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## **10 QUESTIONS TO A LAWYER ABOUT RECOGNITION AND ENFORCEMENT OF ARBITRAL AWARDS AND FOREIGN JUDGMENTS IN KAZAKHSTAN**

In the age of globalization and extension of international economic relations, a greater number of companies participate in cross-border disputes resolved in both international arbitrations and foreign courts. However, issuing a judgment in favor of one of the parties is only a part of the way. The stage that is not less important and often a more complicated one is recognition and enforcement of such judgment in a jurisdiction of a debtor or its assets.

The procedures for recognition and enforcement of foreign judicial acts and arbitral awards in Kazakhstan often give rise to difficulties for the business and require profound understanding of both international obligations of Kazakhstan and provisions of national legislation. To help get an insight into the key aspects of this procedure, we prepared answers to 10 most frequent questions asked by clients. This article will be helpful for both legal counsel and business representatives striving to effectively protect their interests.

- 1. Is it possible to enforce an arbitral award or a foreign judgment in Kazakhstan?*
- 2. What international treaties regulate recognition and enforcement of foreign arbitral awards and judgments in Kazakhstan?*
- 3. May an arbitral award or a foreign judgment be enforced in Kazakhstan in case of absence of an international treaty?*
- 4. How can an arbitral award and foreign judgment be enforced in Kazakhstan?*
- 5. What is the court for submission of an application for recognition and enforcement of a foreign judgment?*
- 6. What is the period to file an application for recognition and enforcement of a foreign judgment?*
- 7. What documents must be drafted in order to file an application for recognition and enforcement of a judgment?*
- 8. What are the requirements to the documents required for recognition and enforcement of arbitral awards and foreign judgments in Kazakhstan?*
- 9. What are the grounds for refusal of recognition and enforcement of arbitral awards and foreign judgments in Kazakhstan?*
- 10. What are the practical difficulties encountered by the parties in the course of recognition and enforcement of arbitral awards and foreign judgments in Kazakhstan?*

## 1. Is it possible to enforce an arbitral award or a foreign judgment in Kazakhstan?

Yes, the Republic of Kazakhstan (the "**Kazakhstan**") allows for recognition and enforcement of international arbitral awards and judgments of foreign state courts. This is possible in case of complying with a number of conditions established by international treaties and national legislation.

Foreign judgments and arbitral awards are recognized and enforced Kazakhstan in case this is stipulated by law and/or international treaties ratified by Kazakhstan, or based on the principle of reciprocity.

The basis for recognition of arbitral awards is the New York Convention on the Recognition and Enforcement of Arbitral Awards dated 1958<sup>1</sup>, to which Kazakhstan acceded on the basis of the Presidential Edict dated 4 October 1995<sup>2</sup>.

As regards foreign judgments, they are subject to recognition and enforcement, as a rule, under multilateral or bilateral agreements on legal assistance entered into by Kazakhstan with relevant countries.

In the absence of an international treaty, it is possible to apply the principle of reciprocity; however, confirmation of such reciprocity may require additional legal efforts.

Thus, presence of an international arbitral award or a court judgment does not itself guarantee automatic enforcement in Kazakhstan. However, in case of complying with the established procedure and presence of relevant international and legal grounds, recovery under such judgments in Kazakhstan is possible.

## 2. What international treaties regulate recognition and enforcement of foreign arbitral awards and judgments in Kazakhstan?

Recognition and enforcement of foreign arbitral awards and judgments is regulated in Kazakhstan by both rules of national legislation and international treaties, to which Kazakhstan is a party.

Internally, the procedure for recognition and enforcement of such judgments is secured in the Civil Procedure Code<sup>3</sup>, Arbitration Law<sup>4</sup>, and the Law on Enforcement Proceedings<sup>5</sup>. These acts determine general procedural framework, including the procedure for applying to court and the list of documents required to consider an application.

As per the international sources, the key role belongs to the New York Convention and the European Convention<sup>6</sup>. Both conventions are ratified by Kazakhstan and play an important role in the practice of recognition of international arbitral awards.

Furthermore, Kazakhstan is a party to many multilateral international treaties providing for mutual recognition and enforcement of judicial acts between the post-Soviet countries. For example, the Chisinau Convention<sup>7</sup>, which simplifies the enforcement of judgments between such countries as Russia, Belarus, Ukraine, Moldova, Kyrgyzstan, Uzbekistan, Georgia, Armenia, and other.

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<sup>1</sup> Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 10 June 1958), as amended.

<sup>2</sup> Edict No. 2485 of the President of the Republic of Kazakhstan "On Accession of the Republic of Kazakhstan to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards dated 1958" dated 4 October 1995, as amended.

<sup>3</sup> Code No. 377-V of the Republic of Kazakhstan "Civil Procedure Code of the Republic of Kazakhstan" dated 31 October 2015, as amended.

<sup>4</sup> Law No. 488-V of the Republic of Kazakhstan "On Arbitration" dated 8 April 2016, as amended.

<sup>5</sup> Law No. 261-IV of the Republic of Kazakhstan "On Enforcement Proceedings and Status of Court Enforcement Officers" dated 2 April 2010, as amended.

<sup>6</sup> European Convention on International Commercial Arbitration (Geneva, 21 April 1961), as amended.

<sup>7</sup> Convention on Legal Assistance and Legal Relations in Civil, Family and Criminal Matters (Chisinau, 7 October 2002), as amended.

Kazakhstan has also entered into several bilateral agreements on mutual assistance, which include provisions on recognition and enforcement of judgments. Such agreements are particularly in effect with Turkey, China, India, Pakistan, UAE, Mongolia, Vietnam, and other countries.

Thus, the possibility of enforcement of a foreign judgment or an arbitral award in Kazakhstan depends in many respects on presence of a relevant international treaty or applicability of the principle of reciprocity.

### **3. May an arbitral award or a foreign judgment be enforced in Kazakhstan in case of absence of an international treaty?**

Yes, in certain cases enforcement of an arbitral award or a foreign judgment in Kazakhstan is possible even in case of absence of an international treaty. In such situations it is possible to apply the principle of reciprocity, which allows for enforcement of foreign judgments if there is a reasonable belief that similar judgments of Kazakhstan courts are recognized and enforced in a respective foreign jurisdiction.

The principle of reciprocity is secured by national legislation of Kazakhstan. The court may demand to submit confirmation that, in turn, a relevant foreign country recognizes and enforces judgments or arbitral awards issued by Kazakhstan authorities. In practice, this may require submission of additional legal reasoning, reference to judicial practice, official clarifications or expert opinion on foreign laws.

It is important to understand that in the absence of an international treaty application of the principle of reciprocity leaves more discretion to court, and successful case outcome will depend largely on quality of arguments, completeness of the submitted evidence and legal approach presented by a claimant.

*For example, in the case of A. S. Avanesov against Shymkentpivo LLP<sup>8</sup>, the Supreme Court of Kazakhstan considered the issue of recognition and enforcement in Kazakhstan of determination of the UK High Court of Justice of 31 July 2013, based on which the amount of USD 3,834,225 was recovered from Shymkentpivo LLP in favor of A. S. Avanesov.*

*The court noticed that there is no international treaty between Kazakhstan and the UK and that the determination is not an arbitral award falling within the effect of the New York Convention 1958.*

*When resolving on this issue, the Supreme Court stated that, according to Article 425 of the Civil Procedure Code of Kazakhstan, judgments of foreign courts are subject to recognition and enforcement if this is stipulated by law, international treaty, or takes place based on the principle of reciprocity. In this case, according to Article 1089 of the Civil Code of Kazakhstan, reciprocity is assumed, unless proven otherwise.*

*Having established that no evidence of absence of reciprocity has been submitted and that the defendant has been properly notified of the proceedings, the Supreme Court concluded about lawfulness of the first instance court's ruling that satisfied the application for recognition and enforcement of the determination.*

Thus, the Supreme Court confirmed that in the absence of an international treaty a foreign judgment may be recognized in Kazakhstan on the basis of the principle of contemplated reciprocity, unless there is evidence to the otherwise.

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<sup>8</sup> Resolution No. 3 rn-242 of the Judicial Board for Civil Cases of the Supreme Court of the Republic of Kazakhstan dated 20 April 2016.

#### **4. How can an arbitral award and foreign judgment be enforced in Kazakhstan?**

Foreign judgments and arbitral awards are enforced in Kazakhstan in two stages: first, recognition and obtainment of an enforcement order (writ of execution), then – actual enforcement via a court enforcement officer.

At the first stage, the party concerned files an application to court at the place of location of a debtor or its property. The application is filed in accordance with the procedure stipulated by the Civil Procedure Code of Kazakhstan, attaching the documents.

As a rule, the application is considered by a judge alone within 15 business days of the day of acceptance by court. Based on the outcome of consideration, a ruling is issued on recognition and permission for enforcement or refusal.

After receiving the enforcement order, the enforcement applicant applies to a court enforcement officer at the place of location of the debtor. In the course of enforcement proceedings, the court enforcement officer applies the measures stipulated by law for the purpose of actual recovery of the debt: attachment of property, writing off the funds, prohibition to alienate assets, and other.

Thus, successful enforcement of a foreign judgment in Kazakhstan requires both compliance with procedural requirements at the stage of recognition, and effective interaction with court enforcement officers at the stage of enforcement.

#### **5. What is the court for submission of an application for recognition and enforcement of a foreign judgment?**

An application for recognition and enforcement of an arbitral award or a foreign judgment is filed to court (1) at the place of considering the dispute, or (2) at the place of residence of a debtor, or (3) at the place of location of a body of a legal entity. If the place of residence or the place of location is unknown, at the place of location of the debtor's property.

Such procedure is established by Article 503 of the Civil Procedure Code of Kazakhstan and applies to both arbitral awards and court judgments to be enforced in the territory of Kazakhstan.

#### **6. What is the period to file an application for recognition and enforcement of a foreign judgment?**

According to Article 503 of the Civil Procedure Code of Kazakhstan, applications for recognition and enforcement of foreign judgments or arbitral awards may be filed within 3 years of the end of the period established for its voluntary enforcement. This means that such period starts running not from the date of issuing a judgment, but from the moment when it should have been enforced on a voluntary basis in accordance with conditions of the very act or notice of its entry into force.

If the 3-year period has been missed for any valid reason, it may be reinstated upon the applicant's motion. In this case, the applicant must submit evidence to court confirming valid reason of the fact of missing the deadlines, which objectively interfered with filing of the application within the established timeline. The issue of reinstatement of such term is considered by court on a case-by-case basis subject to all case circumstances.

It is also worth bearing in mind that, if filing an application with the missed deadlines without specifying valid reasons or without the required documents, the court may dismiss such application, which does not exclude the possibility of a repeated application after eliminating the grounds for dismissal.

## **7. What documents must be drafted in order to file an application for recognition and enforcement of a judgment?**

In case of a failure of voluntary enforcement of an arbitral award, according to Article 503 of the Civil Procedure Code of Kazakhstan, a person concerned files an application for recognition and enforcement of a foreign arbitral award, attaching the following set of documents:

- duly certified original arbitral award or its duly certified copy;
- original arbitration agreement or an arbitration clause contained in a contract, or a duly certified copy of such contract;
- duly certified translation of the arbitral award into the Kazakh or Russian language if it is made in a foreign language.

## **8. What are the requirements to the documents required for recognition and enforcement of arbitral awards and foreign judgments in Kazakhstan?**

The key requirement to the documents set for recognition and enforcement of arbitral awards and foreign judgments in Kazakhstan is their proper certification.

Despite the fact that the Kazakhstan legislation and applicable international conventions are silent as to clear definition of the concept of "duly certified document", based on the existing law-application practice, it is worth pointing out as follows:

As applied to the document certification procedure, it is necessary to follow general provisions of attestation of documents, depending on a country where an arbitral award has been issued.

Two attestation methods are possible: consular legalization or apostilization.

Same as many other countries, Kazakhstan is a party to the Hague Convention<sup>9</sup>, which cancels the requirement on consular legalization for official documents. In such cases, it is sufficient to have an apostille affixed by an authorized governmental agency.

Apostille confirms authenticity of a signature and powers of an official or a notary issuing a document. Although arbitral awards and agreements are not formally referred to the list of official documents specified in the Convention, notarized copies may be apostilled.

In Kazakhstan, an apostille for a notarial act intended for use abroad is executed by the Ministry of Justice and its territorial subdivisions in regions.

It is worth mentioning that with respect to the CIS member states it is necessary to apply provisions of the Minsk Convention<sup>10</sup> and Chisinau Convention<sup>11</sup> on Legal Assistance and Legal Relations in Civil, Family and Criminal Matters.

According to these conventions, documents issued or attested in the territory of one of the parties to the convention by a competent authority or duly authorized person within the limits of their powers, executed in accordance with the established form and affixed with an official seal are recognized as valid in the territories of other parties to the convention without the necessity to ensure additional attestation or legalization.

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<sup>9</sup> The Hague Convention cancelling the requirement on legalization of foreign official documents dated 5 October 1961.

<sup>10</sup> Convention on Legal Assistance and Legal Relations in Civil, Family and Criminal Matters, signed in Minsk on 22 January 1993.

<sup>11</sup> Convention on Legal Assistance and Legal Relations in Civil, Family and Criminal Matters, signed in Chisinau on 7 October 2002.

## 9. What are the grounds for refusal of recognition and enforcement of arbitral awards and foreign judgments in Kazakhstan?

Refusal to issue an enforcement order for an arbitral award is only possible based on the ground specified in Article 57.1 of the Arbitration Law. Such list of grounds is exhaustive, and it is worth distinguishing the following grounds:

- **invalidity of an arbitration agreement in accordance with the laws governing such agreement:** for example, absence of essential elements in the agreement, such as the intention of the parties, subject, and indication to a specific arbitration;
- **issuing an arbitral award in a dispute, which is not covered by the arbitration agreement:** for example, if the arbitration agreement was drafted in a very narrow manner, and the arbitral award affected the rights and interests of third parties;
- **one of the parties to the arbitration agreement has been recognized by court as legally incapable or partially capable:** as a general rule, legal capability of an individual is determined by the laws of such person, i.e. laws of the country of such person's citizenship;
- **failure to notify a party of appointment of an arbitrator or arbitration proceedings:** according to the Kazakhstan legislation, such notice must be sent in writing;
- **there is an effective arbitral award:** for example, there is an arbitral award, which has already been enforced between the same parties, with respect to the same subject (factual circumstances), and based on the same grounds (claims);
- **non-conformity of the composition of arbitration or arbitration procedure to the agreement of the parties:** for example, if a sole arbitrator without respective specialization was appointed instead of three arbitrators who have competence in the field of digital technologies;
- **arbitral award did not become binding upon the parties or was revoked:** for example, if such award was cancelled by a court of the country where it had been issued, or if it has not yet entered into legal force in accordance with applicable laws of the arbitration proceedings;
- **arbitral award contradicts the public order of Kazakhstan:** applicable in a situation where an arbitral award contradicts the bases of the legal order of Kazakhstan. It is worth mentioning that the concept of public order is evaluative and must be interpreted subject to specific case circumstances.

## 10. What are the practical difficulties encountered by the parties in the course of recognition and enforcement of arbitral awards and foreign judgments in Kazakhstan?

Despite formally regulated procedure for recognition and enforcement of foreign judgments in Kazakhstan, in practice, parties encounter a number of significant difficulties conditioned by both specifics of national legislation and the existing law-application practice.

First, much attention is paid to formal requirements set to documents. Even insignificant drawbacks, for example, absence of due certification, apostil, notarized translation or differences in the names of the parties may result in dismissal of an application. This is specifically relevant in the situations where documents are executed in a jurisdiction with different requirements to legalization.

Second, courts fail to always unequivocally interpret international obligations of Kazakhstan. In the absence of an express international treaty with a country where a judgment has been issued, an applicant must prove the presence of reciprocity, which often requires engagement of a foreign

law expert or obtainment of an official response from the governmental agencies of another country. This makes the process more complicated and time-consuming.

Third, there is a risk of refusal based on a failure to comply with public order. The concept of "public order" does not have a clear definition and may be interpreted by courts in a fairly broad manner, up to refusal based on differences in the procedures applied by a foreign court or arbitration even if no such grounds are stipulated by international law.

*As an example, in 2016, Kazakhstan International Arbitration (KIA) considered the case No. 11/2016 under a claim from R LLP to KS N JSC for recovery of insurance compensation. The defendant applied for involvement of K JSC (reinsurer) as a third party and for the dispute submission to a court of general jurisdiction. The claimant objected, specifying that the reinsurer is not a party to the arbitration agreement and may not participate in proceedings.*

*The arbitration recognized its jurisdiction referring to Article 40 of the KIA Regulations, pursuant to which participation of third parties in arbitration is allowed only subject to their consent and consent of the parties. Absence of consent does not entail the loss of jurisdiction – proceedings continue without participation of such third party, which may subsequently file an independent claim to a state court.*

*The arbitration also stated that Article 20 of the Arbitration Law contains the exhaustive list of disputes, which are not subject to the authority of arbitration, and disputes affecting the interests of third parties are not included in this list. According to Article 8 of the Law, arbitration is only possible in case of presence of an arbitration agreement between the parties. The arbitration concluded that the reinsurer is not a third party in the civil sense and its interests are not affected by the award.*

*However, on 30 January 2017, SIEC of Almaty revoked the arbitral award referring to a violation of public order and the fact of affecting the interests of third parties. The appellate instance court upheld this judgment and actually reconsidered the case on the merits, which contradicts the principle of finality of an arbitral award.*

Finally, even after receiving an enforcement order, there may be difficulties with actual recovery. This relates to the cases where the debtor's property is absent in the territory of Kazakhstan or concealed, or formally belongs to third parties. In such situations the efficiency of enforcement is directly dependent upon the actions of a court enforcement officer and presence of assets.

Thus, successful recognition and enforcement of a foreign judgment in Kazakhstan requires not only compliance with formal requirements, but also profound preparation, strategic planning, and flexible response to procedural risks.

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