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Recognition and Enforcement of Arbitration Awards in Kazakhstan

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Abstract

Arbitration, as an alternative way to resolve commercial disputes, has been used in Kazakhstan for more than twenty years. Arbitration Court is governed by Civil Procedure Code, The Law On Enactments and the Regulatory Resolution. The expansion of the list of documents in the Regulatory Resolution does not comply with the requirements of the New York Convention and therefore, the purpose of our study is to clarify it. The research institute of private law of the Caspian University together with Kazakhstan International Arbitration prepared proposals for making amendments and supplements to the Law On Arbitration and the CPC at the request of the Arbitration Chamber of Kazakhstan. Most of the proposals developed by us were approved and included in the Draft Law of the Republic of Kazakhstan On Amendments and Supplements to Certain Enactments of the Republic of Kazakhstan On Enhancing Protection of Title and Arbitration after discussion at the meetings of the General Meeting members of Arbitration Chamber of Kazakhstan. It was proposed to bringing in compliance with the New York Convention some paragraphs of the Art. 255 and the Art. 504 of CPC and a series of articles in the Law on arbitration. In this article also given answers to some questions of the arbitration court regarding corporate and marriage dispute, as well as an issue of contradiction public policy.

Keywords: Arbitration; Foreign court; Recognition of arbitration awards; Enforcement of arbitration awards; Arbitration agreement.

1. Introduction

Arbitration, as an alternative way to resolve commercial disputes, has been used in Kazakhstan for more than twenty years. And for this relatively short time it underwent through several stages in its development. Such stages were completely diametrical, from the stage of formation and systematic development to the stage of implicit and explicit destruction of arbitration courts, from the stage of passing the first arbitration laws to their consolidation. Formations of arbitration in the Republic of Kazakhstan are divided into 4 stages (Khusainov and Abdirova, 2017):

- stage of formation (1993-1999);
- stage of the collapse and destruction of arbitration courts (1999-2004);
- stage after adoption of arbitration Laws (2005-2009);
- a stage of improvement of legislation (from 2009 to the present).

Interest in ways to resolve disputes outside the court or in court, but before the start of the trial, with the help of qualified mediators is increasing in many countries around the world and has recently increased significantly in the Republic of Kazakhstan. The concept of alternative resolution of commercial disputes in the modern sense can be defined as a set of techniques and methods for resolving disputes between participants in business activities outside the court system of the Republic of Kazakhstan (Akimbekova, 2011). In Kazakhstan, the International Court of Arbitration often acts as a third party. The main advantages of arbitration courts: objectivity, quick resolution of disputes, small expenses on arbitration (Inamzhanova, 2009). Being one of the first of its kind in the country, it has settled over 100 economic disputes, including those with organizations and enterprises from Russia, Ukraine, Belarus, Kyrgyzstan, Uzbekistan, the Republic of Korea, Canada, the British Virgin Islands, Panama, etc. The IUS Court of Arbitration comprises 21 arbitrators and has established partnership relations with arbitral tribunals in Kazakhstan, Russia and the Czech Republic. Dozens of disputes have been settled, mutual payments made between enterprises, and property transferred through the arbitral proceedings. Some major enterprises in a number of regions of Kazakhstan have changed ownership due to awards by the Court (Greshnikov P., 2001).

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Arbitrators are passing through arbitration courts. Legally, they work under the CPC, Arbitration Law and so on, and their work is regulated by the Law *On arbitration courts* (Law on Arbitration Courts, 2004). The system of alternative dispute mediation (including arbitration courts) in Kazakhstan, receive the support of the Chairman and judges of the Supreme Court of Kazakhstan and the overwhelming majority of Kazakhstani lawyers and businessmen (Kairat, 2001). On October 31, 2015, the new Civil Procedure Code of the Republic of Kazakhstan (hereinafter referred to as the CPC) was adopted (Civil Procedure Code, 2015). It was followed by adoption on April 8, 2016, of the Law No. 488-V *On Arbitration of the Republic of Kazakhstan* (hereinafter referred to as the Arbitration Law) (The Law On Arbitration, 2016). It combined two previously existing Laws *(On Arbitration Courts* and *On International Arbitration*). According to the Art. 1 of the Arbitration Law, it applies to disputes arising out of civil law relations involving individuals and (or) legal entities, regardless of the place of residence or location of the dispute subjects within or outside the state, to be resolved by the arbitration, unless otherwise established by the legislative acts of the Republic of Kazakhstan. Thus, the division of Kazakhstan arbitration courts into internal and international arbitration was abolished.

The current CPC distinguish the concepts of "internal arbitration" and "foreign arbitration". Internal arbitration means arbitration established and operating in the Republic of Kazakhstan (it can be both institutional arbitration and ad hoc arbitration). A foreign arbitration means the same, but outside the Republic of Kazakhstan. Therefore, the provisions of Chapter 20 titled *Execution of Arbitration award* of the CPC (Articles 253 - 255) are devoted to the execution of the arbitration award rendered by the Kazakhstan arbitration. And the provisions of Chapter 57 titled *Proceedings on Cases Involving Foreign Persons* of the CPC (Articles 501, 503, 504) relate to the execution of an arbitration award rendered by a foreign arbitration. Individuals and entities are free to choose a foreign law if their relationship contains a foreign element: party, property, et cetera (Art. 1112 of the CC), provided that so called *imperative norms* (rules strictly obligatory due to their importance, whatever foreign law is applicable) of the Kazakh legislation are still observed. Such freedom may be restricted by legislative acts. The Arbitration law basically consists of imperative norms, so application of a foreign law to an arbitration agreement within the borders of the Republic of Kazakhstan is practically not possible, although not directly prohibited (Shaikenov, 2017).

The decisions of foreign international commercial arbitration courts under the *Convention on the Recognition and Enforcement of Foreign Arbitration awards* (New York, June 10, 1958, hereinafter referred to as the New York Convention) shall be recognized and enforced in the territory of the Republic of Kazakhstan in accordance with the CPC. Kazakhstan acceded to the Convention by the Decree No. 2485 of October 4, 1995 of the President of the Republic of Kazakhstan *On Accession of the Republic of Kazakhstan to the Convention on Recognition and Enforcement of Foreign Arbitration awards adopted in New York City on June 10, 1958.*

The Art. 3 of the New York Convention stipulates the following provision: "Each Contracting State recognizes arbitration awards as binding and enforces them in accordance with the procedural rules of the territory where recognition and enforcement of such decisions is sought under conditions set forth in the following articles. The recognition and enforcement of arbitration awards to which this Convention applies shall not be subject to substantially more one rous terms or higher fees and duties, or those that exist for the recognition and enforcement of domestic arbitration awards" (Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1959).

In accordance with the paragraph 1 of the Art. 501 titled *Recognition and enforcement of decisions of foreign courts, arbitration awards of foreign arbitration* of the Civil Procedure Code, the decisions, resolutions and rulings on the approval of settlement agreements, judicial orders of foreign courts as well as arbitration awards of foreign arbitration courts shall be recognized and enforced by the courts of the Republic of Kazakhstan, if recognition and enforcement of such enactments are provided for by legislation and (or) an international treaty ratified by the Republic of Kazakhstan, or on the basis of reciprocity.

According to the paragraph 1 of the Art. 4 of the Constitution of the Republic of Kazakhstan (Constitution of the Republic of Kazakhstan, 2001), the applicable law are, inter alia, the norms of regulatory resolutions of the Supreme Court of the Republic of Kazakhstan. In accordance with the paragraph 3 of the Art. 5 of the Law No. 480-V of April 6, 2016 *On Enactments of the Republic of Kazakhstan* (hereinafter referred to as the Law on Enactments) (The Law On Enactments, 2016), the regulatory resolution of the Supreme Court of the Republic of Kazakhstan contains explanations on the issues of judicial practice. In such case, according to the paragraph 5 of the Art. 10 of the Law On Enactments, regulatory resolutions of the Supreme Court of the Republic of Kazakhstan are outside the hierarchy of regulatory enactments established by the Art. 10 of the Law On Enactments.

Thus, in accordance with the clause 30 of the Regulatory Resolution No. 5 of July 11, 2003 *On Judgment* (hereinafter referred to as the Regulatory Resolution) (Regulatory Resolution, 2003) of the Supreme Court of the Republic of Kazakhstan, the awards of foreign courts and arbitrations, according to the Article 501 of the CPC, may be subject to binding execution in the Republic of Kazakhstan within three years from the date when the decision enters into legal force, if provided for by law or by an international treaty of the Republic of Kazakhstan. Such an award shall be enforced at the request of the interested party by the ruling of the court of the Republic of Kazakhstan in accordance with the rules on jurisdiction determined by the Civil Procedure Code at the place where an award shall be executed.

The application is usually accompanied by:

- a duly certified copy of an award the enforcement of which requires permission;
- an official document stating that the decision came into legal force if this circumstance does not result from the text of an award;
- evidences confirming proper notification of the party or its representative in case of procedural incapacity of the party against which an award is made, about the process;

- enforcement document with a note on the partial execution of an award, if any;
- on matters of contractual jurisdiction, a document confirming the agreement of the parties on this issue.

It is noteworthy that this paragraph of the Regulatory Resolution has no delineation of the documents that are attached to the petition for compulsory execution of awards of foreign courts and awards of foreign arbitrations. Meanwhile, as is well known, the New York Convention reduced the list of documents to be submitted for the recognition and enforcement of a foreign arbitration award, up to two documents, namely: the arbitration award itself or its certified copy; an original arbitration agreement or its certified copy (Mussina and Skvortsova, 2012).

In this regard, the expansion of the list of documents in the Regulatory Resolution does not comply with the requirements of the New York Convention, and therefore, in our view, it needs to be clarified. Currently, the provision is saved by the phrase in the paragraph 30 of the Regulatory Resolution that the listed documents are attached to the application "as a rule", and not necessarily.

2. Materials and Methods

The purpose of our study was to study the Law On Arbitration and the CPC, to find in them the disadvantages and inconsistencies with international conventions. Then, in accordance with the results obtained, making amendments and supplements. The research was conducted by the Caspian University together with Kazakhstan International Arbitration at the request of the Arbitration Chamber of Kazakhstan.

As materials for study were used Law on Arbitration, Civil Procedure Code of the Republic of Kazakhstan, Constitution of the Republic of Kazakhstan, The Law On Enactments, Regulatory Resolution On Judgment, Convention on the Recognition and Enforcement of Foreign Arbitral Awards, UNCITRAL Model Law on International Commercial Arbitration, European Convention on International Commercial Arbitration Recommendations of the Round Table titled Some Issues of Application of Law On Arbitration of the Republic of Kazakhstan.

During the work the following research methods were used: comparative, technical and analogies. The comparative method consists in comparing legal concepts, phenomena, processes and clarifying the similarities or differences between them. The compared concepts and phenomena must be homogeneous, comparable, that is, they must be objects of the same class. The comparative method is widely used in the law-making technique, where there is a comparison with similar laws of other countries. The method of analogy takes into account the experience of other countries and the functioning of legal systems. Technical methods are the methods that allow using the system of technical means to know and improve the rules for performing legal work. Nowadays, information technologies are becoming more widely used. Here are some areas of the use of computer methods: obtaining, processing, storing and searching for legal information; increasing the effectiveness of lawmaking work; increase in law enforcement performance.

Most of the proposals were approved and included in the draft Law of the Republic of Kazakhstan On Amendments and Supplements to Certain Enactments of the Republic of Kazakhstan On Enhancing Protection of Title and Arbitration.

3. Results and Discussion

The research institute of private law of the Caspian University together with Kazakhstan International Arbitration prepared proposals for making amendments and supplements to the Law *On Arbitration* and the CPC at the request of the Arbitration Chamber of Kazakhstan in the spring of 2017 (Proposals for amendments and supplements to the Law On Arbitration, 2017). Most of the proposals developed by us were approved and included in the draft Law of the Republic of Kazakhstan *On Amendments and Supplements to Certain Enactments of the Republic of Kazakhstan On Enhancing Protection of Title and Arbitration* (hereinafter referred to as the Draft Law) after discussion at the meetings of the General Meeting members of Arbitration Chamber of Kazakhstan (Law On Making Amendments and Additions to Some Legislative Acts, 2017).

3.1. Arbitration Award Enforcement Procedure

The arbitration award rendered by the Kazakhstan arbitration shall be enforced in procedure provided for in the Articles 253-255 of the CPC. An arbitration award made by a foreign arbitration shall be enforced in accordance with the procedure provided for in the Articles 501, 503, 504 of the Civil Procedure Code.

In accordance with the paragraph 1 of the Art. 503 of the CPC, in case the arbitration award is not executed voluntarily within the time fixed therein, the claimant has a right to demand compulsory enforcement of such award. then the party to the arbitration in favor of which the arbitration award (the recoverer) was rendered, being entitled to apply to the court for enforcement of the arbitration award at the place of arbitration or at the place of residence of the debtor or at the location of the legal entity; if the place of residence or location is unknown, then at the location of the debtor's property._Arbitral awards should be enforced equally with the decisions of the courts of general jurisdiction. The Republic of Kazakhstan has a unified legal enforcement system (Greshnikov P., 2002).

Since an arbitration agreement is a contract, when rights under an arbitration agreement are violated, a party has the right to judicial protection of its rights under the arbitration agreement. The essence and subject matter of an arbitration agreement consist in that the parties have waived going to court for examination of disputes concerning the underlying contract and have agreed to voluntarily carry out the decision of the arbitration tribunal once it is received. If one of the parties does not carry out the decision, the rights of the other party to this contract are violated

and are subject to judicial protection. This judicial protection is administered by way of mandatory enforcement by the courts of the third-party court decision (Kenjebayeva, 2002).

According to the paragraph 2 of the Art. 503 of the CPC, a duly certified arbitration award of a foreign arbitration or a duly certified copy is attached, and, if available, a genuine arbitration agreement or its duly certified copy shall be attached to the application for the issuance of the writ of execution for the enforcement of a foreign arbitration award. If these enactments or arbitration agreements are set out in a foreign language, then the party must submit a duly certified translation into Kazakh or Russian.

It should be noted that these provisions of CPC fully meet the requirements of the New York Convention on the Recognition and Enforcement of Foreign Arbitration Awards with regard to the requirement to submit only two documents to the competent court, the decision itself and the arbitration clause.

Legalization or duly certification of award means an action through which a public official certifies the authenticity of a signature on an official or private document and capacity of a signatory as well as, if required, the authenticity of a seal or stamp affixed on such enactment so that it can be considered true wherever it is presented. There are two main legalization mechanisms: consular legalization and apostille (apostilization).

Apostille is a special stamp to be affixed on official documents of a noncommercial nature issued by governmental authorities and institutions of countries that joined the Hague Convention of October 5, 1961 *On Cancellation of Requirements for Legalization of Official Foreign Documents* (Law On the accession of the Republic of Kazakhstan to the Convention, 2007). The apostille stamp affixed on a document does not require further legalization or certification of the document itself. Such a document shall be recognized by official authorities and institutions of all countries that joined the Hague Convention of October 5, 1961, and has a legal force in their territory.

The court practice initially chose the most liberal path making foreign arbitration awards free from legalization. However, such approach did not become prevailing, and in most cases, arbitration courts require a party to legalize such document within the frames of proceedings for recognition and enforcement of foreign arbitration awards. In such case, apostilization at the location of arbitration would be the most preferable legalization mechanism for a party (in terms of convenience and ease of implementation). However, according to the Hague Convention, which cancels the requirement to legalize foreign official documents, only official documents are subject to apostillation, which do not include awards of nongovernmental authorities represented by the international commercial arbitration (Liebscher and Fremuth-Wolf, 2006).

In practice legalization (apostilization) of foreign arbitration awards be solved by the parties that apply to a notary by choosing the appropriate notarial action (depending on the content of the national notarial law and the opportunities provided by it, i. e, a notary certifies a copy of an arbitration award (namely, they use such notarial action as certification of authenticity of a signature in an arbitration award or agreement). Further, signature and seal of a notary shall be subject to apostilization. Such mechanism of legalizing the decisions of foreign arbitration exists in most states. Thus, in order to enforce in Kazakhstan an arbitration award rendered by the arbitrators of the Arbitration Institute of the Stockholm Chamber of Commerce in English, the party in favor of which an award was made, shall arrange translation of an award and arbitration agreement into Kazakh or Russian and then it shall arrange notarial certification of an award and arbitration agreement in Stockholm. Then it shall arrange apostillation of these documents and shall send them together with the application for arbitration award enforcement to a court at the place of a debtor’s residence or at the location of a legal entity; if a place of residence or location is unknown, then at the location of a debtor's property.

In accordance with the paragraph 3 of the Art. 253 and p. 3 of the Art. 503 of the CPC, application for the issue of the writ of execution can be filed no later than within three years from the date of expiration of the period for the voluntary arbitration award enforcement. Application for the issue of the writ of execution filed with a missed deadline and without an application for restoring the time limit and supporting documents shall be returned by a court without consideration along with the relevant ruling. The ruling can be appealed, challenged to the court of appeal the decision of which shall be final. The court is entitled to restore the time limit for filing an application for the issue of a writ of execution if it recognizes the reasons for missing the specified period valid. The application for the issue of the writ of execution shall be examined by the judge alone within fifteen working days from the date of receipt of the application to the court (clause 6, Article 253 and clause 6, Article 503 of the CPC).

A court notifies a debtor of the received claim of are coverer on arbitration award enforcement as well as of a place and time of its consideration in the court session. The recoverer is also notified of the place and time of consideration of his/her/its application. The failure of the debtor or the recoverer to appear in the court session is not an obstacle to the consideration of the application if the debtor did not submit an application to postpone the consideration of the application specifying the valid reasons for his/her/its failure to appear in the court session.

An important rule is fixed in the paragraph 8 of the Art. 503 CPC. It consists in the fact that when considering an application for the issue of an enforcement order for the enforcement of an arbitration award, the court has no right to review it on its merits. Based on the results of the consideration of the application, the court makes a ruling on the issue of the writ of execution or on refusal to issue it. The court ruling to issue the writ of execution is subject to immediate execution (Clause 9, Article 503 of the CPC).

3.2. Grounds for a Waiver of Recognition or Enforcement of Arbitration Award

In accordance with Art. 504 of the CPC, the waiver of issuance and issue of the writ of execution for foreign arbitration award enforcement are carried out according to the rules provided for by the Chapter 20 of this Code. In such case, the Art. 504 refers to the Art. 255 of the CPC containing a full list of grounds for refusal to issue an

enforcement order for arbitration award enforcement issued by the domestic Kazakhstan arbitration courts and to the Art. 57 of the Arbitration Law.

So, according to the Art. 255 of the CPC:

I. The court renders a ruling on refusal to issue a writ of execution for arbitration award enforcement if:

1) the party against whom the award was made will present evidence to the court that:

- the arbitration agreement is invalid under the laws of the state to which the parties subordinated it and, in the absence of such indication, under the laws of the Republic of Kazakhstan;
- the award is rendered on a dispute not provided for by the arbitration agreement or not subject to its terms or contains awards on the matters that go beyond the scope of the arbitration agreement as well as due to the lack of jurisdiction of the dispute to arbitration;
- one of the parties to the arbitration agreement was recognized by the court as legally incompetent or partially incapacitated;
- the party against whom the decision was rendered was not duly notified of the appointment of an arbitrator or of arbitration proceedings or could not submit its explanation to the arbitration court for other reasons recognized by the court as valid;
- there is a court decision or arbitration award entered into legal force made on the dispute between the same parties, on the same subject matter and for the same grounds, or the ruling of the court or arbitration to terminate the proceedings in connection with the refusal of the plaintiff from the claim;
- an arbitration award was made possible as a result of a criminal offense established by a court verdict that entered into legal force;
- the arbitration panel or the arbitration procedure of the proceedings did not comply with the requirements of the law;
- an award did not become binding on the parties or was canceled, or its enforcement was suspended by the court of the country according to the law of which it was rendered;

2) the court shall establish that enforcement of such arbitration award is contrary to the public order of the Republic of Kazakhstan or that the dispute on which an arbitration award was rendered, cannot be the subject of arbitration in accordance with the law;

II. If the arbitration award on such matters that are covered by the arbitration agreement may be separated from awards on matters that are not covered by such agreement, then the issuance of the enforcement order for the enforcement of that part of the award that is covered by the arbitration agreement cannot be refused from.

Foreign legal practice shows that arbitration proceedings help make decisions that are considered the only possible from the point of view of the law, but take into account personal interests and the wishes of each of the parties (Sabikenov, 2015). In the court practice after enforcement of foreign arbitration awards in Kazakhstan sometimes arise problems. Some of them were overviewed with using the instances of application of separate grounds for a waiver of recognition and enforcement provided for in the Art. 255 of the CPC.

E.g. 1. Arbitration agreement is invalid under the laws of state to which the parties subordinated it, and if no such instruction is provided, under the laws of the Republic of Kazakhstan. The doctrine and national laws of the majority of states adhere to the principle of independence of the arbitration agreement (recognizing it as an independent agreement). That is why the parties are entitled to choose independently the law applicable to the arbitration agreement. This law may differ from the law that the parties chose as applicable to the main agreement.

The question of the law applicable to the arbitration agreement arises out when the question whether the arbitration agreement is valid or not is decided. The validity of the arbitration agreement is determined by the law to which the parties subordinated it and, in the absence of such indication - under the law of the country where the award was rendered. The practice shows that, however, growing numbers of arbitral awards face various obstacles when they come to recognition and enforcement. Consequently, arbitration would rendered worthless unless its final outcome; the arbitral award, is duly recognised and enforced with minimal procedural delay. Therefore, international efforts have been made to enhance and foster recognition and enforcement of international arbitral awards. Those efforts have resulted in a number of international treaties were entered into between different countries, aiming at creating unified and harmonized rules for recognition and enforcement of foreign arbitral awards. The New York Convention on Recognition and Enforcement of Foreign Arbitral Awards 1958 (NYC) is considered, worldwide, to be the most important treaty in respect of recognition and enforcement of foreign arbitral awards. It followed by the UNCITRAL Model Law 1985 which provides, with the Convention, for international legal framework for recognition and enforcement of foreign arbitral awards (Teacher, 2013). This rule is contained in the Art. V (1) (a) of the New York Convention on the Recognition and Enforcement of Foreign Arbitration Awards and Art. 34 (2) (a) (i) of the UNCITRAL Model Law (UNCITRAL Model Law on International Commercial Arbitration of 1985, 2006). European Convention in the Art. IX (1) (a) similarly settled the question of the law applicable to the arbitration agreement by specifying that the law chosen by the parties applies to the arbitration agreement, and in the absence thereof, the law of the country in which the decision is to be made, shall apply. If, however, the parties did not specify the law applicable to the arbitration agreement and it is impossible to establish in which country the arbitration award should be rendered, the court must determine the applicable law on the basis of the conflict-of-law rule of the country in which the case is initiated (European Convention on International Commercial Arbitration, 1961).

In accordance with subparagraph 1) of paragraph 1 of the Art. 57 of the Law *On Arbitration*, the subparagraph 1) of the paragraph 1 of the Art. 255 CPC determines the validity of the arbitration agreement (in the absence of the parties indicating the law applicable to the arbitration agreement) under the laws of the Republic of Kazakhstan.

Since the Law on Arbitration regulates operations of arbitration courts established and operating in the territory of the Republic of Kazakhstan, then the place of making a decision by such arbitration courts shall be the Republic of Kazakhstan.

Such provisions of the Law *On Arbitration* correspond to the globally accepted provisions on determining the validity of the arbitration agreement in respect of arbitration awards of domestic arbitration. However, when it comes to enforcing a foreign arbitration award in the territory of the Republic of Kazakhstan, the provisions of this article regarding the validity of the arbitration agreement (in the absence of the parties indicating the law applicable to the arbitration agreement) contradict V (1) (a) of the New York Convention, Art. IX (1) (a) of the European Convention. The matter is that subparagraph 1), paragraph 1, Art. 57 of the Law of the Republic of Kazakhstan and subparagraph 1), paragraph 1, Art. 255 of the CPC refer to the application of the laws of the Republic of Kazakhstan, while the Convention refers to the law of such country where the decision was made. It is obvious that in this case the provisions of the Conventions must apply and the validity of the arbitration agreement must be determined under the law of such country where the foreign arbitration award was made but not under the Law of the Republic of Kazakhstan *On Arbitration* which also provides an absolutely unreasonably expanded list of material terms of the arbitration agreement (Suleimenov and Duissenova, 2016).

So, according to the paragraph 4 of the Art. 9 of the Law *On Arbitration*, the arbitration agreement must contain:

1) the intention of the parties to refer the dispute to arbitration;

2) an indication of the subject to be considered by the arbitration;

3) specification of a particular arbitration;

4) the consent of the authorized body of the relevant branch or local executive body in case provided for in the p. 10, Art. 8 of the Law *On Arbitration*.

E.g. 2. Arbitration award was rendered on the dispute either not provided for by the arbitration agreement or not falling within its conditions, or it does not contain resolutions on the issues out of the arbitration agreement. Most often, such ground for refusal to enforce an arbitration award is applied when there is an arbitration clause in the ancillary agreement and the main contract does not have such clause. For example, a guarantee or collateral agreement (as an ancillary contract) has an arbitration clause but a loan agreement (as a main contract) does not have such clause. The arbitration court shall not be able to consider the dispute arising out from the accessory contract as it will have to go beyond the arbitration agreement when examining the main contract in order to determine the occurrence of the circumstances and/or the fact of default on the main contract. Based on the provisions of the second paragraph of subparagraph 1), paragraph 1, Art. 57 of the Law *On Arbitration*, a court may also refuse to recognize and enforce such an award.

E.g. 3. Arbitration panel or arbitration procedure of proceedings did not meet the legal requirements. The basis for refusing to issue a writ of execution laid down in the eight paragraph of subparagraph 1) of the Art. 255 of the CPC (paragraph nine of the subparagraph 1), p. 1, Art. 57 of the Arbitration Law), is narrower in its content than a similar basis provided for in the New York Convention.

According to the mentioned norms of the CPC and the Law On Arbitration, the issue of the writ of execution may be refused in case when the party against which the arbitration award was made would submit evidence to the court that the arbitration panel or the arbitration procedure of the proceedings did not meet the requirements of the law. While subparagraph o), p. 1, Art. 5 of the New York Convention formulates such ground more broadly mentioning not only the noncompliance with the legal requirements but first of all the discrepancy between the agreement of the parties: "the composition of the arbitration body or the arbitration proceeding did not comply with the agreement of the parties or, in the absence thereof, did not comply with the law of the country where Arbitration took place". UNCITRAL Model Law formulated the same basis in the subparagraph (iv) of the paragraph 1) of the Art. 36 of the Model Law reads as follows: "the arbitration panel or the arbitration proceeding did not comply with the agreement of the parties or, in the absence of such, did not comply with the law of the country where arbitration took place".

Both international documents describe, first of all, noncompliance with the agreement of the parties which fully corresponds to the nature of arbitration as an alternative way to settle civil disputes based on agreement of the parties. And only provided there is no agreement of the parties, the requirements for the arbitration panel or arbitration proceeding must be determined in accordance with the law of such country where the arbitration took place.

3.3. Grounds contradicting the New York Convention

According to the paragraph 1 of the Art. 57 of the Law On Arbitration (subparagraph 1), p. 1, Art. 255 of the CPC, the court refuses to recognize and (or) enforce an arbitration award regardless of the country in which it was rendered, on the following grounds, if the party against whom the award was made would present the evidence to the court that:

- there is a valid court decision or arbitration award made on the dispute between the same parties, on the same subject matter and on the same grounds, or the ruling of the court or arbitration to terminate the proceedings in connection with the refusal of the plaintiff from the claim;

- an arbitration award was made possible as a result of a criminal offense established by a court verdict that entered into legal force.

Such extension of the grounds contradicts the provisions of the New York Convention as well as the UNCITRAL Model Law on International Commercial Arbitration. In practice, such contradiction may result into

certain problems primarily for state courts. There are no such grounds for refusing to recognize and (or) enforce an arbitration award not only in international documents but also in the domestic laws of other countries.

The bill provides for bringing subparagraph 1) of the paragraph 1 of the Art. 57 of the Law of the Republic of Kazakhstan and subparagraph 1) of the paragraph 1 of the Art. 255 of CPC in compliance with the provisions of the Art. V (1) (a) of the New York Convention on Recognition and Enforcement of Foreign Arbitration Awards and Art. 34 (2) (a) (i) of the UNCITRAL Model Law.

In view of the direct reference provided for in the Art. 504 of the CPC, the issue of the writ of execution for enforcement of arbitration award rendered by foreign arbitration courts can be refused on the grounds specified in the Art. 255 of the CPC. In such case, in our opinion, the provisions of the New York Convention should apply. Otherwise Kazakhstan will become an unfavorable jurisdiction for the enforcement of foreign arbitration awards which will affect the investment attractiveness of the country as a whole.

In connection with such a careless formulation made in the eighth paragraph of the subparagraph 1) of the Art. 255 of the CPC and ninth paragraph of the subparagraph 1), p. 1, Art. 57 of the Law On Arbitration, logical question arises: what law requirements are not met? Whether it is incompliance with the requirements of the law of the Republic of Kazakhstan or the law of the country where the arbitration took place? This issue is of great practical importance for the recognition and enforcement of foreign arbitration awards. With regard to arbitration awards rendered by Kazakhstan arbitration courts in the territory of the Republic of Kazakhstan, it should apparently mean the incompliance with the requirements of the law of the Republic of Kazakhstan.

And what about foreign arbitration awards? What law should there be in this case? Foreign arbitral awards and judgments are recognized and enforced in accordance with the international treaties a party to which is Kazakhstan, the RK Civil Procedure Code and the RK Law on Enforcement Proceedings and Status of Court Enforcement Officers (Tleulina, 2015). Let's suppose that the award was made by the London International Arbitration Court and is subject to recognition and enforcement in the territory of the Republic of Kazakhstan. The unfair party against which the arbitration award was made, after having used such ambiguous version of the eighth paragraph of subparagraph 1) of Art. 255 of the CPC, will present evidence to the court that the arbitration panel or the arbitration proceeding did not meet the requirements of the Law of the Republic of Kazakhstan. And it will be easy for such party to find such inconsistencies since the award was rendered in the UK, where, of course, our Arbitration Law does not apply. In such case the court must apply the provisions of subparagraph 1), p.1, Art. 5 of the New York Convention. The court must initially verify the consistency of the arbitration panel or arbitration procedure with the agreement of the parties and then, if the parties did not come to an agreement, to verify compliance with the law of the country where arbitration took place (that is, the 1996 Arbitration Law of England, not of the Republic of Kazakhstan). However, according to the paragraph 1 of the Art. 501 of CPC, arbitration awards of foreign arbitration courts are recognized and enforced by the courts of the Republic of Kazakhstan if recognition and enforcement of such enactments are provided for by the laws and/or an international treaty ratified by the Republic of Kazakhstan, or on the basis of reciprocity (Mehrabi and London, 2018).

The draft law provides for bringing the eighth paragraph of the subparagraph 1) of the Art. 255 of the CPC in accordance with the provisions of subparagraph o), p. 1, Art. 5 of the New York Convention.

3.4. A Dispute on Which an Arbitration Award is Rendered May Not Be Subject to Arbitration Proceeding in Accordance With Law

According to the paragraph 8 of the Art. 8 of the Arbitration Law, the following disputes are not subject to arbitration:

1) on which the interests of minors are affected;
2) of persons recognized as legally incompetent or incapacitated;
3) of rehabilitation and bankruptcy;
4) between subjects of natural monopolies and their consumers;
5) between state bodies;
6) between subjects of the quasi-public sector.

In addition, according to the paragraph 4 of the Art. 8 of the Arbitration Law, an arbitration agreement on dispute settlement under a contract the conditions of which are determined by one of the parties in the forms or other standard forms and could be accepted by the other party only by joining the proposed contract as a whole (agreement of accession) shall be valid if such agreement is made after occurrence of grounds for filing a claim. Thus, the disputes arising out from the accession agreement may be recognized as non-arbitrative if the arbitration clause was included in it upon entering into a contract. For example, a dispute arising out from an energy supply contract (which is a contract of accession under the Kazakh law) can be considered by the arbitration court only if the arbitration agreement was executed after occurrence of the grounds for filing a claim. In practice, a number of discussion questions arise out regarding the jurisdiction of arbitration for certain categories of disputes. Let's consider a brief analysis of some of them.

3.5. Whether the Arbitration Court is Entitled to Settle the Disputes Arising out from the Marriage Contracts or Not?

According to paragraph 1 of Art. 39 of the Marriage and Family Code (hereinafter referred to as the MFC) (Code On Marriage and Family of the Republic of Kazakhstan, 2012), the marriage contract recognizes the agreement of persons entering into marriage or the spouses' agreement defining the property rights and duties of the

spouses in marriage and (or) in the event of its dissolution. All contracts based on equality, mediating property and related non-property relations, are civil-law contracts. Marriage contract is also one of the above contracts. If by virtue of direct legislative restriction of the competence of arbitration courts, they are not entitled to consider cases involving personal non-property relations and not related to property relations, then the arbitration courts shall be entitled to resolve disputes arising out from a marriage contract that is a civil contract governing property relations between spouses, subject to an arbitration agreement.

According to paragraph 2, Art. 39 of the MFC, the marriage contract may provide for the property rights of children born or adopted in marriage. Therefore, if interests of minors are affected in a dispute arising out from a marriage contract (for example, the property rights of children), then such disputes will not be subject to arbitration by virtue of sub-clause1), p. 8 of the Art. 8 of the Arbitration Law.

3.6. Whether the Corporate Disputes Are Arbitrable or Not?

To answer the question of whether corporate disputes can be the subject of arbitration proceedings, two issues need to be solved: to find out what is the nature of corporate relations and their ratio to the civil-law relations, and to answer the question about availability or lack of special jurisdiction of corporate disputes to state courts (p. 1, Article 27 of the CPC).

Corporate legal relations can be defined as intra-organizational (part of them) civil-law relations related to participation in or management of corporate organizations, between: founders (participants) of a corporate organization, and between the corporate organization and its founders (participants). Corporate relations are not obligations but rather relative relations (property, non-property, organizational). Since corporate relations are civil and legal relations, then disputes arising out from corporate relations can be subject to arbitration.

With regard to the p.1 of the Art. 27 of the Code of Civil Procedure, this clause containing the definition of the corporate disputes, assigns the jurisdiction of this category of civil cases to specialized inter-district economic courts (being members of the court system of the Republic of Kazakhstan). Since arbitrations are not part of the system of state courts of the Republic of Kazakhstan, then the provisions of p. 27 of the CPC do not cover arbitration and, accordingly, it is impossible to say that corporate disputes cannot be arbitrable.

However, when considering certain categories of corporate disputes, the rights and interests of third parties may be affected. For example, a corporate dispute related to the ownership of shares of joint-stock company and exercise of the right to vote arising from it. A shareholder and the joint-stock company may enter into an arbitration agreement on submission of such dispute to arbitration. However, the question of whether a shareholder has the right to vote at a general meeting or does not have such a right directly affects the rights of other shareholders since it changes the proportions of votes in a voting at a general meeting. All other shareholders are interested in consequences of resolving that dispute. However, if an agreement is executed without their participation, they are deprived of the right to participate in arbitration (Skvortsov, 2005). In such case the dispute obviously cannot be considered by arbitration court. Upon entering into an arbitration agreement as well as upon direct consideration of corporate disputes by arbitration courts, it is possible to advise to the parties and arbitration institutes to be especially careful to the problems of the third parties.

3.7. Contradiction to the Ordre Public

The reservation of a public order is widespread in private international law. It is contained in different variations in the law of nearly all countries that have codification under international private law; it was also contained in the laws of the Soviet Union and the Kazakh SSR. The Law On Arbitration (subparagraph 1) of the Art. 2 determines the public order of the Republic of Kazakhstan as the basis of law and order fixed in the enactments of the Republic of Kazakhstan.

According to the paragraph 1, Art. 1090 of the Civil Code, the foreign law does not apply in cases where its application would contradict the basis of the legal order of the Republic of Kazakhstan (public order of the Republic of Kazakhstan). In such cases the law of the Republic of Kazakhstan applies. Clarification is important in the paragraph 2 of the Art. 1090 of the Civil Code that the refusal to apply foreign law a public order cannot be used only on the basis of differences in political or economic system of the corresponding foreign state from the political or economic system of the Republic of Kazakhstan (see clause 2, article 1090 of the Civil Code). A reservation on a public procedure can apply when the application of a foreign law would contradict the basis of the legal order of the Republic of Kazakhstan, legal principles, would produce consequences unacceptable from the point of view of our sense of justice. The concept of public order (ordre public, public policy) is rather vague; it is applied based on the court discretion. A reservation regarding a public order is called a "safety valve", a "rubber paragraph", etc.

Lawyers of different countries tried to develop a list of all principles and provisions that would disclose the concept of the "public order". However, these attempts were unsuccessful and this is understandable because variability and flexibility are inherent in this institution. The view was expressed in the literature that the concept of "the basis of law and order (public order)" includes four interrelated components:

1) fundamental principles of the law of the given country, primarily constitutional as well as private law and civil procedure principles;

2) generally accepted moral law which serve the basis for the public order;

3) the legitimate interests of citizens and legal entities, society and state protection of which is the main task of the country's legal system;

4) generally recognized principles and provisions of international law that are the part of the legal system of the country including international legal standards of human rights.

One thing is clear: the non-application of a foreign law on the basis of violation of the public order is possible only in "exceptional cases". Therefore, every such case must be seriously justified and may not be reduced to any violation, even if serious, of the provisions of the national law. When applying such basis for cancellation of the arbitration award as a contradiction to the public order, it is necessary to warn against a very common misconception when a public order is identified with public interests. Contradiction to the public interests cannot serve as a basis for canceling an award. It may be cancelled and enforcement may be refused for previously agreed procedural violations only. Based on the above, in the vast majority of the countries arbitration awards are never verified by the competent state courts on their merits and are final. Almost nowhere in the world does the court verify the legislative grounds for considering the dispute because the interpretation of the law can be different. This is because of a civil-law dispute and there are always different views on the law in a civil law dispute. This is the basis for the court system of any country including Kazakhstan.

However, arbitration is not a part of the court system. The competent court can review the procedural aspects only. If these principles are not respected, then such organization called arbitration in fact is not the arbitration. It turns into an appendage of the court system and absolutely needless. Rather inconsistent practice of applying such a ground for the abolition of arbitration awards as a contradiction to the public order began forming in Kazakhstan after the Arbitration Law was enacted in 2016.

There are two main aspects in this problem:

1) the non-prevailing party is unconscionable as a rule; if it fails to find any grounds for cancellation of the arbitration award, it often quite unreasonably refers to the contradiction to the public order;

2) some courts started cancelling arbitration awards while referring to the contradiction to the public order which is often identified with the rule of law and which in principle is incorrect.

The concept of public order around the world is possible only in "exceptional cases". The Supreme Court of the Republic of Kazakhstan advised the following to the courts in the Recommendations of the Round Table on Application of the Arbitration Law: "It should be noted that the application of the institution of public order is possible in exceptional cases when the enforcement of an arbitration award off ends the basics of the public order of the Republic of Kazakhstan. In connection with the above the courts when cancelling the awards on this ground, should explain which specific public order is violated and how" (Recommendations of the Round Table titled Some Issues of Application of Law On Arbitration of the Republic of Kazakhstan, 2017).

4. Conclusion

As a result of studying the Law on Arbitration and the Civil Procedure Code, we identified some of their shortcomings and inconsistencies with international conventions. So in the law “On Arbitration” we propose making amendments and supplements in the paragraphs of articles 2, 9, 10, 12, 14-18, 21-24, 35-38, 43, 44, 51, 52, 57, as well as in a number of paragraphs of Article 255 and 504 of the Civil Procedure Code. Summarizing our comments and suggestions, we can say that the Law on Arbitration should be as close as possible to the UNCITRAL Model Law “On International Commercial Arbitration”, excluding various innovations from it compared to the Model Law, as well as the New York and European Conventions. This is primarily about the grounds, extended by the Law of the Republic of Kazakhstan on arbitration, for cancellation and refusal to enforce an arbitral award. These rules worsen the legal status of Kazakhstani arbitrations compared to foreign international commercial arbitrations of those countries where the laws in force are adopted on the basis of the Model Law and the New York and European Conventions. Most of the proposals developed by us were approved and included in the Draft Law of the Republic of Kazakhstan. In this article also given answers to some questions of the arbitration court regarding corporate and marriage dispute, as well as an issue of contradiction public policy.

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