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Contradiction to public order as a basis for annulment of arbitral award

Arbitration is an alternative way to resolve a dispute. In this article the relationship between the competent court and arbitration shall be articulated, which relationship should be built on the principle of coordination, but not subordination. Moreover, it should be noted that the arbitral awards are final and without appeal. Hence, it follows that the competent court is not a higher authority for arbitration courts, and it shall not be entitled to retry the case on its merits or verify the arbitration award from the point of view of legality and validity. Naturally, in implementing its function of a state to maintain and protect the public order, the public court is still vested with supervisory powers with respect to arbitration court, that being said the competent court can exercise the state control only to the extent and within the framework defined by law. Unfortunately, today in Kazakhstan there are cases when the competent courts complicate the procedure of enforcement by reviewing decisions on the merits, request additional documents that are not prescribed in the statutorily established list of necessary documents. At the same time, the arbitral awards enforcement practice is fairly simple and in reality the decisions of international arbitration courts should be enforced promptly, subject to provision of the full package of necessary documents. In this regard, there is a need to study the «public order» concept. After all, if the courts annul arbitral awards referring to violations of public order without proper justification and without taking international theory and practice into account, this will cause serious harm to the development of arbitration in Kazakhstan. It should be kept in mind that the efficient investment activities require adequate development of arbitration.

Keywords: arbitration, court, court award, dispute, public order, Kazakhstan.

Introduction

The development of a modern judicial system in Kazakhstan is inextricably linked with the implemented and actively promoted system of alternative resolution of civil law disputes. The resolution of disputes without the participation of the competent courts through arbitration is one of the priorities for the development of the legal and judicial system of Kazakhstan, the need for quality development of which was repeatedly noted by the President of the Republic of Kazakhstan N.A. Nazarbayev and the President of the Supreme Court of the Republic of Kazakhstan Zh.K. Asanov.

The particular relevance is given to the issue of the development of arbitration in Kazakhstan by commitment to stability and consolidation of society, which is possible only by way of forming a competent civil society, harmonization of relations between government, business and public institutions. The Plan of the Nation «100 Concrete Steps to Implement Five Institutional Reforms» [1] aimed at fundamental changes in the state, approved by the President of the Republic of Kazakhstan in 2015, provides for the improvement of Kazakhstan's justice, including through the creation of the International Council under the Supreme Court of the Republic of Kazakhstan to implement the best international standards required by our system. The development of national arbitration in Kazakhstan is a target positive indicator, indicating an increase in confidence in the legal system of Kazakhstan on the part of civilian turnover and investors, and an effective way to develop international cooperation.

The activities of permanent arbitration in Kazakhstan are very important, because in addition to reducing the workload of competent courts, arbitration as an independent court of trust provides high-quality, qualified resolution of commercial disputes, helping to strengthen the rule of law.

Despite the undoubted importance of the arbitration institution, its further development is hampered by the poor quality of judicial practice in Kazakhstan. There were known several cases when the courts interpreted broadly the concept of the public order, on the basis of which the awards made by arbitrators were annulled. In particular, the judicial acts issued by the Specialized Inter-District Economic Court of Almaty and the Appellate Division of Almaty City Court on the annulment of the decision of the Kazakhstan International Arbitration Court dated April 06, 2016 were widely covered in the media. At the same time, the basis of the judicial acts issued by the competent courts was a circumstance arising from the merits (expiration of the limitation period), but subjected to a different interpretation by the court of first and second instance, which allowed applying Article 52 par. 2 subpar. 1 of the Law of the Republic of Kazakhstan «On Arbitra-

tion» (hereinafter the Law of the RK «On Arbitration») [2], to cancel the arbitral award with reference to a violation of public order. On May 16, 2016, the Cassation Division of the Supreme Court of the Republic of Kazakhstan canceled the definitions of courts of first and second instance, which means that the Supreme Court of the Republic of Kazakhstan legally placed emphasis on the interpretation of the definition of violation of public order and eliminated the incorrect application of procedural law.

However, despite the positive precedent we have examined above, from the point of view of law-enforcement and judicial practice the judicial acts that are again adopted by the courts and which allow for the misinterpretation of the definition of public order and annul the arbitral awards, cause concern. Thus, the Ruling passed by the Appellate Division of Almaty City Court dated April 25, 2018, which cancels the award of the Kazakhstan International Arbitrage dated February 12, 2018, in view of public order violation was placed in the bank of judicial acts of the Unified Information Analysis System. As follows from the above Ruling of the Appellate Division of Almaty City Court, the public order violation is expressed in the decision of the panel of arbitrators to refuse to conduct an expert examination at the request filed by one of the parties to a commercial dispute. The motivation underlying the judicial act suggests the judicial intervention in the independence of arbitral awards made on the basis of the Standing Arbitration Rules and the Law of the RK «On Arbitration».

I. Analysis of Legislation and Law Enforcement Practice in Kazakhstan: the Main Problems and Their Consequences

Recently, in the legal doctrine and jurisprudence there has been a transformation of the content of the public order concept as a basis for the annulment of an award. The contravention of public order is one of the reasons for annulment of an arbitral award. Analyzing the existing judicial practice, we observe the confusion of judges in matters related to the cancellation of arbitral awards. The courts interpret the public order concept in different ways. The consequence of this was ambiguous court practice on issues that seemed to be settled long ago.

The procedure for annulment of an arbitral award is established by the internal legislation of each country. For example, pursuant to Article 52, paragraph 2 of the Law of the RK «On Arbitration» the arbitral award shall be annulled by the court in the event that it is determined that the arbitral award is contrary to the public order of the Republic of Kazakhstan.

In the Civil Code of the RK the exceptional cases are recognized as a violation of public order, when the consequences of applying the norms of foreign law would clearly contradict the principles of the rule of law of the Republic of Kazakhstan (Article 1090 of the Civil Code of the Republic of Kazakhstan) [3]. In these cases, the law of the Republic of Kazakhstan shall apply. At the same time, the refusal to apply foreign law cannot be based only on the difference of the political or economic system of the corresponding foreign state from the political or economic system of the Republic of Kazakhstan.

Pursuant to Article 2 of the Law of the RK «On Arbitration», the public order is understood to be the basics of the rule of law, embodied in the legislative acts of the Republic of Kazakhstan.

Thus, the public order is deployed through evaluation categories, the content of which will be determined depending on the specific case.

Whereat, if the Civil Code of the Republic of Kazakhstan indicates the principles of the public order of the Republic of Kazakhstan, the Law on Arbitration already speaks of the principles of the public order «embodied in the legislative acts of the Republic of Kazakhstan».

Accordingly, the Civil Code of the RK interprets public order more broadly, which not only boils down to the principles of the public order established in the laws. Thus, a contradiction to fundamental moral standards, which are not formally embodied in law, may also indicate a violation of public order [4].

The concept of public order (ordre public, public policy) is rather vague, its application is entirely at the judicial discretion. However, application of such a basis for annulment of the arbitral award worldwide is possible only in exceptional cases. Each such case must be seriously justified and cannot be reduced to any violation, even if serious, of the national statutory provisions. Annulment of an award and refusal to enforce thereof are possible only for procedural violations. On this basis, in the vast majority of countries of the world the arbitral awards are never verified by the competent courts on the merits and are final. Almost anywhere in the world the court does not verify the legal basis for the consideration of a dispute, because the interpretation of the law may be different. Because this is a civil law dispute, and in a civil law dispute there are always different views on the law.

Thus, the public order cannot be confused with legality. These are different things. The judicial system of any country, including Kazakhstan, is built on this. Arbitration is not part of the judicial system. The competent court can verify only procedural moments. If these principles are not respected, then such an organization called arbitration is actually not such. It becomes an appendage of the judicial system and is completely unnecessary [5].

We believe that the violation of public order should be understood as the violation of the fundamental legal principles of law, which are imperative for the country's legal system. Accordingly, Article 52 par. 2 subpar. 1 of the Law of the RK «On Arbitration» should be applied based on the proper interpretation of the definition of public order and violation thereof should be reliably established by the court and clearly to justify the violation of fundamental legal principles having the principle of imperativeness and public importance.

II. International Standards and Practices of Other Countries

The idea of public order was originally developed and modernized in French law, and it is not without reason that the use of the French term 'ordre public' to refer to the category in question is generally accepted in world practice, and these two categories of standards became known as 'ordre public interne' and 'ordre public international'. Along with this, the term of public policy is popular in English and American literature, and 'Vorbehaltsklausel', 'Offentliche Ordnung' in German one [6; 463].

In different countries, the public order is articulated in different ways. Analyzing the relevant norms of legislation of foreign countries, interpretation thereof and judicial practice, it can be concluded that, in general, the functions of the clause on public order are reduced to protecting the basic moral and legal foundations of the state from the undesirable consequences of enforcement of foreign awards and application of foreign law [7; 152].

The extensive literature on the application of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958, available abroad almost always emphasizes the idea that the application of the rule on public order can take place only in exceptional cases and, moreover, applied public policy criteria should be of international nature. These should be the criteria that the state applies to the assessment of relations that have an international element, and not to the assessment of relations of purely internal nature. It is indicative that the court practice with regard to recognition and enforcement of foreign arbitral awards in different countries gives much more examples, when the courts refused to apply the rule of public order, compared with the cases, when they arrived to conclusion that the facts put forward by an interested party as the basis for the application of the rule of public order provision justify its application [8; 92].

III. Recommendations for the Improvement of the Legislation of the Republic of Kazakhstan

Pursuant to Article 465 of the Civil Procedure Code of the Republic of Kazakhstan [9], the competence of public courts is to establish the presence or absence of grounds for annulment of an arbitral award by examining the evidence submitted to the court in support of the stated claims and objections. At the same time, the civil procedural legislation of the Republic of Kazakhstan, including, but not limited to Article 152 par. 7 of the Civil Procedure Code of the Republic of Kazakhstan, as well as Article 8 of the Law of the RK «On Arbitration» provides for the lack of authority of the public courts of the Republic of Kazakhstan to review the merits of a civil case.

The court is entitled to annul the arbitral award only on the grounds established by law (Article 52 of the Law «On Arbitration»). And these grounds only provide for violation of procedural rules by arbitration. Thus, the competent court does not have the right to interfere in the arbitral award on its merits; it can neither analyze nor refute the arguments of the arbitration and the statutory provisions, on which these arguments are based.

However, in practice there are cases when this rule is violated by a competent court. For example, on April 25, 2018, the Appellate Judicial Division of Almaty City Court reversed the decision of Kazakhstan International Arbitration LLP on the grounds that «the composition of the arbitrators violated the principle of providing equal opportunity to the parties to state their position and protect their rights and interests because the issue of the legality or frivolousness of arguments of the defendant about the quality and value of the work performed, which is contrary to public policy is not clarified».

We believe that the incorrect assessment of the evidence in the case by the arbitration court and the unreasonable or incorrect application of certain civil law regulations governing specific agreements arising from the contract concluded between the parties, the legal relations arising in the course of the parties' business activities by the court are not grounds for annulment.

Of course, the application of any statutory provisions of national law may be interpreted by the competent court considering an application for annulment of an arbitral award as significant violations of the rules of substantive and procedural law, but this should not be considered a violation of public order in its conventional sense. It is possible to establish only by analyzing the evidence that underlies the arbitral award whether the statutory provision has been applied correctly, which in turn is a violation of one of the principles of the arbitral proceedings, namely the finality of an arbitral award.

An arbitral award may be deemed to be contrary to the public order of the Republic of Kazakhstan if, as a result of its enforcement, the acts that are either directly prohibited by law, or detrimental to the sovereignty or security of the state, affect the interests of large social groups, are incompatible with the principles of economic, political, legal systems of the state, affect the constitutional rights and freedoms of citizens, as well as contradict the basic principles of civil law, such as equality of participants, inviolability of property, freedom of contract.

The opportunity for the disputants to settle and resolve conflicts by themselves independently from the governmental bodies undoubtedly reflects the degree of a democratic culture of the society and is consistent with the goals of building a civil society. After all, a highly organized society must be able to maintain the rule of law by means simpler than justice.

The coordinated settlement of disputes opens the way to cooperation and interaction, therewith establishing the civilized relations in the dispute resolution processes. This undoubtedly shall contribute to the preservation and sustainability of legal bonds between the subjects of private law relations. Moreover, this shall allow us to form a new legal culture, which is not focused on confrontation in upholding its legal position and protecting its interests, but on cooperation in order to protect its right on a concerted basis [10; 38].

Accordingly, the elimination of errors in judicial practice similar to those considered in this article will ensure the rule of law and the observance of constitutional frameworks. The need for compliance of judicial acts with current legislation is aligned with the nationwide tendency of increase of public confidence in the courts, which was also noted in the Address of the President of the Republic of Kazakhstan to the People of Kazakhstan on October 05, 2018.

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Жария тәртіпке қайшылық арбитраждық шешімнің күшін жоюдың негізі ретінде

Арбитраж - дауды шешудің баламалы тәсілі. Бұл мақала құзыретті сот пен арбитраждың қарым-қатынасын анықтайды, олар бағынышты емес, үйлестіру қағидасына негізделуі керек. Сонымен қатар, төрелік шешімдер түпкілікті және апелляцияға жатпайтынына назар аудару керек. Мұның бәрі құзырлы сот арбитраж үшін жоғары орган болып табылмайды және істі мәні бойынша қарауға немесе төрелік шешімдерді заңдылық пен заңдылық тұрғысынан қарауға құқығы жоқ. Әрине, мемлекеттің заңның үстемдігін сақтау және қорғау жөніндегі функциясын жүзеге асыратын мемлекеттік сот әлі күнге дейін арбитражға қатысты қадағалаушы өкілеттіктерге ие, ал құзыретті сот мемлекеттік бақылауды заңда белгіленген көлемде және шегінде ғана жүзеге асыра алады. Өкінішке орай, Қазақстанда бүгінгі күні құзырлы соттар іс жүргізу тәртібін күрделендіреді, маңыздылықтар бойынша шешімдерді қарайды, қажетті құжаттардың заңмен бекітілген тізімінде қарастырылмаған қосымша құжаттарды сұрайды. Сонымен бірге, төрелік шешімдерді орындау тәжірибесі өте қарапайым және шын мәнінде халықаралық төрелік соттардың шешімдері қажетті құжаттардың толық пакетін ұсыну жағдайында дереу орындалуы тиіс. Осыған байланысты «қоғамдық тәртіп» ұғымын зерттеу қажет. Өйткені, егер соттар қоғамдық тәртіптің бұзылуына негізделмеген және халықаралық теория мен практиканы ескерместен арбитраждық шешімдерді жойса, бұл Қазақстандағы арбитраждың дамуына елеулі зиян келтіреді. Тиімді инвестициялық қызмет үшін арбитражды толыққанды дамыту қажеттігін естен шығармау қажет.

Кілт сөздер: арбитраж, сот, сот үкімі, қоғамдық тәртіп, Қазақстан.

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Противоречие публичному порядку как основание отмены арбитражного решения

Арбитраж — это альтернативный способ разрешения спора. В данной статье раскрываются взаимоотношения компетентного суда и арбитража, которые должны выстраиваться по принципу координации, а не субординации. Более того, необходимо отметить, что решения арбитража окончательны и обжалованию не подлежат. Из всего этого следует вывод, что компетентный суд не является вышестоящей инстанцией для арбитражей и не вправе заново рассматривать дело по существу или проверять арбитражные решения с точки зрения законности и обоснованности. Естественно, что государственный суд, реализуя функцию государства по поддержанию и охране правопорядка, все же наделяется контрольными полномочиями по отношению к арбитражу, при этом компетентный суд может осуществлять государственный контроль лишь в тех пределах и в тех рамках, которые определены законом. К сожалению, на сегодняшний день в Казахстане имеют место случаи, когда компетентные суды усложняют процедуру исполнения, пересматривая решения по существу, запрашивают дополнительные документы, не предусмотренные в законодательно установленном перечне необходимых документов. При этом практика исполнения арбитражных решений достаточно проста и в реалии решения международных арбитражных судов должны исполняться оперативно, при условии предоставления полного пакета необходимых документов. В данной связи возникает необходимость исследования понятия «публичный порядок». Ведь если суды будут отменять арбитражные решения со ссылкой на нарушения публичного порядка без надлежащего обоснования и без учета международной теории и практики, то это нанесет серьезный вред развитию арбитража в Казахстане. Необследует помнить, что для эффективной инвестиционной деятельности необходимо полноценное развитие арбитража.

Ключевые слова: арбитраж, суд, решение суда, спор, публичный порядок, Казахстан.

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