**ON BEHALF OF THE REPUBLIC OF AZERBAIJAN**

**DECISION**

**OF THE PLENUM OF THE CONSTITUTIONAL COURT**

**OF THE REPUBLIC OF AZERBAIJAN**

*On complaint lodged by Saip Azer Machine Company concerning verification of conformity of the decision of the Board on Civil Cases of the Supreme Court of the Republic of Azerbaijan of September 18, 2003 to Constitution and legislation of the Republic of Azerbaijan*

**3 August, 2004 Baku city**

The Plenum of the Constitutional Court of the Republic of Azerbaijan composed of Chairman F.Abdullayev, Judges F.Babayev, B.Garibov, R.Gvaladze (Reporter Judge), E. Mammadov, I. Najafov, S. Salmanova and A. Sultanov,

joined in the proceedings by the Court Clerk I. Ismayilov;

representative of SaipAzer Machine Company- S. Babayev

in accordance with Article 130.5 of the Constitution of the Republic of Azerbaijan has examined in open court session via the procedure of constitutional proceeding the constitutional case on complaint lodged by Saip Azer Machine Company concerning verification of conformity of the decision of the Board on Civil Cases of the Supreme Court of the Republic of Azerbaijan of September 18, 2003 to Constitution and legislation of the Republic of Azerbaijan.

Although the date and venue of court proceedings was informed in advance in writing, the case proceeded in absence of the respondent representatives.

Having heard the report of Judge R. Gvaladze, applicant’s representative S. Babayev and having studied the materials of the case, Plenum of the Constitutional Court

**DETERMINED AS FOLLOWS:**

SaipAzer Machine Company along with Azer Asia joint venture insurance company have submitted the claim against En Trans company for use of mortgage property for compensation of the main amount 340 436 dollars USA of debts and 3 205 400 manats of insurance payments. After this Azer-Asya joint venture insurance company has applied to court with additional claim, requesting the adoption of decision on invalidation of the insurance contract number 31 from April 24, 2000 made with Saip Azer Machine Company and insurance contract number 33 from May 01, 2000 made with En-Trans company.

In turn, SaipAzer Machine Company has refused from joint claim, and entered into the dispute as independent claiming party – has requested the replacement of respondents from EnTrans to AzerAsia Joint Venture Insurance Company and payment of insurance compensation at the amount of 550 080 dollars USA and deduction of state duties to its favor.

In accordance with decision of the Court on Settlement of Disputes Arising from International Contracts from April 7, 2003:

The claim of AzerAsia joint-venture insurance company against EnTrans and SaipAzer Machine Company was rejected;

The claim of SaipAzer Machine Company against AzerAsia joint-venture insurance company was satisfied;

The claim of AzerAsia joint-venture insurance company against EnTrans company for compensation by mortgage of the principle amount of 340 436 dollars USA owned to SaipAzer Machine Company and debts of 3 205 400 manats to AzerAsia joint-venture insurance company via change of ownership of 30 Zamyad A60.9 minibuses, was left non-reviewed in accordance with provisions of Article 259.0.6 of CPC.

In accordance with decision of Economic Court of the Republic of Azerbaijan from July 11, 2003 the decision of first instance court remained unchanged.

In accordance with decision of the Board on Settlement of Economic Disputes (BSED) of the Supreme Court of the Republic of Azerbaijan, the decision of the Economic Court of the Republic of Azerbaijan was changed:

Contracts between AzerAsia joint-venture insurance company and EnTrans company (contract No. 31 from April 24, 2000), and SaipAzer Machine Company (Contract No. 33, from May 1, 2000) considered partially invalid (in the part of 286 880 dollars USA, as a result of increase in price of new minibuses from 7000 dollars USA to 9 596 dollars USA);

Claim of SaipAzeri Machine Company against AzerAsia joint-venture insurance company on payment o 100 655 dollars USA left unchanged;

Part of claim on deduction of the price for transfer of 20 minibuses to Nihad Motors Company and payment of 109 345 dollars USA as partial payment for minibuses was rejected.

As a response to additional cassation complaint of SaipAzeri Machine Company, chairman of Supreme Court in the letter from May 24, 2004 has noted that since grounds of the complaint do not correspond with provisions of Article 424 of CPC, its proceeding through the Plenary Session of the Supreme Court is not possible.

SaipAzer Machine Company in its complaint submitted to Constitution Court has stated that decision of the cassation instance is illegal and groundless, and requested its review for compliance with Constitution and legislation of the Republic of Azerbaijan.

In Applicant’s opinion, BSED of Supreme Court has violated the requirements of provisions of Articles 416 and 417 of CPC, exceeded its authority, reviewed the case in essence, and as a result adopted the illegal decision.

Besides, in applicant’s opinion the court has applied the provisions of Article 29.1.6 of the Law on Insurance, which it should not have applied, and as a result made wrong conclusions.

In respect to the complaint the Plenary Session of Constitution Court hereby decides.

In accordance with Article 125 of the Constitution of the Republic of Azerbaijan, only courts are implementing the representation of court power in Azerbaijan Republic.

Article 6 of CPC based on this provision of Constitution, judgment on civil cases and economic disputes shall only be the competence of courts, which shall implement these in accordance with legislation.

These rules, including procedures for case proceeding by court instances are clearly defined in CPC.

In accordance with these rules, first instance courts by involvement of parties to the case, their representatives, witnesses, experts shall implement the court procedures, court speeches and identification of evidences with full compliance with court procedures at all stages.

Appeal court shall review once more the decision of first instance court that did not enter into force. It shall not only review the legitimacy and grounding of the court decision in the appeal order, but also may review the case in essence if necessary (Article 372 of CPC).

Since cassation instance reviews the decisions, which have already entered into force, this instance shall not review case in essence, case conditions are not investigated, no new evidences are accepted and only existing evidences are legally evaluated.

Cassation instance only reviews the compliance with material and procedural norms of the adopted appeal instance decision (Article 416 of CPC)

In the disputed case the cassation instance court has violated the provisions of legislation and assessed actual conditions and evidences of the case.

Decision of BSED of Supreme Court states: “Upon the review of case documentation, hearing of explanations of parties, Board on Settlement of Economic Disputes of Supreme Court deems that …”. As a result of such review and hearings cassation instance court has rejected certain part of evidences collected by first instance and appeal instance courts, while deeming the others being false. In general, Board of the Supreme Court has violated significantly the provisions of Article 416 of the CPC, and by review of new facts and evidences has reviewed the case in essence.

Cassation instance court also violated the provisions of Article 417 of CPC. In this Article the authorities of cassation instance court are clearly identified.

Introduction of changes to the decision of appeal instance court covers the issues related with case essence (Article 417.0.2 of CPC). By introduction of new evidences, providing legal assessment to existing evidences of the appeal instance court resulted in decision change in essence, which is not a competence of cassation instance court.

When cassation instance court cancels fully or partially the decision of the appeal instance court due to incompliance with material and procedural norms, differs from the appeal court that it cannot adopt new decision on the case, but shall send it back to the appeal instance court for additional review (Article 417.0.3 of CPC).

But the cassation instance court violated the above regulations, and with reference to change of the decision of the appeal instance court has adopted the new decision on the basis of non-compliance of previous instance decision and results with actual case conditions.

Besides, BSED of Supreme Court, by application of material norms to new conditions investigated has exceeded its authority.

Thus, the court has satisfied the decision of AzerAsia joint-venture insurance company and has cancelled the part of the insurance contract which exceeded insurance risk amount of 7000 dollars USA with reference to Article 29.1.6 of the Law on Insurance. First and appeal instance courts made their decisions on the basis of civil liability insurance contracts.

Constitution Court also notes that the decision of cassation instance court does not also comply with everybody’s right for court protection of rights and freedoms, stipulated under Article 60 of Constitution. In accordance with this provision of Constitution nobody’s rights for court protection can be restricted and shall be applicable for all court instances.

International Law (Article 8 of General Statement on Human Rights, paragraph 1, article 14 of the International Pact on Civil and Political Rights, paragraph 1, Article 6 of the Convention for protection of Main Human Rights and Freedoms) court protection shall be defined as reinstatement of rights under fair court proceedings implemented by independent courts.

Thus, in accordance with provision of Constitution of the Republic of Azerbaijan and international legislation the court decisions shall satisfy the principle of fairness and provide reinstatement of violated rights. Wrong court decision shall not be considered as act of fair judgment.

From this point of view the decision of the cassation instance court made disputed by SaipAzer Machine Company contradicts with provisions of Article 60 of Constitution.

In connection with above, Plenary Session of the Constitution Court decides that the decision of the Board on Economic Disputes of the Supreme Court of the Republic of Azerbaijan dated September 18, 2003 on the claim of AzerAsia joint-venture insurance company against EnTrans and SaipAzer Machine Company on the cancellation of contrracts made, and th claim of SaipAzer Machine Company against AzerAsia joint-venture insurance company for payment of insurance and compensation of paid state duties, shall be cancelled due to contradictions with provisions of Article 60 of Constitution of the Republic of Azerbaijan, Articles 416, 417.0.2 and 417.0.3 of the Civil Procedures Code. The case shall be revised in accordance with terms and procedures stipulated under the civil procedures code.

Using the guidance of parts V and IX of Article 130 of the Constitution of the Republic of Azerbaijan, Articles 52, 62, 63, 65-67 and 69 of the law of the Republic of Azerbaijan “On Constitution Court” the Plenary Session of the Constitution Court of the Republic of Azerbaijan

**DECIDED:**

To recognize the decision of the Board on Civil Cases of the Supreme Court of the Republic of Azerbaijan of September 18, 2003 made under the claim of AzerAsia joint-venture insurance company against EnTrans and SaipAzer Machine Company on the cancellation of contrracts made, and th claim of SaipAzer Machine Company against AzerAsia joint-venture insurance company for payment of insurance and compensation of paid state duties as null and void because of its contradiction to Article 60 of the Constitution of the Republic of Azerbaijan, and Articles 416, 417.0.2 and 417.0.3 of the Civil Procedures Code of the Republic of Azerbaijan and the case shall be processed on the basis of this Decision and via the procedure specified in the Civil Procedure Code of the Republic of Azerbaijan.

2. The decision of the Constitutional Court of the Republic of Azerbaijan comes into force from the date of its publication.

3. The decision is subject to publication in the "Azerbaijan", “Respublika”, “Xalg gazeti”, “Bakinsky rabochiy” newspapers and “Bulletin of the Constitutional Court of the Republic of Azerbaijan”.

4. The decision is final and cannot be cancelled, changed or officially interpreted by any body or official.