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Hidden Impediments Await Foreign Parties Seeking to Enforce Arbitral Awards in Kazakhstan

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The overwhelming weight of opinion among legal practitioners is that enforcement of foreign arbitral awards in Kazakhstan is theoretically possible under the [New York Convention](#) (“NY Convention”), albeit problematic in practice due to ambiguity in the Kazakh legislations. Many problems associated with the recognition and enforcement of foreign arbitral awards in Kazakhstan and the application of the NY Convention have already been discussed by Kazakh legal scholars. However, existing research works on such topics are often dated.

This post aims to familiarise foreign parties with up-to-date laws and procedures of the enforcement of arbitral awards in Kazakhstan, and thus identify the most prevalent impediments which await foreign parties seeking enforcement of arbitral awards in Kazakhstan. Three major issues in this regard are discussed: 1) status of the NY Convention in Kazakhstan; 2) inconsistencies with the NY Convention; and 3) public policy as a ground to refuse enforcement.

Status of the NY Convention in Kazakhstan

Kazakhstan joined the NY Convention by [Presidential Decree-No-2485](#) dated 4 October 1995. In accordance with Article 4(3) of the [Kazakh Constitution](#), international agreements ratified by Kazakhstan should take priority over its domestic laws and should be implemented directly.

Kazakhstan has acceded to but has not ratified the NY Convention. In this regard, there are divergent opinions between Kazakh lawyers about the application of the NY Convention within Kazakhstan’s legislative framework. One school of thought is that the NY Convention only has the status of non-ratified treaties under the Kazakh Constitution and has no priority over municipal law. Due to the lack of ratification, Kazakhstan should execute foreign arbitral awards only on the basis of reciprocity.

The other school of thought is that the Convention arguably still applies through direct implementation as its status is equal to that of the enacting decree. According to Article 1(7) of the ‘[On-Legal-Acts](#)’ law, the definition of ‘legislation’ includes all normative legal acts adopted regarding established procedure. Thus, the decree and the NY Convention form a part of the national legislations, which in turn permit the recognition and enforcement of foreign arbitral awards in accordance with Article 501 of the [Kazakh Civil Procedure Code](#) (“CPC”).

From an international legal perspective, Kazakhstan is bound to observe its obligations under the NY Convention and cannot plead a conflict with domestic laws to escape from such obligations. The practical effect is that, where an arbitral award has been lawfully rendered in a third country and is thereafter brought in Kazakhstan for enforcement, Kazakh courts cannot refuse enforcement on the basis that the NY Convention contravenes domestic laws, for this may entail breach of state as well as contractual responsibility by Kazakhstan. There appear to be no previous cases of refusal to issue a writ of execution in Kazakh courts on the ground of lack of ratification of the NY Convention. Therefore, it can be understood that the Kazakh courts consider the NY Convention to be valid and binding in Kazakhstan.

Inconsistencies with the NY Convention

As Kazakhstan is a signatory of the NY Convention, provisions of the CPC and the Law on Arbitration should align with the NY Convention. In this regard, the grounds for refusal of recognition and enforcement of arbitral awards provided in Article V of the NY Convention are listed in [Article 255 of the CPC](#) and Article 57 of the [Law on Arbitration](#).

However, there is a difference between the wording in Article V of the NY Convention and Article 255 of the CPC, and that in Article 57 of the Law on Arbitration. This creates ambiguity on the scope of judicial discretion. Under the NY Convention, the enforcing court is not obliged to refuse enforcement even if it is satisfied that the recognition or enforcement of the award would be contrary to the national public policy. This is reflected by the employment of permissive wording of “may” in Article V of the NY Convention. Therefore, national courts have discretion to enforce the award even if a ground for refusal is established. However, provisions of Kazakh law are mandatory and Article 52(2) of the Law on Arbitration obliges the court to reject an application for enforcement in the event of conflict with Kazakh public policy. As such, it is arguable that the grounds for refusal of recognition and enforcement of arbitral awards under national laws are inconsistent with the grounds under the NY Convention.

Further Article 51 of the [Law on Arbitration](#) provides an additional ground to revise an arbitral award based on the discovery of new facts. Under Article 51(1), a party is entitled to apply for an award to be reviewed if the Kazakh Constitutional Council finds that the legislation applied by the arbitral tribunal in writing its award is unconstitutional. Article 51(2) provides that an application for revision of an arbitral award under Article 51(1) shall be filed and considered by the arbitral tribunal that rendered the award, within three months from the date of the establishment of facts constituting a ground for revising the award, unless another timeline is established by the rules or agreement of the parties. This provision is problematic because the Kazakh courts appear to have substantial discretion to revise arbitral awards, thereby giving rise to doubts as to whether an arbitral award is indeed final and binding on the parties.

Public Policy as a Ground to Refuse Enforcement

The broad and inconsistent interpretation of public policy adopted by the Kazakh courts has caused many problems in practice since the enactment of the [Law on Arbitration](#) in 2016.

The principles of public order are accounted for in the general provisions and [Section II on](#)

‘Person-and-Citizen’ of the [Kazakh Constitution](#). Further, Article 2(1) of Law on Arbitration defines public policy as the fundamentals of law and order which are enshrined in the legislative acts of Kazakhstan, while Article 1090(2) of [Kazakh Civil Code](#) and the Law on Arbitration shed light on the principles of ‘public policy’.

Although the general definition of public policy is provided by Kazakh law, its precise application remains unclear and judges are granted discretion when assessing this ground. In this respect, two observations may be made:

1. If other grounds for refusal have failed, the party resisting enforcement often misuses the public policy ground; and
2. Some courts have annulled arbitral awards on public policy ground on the basis of contradiction of the ‘rule of law’, which might not be accurate as reflected in the 2017 ruling of the Supreme Court of Kazakhstan discussed below.

Until the Supreme Court resolved it with its ruling in 2017, the lower courts of Kazakhstan often applied a broad and inconsistent interpretation of public policy.

In one case, a Chinese company entered into a preliminary agreement with a Panamanian company in which Kazakh businessmen were involved, for the purchase of subsoil use rights for two gold mines. In such case, the Specialized Inter-District Economic Court of Almaty city (“SIDEK”) referred to Article 52 of the Law on Arbitration in its decision and found the award violated public order.

On 10 August 2016, the Civil Division of Astana City Court (“Appeal Court”) upheld the decision issued by SIDEK. The Appeal Court considered public policy as the basis of the rule of law embodied in the legislation of Kazakhstan and that the fundamental principle of the entire legal system of Kazakhstan is based on the principle of legality. As such, the Appeal Court appears to have applied the repealed principle of legality under the former arbitration law “On Arbitration Courts” which is arguably incorrect.

However, on 16 May 2017 the Supreme Court of Kazakhstan reversed the lower courts’ rulings because it concluded that the lower courts were guided by an inaccurate interpretation of public policy. The Supreme Court gave the following recommendation to lower courts in the [Recommendations of the Round Table on Application of the Law on Arbitration](#):

“It should be noted that the application of the ground of public policy is possible only in exceptional cases where the enforcement of an arbitral award offends the basis of the public policy of the RoK. In connection with the foregoing, the courts when annulling arbitral awards on such ground, should explain which specific public policy is violated and how.”¹⁾

Recommendations

To resolve the legal ambiguities discussed above, it is recommended that: 1) the status of the NY Convention within the Kazakh legal system be clarified; 2) the inconsistencies between the NY

Convention and Articles 255 and 57 of the CPC and the Law on Arbitration be regularised; 3) legal practices of enforcement and recognition of foreign arbitral awards be standardised; and 4) explanatory notes concerning the public policy ground are formulated for judges.

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References

?1 Translation provided by the author.

This entry was posted on Wednesday, April 1st, 2020 at 10:30 am and is filed under [Enforcement](#), [Kazakhstan](#), [New York Convention](#), [Public Policy](#)

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