5) обеспечения безопасности личности, общества и государства[10].

В результате проведенного анализа все рассмотренные выше принципы можно классифицировать в зависимости от целей и объектов регулирования по следующим основным группам:

1 группа – общие принципы обеспечения национальной безопасности;

2 группа – общие принципы обеспечения информационной безопасности;

3 группа – принципы государственной политики в сфере информационной безопасности;

4 группа – принципы правового регулирования в сфере информационной безопасности;

5 группа – специальные принципы обеспечения безопасности информатизационных данных (защита персональных данных; принципы деятельности средств массовой информации; принципы государственного регулирования рекламы и рекламной деятельности; принципы электронного документооборота и др.).

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NATIONAL LEGISLATION IN THE FIELD OF COMMERCIAL DISPUTES SETTLEMENT BY ARBITRATION

Kim Ye.A., 2nd year master's student of Law Faculty of Y.A.Buketov Karaganda State University
Mussilimova K.S., Candidate of Juridical Sciences, professor of Constitutional and International Law Department of Y.A. Buketov Karaganda State University

The development of economic cooperation is inconceivable without its legal support. Recognition of arbitration as an effective method of resolving disputes at the international level and the level of adoption of domestic legal acts is of fundamental importance for arbitration practice. Therefore, the legal regulation of international commercial arbitration at the domestic level is one of the main conditions for the successful functioning of arbitration as an institution throughout the world.

The legal status of Kazakhstani arbitration is determined by the current legislative acts, namely the Constitution of the Republic of Kazakhstan and the laws of the Republic of Kazakhstan: «On arbitration» of April 8, 2016; «On amendments to certain legislative acts of the Republic of Kazakhstan on improving civil, banking legislation and improving conditions for entrepreneurial activity» of February 27, 2017. Moreover, various issues of arbitral proceedings are regulated by the rules of the Civil Procedure Code of the Republic of Kazakhstan (Articles 80, 155, 157, 159, Chapters 20 (Enforcement of the award) and 56 (Proceedings on the request for annulment of the arbitral awards) as well as Articles 482, 501, 503 in Section 4 (International proceedings).

Regulation of arbitration proceedings is also carried out in accordance with other norms contained in many other legislative acts of the Republic of Kazakhstan: the Civil Code (Article 9); the Tax Code (Articles 534 and 535); the Code of the Republic of Kazakhstan on administrative offenses (Article 754); the Criminal Procedure Code (Article 78); the Law «On enforcement proceedings and status of enforcement agents» (Articles 5 and 7).

The right of the disputing parties to submit the dispute to arbitration is enshrined in a number of normative legal acts. Thus, in accordance with paragraph 1 of Article 13 of the Constitution of the Republic of Kazakhstan, everyone shall have the right to be recognized as subject of the law and protect his rights and freedoms with all means not contradicting the law including self-defense [2]. One of such means is the consideration of property disputes by arbitration. Paragraph 1 of Article 9 of the General part of the Civil Code of the Republic of Kazakhstan establishes that the protection of civil rights can be carried out by arbitration [3]. Article 24 of the Civil Procedure Code of the Republic of Kazakhstan stipulates the right to transfer the dispute to arbitration by agreement between the parties [1].

A special law in the field of arbitration in Kazakhstan is the Law of the Republic of Kazakhstan «On arbitration». The law consists of 8 chapters and 60 articles and regulates the public relations arising in the process of arbitration activity in the territory of the Republic of Kazakhstan, as well as the procedure and conditions for recognition and enforcement of arbitral awards.

In accordance with Article 1 of the Law on arbitration, its provisions are applied to disputes arising out of civil legal relations involving natural and (or) juridical persons, regardless of the place of residence or location of the subjects of the dispute within or outside the state, resolved by the arbitration [4]. From the foregoing, it follows that in the Republic of Kazakhstan arbitration has the right to resolve both disputes between residents and disputes involving foreign persons.

In addition, the commented Article 1 of the Law on arbitration extends not to any civil law relations, but only to those which arise out of contractual obligations of the parties. As P.Ya. Greshnikov points out «in business, there are disputes which arise out of non-contractual relations of the parties. For example, disputes on legal ownership, compensation for harm and other types of non-contractual disputes, not all of which can be referred to arbitration. The main criterion in determining the arbitration jurisdiction of the dispute will be the private-law nature of the dispute. Disputes arising out of relations with public authority, or having a public-law nature, regardless of the willingness of the parties, may not be referred to the competence of arbitration» [5].

In accordance with Article 4 of the Law on arbitration, both institutional (permanent) arbitration and ad hoc arbitration can be established on the territory of the Republic of Kazakhstan (for consideration of a specific dispute) [4].

It should be noted that arbitration in the Republic of Kazakhstan can not be formed by public authorities, state-owned enterprises, as well as natural monopolies and entities with dominant position on the market of goods and services, juridical persons, fifty and more percent of voting shares (participating interest in the charter capital) directly or indirectly owned by the state, their branch and affiliated organizations, as well as second-tier banks, organizations carrying out certain types of banking operations (Article 4) [4]. This provision, in our opinion, is enshrined in the Law on arbitration with the aim to eliminate any interference of public authorities and other organizations in the activity of arbitration and arbitrators.

In addition, arbitration courts do not resolve disputes between natural and (or) juridical persons of the Republic of Kazakhstan on the one hand and state bodies, state enterprises, as well as juridical persons, fifty and more percent of voting shares (participating interest in the charter capital) of which are directly or indirectly belonged to the state on the other hand if there us the absence of the consent of the authorized body of relevant industry (in relation to the republican property) or the local executive body (in relation to communal property) (Article 8) [4]. The establishment of such a prohibition, in our opinion, is not justified. Obviously, the obtaining consent of the sector ministry or the akimat by state companies for applying to arbitration is conditioned by the subjective factors, including the obscure wording of «economic security and national interests». In this regard, the obtaining such consent is unrealizable. Thus, in spite of the

proclamation of the state support for local producers, the Law on arbitration in fact builds obstacles for the effective protection of their rights. However, as it was noted by A.K. Kaldybayev when foreign companies enter into arbitration agreements with state-owned companies, the Law on arbitration does not require obtaining any consent and thus provides support to foreign companies [6].

The Law on arbitration establishes principles in compliance with which the arbitral proceedings must be carried out. Among these are the principle of autonomy of the will of the parties, legality, independence, competitiveness and equality of the parties, justice, confidentiality and autonomy of the arbitration agreement (Article 5) [4]. In the opinion of A.A. Grigorov international commercial arbitration has a two-level classification of principles: the principles governing the organization, and the principles governing the procedural activity of international commercial arbitration. The principles enshrined in Article 4 of the Law on arbitration, according to A.A. Grigorov theory are organizational. In this regard, we want to highlight the principles that determine the procedural activity of international commercial arbitration. They are not fixed in any specific article of the Law, but can be defined from the meaning of the articles, spread throughout the Law on arbitration. Among these are the principle of resolving a dispute in accordance with the arbitration agreement (paragraph 1 of Article 8, subparagraph 1) of paragraph 1 of Article 52), the principle of recording or fixing in any material form any procedural actions of the parties to arbitral proceedings (paragraph 2 of Article 36), the principle of the reasonableness of the arbitral award (paragraph 1 of Article 44), the principle of mandatory notification to each party of the date, time and place of oral hearings in formal arbitration or initiation of studies of documents by arbitration tribunal in informal arbitration (paragraph 3 of Article 26), the principle of equal opportunity for each of the parties to protect their interests entirely (paragraph 1 of Article 32), the principle of equal opportunity for each of the parties to have full knowledge of the position of its procedural opponent and its objections (Article 31) [7].

The Article 9 of the Law on arbitration establishes the requirements for the form and content of the arbitration agreement. Thus, the Law establishes only a written form for the conclusion of such an agreement. According to paragraph 1 of Article 9 the arbitration agreement is concluded in writing if it is contained in the form of an arbitration clause in a document signed by the parties or concluded by exchanging letters, telegrams, telephone messages, faxes, electronic documents or other documents that determine the subjects and the content of their will. Moreover, the arbitration agreement is also considered as concluded in writing, if it is concluded by exchanging a statement of claim and a statement of defence in which one of the parties states that there is an agreement and the other does not object to it. The reference in the contract to the document containing the condition on the transfer of the dispute to arbitration is an arbitration agreement if the contract is concluded in writing, and this reference is such that makes the arbitration agreement part of the contract.

In accordance with paragraph 4 of Article 9, the arbitration agreement must contain: 1) the intention of the parties to submit the dispute to arbitration; 2) the indication of the subject to be considered by the arbitration; 3) the specification of a particular arbitration; 4) the consent of the authorized body of the relevant branch or local executive body in the case provided by the Law. Supplementary conditions of the arbitration agreement may be determined by agreement of the parties.

The main feature of the new Law on arbitration is the establishment of the Kazakhstan Arbitration Chamber. According to Article 11 of the Law «On arbitration», the Kazakhstan Arbitration Chamber is a non-profit organization, which is a union of institutional arbitration courts, arbitrators, created to ensure favorable conditions for the implementation, encouragement and support of arbitration activity in the Republic of Kazakhstan [4].

The Kazakhstan Arbitration Chamber has its own governing bodies, among these are the general meeting of members - the supreme governing body; the board - standing collegial management body; the chairman of the board – single executive body; the audit commission (auditor) which is the body of internal control over the financial and economic activities of the Arbitration Chamber.

The powers of the Kazakhstan Arbitration Chamber include: the representation and protection of the interests of arbitrators and permanent arbitrations in state bodies of the Republic of Kazakhstan, foreign and international organizations; the monitoring of the state of arbitration activity in the Republic of Kazakhstan and keeping of cases in institutional arbitrations; the training and professional development of arbitrators; the maintenance of register of arbitrators of institutional arbitrations, as well as arbitrators who are the members of the Kazakhstan Arbitration Chamber; the approval of rules for keeping cases in institutional arbitrations; the appointment of arbitrators from among persons who are in the registers of the Kazakhstan Arbitration Chamber or institutional arbitration; the deciding on the termination of the powers of an arbitrator appointed to resolve a particular dispute (Article 12).

The Chapter 4 of the Law on arbitration contains norms that regulate the conduct of arbitral proceedings. Among these are the definition of rules for arbitration proceedings, the initiation of arbitral proceedings, the timing of the preparation of the case for arbitration, the presentation and examination of evidence, the presentation of a counter-claim and offsetting of counter-claims, etc. The Chapter 6 of the Law on arbitration is devoted to the making of award and termination of the arbitral proceedings. We will consider in detail the rules of the arbitral proceedings in the third part 3 of this work.

Besides the Law on arbitration, the normative act which regulates the functioning of arbitrations in Kazakhstan is the Civil Procedure Code of the Republic of Kazakhstan. Special attention should be paid to the Chapter 20 (Enforcement of the award), whereas it provides one of the few cases in which state courts interference in the arbitration is allowed. The Chapter 20 establishes the rules governing the procedure for the enforcement of arbitral awards (issuance of the writ of execution), as well as the grounds for refusing such execution. Thus, in accordance with paragraph 1 of Article 253 of the Civil Procedure Code of the Republic of Kazakhstan «In the case that the arbitral award is not voluntarily fulfilled within the time period established therein, the party to the arbitration in favor of which the arbitral award is rendered (the claimant), has the right to apply to the court for enforcement of arbitration award at the place of consideration of the dispute by arbitration or at the place of residence of the defendant or at the location area of the body of the juridical person, if the place of residence or location area is unknown, then at the location area of the debtor's property». However, paragraph 1 of Article 255 of the Civil Procedure Code of the Republic of Kazakhstan establishes grounds for denial of a writ of execution, among which are the recognition of the arbitration agreement as invalid; the making of arbitral award on a dispute not provided in the arbitration agreement; the recognition by a court of one of the parties to the dispute as incapacitated or partially incapacitated; the violation of procedural rules (for example, improper notification on appointment of an arbitrator or arbitral proceedings); the inconsistency of the arbitral tribunal or arbitral proceedings with the requirements of the law; the enforcement of an arbitral award contradicts to the public policy of the Republic of Kazakhstan, etc. On the issue of enforcing an arbitral award, the court renders a determination (paragraph 3 of Article 255).

Besides the abovementioned international and national sources of law that lawyers working in the field of international commercial arbitration need to know, the attention should be paid to other sources as well, primarily on individual arbitral awards. Although, as a rule, the awards of international arbitrations are performed voluntarily and are not published, there are many specialized editions that print such awards in a special «impersonal» format, which allows to maintain the confidentiality of the arbitral award, but provides an opportunity to get acquainted with the conclusions on legal issues that were made by the arbitrators at the same time. One of these publications is the UNCITRAL Digest of the Case Law on the Model Law on International Commercial Arbitration 2012. The study of such published arbitral awards is very useful for practicing lawyers.

The analysis performed above, shows that there are not so many legal acts regulating arbitral proceedings in our country. In this regard, it is worth paying attention to Article 1 of the Law of the Republic of Kazakhstan «On legal acts», which introduced into the legal system of the Republic of Kazakhstan institutes of the analogy of legal act and the analogy of law [8].

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КӨШІ-ҚОН ҮРДІСІНІҢ ТАРИХИ-ҚҰҚЫҚТЫҚ АСПЕКТІЛЕРІ

Джусупов М.Ш., з.ғ.м., конституциялық және халықаралық құқық кафедрасының PhD докторанты,
Божқараұлы А., з.ғ.к., конституциялық және халықаралық құқық кафедрасының меңгерушісі
Академик Е.А. Бөкетов атындағы Қарағанды мемлекеттік университеті

Қазіргі кездегі қоғамдық-саяси мәселелердің ішіндегі ең маңыздысы көші-қон мәселесі. Еліміз егемендік алып Біріккен Ұлттар Ұйымына және көптеген халықаралық ұйымдарға мүше болуына байланысты Қазақстан өзі үшін жаңа проблемалармен – өзінің ішкі, сыртқы саясатының, қорғанысы мен қауіпсіздігінің және экономикалық проблемалармен бетпе-бет келіп отыр. Кез келген тәуелсіз мемлекеттің ішкі, сыртқы саясатында айрықша назар аударып отыратын мәселелері болады. Республикамызда солардың ең бастыларының бірі көші-қон мәселесі болып табылады.

Қазақстан мемлекеттік тәуелсіздік алғаннан кейін алыс, жақын шет елдерден көшіп келушілер мен көшіп кетушілерді құқықтық реттеуге тура келді. Көші-қон Қазақстан Республикасының «Халықтың көші-қоны туралы» Заңның [1] 1-бабы 9-тармағына сәйкес, жеке тұлғалардың бір мемлекеттен екінші мемлекетке, сондай-ақ мемлекет ішінде тұрақты немесе уақытша, ерікті түрде немесе мәжбүрлі түрде қоныс аударуы.

Қазақстанда көші-қон үрдісі туралы ұғым 70-ші жылдардың ортасында белгілі бола бастады еді. Мұнда бұрын келген жұмыс күштерінің өз еліне қайту үрдісі белең ала бастады.

1992 жылы 26 маусымда «Көшіп келу» туралы Заңын қабылданғанға дейін көші-қон мәселесімен 1977 жылдан бастап Еңбек министрлігі құрамында 5 адам бар арнайы бөлім айналысқан. Заң қабылданған соң іле-шала, 1992 жылы 15 желтоқсанда Министрлер кабинетінің «Көшіп келушілер туралы» №4055 қаулысы қабылданды. Ол 17 тармақтан тұрады. Қаулыда бірыңғай мемлекеттік көші-қон саясатын жүзеге асыру, босқындарды, өзінің ата қонысына қайтып келіп жатқан адамдарды және оның отбасыларын республика көлемінде қоныстандыруды реттеу және ұйымдастырушылық-нысандық тұрғыдан қамтамасыз ету мәселелері қамтылған.

Қазақстан Республикасының мемлекеттік тәуелсіздігі туралы Конституциялық заң көші-қон үрдісін құқықтық реттеу мен көші-қон саясатының негізін құрды [2]. 1992 жылы Алматыда Дүние жүзі қазақтарының алғашқы құрылтайы өткізілді. Осы жиыннан кейін шет елде тұратын байырғы ұлт өкілдерінің елге қайтуға деген ниеті бұрынғыдан да арта түсті [3]. Дүниежүзі қазақтарының қауымдастығы Қазақстан Республикасының Үкіметі мен және басқа мемлекеттік органдар «Адам құқықтарының жалпыға бірдей декларациясы» мен өзге де жаппай танылған халықаралық құқық нормаларында бекітілген адам құқығы мен бас бостандығының басымдылығын танып, сондай-ақ Қазақстан Республикасының Конституциясы мен Қазақстан Республикасының мемлекеттік тәуелсіздігі туралы Конституциялық заңды басшылыққа ала отырып, шетелде тұратын отандастарымыздың ұлттық-мәдени, рухани және тілдік қажеттерін қанағаттандыру жөнінде белгілі жұмыстарды атқара бастады. Атап айтсақ отанына қайтып оралған оралмандарды құқықтық қамтамасыз ету жөніндегі мәселелерге байланысты сұрақтарды шешуге өз үлестерін қосуда.

Әлемдегі күллі қазақтың саны шамамен 15 миллиондай болса, соңғы санақтың алдын-ала қорытындысы бойынша 10 миллионнан астамы Қазақстанда, 5 миллиондайы 40-қа жуық шетелдерде өмір сүріп жатыр және осы 5 миллионның 4 миллионнан астамы «ирредент», қалған бөлігі «диаспора» болып табылатыны анық. Олардың көпшілік бөлігі, кеңестік кезеңдегі революциялық және азамат соғыстары, зорлап ұжымдастыру, ашаршылық, жаппай құғын-сүргін салдарынан өздерінің тарихи отандарын тастап кетуге мәжбүр болды. КСРО тарағаннан кейін жақын шетелдердегі ТМД қалған қазақтар шетелдегі қазақ диаспорасына айналды.