



**Toghrul Guluzada**

*International Commercial Lawyer, LL.M*

**ON WHOM SHOULD THE BURDEN OF PROOF LIE IN THE CASE OF FAILURE TO GIVE A PROPER NOTICE OF THE APPOINTMENT OF THE ARBITRATOR OR OF THE ARBITRATION PROCEEDINGS OR OTHERWISE UNABLE TO PRESENT THE CASE?**

**Summary**

*The New York Convention stipulates the legal norms on the recognition and enforcement of Foreign Arbitral Awards which are binding on the member states of this Convention. There are a few grounds in the Convention for refusing of the recognition and enforcement of foreign arbitral awards in another country. One of them is the ground on the failure of the proper notification of the defendant about the appointment of arbitrator or of arbitration proceedings. The Constitutional Court of the Republic of Azerbaijan (hereinafter - the Constitutional Court) have touched upon the specific element of this ground which is a burden of proof.*

*The Constitutional Court decided on 'denial of the petition (application) of **POSCO DAEWOO Corporation** on recognition and enforcement of the Arbitral Award of the Korean Commercial Arbitration Council dated June 12, 2017 in the Republic of Azerbaijan' by checking the compliance of the Ruling of the Administrative-Economic Board of the Supreme Court of the Republic of Azerbaijan (hereinafter - the Administrative-Economic Board of the Supreme Court) dated May 16, 2018 with the Constitution and laws of the Republic of Azerbaijan (Available at <http://www.constcourt.gov.az/decision/407>).*

**Facts of the Case:**

According to the purchase and sale agreements signed between **POSCO DAEWOO Corporation (hereinafter – Plaintiff, the Corporation)** and **Grand Motors Limited Liability Company (hereinafter – Defendant, Grand Motors LLC)** on July 20, August 23, September 19 and October 22, 2012, **the Corporation** undertook to supply **Grand Motors LLC** with 45 units of construction machinery, and the buyer undertook to pay the agreed amount of USD 4,545,456. These agreements stipulated that the seller had to pay 20 percent of the amount before delivery of the equipment, the remaining 80 percent would be paid within 120 days after the bill of lading, as well as they stipulated a penalty of 18 percent per annum if the buyer failed to pay 100 percent of the contract value. The agreements also set out that the dispute between the parties should be resolved through negotiations, and if no agreement was reached within 30 days, the dispute would be settled by arbitration in Korea in accordance with the Arbitration Rules of the Korean Commercial Arbitration Council (hereinafter – the Council).

**The Corporation** stated that **Grand Motors LLC** had breached its contractual obligations by paying a total of \$ 3,486,261 which was less than the total amount of the price and in additions, these payments were not made on time. Thereby, on this ground **the Corporation** applied the dispute to Council for damages.

According to the Arbitral Award of the Council dated June 12, 2017, the Council had a valid jurisdiction over the current dispute, **the defendant Grand Motors LLC** was obliged to pay USD 2,142,474.22 and KRW 65,872,406 to the plaintiff.

Afterwards, **the Corporation** submitted the petition (application) to the Administrative-Economic Board of the Supreme Court for recognition and enforcement of the Arbitral Award of the Council in the territory of the Republic of Azerbaijan.

**The Corporation** based the petition (application) on the United Nations New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 10 June 1958 (hereinafter - the New York Convention), the Law of the Republic of Azerbaijan on International Arbitration (hereinafter- Law on International Arbitration) with reference to Articles 35 and 36.

#### **Argument of the Defendant Grand Motors LLC and the Ruling of the Administrative-Economic Board of the Supreme Court:**

Defendant Grand Motors LLC filed a written complaint (explanation) to the Administrative-Economic Board of the Supreme Court stating that it had not been duly notified of the appointment of the arbitrator and the arbitration proceedings, therefore, could not submit its arguments to the court, so, according to **Grand Motors LLC**, despite that the notices about the aforementioned actions sent to the wrong addresses and emails, the Council concluded that it had been duly notified.

Thus, by the Ruling of the Administrative-Economic Board of the Supreme Court dated May 16, 2018, the petition (application) of **the Corporation** for recognition and enforcement of the Arbitral Award of the Council dated June 12, 2017 in the territory of the Republic of Azerbaijan was not granted, in other words, was denied.

In its turn, **the Corporation** appealed to the Constitutional Court to verify the compliance of the Ruling of the Administrative-Economic Board of the Supreme Court dated May 16, 2018 with the Constitution and laws of the Republic of Azerbaijan.

#### **The Interpretation of the Constitutional Court:**

Since the disputed arbitral award in this case is related to the recognition and enforcement of the Arbitral Award of the Council, it should be noted that both the Republic of Azerbaijan and the Republic of Korea are full members of the New York Convention. The Convention establishes general principles and rules for the recognition and enforcement of arbitral awards in another country.

Pursuant to Article 1 of the Convention, the Convention shall apply to the recognition and enforcement of foreign arbitral awards in respect of disputes between parties, regardless of whether they are natural persons or legal entities in a country other than the country to which they are applying for recognition and enforcement.

The grounds for recognizing and refusing to enforce foreign arbitral awards are set out in Article 5 of the Convention. One of the grounds for refusal is the failure to give a proper notice of the appointment of the arbitrator or of the arbitration proceedings.

Thus, under Article 5 § 1 (b) of the New York Convention, the party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case, the court may refuse to recognize or enforce such an arbitral award.

Article 36 of the Law on International Arbitration, which regulates relationships related to the recognition or enforcement of international arbitration awards in the territory of the Republic of Azerbaijan, also provides the same rule.

Besides, according to Articles 476.0.1 and 476.0.1.2 of the Code of Civil Procedure of the Republic of Azerbaijan, the party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case, the court may refuse to recognize or enforce such an arbitral award. Thus, both the Convention and national law stipulate the same rule.

However, here another question arises; who should prove the existence or non-existence of this ground? On whom is the burden of proof? In this case, **the defendant Grand Motors LLC** did not prove the existence of this ground and the Administrative-Economic Board of the Supreme Court did not require such a proof and relied only on the written complaint (explanation) given by **Grand Motors LLC**.

The Constitutional Court came to the conclusion that the party against whom the award was invoked should provide with the reasonable and reliable proof that it had not been notified, in other words, the burden of proof is on the defendant.

Worth to note that Parts II, IV and VII of Article 127 of the Constitution of the Republic of Azerbaijan stipulate the main principles of justice which are impartiality, fairness, equity, factualness and lawfulness, and adversariality.

However, the Administrative-Economic Board of the Supreme Court did not comply with the abovementioned requirements of the law and questioned the validity of the evidence presented, relying only on the written complaint (explanation) given by **Grand Motors LLC**.

**Decision of the Constitutional Court:**

The Constitutional Court considered the Ruling of the Administrative-Economic Board of the Supreme Court of the Republic of Azerbaijan dated May 16, 2018 on denial of the petition (application) of **the Corporation** on recognition and enforcement of the Arbitral Award of the Council dated June 12, 2017 in the Republic of Azerbaijan invalid due to non-compliance with the factualness, adversariality principles of the Constitution, the requirements of the New York Convention and the Code of Civil Procedure of the Republic of Azerbaijan. Consequently, the party against whom the award is invoked should provide the court with the necessary proof that it was not given a proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case and in its turn, the court should expect and require it from the party whom the award is invoked.