

Practical and legal aspects of “Governing Law” provision in international loan agreement in the Republic of Azerbaijan

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Since International Loan Agreements across boundaries, “Governing Law” provision plays key role for interpretation and application of those agreements. Thus in the Amin Rasheed Corporation case, Lord Wilberforce defined governing law as “the law which governs the contract and the parties’ obligations under it, the law which determines normally its validity and legality, its construction and effect and the conditions of its discharge”.

After restoration of independence in 1991, the Republic of Azerbaijan started to realize its sovereign rights in economic field which bases on different types of property, transition to market economy and integration into the global economy. These innovations also affected banking sector. New independent banks were established which is not based on the only state property, new reforms were carried out in this field by the state. By these reforms banking sector changed completely in respect of Soviet banking sector and started cross boundaries, bore international features. Banks commenced to carry out their lending activities through foreign capital market. Therefore new agreements, international loan agreements were concluded between these entities. However new fields also brought new challenges along with them. If entities of two countries are concluding an agreement which law will apply to the relations between them? Or does Azerbaijani legislation allow defining other country’s law as an applicable law to the international loan agreements; are there obstacles to interpret it and which challenges can

arise during dispute resolution or execution of the provision? By this article these questions are going to be answered via analyzing of the legislation of the Republic of Azerbaijan in respect of practical aspects.

“Governing Law” or under other name “Applicable Law” provision bases on “the autonomy of parties’ will”. Under the Civil Code of the Republic of Azerbaijan, one of the main principles of civil legislation is autonomy of contracts. Parties are free to define the contractual obligations, rights, terms whatever they want. However this autonomy is limited within legal framework which will be discussed following.

The Law of the Republic of Azerbaijan on “International private law” (hereinafter referred as “Law”) also specifies the principle in detail as following:

“1.2. Applicable law to civil legal relationship with foreign elements is defined by this Law, other relevant legislative acts, international treaties supported by the Republic of Azerbaijan, and commonly accepted international customs, and also by the agreement of the parties.”

“1.3. The agreement of parties on determination of applicable law shall be obviously expressed or directly derived from provisions of agreement and circumstances of cases as a whole.”

As seen from above mentioned articles, in case of appearance of foreign elements, parties can define other country’s law as an applicable law. What is a foreign element? Although foreign elements are not directly defined under the Law, they can be defined the essence of the Law as following: one of the parties is nonresident of Azerbaijan; the subject of agreement is

connected to foreign country; and the property is located outside of the territory of Azerbaijan.

Since International Loan Agreement is concluded between two or more than two different country's residents, the Agreement contains foreign element. Consequently Azerbaijani legislation allows defining foreign law as an applicable law under International Loan Agreement.

However this is the one side of medallion and defining of foreign law as an applicable law does not solve all problems itself. Although governing law provision bases on autonomy of parties' will, this autonomy is limited and there are following restrictions under Azerbaijani legislation:

1) Public policy – this restriction is not particular for only Azerbaijani legislation, but also for all world countries. The principle prevents enforcement of contracts in accordance with their terms. However the frame of the principle differs from country to country. According to the Law, in case of contradictions of foreign norms to the Constitution of Azerbaijan and acts accepted via referendum these norms are not applied in Azerbaijan. The frame of public policy in Azerbaijan is limited within the Constitution and acts accepted via referendum. This approach is very limited approach, even some cases can arise which are not against the Constitution or the acts but execution of cases is real threat for the state. Therefore some countries do not define the frame of the public policy and the principle is estimated according to the circumstances of the issue.

2) Mandatory regulation – under the 5. Article of the Law, regardless of applicable law imperative or mandatory norms of Azerbaijani legislation which regulate relevant relations are applied. But this provision is interpreted differently. So there are two approach to this provision:

a) Some lawyers, scholars interprets the provision is that the mandatory rules are considered the norms of tax code, criminal code, the code of administrative offenses.

b) Other lawyers, scholars construe the provision that mandatory rules are the imperative norms of the whole legislative acts of the Republic of Azerbaijan.

Second interpretation is discrepant because

it is hard to divide norms as imperative or non-imperative in Azerbaijani. They try to substantiate their opinion following way that if the sentence contains “must or shall”, it means that the provision is mandatory one. However this is limited approach and it is completely against the autonomy of the contract principle which is defined under the Civil Code. In my opinion, second approach is right approach but need to be clarified. Persons cannot be prosecuted for a crime which is not considered under the Criminal Code. Or only taxes which are defined under the Tax Code shall be applied in Azerbaijan. Thereby imperative feature comes from the essence of these acts.

In addition to the legal restrictions, there are also practical obstacles for implementation of foreign law.

1) Enforcement – parties define other country's law as an applicable law and placement of dispute resolution under the agreement. When the dispute arises between parties they apply the forum and get award according to the applicable law. This decision shall be recognized in the Republic of Azerbaijan pursuant to the Azerbaijan Legislation. Recognizing other country's court decision against Azerbaijani resident is questionable and generally is not enforceable.

For instance, parties define English law as an applicable law and when dispute arise between them foreign party sues a claim against Azerbaijani resident in relevant court in the Republic of Azerbaijan. How does the court apply English law and is there capacity to apply the law in Azerbaijani courts?

2. Article of the Law clarifies the issue as following:

“In case of application of foreign law the court shall take all necessary measures for establishment of content of these precepts of law according to their official interpretation and practice of application in the respective country.”

In practice, the courts do not take such a kind of measures, even there is not any cases in the courts which proper law is applied to the dispute. On the other hand legislation provides additional actions if above mentioned measures do not result. Parties can suggest their substantiated case (documents, confirmatory precepts of law) referring applicable law. But this is so expensive process, and justification

of suggested cases is not carried out. While rendering award courts rely on only the suggested documents, interpretation of applicable law.

2) Bureaucratic obstacles – these drive from mostly the unfair situation in Azerbaijani courts (corruption, bribe etc.)

But what is the solution for right interpretation of Governing Law Provision? The answer is arbitration. If parties define arbitration as dispute resolution form along with foreign law, they don't encounter above mentioned challenges. Because Azerbaijan is also member of New York Convention dated 1958, on recognition and enforcement of foreign arbitral award and according this Convention, the members countries, including Azerbaijan is bounded to enforce arbitral award within its territory.

REFERENCES:

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4. Governing-Law Clauses of Loan Agreements in International Project Financing, 20 Int'l Law.219, Copyright 1986 by the American Bar Association, Kimmo Mettala.

Xülasə

Açar sözlər: Beynəlxalq kredit müqaviləsi, bank hüququ, tətbiq edilən hüquq, dövlət siyasəti.

Məqalədə Azərbaycan Respublikası müstəqillik əldə etdikdən sonra bank hüququ sahəsində baş verən dəyişikliklərdən, bu dəyişikliklərin beynəlxalq kredit müqavilələrinə təsirindən və "Tətbiq edilən Hüquq" maddəsinin müqavilənin icrası zamanı əhəmiyyətindən bəhs edilir. Məqalədə həmçinin xarici ölkə hüququnun "Tətbiq edilən Hüquq" kimi seçildiyi təqdirdə yarana biləcək problemlər və həll yolları da müzakirə edilir.

Резюме

Ключевые слова: Международное кредитное соглашение, банковское право, административный законодательные положения, государственная политика.

В статье говорится об изменениях, которые произошли в области банковского права после провозглашения независимости Азербайджанской Республики, влияние этих изменений на международные кредитные договора и о важности пункта «Применимое Законодательство» в исполнении договора. Статья также касается спектра проблем и решений, которые могут возникнуть при выборе законодательства иностранного государства как «Применимое Законодательство».