

Execution and challenging decisions of arbitration courts in the system of law of the Republic of Tajikistan

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Abstract—The article is devoted to the regulations of the appeal against the arbitral award by the legislation of the Republic of Tajikistan. The authors comment on the provisions of the law of the Republic of Tajikistan No.344 dated January, 5 2008 "On Arbitral tribunal". There is a scientific discussion about the content of abovementioned legal act and legal act, which regulates the procedure of arbitration.

Keywords—*Republic of Tajikistan, arbitral tribunal, arbitration proceedings, arbitral award, appeal against the arbitral award.*

I. INTRODUCTION

The number of disputes in the courts in the post-Soviet countries is steadily increasing every year. The development of new markets and new technologies, the establishment of business relations, the emergence of new organizational and legal forms of business entities leads to an increase in contractual disputes.

Despite constant updates of civil and business legislation, as well as judicial reforms, national courts are not ready to cope with the growing burden. In a number of cases, a court decision does not at all contribute to effective, mutually beneficial communication with foreign partners. Court decisions are not really enforced. Legal costs, material losses of market entities are growing, business relations deteriorate.

Several decades ago in Europe and the United States of America some legal institutions were created allowing to unload national courts, to reduce conflictness of a dispute, to reduce time and financial resources of participants of economic process, to keep partnership [1]. All of them have national peculiarities, but in general these institutions are referred to as alternative dispute resolution facilities [2].

The arbitration procedure is the most stable, professional and close to the rules of the state.

In 2010, with the introduction of the Federal Law "On an Alternative Dispute Resolution Procedure with the Participation of a Mediator (Mediation Procedure)", the legal basis for the development of mediation was laid in Russia, including when considering disputes in courts. In contrast to European countries and after almost 10 years, this procedure has not become widespread due to the lack of

state funding for mediation, lack of interest of government bodies in it, the low level of legal culture of Russian citizens [3].

In 2015 in the Russian Federation a large-scale reform concerning arbitration courts was made, which toughened rules of admission of the arbitration courts in the legal framework, having blocked a way to "pocket" bodies to the business conflicts [4].

We will analyze as the legislation on consideration of economic disputes by the arbitration courts in other states of the former USSR on the example of the Republic of Tajikistan develops.

Arbitration proceedings in the Republic of Tajikistan is regulated by the law No.344 dated January, 5 2008 "On Arbitral tribunals" (hereinafter the Law of RT), came into force on April, 1 2008. The above mentioned law mostly repeats the contents of the Russian law No.102-FZ dated July, 24 2002 "On Arbitral tribunals in Russian Federation" (hereinafter the Law of RF 2002) that now has become invalid. The current law No.382-FZ dated December, 29 2015 "On arbitration (arbitration proceedings) in Russian Federation" (hereinafter the Law of RF 2015). It's obvious that "successful implementation of arbitral tribunal activities depends largely on a condition of the legislative base which is given sufficient attention in the Republic of Tajikistan, especially in recent years"[5].

We will consider the procedure of appeal against an arbitral tribunal according to the commented Law of RT. We also approve the definition of arbitration as "the procedure of dispute resolving by an independent, neutral person (arbitrator), elected by the parties, who have the authority to make an arbitral award, binding for the parties"[6].

II. METHODS

The institution of arbitration represents a complex legal phenomenon, including, on the one hand, regulation of individual issues by international law, and on the other hand, a large number of issues are regulated by norms of national legal systems. Accordingly, the research uses an integrated approach to the consideration of legal relations arising in the sphere of arbitration, which consists in using the methods applied both by the science of private law and the science of

civil and arbitration process. The basis of this scientific work, which is connected with the research of various legal systems, is comparative legal and analytical methods in combination with a systematic approach to the analysis of problems in the arbitration sphere.

III. COMMENTARY

The Law of RT provides the possibility to appeal against the arbitral award in the competent state court (art.40, art.41 of the Law of RT). In fact, it is “an opportunity to achieve the cancellation of the illegal arbitral award”[7]. The appeal procedure serves as a guarantee against individual errors and the groundlessness of arbitral awards. However, an appeal against arbitral award is possible only if in the arbitration agreement isn’t provided as a final court decision. The Russian legislation also provides that the final decision of the arbitral tribunal is not subject to cancellation.

Application for the cancellation of the arbitral award should be submitted by the concerned party within three months from the date of receipt.

The appeal procedure against the arbitral award is the following. The commented law refers us to the legal acts of the Republic of Tajikistan. The procedure of challenging arbitral awards is described in the §1 Ch. 27 of the Code of economic proceedings in the Republic of Tajikistan (hereinafter the Code of EP). Proceedings on cases connected with challenging the arbitral awards is also described in this code (art. 210-214 of the Code of EP). The civil procedural Code of the Republic of Tajikistan doesn’t contain rules for challenging the arbitral awards. Consequently, these issues are resolved exclusively by the Economic courts. According to the commented Law of RT, competent court should decide on the satisfaction or refusal of the application on the results of application consideration for the cancellation of the arbitral award. But, the art. 214 of the Code of EP provides definition of the competent economic court in the case of challenging the arbitral award. It seems that the formulation of the commented law needs to be changed in order to bring the statements of art. 41 of the Law of RT in accordance with the art. 214 of the Code of EP.

The commented law refers to the grounds for the cancellation of the arbitral award (art.42 of the Law of RT). But the Law of RT does not define these grounds, but refers to the Code of EP.

Grounds for cancellation of the arbitral award are provided by the art. 213 of the Code of EP. They can be divided into two groups such as procedural and substantive violations.

Most of the grounds relates to the procedural violations. These are the violations of the limits of the arbitration agreement; violation of the arbitral tribunal formation or the procedure of participation in the arbitration trial; violation of the notification procedure; the lack of jurisdiction of the arbitral tribunal to consider the dispute. Also the basis for the cancellation of the arbitral award is the consideration of the dispute, that can not be the subject of arbitration in accordance with the law.

Violation of the limits of the arbitration agreement may be expressed in the arbitral tribunal's consideration of the

dispute not provided for by the arbitration agreement. Violation of the limits of the arbitration agreement is arbitral decision made on the dispute, that does not fall under the terms of the arbitration agreement or contains regulations on issues beyond its limits and on issues that were not examined during the arbitration proceedings. Usually “the conditions of validity of the arbitration agreement are determined in accordance with the civil law applicable to civil transactions”[8].

Violation of the formation order of the arbitral tribunal consists of non-compliance with the rules provided by the arbitration agreement and the Law of RT. The formation order of the arbitral tribunal has great importance, as “the efficiency of the arbitral proceedings depends ultimately on the procedure of court formation”[9].

Another reason for challenging the arbitral award is the violation of the procedure of arbitration that was conducted in violation of the terms provided by the agreement of the parties or in the legislation of the country.

Violation of the procedure of notification to the parties of the arbitration trail should be expressed in an undue notice of the appointment of the arbitrator; failure to notify or improper notice of the place, time, form of the arbitration proceedings of the dispute; due to these and other valid reasons, one of the parties was unable to provide their explanations in the case ”[10].

Violations of the substantive law, as the grounds for the reverse of the arbitral award, are the acceptance of the arbitration agreement as invalid and violation of the fundamental principles of law.

The invalidity of the arbitration agreement is represented by the violation of the requirements imposed by the current legislation. The grounds for the invalidity of deals, that an arbitration agreement is, are fixed in the civil legislation of the country.

Violation of the fundamental law principles of the Republic of Tajikistan is an independent basis for challenging an arbitral award. The principles are the guidelines, the main ideas established by the legislation. They represent the general progressive bases of public relations regulation. Violation of the principles encroaches on the main foundations of the State and society. Arbitral awards that are contradictory to these principles should be set aside by the economic court. Unfortunately, neither in the legislation of the Republic of Tajikistan nor in law science the fundamental principles of law are specified. The issue of violation of these principles by the arbitral awards is resolved the competent state court on its own internal belief.

Reversal of an arbitral award generates legal consequences. It is obvious that “reversal of an arbitral award annuls such arbitral award” [11].

As a rule, according to an arbitration agreement each of the parties can re-appeal to the arbitral tribunal for a new arbitration proceedings.

But parties can be deprived of the right to re-appeal to the arbitral tribunal. The latter is possible when the arbitral award is annulled in whole or in part due to the invalidity of the arbitration agreement or an arbitral award is based on a dispute, that is not provided by the arbitration agreement or

not covered by its terms, or a court order is made on issues, that are not regulated by the arbitration agreement. In this situation the parties of the arbitration proceedings may apply for the resolution of the dispute to the economic court on general grounds.

IV. RESULTS

Next we will compare the legal regulation of the considered issues in the Russian Federation and Republic of Tajikistan. It should be noted that Russian legislators use the term “challenge the arbitral award” while the term “appeal against the arbitral award” is used in the legislation of the Republic of Tajikistan. But the legal regulation of the above mentioned procedure is similar in both countries. It seems that the use of the term “challenge” is more correct. “Appeal involves referring to a higher court and, accordingly, new hearing of the case (appeal), or verifying the decision in terms of legality and validity (cassation).

However the general concept of legislation on arbitration proceedings and its principles asserts that the state courts are not the higher courts in relation to the arbitral tribunals and, therefore, have no right to appeal and cassation review of the arbitral awards” [12].

Legal regulation of the appeal procedure against an arbitral award by the Law of RT is practically similar to the legal regulation of challenging an arbitral award by the Law of RF 2002. The new Law of RF 2015 significantly reduced the number of articles (up to one) regulating this procedure. According to the art. 40 of the Law of RF 2015, the final arbitral award (in accordance with the agreement of the parties) is not to be challenged and cancelled. As for the reason for reversal procedure of an arbitral award, that is not final, the Law of the RF 2015 makes reference to the procedural legislation of the Russian Federation.

V. CONCLUSION

In conclusion, we would like to note that the institute of arbitration is developing steadily in the Post-Soviet States, including the Republic of Tajikistan. This trend is reflected in the national legislation. Despite the serious economic problems, there is an independent law governing arbitration proceedings in the Republic of Tajikistan, which contributes to the protection of the rights and interests of economic actors. “The country has taken a significant step towards democratization of legal acts regulating the activities of arbitration courts as an alternative method for resolving civil disputes”[13]. The legislation of the Republic of Tajikistan as the legislation of the Russian Federation provides for the “right to free exercise of economic activity” [14], an integral part of which is the right to arbitration, which is “the most appropriate form of jurisdiction for market relations” [15].

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