16. ENFORCEMENT OF CONTRACTS IN KAZAKHSTAN

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This paper deals with the role of state courts in the enforcement (implementation) of contractual rights and obligations. Regarding this aspect, one may note both successes and serious problems in the Republic, and I will address some of them below.

LEGAL FRAMEWORK

First of all, the existence in Kazakhstan of a quite developed normative legal framework, including the 1995 Constitution, the 2000 Constitutional Law on the Judicial System and Status of Judges of the Republic of Kazakhstan (RK), the Concept of Legal Policy approved by the Presidential Edict in 2002 is referred to the positive factors in the activities of courts and judges. The above and other legislation allows implementing (or, at least, creates grounds for that) such important principles of the activities of courts and judges as independence, irremovability, and inviolability.

On the whole, the Republic has formed a normative legal basis for administration of justice and enforcement of courts' judgments, including those related to contractual legal relations. The 1999 Civil Procedural Code (the CPC) and the 1998 Law on Execution Proceeding and Status of Law-Enforcement Officers refer to such legislative acts.

The important condition for taking by courts of appropriate decisions with respect to contracts is that Kazakhstan has created a market-oriented legislation for a short period of time, including a basic law—General Part (1994) and Special Part (1999) of the RK Civil Code that regulates both general provisions on contracts and principles of contract law, and also individual types of contracts.

However, most of the mentioned (and not mentioned) normative acts need revising, sometimes quite considerable. The reasons of this are clear since despite the great efforts undertaken by the Republic towards creation of the fundamentals of legislation in all spheres of public life, the term that has elapsed from the moment of independence acquisition is too short for

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the harmonic (that is, quite consistent and complete) system of legislation to be formed. It is quite another issue that the work on harmonization may be carried out with greater or lesser efficiency, and depending on the methods chosen this objective may be attained either quite fast or very slowly. However, it is clear that the legislation system needs revision and additions, first of all, based on the theoretical studies and on the practice of law enforcement.

As to specific shortcomings of the legislation that are of paramount importance for the enforcement of contracts, these, in my view, are issues of procedural nature and execution proceeding. I will address the problem of execution proceeding below. As regards the process, the existing Civil Procedural Code for the most part is not sufficiently effective for resolution of business disputes. For comparison, the Arbitration Procedural Code of Russia of 2002 designed for resolution of such disputes allows more careful constructing of relevant relations between the parties and the court. And if the Kazakhstan legal system due to historic decisions does not count on state arbitration court, then special regulations should be provided for within the framework of the CPC in a more adequate way.

Mentioning the Kazakhstan legal base in the context of the paper's theme, it is also necessary to focus on the following issue. The Supreme Court of Kazakhstan has a right to issue normative resolutions that are mandatory and which, together with laws and other normative legal acts, form the body of effective law. In other words, the generalized practice of courts is recognized as a source of law in Kazakhstan. According to our data received from the official sources, the Supreme Court has adopted about 90 normative resolutions on various issues of the Kazakhstan legislation during the period from 1998 through the present day. But the Supreme Court has not adopted normative resolutions on the issues of contractual obligations of the parties to civil law relations. Only reviews of the practice of the Supreme Court on this issue that are not of a normative nature may be found. It seems unexpected considering that the Kazakhstan courts under the conditions of market economy consider a multitude of contract-related cases, first of all, in the sphere of business. Undoubtedly, courts have numerous questions regarding the application of rules of contract law. Relevant scientific and practical summarizing and, as a result, the issue by the Supreme Court of normative resolutions on the interpretation and application of the rules of the Kazakhstan contract law would be extremely helpful.

SPECIALIZATION OF STATE COURTS

One may refer the specialization of courts, and, first of all, the creation of

specialized economic courts to the progressive distinctions of the Kazakhstan state judicial system that occurred lately.[1] The economic courts are established under the principle of exterritoriality, they are interregional courts, that is, they do not connected with specific bodies of local authorities.

For information, Kazakhstan (as distinct, for example, from Russia) with the adoption of the 1995 Constitution abolished the system of arbitration courts[2] and transferred to the system of unified state courts. Initially, such courts had collegiums on civil and business affairs, the latter deciding on economic disputes; later on, the business collegiums entered into the composition of civil collegiums. Recently, experts raise an issue of delusiveness of uniting of arbitration courts and courts of general jurisdiction. Although the officials do not openly admit that the decision on the liquidation of state arbitration courts did not justify itself, however, the successful experiment with the creation of economic courts evidences to the contrary. As to the present situation, despite the existence of economic courts in the Republic, the specialization of courts and judges in the sphere of business is not yet sufficient. In particular, the economic courts may by no means consider all business disputes since disputes, one party of which is an international or foreign organization, fall under the jurisdiction of oblast courts but not economic courts. The absence in the Supreme Court and in oblast courts (and also in city courts of Astana and Almaty) of collegiums on business disputes decreases the efficiency of these courts with respect to the cases of relevant category.

Our practice shows that courts of different levels and especially the Supreme Court have very competent judges in the sphere of business legislation. However, even the Supreme Court, judging by adopted decisions, experiences objective difficulties, and sometimes issues apparently unqualified opinion on complicated issues of the contract law. One of the main problems is that the courts often confuse public relations with contractual civil-law relations, especially in the sphere of ecology, subsoil use, finance, etc. An ecological dispute with Tengizchevroil LLP (our firm participated in it as a consultant of Tengizchevroil LLP) is a specific and very indicative example of such cases. The dispute occurred in 2002–3 and became widely known in Kazakhstan and abroad.

[1] Mr K Mami, the Chairman of the RK Supreme Court, in his recent publications in the press repeatedly noted the development of the institute of specialized courts, including economic courts, as an important development of the judicial system. For example see Kairat Mami 'Observance of a law—inherent convictions of every man' (2002) 15 Yuridicheskaya gazeta (17 Apr). KA Mami 'Legal reform in Kazakhstan. Results and prospects' (2003) 11 Journal Pravo and economika 11–13.

[2] Arbitration courts were state courts that resolved business disputes in the USSR and Kazakhstan.

Another example that received a great publicity is the case of 1999–2000, involving Sokolovo–Sarbaisky ore mining and processing enterprise when the Supreme Court ignored the arbitration clause contained in the contract and stipulating the consideration of the case on the British Virgin Islands and accepted the case for consideration. That is, the Supreme Court, in my view, failed to accurately assess quite a simple legal rule of autonomy of arbitration clause and its legality irrespective of legality of the Contract itself.

Possibly, further extending of the specialization of courts and judges in aggregate with the work of the Supreme Court on scientific and practical generalization of judicial practice in the sphere of contract law would help to resolve many existing problems.

ARBITRATION TRIBUNALS

Mentioning the role of Kazakhstan courts in the implementation of contractual rights and obligations, we should also mention even more complicated situation with arbitration tribunals. In accordance with the Constitution, arbitration tribunals (arbitration courts) do not enter into the state judicial system of Kazakhstan. At the same time, the civil legislation establishes the possibility of protection of civil rights in such courts; a number of international conventions and treaties with participation of the Republic also guarantee the transfer of commercial disputes to arbitration courts.

During the recent years up to February 2002, arbitration tribunals had been actively developing despite the existing problems with the legislative basis of their activities. Some of them (first of all, the Arbitration Commission of the RK Chamber of Commerce) had high prestige with businessmen and enjoyed the reputation of honest and highly competent bodies, which, at reasonable rates, promptly and efficiently considered business disputes. Not only Kazakhstan enterprises used the services of arbitration tribunals, but foreign investors also began more actively resort to their services.

The Civil Procedural Code adopted in 1999 did not provide for the issue of orders for enforcement of awards of Kazakhstan arbitration tribunals, specifying in this respect the possibility of the issue of orders for enforcement of foreign arbitral awards. This served as the ground for refusal by state courts of the issue of orders for enforcement of awards of Kazakhstan arbitration tribunals, and what is more, it deprived the awards of these courts of legal effect. In that way domestic arbitration tribunals were put in an unequal position with foreign arbitration tribunals.

Initially, the Supreme Court took a fair position in the complicated situ-

ation regarding the disputable issue of recognition and enforcement of awards of arbitration tribunals, and in its Resolution in 2001 admitted that the awards of Kazakhstan arbitration tribunals should be enforced on the equal terms with the judgments of general jurisdiction courts. However, the Prosecutor-General's Office and the Government of the Republic took per se a different position and initiated the consideration of the issue by the RK Constitutional Council. However, the indistinct position on this issue of the RK Constitutional Council that considered this issue twice in 2002 as to the compliance of the issues of recognition and enforcement of awards of Kazakhstan arbitration tribunals with the Constitution of Kazakhstan actually blocked the activities of Kazakhstan arbitration tribunals since the Constitutional Council did not recognize the possibility of enforcement of Kazakhstan arbitral awards without their relevant review by state courts. After that the Supreme Court was forced to suspend the effect of its 2001 Resolution in 2002, and since then Kazakhstan arbitration tribunals, as a matter of fact, do not function.

ISSUES OF ENFORCEMENT OF JUDGMENTS OF STATE COURTS

One of the principles of the Kazakhstan legislation in the sphere of judicial protection is the mandatory nature of courts' judgments. According to the RK CPC: 'courts judgments that entered into legal force . . . and shall be subject to mandatory enforcement in the entire territory of the Republic of Kazakhstan'.

But it is generally recognized that the enforcement of courts' judgments is one of the most acute and problem issues of the Kazakhstan legal system. According to the Chairman of the Supreme Court Mr. K. Mami, the basic reason for such situation is the absence of efficient mechanism of enforcement of judicial acts. He believes that in order to fundamentally overcome the situation in the enforcement proceedings it is necessary, first of all, to eliminate existing gaps in the current legislation, having provided in it for strict responsibility for non-enforcement of the judgments. This relates not only to debtors, but also to relevant officials of state agencies, including law enforcement officers. He also thinks that new laws are required on the enforcement proceeding, status of law enforcement officers and bailiffs, and that it is necessary to promptly decide on the issue of improvement of material and technical support to the activities of law enforcement officers, to increase their salaries, reduce their work load, and improve their professional skills.[3]

[3] K Mami 'Observance of a law—inherent convictions of every man' (2002) 15 Yuridicheskaya gazeta (17 Apr).

Recently, on 19 December 2003 the Supreme Court adopted a normative Resolution on Responsibility for Malicious Non-Enforcement of Judicial Acts,[4] which title speaks for itself. The Resolution contains a number of provisions (having under the conditions of the Kazakhstan legal system the force of a normative act) providing for the improvement of the judicial acts enforcement and ensuring holding the guilty person responsible in case of malicious evading from the enforcement of such acts.

The Concept of the Legal Policy of Kazakhstan adopted in 2002 also notes that the system and organization of work of the enforcement proceeding need cardinal reformation and improvement, including the improvement of legislation on enforcement proceeding and status of law enforcement officers and bailiffs. The Concept also contains a provision that it is necessary to legislatively expand the application of procedural judicial control over the enforcement of court's judgments.

CURRENT ISSUES OF COURTS IN KAZAKHSTAN

The Concept of the Legal Policy of Kazakhstan adopted in 2002 in section dealt with the development of judicial system indicates as important (excepting those already mentioned) the following issues: strengthening of the independence of judges; development of economic courts, and, along with them, alternative methods of resolution of civil law disputes, and also the legislative regulation of activities of arbitration tribunals, approaching them to international standards. There is stated the need to attend to the issues of permanent improvement of material and technical support to the activities of courts; preparation and training the judicial corps, measures for the improvement of educational background and professional skills of the judges. For the purpose of implementation of the Concept, a special Program for the improvement of image of the judicial system was adopted in 2003. On the one hand, the Program regrets that the society does not have the objective and full understanding of the judicial reform that is being carried out, its specific results, existing problems in the activities of courts, work on extermination of violations of the rules of judicial ethics, fighting against corruption; on the other hand, it frankly says that there are problems regarding the actual enforcement of court orders, the actual equality of the parties and obligation is not fully ensured in the court proceedings, the level of professional training of lawyers participating in a competition to occupy the position of a judge remains to be low, material and technical equipping of courts is insufficient.

[4] Judicial acts include in themselves judgments of courts, including under business disputes.

As regards the reality, active discussions on various aspects of state judicial system, status of judges, and the legal basis of activities of arbitration tribunals still continue. For example, according to the press, on the most recent session of Standing Conference[5] in December 2003 a heated discussion took place between various agencies (including the Union of Judges, the Supreme Court, and the Prosecutor-General's Office), the main thesis of which that the judicial authority also needs the strengthening of control from the society, and that the confidence to the courts is low was readily supported by all participants, including by those on whom the contour of the forthcoming reform depends.[6]

In connection with evident problems of the activities and prestige of state courts, the creation of the required legislative base for the normal activities of arbitration tribunals in Kazakhstan is of special significance. At the present time a draft Law on Arbitration Tribunals (hereinafter—the Draft) is under review in the Parliament of the Republic of Kazakhstan. Unfortunately, the Draft has some conceptual shortcomings, which were repeatedly criticized by the most authoritative lawyers of Kazakhstan. The main shortcoming at this writing is the existence of a rule in the Draft under which the award of an arbitration tribunal may be challenged in a competent (state) court in the case of contradiction of the award with the principle of lawfulness under which non-contradiction of the award to any normative legal acts of the RK is meant. Under such approach a state court is turned into a higher instance that reviews the lawfulness of the award of arbitration tribunal under merits, and depending on its own evaluation—turns to the decisive instance: whether to retain the legal force of such award or not. Such conclusion contradicts the main objective of the introduction of an arbitration tribunal into the legal system of the state.[7]

The Secretariat of UNCITRAL (the UN Commission on International Commercial Law) in its comments to the Draft notes that the latter contains a number of provisions, which hardly would be welcomed by international commercial circles. Some of such provisions may compel foreign investors in the discussion of contracts with Kazakhstan parties to insist that Kazakhstan should not be the place of arbitration, which would negatively affect the aspiration of the state to be the place for consideration of international arbitration disputes or for becoming the regional commercial and

[5] Standing Conference for the development of proposals on further democratization and development of civil society whose participants represent Parliament, the Government, Administration of the President, other state agencies of the Republic of Kazakhstan, political parties and the Republic's non-governmental organizations.

[6] See N Drozd 'Carrying out judicial reform causes optimistic expectations' (2003) 48 Panorama (12 Dec) 6.

[7] See Yu Bassin and M Suleimenov 'The idea is present. More logic is needed. The concept of the Law On Arbitral Tribunals threatens to liquidate them' (2003) Yuridicheskaya gazeta (12 Dec) 2.

arbitration centre. The apparent difficulties with the draft law may, in the opinion of UNCITRAL, also weaken the readiness of foreign partners to invest in Kazakhstan or enter into long-term commercial ties with Kazakhstan enterprises. Even if a contract between a Kazakhstan party and a foreign party would contemplate the arbitration outside Kazakhstan, owing to provisions of the draft law related to the enforcement of foreign arbitral awards, some of them could be interpreted as a proposal to the courts to reconsider foreign arbitral awards under grounds not provided for by the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York 1958).[8]

Despite the situation described, there is hope that considering the active discussions of the Draft on various levels the Law could evade conceptual errors contained in the Draft.

Regarding the existing problems of activities of Kazakhstan courts in the context of ensuring the enforcement of contracts, their prospects are not so clear, although we would like to hope to see their positive resolution.

[8] Recently the Ministry of Justice of Kazakhstan has prepared a Draft Law on International Commercial Arbitration in the Republic of Kazakhstan. The initial version of the Draft has similar legal defects as the Draft Law on Arbitration Tribunals.