PATHOLOGICAL ARBITRATION CLAUSE: PLAINTIFF'S TACTICS EXEMPLIFIED BY A CASE STUDY

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Legal practitioners often face the so called pathological or flawed arbitration agreements where the agreement enforcement is impossible or largely hindered. For instance, the parties have chosen a non-existent arbitral institution or have specified its name incorrectly. There are arbitration agreements in which the parties have designated one arbitral institution to hear disputes, but indicated the rules of another arbitral institution or made reference to the procedural law of some country as the hearing procedure.

The most common is the pathological arbitration clause specifying a non-existent arbitral institution. For example, the number of disputes over such clauses has recently grown in Kazakhstan due to the liquidation of the Chamber of Commerce and Industry of the Republic of Kazakhstan (CCI) and the International Arbitration Court thereunder. These were liquidated in connection with the creation of the National Chamber of Entrepreneurs of the Republic of Kazakhstan, which formed its own arbitration institution – "Atameken" Arbitration Center, the new structures not being the legal successors of the abolished CCI and International Arbitration Court. Meanwhile, there are lots of contracts specifying the arbitration court of the Chamber of Commerce of the respondent's country as the institution for dispute resolution. Such arbitration clauses continue to be included in the terms of new contracts.

Attempts by the parties to eliminate such flaws on their own often yield no result, as this happens already after the dispute has arisen and the party in breach ignores the counterparty's proposal to amend the arbitration clause.

If the parties to the contract are located in the signatory states of the European Convention[1], this problem is solved quite easily. Article 4.5 of the Convention governs the situation where the parties have provided for the submission of potential disputes between them to a permanent arbitration institution, but have not appointed such institution and have not reached an agreement thereon. In this case, the claimant may submit a request for such institution appointment to the president of the competent chamber of commerce of the respondent's country or to the special committee, whose composition and procedure are described in the annex to the European Convention.

It must be borne in mind that the possibility to apply the European Convention depends not only on the location of the parties to the arbitration agreement, but also on the nature of dispute. According to its Article 1, the Convention applies to arbitration agreements on the arbitral resolution of disputes arising in the course of foreign trade operations. The concept of "foreign trade" is to be defined in accordance with the substantive law applicable to the legal relations in dispute.

[1] *The European Convention on International Commercial Arbitration, Geneva, April 21, 1961.*

In Kazakhstan, the functions of the institution authorized to appoint permanent arbitration or resolve other issues stipulated by Article 4 of the European Convention are performed by "Atameken" Arbitration Centre (hereinafter, the Arbitration Centre) on the basis of notification of the Permanent Mission of the Republic of Kazakhstan dated September 11, 2014 submitted as per Article 10.6 of the European Convention to the UN.

Thus, if the respondent in a dispute arising in the course of foreign trade operations is a Kazakh company and the other party to the dispute is located in a signatory state of the European Convention, the Arbitration Center can eliminate the flaws in the arbitration agreement, including appoint a permanent arbitration institution, unless it has been appointed by the parties, and in the event the agreement provides for the consideration of disputes by an ad hoc arbitration:

- Appoint the arbitrators;
- Determine the place of arbitration; and
- Lay down the procedure to be followed by the arbitrators, unless the parties have agreed on these matters.

Pursuant to Article 4.5 of the European Convention, the claimant may request the appointment of permanent arbitration institution, unless the parties have specified it and reached an agreement thereon. Proceeding from the meaning of this rule, the claimant should attempt to agree on the arbitration institution with the respondent before applying to the Arbitration Center.

But is it possible to overcome a flaw in the arbitration clause, if the European Convention is not applicable? Let us look into this problem using an example from our firm's practice.

A dispute arose between a Lithuanian and a Kazakh company over a contract for the supply of goods. The Lithuanian company intended to collect indebtedness for the delivered goods and the late payment penalty. The arbitration clause in the contract contained a condition to resolve disputes "in the International Arbitration Commission under the union of the Chamber of Commerce and Industry of the Republic of Kazakhstan." No arbitration institution with such name (same as no union of the Chamber of Commerce and Industry) has ever existed in Kazakhstan, and the International Arbitration Court under the Chamber of Commerce and Industry had been liquidated before the contract was concluded.

Since the Republic of Lithuania is not a party to the European Convention, the latter could not apply to the arbitration agreement concluded by the Lithuanian company. Hence, a permanent arbitration institution could not be appointed in the manner prescribed by Article 4 of the Convention.

Let us consider two options to resolve the problem described above, each of these having its pros and contras.

The first option: to file a claim with the Arbitration Center without first trying to agree with the respondent on the permanent arbitration institution to consider the dispute.

Pursuant to the Arbitration Law[2], the permanent arbitral institution with which a claim is filed must, within 10 calendar days, rule whether to institute arbitral proceedings, notify the parties of the place of arbitration and invite the respondent to submit a written statement of defense. The permanent arbitration institution may dismiss the claim, if it has been filed with an arbitration not provided for in the arbitration agreement. In practice, however, if there are flaws in the arbitration clause that require its interpretation, the permanent arbitration institution takes up the claim and institutes arbitral proceedings.

By virtue of Article 35/1 of the Arbitration Law, the arbitral tribunal decides independently whether or not it is competent to hear a particular dispute, including in cases where one of the parties objects to the arbitral proceedings for the reason of the arbitration agreement invalidity. To this effect, the arbitration clause constituting a part of the contract is interpreted as an agreement independent of the other terms of the contract (Article 20.1 of the Arbitration Law).

In case the claim is filed with the Arbitration Centre, the arbitral tribunal may conclude that it is competent to hear the dispute, proceeding from the following interpretation. The National Chamber is not formally the legal successor of the Chamber of Commerce and Industry, but actually performs the same functions. This circumstance can be interpreted as the existence of the will of the parties to submit the dispute to arbitration formed by the institution performing the CCI functions. Nowadays, such institution is the Arbitration Center.

The likelihood of such interpretation is fairly high.

[2] *Law No. 488-V of the Republic of Kazakhstan "On Arbitration" dated April 8, 2016.*

As noted by V. V. Khvaley, "practically all arbitration institutions, when resolving the competence disputes arising from the misnomer of this or that arbitration institution, tend to interpret broadly in favor of their own competence."[3] Kazakhstan arbitration institutions are no exception. Our firm's practice shows that in all instances where the name of the arbitral institution had been stated in contracts incorrectly the arbitral tribunals concluded that they are competent to hear the disputes.

As for the Arbitration Center, since its establishment, it has administered 14 cases with clauses setting forth the CCI International Arbitration Court's jurisdiction over disputes, nine of which have reached the stage of arbitral award enforcement. So far, there have been no refusals to enforce these awards on the ground of the Arbitration Center's lack of competence to consider the dispute.

However, the above statistics does not mitigate the following risk. As is known, an arbitral award may be refused enforcement, if the composition of the arbitral institution or the arbitration procedure are not in accordance with the agreement of the parties (Article 5 of the New York Convention[4], Article 255 of the Civil Procedure Code[5]). On the same ground, an award of Kazakh arbitration may be set aside by a court (Article 52.1.4 of the Arbitration Law).

In contrast to the broad interpretation practiced by arbitration institutions, the state courts stick to the letter of the law. Therefore, the court is most likely to resolve that the consideration of dispute by the arbitration center not specified in the contract and under the rules of that center is not in accordance with the arbitration agreement.

In the case under review, this risk was aggravated by the fact that the arbitration clause misnamed the International Arbitration Court under the CCI. Therefore, the chance of refusal to recognize and enforce the award of the Arbitration Center was fairly high.

The second option: to invite the respondent to agree on the active arbitration institution to consider the dispute and in case of refusal or no response – file a claim in court.

According to Article 2.3 of the New York Convention, if the court of a contracting state receives a claim in a matter in respect of which the parties have concluded an arbitration agreement, it must, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed. Article 10 of the Arbitration Law contains similar provisions.

The respondent's unwillingness to agree on a different arbitration institution to hear the dispute and the impossibility to appoint such institution in the manner prescribed by the European Convention give rise to an argument that the arbitration clause is unenforceable. Given that the state courts tend to interpret arbitration agreements in a narrow, literal sense, it seems unlikely that a court will be trying to establish the will of the parties and "fix" the flaw in the arbitration clause that specifies the never existent in Kazakhstan "International Arbitration Commission under the union of the Chamber of Commerce and Industry of the Republic of Kazakhstan."

Consideration of disputes by a state court excludes the risks of decision unenforceability, which exist under the first option. In our view, these risks are more significant than the advantages of arbitration, so the second option looks preferable.

It should be mentioned that we recommended the claimant to choose the second option, since the debtor in this case was a Kazakh company and there would be no problems with the enforcement of the Kazakh court's decision. In a different situation, one must take into account whether there is an international treaty on legal assistance with the country in which the debtor is located or has property. Absent such treaty, the expediency of going to court should be evaluated taking into account the country's current practice of applying the principle of reciprocity in foreign judgment enforcement.

[3] *Khvaley, V. V. How to Kill an Arbitration Agreement. Treteyskiy Sud, 2003, No. 5.*

[4] *Convention on the Recognition and Enforcement of Foreign Arbitral Awards, New York, June 10, 1958.*

[5] *Civil Procedure Code of the Republic of Kazakhstan, No. 377-V dated October 31, 2015.*