arbitration award is made under the law of RK in a foreign state /17/.

However, if the parties have not determined the applicable law for the arbitration agreement, Kazakhstan law contains provisions on the applicable law to the arbitration agreement in cases where the arbitration award is appealed by a party to a Kazakhstan court. In particular, this refers to decisions of Kazakhstan arbitrators (permanent or established in Kazakhstan): 1) made in the territory of the Republic of Kazakhstan; 2) if the arbitration award is made under the law of the Republic of Kazakhstan in a foreign country.

Nevertheless, it should be borne in mind that arbitral awards made abroad by Kazakh arbitrators may be appealed against at the place of the award.

According to the commentary to the RK Code of the Civil Procedure, courts of general jurisdiction have no right to set aside decisions of foreign arbitration courts, and a competent court in accordance with the rules of Chapter 57 of the Code of Civil Procedure may only refuse recognition and enforcement of foreign arbitration awards /18/.

However, we believe that on the basis of the 1) cl. 2 of Article 464 of the Civil Procedural Code of the RK, an appeal to Kazakh courts should be allowed with respect to decisions of foreign arbitrations for which the place of arbitration is determined by the Republic of Kazakhstan, which gives grounds for application to the arbitration agreement in the absence of agreement between the parties on the applicable law of the RK.

For an arbitration award, irrespective of the country in which it was made, paragraph 1) cl. 1 of Art. 57 of the Arbitration Act provides that a court shall refuse to recognize and/or enforce such an award if the arbitration agreement is invalid under the laws of the State to which the parties have subordinated it or, failing that, under the laws of the country where the arbitration award was made.

In applying the above provisions, it should be borne in mind that according to cl. 3 of Art. 32 of the Arbitration Act, the place of the meeting, the award is the place of arbitration. Accordingly, under the laws of the place of arbitration and the laws of the RK the place of award may be determined differently. Nevertheless, we believe that the place of the foreign arbitration award, which is made abroad, should be determined under the law of the country designated as the place of arbitration, regardless of the country in which the award was actually made.

The provisions of art. 52 and 57 of the Arbitration Act on the determination of the applicable law to an arbitration agreement apply to cases of annulment or recognition and enforcement of an award in Kazakhstan respectively. However, the question of the law applicable to the arbitration agreement initially arises when determining the jurisdiction of an arbitration tribunal to hear the dispute. So, according to cl. 1 of Art. 20 of the Arbitration Act, the arbitration tribunal shall decide on its own jurisdiction to consider the dispute, including in cases where one of the parties objects to the arbitration proceedings on the grounds of invalidity of the arbitration agreement. At the same time, there are no special provisions in the legislation of the RC on arbitration on the basis of which, in the absence of the parties' indication of the applicable law to the arbitration agreement, the arbitration shall determine such law. In this connection, the question arises as to whether the applicable law to an arbitration agreement complicated by a foreign element can be determined on the basis of the rules of private international law provided for in the Civil Code of the RC.

The arbitration agreement is by its legal nature a civil law contract, although it deals with procedural issues. Nevertheless, it is subject to the general provisions of the contract contained in the RK Civil Code /6, p.102-103/. V.Z. Shaykenov and A.T. Idayatova, based on the civil law nature of arbitration, consider it reasonable to resolve the conflict of laws applicable to the arbitration agreement in the section of private international law of the RK Civil Code. They note that the French courts, for example, have followed this path. These authors believe that in the absence of an agreement between the parties, it is reasonable to apply to the arbitration agreement the law of the country with which the agreement is most closely connected, as proposed in paragraph 4 of Art. 1113 of the RK Civil Code. They see the closest connection between an arbitration agreement and the place of arbitration /16/.

The stated position corresponds to the provisions of Article 5 (1) (a) of the 1958 New York Convention, Article IX (1) (a) of the 1961 European Convention, Article 34 (2) (a) (i) of the UNCITRAL Model Law. However, it should be taken into account that in order to apply the provisions provided for in the section of private international law of the Civil Code of the RK, it is necessary to define a foreign element in the relations and to establish that the place of arbitration is closely connected with such relations. However, the concept of "close relationship" is an evaluative one and in practice may lead to a different understanding. Since, under article 52 of the Arbitration Act, in the absence of an indication by the parties of the applicable law, the validity of an arbitration agreement is determined in accordance with the provisions of the laws of Kazakhstan, we believe that, for the purposes of determining the jurisdiction of arbitration, if the place of arbitration is Kazakhstan, it is necessary to proceed from the fact that the applicable law to the arbitration agreement is Kazakh law. The same should be done in cases where the place of arbitration is a foreign country.

III CONCLUSION

There is a practice of extending the law applicable to the main contract and to an arbitration agreement is contrary, in our opinion, to the doctrine of the autonomy of such agreement. Changes in RK legislation on the applicable law are in line with the 1958 New York Convention, the 1961 European Convention and the UNCITRAL Model Law. Nevertheless, the conception and meaning of the place of arbitration proceedings in Kazakhstani law contradict international practice, which may cause conflicts in law enforcement activities. At the stage of determining the jurisdiction of arbitration, the application of conflict rules of private international law may lead to different understanding of the concept of "close link" and contradictory practice.

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