RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS

Kim Ye.A., 1st 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 recognition and enforcement of foreign arbitral awards is an important part of both the international arbitration process in general and international legal assistance. This sphere of interstate relations has various regulations at the level of multilateral and bilateral international treaties and at the level of national legislation.

The legal basis for the recognition and enforcement of foreign arbitral awards in the Republic of Kazakhstan is as follows:

1. The Convention on the Recognition and Enforcement of Foreign Arbitral Awards of July 10, 1958 (the New York Convention). The Convention consists of 16 articles. In accordance with paragraph 1 of Article 1 the Convention shall apply to the recognition and enforcement of arbitral awards made in the territory of a State other than the State where the recognition and enforcement of such awards are sought, and arising out of differences between persons, whether physical or legal. It shall also apply to arbitral awards not considered as domestic awards in the State where their recognition and enforcement are sought. The Article 3 of the Convention has established that each Contracting State shall recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon [1].

Moreover, there shall not be imposed substantially more onerous conditions or higher fees or charges on the recognition or enforcement of arbitral awards to which this Convention applies than are imposed on the recognition or enforcement of domestic arbitral awards [1].

2. Bilateral international treaties that provide for the procedure for resolving disputes through an arbitration court. These include the Agreement between the Government of the Republic of Kazakhstan and the Government of the United Kingdom of Great Britain and Northern Ireland on the Promotion and Protection of Investments of 1995, the Agreement between the Government of the Republic of Kazakhstan and the Government of the Kingdom of Sweden on the Promotion and Mutual Protection of Investments of 2004, the Agreement on the Promotion and Mutual Protection of Investments between Government of the Republic of Kazakhstan and the Government of the Republic of Korea in 1996 and others.

Thus, in accordance with paragraph 1 of Article 8 of the Agreement between the Government of the Republic of Kazakhstan and the Government of the United Kingdom of Great Britain and Northern Ireland on the Promotion and Protection of Investments «disputes between citizens or companies of one Contracting Party and the other Contracting Party in respect of the latter's obligations under this agreement in relation to the investments that were not settled amicably, shall be submitted to the institutional body of international arbitration and three months after delivered written notification of claims, if the citizen or the company wills so» [2]. Paragraph 5 of Article 9 stipulates that «the arbitration court shall take its decisions by majority vote. Such decisions shall be binding on both Contracting Parties» [2].

3. National legislation on arbitration. As a rule, the rule according to which the arbitral award, irrespective of the country in which it was pronounced, is recognized as binding in national laws on arbitration of a number of countries. Such a rule, for example, is contained in the Law of the Russian Federation «On international commercial arbitration» (paragraph 1 of Article 35). Consequently, based on the meaning of this rule, no judicial or other procedure is required to recognize and enforce an arbitral award of a foreign arbitration - it is recognized automatically. If the arbitration award automatically receives the preclusive effect without an additional procedure for its recognition, then, according to the logic of the legislator, special rules for recognition without its enforcement are simply not required, the binding decisions of international arbitrations is required by paragraph 1 of Article 35 of the Law «On international commercial arbitration».

Paragraph 1 of Article 54 of the Law of the Republic of Kazakhstan «On arbitration» establishes that an arbitral award is recognized as binding. However, is does not contain the wording «irrespective of the country in which it was made». From the content of paragraph 1 of Article 54 it is not clear what arbitral awards (Kazakhstani or foreign ones) are recognized as binding. The answer to this question can be found in the Civil Procedure Code of the Republic of Kazakhstan. For arbitration awards of foreign arbitrations in the Civil Procedure Code of the Republic of Kazakhstan, the procedure for the recognition, execution and enforcement is provided (Articles 501-504 of the CPC of the RK), when for both arbitral awards (without any clarification on the place of making the award) only the enforcement procedure (Articles 253- 255 of the

CPC of the RK). Hence the conclusion, that the Law on arbitration recognizes only Kazakhstani arbitration awards as binding, and as a result, recognition of such decisions is not required. In addition, in the Civil Procedure Code of the RK, the procedure for recognizing the decisions of local arbitration simply does not exist**.**

In the Republic of Kazakhstan foreign arbitration awards are equal to the decisions of foreign courts of general jurisdiction. This conclusion follows from the fact that Article 501 of the Civil Procedure Code of the Republic of Kazakhstan defines the same procedure for recognizing and enforcing awards made by foreign arbitrations, as well as by foreign courts of general jurisdiction. Thus, in accordance with paragraph 1 of Article 501 of the Civil Procedure Code of the Republic of Kazakhstan, decisions, decrees and rulings on the approval of settlement agreements, judicial orders of foreign courts, as well as arbitral awards of foreign arbitration courts are recognized and enforced by the courts of the Republic of Kazakhstan, if recognition and enforcement of such acts are provided for legislation and (or) an international treaty ratified by the Republic of Kazakhstan, or on the basis of reciprocity [3].

It turns out that the recognition and enforcement of arbitral awards foreign arbitrations in the Republic of Kazakhstan is carried out on two bases:

1) the existence of an international treaty ratified by the Republic of Kazakhstan;

2) the principle of reciprocity.

In the presence of an international treaty, the situation with the recognition and enforcement of a foreign arbitration award is more or less understandable. It is common knowledge that the norms of international conventions and other international treaties become part of the domestic legislation of the member states and have a priority in relation to it. This provision, for example, is enshrined in paragraph 3 of Article 4 of the Constitution of the Republic of Kazakhstan. Moreover, we have considered above bilateral international and multilateral international treaties to which the Republic of Kazakhstan is a party, which establish that foreign arbitral awards are binding.

However, the recognition and enforcement of arbitral awards by foreign arbitrations on the basis of the principle of reciprocity in practice often causes difficulties. As S. Akimbekova points out, with regard to reciprocity as prerequisites for the execution of foreign judicial and arbitration decisions, several approaches to this phenomenon are possible.

Firstly, by recognizing decisions on the basis of reciprocity, one can understand the recognition of foreign judicial and arbitration decisions, only if the foreign state, in turn, recognizes the decisions of the recognizing state. With this interpretation, the recognition of a foreign judicial and arbitral award will be refused if the court does not establish cases of recognition of the decisions of its country on the territory of the state where the foreign decision was made. Such an approach has many drawbacks, since the decision acts simultaneously both in the state of the court, and in the state, where the decision is required to be recognized but which had no contacts in this area before, the decision will not be enforced until one of the parties takes the first step to retreat the principle of reciprocity in the designated understanding.

Secondly, the principle of reciprocity can also be approached on the other hand. Then as a consequence of the reciprocity condition' action, there will be refusal to recognize and enforce foreign judicial and arbitral awards of that country, which refuses to recognize the decisions of the state where recognition is sought. In this case, the foreign judicial and arbitral award will be recognized exactly when the court of the recognizing state does not establish cases of refusal to recognize decisions made in the recognizing state. As it can be seen, the emphasis is made on the compensatory nature of the refusal to enforce. In both cases, we can speak of the need to ensure full as well as partial reciprocity [4, 72-73].

In our opinion, the interpretation of reciprocity proposed by S.Zh. Aidarbayev and N.S. Eshniyazov is preferable: «the recognition and enforcement of decisions of foreign court and arbitration is allowed when, under the law of the state, where a foreign judicial and arbitral award has been rendered, the principle of res judicata (inadmissibility of reconsideration of the case) applies to judicial and arbitral awards of the state where recognition is required» [5].

It should be noted that if an international arbitral award, made in accordance with the procedure agreed by the parties by independent and impartial arbitrators on the basis of the arbitration agreement reached by the parties, is not executed voluntarily, the non-prevailing party will have to execute it forcibly. As noted by B.R. Karabelnikov «voluntary execution is more profitable for a non-prevailing party both economically and in terms of reputation» [6,, 311].

The enforcement procedure, as a rule, is regulated at the level of national laws, but not at the level of international treaties. In Kazakhstan, for example, such a procedure is regulated in the Civil Procedure Code of the Republic of Kazakhstan. The procedure for the enforcement of foreign and local arbitration awards is very similar and is governed by Articles 503 and 253 of the Civil Procedure Code of the Republic of

Kazakhstan respectively. Moreover, the refusal to issue and the issuance of a writ of execution for enforcing decision of foreign arbitration as well as Kazakhstani one is regulated by the norms of single chapter of the Civil Procedure Code of the Republic of Kazakhstan (Articles 254-255 of Chapter 20). Let us examine in detail the procedure for the enforcement of arbitral awards of foreign arbitrations in Kazakhstan.

Thus, if the arbitration award of a foreign arbitration is not voluntarily carried out within the time limits set by it, the prevailing party may apply for enforcement either in the court at the place of the dispute, or at the place of residence of the debtor, or at the location body of a juridical person, if the place of residence or location is unknown, then at the location of the debtor's property.

The application for the issue of the writ of execution shall be accompanied by a duly certified original arbitration award of a foreign arbitration or a duly certified copy thereof, and, if available, a genuine arbitration agreement or a duly certified copy thereof. If the arbitration award of a foreign arbitration or arbitration agreement is made in a foreign language, the party must provide a duly certified translation into Kazakh or Russian. An application for the issue of a writ of execution may be submitted not later than three years from the date of expiration of the period for the voluntary execution of the arbitral award of a foreign arbitration. The court, when considering an application for the issuance of a writ of execution for the enforcement of an arbitral award of a foreign arbitration, has no right to review it on its merits. Based on the results of consideration of the application by the court, a decision on the issue of the writ of execution or refusal to issue it is made. The court's decision to issue the writ of execution is immediately enforceable [3].

The legislation of the Republic of Kazakhstan and international treaties contain standard grounds for refusing to enforce a foreign arbitration award. Among them are the incapacity of the parties, the invalidity of the arbitration agreement, procedural violations, the scope of the arbitration agreement, the competence of the arbitration court, the annulment or stay of the execution of the decision in the country in which or in accordance with the legislation of which the decision was made, the impossibility of considering the subject of the dispute in arbitration (in accordance with national legislation) and public policy considerations.

The problem of recognition and enforcement of judgments made by the courts of other states arises in the event when the non-prevailing party refuses to execute the decision voluntarily. In the event of non-execution of the arbitral award voluntarily, the claimant has to apply to a foreign court for its recognition and enforcement. Starozhilova N.P. fairly notes that while executing the request, contained in the motion, the foreign court does not consider the case on its merits, but considers exclusively the possibility of execution of foreign judicial decision in the territory of its state [7, 30].

From the meaning of Article 5 of the New York Convention and Articles 52 and 57 of the Law on arbitration, it is evident that the state court is not a higher authority in relation to international arbitration, i.e. has no right to lead it. After receiving a motion for recognition and enforcement of foreign arbitral awards, the court does not examine the decision on its merits and in most cases (with the exception of research on arbitrability and public policy issues) does not play an active role. The court only examines the arguments about jurisdictional and procedural violations committed by the arbitral tribunal, if any of violations will be submitted by the non-prevailing party. Only with this approach the state court can remain within the limits, assigned to it by the New York Convention and the Law on arbitration and to prevent illegal interference in international arbitration prohibited by Article 7 of the Law on arbitration.

References:

1 Convention on the Recognition and Enforcement of Foreign Arbitral Awards. New York, 10 June 1958. Register of texts of conventions and other instruments concerning international trade law. Vol. 2. - New York: United Nations, 1973. – pp. 24-33

2 The Law of the Republic of Kazakhstan N 44-I «On ratification of the Agreement on the Promotion and Protection of Investments between the Government of the Republic of Kazakhstan and the Government of the United Kingdom of Great Britain and Northern Ireland» [Available at]: http://egov.kz (in Russian)

3 The Code of the Republic of Kazakhstan No.377-V of October 31, 2015 «Civil Procedure Code of the Republic of Kazakhstan» (last amended on April 18, 2017) // Kazakhstanskaya pravda. – 2015. – November 3. - No.210. Amendments: Kazakhstanskaya pravda. – 2017. – April 20. - No.76. (in Russian)

4 Akimbekova, S. *Priznanie i privedenie v ispolnenie resheniy inostrannykh sudov na territorii Kazakhstana* // *Yurist.* - 2013. - No.4. – P. 71-73 (in Russian)

5 Aydarbaev, S.Zh., Eshniyazov, N.S. *Khalykaralyk azamattyk protsess. – Almaty: Tanbaly,* 2012. – 177 p. (in Kazakh)

6 Karabelnikov, B.R. *Mezhdunarodnyy kommercheskiy arbitrazh:* Textbook. - *M.: Infotropik Media,* 2013. - 541 p. (in Russian)

7 Starozhilova, N.P. Comparative analysis of the legal regulation of recognition and execution of foreign judgments in Republic of Kazakhstan and Russian Federation // Vestnik karagandinskogo universiteta. -2015. -No.3. - P.30-39.

РОЛЬ КАЗАХСТАНА В СТАНОВЛЕНИИ И РАЗВИТИИ ЕАЭС

Мүсілім Туған, студент юридического факультета КарГУ им. академика Е.А.Букетова

Вопросы становления и развития Евразийского экономического союза (далее-ЕАЭС) – одни из самых актуальных в науке и практике в связи со вступлением в силу с января 2014 года Договора о ЕАЭС.

Евразийский экономический союз (ЕАЭС) — международное интеграционное экономическое объединение (союз), договор о создании которого на базе Таможенного союза ЕврАзЭС был подписан Казахстаном, Россией и Белоруссией 29 мая 2014 года в Астане. Созданию ЕАЭС предшествовало несколько этапов евразийской экономической интеграции:

1.Зона свободной торговли(1994-2007г.г.)

2.Таможенный союз (2007-2011г.г.)

3.Единое экономическое пространство (2011-2012г.г.)

4.Евразийский экономический союз (2012-2014г.)

Рассмотрим наиболее значимые события, произошедшие в рамках данных этапов.

В современной евразийской интеграции и, в частности, в создании Евразийского экономического союза исключительно важную роль сыграл Президент РК, Лидер нации - Нурсултан Абишевич Назарбаев. Именно он в марте 1994 году выступил в МГУ им. Ломоносова с лекцией "Проект о формировании Евразийского Союза Государств (ЕАС)". В целях достижения стабильности и безопасности в евразийском регионе Н.А. Назарбаев впервые в новейшей истории предложил создать эффективно работающий союз государств на основе тесных экономических связей. Он сказал: "Учитывая различия между странами в уровнях развития рыночной экономики, демократизации политических процессов, мы предлагаем формирование дополнительной интеграционной структуры - Евразийского Союза. Цель -согласование экономической политики и принятие обязательных для исполнения государствами-участниками совместных программ проведения экономических реформ" [1; 27]. Предложенная Президентом Казахстана современная евразийская интеграционная стратегия возникла не случайно**.**Народы Евразии на протяжении тысячелетий имели тесные экономические, культурные и духовные связи. О евразийстве писали и отстаивали эту идею такие личности, как Г.В. Вернадский и Л.Н. Гумилев, Г.В.Трубецкой, П.Н. Савицкий и многие другие. «Евразия, как географический мир, как бы предсоздана для образования единого государства»- писал Г.В. Вернадский [2]. Выдающийся ученый Л.Н. Гумилев говорил: «Знаю одно и скажу вам по секрету, что если Россия будет спасена, то только как евразийская держава и только через евразийство» [3; 289]. Всей своей жизнью и трудами Л. Н. Гумилев неустанно доказывал концепцию естественного братства между народами населявшими Евразию. В Республике Казахстан высоко ценят и чтят научное наследие Л.Н.Гумилева.

По инициативе Н.А.Назарбаева имя Л.Н. Гумилева было присвоено Евразийскому Национальному университету в г. Астане.

В новейшей истории Казахстана предложенная Н.А. Назарбаевым евразийская интеграционная идея имела под собой и целый ряд успешных мировых примеров региональной интеграции, таких как Евросоюз, НАФТА, АСЕАН, АТЕС, ШОС и др. Наиболее предпочтительной являлась модель Европейского союза, которая предполагала поэтапное продвижение от зоны свободной торговли к таможенному союзу, затем - к общему рынку и в конечном итоге - к единому экономическому и валютному союзу. Предложение Н.А. Назарбаева нашло отклик и поддержку как в Казахстане, так и в России. Значительную роль в становлении ЕАЭС сыграл Президент РФ В.В. Путин. Не случайно Н.А.Назарбаева и В.В.Путина называют локомотивами евразийской интеграции. Из стран СНГ идею создания ЕАЭС поддержал и внес ощутимый вклад Президент Белоруссии А.С.Лукашенко. За создание ЕАЭС Президенты стран – участниц удостоены в России международной премии "Человек года-2014" [4].

Однако до реального воплощения евразийской интеграционной идеи Президентам пришлось приложить очень много усилий.Не все однозначно положительно восприняли факт создания ЕАЭС.