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Kazakhstan

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Alexander Korobeinikov[1]

A. Legislation and rules

The ability to settle disputes through binding arbitration, and particularly the ability to enforce arbitration awards in Kazakhstan's courts, has been the subject of much uncertainty and controversy over the past 10 years.

For example, the Constitutional Council of Kazakhstan ruled in 2002 that an arbitration award may be appealed in the courts as a result of the constitutional right to judicial protection. This made the enforcement of domestic arbitration awards virtually impossible. The Council only annulled the disputed ruling in 2008.

In December 2004, Kazakhstan adopted two laws concerning arbitration: the Arbitration Courts Law[2] and the International Commercial Arbitration Law.[3] One of the objectives of the new legislation was to end the uncertainty and controversy surrounding the right to arbitrate and/or enforce arbitration awards.

The Arbitration Courts Law applied to disputes between residents of Kazakhstan and permitted such disputes to be resolved by "arbitration courts" in Kazakhstan (these "arbitration courts" are not state courts, but various private arbitration tribunals roughly analogous to private arbitration tribunals in Western countries). The law regulated every stage of arbitration proceedings and provided a mechanism to enforce such awards in state courts. However, the Arbitration Courts Law prohibited arbitration of disputes involving state interests, state enterprises or natural monopolies.

[1] Alexander Korobeinikov is a senior associate in Baker McKenzie's Almaty office and a member of Baker McKenzie's International Arbitration Practice Group.
[2] The Law On Arbitration Courts, dated 28 December 2004.
[3] The Law On International Commercial Arbitration, dated 28 December 2004.

The International Commercial Arbitration Law roughly mirrored the UNCITRAL Model Law. It applied to disputes where at least one party was not a resident of Kazakhstan. For the purposes of this law, a wholly owned Kazakhstani subsidiary of a foreign legal entity was considered a local resident; therefore, disputes between two Kazakhstani-registered subsidiaries of foreign companies might not be resolved by foreign arbitration. The International Commercial Arbitration Law regulated arbitration proceedings in Kazakhstan and also contained implementing procedures for the enforcement in Kazakhstani courts of foreign arbitration awards.

In addition, international commercial arbitration matters were governed by the following:

(i) The Code of Civil Procedure of the Republic of Kazakhstan dated 13 July 1999, which, among other things, dealt with recognition, enforcement and appeals of foreign arbitral awards

(ii) The Law of the Republic of Kazakhstan On Investments dated 8 January 2003, which confirmed investors' right to bring their disputes with the Republic of Kazakhstan (and its state agencies) to international arbitration

(iii) The Law of the Republic of Kazakhstan On Commodity Exchange dated 4 May 2009, which permitted the arbitration of disputes arising out of transactions concluded through a commodity exchange

The existence of such different laws led to certain difficulties in using arbitration for the settlement of disputes between local companies. In particular, in 2014 the Supreme Court of the Republic of Kazakhstan upheld lower court decisions that invalidated the arbitration agreement between two local companies where parties agreed to settle their disputes under LCIA Rules.

The above laws (with minor amendments) regulated arbitration in Kazakhstan until 2016.

In April 2016, as a result of the reform of the judicial system, the Law On Arbitration (the "New Arbitration Law") was adopted. This law is also based on the UNCITRAL Model Law. It governs both international and domestic arbitration proceedings.

In addition to unifying procedural rules for international and domestic arbitration proceedings, the New Arbitration Law implements the following changes to the previous rules:

(i) State-owned companies may only execute arbitration agreements with Kazakhstani companies after getting consent from the superior state authority.

(ii) An arbitration agreement must set forth the name of the arbitration institution to be used. Due to this provision, it is not entirely clear whether arbitration agreements that refer to *ad hoc* arbitration rules will be valid or not.

(iii) A party has the right to terminate an arbitration agreement unilaterally before the origin of the dispute.

(iv) A new association of arbitration institutions and arbitrators — the Arbitration Chamber — should be established. This Chamber is responsible for maintaining a Register of Arbitrators and represents local arbitration institutions to local state authorities and foreign organizations.

(v) When reviewing disputes with state-owned companies, arbitrators are required to apply Kazakhstani law only, unless otherwise provided in the international treaties of the Republic of Kazakhstan.

(vi) Parties have the right to seek the reconsideration of arbitral awards based on so-called "newly opened circumstances" (ie, facts that are material to the case, but were not previously

known to an applicant). This provision has been copied from the Civil Procedure Code, and it is not entirely clear how it will be applied by arbitrators.

(vii) In addition to the currently existing grounds for challenging an arbitral award, the New Arbitration Law will allow parties to challenge the award if there is a judgment or an award that has a *res judicata* effect on the subject matter of the challenged award.

Generally, while the unification of procedural rules for international and domestic arbitration proceedings is a positive change, other provisions of the proposed New Arbitration Law will make the regulation of arbitration proceedings in Kazakhstan more restrictive. Additionally, it is not entirely clear how these new provisions will interrelate with the provisions of international treaties ratified by Kazakhstan.

In addition, under the new version of the Civil Procedural Code of the Republic of Kazakhstan, adopted in October 2015 and in force since 1 January 2016, the procedure for enforcing domestic arbitration awards has become more complicated.

In particular, in addition to the grounds for refusing to enforce an arbitral award listed in Article V of the New York Convention, the enforcement of an award may now be rejected if: (i) there is a judgment or an arbitral award issued on the same dispute between the same parties and based on the same grounds (ie, a judgment or award that has *res judicata* effect); or (ii) an award is issued as a result of a crime confirmed by the sentence of a criminal court.

While it is not entirely clear, due to the fact that Kazakhstan is a member of the New York Convention and the Geneva Convention, it is our understanding that these new grounds will be applied only to

domestic arbitral awards.[4] However, this issue will need to be clarified by local court practice.

Kazakhstan is a party to a number of bilateral and multilateral agreements that grant investors the right to arbitrate disputes over their investments in Kazakhstan. These treaties include the ICSID Convention, the Treaty On Partnership and Co-operation Agreement Between the European Union and the Republic of Kazakhstan dated 23 January 1995, and the Energy Charter Treaty dated 17 December 1994.

A.1 Institutions, rules and infrastructure

At present, there are around 20 arbitration institutions in Kazakhstan. The most famous of these are the Kazakhstani International Arbitrage (KIA), the International Arbitration Court IUS (IUS) and the Center of Arbitration of the National Chamber of Entrepreneurs of the Republic of Kazakhstan (CA of NCE).

A.1.1 CA of NCE

The CA of NCE was established in 2014 as a result of the reorganization of the International and Domestic Arbitration Courts at the Chamber of Commerce and Industry of the Republic of Kazakhstan. This reorganization took place as a result of amendments to Kazakhstani law relating to the liquidation of the Chamber of Commerce and Industry and the establishment of the National Chamber of Entrepreneurs (NCE). While the CA of NCE signed assignment agreements with the International and Domestic Arbitration Courts at the Chamber of Commerce and Industry of the Republic of Kazakhstan, technically, it is not a successor of these arbitration institutions. However, due to the fact that for most local

[4] Please note that some local scholars and practitioners argue that Kazakhstan did not properly ratify the international treaties above (ie, by the law adopted by the Kazakhstani Parliament) and, therefore, these treaties cannot prevail over national laws. However, there are a number of court decisions which confirm that provisions of the New York Convention and Geneva Convention will overrule the national laws in a case of conflict.

companies, membership of the NCE is mandatory, and given that the CA of NCE has opened branches in all Kazakhstani regions, this institution will be the biggest in Kazakhstan.

The CA of NCE handles all types of commercial disputes between local and foreign companies, except disputes which are non-arbitrable under Kazakh law (such as disputes relating to the registration of rights over immovable property and challenges to decisions of state authorities).

The CA of NCE has been designated by the Kazakhstani government to exercise the functions referred to in Article IV of the Geneva Convention.

A.1.2 IUS

The IUS was the first arbitration institution in Kazakhstan, established in 1993 shortly after the declaration of independence of the Republic of Kazakhstan. This institution was established by the famous local scholar Professor Petr Greshnikov. In 2002, the IUS opened a branch in St. Petersburg. This branch was established, among other reasons, for the purpose of avoiding the application of Kazakhstani law, which was unfavorable toward arbitration proceedings.

The IUS also handles all types of commercial disputes between local and foreign companies, except disputes that are non-arbitrable under Kazakh law.

Under the Rules of Arbitration of the IUS, in exceptional cases the Council of the IUS may dismiss an award issued under the Rules of Arbitration of the IUS.

A.1.3 KIA

The KIA was the first arbitration institution established after the adoption of the International Arbitration Law. This institution was established by the famous local scholar Professor Maidan Suleimenov.

Similar to the other two institutions, the KIA handles all types of commercial disputes between local and foreign companies.

B. Cases

B.1 Recognition of ICC award appealed to the competent court of the place of arbitration

In 2012, the Mangistau Regional Economic Court and the Court of Appeal of the Mangistau Regional Court rejected Ciments Français' request to recognize a declaratory ICC award issued in Turkey against the Russian Holding company Sibirskiy Cement. Sibirskiy Cement had assets in Kazakhstan in the form of shares in a Kazakhstani entity. It relied on Articles V(1)(e) and V(2)(b) of the New York Convention to argue that the ICC award should not be recognized in Kazakhstan.

Specifically, Sibirskiy Cement claimed that recognition of the ICC award would violate Kazakhstani public policy because, among other reasons, the Russian court had already invalidated the contract between Sibirskiy Cement and Ciments Français, which was the subject of the arbitration. Sibirskiy Cement also argued that the ICC award was set aside by the competent court of Turkey[5] (the country in which the award was made).

The Kazakh courts rejected Sibirskiy Cement's public policy argument, holding that under the Kazakh Civil Procedure Code, only enforcement of a foreign arbitral award — and not recognition — can violate Kazakh public policy. However, the Kazakhstani courts refused to apply the provisions of Article IX (2) of the Geneva Convention, which restricted the application of Article V(1)(e) of the New York Convention, arguing that the Geneva Convention can be applied by Kazakhstani courts only to disputes arising out of contracts relating to the import or export of goods in or out of Kazakhstan.

To the best of our knowledge, this was the first time the Kazakhstani courts considered the application of restrictions set forth in Article IX

[5] Due to reasons that are not listed in Article IX (1) of the Geneva Convention.

of the Geneva Convention. This approach of the Kazakhstani courts is very debatable and evidences that local courts are still not sophisticated in the application of international treaties regulating arbitration proceedings.[6]

B.2 Enforcement of the SCC separate award on costs

In July 2015, the Kazakh court reviewed an application seeking the enforcement of a separate award on costs ("SCC Separate Award") issued under Article 45.4 of the SCC Arbitration Rules. This Article allows arbitrators to issue a separate award for the reimbursement in full of the advance cost payment made by one of the parties to the arbitration proceedings if the other party refuses to pay its part. This separate award may be issued before the issuance of the final award on the dispute.

As a result of the review of the application, the Kazakh court decided that this SCC Separate Award could be recognized and enforced under the New York Convention. To the best of our knowledge, this was the first time the Kazakhstani courts reviewed this issue. This case has not been reviewed by higher courts, and it is not entirely clear whether this practice will be supported by further Kazakhstani court practice. However, the positive outcome of this case evidences the general pro-arbitration approach used by the Kazakhstani courts.

B.3 Kazakhstani court prohibited parallel arbitration proceedings

In 2014, a Kazakh company (the "Claimant") commenced *ad hoc* arbitration under the UNCITRAL Rules against one of the world's biggest oil companies (the "Defendant"), initially seeking to collect debt based on the arbitration clause in the service contract between the parties.

In accordance with this arbitration clause, if the claimed amount was less than USD 5 million, the claim should be reviewed by a sole

[6] For a review of this dispute from a Turkish perspective, see the Turkey chapter of this *Yearbook*.

arbitrator. If the amount of the claim was more than USD 5 million, the dispute should be resolved by a tribunal consisting of three arbitrators.

Initially, the Claimant filed a Request for Arbitration that stated that the amount of the claim would be more than USD 5 million and the parties established the tribunal according to the provisions of the arbitration clause and the UNCITRAL Rules. However, the Claimant later decided to decrease the claimed amount to less than USD 5 million and asked to transfer the case to a sole arbitrator.

Since the Defendant objected to this motion, the Claimant submitted an interim measures application, seeking a court order prohibiting parallel arbitration proceedings, ie the review of the initial claim by the tribunal, to a state court. The court upheld the Claimant's application, stating that, while the list of interim measures set by the Civil Procedural Code does not directly provide the right of a court to prohibit parallel arbitration proceedings, under general provisions of the interim measures rules, the court has the right to apply measures against any persons if the lack of these measures would render the enforcement of an award complicated or impossible.

As far as we know, this is the first example of such an injunction applied by the Kazakh courts and evidences their pro-arbitration approach.

C. Trends and observations

In the past 10 years, Kazakhstani courts and state authorities have become more pro-arbitration and, as a result, much more experienced and sophisticated in the application of arbitration laws and international treaties. However, relevant local court practice is still controversial. In addition to this, local courts may still be biased in favor of the state.

Moreover, the Kazakhstani government has very ambitious plans to attract foreign investors, by providing investors with new options for

the settlement of disputes, including the establishment of new courts and arbitration institutions.

In an effort to attract further investment into Kazakhstan, on 19 May, President Nursultan Nazarbayev issued a decree (the "Financial Center Decree"), which significantly affects the Republic's financial and judicial systems. Pursuant to the Financial Center Decree, a new international financial center will be created in Astana (the "Astana Financial Center" or the "Center"), with the goal of becoming one of the top 10 financial centers in Asia, as well as one of the top 30 financial centers in the world, by 2020.

In line with the Financial Center Decree, in December 2015 the Constitutional Law on the Astana Financial Center ("Astana Financial Center Law") was adopted in order to ensure the establishment and operation of the Astana Financial Center.

A key part of the Astana Financial Center will be the creation of a "financial court" ("Astana Financial Center Court"). It will engage foreign judges to resolve investment and other disputes between members of the Astana Financial Center, or other parties if they agree to settle their disputes in this financial court. It appears that the new court may hear disputes under agreements governed by English law and that the English language will be used for the proceedings of the new court.

Similar to the Dubai Financial Center, under the Astana Financial Center Law, the Council of the Astana Financial Center will establish the International Arbitration Center, which will be a new arbitration institution. While it is not entirely clear, it seems that the Astana Financial Center Court will be responsible for the enforcement of awards issued by the International Arbitration Center.