

Yekaterina Khamidullina

Partner, Head of Dispute Resolution,
AIFC Law and TMT Practices

Dinmukhamet Nurakhmet

Associate

AEQUITAS Law Firm

CONTRACTUAL JURISDICTION UNDER THE LAWS OF THE REPUBLIC OF KAZAKHSTAN: LIMITS OF AGREEMENT OF THE PARTIES AND PROCEDURAL RISKS

The right to judicial protection includes an opportunity to apply to court and to have case considered by court whose competence applies to the case by law, in complying with the principles of legality, equality of parties, and publicity of judicial proceedings. The exercise of this right depends, among other things, upon correct determination of jurisdiction. The legal venue affects procedural expenses, possibility of personal participation of the parties in a court session, presentation and examination of evidence, ensuring of appearance of witnesses, and timely claim security measures.

The Civil Procedure Code of the Republic of Kazakhstan (the "**Code**") grants the right to the parties to change territorial jurisdiction or choose extraterritorial jurisdiction over a specific case upon agreement. At the same time, the agreement of the parties remains in effect only within the limits established by procedural law.

Contractual jurisdiction implies agreement of interests of all parties. Choice of a legal venue must not deprive a party of the right to judicial protection or contradict the imperative rules of jurisdiction. The risk of violating this balance originates in case of incorporating a clause into standard contractual conditions, granting the right to choose only to one party, or in a situation where a clause of a master contract also applies to other related contracts, or if there is a direction of court that has no competence to consider relevant category of cases.

A clause, the content of which does not allow to determine a competent court or which contradicts the imperative rules of the Code, fails to ensure the dispute resolution procedure agreed upon by the parties. Its application may entail the return of a claim, case transfer to another court, separate consideration of inter-related claims, and greater judicial protection term. Such conditions are referred to pathological jurisdiction clauses.

This article considers legal regulation of contractual jurisdiction, limits of agreement of the parties, requirements to the content of a jurisdiction clause, jurisdiction over claims relating to security obligations with mixed parties involved, as well as the competence of Kazakhstan courts over cases involving foreigners.

1. Contractual jurisdiction in the system of civil legal proceedings of Kazakhstan

Chapter 3 of the Code establishes the key rules of jurisdiction.

According to Article 32 of the Code, if so agreed upon between the parties, they may change territorial jurisdiction, choose extraterritorial jurisdiction for a specific case, including with respect to case handled by court, at the stage of preparing the case to proceedings.

At the same time, this right is of limited nature. The parties may not change (by way of agreement between them) exclusive (in rem) jurisdiction that determines competence of courts of different types and levels, or exceptional jurisdiction stipulated by Article 31 of the Code.

The civil procedure legislation of Kazakhstan distinguishes the following types of jurisdictions:

- **exclusive jurisdiction** determines a court of a relevant level or specialization competent to consider a civil case as a first instance court;
- **territorial jurisdiction** determines a specific court where a case must be considered based on the place of residence or location of a defendant, or another territorial criterion stipulated by the Code;
- **exceptional jurisdiction** is jurisdiction over categories of cases specified in Article 31 of the Code, which cannot be changed by agreement of the parties;
- **contractual jurisdiction** is the change of territorial jurisdiction over a specific case by the parties.

Determining of jurisdiction is one of the first steps in the course of a lawyer's analysis in case of origination of judicial proceedings.

2. Limits of agreement of the parties

The principle of freedom of contract is effective in substantive legal relations. In procedural relations, the parties' discretion is limited by imperative rules, including the necessity to ensure the right of an economically weaker party to judicial protection.

A jurisdiction agreement is a procedural agreement between the parties changing territorial jurisdiction established by law. Article 13.2 of the Kazakhstan Constitution grants the right to judicial protection of own rights and freedoms to everyone, while Article 77.3.3 of the Kazakhstan Constitution establishes that no one may be changed jurisdiction stipulated by law without his/her consent. A similar principle is secured in Article 8.3 of the Code.

Accordingly, when entering into contractual legal relations, a person may base itself on the assumption that a dispute will be considered by court, which has jurisdiction over it by law, including according to the general rule based on the place of residence or location of a defendant.

Therefore, according to Article 32 of the Code, the subject of agreement does not cover exclusive and exceptional jurisdiction.

Civil cases are considered and resolved by district (city) courts and courts deemed equal to them, except for the cases stipulated by Article 26 of the Code.

According to Article 27 of the Code, specialized inter-district economic courts consider and resolve civil cases involving property and non-property disputes, the parties to which are individuals carrying out individual entrepreneurial activities without formation of a legal entity, legal entities, and with respect to corporate disputes, except for the cases where a different court's jurisdiction is determined by law.

Article 31 establishes the following categories of disputes with exceptional jurisdiction:

- claims in relation to rights to land plots, buildings, premises, structures, other facilities inseparable from land (immovable property), for removal of attachment from immovable property, for initiation of proceedings against pledged immovable property, for termination or invalidation of immovable property pledge agreement are filed at the place of location of such facilities;

- claims from creditors of a testator filed against successors, executor of will (administrator to a will) are subordinated to a court at the place of location of inheritable property;
- claims for recognition as unworthy heir, recognition as heirless inheritance, extension or restoration of term for acceptance of an inheritance, and abatement of inheritance are filed at the place of opening of an inheritance;
- claims against transporters arising out of haulage contracts, passenger transport contracts, luggage carriage contracts are filed to court at the place of location of a transporter (transportation organization, individual entrepreneur); and
- claims for compensation for damages caused by a foreign country's violation of Kazakhstan's jurisdictional immunity and its property are filed to court at the place of location of a claimant, unless otherwise stipulated by an international treaty ratified by Kazakhstan.

Indication to a court in a contract, which does not have statutorily established jurisdiction, does not remove the effect of imperative rules of the Code.

A jurisdiction agreement must be executed in writing. The text of such agreement must determine a dispute or a category of disputes, court or a method allowing to determine it, and the scope of persons bound by the condition. The name of a court must correspond to the system of Kazakhstan courts. A wording containing only an indication to a settlement does not determine a court in case there are several courts at the relevant territory.

An agreement binds a person expressing consent to its conditions. Provision of a master contract does not cover a guarantor, surety or any other person providing security, unless an agreement of security nature contains a relevant condition or a direct reference, which would evidence the acceptance of such condition.

3. Practical issues of application of contractual jurisdiction

In practice, a contractual jurisdiction clause agreed upon by the parties to a master contract is often reproduced in security agreements, including guarantee agreements and surety agreements. At the same time, when determining jurisdiction over a dispute, claims to a person providing security must be analyzed separately. Accessoriness of a guarantee or a surety does not mean that a jurisdiction agreement contained in a master contract will automatically cover a guarantor or a surety. For this purpose, such person must express consent to relevant contractual jurisdiction. Furthermore, the parties' agreement may change only territorial jurisdiction; competence of a relevant type of court determined, among other things, based on the parties involved in a dispute, as well as exceptional jurisdiction, may not be changed by the parties' agreement.

For example, parties to a credit agreement (master contract) are legal entities and a jurisdiction condition provides for consideration of disputes at the Specialized Inter-District Economic Court (SIEC) of Almaty. As applied to claims between the parties to the master contract, such clause may comply with Article 27.1 of the Code, according to which SIEC considers property and non-property disputes, the parties to which are legal entities and individuals carrying out individual entrepreneurial activities without formation of a legal entity.

When entering into surety agreements, a master contract's condition on consideration of disputes at SEIC of Almaty was reproduced without any changes. At the same time, sureties under such agreements were individuals who did not have the status of individual entrepreneurs. If a creditor files claims against the said sureties, the parties involved in a dispute will not correspond to the

parties stipulated by Article 27.1 of the Code. Jurisdiction over such claim will be determined based on the rules of Article 26 of the Code and other applicable rules of Chapter 3 of the Code.

In the situation at hand, condition of the surety agreement on consideration of disputes at SIEC of Almaty may be considered as a pathological jurisdiction clause, because the court determined by the parties does not possess the statutorily established competence for the relevant category of disputes. Article 32 of the Code grants the right to the parties to change territorial jurisdiction or choose extraterritorial jurisdiction upon agreement of the parties, but it does not allow changing the division of jurisdiction between district (city) and specialized courts established by law.

In light of pathological nature of such clause, it must not apply. Accordingly, applicable must be jurisdiction based on the place of residence of a defendant.

Another example is a situation where a model bank loan agreement may provide that the bank's claims must be filed at the place of location of its head office or any branch at the bank's discretion. The agreement neither contains any specific name of court, nor establishes any objective criterion for selection among several branches.

Such wording may give rise to uncertainty, because a court is determined by a creditor after a dispute has arisen. When entering into the agreement, a borrower may not determine a court, to which the claim will be submitted. The condition gives an opportunity to one party to determine territorial jurisdiction without additional agreement with the other party.

Article 32 of the Code provides for changes in territorial jurisdiction or choice of extraterritorial jurisdiction upon agreement of the parties. Therefore, a condition, based on which a specific court is determined by one party after a dispute has arisen, requires examination as to presence of the agreed jurisdiction criterion. Indication of several branches without the rule for determining a competent court may evidence not an effective agreement of the parties, but the fact of granting a unilateral right to a creditor to choose a court.

If the bank loan agreement has been entered into by accession to a standard form drafted by the bank, the said clause may also be evaluated subject to Article 389 of the Civil Code of Kazakhstan (the "**Civil Code**").

A party acceding to a contract may claim for the contract cancellation if an accession agreement, although being in line with legislation, deprives such party of the rights normally granted under contracts of such type, excludes or limits liability of the other party for violation of obligations or contains other expressly onerous conditions for the acceding party, which the acceding party would have not accepted based on its reasonably comprehended interests if it had had an opportunity to participate in the process of determining the contract conditions. Thus, as applied to a jurisdiction clause, important may be whether a relevant condition is expressly onerous for the acceding party and whether the agreement is an accession agreement in terms of Article 389 of the Civil Code. The very signing of the agreement evidences the party's consent to the conditions contained therein; however, it does not exclude the necessity to establish whether a relevant clause allows determining territorial jurisdiction agreed upon by the parties, and whether it is in line with limits of contractual jurisdiction established by Article 32 of the Code.

The situations described above demonstrate that, when evaluating contractual jurisdiction, it is insufficient to establish presence of a provision on dispute resolution in a contract. Depending on the circumstances, subject to examination must be the parties involved and nature of the dispute, presence of a jurisdiction agreement between the parties, method of including the clause in a contract, certainty of territorial jurisdiction agreed upon by the parties or its determination criterion,

contract nature, as well as compliance of the clause with the contractual jurisdiction limits established by Article 32 of the Code.

4. Contractual jurisdiction in cases involving foreign persons

The competence of Kazakhstan courts with respect to cases involving foreign persons is determined by Chapter 57 of the Code. According to Article 466.1 of the Code, Kazakhstan courts consider cases involving foreign persons if a defendant organization is located or a defendant citizen has the place of residence in the Kazakhstan territory. Other grounds for the competence of Kazakhstan courts are stipulated by parts 2 and 3 of the said Article. Article 467 of the Code establishes the categories of cases referred to exclusive competence of Kazakhstan courts.

Article 468 of the Code establishes that competence of a foreign court may be stipulated by a written agreement of the parties, except for the cases stipulated by Article 31 of the Code. In case of presence of such agreement, subject to a defendant's application, the court dismisses a claim if such application is submitted before considering the case on the merits.

In this case, the agreement on the foreign court's competence must not be considered as allowing to exclude competence of Kazakhstan courts with respect to the cases referred by Article 467 of the Code to their exclusive competence.

In order to apply Article 468 of the Code, subject to verification are written form of the agreement, its effect with respect to a specific defendant, absence of exceptional jurisdiction under Article 31 of the Code, and the term of submitting an application. Absence of the defendant's application or its submission after the court has started considering the case on the merits excludes the procedural consequence specified in Article 468 of the Code.

In case the Kazakhstan court's competence remains in effect, after application of Articles 466–468 of the Code, subject to determination is jurisdiction over the case within the judicial system of Kazakhstan. For this purpose, it is necessary to apply Articles 26-34 of the Code. The agreement on competence of a foreign court and agreement on territorial jurisdiction within Kazakhstan have different subjects.

5. Contractual jurisdiction in administrative proceedings

Extraterritorial jurisdiction is stipulated not only in civil, but also in administrative proceedings.

According to Article 1.3 of the Administrative Procedure Code of Kazakhstan (the **"Administrative Procedure Code"**), provisions of the Code are applied in administrative proceedings, unless a different procedure is stipulated by the Administrative Procedure Code. At the same time, the issues of jurisdiction over administrative cases are regulated by special rules of Chapter 16 of the Administrative Procedure Code. Article 106 of the Administrative Procedure Code provides for the rules of territorial jurisdiction over administrative cases, while Article 107 of the Administrative Procedure Code provides for jurisdiction by the interrelation of choses in action and at the choice of the parties.

Article 107.1 of the Administrative Procedure Code grants the right to a claimant to choose extraterritorial jurisdiction once when filing a claim. Such right is the exclusive right of the claimant and does not require consent of a defendant or of other participants to the administrative process. Extraterritorial jurisdiction does not apply to cases, which must be considered in accordance with the procedure stipulated by Articles 102.3, 103, 105.1, 106.2, 106.3, and Chapter 25 of the Administrative Procedure Code.

Along with that, Article 107.2 of the Administrative Procedure Code provides for the right of the parties to change territorial jurisdiction for a specific administrative case upon agreement. Such agreement may be entered into even after the court accepts the administrative case for proceedings, but before appointing the case for proceedings in a court session.

Thus, Article 107 of the Administrative Procedure Code distinguishes two procedural mechanisms. According to part 1 of the said Article, extraterritorial jurisdiction is chosen by a claimant. According to part 2, territorial jurisdiction of a specific case may be changed by agreement of the parties. These mechanisms have different legal grounds and must not be synonymous with each other.

Since the procedure for choosing extraterritorial jurisdiction is expressly regulated by the Administrative Procedure Code, application of Article 32 of the Code as an independent ground for choosing extraterritorial jurisdiction in an administrative case is not required. Provisions of the Code may be applied subsidiarily only with respect to the issues not regulated by the Administrative Procedure Code, and may not be used to expand the grounds and jurisdiction application limits established by Article 107 of the Administrative Procedure Code.

When preparing an administrative claim, subject to examination must be a category of an administrative case, presence of exceptions stipulated by law, stage of administrative proceedings, and method of changing jurisdiction. The parties' agreement on the change of territorial jurisdiction does not substitute the claimant's expression of will on the choice of extraterritorial jurisdiction and does not allow for changing jurisdiction over an administrative case established by law.

6. Forum non conveniens concept

When choosing extraterritorial jurisdiction, it could be reasonable to bear in mind actual accessibility of the chosen court. Territorial distance of court may entail additional expenses associated with the participation of representatives and other participants of the process, and may have practical importance for representation and examination of evidence, ensuring of participation of witnesses, examination at the place of location of evidence, and other procedural actions.

When evaluating reasonable practicality of choosing a specific court, it is possible to consider the factors similar with the circumstances taken into consideration in the system of justice of common law under the *forum non conveniens* doctrine, including accessibility of evidence, possibility for the participation of witnesses, related expenses, and procedural convenience for the parties.

At the same time, *forum non conveniens* as an independent procedural doctrine allowing a court to refuse from consideration of a case, over which the court has jurisdiction, due to convenience for another court is not stipulated by the Kazakhstan legislation. Therefore, the said factors may be taken into consideration by the parties when choosing a court stipulated by law; however, these factors alone do not serve as a ground for changing jurisdiction or referring a case to another court.

The opportunity to participate in a court session by using technical communications means stipulated by Article 133-3 of the Code reduces importance of territorial distance of court. However, remote participation does not eliminate the difficulties associated with investigation of material evidence, inspection on the spot, ensuring of appearance of witnesses, and execution of letters of request.

7. Conclusions

Thus, contractual jurisdiction in a civil process in Kazakhstan represents a limited form of procedural autonomy of parties. It allows considering particulars of specific legal relations when determining territorial jurisdiction over a dispute without changing the jurisdiction division between relevant types of courts and rules of exceptional jurisdiction established by law.

The legal importance of a clause is determined not only by the fact of its incorporation into a contract, but also by compliance of its content with requirements of procedural legislation. Clearness of the chosen court, consistency between conditions of inter-related contracts, range

of embraced claims, and presence of a foreign element in total affect the possibility to perform the agreement reached by the parties. Proper agreement of these issues increases predictability of the dispute resolution procedure and mitigates the risk of origination of additional procedural conflicts.
