

## RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGMENTS AND AWARDS IN KAZAKHSTAN: ISSUES AND PRACTICAL RECO

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Recognition and Enforcement of Foreign Judgments and Awards in Kazakhstan: Issues and Practical Recommendations

It is well-known that arbitral awards and court judgments are not always performed voluntarily; hence, the topicality of their enforcement, which is to be implemented in accordance with the procedural law of the country of enforcement.

At first sight, the procedure for recognition and enforcement of foreign judgments and awards in Kazakhstan is fairly simple. The claimant needs to apply with the competent court requesting to enforce the judgment/award and to issue the enforcement order (writ of execution). Following the application review, the court rules to either issue the enforcement order, or deny its issuance. In case the enforcement order is issued, it is transferred to the court enforcement officer who will be directly handling the enforcement. However, in practice, one often encounters problems due to gaps and contradictions in the national legislation or its incorrect application by courts.

### 1. Problems of Arbitral Awards Recognition and Enforcement

#### 1.1 Request to Submit Documents Not Provided For by the New York Convention

Pursuant to Article 4 of the New York Convention<sup>[1]</sup> the party seeking to enforce the award must submit to the competent court:

- The duly authenticated original award or a duly certified copy thereof; and
- The original arbitration agreement or the arbitration clause contained in the contract, or a duly certified copy thereof.

The RK Civil Procedure Code (CPC)<sup>[2]</sup> mentions the same documents. However, the Regulatory Resolution of the Supreme Court No. 5 of 11 July 2003<sup>[3]</sup> (hereinafter, the Regulatory Resolution) requires providing the following documents, beside those listed in the New York Convention:

An official document confirming that the award has entered into legal force, unless it is evident from the text of the award:

- Evidence supporting that the party against whom the award has been rendered has been duly notified of the proceedings; and

The enforcement document with a mark of partial performance of the award, if any.

It should be mentioned that the above provision of the Regulatory Resolution specifies the documents to be attached to the applications for enforcement of both foreign judgments and foreign arbitral awards, without any distinctions. Meantime, the list should be different, depending on whether it was a court or an arbitration that has passed the decision to be enforced. If the decision to be enforced is that of a foreign court, the requirement to provide the above documents is justified, since it is provided for by most international treaties on legal assistance. If, otherwise, the application is for enforcement of a foreign arbitral award, the provisions of the Regulatory Resolution are not in line with the New York Convention and the CPC.

The regulatory resolutions of the RK Supreme Court are included in the legal framework currently in effect. Due to this, courts often request the applicant to provide documents not stipulated by the New York Convention. The complexity is also in the prevalence of international treaties ratified by Kazakhstan over its national

legislation. Meantime, the New York Convention has not been duly ratified – only the RK President's Edict on accession to the said Convention has been issued.

We believe that the abovementioned controversy is resolved by the Resolution of the RK Constitutional Council regarding official interpretation of the RK Constitution provision relating to the regulatory resolutions of the Supreme Court, stating that such regulatory resolutions *may be issued only in respect of the matters of legislative rules application in judicial practice*.<sup>[4]</sup> Hence, the Supreme Court's regulatory resolutions can only explain to courts the law application issues, but cannot contradict the legislative rules proper.

### **1.2 Shifting the Burden of Proof onto the Claimant**

Requesting the claimant to present the proof of debtor's notification of the arbitration proceedings and/or documents supporting the final nature of the arbitral award, the courts are thus acting in contravention of paragraph 1 of Article 5 of the New York Convention. By virtue of this paragraph, failure to notify a party of the arbitration proceedings or non-finality of the arbitral award are referred to those grounds for refusal to enforce an award, which are to be invoked by the party against whom the award has been rendered. The same party is to furnish proof to the court that such grounds do exist. Requesting the claimant to provide such proof, the courts are thus unjustly shifting the burden of proof onto the claimant.

### **1.3 Lack of Regulation over the Types of Arbitral Awards Subject to Recognition and Enforcement**

Article 5 of the New York Convention essentially implies that subject to enforcement are only arbitral awards rendered on the dispute merits and upon completion of the arbitration proceedings. However, not all courts interpret this rule correctly, which is evidenced by instances where recognized were the so-called partial arbitral awards, including those not requiring enforcement. For example, the Mangystauskaya Oblast Specialized Inter-District Economic Court<sup>[5]</sup> recognized a partial arbitral award rendered in Istanbul under the ICC Rules of Arbitration, declaring as valid a shares sale and purchase agreement and the claimant's right to retain the advance payment under the said agreement. No enforcement of this award was required, because the advance payment had already been received by the claimant. Besides, the final award on the merits of the dispute between the claimant and debtor has not yet been rendered. Subsequently, the partial award has been set aside by the competent Turkish court, resulting in the revision, upon the newly revealed circumstances, of the Kazakh court's ruling recognizing the partial award and the ruling cancellation.

## **2. Problems Relating to the Recognition and Enforcement of Foreign Arbitral Awards**

### **2.1 Non-Application of the Reciprocity Principle**

Foreign judgments may be enforced in Kazakhstan if so provided for by an international treaty on legal assistance between Kazakhstan and the state whose court has passed the judgment. Such treaties are quite limited in number and are mostly concluded with the post-Soviet states and with Turkey, China, Vietnam, India, Pakistan, Mongolia and some other states.

The CPC mentions recognition and enforcement of foreign judgments based on the reciprocity principle, this principle, however, not being applied in practice. For instance, the appellate instance court has set aside the South Kazakhstan Specialized Inter-District Economic Court's decision to recognize and enforce, on a reciprocal basis, the Order of the High Court of Justice, Queen's Bench Division, Commercial Court of London. As one of the arguments, the appellate court referred to the absence of the international treaty on recognition and enforcement of judgments between the Republic of Kazakhstan and the United Kingdom of Great Britain and Northern Ireland<sup>[6]</sup>.

### **2.2 nCourts' Broadly Interpreting the Grounds for Refusal to Enforce**

Most international treaties on legal assistance obligate the claimant to attach to the application for foreign judgment enforcement a document confirming that the judgment has entered into legal force and a document confirming that the party against which the judgment has been rendered was duly notified of the court proceedings, if such party did not participate therein.

Proceeding from judicial practice, enforcement of foreign judgments is most often refused in connection with improper notification of the defendant about the proceedings. Some courts interpret this ground for refusal too broadly, making a conclusion of improper notification even in cases where a judicial summons is in place.

For instance, a Kazakh court refused enforcement of a judgment by the Saint-Petersburg State Court of Arbitration, which sent the summons directly to the defendant by registered mail. It is worth mentioning that Kazakhstan has not yet ratified the 1965 Hague Convention [7] allowing for the possibility to send judicial documents directly to persons abroad via postal channels. Therefore, in the case mentioned above, the judicial summons was to be sent via the justice authorities of Kazakhstan and Russia, as per the Chisinau Convention[8] the parties to which are the said states. However, the court substantiated its refusal not by the breach of notification procedure established by the Convention, but by the fact that the postal notification did not specify the name of the document sent by the court.

## Conclusions

- The limited number of international treaties on legal assistance and failure to apply the reciprocity principle makes it impossible to enforce in Kazakhstan the judgments of most foreign states. Therefore, it would be expedient to submit, as early as at the stage of contract execution, the disputes arising therefrom to arbitration whose award would be potentially enforceable in 156 states[9] that have acceded to the New York Convention, including Kazakhstan.
- Not all courts are correctly applying the provisions of international treaties, which results in unjustified refusals to recognize and enforce foreign judgments and awards. In order to mitigate such risks, we would recommend requesting from the arbitration in advance the document confirming that the award has entered into legal force (unless it is evident from the arbitration agreement, the award itself or the rules of arbitration) and the document confirming the defendant's notification of the proceedings, if he has not participated therein.

[1] [Convention on the Recognition and Enforcement of Foreign Arbitral Awards \(New York, 10 June 1958\)](#).

[2] [RK Civil Procedure Code No. 411-I dated 13 July 1999, as amended \(hereinafter, the CPC\)](#).

[3] [Regulatory Resolution No. 5 of the RK Supreme Court "On Court Judgments" dated 11 July 2003 \(hereinafter, the Regulatory Resolution\)](#).

[4] [Resolution No. 3 of the RK Constitutional Council "On the Official Interpretation of Paragraph 1 of Article 4, Paragraph 1 of Article 14, Subparagraph 3\) of Paragraph 3 of Article 77, Paragraph 1 of Article 79 and Paragraph 1 of Article 83 of the RK Constitution" dated 6 March 1997](#).

[5] [Ruling of the Mangystauskaya Oblast Specialized Inter-District Economic Court dated 12 April 2011](#).

[6] [Ruling No. 2a-3290/14 of the Appellate Judicial Board of the South Kazakhstan Oblast Court dated 29 December 2014](#).

[7] [Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters \(The Hague, 15 November 1965\)](#).

[8] [Convention on Legal Assistance and Legal Relations in Civil, Family and Criminal Matters \(Chisinau, 7 October 2002\)](#).

[9] As of 9 September 2015. The current status of the New York Convention is available at the UNCITRAL website at: [http://www.uncitral.org/uncitral/en/uncitral\\_texts/arbitration/NYConvention\\_status.html](http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_status.html).

- See more at: <http://www.legal500.com/developments/30296#sthash.iNzKqWwD.dpuf>