The Decision

of the Plenum of the Supreme Court of the Republic of Azerbaijan

on the

“Application of the norms of legislation in commercial disputes involving a foreign element"

14 December 2023 № 15/2023 Baku city

The legislation of the Republic of Azerbaijan and the norms of international agreements to which the Republic of Azerbaijan is a party are equally important during the trial of commercial disputes involving a foreign element (in which foreign physical and legal entities engaged in business activities), for the correct resolution of substantive and procedural legal issues. In this regard, in order to ensure the correct application of the norms of legislation during the resolution of commercial disputes involving a foreign element by the courts, as well as to ensure the stability of the legal approach to cases of this category, the Plenum of the Supreme Court of the Republic of Azerbaijan on the basis of paragraph 1 of Article 131 of the Constitution of the Republic of Azerbaijan and Articles 79, 79-1 and 80 of the Law of the Republic of Azerbaijan "On Courts and Judges"

DECIDED:

1. The procedural grounds of the status and participation of foreign persons in commercial disputes

1.1. Paragraph 1 of Article 69 of the Constitution of Azerbaijan Republic and related legislative acts determine the status of foreign persons and legal entities according to the national regime (rights and duties or obligations on an equal footing with its own citizens) unless otherwise provided by the law or by the international agreements acceded to by the Republic of Azerbaijan. This regime is also provided by Article 439 of the Code of Civil Procedure (“CCP”). In this regard, it should be taken into account that procedural rights and obligations of foreign persons are same as the rights and obligations of individuals and legal entities of the Republic of Azerbajan.

1.2. Article 440.3 of the CCP determines that the Republic of Azerbaijan may establish reciprocal restriction (retortion - specific restriction) in relation to foreign persons of those states in which special restrictions on procedural rights of citizens and legal entities of the Republic of Azerbaijan are allowed.

1.3. The procedural rights and legal capacity of foreign persons are determined on the basis of the legislation of the Republic of Azerbaijan unless otherwise stipulated by the bilateral and multilateral treaties to which the Azerbaijan Republic is a party.

1.4. The procedural rights and legal capacity of foreign persons engaged in business activities without establishing a legal entity is determined: 1) by the law of the country which they are citizens of; 2) if that person has several citizenships by the law of the country with which that person has the closest link; 3) if that person is a stateless person by the law of the country in which that person has the place of residence, if that person does not have any place of recidence by the law of the country often visited; 4) in case of

a refugee, it is determined by the laws of the state in which that person found refuge (Article 441 of the CCP).

1.5. In terms of the mentioned requirements of the legislation, in order for a foreign person to be considered a foreign individual engaged in business activities, it is necessary for that person to be registered as an individual entrepreneur in the relevant state. In this regard, courts, when considering a dispute with the participation of a foreign individual entrepreneur, must first determine that that person is registered as an individual entrepreneur in the relevant foreign country and that such registration is valid as evidenced by supporting document(s).

1.6 Taking into account that (Article 2.0.2. of the Law of the Azerbaijan Republic "On the State Registration and State Registry of Legal Entities) a legal entity established outside the Republic of Azerbaijan is a foreign legal entity, in the legal disputes where this legal entity is a party, the courts must determine that this foreign legal entity exists (not dissolved or closed down) and operates in the country where it is registered evidenced by the extract of the state register of legal entities of the relevant foreign country or by the documents issued by the competent state body.

1.7. The procedural rights and legal capacity of foreign legal entities are determined by the law of the country where they are established. The legal entity that does not have procedural rights and legal capacity in its own country may nevetheless be considered to have legal capacity in the territory of the Republic of Azerbaijan (Article 442.1 of the CPC).

1.8. According to Article 42 of the Vienna Convention "On Diplomatic Relations" of 18 April 1961 and Article 57 of the Vienna Convention "On Consular Relations" of 24 April 1963 to which the Republic of Azerbaijan acceded on 21 June 1992 the diplomatic agents of foreign countries and career consular officers shall not in the receiving State practise for personal profit any professional or commercial activity. In this regard, it is not possible for those persons to engage in commercial disputes as claimants, defendants and third parties.

2. The characteristics of international jurisdiction of the courts in the commercial disputes involving a foreign element

2.1. International jurisdiction of courts is the jurisdiction of the domestic courts of a particular state over disputes involving a foreign element. If the domestic court of a state does not have international jurisdiction over the relevant case involving foreign persons, it cannot hear the case. The commercial courts of the Azerbaijan Republic can only hear the disputes involving foreign individuals if they have international jurisdiction over those cases.

2.2. The courts of the Azerbaijan Republic have international jurisdiction over disputes involving a foreign element, unless otherwise stipulated by international treaties or agreement of the parties (Article 28 of the CPC). Therefore, in commercial disputes involving a foreign element, the courts must first determine the presence of either of the two conditions in order to ascertain whether they exercise international jurisdiction as specified in the CPC.

2.3. International jurisdiction of the courts of the Republic of Azerbaijan over the disputes involving a foreign element can also be determined by the international treaties to which the Republic of Azerbaijan is a party. This includes bilateral or multilateral agreements

specifically related to legal assistance (for example, the 1993 Minsk and 2002 Chisinau Conventions on Legal Aid and Legal Relations in Civil, Family and Criminal Cases) including those with a specific subject area (for example, the 1992 Kyiv Agreement on Settling Disputes Related to Commercial Activities).

2.4. If neither of the circumstances specified in paragraph 2.2 of this Decision exist, which precludes consideration of a commercial dispute involving a foreign element by the courts of the Republic of Azerbaijan, then the requirements of Article 440.1 of the CPC, which establishes the general conditions of the international jurisdiction of the courts, should be taken as a basis. In terms of the requirements of that Article, the general conditions of international jurisdiction of the courts in a commercial dispute involving a foreign element are as follows:

- Any of the persons involved in the case must be a foreign person;
- The place of residence or stay, the frequent place of visit of a foreign person must be in or to the Republic of Azerbaijan.

2.5. In addition to the general conditions, Article 443 of the CPC determines the international jurisdiction of the courts of the Republic of Azerbaijan over commercial disputes involving foreign elements in the following special cases:

- any of the co-plaintiffs or co-defendants in the case having a place of residence or stay, having the frequent place of visit in or to the Republic of Azerbaijan;
- the presence of the administrative body, branch or representative office of foreign persons in the territory of the Republic of Azerbaijan;
- the possession of property in the territory of the Republic of Azerbaijan by the defendant;
- the occurrence of an action or other circumstance in the territory of the Republic of Azerbaijan giving rise to the claim for the reimbursement of the damage caused to the property;
- the enforcement of the claim in whole or in part arising out of the agreement occuring in the territory of the Republic of Azerbaijan;
- the claim arising out of unjust enrichment having occurred in the territory of the Republic of Azerbaijan.

2.6. Only a single category of special proceedings cases provided for in Article 445 of the CPC due to their subject matter and nature pursuant to the requirements of Article 26.2 of the CPC, may be subject to the jurisdiction of the commercial courts of the Republic of Azerbaijan. This refers to the applications submitted by the person for the restoration of the rights over lost documents (special proceedings).

2.7. In assessing the existence of international jurisdiction over a commercial dispute involving a foreign element, it should be noted that irrespective of the existence of general and special conditions provided for in Articles 440.1 and 443 of the CPC, the courts are vested with the power to hear disputes over which they exercise exclusive jurisdiction in accordance with Article 444 of the CPC. Exclusive jurisdiction cannot be derogated by the agreement of the parties.

2.8. It should be noted that even if the courts of the Republic of Azerbaijan in accordance with the rules set out in Article 450 of the CPC do not exercise international jurisdiction over the commercial disputes involving a foreign element, the parties may nevertheless determine that the courts of the Republic of Azerbaijan possess such a jurisdiction

(prorogation agreement) or alternatively they can agree that the court of a foreign state possesses such international jurisdiction over a specific dispute (derogation agreement) through a written agreement.

2.9 The legal procedural grounds for exercising international jurisdiction in commercial disputes involving a foreign element by the courts are determined solely by the CPC. Since the Law of the Republic of Azerbaijan "On Private International Law" provides for substantive legal norms applicable to legal relations with foreign elements, it is not permissible to refer to this Law in the process of determining the international jurisdiction of the courts.

2.10 Based on the above mentioned, when determining the existence of the international jurisdiction of the courts over a dispute involving a foreign element, the following sequence should be observed and the judgments of the courts in a dispute must be well reasoned with references to the relevant procedural legal norms:

- The existence of a separate written agreement (contract, arrangement and etc.) or a clause in the agreement between the parties determining the international jurisdiction of the courts of the Republic of Azerbaijan or the courts of a foreign state;
- In the absence of such agreement, the existence of any relevant international agreements (treaties) to which the Republic of Azerbaijan is a party; and
- In the absence of such an international agreement (treaty), whether the CPC provides for such international jurisdiction.

2.11 When considering disputes with a foreign element, first it should be determined whether a foreign element exists. It should be noted that the term “foreign element” in use is distinguished in terms of the following categories:

- The foreign element expressed in the subject of the legal relationship. Legal entity or individuals of different states or an international organization can participate as a party in this relationship.
- The foreign element expressed in the object of the legal relationship. The relationship is considered to be international in nature in the event that the participants (subjects) of the legal relationship are citizens of the Republic of Azerbaijan and the object of the legal relationship is located abroad. In a different case, the relationship between foreign persons regarding the property located in the Republic of Azerbaijan is also considered to be international in nature due to the object of the legal matter.

3. The procedural grounds for refusing to admit a claim for consideration, terminating or staying the proceedings in connection with the international jurisdiction of commercial courts.

3.1 Special attention should be paid from the stage of admitting an application for consideration when resolving the procedural grounds of international jurisdiction. In the event it is determined at the stage of admitting a claim for consideration that the court does not exercise international jurisdiction over the dispute, then according to Article 153.2.1 of the CPC, such claim should not be admitted for consideration and a reasoned decision should be issued in accordance with Article 153.3 of the CPC, and contemporaneously the parties should be advised of their right to apply to the courts of a foreign country.

3.2 In the event it is found that the court does not exercise international jurisdiction following the admittance of a claim for consideration, then a decision to terminate the proceedings should be issued in accordance with Articles 261.0.1, 262.1 and 262.3 of the CPC, and contemporaneously the parties should be advised of their right to apply to the courts of a foreign country.

3.3 By collectively interpreting Articles 29, 32.2, 259.0 and 259.0.5 of the CPC, it should be noted that in the event the parties have agreed in advance on submitting the dispute to arbitration (arbitraton tribunal) and formalized it in a separate agreement or a contractual clause, the presence of such a condition does not automatically indicate that the dispute will be resolved in that particular manner. The procedural legislation does not exclude the possibility of reviewing disputes in court even in cases where an agreement has been reached between the parties to refer the matter to arbitration (arbitraton tribunal) so long as the parties agree to that effect before the matter is examined on its merits in trial. In this regard, despite the fact that there is a relevant contractual clause regarding the referral of a specific dispute to arbitration (arbitraton tribunal), the admissibility of a claim must be examined in accordance with the requirements of Articles 152 and 153 of the CPC. In the absence of the mentioned procedural grounds, if an objection lodged by the defendant to resolve the dispute in court is filed before the case is examined on its merits, the application must be assessed in accordance with the requirements of Article 259.0.5 of the CPC and the application should be stayed.

3.4 An objection lodged by the defendant, who has been duly informed about the preliminary hearing, after the review of the case on the merits, should be disregarded and the proceedings should continue in an ordinary legislatively prescribed manner.

3.5 In cases where there is an arbitration clause, if the examination of an application is stayed for the above-mentioned reasons or if the civil proceedings continue in the ordinary legislatively prescribed manner, the court must issue an appropriate reasoning in this regard.

3.6 Irrespective of the existence of an arbitration clause between the parties, in the event an application is filed before the court, the parties shall be advised of their rights to refer the matter to arbitration and of the consequences of such action in accordance with Article 2,3 of the New York Convention dated 10 June 1958 "On the Recognition and Enforcement of Foreign Arbitral Awards" to which the Republic of Azerbaijan acceded on 9 November 1999 and Article 167.1 and 167.1.5 of the CPC.

3.7 In light of the principle of procedural efficiency, the examination of the claim with the requirements of the Articles 149 and 150 of the CPC cannot proceed without determining the international jurisdiction of the commercial court in the first place. If the court possesses international jurisdiction to hear the case, but the claim does not meet the requirements of Articles 149 and 150 of the CPC, legal reasoning first should be provided for the exercise of international jurisdiction in the decision to return the application, and only after that the procedural grounds for returning the application.

4. Requirements for official documents issued abroad in connection with disputes involving a foreign element

4.1. When considering disputes involving a foreign element, particular attention should be paid to the requirements of documents issued in the relevant foreign country.

4.2. According to the general principles of international law, documents issued in the territory of any country and having legal force can be used in the territory of another country after being duly formalized. There are two types of such formalization: 1) authentification of document though an apostille; 2) consular legalization.

4.3. The range of official documents required to be apostilled in disputes involving a foreign element is determined by The Hague Convention of 5 October 1961 "Abolishing the Requirement for Legalization of Foreign Official Documents" (hereinafter - the Convention), to which the Republic of Azerbaijan became a party on 5 March 2004. Apostille of documents confirms the authenticity of the signature of the person who signed the document issued in the member states of that Convention, as well as the seal or stamp affixed to the document and the capacity of this person.

4.4. According to the requirements of the Convention, the only formality that may be required in order to certify the authenticity of the signature, the capacity in which the person signing the document has acted and, where appropriate, the identity of the seal or stamp which it bears, is the addition of a certificate issued by the competent authority of the state from which the document emanates. The certificate is affixed in the document itself or in a separate attachment to the document, may be drawn up in the official language of the authority which issues it.

4.5. Consideration should be given to the apostille requirement of the following documents mentioned in the relevant subsections of Article 1 of the Convention:

- documents emanating from an authority or an official connected with the courts or commercial courts of the state, including court judgments (judgments, decisions, verdicts and orders), writs of execution emanating from a public prosecutor (prosecutor), a clerk of the court, bailiff or a process-server (subsection "a");
- administrative documents - orders, decisions of administrative bodies and municipalities, orders of the heads of administrative bodies and municipalities, certificates, licenses, permits, title, birth, death and other certificates issued by administrative bodies, other legal documents (subsection "b");
- all documents notarized and issued in accordance with notarial acts (subsection "c");
- official certificates which are placed on (attached to) documents signed by person in his/her private capacity, such as official documents (notes) that confirm the registration of a document or the fact that it was in existence on a certain date and notarial and official authentification of signatures ("d" subsection).

4.6. The Convention does not require an apostille for documents executed by diplomatic or consular agents, as well as for administrative documents dealing directly with commercial or customs operations.

4.7. The courts of the Republic of Azerbaijan shall accept the documents issued, drawn up or duly approved by the competent authorities of foreign countries outside the Republic of Azerbaijan about the citizens or legal entities of the Republic of Azerbaijan, or foreigners, if not otherwise provided for by law or by the international agreements to which the Republic of Azerbaijan is a party, only after the legalization of such documents by the consular authorities (Article 457 of the CPC).

4.8. Consular legalization is carried out to determine and confirm the authenticity of signatures on documents issued in states that are not members of the mentioned

Convention, and the compliance of the documents with the laws of the state where the consulate is located. Compared to the apostillation of documents, consular legalization is a much longer process requiring the approval of several bodies; it involves satisfying formalities for approval by the diplomatic and consular offices of the foreign state to which the document is to be submitted.

4.9. Relevant rules found in other international agreements that the Republic of Azerbaijan is a party to may also be applicable regarding the formalization of documents. Thus, according to Article 43 of the Convention "On legal assistance and legal relations in civil, family and criminal matters" signed at the meeting of the Council of Heads of State of the Commonwealth of Independent States in Chisinau on 7 October 2002, the form and duration of the power of attorney is determined according to the legislation of the Agreed Party. Such a power of attorney translated into the language of the Contracting Party in whose territory it will be used, or into Russian with a notarized translation, is accepted in the territories of other Contracting Parties without any special requirement.

4.10. In addition, in accordance with the requirements of Article 18 of the Law of the Republic of Azerbaijan "On Private International Law", the form and validity period of the power of attorney is determined by the law of the country where it is issued. However, a power of attorney cannot be invalidated due to the non-compliance with the form requirement, provided that its form complies with the requirements of the laws of the Republic of Azerbaijan. In this regard, a power of attorney is considered valid if it is issued in accordance with the form required by the law of the country where it is issued.

5. Choice of substantive law in disputes involving a foreign element, determination of the content of the foreign substantive law by the courts applicable in those disputes

5.1 Since disputes involving a foreign element arise out of civil transactions involving a foreign element, the correct resolution of the dispute relies on the correct choice of the substantive law of the applicable state (the Republic of Azerbaijan or the applicable foreign state) and in this case, the requirements of private international law must be complied with.

5.2. Private international law governs the determination of the choice of law in disputes involving a foreign element by two methods: 1) conflict of laws method; 2) substantive law method. According to these methods, the norms of private international law are also divided into two groups: 1) conflict of laws norms; 2) special substantive law norms.

5.3. In private international law, a conflict arises between legal norms belonging to different national legal systems regulating the same relationship. In order to resolve this conflict, first it is necessary to determine a particular set of applicable laws. The issue is resolved by applying conflict of laws norms. From this point of view, in order to resolve the matter in substance, it is first necessary to resolve the conflict issue.

5.4. The conflict of law norms can be found in domestic law and international agreements. The conflict of law norms in the domestic law of the Republic of Azerbaijan are mainly specified in the Law of the Republic of Azerbaijan "On Private International Law" adopted on 6 June 2000.

5.5. In contrast to the conflict of law norms, special substantive law norms provide for a rule of conduct for the parties to a special legal relationship involving a foreign element.

Such norms are direcltly applied bypassing the conflict determination stage. For example, Chapter XXVI of the Code of Merchant Shipping of the Republic of Azerbaijan, called "applicable law", directly governs which state's substantive legal norms should be applied when regulating relations involving a foreign element arising from merchant shipping.

5.6. The following are the legal grounds for choosing the substantive law of the state applicable to the disputed legal relationship by the courts: 1) the contract (agreement) concluded between the parties to the dispute; 2) bilateral or multilateral international agreements to which the Republic of Azerbaijan is a party; 3) generally accepted international customs; 4) Law of the Republic of Azerbaijan "On Private International Law"; 5) other national legislative acts (Article 1.2 of the Law of the Republic of Azerbaijan "On Private International Law").

5.7. The parties' agreement on the choice of substantive law to be applied may be memorialized in the form of a separate agreement or as one of the contractual terms.

5.8. If the parties to the dispute have stipulated in a written agreement that the specific dispute should be resolved in accordance with the substantive laws of a foreign country, then the laws of that country should be applied (Article 3 of the Law of the Republic of Azerbaijan "On Private International Law").

5.9. In terms of the requirements of Article 24.3 of the Law of the Republic of Azerbaijan "On Private International Law", the parties can choose the applicable law not only at the time of the signing of the contract, but also thereafter. The parties may also agree to change the applicable law in the contract at any time.

5.10. From this point of view, irrespective of the existence of an agreement or a contractual clause between the parties on the application of foreign law to a specific dispute, if one of the parties requests the court to apply the laws of the Republic of Azerbaijan to the dispute and there is no objection from the other party, then the substantive laws of the Republic of Azerbaijan should be applied to the dispute taking into account the aforementioned.

5.11. Since the international agreements that the Republic of Azerbaijan is a party to are an integral part of the legislative system of the Republic of Azerbaijan, regardless of the pleadings of the parties, based on the principle of "*jura novit curia*" - "the court knows the law", the existence of an international agreement on the application of foreign substantive laws to disputes involving a foreign element that the Republic of Azerbaijan is a party to should be carefully examined.

5.12. If there is a substantive legal norm in the international agreements to which the Republic of Azerbaijan is a party applicable to the relevant relationship, the reference to the conflict of laws norm is excluded for the purposes of governing such relationships. This situation arises from the requirements of Article 151 of the Constitution of the Republic of Azerbaijan.

5.13. In the event that there are several international agreements regulating the same subject matter (for example in the field of legal assistance), when determining the priority of such agreements, the requirements of Article 30 of the "Vienna Convention on the Law of Treaties" dated 23 May 1969, which the Republic of Azerbaijan joined on 2 October 2017, governing the application of successive treaties relating to the same subject matter, should be taken as a basis.

5.14. According to the legal maxim "more specific laws prevail over more general laws" (*lex specialis derogat lex generalis*), international agreements containing more specific terms should prevail and be given priority over international agreements containing more general terms. Irrespective of the date of the adoption of the agreement or the number of signatories, such an approach is not applicable if a different rule is stipulated in the international agreement containing more specific terms. In resolving the conflict between two international agreements on the same subject matter, in order to determine the priority of such agreements, attention should be paid to the content of those agreements, and thus an international agreement that contains a more specific legal regime for the parties is more applicable.

5.15. International trade customs are such rules of conduct well settled over a long period of time in international practice that are generally accepted by the subjects of international law as legally binding. Such customs are mostly found in international trade transactions, international financial transactions, international trade shipping, in the relations between legal and natural persons of different countries in the field of entrepreneurship.

5.16. A court may apply international trade customs on the following grounds:

- if it is provided for in the domestic law (for example: The Merchant Shipping Code, Article 224, etc.);
- If it is provided for in the international agreements to which the Republic of Azerbaijan is a party (for example: The United Nations Convention on Contracts for the International Sale of Goods (1980 Vienna Convention), Article 9);
- If these customs are specifically referred to in the contract between the disputing parties, or if this particular rule of conduct has already become customary in the relevant field of business (*lex mercatoria* - commercial customary law).

5.17. When applying international trade customs in disputes involving a foreign element, the requirements of the following documents establishing these customs should be taken into account: "International Rules for the Unified Interpretation of Trade Terms" (INCOTERMS), "Unified Rules and Customs for Documentary Letters of Credit", "Unified Rules for Bills of Exchange", “Uniform Rules for Contractual Guarantees”, etc.

5.18. Thus, the following sequence should be followed when determining which state's substantive law should be applied to a dispute involving a foreign element.

- Existence of a separate written agreement (contract, pact, etc.) or a contractual clause concluded between the parties regarding the application of the substantive laws of any country to the dispute, or a clear expression of intent addressed to the court on the application of the laws of the Republic of Azerbaijan;
- Existence of a bilateral or multilateral international agreement to which the Republic of Azerbaijan is party, or well-settled international customs;
- Existence of field-related specific laws of the Republic of Azerbaijan governing disputed relations and determining which country's law should be applied;
- Existence of the conflict of laws norms established by the Law of the Republic of Azerbaijan "On Private International Law".

5.19. Determining the content of applicable foreign law is an official function of the court (*ex officio*). The content of applicable foreign law in disputes involving a foreign element should be determined in accordance with the official interpretation and application in the respective country. In the following cases, when the content of applicable foreign law

cannot be determined, the court applies domestic law (*lex fori*): a) measures taken to determine the content of applicable foreign law yield no results; or b) these measures require excessive costs; c) none of the disputing parties submitted evidentiary documents to substantiate their claims and objections.

5.20. When determining the official interpretation and application in the respective country, preference may be given to procuring opinions of relevant state and professional institutions, including scientific and educational institutions or professional legal scholars in that country.

5.21. The requirements of the Law of the Republic of Azerbaijan "On the Alat Free Economic Zone" are taken into account when conducting court proceedings in civil cases and commercial disputes in the Alat Free Economic Zone (Article 1.6 of the CPC). In this regard, the guidance provided by this Plenum Decision is not applicable to commercial disputes under the jurisdiction of the institutions in charge of the review and resolution of disputes in the Free Zone in accordance with the requirements of the Law of the Republic of Azerbaijan "On the Alat Free Economic Zone" (Articles 25, 26).

5.22. The guidance provided by this Plenum Decision can be applied in other court proceedings as well, taking into account the characteristics of civil disputes, as well as the principles of administrative court proceedings.

Chief Justice of the Supreme Court of
the Republic of Azerbaijan **Inam Karimov**