Kluwer Arbitration Blog

Kazakhstan Internationalises Arbitration Law

Cameron Ford (Squire Patton Boggs) · Monday, August 19th, 2019

Kazakhstan has been making concerted efforts to increase foreign investment and to reduce its dependency on extractive industries which have long dominated production. In 2015, when it was ranked 77th out of 190 countries for doing business, the then President introduced a "100 Concrete Steps" Plan to make the country one of the top 30 developed countries by 2050. In 2019 it had risen to 28th place, no doubt in large part due to the Plan which focused on five critical areas – New Modern State Apparatus; Rule of Law; Industrialization and Economic Growth; Nation with a Shared Future; Transparent and Accountable Government. A report by the Boston Consulting Group in December 2018 Investing in Central Asia was optimistic about the potential for future investment in Kazakhstan, identifying further improvement of the investment environment as one of the five keys to unlocking full potential.

Straddling a number of those areas is the Astana International Financial Centre (AIFC), incorporating the AIFC Court and the International Arbitration Centre (IAC) (past coverage of that development available here). The AIFC came into being in 2018 and is intended to be a major financial hub for Central Asia, the Caucasus Republics, Eurasian Economic Union, the Middle East and Europe. The AIFC Court hears disputes arising out of the AIFC with judges from common law countries and Lord Woolf as its first Chief Justice.

Being an arbitral institution, the IAC is not limited to administering disputes arising out of transactions within the AIFC but is available for disputes in transactions generally. Any contract may refer disputes to be resolved under IAC arbitration. To deal with these, the IAC was endowed with a set of state-of-the-art rules, a panel of outstanding international arbitrators and mediators, and an internationally regarded Chairman in the person of Barbara Dohmann QC.

2019 Amendments to the Law on Arbitration

Complementing the Plan and the IAC in particular, in January 2019 Kazakhstan amended its 2016 Law on Arbitration (the Law) (see rough translation in English of the Law) to align it with international conventions and practice by the Law of the Republic of Kazakhstan No. 217-VI "On Amendments to Certain Legislative Acts of the Republic of Kazakhstan Concerning Strengthening the Protection of Property Rights, Arbitration, Optimizing the Judicial Caseload, and Further Humanizing the Criminal Law". This approach to internationalising arbitration could be expected to increase the attractiveness of the IAC as an administering institution and arbitration for

Kazakhstan generally. This in turn can lead to significant increases in foreign direct investment,[1)] can have a measurable impact on the country's trading patterns particularly in the increased export of complex goods, and can trigger a process of institutionalization.[2)]

The more important 2019 amendments relax the requirements for the arbitration agreement, enable foreign law to be chosen to govern the dispute, allow the tribunal to use foreign law to determine the governing law, reduce the grounds for annulment of an award, internationalise the grounds for refusing to recognise an award, and restrict a state party's revocation of consent to arbitration. This post discusses each of these changes in turn.

1. ***Relaxing Arbitration Agreement Requirements***

Before the changes, in order to be enforceable, arbitration agreements were required to state the intention of the parties to refer disputes to arbitration, indicate the subject matter to be determined by arbitration, state a specific arbitral institution or rules, and have the consent of the relevant authorised body where a state entity was party to the agreement.

Article 9.4 of the Law has been amended to remove those strictures, making more arbitration agreements enforceable and enabling parties to choose ad hoc arbitration.

This change gives foreign parties greater confidence that their arbitration agreement with a Kazakh counterparty will be upheld and this makes it more attractive for to agree to arbitration. This in turn encourages foreigners to do business with Kazakh state entities and nationals, increasing investment in the country. One of the reasons arbitration is chosen by foreign parties is their unfamiliarity with domestic courts and laws. If foreigners fear their arbitration agreement will not be upheld domestically and the local party will be allowed to commence domestic court proceedings, they may simply not enter into the transaction or require something to allay their fears such as some form of security, better terms and so on. This has the effect of either chilling investment in the country or increasing transaction costs.

2. ***Foreign Law as Governing Law***

Under Article 44.1 foreign law may now be chosen as the governing law of the contract and the dispute where one party is foreign to Kazakhstan. Formerly, that article required the governing law to be that of Kazakhstan where one party was a state entity – *i.e.*, state bodies, and entities held 50% or more by the state. Now only contracts and disputes purely between Kazakh parties must be governed by Kazakh law.

This is a significant advancement, making transactions with Kazakh parties more attractive to foreigners and making arbitration in Kazakhstan more international. As well as being concerned at unfamiliarity with domestic courts, foreign parties worry about being committed to an unknown domestic law in a system they may not understand. Transacting under such a law increases risk and uncertainty, sometimes to levels a foreign party is unable to accept. Having the ability to choose a known and neutral governing law enables those risks to be managed and the transaction to be approved.

3. ***Foreign Law May Determine Choice of Law***

Article 44.1 now says that, if the parties do not agree, the applicable law will be determined in accordance with appropriate conflict of laws rules determined by the tribunal. This replaces the former position that the applicable law was determined by reference to Kazakh law and now conforms to Article 7 of the European Convention on International Commercial Arbitration.

Although under-appreciated by lay parties, the possibility of foreign choice of law rules determining the governing law makes contracting with Kazakh parties more appealing. Lawyers for foreign parties would have more confidence that an appropriate law with which they are familiar would be chosen in this way.

4. ***Grounds of Annulment Reduced***

Awards may no longer be annulled simply because they do not comply with the Law's requirements on written form and signature. Under Article 52, Kazakh courts now may not examine the substance or merits of an award in annulment or recognition proceedings, in line with the New York Convention. Where the ground relied on for annulment is the tribunal's non-compliance with the parties' agreement that agreement cannot be contrary to the mandatory provisions of the Law. If there is no agreement, an award may be annulled if the tribunal did not comply with the Law generally, not only its mandatory provisions. This matches the approach of the UNCITRAL Model Law on International Commercial Arbitration.

Reducing the grounds of annulment, particularly quarantining the merits from review, makes parties feel safer in doing business with Kazakh counterparties and in selecting arbitration. Enforcement and recovery are very real questions for all parties to contracts without the added uncertainty of the potential for annulment through a merits review, particularly when the international standard restricts annulment to much narrower grounds.

5. ***Internationalising Recognition and Enforcement***

Article 57 on recognition of awards has been amended to align more closely to the New York Convention with three changes:

- Under the former Law, a Kazakh court could refuse to recognise or enforce an award if it had been made possible by the commission of a criminal offence. This has been removed by the 2019 amendments.
- Formerly an award could be invalidated and refused to be enforced if the arbitration agreement did not state its governing law. This has been removed, with invalidity of the arbitration agreement now being determined by the law where the award was made.
- Before the amendments, the Law stated that an award was unenforceable if the tribunal did not comply with "the law", without stating which law. Arguments could be made that "the law" referred to Kazakh law, the governing law of the contract, the lex arbitri or the law where the award was made (if different from the lex arbitri). The changes clarify that the law to be

complied with is the law of the place where the arbitration was held.

While it would be rare for awards to be invalidated because they had been made possible by a criminal offence, it would be much more common for arbitration agreements not to state their governing law. Many arbitration agreements would fall into this category, with most seeming to assume they are governed by the law applicable to the contract. Removal of this ground of refusal to recognise is a significant step in giving parties confidence their awards will be enforced, in turn encouraging foreign parties to transact with Kazakh parties and agree to arbitration. The same could be said of clarification of "the law" with which the award must comply.

6. ***Revocation of State Party's Consent***

Unlike the position before the amendments, under Article 8.10 a state party cannot now revoke its consent to arbitration. A state party is a state body or an entity in which the state has 50% ownership or more. Under Article 8.10, state parties must obtain the consent of the "authorised body" of their relevant industry to enter into an arbitration agreement. Formerly there was no preclusion on the authorised body revoking its consent at any time; however the 2019 amendments now state in article 8.10 that the consent is irrevocable.

Foreign parties must have been cautious in dealing with state parties before the amendments, not knowing whether the state party would adhere to the arbitration agreement or the foreigner be forced into domestic court proceedings. Again, this change heightens confidence in dealing with state parties and agreeing to arbitration.

Comments

Viewed overall, the amendments make transactions with Kazakh parties more attractive to foreigners knowing that they can choose a foreign governing law, their arbitration agreements are more likely to be upheld, they do not have to know and comply with obscure technical requirements, and that awards have a greater chance of being recognised and enforced.

On his appointment as Chief Justice of the AIFC Court, Lord Woolf said:

> "[The President] wants the world to see English common law being applied in this country and not just in the capital, but to radiate throughout society in years to come as an example of how business should be done and justice done."

The IAC and the amendments to the Law can be seen as part of that vision, not just promoting arbitration but also the common law, both with the ultimate aim of increasing business in the country and diversifying the economy.

Central Asia generally is seeing a move towards institutionalising and modernising arbitration as part of efforts to improve access to justice and the general investment environment. Kazakhstan is the largest country in Central Asia with vast oil, uranium and other mineral resources. Its efforts to

attract trade through developing its laws and arbitration are likely to be mimicked by other countries in the region. Not only might the common law radiate through Kazakh society, but modern arbitration laws and rules might radiate through the region.

In November 2018 Uzbekistan resolved to establish the Tashkent International Arbitration Centre under the Chamber of Commerce and Industry of Uzbekistan to promote arbitration and investment (past coverage of that development available here).

Kyrgyzstan proposes to institutionalize arbitration as a mechanism for improving the access to justice as reported in this blog in Arbitration in Kyrgyzstan: Evolution and Next Steps Ahead.

In 2016 Turkmenistan adopted the International Commercial Arbitration Law based on the UNCITRAL Model Law but is not a party to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards – see in this blog Law of Foreign Arbitration in Turkmenistan: An Introduction.

Tajikistan has also ratified the New York Convention with a reservation that it would not be applied to differences related to immovable property, a restriction which may impose significant limitations on the utility of arbitration in infrastructure disputes.

Further modernisation of arbitration law, institutions and rules can be expected across the region as countries vie for foreign investment and seek to diversify their economies.

References

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?2 Daniel Berkowitz, Johannes Moenius & Katharina Pistor, *Legal Institutions and International Trade Flows*, 26 Mich. J. Int'l L. 163 (2004), 177.

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