KAZAKHSTAN

LAW & PRACTICE: p.357

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The ‘Law & Practice’ sections provide easily accessible information on navigating the legal system when conducting business in the jurisdiction. Leading lawyers explain local law and practice at key transactional stages and for crucial aspects of doing business.

TRENDS & DEVELOPMENTS: p.366

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The ‘Trends & Developments’ sections give an overview of current trends and developments in local legal markets. Leading lawyers analyse particular trends or provide a broader discussion of key developments in the jurisdiction.

DOING BUSINESS IN KAZAKHSTAN: p.369

Chambers & Partners employ a large team of full-time researchers (over 140) in their London office who interview thousands of clients each year. This section is based on these interviews.

Law & Practice

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Contributed by AEQUITAS Law Firm **Authors** Valikhan Shaikenov, Olga Chentsova, Lyailya Tleulina

The litigation, arbitration and dispute resolution team at **AEQUITAS Law Firm** includes a partner, senior advisor, two senior associates and two associates. It is based primarily in Almaty, but with offices in Astana and Atyrau. The team has a strong international network that enables it to advise on claims and enforcements across a range of jurisdictions. Key areas of expertise include foreign investments, construction, debt restructuring-related disputes and arbitration clause invalidation. Members of the team serve as arbitrators at a range of institutions in Kazakhstan. AEQUITAS lawyers were among the developers of Kazakhstan's Law on Arbitration Tribunals and Law on International Arbitration.

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Partner **Valikhan Shaikenov** is an arbitrator for the Center of Arbitration of the National Chamber of Entrepreneurs of the Republic of Kazakhstan. He supervises the arbitration, litigation, dispute resolution and banking & finance teams.

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Lyailya Tleulina is an experienced litigator, handling the majority of the firm's litigation projects. Her practice also covers commercial arbitration where she has represented clients in a range of disputes.

1. General

1.1 Prevalence of Arbitration

(i) Concept of international arbitration in the Kazakh legislation

It is well known that there is no uniformity in the understanding of what is termed 'international commercial arbitration' (as opposed to 'domestic arbitration'). Approaches may vary considerably depending on the country, and in jurisdictions where there are differences in the legal regulation of 'local' and 'international' arbitration the content of the latter concept may also significantly differ from country to country. Kazakh legislation qualifies arbitration as 'international' exclusively on the basis of the entities involved; disputes in which at least one of the parties is a non-resident are submitted to international arbitration and reviewed pursuant to the Republic of Kazakhstan (RK) Law No 23-III 'On International Arbitration' dated 28 December 2004 (hereinafter, the International Arbitration Law), and disputes between residents are submitted to local arbitration and reviewed pursuant to the RK Law No 22-III 'On Arbitral Tribunals' dated 28 December 2004 (hereinafter, the Domestic Arbitration Law).

(ii) Prevalence of international arbitration

The choice of international arbitration as a method of dispute resolution is fairly widespread in Kazakhstan. If the subject of the contract allows the parties to use arbitration, the parties will normally do so (including following insistent lawyers' recommendations). This choice is due to the many advantages associated with international arbitration, such as effectiveness, confidentiality, promptness of dispute resolution, the possibility to select arbitrators, the arguable cost-efficiency, etc. In addition to these reasons, in Kazakhstan, in common with a number of

other post-Soviet countries, this choice is often due to a lack of trust in the judicial system. On average, the leading Kazakh arbitration institutions review 10–20 cases annually.

(iii) Influence of Kazakhstan's judicial practice on arbitration
Kazakhstan does not adhere to the principle of judicial practice uniformity; therefore, entirely different decisions are often taken by the same judge or court on similar types of cases. On rare occasions, judicial practice is summarised in the regulatory resolutions of the RK Supreme Court on certain categories of cases.

Moreover, the available database of judicial acts is not systematised, which makes any search extremely difficult. There is no available search according to specific categories of cases, specific judges or specific context. It is very difficult not only to collect and systemise the judicial acts relating to arbitration, but also to rely on the isolated decisions of courts in order to form an idea of the current judicial practice.

1.2 Trends
In 2014, the Government started drafting the new Law on Arbitration, which is expected to unite the current International Arbitration Law and Domestic Arbitration Law. Please see the review of the draft Law on Arbitration as of January 2015 in the '**Trends & Developments**' section.

1.3 Key Industries
According to the leading arbitration institutions in Kazakhstan, the principal category of cases comprises disputes stemming from sale and purchase, supply, service, financing, lease, transportation agreements and construction contracts (including construction at local oil and gas fields and construction of residential and administrative buildings) and disputes arising from foundation agreements.

1.4 Arbitral Institutions
According to the available information, Kazakhstan has about 20 active arbitration institutions, most of which are located in Almaty. There are no statistics indicative of these institutions' popularity; however, there is evidence that parties often choose the Kazakhstan International Arbitrage and the International Arbitration Court of the Juridical Centre (IUS). Occasionally, there have been arbitration clauses referring to the Rules of the International Commercial Arbitration Court of Eurasian Mediation Centre (ICAC). Kazakhstan also has the International Arbitration Court (IAC), the Centre of Arbitration and Arbitration Tribunal Proceedings under the National Chamber of Entrepreneurs of the Republic of Kazakhstan, the Arbitral Tribunal under the Association of Banks of the Republic of Kazakhstan, and a number of others. The foreign arbitration institutions most popular among local and foreign counterparties are the ICC International Court of Arbitration, the London Court of International Arbitration, the Arbitration Institute of the Stockholm Chamber of Commerce. Arbitration clauses referring to the Rules of the Vienna International Arbitral Centre have also been encountered.

2. Governing Law

2.1 International Legislation
International arbitration in Kazakhstan is governed by the International Arbitration Law. In respect of injunctive (interim) measures and enforcement of arbitral awards, the Civil Procedure Code No 411-I of 13 July 1999 also applies.

Certain rules of the International Arbitration Law were borrowed from the UNCITRAL Model Law on International Commercial Arbitration (as amended in 2006) (hereinafter, the Model Law), as follows:

- Rules for submission and receipt of written communications by the parties.
  The concept of the waiver of right to object.
- Chapter VII of the Model Law regarding the grounds and procedure for appealing the arbitral awards has been reproduced practically verbatim and has not been expanded in the International Arbitration Law.
- The requirement of the International Arbitration Law to comply with the written form of the arbitration agreement also stems from the Model Law. The difference is that the Model Law's interpretation of the written form provision is much broader. In respect of the challenging of an arbitrator, both the International Arbitration Law and the Model Law oblige the person who has been appointed or is to be appointed as an arbitrator to disclose to the parties any circumstances that may give rise to

a challenge to their eligibility, and to submit their resignation if the proceedings have already started.

At the same time, certain provisions of the International Arbitration Law differ significantly from the Model Law, as follows:

- Whilst the Model Law makes a clear distinction between the arbitral tribunal and arbitration institution, Kazakh law does not draw such a boundary and combines these concepts (which may bring about major adverse implications).
- Unlike the Model Law, the International Arbitration Law provides for the necessity to comply with the 'principle of the rule of law', pursuant to which arbitration in its decision must follow only the rules of the governing law chosen by agreement between the parties. Although failure to comply with this principle is not specified amongst the grounds for refusing enforcement of an award, this poses certain risks in the context of the Kazakh judicial system.
- In contrast to the Model Law, which provides for the right of the parties to agree on the place of arbitration at their discretion, the International Arbitration Law limits this possibility by setting forth the following rule: 'The parties may, at their discretion, determine the place of arbitration, unless the dispute is submitted to a permanent arbitration.' It is clear that this rule appeared in the International Arbitration Law due to a confusion of the concepts of 'arbitral tribunal' and 'arbitration institution', thus resulting in a situation in which the parties are actually being restricted to the location of the arbitration institution.
- Great difficulties also arise with the choice of law to govern the arbitration procedures, since the International Arbitration Law does not distinguish between the concepts of the 'seat of arbitration' (determining the applicable law) and the 'venue of arbitration' (meaning the place of hearings in the geographical sense). Such an approach of the local legislature is significantly different from that of the Model Law, which, in addition to the composition of entities involved, offers a number of other links to foreign elements allowing the arbitration to be covered by an 'international' regime. For instance, the Model Law provides for the possibility for the parties located in the same country to select another jurisdiction as the place of arbitration (often with all the resulting implications associated with the applicability of the law of that other jurisdiction to the arbitration procedures). The literal interpretation of the Kazakhstan's International Arbitration Law, as well the judicial practice based thereon and known to us, implies the impossibility for two residents of Kazakhstan to select a foreign place of arbitration.

2.2 Changes to National Law

In 2014, the International Arbitration Law was amended with a provision permitting the reference to arbitration of disputes related to the performance and termination of concession agreements in cases provided for by the RK Law on Concessions. Furthermore, a new law on commercial arbitration is expected to be adopted in 2015. The draft law is being extensively discussed by the legal community and, if adopted, it will supersede the current International Arbitration Law and Domestic Arbitration Law.

3. The Arbitration Agreement

3.1 Enforceability

The key requirement of the arbitration agreement for it to be enforceable under the laws of Kazakhstan is that it is to be made in writing. The parties to the arbitration agreement must be legally capable persons. The arbitration agreement must be valid under the law to which the parties have subjected it, and in the absence of such a reference, under the legislation of the Republic of Kazakhstan.

3.2 Approach of National Courts

Kazakh courts pay special attention to the presence of arbitration clauses in contracts. If a contract contains an arbitration clause, the courts will return the statement of claim or leave it undecided, depending on the stage of proceedings.

In order to restore a contract to the Kazakh court's jurisdiction, the parties involved often resort to claims for the invalidation of arbitration agreements. There have been a number of instances where such claims have been satisfied, including by the Supreme Court of the Republic of Kazakhstan.

3.3 Validity of Arbitral Clause

The Kazakh legislation contains no rule to govern the issue of validity of the arbitral clause in an invalidat-

ed contract. Moreover, according to the Kazakh law, with very rare exceptions, transactions are voidable, but not void. That is, their invalidity must be declared by a court or arbitration.

From the procedural point of view, if there is a claim to invalidate a contract containing an arbitration clause, it is firstly necessary to decide whether the dispute is to be reviewed by a court or by arbitration. Therefore, from a practical perspective, the issue of whether the arbitration clause is valid or concluded is to be decided before the contract is reviewed on the merits. In addition, Kazakh scholarly legal publications stand for a view that the arbitration clause's validity should not depend on the validity of the main contract.

4. The Arbitral Tribunal

4.1 Selecting an Arbitrator

In most countries, arbitration institutions are not the entities which review disputes, but merely administer the arbitration procedures, whilst the arbitral tribunal considers the dispute on the merits. The Kazakh legislation does not distinguish between these two concepts (or, quite possibly, mixes them up due to the fault of the legislature), as a result of which the arbitration institute becomes the dispute-reviewing entity.

Such an approach of the Kazakh legislature and the judicial practice formed on the basis thereof have significant implications, ranging from the procedure for the reimbursement of arbitration costs to the impossibility for two Kazakh residents to choose a foreign arbitration institution to administer their dispute (since such a choice is most likely to be regarded as a choice of a foreign place of arbitration, which are different concepts in the classic model of arbitration).

4.2 Challenging or Removing an Arbitrator

The International Arbitration Law imposes certain limitations on the autonomy of the parties' choices. A person selected as an arbitrator is to be an individual who does not have an interest, either direct or indirect, in the outcome of the case and is independent from the parties, who consents to perform the arbitrator's duties, is twenty five or more years of age and who has undertaken higher education. A sole arbitrator appointed to review the dispute must have attained a higher level of legal education and have had at least two years' experience of working in the legal profession. In the event that the dispute is to be resolved by a panel of arbitrators, the arbitration chairperson must have achieved a higher level of legal education. Additional requirements for arbitrator nominees may be set forth in the rules of a permanent arbitration. The panel must be comprised of an odd number of arbitrators.

The arbitrator cannot be a person who:

- has been selected or appointed as a judge of a competent court in accordance with the procedure established by a legislative act of the Republic of Kazakhstan;
- has been declared to be legally incapable, or as having limited legal capacity, by a competent court in accordance with the procedure established by the legislation of the Republic of Kazakhstan; has an unexpunged or outstanding conviction; is a state official, deputy of the Parliament of the Republic of Kazakhstan or deputy of a maslikhat (city council), performing on a permanent or full-time basis their activities remunerable from the state budget, or a military service person.

In the absence of the mutual agreement of the parties, the competent court may, within 30 calendar days, upon the application by a party to the dispute, appoint arbitrators (or an arbitrator) from amongst the persons acting as arbitrators of permanent arbitrations, in cases where:

- a party has not appointed the arbitrator within 30 calendar days of receiving the relevant request from the other party;
- two arbitrators have not agreed on the third arbitrator within 30 calendar days of their appointment; or
- the parties have not agreed on the sole arbitrator to consider the dispute.

The current legislation governs the issues of challenging an arbitrator without providing for the possibility for the Kazakh courts to intervene in that challenging process.

If a challenged arbitrator refuses to satisfy the challenge or neither party agrees with the challenge, the

issue of challenging that arbitrator is to be resolved by the arbitrators on the arbitration panel within ten days of receiving the relevant written reasoned application from a party.

The issue of challenging a sole arbitrator must be resolved by the arbitrator themself.

If the sole arbitrator of a dispute refuses to satisfy the challenging application by one or by both parties, or if one of the parties does not agree with the challenge to the arbitrator, the challenging issue is to be resolved by the parties via an agreement to terminate the arbitral proceedings.

4.3 Independence, Impartiality and Conflicts of Interest

The law stipulates that the arbitrator must be independent from the parties and disinterested, directly or indirectly, in the outcome of the case.

In the case of approaching an individual in connection with their possible selection (appointment) as an arbitrator, the individual in question must report any circumstances that could constitute grounds for challenging them, including, inter alia, if the individual does not meet the following requirements: independence from the parties and disinterest in the case's outcome. In the event that such circumstances arise during the course of the arbitral proceedings, the arbitrator must promptly report them to the parties, and then submit their resignation from the role of arbitrator. The same requirement is contained in the Rules of the Kazakhstan International Arbitrage ('KIA'):

"A person who assumes the functions of an arbitrator shall fill out and sign a statement of assumption of an arbitrator's functions and independence from the parties according to the form approved by KIA and shall also disclose in writing to KIA any circumstances likely to give rise to justifiable doubts as to their impartiality or independence with regard to the dispute in the resolution of which they are supposed to participate. The arbitrator shall inform KIA forthwith about any such circumstance if it has become known to them in the course of the arbitration proceedings."

5. Jurisdiction

5.1 Matters Excluded from Arbitration

Arbitration cannot resolve disputes arising from administrative relations and other relations of a public law nature.

Arbitration has no jurisdiction over disputes touching upon the interests of minors or persons declared legally incapable or having limited legal capacity, in accordance with the statutory procedure. Arbitration may not consider disputes arising from personal non-property relations unrelated to property relations and disputes associated with human life or health, privacy, personal and family secrets, and the right to one's own name.

5.2 Challenges to Jurisidiction

Arbitration independently decides on its own powers to consider (jurisdiction over) a dispute submitted thereto, including in cases where one of the parties objects to arbitration due to arbitration agreement invalidity.

A party may claim abuse of powers by the arbitration, if in the course of the arbitration proceedings the subject of such proceedings becomes an issue, which had not been envisaged by the arbitration agreement or which cannot be the subject of arbitration under the rules of that arbitration's governing law or under the rules of the arbitration proceedings.

The Republic of Kazakhstan's legislation does not provide for a procedure according to which the courts of Kazakhstan could interfere with the jurisdiction determination during arbitration proceedings. However, it should be noted that the lack of an arbitration's jurisdiction over a dispute may be regarded by a competent Kazakh court as a ground for setting aside the arbitral award or for denial of that award's recognition and enforcement.

5.3 Timing of Challenge

The right to file a motion to set aside an arbitral award arises after the arbitral award has been rendered.

5.4 Standard of Judicial Review for Jurisdiction/Admissibility

Once the arbitral award has been rendered, upon receipt of a motion by a party to the arbitration or by third parties who have not been involved in the case,

but whose rights and obligations have been affected by the arbitral award, the court may set aside the arbitral award or dismiss the motion. In the framework of the motion review, the court has no right to pass a new decision on the case merits.

5.5 Breach of Arbitration Agreement

The competent court in which the claim on the subject of arbitration has been filed must, if so requested by a party, not later than when issuing its first statement on the merits of the dispute, refer the parties to arbitration, unless it finds that the arbitration agreement is invalid, has lost its force or is unenforceable. Despite such a claim, the arbitration proceedings may be commenced or continued and the arbitral award may be rendered whilst the competent court is reviewing the issue of its jurisdiction over the subject of arbitration.

5.6 Right of Tribunal to Assume Jurisdiction

The legislation does not recognise as parties to arbitration any other persons who have not entered into the arbitration agreement. At the same time, taking into account that the arbitral award may affect third parties' rights and obligations, the arbitral award can be set aside upon a motion by the third parties not involved in the case, if the arbitration has ruled on such parties' rights and obligations.

6. Preliminary and Interim Relief

6.1 Types of Relief

Arbitration has no independent powers to award preliminary or interim relief.

6.2 Role of Courts

In the course of the arbitration proceedings, the parties may petition for interim relief (injunction) in a competent court. The petition for interim relief in the arbitrated claim is to be filed in a court which has jurisdiction over the place of arbitration or the location of property to be injuncted. The competent court must consider the petition for injunction in the arbitrated claim and issue the ruling to grant or deny the interim relief for the claim, in accordance with the same procedure that has been established for the Kazakh courts.

The key rule for the courts to apply injunctive measures is to meet the following condition: 'injunctive measures in a claim shall be allowed in any case situation where failure to take such measures may hinder or render impossible the court decision enforcement.'

Moreover, the arbitration or a party may, upon the arbitration's consent, request the competent court's assistance in evidence collection.

6.3 Security for Costs

Since during arbitration proceedings the parties may petition in a competent court for interim relief (injunction) to secure the claim/counterclaim, and the claim may require costs recovery, such a possibility is deemed to exist and may be exercised in a general procedure by way of filing in a competent court.

7. Procedure

7.1 Governing Rules

The International Arbitration Law stipulates that the arbitration procedures are to be performed in accordance with the rules of arbitration (for permanent arbitration institutions) or in accordance with the rules agreed upon by the parties (for ad hoc arbitrations). This law also contains a number of requirements for the procedure of arbitration (in particular, with regard to the rights of the parties, submission and examination of evidence, consequences of a party's non-appearance, language of arbitration, and deadlines for submission of the statement of defence) with reservations that these requirements apply unless otherwise established by the rules of arbitration or by agreement of the parties.

Pursuant to the International Arbitration Law, the rules for arbitration proceedings which are not determined by either the arbitration rules, the provisions of the said law or by agreement of the parties are to be determined by the arbitration itself.

7.2 Procedural Steps

It is possible to identify conventionally the following main steps: the filing of an application to institute arbitration proceedings; the institution of arbitration proceedings; the arbitration proceedings; and the rendering of an arbitral award.

7.3 Legal Representatives

The International Arbitration Law sets out no specific requirements regarding qualifications of a representative in arbitration proceedings. There are requirements for the execution of the representative's powers.

8. Evidence

8.1 Collection and Submission of Evidence

The legislation has not established any specific forms for the submission of evidence in arbitration proceedings.

8.2 Rules of Evidence

The basic principle of the proving process is that each party must prove those circumstances to which they refer in order to support their claims and objections. If the arbitrator deems the presented evidence insufficient, they may invite the parties to present additional evidence. The arbitrator must personally examine all evidence available in the case.

8.3 Powers of Compulsion

Arbitration may not take measures of a compulsory nature to collect evidence. However, the arbitration or a party, with the arbitration's consent, may request the competent court's assistance in evidence collection. The issued judicial act is binding both on the parties to the arbitration and on third parties not involved in the proceedings. This act may encompass such actions as the interrogation of witnesses, expert reviews, on-site review, etc.

9. Confidentiality

As for legislative provisions, first of all, arbitrators are obliged not to disclose information which comes to their knowledge in the course of arbitration proceedings without the parties' or their legal successors' consent. Moreover, arbitrators cannot be interrogated as witnesses about the information coming to their knowledge in the course of the arbitration proceedings, unless the law expressly provides for the individual's obligation to report the information to a relevant authority.

If the documents relevant to the proceedings, the statement of claim or the arbitral award contain elements of banking/insurance secrets, personal data, commercial or official information, personal correspondence, etc, such information cannot be disclosed to the public. Also of great importance is the language of confidentiality provisions contained in the contract and/or arbitration agreement.

10. The Award

10.1 Legal Requirements

The International Arbitration Law sets forth certain requirements for the form and content of the arbitral award. It must be made in writing and the date and place of arbitration and the motifs underlying the award are to be specified; the arbitral award must be signed by the arbitrators, including by any arbitrator who has a particular opinion whose written position is an integral part of the arbitral award. If the arbitration proceedings were conducted by a panel of arbitrators, the arbitral award may be signed by the majority of arbitrators, stating the reason for any missing arbitrators' signatures.

10.2 Types of Remedies

The legislation puts no limitations on the types of remedies that an arbitral tribunal may award.

10.3 Recovering Interest and Legal Costs

The parties may claim recovery of costs incurred in connection with the arbitration proceedings. Pursuant to legislation, the arbitration/arbitral tribunal distributes such costs amongst the parties in accordance with the agreement of the parties, and in the absence of any such agreement, in proportion to the satisfied and denied claims. The general practice adheres to the above legislative provisions.

11. Review of an Award

11.1 Grounds for Appeal

Arbitral awards rendered pursuant to the International Arbitration Law may be appealed on the grounds provided for in Article 5 of the New York Convention, within three months of the date a party receives a copy of the arbitral award. The motion for setting aside the arbitral award must be filed in court at the place of dispute arbitration. The period for the consideration of such a motion is from 10 to 30 days of the institution of the case. The competent court may request the case materials from arbitration. Once the motion to appeal the arbitral award has been reviewed, the court may issue a ruling to set aside the arbitral award or to deny satisfaction of the motion.

The court rulings on the results of the appeal review may be appealed in a higher court.

11.2 Excluding/Expanding the Scope of Appeal

The parties cannot expand the grounds for appeal of an arbitral award established by international treaties and/or national legislation. An agreement of the parties excluding the scope of appeal may be regarded by Kazakh courts as a waiver, which is invalid under the Kazakh legislation.

11.3 Standard of Judicial Review

The court does not review on the merits the arbitral awards rendered in accordance with the International Arbitration Law. In the event that an arbitral award is set aside, any of the parties may, in accordance with the arbitration agreement, refer to arbitration again, except where the arbitration agreement is invalid or where the arbitral award was rendered on a dispute not covered by the arbitration agreement.

12. Enforcement of an Award

12.1 New York Convention

Kazakhstan is a party to the New York Convention and the European Convention on International Commercial Arbitration.

12.2 Enforcement Procedure

If an award has not been voluntarily performed within the deadlines established therein, the winning party to the arbitration may apply for the arbitral award enforcement. Such an application may be filed in court at the place of arbitration or at the place of location of the debtor's body (if the debtor is a legal entity) or at the place of the debtor's residence (if the debtor is an individual). If the debtor's place of residence or place of location is unknown, the application may be filed at the place of the debtor's property location. The deadline for filing the application is three years from the date of expiry of the period for voluntary performance of the arbitral award.

The application is to be considered by the judge within fifteen days of the date of its receipt by the court. The parties to the arbitration proceedings must be notified of the place and time of the application consideration; however, if they fail to appear, this does not prevent consideration of the application, unless the debtor files a motion for postponement, stating valid reasons for their inability to appear in the court session.

Based on the results of consideration of the application, the court issues a ruling to issue the enforcement order (writ of execution) or deny its issuance. The arbitral award is further executed by the court enforcement officers in the manner prescribed by the national law for the enforcement of judicial acts.

12.3 Approach of the Courts

Normally, the Kazakh courts recognise and enforce arbitral awards (both foreign and those rendered in the territory of Kazakhstan), provided that formal requirements to the arbitral award and arbitration agreement are met. Refusal to recognise and enforce arbitral awards is allowed only in cases of procedural breaches in relation to the arbitration clause or arbitration proceedings. Refusal on public policy grounds are extremely rare.

However, there are instances where courts require the party applying for arbitral award enforcement to provide documents not envisaged by the New York Convention and the Civil Procedure Code, specifically, the proof of due notification of the proceedings to the other party. This may be due to the judges incorrectly interpreting the rules of Article 5 of the New York Convention. Moreover, these rules imply that such proof must be provided by the party seeking refusal of the arbitral award enforcement, not the applicant. Some courts also require provision of a document to support the fact that the arbitral award has entered into legal force, if it is not clear from the text of the award. Such judicial practice results from the provisions of the Regulatory Resolution No 5 of the Supreme Court of the Republic of Kazakhstan, dated 11 July 2003, which sets out a list of the documents necessary for the enforcement of both foreign judgments and foreign awards, without any distinction. In this respect, the Regulatory Resolution contradicts both the Civil Procedure Code and the New York Convention.

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Trends & Developments

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Lyailya Tleulina is an experienced litigator, handling the majority of the firm's litigation projects. Her practice also covers commercial arbitration where she has represented clients in a range of disputes.

Arbitration Trends & Developments in Kazakhstan

Since its adoption in 2004, the International Arbitration Law has been amended three times – in 2010, 2013 and 2014. Amongst other things, the amendments addressed the issues of the right to object against arbitration proceedings, the arbitrability of certain categories of disputes, the entering into and termination of an arbitration agreement, requirements for arbitrators, the formation of the panel of arbitrators, the taking of interim measures, certain procedural aspects of arbitration proceedings, submission of written communications by the parties, and the scope of application of the International Arbitration Law.

New Draft Law

The most prominent news in the area of arbitration is the new draft Law on Arbitration prepared by the Government, which is to replace the existing International Arbitration Law and Domestic Arbitration Law. The draft law was presented for public discussion in January 2015 and is expected to be submitted for consideration to Parliament in the next few months, very little time having been thus allotted for its discussion and finalisation.

The draft law has generated many questions and critical comments.

Shortcomings

It does not subdivide arbitration into 'international' and 'local,' which, according to a number of experts,

is the draft law's shortcoming. It would not be an issue, were the draft law to grant a maximally liberal regime equally for both types of arbitration. However, it retains, and in some instances even strengthens, control over arbitration procedures and limits the autonomy of the will of the parties. The draft law continues to confuse the concepts of the 'arbitral tribunal' and 'arbitration institution', granting the latter not only the function of the arbitration procedures' administration, but also the function of dispute review on the merits. Revised in March 2015, the draft law specifies as a ground for setting aside an arbitral award non-conformance to applicable law, which creates a formal ground for the judicial review (revision) of the arbitral award on the merits. However, at the moment, the Government is discussing the exclusion of this provision from the draft law.

The Arbitration Chamber

It is proposed that a so-called 'Arbitration Chamber' be set up, which is expected to unite (probably on a mandatory basis) all currently active arbitration institutions. The Arbitration Chamber will be keeping a record of the unified register of arbitrators who are conducting activities in the territory of the Republic of Kazakhstan.

Setting Aside Arbitral Tribunals

The draft law's list of grounds for setting aside arbitral awards is much larger than that stipulated by the 1958 New York Convention. The draft law also stipulates the grounds for revision of arbitral awards with the advent of newly discovered circumstances, which include, for instance, recognition as unconstitutional by the Constitutional Council of the Republic of Kazakhstan of a law or another regulatory act applied by arbitration.

Requirements for Arbitrators

The draft law sets forth fairly stringent requirements to arbitrators. For example, an arbitrator cannot be younger than 35 and must have undertaken higher education of a legal nature, and have at least five years' continuous work experience in the legal profession. A person who has been charged with a crime, as well as a state official or a deputy of the Parliament or a local representative body, cannot be an arbitrator.

The Arbitration Agreement

The draft law sets forth strict requirements to the content of an arbitration agreement. In addition to the written form requirement, the legislator demands that the parties confirm their 'express intent to submit disputes to arbitration' and specify the subject and the rules of or procedure for the arbitration proceedings.

Place of Arbitration

Moreover, the draft law limits the possibility to choose the place of arbitration in cases where the parties submit the dispute to a 'permanent arbitration.' Clearly, this happens because of the confusion of the concepts of an 'arbitration institution' and an 'arbitral tribunal'. Furthermore, the draft law does not delimit the concepts of the 'seat of arbitration' and 'venue of arbitration', which leaves open the issue of the freedom of choice as applied to arbitration.

Timeframes for Proceedings

The legislature also intervenes in the area of regulation of the timeframes for arbitration proceedings. Pursuant to the draft law, the case is to be prepared for arbitration proceedings within seven business days of the date of the statement of claim acceptance, unless otherwise established by legislative acts. In exceptional instances involving especially complex cases, this deadline may be extended to one month, following the arbitrator's reasoned ruling.

Maximum Deadlines

The draft law also establishes maximum deadlines for conducting arbitration proceedings on the merits; the arbitration must not take more than two months from the date on which the case preparation for arbitration proceedings was completed. The established deadlines may be extended by arbitration, if they were missed due to reasons recognised as valid by the arbitration. In addition, the draft law sets forth a rule according to which the parties may file a motion to challenge an arbitrator and appoint a new arbitrator, if the arbitrator unreasonably delays the arbitration proceedings.

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