

Constitutional Court Recognized that the Rule Prohibiting to Re-Consider Arbitral Awards on the Merits is in Line with the Constitution

■ General

On 13 September 2024, the Constitutional Court issued a normative resolution on consideration of Article 52.3 of the Arbitration Law of Kazakhstan dated 8 April 2016 as to be in line with the Constitution, according to which the court **may not re-consider an arbitral award on the merits** when considering an application for revocation of the arbitral award, rejection to issue an enforcement order (writ of execution).

After losing the arbitration proceedings, the application initiator filed a claim to court for revocation of the arbitral award, including for re-consideration of the issues on the merits of the dispute. The court dismissed this claim, referring to the above legislative restriction. The applicant decided that this restricts her constitutional right to judicial protection and violates the principle of equality before law and court and applied to the Constitutional Court.

■ Interpretation and Conclusions of the Constitutional Court

The Constitutional Court explained that everyone's guaranteed right to judicial protection of own rights and freedoms is exercised in courts only. By recognizing such right, the Constitution concurrently provides for everyone's right to protect own rights and freedoms by all means, which do not contradict the laws.

In turn, arbitration neither exercises judicial power, nor forms a part of judicial system.

Granting of, specifically, the right to the individuals and legal entities concerned, but not establishment of an obligation, to apply, at sole discretion, for resolution of disputes to the Kazakhstan courts or select an alternative form of protection of rights by applying to arbitration cannot itself be a violation of the rule that everyone has the right to judicial protection of own rights and freedoms.

By entering into an arbitration agreement to submit a dispute for consideration to arbitration and, thus, exercising the right to the freedom of contract, the parties to such dispute voluntarily agree to submit to the rules established for arbitration proceedings.

In this case, everyone's right to judicial protection guaranteed by the Constitution and distribution of judicial power on all originating cases and disputes are ensured by the possibility to apply to court in accordance with the procedure and in cases established by law with an application for revocation of an arbitral award or issuance of an enforcement order (writ of execution) for enforcement of the arbitral award.

Submission of a dispute, which originated or may originate between the parties to a contract, for consideration by arbitration remains an alternative form of protecting the rights to the same extent and does not transform the procedure for conducting arbitration proceedings into the form of protecting the rights, nor gives rise to legal implications other than those prescribed by law for an arbitral award only.

An award issued by an arbitrator is implemented on the basis of voluntary performance of the arbitration agreement by each party, and security of its enforcement is beyond consideration by the arbitration tribunal and is referred by the law-maker to the competence of court.

Based on the above, the Constitutional Court does not see any signs of a violation of equality of rights and freedoms of such persons that are subjected to equal conditions and have equal legal status, in which connection it believes that the **rule of the Arbitration Law in question is in line with the Constitution.**

▀ Proposal of the Constitutional Court on Legislation Improvement

At the same time, the Constitutional Court instructed the Kazakhstan Government to consider the possibility of improving the legislation on arbitration.

Specifically, the term "*public order*", which serves as one of the grounds allowing to revoke an arbitral award and reject the issuance of an enforcement order (writ of execution) needs to be adjusted to ensure its formal certainty and clarity.

The Constitutional Court believes that the definition of "*public order*" must be based on intelligible criteria, allowing to make distinction with absolute certainty between lawful and unlawful behavior, excluding the possibility of arbitrary interpretation of provisions of law.

The normative resolution entered into force from the date of its issue, it is mandatory for all in the entire territory of Kazakhstan, final, and is not subject to appeal.

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