Client Note
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Arbitration of Disputes in the South Caucasus: *Armenia, Azerbaijan and Georgia*

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FURTHER INFORMATION
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THE SCOPE OF APPLICATION

Both the Armenian Commercial Arbitration Act of 2007 (the Armenian Act) and the Azerbaijani International Arbitration Act of 1999 (the Azerbaijani Act) apply if the place of arbitration is within the territory of the state, except articles 8, 9, 35 and 36. Whereas the Georgian Private Arbitration Act of 1997 (the Georgian Act) applies to any arbitration whether domestic or international, whether commercial or non-commercial.

Under the Armenian Act and the Azerbaijani Act it is expressly permitted, unless otherwise agreed by the parties, for the arbitral tribunal to meet at any place outside the place of arbitration (or outside the country of the place of arbitration) if it considers this appropriate for consultations among its members, for hearing witnesses, experts or the parties, or for inspection of goods, other property or documents (*e.g.* article 20(2) of the Azerbaijani Act).

Certain further supportive powers may be used by the courts of law in these jurisdictions if they think it appropriate where no seat has been designated or determined or because of some connection to Armenia, Azerbaijan or Georgia.

THE EXTENT OF COURT INTERVENTION

The Georgian Act does not contain a provision like article 5 of the Armenian Act or article 5 of the Azerbaijani Act, which provides that *"no court shall intervene except where so provided in this Law"*. However, it is generally considered that also under the Georgian Act a court is permitted to intervene in the arbitral proceedings only where so authorized by the Act.

THE RECEIPT OF WRITTEN COMMUNICATIONS

Article 3 of the Azerbaijani Act (article 3 of the Armenian Act), which does not have a corollary in the Georgian Act, regulates the receipt of written communications. It provides a useful presumption that any written communication is deemed to have been received if it is delivered at the addressee's place of business, habitual residence or mailing address. The communication is deemed to have been received on the day it is so delivered.

ARBITRATION AGREEMENT

Definition

Unlike article 7(1) of the Armenian Act (article 7(1) of the Azerbaijani Act), the Georgian Act does not contain any actual definition of the arbitration agreement.

However, a definition is implied in article 2, which deals with the formal requirements of the arbitration agreement (see below). The Armenian Act and the Azerbaijani Act state that *"arbitration agreement"* is an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship. An arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement.

Form

Like article 7(2) of the Armenia Act, article 7(2) of the Azerbaijani Act requires that the arbitration agreement be in writing. This requirement is met if the agreement is contained in a document signed by the parties or in an exchange of letters, telex, telegrams or other means of telecommunication which provide a record of the agreement, or in an exchange of statements of claim and defence in which the existence of an agreement is alleged by one party and not denied by another.

Both Acts provide that the reference in an agreement to a written form of arbitration clause or to a document containing an arbitration clause constitutes an arbitration agreement, if the reference is such as to make that clause part of the agreement.

However, article 2 of the Georgian Act requires that *"the arbitration agreement shall include the names, the places of residence or legal addresses of the parties; the subject-matter of the dispute; the date and place of the agreement"*.

Separability

Unlike the Georgian Act (article 4 may provide some guidelines), statutory effect is now given by article 16(1) of the Armenian Act (article 16(1) of Azerbaijani Act) to the principle of the separability of the arbitration agreement. An arbitration agreement is treated as distinct from any larger substantive agreement of which it forms (or was intended to form) part and can still be effective even if that substantive agreement is invalid, or did not come into existence or had itself become ineffective. Both article 8(1) of the Azerbaijani Act and article 8(1) of the Armenian Act allow the arbitrators to find that the arbitration agreement is valid, and that the remaining provisions of the parties' agreement are null and void. (CLOUT case No. 367 [Ontario superior Court of Justice, Canada, 29 July 1999] (full text of the decision)).

THE ARBITRATION AGREEMENT AS A BAR TO COURT PROCEEDINGS

The Georgian Act does not contain a detailed provision like article 8 of the Armenian Act or article 8 of the Azerbaijani Act. They provide that if a dispute covered by an arbitration clause is brought before a court, the court shall refer the parties to arbitration if the arbitration agreement is invoked by the party relying on the arbitration agreement. The court will not consider the arbitration clause on its own motion, but only if so requested by the party. Both Acts place a time limit on the party's request that the matter be referred to arbitration. Although worded differently, both the Armenian Act and the Azerbaijani Act provide that the party must invoke the arbitration agreement in or with the first statement on the substance of the dispute.

Article 8(1) of the Armenian Act (article 8(1) of the Azerbaijani Act) provides that the court should not refer a dispute to arbitration if the arbitration agreement is null and void, inoperative or incapable of being performed. It has been submitted that, although not expressly stated in the Model Law of the United National Committee on International Trade Law (UNCITRAL), the same should apply where the dispute is not arbitrable (*Holtzmann/Neuhaus, A Guide to the UNCITRAL Model Law on International Commercial Arbitration, p. 304*).

However, article 30 of the Georgian Act contains a different language providing that the court is not empowered to hear a case if there is a valid arbitration agreement.

JURISDICTION

Article 16 of the Armenian Act (article 16 of the Azerbaijani Act) gives statutory recognition to the concept of *"Kompetenz-Kompetenz"* as recognised in the laws of other countries. This means that, unless otherwise agreed by the parties, arbitrators may rule on their own substantive jurisdictions which would include such questions as, for example, whether there was a valid arbitration agreement. However, any decision by the arbitral tribunal may be subject to review by the court, although objection must be taken in the arbitration before a party takes a step to contest the merits of the case. The effect of this provision is that if a party does not object to the jurisdiction of the arbitral tribunal in a timely manner the party will be precluded from later presenting such an objection to the arbitral tribunal and presumably also in later court proceedings,

although the arbitral tribunal has a discretionary right to admit a later plea where the tribunal finds that the party should be excused.

The arbitral tribunal might make its decision as a preliminary issue or may wait until it makes its award on the merits. The parties may make an application to the court to determine the issue. This solution allows the arbitral tribunal to come up with a solution that is suitable for the individual case.

There are no corresponding provisions in the Georgian Act.

COMPOSITION OF THE ARBITRAL TRIBUNAL

The Armenian Act and the Azerbaijani Act (articles 10 and 11) as well as the Georgian Act (article 9) contain similar procedures for the appointment of arbitrators, which apply where the parties have not agreed otherwise. The statutes permit the parties to determine the number of arbitrators, which includes also an even number, except the Georgian Act.

Under the Acts, a decision regarding a request for the appointment of arbitrators is not subject to appeal (article 11(5) of the Armenian and the Azerbaijani Act as well as article 11(2) of the Georgian Act). Finally, article 11(5) of the Armenian Act (or article 11(5) of the Azerbaijani Act) contains a useful provision containing criteria that the court should observe when appointing an arbitrator, which does not have a corollary in the Georgian Act. Article 11(5) provides that *"[t]he court or other authority, in appointing an arbitrator, shall have due regard to any qualifications required of the arbitrator by the agreement of the parties and to such considerations as are likely to secure the appointment of an independent and impartial arbitrator and, in the case of a sole or third arbitrator, shall take into account as well the advisability of appointing an arbitrator of a nationality other than those of the parties"*. The said provision is designed to reflect the principle of the will of the parties as well as to give them comfort that the court in appointing an arbitrator will bear in mind the factors that are likely to secure the appointment of an independent and impartial arbitrator.

Challenge of Arbitrators

As to the procedure for the challenge of arbitrators, the Georgian Act (article 15) has followed both the Armenian and the Azerbaijani Acts. Thus, both statutes provide that a challenge must be brought within 15 days (the Georgian Act stipulates 10 days-timing) from the date the party became aware of the circumstance on which the challenge is based, that the challenge will be determined by the arbitral tribunal in the first instance, and that a dismissal of the challenge may be appealed to a court within 30 days. Furthermore, under both statutes the arbitral tribunal may continue the arbitral proceedings pending the court determination of the challenge. However, under those Acts, a court decision on the challenge of an arbitrator may not be appealed.

Disclosure of circumstances

Both the Armenian and Azerbaijani Acts, articles 12(1), contain similar obligations for the arbitrator in connection with his or her possible appointment. Under the Armenian Act, *"he shall disclose any circumstances likely to give rise to justifiable doubts as to his impartiality or independence"*.

There is no corresponding provision in the Georgian Act.

Grounds for challenge

As to the grounds for challenge of an arbitrator all three Acts contain similar rules (*e.g.* article 15(1) of the Georgian Act). The provisions are based on the fundamental principle that all arbitrators, including the party-appointed arbitrators, must be impartial and independent. As an example, the Armenian Act, article 12(2), provides that *"an arbitrator may be challenged if circumstances exist that give rise to justifiable doubts as to his impartiality or independence or if he does not possess the qualifications agreed to by the parties"*.

The ground for challenge in the Armenian and the Azerbaijani Acts that the arbitrator does not possess qualifications agreed to by the parties is not reflected in Article 15(1) of the Georgian Act (cf. Article 12 of the Armenian Act). This would imply that under the Georgian Act, a party could not rely on the statutory procedure for the challenge of arbitrators where an arbitrator does not possess the qualifications agreed to by the parties. However, it is to be noted that the Georgian Act says that *"…the arbitrator does not know the language of proceedings or he lacks the competence"*.

Nevertheless, in order to be able to invoke such a lack of qualifications in an action for the enforcement of the arbitral award, a party must have protested against the arbitrator already when it became aware of such lack of qualifications.

Failure to act without undue delay

The Armenian Act only contains provisions for the replacement of arbitrators that delay the arbitral proceedings, where the arbitrator *"fails to act without undue delay"* (article 14). Moreover, under the Armenian Act, a court decision under artic*le 14 is not subject to appeal.*

This provision has no corollary either in the Azerbaijani Act or the Georgian Act.

Substitute arbitrators

Under both the Armenian Act (article 15) and the Azerbaijani Act (article 15), where the mandate of an arbitrator terminates because of a challenge or because he or she is unable to perform the functions or fails to act without undue delay or withdraws from office, a substitute arbitrator is to be appointed according to the rules that were applicable to the arbitrator being replaced.

Neither the Armenian Act, nor the Azerbaijani Act (including the Georgian Act) addresses the question whether the replacement arbitrator should rehear testimony and argument at a new hearing. It has been submitted that this presumably should be considered a matter of arbitral procedure that comes under articles 19 of the Armenian Act and the Azerbajiani Act *Holtzmann/Neuhaus, A Guide to the UNCITRAL Model Law on International Commercial Arbitration, p. 466*). This would mean that this issue will be determined with reference to the rules agreed upon by the parties, or, failing such agreement, the arbitral tribunal will conduct the arbitration in such manner as it considers appropriate. The same applies under the Georgian Act (article 18). If the question is not addressed in the arbitration agreement or arbitration rules referred to therein, it will be the responsibility of the arbitrators to determine whether and to what extent testimony and oral argument need to be repeated.

CONDUCT OF ARBITRAL PROCEEDINGS

Due process

Article 18 of the Armenian Act (article 18 of the Azerbaijani Act), which provides that *"the parties shall be treated with equality and each party shall be given a full opportunity of presenting his case"*, lays down the fundamental principles of due process and procedural fairness that governs the entire arbitral procedure. Article 25 of the Georgian Act provides that *"the proceedings shall be conducted on the basis of equality of the parties"*. The principle of equality of the parties established by these articles is intended to bind both the arbitral tribunal and the parties when they are taking procedural decisions or laying down rules of procedure.

Party autonomy and discretionary powers of the arbitral tribunal

Both the Armenian Act and the Azerbaijani Act in articles 19 respectively establish the procedural autonomy of the arbitral process from the peculiarities of the local procedural system by recognizing in a general provision the freedom of the parties to lay down the rules of procedure and by granting to the arbitral tribunal, failing agreement of the parties, wide discretion to conduct the process as it considers appropriate. This broad freedom of the parties is limited only by the principle of equality (articles 18, see above) and the other mandatory provisions of the both Acts; the discretion of the arbitral tribunal is somewhat more limited in that it has to observe also the non-mandatory provisions of arbitration law.

Worded differently, the article 18 of the Georgian Act allows party to agree upon the applicable rules, failing agreement of the parties *"the dispute shall be decided under the procedure established by the arbitration"*.

The Proceedings

Both the Armenian Act and the Azerbaijani Act contain a number of procedural rules which apply if the parties have not agreed otherwise. In respect of certain issues these Acts provide a more detailed regulation than the Georgian Act, for example, as to the language to be used in the arbitral proceedings (articles 22), notice of hearings and documents (articles 24(2) and (3)), default of a party (articles 25), duty of the parties to cooperate with an expert appointed by the arbitral tribunal and the hearing with such expert (articles 26), while the Georgian Act is more detailed in other respects such as the request for arbitration (article 17), the confidentiality and the privacy (article 24 and article 27) and witnesses (article 21).

COURT ASSISTANCE IN TAKING EVIDENCE

Article 27 of the Azerbaijani Act (article 24 of the Armenian Act) and article 21 of the Georgian Act contain provisions on court assistance in taking evidence. Under both the Armenian Act and the Azerbaijani Act, requests for court assistance by

the parties are subject to approval by the arbitral tribunal. While these Acts does not set out the criteria to be applied by the arbitrators in determining such a request, the Georgian Act provides that *"if a witness's voluntary appearance or presenting of evidence is impossible…"* Furthermore, the requesting party should show that there is a justified need for the sanctions that can be achieved through court assistance in the individual case and that the sanctions that would be available in the particular case are needed to achieve the purpose of the request.

As to the role of the competent court with regard to a request for court assistance, the Armenian Act provides that *"the court may execute the request within its competence and according to its rules on taking evidence"* (whilst drafted differently both the Georgian Act (article 32) and the Azerbaijani Act contain the same provisions). Thus these Acts are based on the principle that both the availability of the court assistance requested and whether it may be granted in the individual case should be determined according to regular rules on taking evidence *i.e.* the Code of Civil Procedure.

As to international court assistance, the Acts only address the right to request court assistance from the competent courts at the place of arbitration, *i.e.* articles 27 only grants the right to seek court assistance from competent *e.g.* Armenian courts. Thus, the possibility to request court assistance from a court in a country other than the one where the arbitration takes place is not dealt with by the statutes (which should mean that assistance is permitted to be requested if the foreign court is willing to provide it).

INTERIM MEASURES OF PROTECTION

Interim measures of protection by court

Unlike the Georgian Act, both the Armenian Act (article 9) and the Azerbaijani Act (section 9) recognize that the existence of an arbitration agreement does not preclude the jurisdiction of the competent courts to order interim measures of protection and that the request for interim measures of protection by a party does not constitute a waiver of such party's right to have the substantive dispute decided by arbitrators in accordance with the terms of the arbitration agreement. Under these Acts the conditions under which interim measures of protection will be ordered by the court are left to the internal procedural law *e.g.* the Code of Civil Procedure of Armenia.

The power of the arbitral tribunal

Article 17 of the Armenian Act (article 17 of the Azerbaijani Act) provides that *"unless otherwise agreed by the parties, the arbitral tribunal may, at the request of party, order any party to take such interim measure of protection as the arbitral tribunal may consider necessary in respect of the subject-matter of the dispute. The arbitral tribunal may require any party to provide appropriate security in connection with such measure"*.

Neither the Armenian Act nor the Azerbaijani Act provide detailed regulation as to the kind of interim measures that can be ordered by the tribunal or the conditions under which such measures should be granted.

MAKING OF AWARD AND TERMINATION OF PROCEEDINGS

Decision making

Regarding decision making in arbitral proceedings with more than one arbitrator the Armenian Act (article 29) provides that *"any decision of the arbitral tribunal shall be made, unless otherwise agreed by the parties, by a majority of all its members"*. This is the main rule also under both the Azerbaijani Act (article 29) and the Georgian Act (article 34).

Both the Armenian Act (article 29) and the Azerbaijani Act (article 29), but not the Georgian Act, contain an express provision that questions of procedure may be decided by a presiding arbitrator, if so authorized by the parties or the members of the arbitral tribunal.

Form and content of award

There is no any definition of *"arbitral award"* in the Acts.

Both the Azerbaijani Act (article 30) and the Armenian Act (article 30) provide that the arbitral tribunal, at the request of the parties, may record a settlement in an arbitral award. In addition, both Acts stipulate that the arbitrators have certain discretion to refuse recording a settlement in an award on agreed terms.

As to the formal requirements for an arbitral award contained in article 31 of the Azerbaijani Act (or article 31 of the Armenian Act) and articles 35 and 36(1) of the Georgian Act, such requirements are essentially the same. These requirements are:

- the award shall be made in writing and shall be signed by the arbitrator;
- the award shall state the reasons upon which it is based;
- the award shall state its date and the place of arbitration;
- after the award is made, a copy signed by the arbitrators shall be delivered to each party.

Under both the Armenian Act and the Azerbaijani Act in principle the violation of any of the formal requirements in article 31 could lead to the setting aside of the arbitral award under article 34 (discussed below).

The Acts do not contain any requirement that the award should be registered or deposited.

Termination of proceedings

Article 32 of the Armenian Act and article 32 of the Azerbaijani Act contain the same main rule that the arbitral proceedings and the mandate of the arbitral tribunal terminate upon the issuance of the final award. Furthermore, both the Armenian Act (article 32(2)(1)) and the Azerbaijani Act (article 32(2)(a)) provide that where a party withdraws a claim, the dispute should be terminated by the arbitral tribunal in respect of such claim. However, these Acts in such a case grant the respondent a conditional right to request an award i.e. upon the arbitral tribunal finding that the respondent has a legitimate interest in obtaining the final settlement of the dispute.

Both Acts also provide that the arbitral tribunal should issue an order for the termination of the arbitral proceedings when the parties agree on the termination of the proceedings or the arbitral tribunal finds that the continuation of the proceedings has for any other reason become unnecessary or impossible (article 32(2)(1) and (2) of the Armenian Act).

These provisions have no corollary in the Georgian Act. It is clear, however, that the arbitral proceedings should be terminated where agreed by the parties.

Correction and interpretation of award, additional awards

Article 33(1) of the Armenian Act and article 33(1) of the Azerbaijani Act afford in essence the same possibilities for the tribunal, at its own initiative or at the request of a party, to correct in the award any errors in computation, clerical or typographical errors or any similar errors. Article 41 of the Georgian Act contains the different language stating that the parties are only entitled to request the arbitral tribunal to correct any error or mistake.

As to the interpretation of the arbitral award, article 33(1)(2) of the Armenian Act provides that if so agreed by the parties, a party, with notice to the other party, may request the arbitral tribunal to give an interpretation of a specific point or part of the award. Article 33(1)(b) of the Azerbaijani Act provides the same solution whilst the Georgian Act does not have any provision governing issues associated with interpretation.

Where the tribunal has failed to decide an issue that should have been dealt with in the arbitral award, article 33(3) of the Azerbaijani Act, the tribunal may only make such an additional decision at the request of a party (or article 33(3) of the Armenian Act).

CHALLENGE OF ARBITRAL AWARDS

Under the Armenian Act an application for the setting aside under article 34 (article 34 of the Azerbaijani Act) is the sole recourse against an arbitral award, while the Georgian Act does not contain any setting aside proceedings.

Articles 34 of the both Acts set out the grounds (with slight differences of language of article V of the New York Convention[1]) on which an award may be set aside. In summary, these grounds are as follows:

- lack of capacity to conclude an arbitration agreement, or lack of a valid arbitration agreement;
- where the aggrieved party was not given a proper notice of the appointment of the arbitral tribunal or the arbitral proceedings or was otherwise unable to present its case;
- where the award deals with matters not contemplated by, or falling within, the arbitration clause or submission agreement, or goes beyond the scope of what was submitted;

[1] Armenia ratified the New York Convention (the Convention) on 29 December 1997 and it entered into force on 29 March 1998. Azerbaijan ratified the Convention on 29 February 2000 and it entered into force on 29 May 2000. Georgia ratified the Convention on 2 June 1994 and it entered into force on 31 August 1994. The above information is available on http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_status.html (accessed on 15 February 2007).

- where the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, or with the mandatory provisions of the Acts itself;
- where the subject matter of the dispute is not capable of settlement by arbitration under the laws of Armenia and Azerbaijan;
- where the award (or any decision in it) is in conflict with the public policy of Armenia (or the legislation of Azerbaijan).

Furthermore, it should be noted that, the Armenian Act and Azerbaijani Act do not exclude an appeal against a court decision on the setting aside of an arbitral award.

The grounds for setting aside in articles 34 of both Acts are subject to the same three-month time-limit. They also do not regulate the extent to which a party would be able to introduce new grounds after the expiry of the three-month period.

The Armenian Act, article 34(4), as well as the Azerbaijani Act whilst drafted differently, grant the courts the power, at the request of a party, to stay the proceedings for invalidity or setting aside to provide the arbitrators with an opportunity to resume the arbitral proceedings or to take such other action as in the arbitral tribunal's opinion will eliminate the grounds for the invalidity or setting aside.

RECOGNITION AND ENFORCEMENT OF ARBITRAL AWARDS

Articles 35 and 36 of the Armenian Act and the Azerbaijani Act deal with recognition and enforcement of arbitral awards. The grounds on which recognition or enforcement may be refused are substantially the same as those listed in article V of the New York Convention (see above).

Stay of enforcement proceedings

Article 36(2) of the Armenian Act, which is based on article VI of the New York Convention, provides that if an application for setting aside or suspension of an award has been made to a court, the court where recognition or enforcement is sought may, if it considers it proper, adjourn its decision and may also, on the application of the party claiming recognition or enforcement of the award, order the other party to provide appropriate security (the Azerbaijani Act contains slightly different language). There is no corresponding provision in the Georgian Act.

INVESTMENT ARBITRATIONS

Armenia ratified the Washington Convention on the Settlement of Investment Disputes between States and Nationals of Other States (1965) (the Convention) on 16 September 1992 and it entered into force on 16 October 1992.

Azerbaijan ratified the Convention on 18 September 1992 and it entered into force on 18 October 1992.

Georgia ratified the Convention on 7 August 1992 and it entered into force on 6 September 1992.

Each of the three countries are parties to over 25 bilateral investment treaties (BITs).[2] Usually those treaties provide for arbitration in different institutions at the claimant's option. The most common is the Arbitration Institute of the Stockholm Chamber of Commerce. Some BITs provide for ad hoc arbitration under the UNCITRAL Arbitration Rules.

All these countries are also parties to the Energy Treaty Charter and Convention Establishing the Multilateral Investment Guarantee Agency (the MIGA Convention).

CONCLUSIONS

The discussed arbitration acts represent a significant advance in arbitration law in the South Caucasian region. They put more power in the hands of parties, while at the same time imposing obligations on them and the tribunal to achieve what arbitration is always supposed to be able to do: to provide an efficient and cost-effective means of dispute resolution. Some issues have not been addressed, such as confidentiality and multiparty arbitrations (other than in the power of the parties to agree to consolidation or to concurrent hearings). These issues were thought too problematic to legislate on, but this ought not to detract from the usefulness of the Acts.

It is likely that the experience will show that the Acts provide modern and well-functioning statutory frameworks for international as well as domestic arbitrations. However the law should be supported by a reliable and efficient judicial system that shall build upon a tradition of arbitration-friendly rulings.

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[2] The information is available on http://www.unctad.org/Templates/Page.asp?intItemID=2344&lang=1 (accessed on 15 February 2007).

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