

ARBITRARY COURT – AN ESSAY ON THE ISSUE OF IMPROVING THE INVESTMENT CLIMATE IN TAJIKISTAN.

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1) Introduction

Foreign investors usually make their decision on financial participation in a foreign country depending upon what to expect there proportionally with risk of relevant capital increment. When making a choice where to locate the priority is given to issues of tax regulations on duties, agrarian law, public administration in terms of various facets of bureaucracy, control mechanisms and corruption, considerations of infrastructure and logistics, and also the labor market.

Responsible entrepreneurs also involve in the process of calculation the thoughts related to what kind of legal tool can be used in case of a conflict. This inevitably will lead to the question of quality of a relevant arbitrary court in this state, independence of judiciary and independence of judges especially in the disputes between a foreign businessman and any public agency or even with the state itself as a contracting party.

The economy used to a western judicial standard will, thus, in many eastern countries and especially in ex-USSR countries have a disillusioning summary with regards to the expectations in relevant judiciary. It will speak to a weakly equipped with finances and human resources justice. Whose judges, for example, in Tajikistan, have an official monthly salary in average of 40 USD. Therefore in this poor country nobody can cover their living standards, so the economic independence of judiciary runs upon the rocks under such insignificant payment.

Therefore the investors come to a thought if there are alternatives to settling the conflicts at state courts. The main solution is the arbitrary courts only if they are allowed in such state and its work is actually possible, or if summons of the arbitrary courts is to be made possible outside the state.

The experience teaches, that in many countries in transition they proudly refer to existence and practical work of the arbitrary court. At the same time it is not as such a true alternative to state courts, and according to the traditional Soviet perception, is something integrated into the state machinery. Or declaration of the feasibility through a decision of an arbitrary court is made dependent on the full control through state courts, therefore the advantage of proceedings by an arbitrary court leads to an absurdity.

1.). *Essence and organization of arbitrary courts*

Even in states where existence of independent tribunals with incorruptible and unbiased judges is evident, such as Western Europe countries, the arbitrary courts create the desired alternative to state jurisdiction. There is data, according to which for example in Germany 80-90 % of all economic agreements executed abroad contain an arbitrary agreement, according to which the disputable issues of these contracts are settled at private arbitrary courts, see Rabbow-Geiss, "Execution of decisions of foreign arbitrary courts in Germany", Stuttgart, 2002.

Arbitrary courts there are established not due to the distrust towards state justice, but in order to meet the needs of economy in a rapid, final and cheap solution of disputable issues.

In the mentioned above western states in principle two models of arbitrary court are conceived. When parties chose them, they have equal rights and in the relevant decisions are discharged unconditionally from the state judiciary.

A) *Arbitrations of institutions and agencies.*

The contracting parties may agree that in case of disputes of the contracting parties, the arbitration formed for a long term within the country or abroad will consider them. Known arbitrary courts of such nature have, for example, its headquarters in Stockholm, or in London. There are large arbitrary courts engaging international law experts, to whom people apply worldwide in order to settle a disputable question.

Along with them there are other arbitrary courts formed for a long term created in close cooperation with Chamber of commerce and industry, or for example, with Trade Chamber.

B) *Ad hoc arbitrage*

In Germany and in many other industrialized states it is possible and quite usual that the contracting parties in their contracts agree on an arbitration clause according to which one specific person to a group of persons settles all related to the agreement disputable issues. This way is quite often chosen by the businesspeople when concluding purchase and supply treaties, when concluding contracts for construction, leasing and other types of contracts. It is up to the free choice of the parties who will be chosen as an arbitrary judge. Usually the parties appoint as an arbitrary judge an outstanding right holders, legal entities from judiciary such as presidents of courts. It has to be noticed that in such cases these legal entities acting as arbitrary judges do not implement functions of a state judge, but work only privately in legal issues.

Naturally the parties can also agree on persons outside the state justice for work as an arbitrary judge and to delegate such task (this work) for example to a university professor. Often as arbitrary judges lawyers are appointed. Since there are no principal limitations on lawyers, it is possible to agree on representatives of other professional groups as well, for example in issues of construction, it will be certain architects.

Since the advantage of the arbitrary paper work is actually that especially competent persons can be appointed as arbitrary judges, which can be involved in proceedings not as lawyers but as experts.

Besides that there is a possibility that contracting parties do not appoint a specific judge or judges independently, but agree on that in the contract, that the arbitrary judge will be appointed by special institutions such as the Chamber of Commerce and Industry.

C) Execution of the arbitration decisions

Also in the western democracies the state has the monopoly of power. It happens because the private arbitrary courts for whose activity according to the constitution, no special authority of a relevant state is required because they are not courts in the usual meaning and its decision is taken completely without participation of state courts. In order for the arbitrary court decision to be executed, still a decision of the state court of the country where the execution is to take place is needed. For example, in Germany, it happens in a way that the state court has to declare in each specific case the decision of the arbitration as impractical, i.e., it considers whether the clause of impracticality can be issued for the decision of the arbitrary court. It is important in this regard, that the state courts re-consider only implementation of certain formal steps and do not question the proceedings of arbitrary court on the merits of the case or in all may again raise the question since if otherwise, then the gist and necessity of arbitrary proceedings would have an idle run.

D) Advantages of proceedings by an arbitrary court

aa). The involved economic circles find the prior advantage in the ability of parties to identify independently the arbitrary judge, and also the composition of arbitrary court. At the same time they are able to identify jointly the person who will settle the dispute as an arbitrary judge. But also based on the agreement to regulate the fact that in order to arrive at a decision the multitude of voices is to be summoned, in practice it happens that each contracting party by agreement with the other party appoints the arbitrary judge, and as a chairman the third arbiter is appointed by the contracting parties, or such institutions as the Chamber of Commerce and Trade are to do this appointing. The key factor is the unanimous desire of the agreeing parties seeing the special advantage of arbitrary clause especially in the ability to choose their agents on their own or to give this right of choice to a trusted institution.

bb). The ability of parties to involve especially experienced experts and professionals in a certain area to make a decision is closely related with the free allocation of funds when choosing and identifying the composition of a relevant arbitrary court. Especially states like Germany with its numerous specialized courts aim at such majoring in relevant areas, even inside the state jurisdiction, and further majoring even within the relevant court area. But the ability to engage ad hoc the world-known experts for solution of disputable cases gives a chance for individual

choice related to expectation and the ability to choose amongst the available experts those who seem to be most appropriate for solution of the dispute.

cc). The following advantage is the straight brief duration of the arbitrary court proceedings.

In many countries of Western Europe such as Germany practically there is no legitimate limitation for period in order to arrive at a decision in proceedings. Although the courts try that the case proceedings are to be settled without any hindrance and in correctly conceived requests of the parties. But according to the experience, the arbitrary proceedings are implemented according to all regulations in a shorter term, than the proceedings by the state court.

dd) Dynamics-oriented economy interested in processes of fast decision-making, finds (conceives) conclusion of the arbitrary proceedings in one instance as a crucial win. The capacities of legal tools of state courts are exactly the tools to rectify mistakes. Complex visits to instances which also have this danger of bringing the case back into inferiors, delaying the case through cassation instances, also as well compulsory termination of case proceedings thus make it difficult for the parties to identify the end of court proceedings timely and to a certain extent find their bearings. Especially abolishment of the circulation in the instances promotes the win of time indicated in paragraph cc).

EE) Big freedom of actions in arranging an arbitrary proceedings in comparison with the strict, if not to say stiff regulations of the established proceedings of the state courts is conceived as a relief, which also promotes the saving of time mentioned in CC). It is matching with the fact that related freedoms so that to coordinate with the process of technical development timely and in adequate manner.

FF). The main advantage is the comparatively small costs of arbitrary proceedings and the better overview of the risk of charges of the legal costs already because there is no circulation in the instances.

GG) And finally as the most advantage, in economy is conceived the secrecy of arbitrary court since the state courts act according to all existing rules openly and therefore it creates a risk that confidential details of an enterprise (firm) are available to the public at large. Besides that the stigmatizing action of a process conducted in public in general is considered as a weighting deficiency.

Altogether according to the estimates of economy at least in western industrialized countries the advantages of arbitrary proceedings prevail the relevant weak sides such as impossibility to rectify mistakes through appellation of judicial definition. Due to the listed advantages of arbitrary proceedings it proved to pay off to refuse completely to have the estate courts revise the contents of decisions of arbitrary courts.

2.) Tajikistan's situation

A) Legal basis

The initial legal basis for jurisdiction over the arbitrary court in Tajikistan currently is to be positively evaluated. In the article 11 of the Civil Code of the Republic of

First of all information about such way of elimination of conflicts in Tajik economy is clearly not so widely known. Public awareness work may raise interest to such an interesting alternative to state jurisdiction for some representatives of economic life.

Besides that, in Tajikistan, only a small amount of foreign investors is active, which have interest first of all in arbitrary courts. Having the foreign investment growth in arbitrary courts. Having the Tajik government, one may expect a revival of interest towards arbitrary courts. Still one can not underestimate that between the foreign investors and arbitrary courts there certainly is an ongoing interaction. Since the possibility to engage arbitrary courts into conflict situations is an important key factor for many investors when choosing where to invest, as less there is trust from foreign investors towards the state justice of the country where he/she wants to be involved in economy, the more important is the real possibility to settle disputable issues through a private arbitrary court.

It is not a secret that exactly the potential investors from the leading industrial countries have considerable mistrust with regards to independence and equity of justice in the former USSR countries. Even if in countries like Tajikistan the independence of judging is guaranteed according to the constitution, see article 84 of the Constitution of the Republic of Tajikistan as of 06.11.1994, still the pitance of judges causes some doubt in existence of independent and impartial judges. But the substantial reason for existence of arbitrary practice in Tajikistan as an elementary education possibly is the inadequate regulation of execution of arbitrary court decisions. According to the modern status of legal right, when a contract is being concluded between Tajik entrepreneurship or even the state of Tajikistan which may act in an economic way as an enterprise or for example when concluding a contract between a foreign investing concern and a Tajik partner, and in Tajikistan a proviso on arbitrary procedure is not problematic. This proviso may provide for an agreement in a sense that the arbitrary court is to settle a disputable issue within Tajikistan. However as strictly it has to be established that the arbitrary court has to be referred to jurisdiction beyond the Republic of Tajikistan. When implementing such decision of the arbitrary court in reality of juridical working days it has to be expected however to have considerable difficulties which naturally become obvious only when the parties within the jurisdiction of arbitrary proceedings do not maintain the final arbitrary requirement.

But if the chances of putting into effect an arbitrary proceeding depend from whether the verdict made by the arbitrators in favor of one party leads to satisfaction only when it is implemented voluntarily by the person who is obliged to discharge a debt, be he/she satisfied or not. Then according to experience, such debtors fulfill their commitments only when they are pushed by ethics, or when they are specially interested in keeping commercial relations with the winner of the case.

In order to provide for the possibly similar executions of the decisions of arbitrary court, more than 100 UN countries have joined the Convention which was entered on 10th of June, 1958 in New York and which came into experience of arbitrary courts in Tajikistan?

Tajikistan as of 30.06.1999 together with regular courts arbitrary courts are mentioned and the institutes, vested with right equal with economic courts for persons seeking truth. In accordance with this there is an impression that also in the Republic of Tajikistan there is a real alternative to the state court- the private arbitrary courts. This feeling is made stronger through, on the one hand, The Law on Civil Procedure as of 28.12.1963 whose Annex II organizes the rules for arbitration proceedings for natural persons and on the other hand the regulation dated as of 15.05.1997 which establishes the procedural rules for legal entities.

Exemption from duties established in the article 8 of the above-mentioned annex should, actually, become a peculiar motivation for the use of jurisdiction over the arbitrary court in Tajikistan. Unfortunately still Tajik practice looks different from what its legal status allows for.

Initiated by the British NGO DFID first steps were taken in rural areas in settling disputes outside the state courts. In one of pilot projects for rural population an out-of-court, for the moment free of charge dispute settlement, since the fear of courts so wide spread amongst population and the fees for implementation of proceedings complicate the access to state courts or make it impossible at all. Moreover in the project it is indicated how useful it is that the respected by all, unstained persons of relevant rural communities act as a dispute regulator. They are well posted on all local conditions and due to their awareness and also because their authority they reach in high extent approval amongst the arguing parties.

Typical cases of such dispute regulation are the conflicts amongst the villagers, even neighbors, which happen everywhere in everyday life. These are different opinions with regards to the borders of the allotment, rent or loan agreement, or something similar, such as disagreement in area of sale and purchase at the farm, which are truly important for the parties, and which can question the state of peace in a rural community. On this point one can wish and hope that this secured with success project from regions where it was tested will gradually spread over the entire Tajikistan. Since by such model a significant contribution will be made into the peaceful neighboring of simple rural population. Indeed, the DFID project does not claim to work as arbitrary courts since it is working usually in economic life.

Procedures of arbitrary proceedings in economy mainly are understood in a way that the parties involved in economic life to a certain extent argue about financially important issues. In Tajikistan there practically is no practical experience for solution of such conflicts. It also can happen, that the contracting parties with participation of a Tajik side have revised in the contracts the competence (jurisdiction) of the arbitrary court outside of Tajikistan. However there is no data about such proceedings. What would be the reasons of such insignificant experience of arbitrary courts in Tajikistan?

D) The practice of the arbitrary proceedings in Tajikistan

force on June 7th, 1959. With regards to the so-called New York Convention, which also is called a UN convention, look "Convention on the Recognition and Enforcement of Foreign Arbitral Awards". It establishes specific standards for recognition and implementation of a decision of a foreign arbitrary court in certain states of the agreement which simultaneously regulate the limited threshold of control of contents of the decision of an arbitrary court through a state court.

3.) Conclusion

The Republic of Tajikistan with a regulating tool, excluding the orders to implement the decisions of the arbitrary court has a good basis. In order to rectify the deficiency in executing the sentences and

to keep the international Anschluss, Tajikistan is to join the New York Convention as of 1958 and thus to create a significant impulse for foreign investors. With this step, possibly a noticeable improvement of Tajik reputation and therefore one can expect such advantages, as the ones which should be considered when intending to access to WTO.

In order to have the foreign investors favored in international competition, ratification of the New York Convention would be the most important tool in recruiting to Tajikistan and a big opportunity for public work oriented towards facts to make the advantages of arbitrary courts understood.