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BETWEEN PUBLIC AND PRIVATE-STATE ENTITY AS A PARTY TO INTERNATIONAL COMMERCIAL ARBITRATION: LESSONS FOR THE REPUBLIC OF UZBEKISTAN

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***ABSTRACT**--International commercial arbitration has become an effective mechanism in resolving international commercial disputes owing to the massive increase of commercial interactions between private entities in business world. This article discovered that when States and State entities have different legal personalities, the arbitral tribunals should not expand the arbitral clause to the State itself with respect to the disputes before commercial arbitration. It analyzes the nature of State entities, including important roles of State entities in Uzbekistan and some strategic elements of State entities in international commercial arbitration practice. Furthermore, the article proposes potential solutions on the participation of State entities in international commercial arbitration and provides significant recommendations for further development of international commercial arbitration practice in Uzbekistan.*

***Keywords**-- State, state entity, international commercial arbitration, incapacity, law applicable, arbitration clause, legal capacity.*

I. INTRODUCTION

Due to a substantial increase in commercial relations in the business world, international commercial arbitration has become a preferable method of settlement in international commercial disputes. Parties to disputes are usually entities which are involved in commercial activities, but in some cases, a state may also participate as a disputing party to international commercial arbitration through its entities. When State entities conclude commercial contracts (which include arbitration agreements) with foreign companies, they formally become a party to that contract and, at the same time, a party to the arbitration agreement. Participation of States is rare in international commercial arbitration, as the primary outlet for dispute resolution between States and foreign investors is normally international investment arbitration, to which States are bound to submit to its rulings by virtue of international treaties.

As legal entities, States have been participating in international arbitrations since the beginning of the modern era and continue doing so, both in their public and private capacities [14]. In this sense, there is a clear distinction

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in the concept of "State" in terms of public international law and private international law. From the perspective of public international law, "State may be considered a social reality; it is also a legal fiction – a legal entity vested with legal rights and obligations" [14]. When the State gives its consent to arbitrate disputes with private investors in terms of bilateral investment treaties (BIT), "the State acts under public international law or in its capacity as a sovereign (jure imperii)" [13]. Moreover, State effectively coincides with that of public power (puissance publique). In other words, under public international law, a sovereign country is substantially a formal legal entity and it is a concept covering all legal subjects, both public and private, which is bestowed with the authority to exercise sovereign power on behalf of the State [14].

Under private international law, on the other hand, the definition of the State may vary substantially, depending on the applicable law. Therefore, in many jurisdictions, State agencies and entities have distinct legal personalities, and they may enter into contracts, and have the capacity to sue and be sued in their own name [14]. When a State gets involved in international commercial arbitration, it acts under private international law and thus in its private capacity (jure gestionis). After agreeing to an arbitration clause, "the State waives its immunity from jurisdiction vis-à-vis both the arbitral tribunal and the local courts competent to exercise judicial review and supervision over the arbitral proceedings." [32] In other words, the State is stripped of its sovereign status and effectively acts as a private entity when it is a party to international commercial arbitration.

II. MAIN CHARACTERISTICS OF "STATE ENTITIES"

The term "State entities" has still not been universally defined. On the other hand, such a lack of universal definition does not seem to pose any problem for "privately owned entities," which refers to all entities which do not belong to or are not under the state control regardless of forms or sizes [16].The lack of a generally accepted definition is the result of the lack of coherent and effective international legal mechanisms governing State entities. Without universal guidance providing a consistent definition, different bilateral, plurilateral, or multilateral agreements have set forth different definitions for the same term [16].

Even in the lack of a generally shared definition, State entities may be defined a contrariis by underlying three features distinguishing them from private entities. First, the guiding objectives of State entities differ because private entities principally focus on maximizing their profits, while the ownership of the State has been viewed as a methodology for coping with market failures [16]. At the same time, government-owned entities can circumvent the doctrine of competitive neutrality [*The 2005 OECD Guidelines*] while aiming at providing remedies for market failures. Examples can be seen in the situations where natural monopolies are present or where State entities are utilized as units for policies concerning development [3].Second, State entities usually possess essential competitive advantages [18]. As a consequence, they need particular provisions to govern the competitive advantages which are enjoyed by State entities only due to the fact that they are owned by the State, their functions are controlled by the State and they are financially support by the government. Last, the decision-making process and accountability issues differ greatly between State entities and privately-owned entities. The top management of State entities, especially those that do not take the form of a corporation, usually is faced with insufficient incentives and limited accountability, yet decision-making is centered on a restricted number of people [10].

Nonetheless, State entities exist in various corporate forms and features and they could operate in the market in the same way as private corporations do: however, given their peculiarities, the activities of State entities in the market may result in a distortion of trade. These main features help explain why State enterprises usually hinder a competitive or neutral market. Where States pursue their policies through State entities, trade and investment can be greatly damaged. As a result, there is an urgent need for creating particular rules for State entities to function in parallel with private entities without leading to the distortion of international trade.

III. STATE ENTITIES IN UZBEKISTAN

In Uzbekistan, State entities dominate many areas of the economy which the government considers strategic. Those areas include the energy sector (power generation and transmission, and oil and gas refinery and transportation), mining sector (metals and uranium extraction), telecommunication industry (fixed telephony and transmission of data), agriculture industry (cotton production), machinery (the automotive sector, locomotive and aircraft), and transportation (airways, trains and public transportation) [1].

Certain large State-owned enterprises are actively involved in commercial activities, and still operate as governmental institutions. The Law on Privatization and Denationalization [17], along with a number of supplementary acts, provides a list of industries for which the government has prohibited the involvement of private entities. The government of Uzbekistan has established some of its major State entities by merely changing the name of the former government entities. Sometimes those entities still enjoy the power to act on behalf of the governments [2].For instance, Uzbekneftegaz National Holding Company holds the exclusive monopoly over the oil and gas sector and any foreign investor wishing to conduct business in this area needs its authorization in doing so, even though legislative mandate for this power has never been explicitly provided [2].Most of the State entities in Uzbekistan are listed as national holding companies or joint-stock companies, and generally the employees or private enterprises hold a minority share in those entities.

State entities generally have their own boards of directors; however, the board usually includes at least one government official [2].Moreover, in practice, senior executives directly report to the concerned ministries or to the Cabinet of Ministers [30].In fact, State entities are under obligation to consult with the concerned ministries prior to making any decisions on important business matters [30].The government of Uzbekistan possesses majority shares or the power to block minority shares in a large number of private entities. This is to ensure that the government retains essential control over their operations, as it maintains the power to regulate and control the acts and transactions of such enterprises.

IV. ISSUES CONCERNING PARTICIPATION OF STATE ENTITIES IN INTERNATIONAL COMMERCIAL ARBITRATION

The participation of State entities as a party in international commercial arbitration is likely to pose a variety of issues, including in jurisdictional, procedural sense. The current section will analyze most concerning issues of the above-mentioned context. Following jurisdictional issues of State entities in international commercial arbitration, some procedural matters will also be discussed within this section.

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Jurisdictional issues of State entities in international commercial arbitration

One of the issues that tend to arise when State entities get involved in arbitration agreements (in the framework of commercial contracts) is the determination of the personality of such parties. When a private party concludes a contract with State entities, he or she should identify the type of State party with whom private party concludes the agreement. For example, State entities could be "the central government, a State agency or a State instrumentality with separate legal personality (but not necessarily with its own assets), a State corporation owned and controlled by the State, but established and operating under the private law of the jurisdiction in question, or a purely private entity, but one authorized to exercise public powers for certain specific purposes" [14].

From the viewpoint of State, State must establish whether the party to the contract could be a State entity, a special legal entity with independent personality from the State, or a corporation owned by a State, considering the extent and the subject matter of the activity of the particular State entity. Therefore, for example, in case concerned contract is about a commercial activity and is conducted within the scope of activity of such entity, the State can legally restrict its probable direct liability by detaching itself from the State-controlled entity involved. Also, the State can have such contract agreed using the name of the entity in question; as a result, the arbitral tribunals or the court might consider such entity to have sole and legitimate liability for the contract execution, and for other legal responsibilities incurred as a result of execution.

Arbitral tribunals and domestic courts do not have the same view on the matters of legal personality of State entities since some of arbitral tribunals aim at expanding the extent of arbitration clause to cover the State not formally a signatory to the contract; at the same time, domestic courts view that the corporate veil between State itself and its organs or instrumentalities must be respected because they do not the same legal personality [14].It is obvious that there is an increasing tension between two approaches in practice.

In the ICC case of Svenska Petroleum Exploration AB v. Lithuania, the State corporation, namely AB Geonafta, concluded the contract; in the meantime, the contract was also signed by government officials and included the statement beyond their signatures to the extent that the agreement was approved by the government and the government considered itself to be bound by the contract in the identical manner as a signatory [*20*]. As a consequence, the ICC found that the government itself must comply with the contract. Later on, Svenska filed for enforcement of this award in the United Kingdom. The award was challenged by the Lithuanian government, revoking State immunity; however, the court rejected this challenge and granted the enforcement of the award [15].

The court in many cases applied another approach which aims at excluding the expansion of the scope of arbitration clause to the State per se, without any evident consent of the State. Two examples of awards (subsequently challenged before State courts) illustrate this tendency: Southern Pacific Properties (Middle East) Ltd v. Egypt and Dallah v. Pakistan. In the case of SPP, EGOTH, a State entity of Egypt with a different legal personality, signed the contract, along with the Minister of Tourism of Egypt, whose signature appeared below the terms "approved, agreed and ratified" [19]. In this case, the Court of Appeal of Paris found that those terms could not imply the intention of the government to be bound by such an agreement; in contrast, they just meant that the agreement had been approved by the government. Therefore, the Court annulled the arbitral award [19].In the case of Dallah Estate and Tourism Holding Co. v. The Ministry of Religious Affairs of Pakistan, the dispute sprang from a contract between Dallah, a Saudi Arabian corporation, and the Awami Hajj Trust, an entity established by

the Ministry of Religious Affairs of Pakistan [9].The tribunal have justified that it had jurisdiction over the Ministry. The arbitral award was challenged in London claiming that the State was a non-signatory and it did not have to be bound by the contract. The High Court accepted this challenge, upholding that according to the law governing the arbitration agreement in France, without a choice of law clause [The clause of law in which the parties designate the law govern disputes arising under the contract],the contract did not bind Pakistan. Afterwards, the Court of Appeal supported the decision [12].

V. PROCEDURAL ISSUES OF STATE ENTITIES IN INTERNATIONAL COMMERCIAL ARBITRATION

With respect to procedural matters, the fact that a party is a "State" or "State entity" does not create specific legal issues. In contrast, the arbitral tribunals must treat parties in the identical manner. This standard is embedded in most of the rules concerning international arbitration, such as the ICC Rules of Arbitration [33].Nevertheless, this fact does not necessarily mean that the fact that a party to arbitration is a State or State entity does not have any legal implication.

With regard to the State, procedural matters might include the question which State entity should act on behalf of the State in the arbitration and coordinate the data and evidences obtained from other State entities. Also, some legal issues such as whether some defenses, including force majeure, are accessible for the State party where the concerning situations are caused by a decision of the government, may arise. The first question is the one that the State must consider at an early stage in the procedures, because they might affect both efficiency and effectiveness of the defense of such a State. Generally, due to the necessity to coordinate with different State entities, the State usually requires more time than private sectors to gather evidence and data, to designate suitable witnesses and other data and evidence, and to advise their counsel on major matters of strategy, procedure, and other important substances. Therefore, they need efficient advocacy of the State's counsel to make sure that the legitimate interests of the State are appropriately guarded throughout the arbitration course.

Even though the challenges confronting the State counsel in the context of international commercial arbitration are daunting, they are generally not as formidable as in the case of investment arbitration. This situation is, partly due to the fact that the disputes in international commercial arbitration spring from contractual agreements between a private entity and a State entity or its organs, implying that the concerning data and evidences are not usually inaccessible within that specific entity or its instrumentality and they in turn do not need to collect such data from various different sources. This situation also applies to the cases of witnesses and other evidence sources which are generally accessible within the entity managing the contract in question.

In the case of investment arbitration, in contrast, the disputes may emerge because of actions or omissions of some state entities or related instrumental entity. Those disputes evidently make the defense of such State complicated and require the client and the State counsel to work in coordination. Acquiring evidences as well might complicate the defense and usually needs some forms of interventions at the highest ranked State entities. Therefore, the disputes involving State instrumentalities are more time-consuming and require the counsel to make more effort in communicating with the State entities in investment arbitration.

With regards to legal issues of the referral to legal defenses such as force majeure, arbitral tribunals are prone to respect the corporate veil between the State itself and State organs and consider them to have a distinct legal personality [14; 10].Since the case of Rolimpex, the arbitral tribunals have regarded State corporations to be separate from the State in term of function and finance [8].In the case of entities established by public law, this problem is more complicated, and the result tends to depend on the facts of each case, even though in practice the identical elements, such as degree of State control and independence in term of finance, are usually considered relevant [14; 10-11].

In conclusion, the participation of State entities in international arbitration might create some serious problems, both in jurisdictional and procedural contexts. In fact, arbitral tribunals still differ in their opinions on determining the identity of State entity and on extending the scope of arbitration agreements to cover the core State. Therefore, the international rules concerning the personality and identity of the State and State entities when entering into the contract should be established.

VI. LAW GOVERNING STATE ENTITIES IN THE REPUBLIC OF UZBEKISTAN

The Civil Code of the Republic of Uzbekistan and the No 205 Regulation of the Cabinet of Ministers On State entities are the relevant legal sources on governing State entities in Uzbekistan. However, the Civil Code of Uzbekistan does not contain direct regulatory provisions concerning State entities but does provide general rules which are relevant to the activity of State entities. According to Article 80 of the Civil Code of Uzbekistan states as following:

A legal entity established by State shall not be liable for its obligations. The State shall not be liable for the obligations of legal entities created by it except for cases provided for by a Law. The rules of the present Article shall not be applied to cases when the State on the basis of the contract concluded by it has undertaken a surety (or guarantee) the obligations of a legal entity or an indicated juridical person has undertaken a surety for (or guarantee) the obligations of the State [4].

This provision plays a crucial role on participation of Uzbek State entities in international commercial arbitrations. In other words, this provision means that when the State concludes an arbitration contract with a private enterprise, the State should comply with its obligations that it has with private enterprise.

The No 215 Regulation of the Cabinet of Ministers On State entities includes provisions on the notion of State entity, the founder of the State entity, rights and obligations of the founder, establishment of State entity, the property of the State entity, the responsibilities of the State entity and reorganization and liquidation of the State entity [29].According to this regulation, a State entity is defined as a commercial organization in the form of a State unitary enterprise established on the basis of State-owned property [29].The founder of the State entity should be the Cabinet of Ministers or a State body which is authorized by the Cabinet of Ministers. The State entity has its own separate property apart from the State, bank account and its corporate name in the State language. The firm name of a State entity should contain the words “davlat korxonasi” which in translation means “State entity”. A State entity may acquire and exercise property and personal non-property rights, incur obligations, and be a plaintiff or a defendant in court. State entities may be established by a decree of the Cabinet of Ministers and with some exceptions provided by the Law. The State entity is responsible for its obligations within the scope of its property.

Moreover, the State entity can be reorganized or liquidated by the decision of the court according to legislation of Uzbekistan.

Even though Uzbekistan does not have a special law on international commercial arbitration (however once it proposed law project in the past two years), it has a Law On Arbitration Courts [25] which limits the ability to resolve international commercial disputes by arbitration, owing to a number of restrictions. For instance, Article 14 of the law sets forth a special provision where an arbitrator can only be a citizen of the Republic of Uzbekistan chosen by the parties of the arbitration agreement or appointed to settle the dispute. Furthermore, Article 10 states that the arbitral court should resolve the dispute according to Uzbek legislation. The scope of Uzbek legislation includes the Constitution, laws of the Republic of Uzbekistan, decrees of the President and resolutions of the Government, normative legal acts of the executive authorities, international treaties of Uzbekistan and other legal acts in force in its territory [7].Moreover, Article 5 notes that public authorities and bodies cannot form arbitration courts and cannot be parties to such arbitration agreements. This provision shows that when one party of the dispute is a State body, the dispute cannot be resolved in arbitration courts of Uzbekistan.

Also, this provision stipulates that parties to international commercial arbitration are able to apply foreign law when resolving the disputes between foreign parties and legal entities of Uzbekistan; in other words, references to foreign law as applicable are not excluded [7]. Obviously, in practice, the application of a foreign law is much more preferable in the cases of international commercial arbitration, compared to domestic Uzbek law. However, domestic law is still partially applied in the cases of the law concerning restrictions on citizenship of the arbitrators, the selection of the applicable law, restrictions on the ability of courts of arbitration for matters with a foreign element, yet it does not mean that Uzbek law totally precludes the application of foreign law.

VII. DEVELOPMENT STAGES OF INTERNATIONAL COMMERCIAL ARBITRATION PRACTICE IN UZBEKISTAN

From the first day of independence, the idea of creating and supporting international commercial arbitration in Uzbekistan was of great importance. In the conditions of a market economy, there was always a massive need for fast and effective dispute resolution procedures, and to seek alternative legal mechanisms in resolving disputes in the sphere of international commercial matters. The development of international commercial arbitration practice can be conventionally divided into three stages in Uzbekistan. The first stage covers the period from 1991 to 2006, the second stage includes the period from 2006 to 2016 and finally, the third stage starts from 2016 continues until the present day.

The special law concerning commercial arbitration had not been adopted in the first stage, however national legislature adopted several legal acts containing some rulings about commercial arbitration in Uzbekistan. For instance, the Civil Code of the Republic of Uzbekistan (Articles 9, 10) [5] , previous edition of the Civil Procedural Code (Articles 100-152) [6] , the Law On the Execution of Judicial Acts and Acts of Other Bodies (Article 7) [28], the Law On the Contractual Legal Basis of Activities of Economic Entities (Article 36) [27], and the Law On the Chamber of Commerce and Industry of the Republic of Uzbekistan [26] partially included some provisions on commercial arbitration. Besides these, under the initiative of the government, the primary arbitration court was

established in 2002 and seated in Tashkent. The main objective of the arbitration court was to resolve the disputes on exchange trade matters between the participants of the Republican Stock Exchange Market.

The second stage covers the period from 2006 to 2016 as the law On Arbitration Court was adopted and the International Commercial Arbitration Court (ICAC) was established under the Chamber of Commerce and Industry in 2011. Even though Uzbekistan adopted this law, it still included some restrictions on settling international commercial arbitration disputes. For instance, the arbitrators can only be citizens of the Republic of Uzbekistan, the disputes have to be resolved in accordance with Uzbek legislation, and State authorities (State entities) should not be a party to arbitration. In addition, there was an uncertainty in applying the foreign law. Therefore, the law did not meet the requirements for resolving international commercial cases.

The International Commercial Arbitration Court is an independent permanent non-State body (arbitral tribunal) carrying out its activities in accordance with the Law On Arbitration Courts, international law and other domestic legal acts. The seat of the ICAC is the city of Tashkent. As the Law On Arbitration Courts governs the arbitration rulings of the ICAC, it cannot settle international commercial disputes owing to above mentioned restrictions in the law. In other words, the ICAC cannot resolve the commercial related international disputes due to the fact that the arbitral tribunal limits its capacity only with national legislation of Uzbekistan.

The third stage on development of international commercial arbitration practice includes the period from 2016 until the present day. In this stage, new edition of the Civil Procedural Code, the Economic Procedural Code (both codes were adopted in 2018) as well as several decrees of the President of the Republic of Uzbekistan were adopted. For example, the decree On additional measures to ensure the further development of entrepreneurship, the full protection of private property and a qualitative improvement of business climate stressed to review the status and activity of the ICCA [21]. Another decree On measures to further reform the judicial and legal system and to strengthen guarantees for the protection of citizens' rights and freedom stated to attract more foreign enterprises into domestic economy and create sufficient conditions for their business in Uzbekistan [22].Furthermore, the decree On measures to further improve the system of State protection of legitimate business interests and further development of entrepreneurship emphasized to improve international commercial arbitration practice in Uzbekistan and adopt the Law On International Commercial Arbitration [23]. However, the Law On International Commercial Arbitration has not still been adopted. Finally, with regard to the decree On the creation of the Tashkent International Arbitration Center (TIAC) at the Chamber of Commerce and Industry of the Republic of Uzbekistan it has been established TIAC.

The main function of the TIAC Court of Arbitration is an organization of dispute resolution arising from contractual and other civil legal relations arising between commercial organizations located in different states, including foreign investors, as well as disputes related to investments, intellectual property and Blockchain technologies through international arbitration.

VIII. CONCLUSION

The further development of international commercial arbitration practice in Uzbekistan should involve three major steps. First, the Law On Arbitration Courts should be drastically amended to meet the requirements of international arbitration standards. Second, the Law On International Commercial Arbitration" should be adopted

in terms of further developing the practice on international commercial arbitration in Uzbekistan. Finally, the status and activity of the ICAC should be reviewed in order to enhance the capacity of the tribunal for settling international commercial disputes.

The amendments could open a new chapter in the development and practice of international commercial arbitration in Uzbekistan. The amendments would make Uzbekistan more integrated with the world community, attract foreign investors (enterprises), and meet international standards on arbitration. Therefore, the amendments to the Law On Arbitration Court should include as follows: first, in Article 14 of the law, where arbitrators can only be citizens of Uzbekistan, there should be added the provision that foreign citizens should also be granted to be arbitrators. Article 10 of the law where it states that the disputes are settled in accordance with the legislation of Uzbekistan should be amended so that the disputes are settled not only in accordance with the legislation of Uzbekistan but in regards to applicable law (foreign law) which the parties have chosen in their arbitration agreement. Also, Article 5 of the law, which stipulates that public authorities or bodies should not be a party to arbitration, should be changed to the provision that public authorities and bodies (State entities) can be a party to arbitration.

Uzbekistan has not adopted the Law On International Commercial Arbitration". This law will be a fundamental guarantee for foreign investors and enterprises on doing business in Uzbekistan. Without adopting this law, Uzbekistan may fail to create all the necessary conditions for attracting foreign investors and enterprises. Therefore, Uzbekistan has to adopt this law to meet the requirements of international standards of arbitration. In this sense, the UNICTRAL Model Law on International Commercial Arbitration (1985) with amendments in 2006 [31] could be a great example to follow.

The change of status and activity of the ICAC is relatively connected with the amendments to the Law On Arbitration Courts and adoption of the Law On International Commercial Arbitration. These steps could have an effect on the capacity of the ICAC to settle commercial disputes. Hence, in order to make the ICAC international dispute settling tribunal in commercial matters, first, some provisions of the Law On Arbitration Courts should be amended. Second, the Law On International Commercial Arbitration should be adopted respectively.

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