

# Some Issues in the Kazakhstani Laws with Regard to Full-fledged Implementation of the Right to Refer Disputes to Arbitration Courts and International Commercial Arbitration Institutions

*By Alexey Bukhtiyarov, Associate, Macleod Dixon (Almaty)*

On 28 December 2004, the long-awaited ROK Laws "On Arbitration Courts" and "On International Commercial Arbitration" were enacted, bringing to an end the long-standing and incomprehensible saga of the government agencies opposing the operation of arbitration courts in the Republic of Kazakhstan. The two Laws reaffirmed the individual citizens' and legal persons' respective rights to seek resolution of disputes in arbitration courts or international commercial arbitration institutions and established the mechanisms and procedures securing the implementation of those rights. The two Laws have marked a major stride in recognizing and assigning, to the arbitration courts and international commercial arbitration institutions, the realistic right to make legally significant and binding decisions on the disputes before them.

Having granted the arbitration courts and international commercial arbitration institutions the necessary rights and powers, the above two Laws will certainly help advance the full-fledged implementation of the physical and legal persons' rights to alternative dispute resolution. This is bound to increase the number of disputes referred to the arbitration courts and international commercial arbitration institutions, because this method of dispute resolution has some obvious advantages as opposed to the state courts. It is that desire, for obvious reasons, to avoid the state courts, that makes the arbitration courts and international commercial arbitration institutions more attractive in terms of the resolution of commercial disputes.

At the same time, there still remain, in the Republic of Kazakhstan laws, some provisions that make it possible, in a certain manner, to restrict the parties' right to submit their disputes to arbitration courts and international commercial arbitration institutions, despite the presence of an arbitra-

tion clause or international commercial arbitration agreement between the parties concerned. More specifically, those provisions make it possible for one of the parties to ignore the arbitration clause or commercial arbitration agreement between them and take the case to the state court. This report will focus on examining and analyzing some of those legal provisions.

## Public Prosecutors Interventions

The presence of the arbitration clause does not preclude the possibility of hearing the dispute in a domestic Kazakh court on the public prosecutor's action. For instance, under Article 8.2 and Article 55.3 of the Republic of Kazakhstan Civil Procedure Code (the "ROK CPC"), the public prosecutor can institute an action in a state court to defend the rights of physical or legal persons or protect public or state interests. In accordance with Article 29.2(6) and Article 23.1 of the Republic of Kazakhstan Law #2709 "On Public Prosecutor's Offices" dated 21 December 1995, upon conducting an inspection, the public prosecutor can institute an action in a state court to restore the infringed rights or defend the interests of the State or those of individuals or legal persons.

In other words, the kind of situation that may well arise is something like this. Suppose that any two organizations have concluded a contract containing an arbitration clause or international commercial arbitration provision whereby all disputes arising out of the contract should be resolved by an arbitration court or international commercial arbitration institution. In the course of its business dealings, one of the parties fails to respect some contractual provisions, which prompts the other party to seek the defense of its legal rights and interests. Despite the existing arbitration clause, however, due to certain consider-

ations, the party concerned may choose to seek the defense of its interests in a state court rather than in the arbitration court or international commercial arbitration institution. To that end, it may request the public prosecutor to help defend its rights. The public prosecutor will then institute an action on behalf of the petitioner.

There is a considerable risk that the state court may have to examine the case on its merits rather than reject the claim. On several matters already, the Civil Cases Chamber of the Republic of Kazakhstan Supreme Court has ruled that, in submitting claims in defense of the rights of physical or legal persons or the interests of the State, the public prosecutors are not bound by previous agreements between the parties regarding the contractual or alternative jurisdiction, including the arbitration clause in the contract, and are within their powers to submit claims following the general rules governing exclusive or territorial jurisdiction<sup>1</sup>.

The Republic of Kazakhstan Law "On Arbitration Courts" and the ROK Law "On International Commercial Arbitration" lay down no provisions restricting the public prosecutor's right to institute action in a state court even where there is a prior arbitration agreement in place between the parties. Furthermore, the ROK Civil Procedure Code, which grants the public prosecutors such powers, has a greater legal force compared with that of the above two Laws.

What may happen in reality is that the special provisions concerning the status and rights of the public prosecutors will make it possible for the petitioners to bypass the arbitration clause and, through the offices of the public prosecutor, take their claim to the state court, which will have to consider the case on its merits.

It is a well-known fact that, for the past few years, the Office of the Prosecutor General of the Republic of Kazakhstan has been in open opposition to the establishment of a full-fledged arbitration court system in the Republic of Kazakhstan. The possibility cannot be excluded that, being in a position to "disregard", so to speak, the arbitration clause or prior commercial arbitration agreement, and taking into account their general negative attitudes to the arbitration courts and international commercial arbitration institutions, the public prosecutors may well use their powers to pursue claims in the state courts on behalf of unscrupulous petitioners.

## The State Court's Jurisdictional Priority

According to Article 26.1 of the ROK CPC, where several related claims are joined, with some of them falling under the jurisdiction of the state court and others under the jurisdiction of non-judicial authorities, all of those claims together will have to be heard in the state court. That provision of the law may also allow the unscrupulous petitioner who seeks to avoid the arbitration court to insist that his claim should be considered on its merits in a state court.

To take advantage of that provision of the law, it is sufficient for such a petitioner to unite their claim with several other claims, at least one of which would not be covered by the commercial arbitration agreement or would come under the exclusive jurisdiction of the state courts of the Republic of Kazakhstan. That conclusion is based on a resolution made by the Civil Cases

Chamber of the Republic of Kazakhstan Supreme Court ruling that, where the petitioner files several claims, including at least one claim that falls under the jurisdiction of the Republic of Kazakhstan state court system, all those claims together will have to be heard in a state court<sup>2</sup>.

For example, under Article 7.5 of the ROK Law "On Arbitration Courts", domestic arbitration courts have no jurisdiction over disputes that affect the interests of the State to the interests of persons that are not party to the arbitration agreement. In other words, if the petitioner chooses to invite either as a co-respondent or as a third party, whether on its own side or on the side of the respondent, another person that is not party to the arbitration clause, then the petitioner may take its case to a state court bypassing the arbitration agreement. For example, if the petitioner challenges the terms of a real estate purchase-and-sale contract containing a commercial arbitration agreement or arbitration clause, it may bring into the action a third party, for instance, in the person of the Real Estate Registration Center, which had registered the contract and is not party to the arbitration agreement. Alternatively, the petitioner may bring into the action one of its affiliates as a third party with a claim of its own on the object of the contract, claiming, for instance, that the petitioner had promised to give that piece of real property to that third party.

<sup>1</sup> See Ruling #1k-207-01 of the Civil Cases Chamber of the Republic of Kazakhstan Supreme Court dated 19 April 2001; and Ruling #3a-113-02 of the Civil Cases Chamber of the Republic of Kazakhstan Supreme Court dated 4 April 2002.

<sup>2</sup> See Resolution #3n-86-03 of the Civil Cases Chamber of the Republic of Kazakhstan Supreme Court dated 4 April 2002.

Moreover, if the petitioner somehow succeeds in proving that its dispute with the respondent affects the interests of the State, the matter will then be subject to the exclusive jurisdiction of the state courts of the Republic of Kazakhstan. The scope of the government's interests is very broad, indeed, and covers such matters as maintenance of due process of law, matters of national defense, security of the public and its individual citizens, matters involving taxes, customs, foreign exchange regulations, pricing, antimonopoly regulations, and the observance of environmental, public health and fire-protection rules and regulations<sup>3</sup>. In principle, such a State interest as maintenance of the due process of law may cover practically all civil law relationships, given that the State is interested in ensuring that all parties to such relationships should observe the laws of the Republic of Kazakhstan. As a result, the fact that Article 7.5 ROK Law "On Arbitration Courts" does not clarify the meaning of the term "state interests" nor provides that a given dispute must directly affect such interests in order to apply, may result in a significant restriction of the right to refer the dispute to a Kazakh domestic arbitration court or international commercial arbitration institution.

### **The Possibility of Challenging Arbitration Courts' Awards on Merit**

The possibility of challenging the arbitral award on the merits of the case presents a particular obstacle in the path toward a full-fledged implementation of the right to have disputes resolved in an arbitration court or international commercial arbitration institution. More specifically, under Article 44.2(5) of the ROK Law "On Arbitration Courts", it is possible to challenge the arbitration court's award where it is seen to contradict the principle of lawfulness. The concept of the lawfulness principle is defined in Article 4(2) of the ROK Law "On Arbitration Courts" whereby the arbitrators should only be guided by the provisions of the ROK Constitution and provisions of legislative and regulatory acts of the Republic of Kazakhstan. In order to establish conformity with the principle of lawfulness, the authorized state court examining a petition to challenge the arbitration court's award should examine the award on its merits, in other words, to verify the arbitrators' conclusions on the facts of the matter and establish the correct application by the arbitrators of the rules and provisions of

the Republic of Kazakhstan laws in respect to the facts discovered.

According to the provisions of Article 31 of the ROK Law "On International Commercial Arbitration", it is impossible to challenge the arbitral award on its merits in the case of international commercial arbitration awards. Consequently, international commercial arbitration awards are in a better position compared with the decisions made by domestic Kazakh arbitration courts, even though such decisions may basically be the same and may have been made by the same Kazakh extrajudicial body. It is just that such an extrajudicial body like the Arbitration Court with the Republic of Kazakhstan Chamber of Commerce and Industry, for instance, will act as a domestic arbitration court in settling a dispute between two Kazakh persons but will assume the role of international commercial arbitration institution where the dispute involves a nonresident party.

However, such inequality in the respective rights of the parties to domestic or international commercial arbitration proceedings may contradict the sense of Article 14.1 of the Republic of Kazakhstan Constitution, which proclaims equality of all before the law. In its 31 January 2005 Resolution #1 "Concerning the Verification of Constitutional Validity of Article 15.3 of the Republic of Kazakhstan Law "On Notaries Public" Following the Petition from the Astana City Court", the Republic of Kazakhstan Constitutional Council declared unconstitutional the provision imposing additional obligations on one category of persons compared with those of another category of persons in the same matter.

In this connection, there is a risk that, against the possibility of challenging the arbitration courts' awards on their merits, the absence of such powers of challenging on merit in respect of international commercial arbitration courts may be viewed as contradicting the provisions of the Republic of Kazakhstan Constitution.

Moreover, under Article 13.2 of the ROK Constitution, "everyone shall have the right to the judicial defense of their rights and freedoms". According to Article 39.3 of the ROK Constitution, the above right shall not be restricted under any circumstances. The ROK Constitutional Council, too, has on many occasions reaffirmed the absolute nature of that right and has ruled on the inadmissibility of curbing the right to relief in court. In its 29 March 1999 Resolution #7/2, the ROK Constitutional Council ruled that it is only possible to restrict the above right in exceptional instances

<sup>3</sup> In accordance with Article 3.1 of the Republic of Kazakhstan Law #1543-XII "On the Protection and Support of Private Enterprise" dated 4 July 1992, which determines what matters fall under the exclusive jurisdiction of the State.

sions on the facts of the matter and establish the correct application by the arbitrators of the rules and provisions of

as specifically provided for under the Republic of Kazakhstan Constitution such as, for instance, in the case of the ROK President's Decrees, which are impossible to challenge in the ROK courts. In its 5 August 2002 Resolution #5, the ROK Constitutional Council established that the "finality of the court's judgment runs contrary to the provisions of Article 13.2 of the ROK Constitution ... That Constitutional right provides for the defense of one's rights and freedoms ... against wrong judgments of the court. The most efficient safeguard of such a defense is the review of the case by higher courts, something that should be secured by law. The finality of the court's judgment... excludes the possibility to have the judgment verified by other courts in terms of its lawfulness and reasonableness ... in order to rectify judicial errors". That Resolution reaffirmed the ROK Constitutional Council's position, as taken in its Resolution #1 dated 15 February 2002; Resolution #14/2 dated 10 July 2000; and Resolution #8/2 dated 5 May 1999 regarding the inadmissibility of restricting the right to judicial defense against any actions by persons infringing the rights or freedoms of other persons, including the instances of submitting the disputes to international commercial arbitration. Furthermore, Article 1.2.2 of the Constitutional Law of the Republic of Kazakhstan "On the Judicial System and the Status of Judges in the Republic of Kazakhstan" dated 25 December, stipulates that "everyone shall enjoy the guarantee of judicial defense against any wrongful decisions or actions ... by persons infringing or restricting rights, freedoms or legitimate interests as provided for in the ROK Constitution and the laws of the Republic of Kazakhstan". From the sense of the above provisions of the law it fol-

lows that decisions or actions of any persons or bodies, including those of government agencies or arbitration courts, which may be seen as violating the rights of physical or legal persons, will not be final, meaning that they can always be challenged on merit with the authorized state court.

In this connection, there is a significant risk that the state court may reverse the domestic arbitration court's or international commercial arbitration institution's awards on the merits of the case. If that is, indeed, the case, then the whole meaning of alternative dispute resolution through arbitration courts and international commercial arbitration institutions will be lost, something that is bound to result in restricting the rights of physical and legal persons to have their disputes settled through arbitration courts or international commercial arbitration institutions.

## Conclusions

In view of the above, it is felt that, despite the passage of the new ROK Laws "On Arbitration Courts" and "On International Commercial Arbitration", there remains in the Republic of Kazakhstan legislation the possibility for a party to the dispute to "ignore" the presence of the arbitration clause or commercial arbitration agreement and take the case to the ROK state court instead.

In this connection, it is desirable that the relevant ROK laws should be amended accordingly so as to reduce such a possibility and to secure a full-fledged implementation of the physical and legal persons' right to have their disputes examined in ROK arbitration courts or international commercial arbitration institutions. □