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Impacts Of Wording And Applicable Law On The Energy Investment Arbitration: An Evaluation Of The Case Of Azpetrol Group v. Azerbaijan

Abstract

Energy investment arbitration is never guaranteed from unexpected challenges or outcomes that may arise from the acts of parties to the dispute. Focused on completely different purposes of negotiations, parties may sometimes make a mistake by accepting settlement agreements with general wordings. Such settlement agreements can, in turn, result in the dismissal of proceedings before arbitration tribunals which can deprive one of the parties of many benefits, especially the compensation. An appropriately chosen applicable law plays a significant role in this case as they help interpret the agreements between parties. However, the Azpetrol case is quite notable to examine that applicable law did not save the investors from the dismissal of proceedings and all claims of claimants..

Annotasiya

Enerji investisiya arbitrajı mübahisə tərəflərinin hərəkətləri nəticəsində meydana gələn gözlənilməz çağırışlar və ya nəticələrdən heç vaxt sığortalanmayıb. Danışıqların bir-birindən tamamilə fərqli məqsədlərinə diqqətlərini toplayan mübahisə tərəfləri bəzən ümumi yazı üslublu barışıq sazişlərini qəbul etməklə səhvə yol verə bilirlər. Bu cür barışıq sazişləri arbitraj heyətləri tərəfindən baxılmağa qəbul edilən mübahisələrin yurisdiksiyadan rədd edilməsinə gətirib çıxara bilir ki, bununla da tərəflərdən biri bir çox mənfəətlərdən, xüsusilə, kompensasiyadan məhrum qala bilər. Doğru seçilmiş tətbiq edilən hüquq tərəflər arasındakı sazişlərin təfsirində əhəmiyyətli rol oynayır. Buna baxmayaraq, Azpetrol işində tətbiq edilən hüququn mübahisəyə təsirinin qiymətləndirilməsi ona görə vacibdir ki, bu mübahisədə tətbiq edilən hüquq iddiaçı investorları mübahisənin və bütün iddiaların rədd edilməsindən xilas edə bilməmişdir.

Introduction

Investment arbitration is a forum where parties choose with their free will and come to get their binding judgment which will resolve their dispute. In this regard, the role of investment arbitration tribunals should be appreciated that they help several investment disputes be resolved by experts in relevant fields by giving their good offices. The parties' role should not be denied either, because they not only bring their dispute and claims and pleading before arbitration tribunals established by their choices, but they make up their mind on the applicable law that can be quite influential in most cases.

Nevertheless, things may not go always well, and unexpected changes can be followed by unpredictable outcomes by arbitration tribunals. One of

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such unexpected realities that often occur in the proceedings with developing oil-rich states as respondents, is, unfortunately, corruption or bribery. Such occurrences can sometimes affect the whole process of the arbitration. Parties to the dispute, especially those convicted for their involvement in corruption or bribery issues, are in a hurry in such cases, that's why they want to conclude cases with the help of settlement agreements as soon as possible and protect their reputation. These compromises may result in mistakes in the choice of law or in the form of agreement with several clauses that are not, actually, in favor of claimants.

The *Azpetrol case* initiated by the joint request of parties is one of those cases against the Republic of Azerbaijan. The effects of the general wordings offered by the state party and immediately accepted by the claimants and the flexible approach demonstrated by the applicable law supported the settlement agreement between the parties. As a result of a binding settlement agreement that contained a very general wording, the bribery claims together with other claims on the Energy Charter Treaty (ECT) stood clear from the examination of the arbitration tribunal.

This case study is going to give a brief introduction to the facts of the case and parties' observations and the award rendered by the tribunal, first. Then in the second chapter, we will discuss the key problems derived from the bribery testimony and general wording of the settlement agreement. In the third chapter, we will focus on the applicable law and how it actually put an impact on the interpretation of the agreement. The case study will finish with a conclusion in which we will also come up with our thoughts and final notes on the case.

I. Facts: What Led The Case To The ICSID Arbitration?

A. Procedural History

It is clear from the award by the International Centre for Settlement of International Disputes (hereinafter, *'ICSID'*) Arbitration Tribunal (hereinafter, *'Tribunal'*) that the Tribunal was established on 13 July 2006 by joint request pursuant to the claims brought by three claimant companies. All of the three companies are incorporated in the Netherlands, namely *Azpetrol International Holdings B.V., Azpetrol Group B.V. and Azpetrol Oil Services Group B.V.* (Claimants) but they are beneficially owned by the Republic of Azerbaijan (Respondent).[1] The concept of the *beneficial ownership* can be explained so that while these three companies are based and registered in the Netherlands, their parent company is Azpetrol, a registered

[1] 'Azpetrol International Holdings B.V., Azpetrol Group B.V. and Azpetrol Oil Services Group B.V. v. The Republic of Azerbaijan,' Award, ICSID Case No. ARB/06/15, September 08, 2009, available at https://www.italaw.com/sites/default/files/case-documents/ita0059.pdf, §3, (last visited April 06, 2018). *('Azpetrol Case')*.

company in Azerbaijan.[2] In other words, three companies sued the country of nationality of their parent company in the following case.[3] The claims were based on **Article 10, 13, 14** and **22** of the ECT. Before going through the summary of the facts of this case, it should be noted that the *Azpetrol case* is one of the few cases against Azerbaijan. It has been examined by the ICSID Tribunal and dismissed due to the lack of jurisdiction.[4]

During the cross-examinations phase of the proceedings before the Tribunal, on 1 July 2008, the director of the Claimant companies testified his involvement in bribery with Azerbaijani officials in early 2006.[5] After this testimony, parties asked for the adjournment of hearings. Later then the director claimed that his testimony about the bribery was absolutely untrue.

After the adjournment request, both parties came closer to discuss any settlement for the case, but the Claimants were reluctant at first, because of the probability of receiving no compensation in the end. However, the Claimants were willing to insert safeguards in the settlement for the director who might be subject to prosecutions by Azerbaijani authorities, in case they decide to conclude a settlement agreement. The Claimant offered the compensation to be paid to Azpetrol Holding[6] but the Respondent was preferring a drop-hands approach (no compensation). It is clear from the contents of exchange of e-mails that the Respondent is not evading from any settlement agreement but from any compensation to cover the costs incurred by the Claimant in this case.

B. Parties' Observations

The gist of the case has been centred in the e-mails exchanged between the parties to the dispute on 16 and 19 December 2008 when they discussed the possible settlement of the dispute and a standstill agreement. On 19 December 2008, the Claimant said that they had confirmed the offer of settlement delivered via e-mail on 16 December 2008 by the Respondent. On the same day, both parties sent a notification to the Tribunal saying that they had reached *"an agreement in principle and they agreed on an immediate procedural standstill until 31 December 2008*".[7] Following this notification, on 23 December 2008, the Respondent e-mailed the Claimant asking for the draft of the settlement agreement and offered to resolve this issue as soon as possible.

[2] Such cases are often referred as 'round-tripping' or 'treaty shopping' in the legal doctrine. *See*, e.g., Karl P. Sauvant, Emerging Markets and the International Investment Law and Policy Regime, in The Oxford Handbook of Management in Emerging Markets, 34-35. (2018).
[3] Eunjung Lee, *Treaty Shopping in International Investment Arbitration: How Often Has It Occurred and How Has It Been Perceived by Tribunals*, 15-167 Working Paper Series 1, 16. (2015).
[4] N.Jansen Calamita, Adam Al-Sarraf, *International Commercial Arbitration in Iraq: Commercial Law Reform in the Face of Violence*, 31 Journal of International Arbitration 37, 61. (2015).
[5] *Supra* note 1, §6.
[6] *Ibid*, §19-22.
[7] *Ibid*, §8.

On 24 December 2008, the Respondent sent the draft of the settlement agreement to the attention of the Claimants, but no response was received. The Respondent claimed the existence of a binding settlement and knocked on the waiver of the conditionality of the settlement agreement by stating that they have executed all the documentation by 31 December 2008. The execution of the required documentation until 31 December 2008 was a condition for completing the settlement agreement between the parties, which can only be waived by the Respondent.

As a response to the claims by the Respondent, the Claimant held that **there was no binding agreement on the settlement but on a standstill**, and the draft sent on 23 December consisted of completely new terms, which turn it into a counter-offer. The Claimant further made a note about the extension of the scope of the e-mail of 16 December 2008. The Claimants alleged that they had not reached any concluding binding agreement with the state party on 31 December 2008. However, the state party Respondent disagreed with this view and insisted on the conclusion of the case for the reason that parties had reached a binding settlement.

On 31 December 2008, the Respondent requested the waiver of the documentation requirement of the binding agreement and the termination of proceedings according to ICSID Arbitration Rule 43(1). In addition, on 2 January 2009, the Respondent asked again for the termination of proceedings as there did not exist any legal dispute between parties as required by Article 25(1) of the ICSID Convention.

C. Tribunal's Award

The Tribunal, after the examination of the exchange of emails between parties on 16 and 19 December 2008 concluded that the parties had indeed reached a binding agreement, therefore it has a jurisdiction to hear the case neither on the ECT nor the Convention on the Settlement of Investment Disputes (ICSID Convention). From the procedural context, it should not be discarded that the Tribunal dismissed the proceedings under Article 25(1), instead of Article 43(1) of the ICSID Arbitration Rule, because in order to apply Article 43(1), a joint request from both parties is a pre-condition.[8] However, nodding to the very general wording of the settlement agreement, the Claimant implicitly agreed that no legal dispute existed between the parties; this approval encouraged the dismissal of the proceedings under Article 25(1) of the ICSID Convention.

[8] August Reinisch, *Introductory Note*, M.Cherif Bassiouni et al (Ed.), in The Global Community Yearbook of International Law and Jurisprudence, 2 Oxford: Oxford University Press 839, 843. (2010).

II. Key Problems: What Factors Triggered The Victory Of The Respondent?

A. Effects Of The Bribery On The Proceedings

Despite it is invisible from the assessments by the Tribunal, the impetus that brought parties closer to discuss the settlement of the dispute without the Tribunal's final judgment was the testimony given by the director of the Claimant companies. In the cross-examination sessions, the director testified that he had provided bribe to Azerbaijani officials in early 2006, to protect unnamed officials in Azerbaijan. Later on, the parties asked for the adjournment of hearings jointly and started to discuss any swift settlement of the dispute. However, we should not ignore that fact that the possible institution of criminal proceedings in Azerbaijan to investigate the said bribery scandal was another triggering event.[9]

The allegations of corruption were not heard and concluded by the Tribunal, solely because of the fact that the parties had already reached an agreement on the settlement of the dispute between them.[10] As far as there is a dispute over the character of the settlement agreement between the parties, the presence or absence of the said settlement agreement would inevitably influence the case proceedings. If there existed an agreement of the standstill between the parties, instead of a binding settlement agreement, then the Tribunal would resume the examination of the case on merits and also touch the corruption allegations and testimony given by the director of Claimant companies. However, the opposite happened in the end, and the Tribunal ceased the proceedings on the ground that there did not exist any legal dispute between the parties (Article 25(1) of the ICSID Convention). One of the reasons for putting corruption claims aside lied in the wording used in the settlement agreement approved by both parties; to clarify, by accepting the terms of the settlement agreement, the Claimants literally acknowledged that no legal dispute existed between the parties any longer.[11] This wording precluded the claims of bribery from being examined by the Tribunal.

The reaction of the Respondent party was, of course, to benefit from the alleged corruption scandal for its own interests. The Respondent used this opportunity and disputed the admissibility of the case saying that the investment in dispute was involved in corruption and bribery[12], and what the Claimants conducted with Azerbaijani officials was absolutely

[9] R.Zachary-Torres Fowler, *Undermining the ICSID: How the Global Anti-bribery Regime Impairs Investor-State Arbitration*, 52 Virginia Journal of International Law 995, 1023. (2012).
[10] Austin I. Pulle, *Demand Side of Corruption and Foreign Investment Law*, 4 Journal of International and Comparative Law 1, 28. (2017).
[11] *Supra* note 1, §105.
[12] Sergey Alekhin, Leonid Shmatenko, Corruption in Investor-State Arbitration: It Takes Two to Tango, A.V.Asoskov, A.I.Muranov, R.M.Khodykin, (Ed.), in New Horizons of International Arbitration, Moscow: Association of Private International and Comparative Law 150, 166. (2018).

contradictory with the **international public policy**[13].[14] One more issue to put a consideration on is the effects of the evidence of corruption that might impair the validity of investment contract between the Claimants and Respondent. While the Respondent, in this case, contested the jurisdiction of the Tribunal because of the corruption claim, the Tribunal set a deadline to submit their pleadings to the Tribunal regarding the bribery scandal. But during this period, the parties ended up with a concluding agreement of settlement. In any case, the Respondent party cannot be qualified as justified by contesting the jurisdiction of the arbitration tribunal for the allegation of bribery. Here comes *the principle of separability* or *severability* of an arbitration agreement or dispute settlement agreement from the main investment contract. We would like to state that even if the corruption claims were approved to be true and thereby defected the validity of the underlying investment contract, because the investment in dispute would be tainted, the Tribunal would expect the Respondent party to prove that the arbitration agreement *per se* was invalid too, due to the involvement of bribery in this agreement too. Thus the Tribunal's jurisdiction over the validity of the arbitration agreement would still survive. This notion was reiterated in the case of *Malicorp Ltd v. Egypt*[15]. Although the violation of international public policy has not been explicitly enumerated among the grounds in Article 52 of the ICSID Convention, the Tribunal's failure to address the question of illegality and involvement of bribery, however, would have amounted to the violation of international public policy.[16]

The legal basis for contesting the jurisdiction of the Tribunal lies in Article 41(1) of the ICSID Convention[17] which specifies the *principle of competence-competence*. According to paragraph 2 of Article 41 of the ICSID Convention, in case of such allegations, *the Tribunal shall either deal with the objection to jurisdiction as a preliminary question or examine it under the merits of the case.* As

[13] Bearing in mind that the dynamic nature of the concept of public policy depends on every state, according to the reports of the Committee on International Commercial Arbitration of the International Law Association of 2000 and 2002, the concept of international public policy has been confined to violations of really fundamental conceptions of the legal order in the country concerned. This concept of international public policy includes the following elements:

1) fundamental principles, pertaining to justice or morality; this category is divided into two groups, one of which refers to fundamental substantive principles and the other, procedural public policy principles;
2) rules designed to serve the essential political, social or economic interests of the State ("lois de police" or "public policy rules";
3) duty of the State to respect its obligations towards other States or international organizations.

The scope of the international public policy is narrower than of domestic public policy. See, The International Law Association's Report of the Seventieth Conference (2002), https://home.heinonline.org/ (last visited April 27, 2018).

[14] *Supra* note 1, §7.

[15] 'Malicorp Ltd v. The Arab Republic of Egypt,' Award, ICSID Case No. ARB/08/18, February 07, 2011, available at https://www.italaw.com/cases/660, §119, (last visited April 17, 2018).

[16] Richard H. Kreindler, Competence-Competence in the Face of Illegality in Contracts and Arbitration Agreements, Brill-Nijhoff, 338. (2013).

[17] *See* the full text of the ICSID Convention, available at https://icsid.worldbank.org/en/Documents/icsiddocs/ICSID%20Convention%20English.pdf, (last visited April 17, 2018).

obvious from the facts of the case, the Tribunal decided to examine it as a preliminary question and set a deadline for both parties in order to receive their memorials and further pleadings. This issue led the Claimants to think about the settlement of dispute amicably more often.

The involvement of corruption and bribery in investment contracts is not only the case of Azpetrol companies. *World Duty Free case*[18] examined by the ICSID Arbitration Tribunal in 2006, three years before the award on the *Azpetrol case,* is also significant in this regard. The common point in both cases is that the Claimants gave pieces of evidence about the involvement of the bribe, but the *World Duty Free case* ended differently from the *Azpetrol case*. The Tribunal in the *World Duty Free case* dismissed the claim brought by the World Duty Free company due to the involvement of the bribe in the investment contract of 1989. According to the view of the Tribunal, the investment contract was null and void, because the contract not only *violated the international public policy* but at the same time the respective rules of English and Kenyan laws in force.[19] The violation of the international public policy is a good point to knock on, in relation to the object of our study, as the Respondent in the Azpetrol case also claimed the violation of the international public policy when they raised the dismissal of the proceedings. In any case, we acknowledge the *World Duty Free case* as a well-established example to demonstrate the possible outcomes and subsequent scenario, if things did not go as well as the parties to the dispute in the *Azpetrol case* wished. The difference between the two outcomes can only be explained by the protection of the reputation of the respective companies because in the *Azpetrol case*, the bribery claim remained undisclosed to the public.[20]

To conclude, two points are worth to note about the possible and existing effects of bribery allegations. Firstly, the testimony by the Claimant had a considerable impact on the next stage[21] when both parties aimed to resolve the issue as soon as possible, prior to the judgment by the Tribunal[22]. This practice is familiar to the energy investment arbitration. The parties to the dispute sometimes face with such an unexpected situation, especially during the cross-examinations that they eventually turn to the negotiations on the settlement agreement as soon as possible.[23] Because this tact enables parties

[18] 'World Duty Free Company Ltd v Republic of Kenya', Award, ICSID Case No ARB/00/7, 4 October 2006, available at https://www.italaw.com/cases/documents/3281 (last visited April 20, 2018). ('*World Duty Free case'*)

[19] Cecily Rose, *Questioning the Role of International Arbitration in the Fight against Corruption*, 31 Journal of International Arbitration 183, 210. (2014).

[20] It should also be noted that in the *Fondel case* which we understand from the *Azpetrol case* that the Respondent accepted the payment to the Fondel, the Respondent even managed to prevent the publication of the award and protect its secrecy.

[21] Jean-Michel Marcoux, International Investment Law and the Evolving Codification of Foreign Investors' Responsibilities by Intergovernmental Organizations, University of Victoria, 170. (2016).

[22] *See* the similar purpose in the case facts, *Azpetrol Case*, §17.

[23] Rose, 210.

to avoid the publication of the judgment which includes some paragraphs about the bribery or other illegal activities of any of parties, although awards on the dismissal of the proceedings are mostly published.[24] Secondly, from our perspective, while the Respondent was indeed wrong when they asserted the dismissal of the proceedings on the claims of bribery by ignoring the principle of separability of the arbitration agreement, they succeeded by the inclusion of a general wording which reads as **"no legal dispute exists"** in the settlement agreement. If the Claimant contested the terms and conditions of the settlement agreement and did not accept such a general wording either, the pleadings of bribery scandal would probably be heard before the Tribunal.

B. The Nature Of Exchange Of E-Mails Between The Parties

The dispute between the parties, however, mainly derives from the characteristics of the exchange of e-mails by counsels of parties to the dispute. While the Claimants allege that the exchange of e-mails did not create any binding agreement between the parties on the settlement but just aimed at the agreement of standstill until the conclusion of the final binding agreement, the Respondent thought the opposite.

It is clear from the facts of the case that no legal dispute exists over the bindingness of the agreement reached as a result of the exchange of e-mails between the parties on December 16 and 19, 2008, respectively.[25] This fact is crucial, in terms of switching the gears to the most relevant question – to the nature of the agreement. If the agreement concluded between the parties was a settlement agreement, the Respondent was true when they alleged the dismissal of the proceedings by the Tribunal, by completing the documentation by December 31, 2008. On the other hand, if the exchange of e-mails knocked solely on the agreement on a standstill, then the award of the Tribunal was wrong, and the examinations had to proceed until parties reach the final agreement on the dispute settlement.

Subject to the e-mail conversations between the parties prior to December 16, 2008, the e-mails on the specified date and on December 19, 2008, had an utmost importance. This importance and huge consideration to their wordings have been reiterated in the award by the Tribunal. On December 16, 2008, the counsel of the Respondent e-mailed the Claimants, the following e-mail:

Our client counter-offers as set out below. Upon receipt of your acceptance (which should expressly state your authority on behalf of all Fondel[26] and Azpetrol

[24] *Ibid*, 194.
[25] *Supra* note 1, §47.
[26] The Fondel case was separate but still interrelated with the Azpetrol case that they were resolved simultaneously with a single settlement agreement between the parties. For more information, *see*, 'Fondel Metal Participations B.V. v. The Republic of Azerbaijan,' Award, ICSID Case No. ARB/07/1, (2008), available at https://www.italaw.com/cases/3632, (last visited April 18, 2018). *('Fondel Case')*.

claimants), Azerbaijan is prepared immediately to inform the Fondel and Azpetrol Tribunals that ***a standstill is agreed until 31 December 2008. The settlement is conditional upon on [sic] all documentation being executed by 31 December 2008****, such condition being for the benefit of (and thus can only be waived by) Azerbaijan.*[27] [emphasis added]

This counter-offer included *inter alia* seven independent paragraphs, namely, the *withdrawal of claims, nuisance payment by Azerbaijan in respect of Fondel claim* (1.500.000 US dollars), *no admission of liability by Azerbaijan, confidentiality, the scope of settlement for both claims and parties* and finally, *allegations concerning personal and professional conduct.*

This e-mail consists of the gist of the case, from our perspective, because the Respondent here comes with a precise and novel offer (so-called counter-offer). In this counter-offer, the Respondent connotes the standstill agreement until December 31, 2008, but goes even beyond that, and refers to this e-mail as a settlement, putting a mere documentation condition. Additionally, the wording used in the subsequent seven paragraphs justifies that the dispute is going to be closed. Under the heading of confidentiality, the Respondent refers to these terms as *"terms of this settlement"* again. Under paragraphs 5 and 6 of this settlement e-mail, the wording of settlement has been used for several times with the most general wording to cover all reasonable claims.

Accordingly, on December 19, 2008, after *the acceptance of the offer of settlement* by the counsel of the Claimant in the Fondel case, the counsel of the Claimants in Azpetrol case also confirmed *the acceptance of an offer* on behalf of the Azpetrol companies, with a one-line short response. The Tribunal, in the award, also paid attention to the character of this acceptance and highlighted that this acceptance e-mail was sent as *a reply to the e-mail* of the counsel of the Claimant in the Fondel case. The following e-mails expressed the waiver by the parties of the argument over the bribery issues.[28]

Practically speaking, settlement agreements, in most cases, affect past, present and future claims and events with a general wording contained. Since settlement agreements do not limit themselves to the particular dispute or claim and extend to past and future claims with a general claim, there can even raise another dispute over the meaning of settlement agreements. In such cases, courts or tribunals are expected to look at the objectivity criteria, rather than analyzing subjective intents of parties; at least English law demands that. In *Azpetrol case*, the situation was not very different. That's why the Tribunal took account of an objective meaning and interpreted the plain meaning of the exchange of e-mails between the parties. Putting the reasonable third person in the centre of the

[27] *Supra* note 1, §28.
[28] *Ibid*, §32.

interpretation helped the Tribunal a lot at the interpretation phase. The Tribunal's choice was actually the feature of the English law, which demands the exclusion of subjective reservation after the formation of a contract, in order to contest the existence of a contract between parties.[29] The objective criterion brings the reasonable observer to the centre of the assessment of the formation of a contract, and this criterion has been referred as *an outward appearance of the acceptance*[30] in the award of the Tribunal.

As set out above, the parties then on December 19, 2008, informed the Tribunal about *"the agreement in principle"* between the parties to the dispute and asked for a procedural standstill until December 31, 2008. However, between December 19-31, 2008, the Claimant behaved doubtfully towards the nature of the legal agreement between the parties. The Tribunal's interpretation of the exchange of e-mails between the parties relied on the wording and plain meaning of the words used in the e-mails, along with the applicable law, effects of which are discussed under the next chapter.

III. Applicable Law And Its Impact On The Interpretation Of The Settlement Agreement

A. The Influence Of English Law On The Interpretation

Neither the competence of the Tribunal to determine if a settlement agreement was concluded or not nor the applicability of English law on the existence of a settlement agreement and its interpretation was questioned by the parties, during the proceedings before the Tribunal.[31] The applicability of the English law was the priority for the Tribunal if it is taken by sequence[32]. Notwithstanding the Tribunal sometimes pointed out the international standards, it should be pointed out that the application of the English law affected the final decision significantly.

B. Language Of The Settlement Agreement

According to the Tribunal, the English law which is the applicable law, in this case, does not ascertain binding requirements for the formation of a contract. Two main requirements are the **consideration of parties** and **meeting of minds** (*consensus ad idem*). A formation of a contract is not depended on the written form or other formalities, thus, according to the Tribunal, the parties can conclude their binding settlement agreement simply by exchanging e-mail, if they wish so. Other two requirements for the formation of a contract, developed by the most prominent commentaries

[29] *Ibid*, §59.
[30] *Ibid*, §60.
[31] *Ibid*, §47.
[32] J.Christopher Thomas, Harpreet Kaur Dhillon, *Applicable Law under International Investment Treaties*, 26 Singapure Academy of Law Journal 975, 994. (2014).

are embodied in the *intention to create legal relations and completeness & certainty of a contract.*

Opposed to the pleadings by the Claimants, the Tribunal focused on the plain wording of the settlement agreement and held that according to the meaning of the wording used in the offer dated December 16, 2008, by the Respondent, the request for the immediate standstill had a complementary character, in relation to the main purpose of the offer which was the settlement of the dispute.[33] The Tribunal, in this regard, considered the inclusion of the condition of documentation as an evidence that the agreement was aimed at the settlement of the dispute. We would like to highly appreciate the point of the Tribunal where they spelled the *"argumentum a contrario"* to come to a conclusion that if there was no offer of settlement, the documentation requirement would mean nothing more than nonsense.

The Claimants' evidence of the usage of the terminology of *"agreement in principle"* when both parties informed the Tribunals in written form was considered unsatisfactory by the Tribunal in the final award.[34] The claim was that this term was generally being used to indicate the non-binding feature of a contract in the English law. The Tribunal, in response, held that this term was not used in the communications between the parties and there is no notorious evidence to justify that this term is used for non-binding agreements in the English law. Here again, we witness the impact of the English law on the interpretation of another term. Indeed, the English law is too far away from such terminology and the term *"agreement in principle"* does make no sense even if referred to the legal practice of the English law.

C. Incompleteness Of The Settlement Agreement

Apart from the allegations about the absence of *the meeting of minds* that were discussed *supra* under the objectivity criteria, the Claimants also concerned about the incompleteness of the settlement agreement. The Claimants insisted, in this case, on the absence of the provisions below, in the settlement agreement:

- *The provision of the governing law;*
- *The provision of dispute resolution;*
- *The provision on the protection of the director of the Claimant companies who gave an evidence about the fact that he bribed Azerbaijani officials.*[35] [emphasis added]

However, the Tribunal concluded that the first two provisions cannot be established indispensable for the formation of the contract. According to the point of view of the Tribunal, agreements can be concluded well in the

[33] *Azpetrol Case*, §70.
[34] *Ibid*, §77.
[35] *Ibid*, §84.

absence of such provisions. Being completely agreed with the Tribunal, from our perspective, since these two provisions often appear in arbitration agreements, they are always independent or severable from the main contracts. That's why their absence does not harm the completeness of the main contract, as much as their presence does not contribute to its completeness. Regarding the third provision, the Tribunal did not consider it indispensable as well, because of the insufficiency in the language of the Claimant when asking for a provision for the safeguards in Azerbaijan for the director of the Claimant companies who gave an evidence for the bribery. We would complement this argument by pointing out that even if it had even been included in the agreement as an indispensable part, the intention of the Claimants to ensure the evasion of the director of the Claimant companies would have been quite unreal, because of the illegality of guaranteeing someone suspected to commit a crime.

Apparently, the English law demonstrates a quite flexible approach to the concept of contract. The courts in England recognize the binding feature of a contract, even when the said contracts lack their essential terms.[36] The approach towards the validity of a contract or an agreement is quite broad that there are no legislative criteria that determine what the essential terms of contracts are. In this respect, contracting parties are always free to choose their essential terms and include them in the respective contracts. Furthermore, it should be pointed out that no technical rules dominate in English law, nor does the international law prescribe such an array of rules.[37] Being partly agreed with the Tribunal, in fact, we should not deny the rules of interpretation brought by the Vienna Convention of 1969. The point of view of the Tribunal in the *Azpetrol case*, with regard to the similarities between the thoughts in the English and international law, is true to the extent that both of them focus mainly on the identification of *the intention of the parties fully and fairly*. However, there is a certain difference between their approaches to the interpretation that will be discussed below.

D. Relationship Between 'Travaux Preparatoires' And The Interpretation

The difference we gave a little clue about above is the exclusion of the *travaux preparatoires* from the interpretation of contracts in the English law. This distinction between the English law and the international legal practice is worth to note because the Tribunal in the *Azpetrol case* put the negotiation sessions of the respective settlement agreement completely aside and focused on the plain wording.[38] We appreciate this paragraph of our case study as the most important one because **the exclusion of the negotiations**

[36] *Ibid*, §55-57.
[37] Eirik Bjorge, *The Evolutionary Interpretation of Treaties: The Means of Interpretation Admissible for the Establishment of the Intention of the Parties*, Oxford Scholarship Online 1, 37-38. (2014).
[38] *See* the point of the Tribunal, *Azpetrol Case*, §62-65.

history, in addition, of **subsequent conducts** of the parties from the interpretation of the concluded settlement agreement, led to a different judgment of the Tribunal.

The Claimants were also alleging the importance of their communications with the Respondent before December 16, 2008, in which they claimed that the parties had agreed to finalize the standstill agreement in the first stage and then move on to the discussions of the settlement agreement after December 31, 2008.[39] According to their claims, this argument was also supported by the subsequent conduct of the parties after December 19, 2008.

From the assessment of the Tribunal, it is more than clear that the Tribunal was inclined to put the negotiations history and subsequent conducts of parties just aside, and concentrate solely on what the e-mails exchanged between December 16-19, 2008 said in this respect. The reference to the *travaux preparatoires* is actual in the international law, but also in the English law in some exceptional cases, such as **an aid to interpreting the objective and purpose of parties to the contract**. The reason for avoiding the recourse to the negotiations history lies in the aim of encouraging the parties to negotiate in good faith and not to concern about the ramifications of their dialogue at the next stage when they fail to resolve the issue amicably and head to the litigate or arbitrate their dispute. Following this rule, parties will always be free to attempt the resolution of their dispute by negotiations and will not be worried about the "side-effects" of their negotiations during the litigation and arbitration phases in the future.

However, in the Azpetrol case, the Tribunal did not notice any need for the clarification of the parties' objective and purpose while they were e-mailing each other before December 16, 2008. According to the Tribunal, even if it referred to the negotiations history where the parties were speaking about the two-stage resolution of the case, the parties' aim was still the same which was the settlement of the dispute.[40] Thus, the Tribunal considered it unnecessary to take a look at what the parties discussed in their exchange of e-mails before and after December 16-19, 2008, just because of the fact that the parties' aims remained unchanged in the *travaux preparatoires*, though it changed dramatically by the end of December 2008. The subsequent changes, however, did not affect the parties' positions, due to the already concluded binding settlement agreement between them. Accordingly, the Tribunal held that the recourse to the subsequent conducts of the parties would not prove the claim of the Claimant about the absence of the settlement agreement.[41] Of course, the applicable English law was one

[39] *Ibid*, §89.
[40] *Ibid*, §90-91.
[41] *Ibid*, §92.

of the undeniable factors which helped the Tribunal come up with such an argument.[42]

E. Speak Off The Cuff: What If The Applicable Law Was Other Than English Law?

This case cannot be categorized as complex, as the choice of law which applied to the jurisdiction of the Tribunal and characteristics of the settlement agreement, including its interpretation had been determined by the parties before the Tribunal focused on the jurisdictional matters. The parties agreed on the English law to apply the dominant rules on their dispute, however, in the absence of such an agreement on the choice of law between the parties, things might have gone quite differently. Article 42(1) of the ICSID Convention reads in a way that in the absence of the agreement of parties on the choice of law, the tribunal may apply the law of the host state, together with the rules of international law. Thus, it can be claimed that the state party Respondent in the *Azpetrol case*, did a good job by setting the English law as the applicable law. Because, if the applicable law was not opted by the parties or the parties agreed on an applicable law other than any law based on the *common law* system, the Tribunal might have come to a completely different conclusion from they did in the present case. The point of rules of international law for the interpretation of treaties has been discussed *supra*. However, for this part of our case study, we find it of paramount importance to turn to another alternative situation, in order to better evaluate to what extent the applicable law, in this case, triggered the said conclusion.

As understood from Article 42(1) of the ICSID Convention, the Tribunal would turn to the law of the host state, in this case, if the parties did not choose any applicable law. Which means, Azerbaijani law as the law of the host state would be applied in order to determine if the agreement concluded between the parties was indeed a settlement agreement. Contracts have been regulated under Article 405 of the Civil Code of the Republic of Azerbaijan, which together with subsequent provisions on contracts, specifies the legislative requirements for the conclusion of a contract.

Azerbaijani contract law has been based on the well-known system of offer and acceptance, as many Continental legal systems have. No oral or written contract requirement exists for the conclusion of a valid contract that we can classify this point as one of the similarities with the applicable English law. According to Article 405, however, a contract is considered concluded when parties come to an agreement on **all essential terms of a contract**. These essential terms, in accordance with the law, include *the terms*

[42] Eleni Methymaki, Antonios Tzanakopoulos, Masters of Puppets? Reassertion of Control through Joint Investment Treaty Interpretation, Cambridge University Press, 171. (2017).

related with an object of a contract, the terms referred in the mentioned law as essential or necessary for contracts, and the terms requiring an agreement with the request of one of the parties. In the *Azpetrol case*, when the Claimants disputed the incompleteness of the agreement, they also referred to the absence of the term about the sufficient safeguards for the director of the Claimant companies who had testified about the bribery with Azerbaijani officials. But the Tribunal, in its award, criticized the term "essential" itself, giving a reference to the English case law.[43] According to the point of view endorsed by the Tribunal in the final award, parties are masters of their agreement, and if they consider a term as essential, they are supposed to insert it into the following agreement. If not, they won't do so, and nor will they be bound by the said terms.

While other terms about the offer and acceptance or the required form of the contract do not frame the contract with the power of the legislator, the philosophy behind the formation of contracts in English and Azerbaijani law seem to be different. The English case law complains about the ambiguity of the term "essential" and leaves it to the mind of contracting parties to determine what is essential for them. The Azerbaijani law, in contrast, demonstrates a positivistic approach and requires that all essential terms shall be included in the contract in order at least to define it as a contract. Even those essential terms have been enumerated in three categories to show the way to courts about what the essential terms are, for different contracts. Taking this approach in the Azerbaijani law into account together with the claims of the Claimants in the *Azpetrol case*, it is not straightforward to claim that the term about the safeguards for the director of the Claimant companies will be related with the object of the settlement agreement. There are no specific requirements for the essential terms of the settlement agreement in the Azerbaijani law either. However, coming to the third category of essential terms in Article 405 of the Civil Code, the Claimants were actually discussing the inclusion of sufficient safeguards for the director of the Claimant companies in the agreement before December 16, 2008, in the negotiations sessions, even when the negotiations started in late summer of 2008. But from the perspective of the Tribunal, these negotiations did only make sense in the interpretation of international treaties in international law. According to Article 404(2) of the Civil Code which regulates the interpretation of a contract, during the interpretation of a contract, previous negotiations and correspondence and subsequent conducts of parties shall be considered. This provision also supports our claim that if the applicable law had been Azerbaijani law, the Tribunal would have sought essential terms in the contract and have a look at the negotiations phase in order to find out if the provision of the protection for

[43] *Azpetrol Case*, §57.

the director was considered as an essential term. Because if the answer is affirmative, there will be no contract because of the incompleteness of its terms.

To summarize, the changes in the applicable law would apparently affect the whole examination conducted by the Tribunal. In our opinion, the significance of the English law on the award of the Tribunal is much more clear, when alternative choices of law are analyzed. Thus, the efforts by the Respondent both in the negotiations and contract drafting sessions, and also when together they decided the applicable law were absolutely successful. The flexibility of approaches in the English law led to the conclusion that the settlement agreement was approved by the Tribunal which contained no provision in favor of the Claimants or in compliance with the expectations of the Claimants.

Conclusion

The *Azpetrol case* is firstly a good example to explain the effects of side events on the arbitration proceedings. Corruption and bribery is not an exception in terms of the investment arbitration, and no parties have been insured from such unexpected happenings during the proceedings. Mostly the state party respondents are successful to benefit from such situations and finalize the dispute by releasing a nuisance payment to the claimants' account. These acts contain "the bottom side of an iceberg", as regards these issues are neither clarified in the tribunal awards nor did they even open to the investigations. The inclination of most parties towards the settlement of disputes amicably increases the importance of settlement agreements in the investment arbitration.

The object of our case study has indeed put a legacy behind which can be used by many parties to investment disputes as a manual. The reflections of the submissions of the Respondent in the exchange of e-mails and precise and certain wordings used were the architects of the ultimate success. In order to avoid the drop-hands result and at least gain some compensations from investment disputes, claimant investment companies have to be careful with the acceptance they submit in response to offers of respondent state parties. However, another tribute needs to be paid to the choice of law, especially by the Respondent party in the *Azpetrol case*, who very much succeeded just because of the flexibility of the English law. As the English law has not set any written conditions for contracts, apart from those established by legal doctrine, the Tribunal found it enough to see the meeting of minds of the parties to conclude a binding contract.

No doubt, the English law played a significant role in the interpretation of the settlement agreement as well. The Tribunal neither looked for the essential terms to be included in the settlement agreement nor did it take the

account of negotiations and subsequent conducts of the parties, to decide the validity of the settlement agreement. However, as we discussed *supra*, the law of the host state, in this case, would have been less efficient for the Respondent, because of the peculiarities of contract law in Azerbaijan. Although states tend to choose their own laws as an applicable law in the investment arbitration, the choice of law, this time, has contributed to the victory of Azerbaijan, in the *Azpetrol case*. Thus, the parties to investment agreements should acknowledge that no stable rule exists in the choice of law, and parties should research about all features of laws under which they want their dispute to be examined in the future.