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Arbitration Court under Astana International Financial Centre

The article deals with the problems of formation and current state of the Arbitration Court of the Republic of Kazakhstan and foreign countries and the implementation of the President of the Republic of Kazakhstan N.A. Nazarbayev's National Plan «100 concrete steps» of Step 70 «the formation of Astana International Financial Center (AIFC) on the basis of ASTANA EXPO 2017 infrastructure, and giving it a special status».

Key words: International commercial arbitrage, Arbitration Court, Astana International Financial Centre, National Plan 100 concrete steps.

In March, 2015 at the XVI congress of «Nur Otan» party Nursultan Nazarbayev put forward five institutional reforms among which modernization of government, ensuring the rule of law, industrialization and economic growth, strengthening of Kazakhstan identity, strengthening of transparency and accountability of the state. The five institutional reforms include the necessity to create the International financial center in Kazakhstan. Subsequently, in the Plan «100 concrete steps. Modern state for all» Step 70 was defined as creation of Astana International Financial Center (AIFC) on the basis of hi-tech infrastructure of the International specialized exhibition Astana EXPO-2017 [1]. In the decree of May 19, 2015 No. 24 «On Astana International Financial Center and redeployment of the National Bank of the Republic of Kazakhstan to the city of Astana» [2] the President of the Republic of Kazakhstan entrusted the Government together with the National Bank with submitting the bill on creation of Astana International Financial Center (AIFC) till September 1, 2015 for consideration by the Mazhilis of the Parliament. The bill specified the conditions of functioning of the new financial center, the funds spent on its formation and the ways to attract foreign investors to this large project. Dubai International Financial Center (DIFC) was chosen as a model of Astana International Financial Center, as that project had already proved its efficiency. Today the United Arab Emirates for a small period have achieved high success in the sphere of the international business and are promptly developing and turning into the financial center of the world. It is promoted by the effective stable economy and cooperation with the capital markets of London, New York, Hong Kong, and one of the successful projects of this country is DIFC. The Dubai International Financial Center was founded in 2004 by ruler of Dubai, Prime Minister of the United Arab Emirates Rashid Al Maktoum who signed the decree about establishment of Financial Center and it is among the twenty of the world's most advanced financial centers. There are 80 financial centers in the world. The most developed among them are located in London, New York, Toronto, Tokyo, Singapore, Hong Kong and in some other megalopolises of the world. The Dubai Financial Center in 10 years has successfully taken its place and covered the financial markets of the Persian Gulf and Africa. The purpose of Kazakhstan is to enter top ten Asian financial centers in 10 years as Dubai now.

Kazakhstan has intercepted an initiative of Russia in creation of the international financial center. The first package of measures for creation of the International financial center in Russia was developed by the Ministry of Economic Development in 2009. But they did not take any concrete decisions on implementation of the program. Because of the crisis which began in 2014, the project of Moscow IFC was informally frozen. In 2012 the experts called that idea unsuccessful. Kazakhstan considered the project of creation of AIFC in connection with the deceleration of the world economic growth and reduction of prices of oil and with the purpose to secure the economy against the new shocks due to the attraction of the international capital. Therefore, the main mission of AIFC is the assistance to the fastest growth of non-raw sector of the economy [3].

Also, the Decree of the President of Kazakhstan «On Astana International Financial Center» for solution of investment disputes has provided the creation of the financial court with involvement of foreign judges, the Anglo-Saxon legal system and the English language in legal proceedings. The President has indicated the need of studying of Dubai experience concerning the functioning in the structure of AIFC. For the Decree realization the joint delegation of representatives of the Supreme Court and National Bank gave a working visit to the United Arab Emirates and the Republic of Singapore. During the visit they studied the experience in the solution of investment disputes and the work of foreign financial centers. Also the delegation

signed two memoranda of understanding. One memorandum was on interaction of courts of the countries and the second one was about rendering assistance of the United Arab Emirates to Kazakhstan in creation of the international financial center in Astana. Nowadays the United Arab Emirates have signed memorandums with such countries as the USA, England, Singapore and Kenya. During the visit to Singapore the delegation studied a wide range of the issues connected with local reform in the field of investment disputes solution and the professional advancement of judges. The legal DIFC system is based on the principles of the general (Anglo-Saxon) law. There are several legal systems in the world. The largest of them are the Anglo-Saxon, the continental system and Sharia. In Dubai all three legal systems are applied. In the United Arab Emirates Sharia is applied. Also, there are courts which apply the continental law. It is made for numerous labor migrants, tourists and businessmen. In the territory of the international financial center DIFC of 44 hectares in size the Anglo-Saxon legal system is applied. The Anglo-Saxon legal system has been chosen for the financial center considering the main participants of the global international financial market come from the countries of North America (the USA, Canada), Great Britain, Hong Kong, Singapore, Australia and New Zealand. As, the elite of the international financial business is very well familiar with the Anglo-Saxon legal system and trusts it, it has been chosen in the Dubai Financial Center for the convenience of foreign investors. AIFC is being projected on the analogy of DIFC, that is the independent arbitration with the international judges is to solve the disputes between the residents and investors of AIFC. As the AIFC's law will receive the status of constitutional, the Supreme Court of Kazakhstan will submit to the decision of its court: for example, if the first decides to keep any property for the investor, the latter will be obliged to make it. The AIFC's court will not carry out criminal and administrative legal proceedings. The criminal or administrative offenses committed in the territory of AIFC or outside AIFC by its participants or their workers will be considered by the courts of the Republic of Kazakhstan, authorities (officials), competent to consider the administrative cases according to the existing criminal procedure legislation and the legislation on administrative offenses of the Republic of Kazakhstan. During cases consideration the AIFC's court will also be guided by the available precedents, i.e. their own decisions on the previous cases, decisions of DIFC, the courts of England and Wales and other countries of common law. The decisions of the AIFC's court of appeals will be final, not subject to the appeal and obligatory for all natural and legal entities. Besides, the court of AIFC will have an exclusive right of interpretation of the law of AIFC. The judges with a sufficient experience of administration of justice and faultless reputation will be appointed as the judges of AIFC [4].

According to the Plan «100 concrete steps. Modern state for all», the creation of the international arbitration center is planned for AIFC. Most likely, the basis for it will be the model of the Dubai arbitration DIFC-LCIA which is carrying out the activity on the integrated base of DIFC arbitration and the London court of the commercial arbitration (LCIA) created in 1892. The AIFC international arbitration center will be created for the alternative, extrajudicial settlement of disputes between the participants of AIFC and other investors. Use of the Dubai experience will allow to apply the English arbitration regulations in Kazakhstan, and also to involve the foreign arbitrators into the AIFC international arbitration center activity. In general the idea of creation of the international arbitration center, as well as financial court of AIFC, has been acclaimed enthusiastically by foreign and Kazakhstan lawyers, as well as the representatives of the large national companies [3].

The emergence of the international arbitration in Kazakhstan originated in 1993 when the Arbitration commission at the Chamber of Commerce and Industry of the Republic of Kazakhstan has been created. Then, in 1993 the International arbitration court at the legal center «IUS» was created. That time in Kazakhstan the Standard provision on the arbitration court approved by the resolution of the Cabinet of Ministers of the Republic of Kazakhstan of May 4, 1993 No. 356 was functioning.

Those years the arbitration trial developed slowly but steadily. If the problems arose, they had a removable character. One of such problems was the relationships with the Prosecutor General's Office which tried to object the decisions of the arbitration courts. But after adoption on July 1, 1999 of the Civil Procedural Code the situation changed. Shortly before it the state arbitration courts had been liquidated and the provisions of the Civil Procedural Code began to cover the economic disputes between legal entities.

In the history of development of the legislation on arbitration (arbitration courts) in Kazakhstan it is possible to define three stages: 1) stage of formation of arbitration (1993–1999). At that time the Standard provision on the arbitration court approved by the resolution of the Cabinet of Ministers of the Republic of Kazakhstan of May 4, 1993 No. 356 was applied. Those years the arbitration trial developed slowly, but steadily, the problems were not the sharpest; 2) stage of failure of arbitration courts (1999–2004) as the newly adopted Civil Procedural Code of the Republic of Kazakhstan on July 1, 1999 didn't comprise the norms

providing compulsory execution of decisions of the arbitration courts by the state courts. After the adoption of the Civil Procedural Code the jurisprudence failed. To correct a situation, the Supreme Court adopted the Standard resolution No. 14 of October 19, 2001 which obliged the courts to render determinations about compulsory execution of decisions of the arbitration courts. However, this resolution was opposed by the Prosecutor General's Office and the Ministry of Justice. As a result the Supreme Court was forced to suspend the standard resolution; 3) stage after adoption of arbitration laws (since 2005 till present). On December 28, 2004 the Law «On the Arbitration Courts» [5] and the Law «On the International Commercial Arbitration» were adopted [6].

Nowadays the Republic of Kazakhstan is facing the situation of excessive workload of regular courts, bureaucracy and red tape at hearing of cases, insufficient training and selection of personnel for judicial system that in total negatively influence the quality of administration of justice and terms of case consideration. As a rule, the period from submission of the claim to the court till the entry of decision into legal force (at the appeal of the decision in an appeal order) is 4–5 months that finally prolongs the execution of the decision. We should not forget about the right of a defeated party to appeal the judicial act in cassation and supervising instances. All this exhausts the «opponents» and does not promote the fruitful business activity [7; 137].

For the last five years the question of need to decrease the courts workload has arisen. In his speech at the V Congress of Judges of the Republic of Kazakhstan (November, 2009) President N. Nazarbayev has directed the judges' attention to «the reduction of number of the disputes which are subject to consideration in a judicial proceeding, introduction of alternative ways of their settlement, including conciliatory procedures and mediation. It will give our justice a recovery character. Besides, the use of alternative methods of disputes settlement will allow help to reach a fundamental goal of judicial system — the expeditious and high-quality settlement of disputes between citizens» [8].

The application of alternative ways of disputes settlement was also discussed at the VI Congress of Judges in November, 2013. In the speech of the President of the country «Problems of national judicial system in the context of Strategy «Kazakhstan – 2050» it was said about the huge potential of development of the Kazakhstan legal system: «It will make positive impact on judicial system of Kazakhstan, will promote decrease in load of courts. And at the same time it will make an impact on strengthening of business activity, creation of favorable investment climate in the country».

In the world practice the various alternative ways of disputes settlement are widely used, among them are arbitration and arbitration courts. For example, in the USA about 60% of commercial disputes are settled by the arbitration and arbitration courts which activity is regulated at the federal level by the Federal Arbitration Act of the USA of 1925.

Unfortunately, the absence of due promotion and awareness of wide sectors of society on the arbitration courts and arbitration interfere with their development and more active address to them for disputes settlement. Whereas arbitration and arbitration trial unlike consideration of the case in regular courts possesses a number of indisputable advantages.

The appeal to the arbitration court (the international arbitration) requires the presence of civil contracts signed between the parties (deliveries, purchase and sale, rent, loan, pledge, leasing, insurance, assignation of the right of the demand, etc.) the arbitration reservation. Its absence won't allow the arbitration court (arbitration) to settle a dispute.

It should be noted that the arbitration court and arbitration are the same in essence, they consider the disputes between natural and (or) legal entities following from the civil relations. Distinction between them is in subjects and jurisdiction of disputes.

Thus, the arbitration court considers the disputes between the legal and (or) natural persons who are residents of the Republic of Kazakhstan, and the international arbitration — the disputes between legal and (or) natural persons if at least one of the parties is a nonresident of the Republic of Kazakhstan.

The following disputes are not subordinated to the arbitration courts and arbitration: the disputes involving the interests of minors and the persons recognized incapacitated by legal order, also the disputes arising from the personal non-property relations which are not connected with property but connected with life and health, personal privacy, personal and family secret, the person's right for name.

In addition, the arbitration courts have no right to settle the disputes involving the interests of the state, the state enterprises, the persons who aren't participants of the arbitration agreement, disputes from contracts on services rendering, work performance, production of goods by subjects of natural monopolies, the subjects holding a dominant position on a services and goods market and also on cases of bankruptcy. These disputes are subordinated to arbitration.

Thus, if an arbitration reservation is present in the contract, any natural and legal entities who are the residents of the Republic of Kazakhstan have the right to apply to arbitration court for settlement of disputes. The exception is made for the companies which share of participation belongs to the state as the decision made on such dispute can be cancelled because interests of the state are infringed. Whereas the international arbitration has the right to consider disputes in which interests of the state are infringed, that is disputes between nonresidents of the Republic of Kazakhstan and residents whose share of participation belong to the state.

The advantages of the arbitration courts and arbitration are as follows: the independence of arbitration judges (arbitrators); immediate entry of the decision of the arbitration court (arbitration) in force; immediate execution of the arbitration court (arbitration) decision; possibility of election of arbitrators and arbitration judges; faster settlement of a dispute; observance of the principle of confidentiality; lower amount of arbitration (arbitration) fee; revision of decisions of the arbitration court is carried out generally at procedural violations of an order of carrying out the trial [9].

Kazakhstan does not have a lot of arbitration courts. Their exact number is unknown as there is no unified center and statistics of activity of the arbitration courts. It is possible to assume that their general number is over thirty, generally in Almaty. The first arbitration courts which were created in Kazakhstan in 1992 — 1993 are the Arbitration commission at the Union of Chambers of Commerce and Industry of the Republic of Kazakhstan and the International arbitration court of «IUS». On January 5, 2005 the Kazakhstan International Arbitration (KIA), which in five years of existence has turned into the leading arbitration (arbitration) court in Kazakhstan, was created.

Nowadays the most popular arbitration center in Kazakhstan is the Kazakhstan International Arbitration. The Kazakhstan International Arbitration employs over 200 leading Kazakhstan and foreign lawyers who work in the major and well-known international law firms and universities. The Kazakhstan Arbitration has established partnership with the leading arbitration agencies of various countries. Among them are the China International Economic and Trade Arbitration Commission (CIETAC), the Japanese Commercial Arbitration Association, the International Commercial Arbitration Court at the Chamber of Commerce and Industry of the Russian Federation, the Korean Commercial Arbitration Court (KCAB), the International Arbitration court of the International Chamber of Commerce, the Netherlands Arbitration Institute and others.

Today the leading arbitration courts of the world operate in London, Stockholm, Paris, Washington, Hong Kong, Singapore and other large centers of the international business. Implementation of an idea to create the international arbitration center in Astana will exclude the need to participate in «legal tourism», will allow to settle all investment disputes in Kazakhstan using the best practices of the international arbitration. It will create the additional infrastructure for investment activity in the region. Astana can become another successful center of commercial arbitration in Eurasia, which means the additional inflow of the capitals, a possibility of development of the Kazakhstan market of legal services and education, positive image of Kazakhstan on the international arena. These advantages are obvious on the example of London. For example, according to the experts in 2012 in lawsuits, including with participation of businessmen from the CIS, a hundred of best London lawyer offices earned about 5,4 billion pounds. Only in the case «Berezovsky vs. Abramovich» the fees made over 100 million pounds. These indicators have positively affected many spheres of the London business, from transport to hotel and translation services. Probably, for this reason the mayor of London Boris JOHNSON directly urged businessmen all over the world to settle their disputes in the capital of Great Britain [3].

According to the DIFC legislation, the decisions of foreign courts and arbitration are recognized and executed in the territory of DIFC, despite the absence of international treaties with the correspondent states. For example, in the Republic of Kazakhstan the courts execute foreign decisions only if the international treaty has been signed with the state. Owing to a small amount of international treaties, the execution of foreign decisions in the Republic of Kazakhstan is difficult or impossible. For example, the courts of the Republic of Kazakhstan do not execute the decision of the courts of the European countries and the USA. This experience of DIFC would be interesting to Kazakhstan; however the blanket standard on recognition and execution of decisions of foreign courts in DIFC can provide the foreign companies with a unilateral advantage as not all foreign courts are ready to execute the decisions of the Republic of Kazakhstan courts on a mutual basis. There is an opinion that due to the fact that the DIFC courts recognize and execute foreign decisions without the international treaty, it is possible to recognize the foreign decision in DIFC and to transfer it further to execution outside DIFC (in the United Arab Emirates and other countries). But there is an uncertainty in this question. It is necessary to study and estimate pluses and minuses of the similar scenario in the Re-

public of Kazakhstan as the copying of this practice can have serious consequences. The DIFC courts have gone further. As there are not many agreements between the United Arab Emirates and the foreign states on mutual recognition and execution of court decisions (as well as in the Republic of Kazakhstan), DIFC studies a possibility of «converting» the decisions of the DIFC courts into arbitral decisions. It would allow to execute the DIFC courts decisions in more than 140 countries of the world owing to the New York convention of 1958 «About the recognition and execution of foreign arbitral decisions». That is, for the execution of decisions of the DIFC courts it is offered to use the mechanism of recognition and execution of arbitral decisions. Moreover, as we know, recognition and execution of the decision of foreign arbitration in the Republic of Kazakhstan provides the procedure according to which the local courts study a possibility of recognition and execution of the decision taking into account objections of the defendant. That is, not all decisions of foreign arbitration are executed and a lot of things depend on local courts. The DIFC courts have positively proved themselves in the questions of recognition and execution of decisions of foreign arbitration, as they study this issue more liberally than the judges of courts of the Emirate of Dubai. In this regard, the probability of recognition and execution of the decision of foreign arbitration by the DIFC court (for further execution in the territory of the United Arab Emirates) is significantly higher than if the arbitral decision recognized and executed by the courts of the Emirate of Dubai.

It should be noted that on April 30 the current year the Bill of the Republic of Kazakhstan «On Arbitration» was submitted to the Mazhilis of Parliament [10]. Why is there a need of adoption of this law today and how is this connected with implementation of AIFC project? The working out of the Bill «On Arbitration» is carried out in execution of N.A. Nazarbayev's order on development of the uniform law on arbitration given at opening of the fourth session of the Republic Kazakhstan Parliament, the fifth convocation on September 2, 2014 and according to Paragraphs 1, 2 of the Plan of lawmaking works of the Government for 2015 approved by the Government resolution on December 31, 2014 No. 1421.

The purpose of the bill adoption is the improvement of the legislation which regulates the arbitration sphere, promotion of its activity, development of a general system of alternative disputes settlement, decrease in workload of competent (state) court. The adoption of the bill will allow to strengthen the operating system of arbitration, to create favorable conditions for effective activity of arbitration according to the international standards, and also to eliminate gaps and contradictions in the legislation of the Republic of Kazakhstan in this sphere.

The main changes / innovations of the Project can be described briefly as follows:

- 1) The concepts «arbitration court» (resolves disputes with participation of the residents of the Republic of Kazakhstan) and «the international arbitration» (resolves disputes with participation of the nonresident) have been integrated. From now on, the general term «arbitration» will be used;
- 2) The principle of «divisibility» of the arbitration reservation has been introduced (invalidity of the contract does not result in invalidity of the arbitration reservation);
- 3) The competence of arbitration in the questions of civil disputes settlement, both in object and in subjects, has been changed. Essential restrictions for consideration of disputes with participation of the organizations of the public and quasi-public sector have been established;
- 4) Requirements to the contents and registration of the arbitration reservation have been toughened;
- 5) The new bases for cancellation of arbitration decisions have been provided;

In general, the innovations reflected in the Project have a double character. There are both positive and negative moments. The Project shows the developers' intention to more accurately regulate the arbitration activity. However, the analysis shows that more accurate regulation is not always appropriate and necessary.

The essential part of innovations follows from integration of Laws of the Republic of Kazakhstan «On the Arbitration Courts» and «On the International Arbitration». For example, the project assumed the norms about the order of delivery of written messages which are available in the Law of the Republic of Kazakhstan «On the International Arbitration», but which were not available in the Law of the Republic of Kazakhstan «On the Arbitration Courts». Similarly, the Project provides the possibility of revision of decisions with newly discovered facts, which was impossible before within the Law of the Republic of Kazakhstan «On the International Arbitration», but it was provided by the Law of the Republic of Kazakhstan «On the Arbitration Courts», etc. [10, 11].

Astana is seriously ready for creation of the necessary environment for investments.

In conclusion I would like to tell that implementation of such a complex project as the international financial center will be a difficult task which will demand a lot of time and forces.

The project of financial center has a qualitatively developed program of the project implementation. In the development of AIFC we will use the experience of Dubai which is similar in terms of startup. The Execution of the project of Astana International financial center is supervised by the National Bank of Kazakhstan which shows a high level of professionalism and steady work in this difficult period of attacks on national currency. A big advantage of AIFC is creation of financial court and arbitration center. For investors' attraction it is necessary to have the court which works according to the international standards. Kazakhstan has to have an accurate system of the disputes settlement and create better conditions than in their own countries.

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Ж.Т.Мырзалиева

«Астана» Халықаралық қаржы орталығы жанындағы Төрелік сот

Мақалада Қазақстан Республикасындағы және шетелдегі Арбитраждық соттың қалыптасуы, қазіргі жағдайы және Қазақстан Республикасының Президенті қабылдаған Ұлт жоспары — «100 нақты кадам» Стратегиясының 70-қадамы — ASTANA EXPO-2017 инфрақұрылымдары арқауында арнаулы мәртебе бере отырып, «Астана» Халықаралық қаржы орталығын (AIFC) құру мәселесін іске асыру қарастырылды.

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Арбитражный суд при Международном финансовом центре «Астана»

В статье рассмотрены вопросы становления, современное состояние Арбитражного суда Республики Казахстан и зарубежных стран. Показана реализация Шага 70 — Создание международного финансового центра Астана (AIFC) на базе инфраструктуры ASTANA EXPO 2017, с приданием ему специального статуса в соответствии со Стратегией Президента Республики Казахстан Н.А. Назарбаева «План нации — 100 шагов».

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