

# RECOGNITION AND ENFORCEMENT OF DECISIONS OF FOREIGN COURTS AND ARBITRATIONS IN THE REPUBLIC OF KAZAKHSTAN: CURRENT STATUS AND PROBLEMS

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## ABSTRACT

*The article is devoted to an urgent and significant problem of modern civil procedure - recognition and enforcement of decisions of foreign courts and arbitration. The inclusion of the Republic of Kazakhstan in the global economic and legal space makes it necessary to ensure free circulation of not only goods, services, money and people, but also judicial acts that have resolved conflicts between participants in international civil circulation.*

*The article is devoted to the study of the features of the enforcement of decisions of foreign courts and arbitration under the legislation of the Republic of Kazakhstan. At the present time, one can hardly doubt the urgency of the problem of mutual execution of court decisions. The issue of the execution of a decision of a foreign court or arbitration tribunal is essentially a question of extending its legal force to the internal legal space of another state, of giving it the same legal properties, legal force and general obligation that are inherent in national decisions.*

**Keywords:** Foreign Award, Arbitral Award, Enforcement Proceedings, Investment Dispute, Recognition of Award, Enforcement of Award, Court, Commercial Court, Convention, Exequatur.

## INTRODUCTION

The current stage of development of the Republic of Kazakhstan is characterized by large-scale legal reforms, economic liberalization, the development of foreign economic and investment activities, as well as international cooperation in general. In turn, globalization and the growing position of the country in the international community require the development and improvement of mechanisms of legal cooperation and ensuring the principle of reciprocity in the provision of legal assistance. In the light of the above, one of the most important areas of international legal cooperation and the provision of legal assistance is the recognition and enforcement of decisions of foreign courts and arbitration tribunals on the territory of the Republic of Kazakhstan. This issue is directly related to the development of the judicial system and is an indicator of the implementation of international standards in the field of the rule of law.

It should be noted that in accordance with the Strategy of Action on Seven Priority Areas of Development of the Judicial System of the Republic of Kazakhstan "*Seven Stones of Justice*", ensuring its true independence and strengthening guarantees of reliable protection of the rights,

freedoms and legitimate interests of citizens is one of the important directions of reforms being implemented in Kazakhstan.

In the course of the on-going judicial reform, it is important to pay special attention to improving the mechanisms for the recognition and enforcement of decisions of foreign courts and arbitration. Since at present, the recognition and enforcement of decisions of foreign courts and arbitration tribunals on the territory of the Republic of Kazakhstan does not have clear legal regulation and a unified law enforcement practice that takes into account the interests of the parties and the state itself.

The current practice of recognizing and enforcing decisions of foreign courts and arbitrations is based on international treaties and the relevant legislation of the Republic of Kazakhstan and does not have a single document regulating this process, does not fully comply with international practice, and the judicial practice itself in this area does not have a unified methodology for considering such disputes, which is also due to the fact that judges do not have the appropriate knowledge and skills to consider such issues, especially when challenging the recognition and enforcement of decisions.

All this leads to misunderstandings on the part of law enforcement officers and different application of certain norms regulating the procedure for the recognition and enforcement of decisions of foreign courts and arbitrations, which in turn requires a revision of the existing practice and mechanisms for the recognition and enforcement of decisions of foreign courts and arbitration, improvement of international and national frameworks. In this area, the development of specific recommendations or a consistent methodology for organizing activities for the recognition and enforcement of decisions, as well as the introduction of mechanisms for improving the qualifications of law enforcement officers in this area.

Developing countries require foreign investment to finance their state budget. In conducting investment investors also see the security aspect offered by host country (Hendrawan et al., 2018).

The role of investments for the country today is very high and is of great importance in the light of rapid economic development, in various integration alliances. Any investor needs protection, investment attractiveness, security guarantees. And, of course, legal guarantees and protection of their interests, if necessary, should be provided by a state that is a full member of international legal organizations (Moroz, 2003).

These tasks cannot be achieved without attracting additional investment in the economy, without accelerating integration processes with other countries, which, in turn, is hardly achievable without close cooperation of states in the field of justice, one of the most important elements of which is the recognition and enforcement of decisions foreign courts and arbitration.

## **RESEARCH METHODOLOGY**

During the study, both general research methods (analysis, synthesis, generalization of scientific, normative and practical materials, a systematic approach, etc.) and particular methods of comparative jurisprudence and the historical approach were used.

## RESULTS AND DISCUSSION

Legal and Regulatory Framework of the Republic of Kazakhstan on the Issue of Recognition and Enforcement of Decisions of Foreign Courts and Arbitration Tribunals

According to the general principle of international law, the procedure for the recognition and enforcement of decisions of foreign courts and arbitrations is carried out in accordance with international treaties and the national legislation of the country of execution.

In modern international relations the international treaty is the main instrument with the help of which states, as the main subjects of international law, can create and secure international law and order. Only legally valid treaties can affect international relations and ensure their stability and effectiveness. The entire international system is based on the principle of *pacta sunt servanda*, according to which each treaty must be observed in good faith by the parties (Khatniuk et al., 2020).

A legal basis for the recognition and enforcement of international arbitration awards has been formed in Kazakhstan. Arbitration as an alternative method of resolving commercial disputes in Kazakhstan has been used for over twenty years. Arbitration can be defined as: a substituted of litigation way to resolve commercial conflicts through third independent and imperial party (Ibrahim & El-Haija, 2020).

The main international treaties governing the recognition and enforcement of international arbitration awards are the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, the European Convention on Foreign Trade Arbitration and the Washington Convention on the Settlement of Investment Disputes between States and Individuals and Legal Entities of Other States.

The issues of recognition and enforcement of decisions of foreign courts are regulated by international multilateral treaties to which Kazakhstan is a party. These include the Kiev agreement on the procedure for resolving disputes related to the implementation of economic activities, the Minsk Convention on Legal Assistance and Legal Relations in Civil, Family and Criminal Cases, the Moscow Agreement on the Procedure for the Mutual Execution of Decisions of Arbitration, Economic and Economic Courts in the Territories of the Member States Commonwealth.

The listed agreements provide for mutual recognition and enforcement of decisions of the courts of states located on the territory of the post-Soviet space.

In addition, the Republic of Kazakhstan has entered into a number of bilateral international agreements on the provision of legal assistance, which regulate bilateral relations on the provision of legal assistance and legal relations in civil, family and criminal cases, including the recognition and enforcement of decisions.

In addition, when considering cases on the recognition and enforcement of decisions of foreign courts and arbitration tribunals, the courts of the Republic of Kazakhstan apply the norms and provisions of the Civil Procedure Code, the Law of the Republic of Kazakhstan "*On Arbitration*", the Law of the Republic of Kazakhstan "*On Enforcement Proceedings and the Status of Bailiffs*" and others regulatory legal acts.

In the absence of an international agreement governing this relationship, recognition and execution are made on the basis of the principle of reciprocity, which is one of the basic principles of such cooperation between states. In this case, reciprocity should be understood as the recognition and enforcement of foreign judgments, subject to the recognition and

enforcement of domestic judgments in the relevant foreign state. At the same time, one should distinguish between full and partial reciprocity, when it will be based on the enforceability of not all, but a large, significant group of judicial decisions of a foreign state. When the application of foreign law depends on reciprocity, it is presumed to exist, unless proven otherwise. The recognition and enforcement of foreign judgments on the basis of reciprocity is currently carried out in many states through the implementation of this principle in national legal acts.

In world practice, there are three main ways to enforce a foreign judgment:

1. When a procedure for the recognition of this decision is necessary, i.e. the so-called “*issuance of exequatur*” (for example, in France & Belgium);
2. When it is enough to check the correctness of the decision only from a formal point of view, and also not to contradict its public policy of the country of the court (for example, in Italy).
3. When foreign judgments require registration of the decision in a special register (in the UK).

### **Procedure for the Recognition and Enforcement of Decisions of a Foreign Court and Arbitration**

In the Republic of Kazakhstan, the norms and provisions of international documents on the recognition and enforcement of foreign courts and arbitrations are incorporated into the civil procedural legislation and the courts consider cases on the basis of the norms and provisions of the civil procedural legislation of the Republic of Kazakhstan.

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The application is usually accompanied by:

1. A duly certified copy of an award the enforcement of which requires permission;
2. An official document stating that the decision came into legal force if this circumstance does not result from the text of an award;
3. Evidences confirming proper notification of the party or its representative in case of procedural incapacity of the party against which an award is made, about the process;
4. Enforcement document with a note on the partial execution of an award, if any;
5. On matters of contractual jurisdiction, a document confirming the agreement of the parties on this issue (Suleymenov et al., 2018).

At the same time, the New York Convention has reduced the list of documents that must be submitted for the recognition and enforcement of a foreign arbitral award to two documents, namely: the arbitral award itself or its certified copy; the original of the arbitration agreement or its certified copy.

Failure to comply with the requirements for the application form or the list of attached documents is the basis for returning the application to the applicant (part 4 of article 503 of the Code of Civil Procedure of the Republic of Kazakhstan).

An application for the recognition and enforcement of a decision of a foreign court or arbitration tribunal shall be considered in a court session with the participation of the persons participating in the case. An application for the issuance of a writ of execution is considered by a

judge alone within fifteen working days from the date of receipt of the application by the court (part 6 of article 253 of the Code of Civil Procedure of the Republic of Kazakhstan).

The court session is held according to the general rules for holding court sessions. When considering a case, the courts establish the existence of grounds for refusing recognition and enforcement. At the same time, the courts are not entitled to review the decision of a foreign court or arbitration on the merits. Based on the results of consideration of an application for the recognition and enforcement of a decision of a foreign court or arbitration, the courts of the Republic of Kazakhstan issue a ruling on the recognition and enforcement of a decision of a foreign court or arbitration, or on a refusal to recognize and enforce a decision of a foreign court or arbitration (p. 9 article 503 of the Code of Civil Procedure of the Republic of Kazakhstan).

In this case, a decision of a foreign court or arbitration may be presented for recognition and enforcement within three years from the date of entry into force of the decision.

The civil procedural legislation of the Republic of Kazakhstan establishes a list of grounds on which the recognition and enforcement of arbitration awards may be refused.

So, in accordance with Article 255 of the Code of Civil Procedure of the Republic of Kazakhstan, the court issues a ruling on refusal to issue a writ of execution for compulsory execution of an arbitral award, if:

1. The party against whom the award was made submits evidence to the court that:
  1. The arbitration agreement is invalid under the laws of the state to which the parties subordinated it, and in the absence of such an indication - under the law of the country where the award was made;
  2. The arbitral award was made on a dispute that is not provided for by the arbitration agreement or does not fall under its terms, or contains decisions on issues beyond the scope of the arbitration agreement, as well as due to the dispute being not subject to arbitration;
  3. One of the parties to the arbitration agreement was recognized by the court as incapable or partially incapacitated;
  4. The party against whom the award was made was not duly notified of the appointment of an arbitrator or of the arbitration proceedings, or, for other reasons recognized by the court as valid, could not present its explanations to the arbitration;
  5. There is a court decision or an arbitral award, or a court or arbitration ruling on the termination of proceedings in the case in connection with the plaintiff's refusal from the claim, which has entered into legal force on a dispute between the same parties, on the same subject and on the same grounds;
  6. The composition of the arbitral tribunal or the arbitration procedure of the proceedings did not comply with the agreement of the parties or, failing such agreement, did not comply with the laws of the country where the arbitration was held;
  7. The decision has not yet become binding on the parties or has been cancelled, or its execution has been suspended by the court of the country in accordance with the law of which it was made;
2. The court will establish that the enforcement of this arbitral award is contrary to the public order of the Republic of Kazakhstan or that the dispute on which the award was made cannot be the subject of arbitration in accordance with the law.

It should be noted that these norms of the Code of Civil Procedure of the Republic of Kazakhstan are generally consistent with the Minsk Convention, the Kiev Agreement and the New York Convention. The New York Convention sets out a limited list of grounds for denying recognition and enforcement of foreign arbitral awards. These grounds are exhaustive and not subject to broad interpretation.

The list includes two groups of grounds for refusal:

1. Applied by the court only at the request of the party to the dispute against which the decision was made;
2. Applied by the court ex officio, i.e. on their own initiative.

With regard to the first group of grounds, the recognition and enforcement of an arbitral award may be refused if the interested party submits evidence to the court that:

1. The parties to the arbitration agreement were in any way incompetent under the law applicable to them;
2. The arbitration agreement is invalid under the law to which the parties - this agreement have been subordinated, and in the absence of such an indication - under the law of the country where this award was made;
3. The party against whom the award was made was not duly notified of the appointment of an arbitrator or of the arbitration proceedings, or for other reasons could not provide an explanation;
4. The award was made on a dispute not covered by the arbitration agreement;
5. The composition of the arbitration body or the arbitration process did not comply with the agreement of the parties or the law of the country where the arbitration took place;
6. The decision has not yet become final for the parties or has been cancelled or suspended by the competent authority of the country where it was made or the country whose law is applied.

The second group of grounds for refusal to recognize and enforce an arbitral award includes cases where the court in which such recognition and enforcement is sought finds that:

1. The object of the dispute cannot be the subject of arbitration under the laws of that country;
2. Recognition and enforcement of a foreign arbitral award is contrary to the public policy of that country (Article V of the New York Convention).

Based on Article 255 of the Code of Civil Procedure of the Republic of Kazakhstan, it can be concluded that the court issues a ruling on refusal to issue a writ of execution for the enforcement of only an arbitral award, but has no right to refuse to execute a foreign judgment.

The execution of decisions of foreign courts and arbitration tribunals is carried out after the recognition of such a decision as valid on the territory of the Republic of Kazakhstan. Thus, on the basis of the determination of the relevant state court of the Republic of Kazakhstan, a writ of execution is issued and enforcement proceedings begin. Enforcement proceedings are carried out on the basis of the Law of the Republic of Kazakhstan "*On Enforcement Proceedings and the Status of Bailiffs*".

In accordance with Article 11 of the Law of the Republic of Kazakhstan "*On Enforcement Proceedings and the Status of Bailiffs*", writ of execution issued on the basis of a court ruling on the compulsory execution of decisions of a foreign court or international arbitration may be submitted for execution within three years.

Thus, after the decision of a foreign court or arbitration is recognized as valid on the territory of the Republic of Kazakhstan, the claimant has a certain time during which he must submit the writ of execution for execution.

## CONCLUSION

In the Republic of Kazakhstan, the Service "*Judicial Office*" is actively operating, intended for filing applications, appeals, complaints and petitions, as well as for sending letters to the judicial authorities of the Republic of Kazakhstan. Through this service, you can search for court documents and cases; track the progress of the case, etc. The Judicial Office provides

citizens with access to the electronic services of the judicial authorities through a single window. At the same time, in this system there is no section;

*"Application for recognition and enforcement of a decision of a foreign court or arbitration".*

And accordingly, this type of appeal goes to the action proceeding, which is misleading regarding the order and timing of consideration of such applications.

According to subparagraph 1) of paragraph 2 of Article 52 of the Law of the Republic of Kazakhstan *"On Arbitration"*, an arbitral award is cancelled by the court if it is determined that it contradicts the public order of the Republic of Kazakhstan. This basis is also provided for by Article 5 of the New York Convention.

The norms of the current legislation do not provide a clear definition of public order, and the criteria by which a decision is considered to be contrary to it. The concept of public policy (order public, public policy) is rather vague; its application is left entirely to the judicial discretion. The public policy clause is called a *"safety valve"*, *"rubber paragraph"* and the like (Suleymenov & Duissenova, 2018).

Unfortunately, we can state the fact that in Kazakhstan there are situations when the courts refused to recognize and enforce on this basis.

Taking into account the fact that in the framework of challenging the recognition and enforcement of decisions of foreign courts and international arbitrations, one of the basic grounds is a contradiction with public order. This requires legislative consolidation of the concept of *"public order"*, taking into account its comprehensive description and application procedure. At the same time, it is necessary to establish a limited framework and an unambiguous interpretation of the rules governing the possibility of challenging the decisions of foreign courts and international arbitrations, which should not be wider than the conditions provided for by international treaties of the Republic of Kazakhstan, otherwise the practice may lead to unjustified refusals to recognize and enforce decisions and reduce trust of the international community in the judicial system of Kazakhstan.

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