https://www.globallegalinsights.com/practice-areas/litigation-and-dispute-resolution/global-legal-insights---litigation-and-dispute-resolution-5th-ed./kazakhstan

2016 - Bakhyt Tukulov, Askar Konysbayev - GRATA Law Firm

Kazakhstan – Litigation & Dispute Resolution 2016

1 Efficiency of process

Overview

Kazakhstan gained its independence in 1991 from the USSR. Kazakhstan's judicial system is young, relatively underfinanced, and thus not sufficiently strong or independent. The system is in transition from a Soviet-style and judge-dominated, inquisition-type civil process to a more liberal, competitive judicial process. Corruption, although not common, is said to take place.

This causes a series of uncertainties in the judicial system, such as lack of sufficient predictability in judicial practice of courts, lack of sufficient qualification of judges (sometimes), relatively low level of rule of law (depends on a judge), although overall the system works at acceptable levels and much depends on individual judges assigned to review specific cases.

Judicial process is relatively quick and legal fees are not significant.

Courts are generally driven by form rather than substance, which is a general feature of most post-Soviet courts. Courts are strict in terms of observing formalities. For example, witness statements are extremely rarely taken seriously in commercial cases, while document evidence is seen as a key source of evidence.

Foreign clients should therefore be prepared for these uncertainties when entering domestic litigation in Kazakh courts. The situation in the judicial system is improving, although not as fast as we could wish.

Structure of courts

Kazakhstan's court system is generally comprised of three tiers of courts: (i) special district courts and general district courts; (ii) appellate courts; and (iii) cassation court (the Supreme Court).

Specialised district courts review special categories of cases, such as administrative, commercial, criminal and juvenile. The vast majority of commercial disputes are tried in specialised commercial (economic) district courts. These courts have jurisdiction to review all commercial disputes, regardless of their size, provided both parties to the dispute are legal entities or entrepreneurs. General district courts review all civil cases that do not fall within the jurisdiction of any other specialised district court.

The distribution of courts according to specialisation exists only at the level of district courts. There is no such distribution in the appellate courts and cassation courts. However, within the appellate court and the cassation court, there are special boards that focus on certain categories of cases (civil and administrative, or criminal).

Civil courts are spread throughout 16 administrative regions of Kazakhstan, with each administrative region having one specialised commercial (economic) district court and appellate court. Generally, each town and smaller district comprising the administrative region has a general district court.

For certain categories of disputes, for example, so-called investment disputes (disputes arising out of an investment contract between the state and an investor) or disputes relating to investment activity, the appellate court of the city of Astana (capital city) would be the court of first instance, while the Supreme Court would be the court of appeals and cassation. For investment disputes or disputes relating to investment activity involving a large investor (where

the size of investment exceeds approx. US$ 12.7m), the Supreme Court acts as the court of first instance.

Commencing proceedings

• Pre-trial procedure

According to rules of Kazakh civil procedure, before applying to court, a claimant may be required to follow certain pre-trial procedure, i.e. usually filing a written demand addressing relevant clams to the counter party. Mandatory pre-trial procedure is required by law in relation to certain sensitive categories of civil claims (e.g. claims against transport operators, consumer claims, and claims against mass media for the protection of reputation and dignity, employment-related claims, etc.).

Mandatory pre-trial procedure is also required when such pre-trial procedure is set by contract. Failure to observe pre-trial procedure when required by law or contract would usually prevent a civil claim filed to court from moving forward. The court would return the case file and advise that the pre-trial procedure is observed, except where the claimant can demonstrate that pre-trial procedure is not possible to observe.

• Bringing a claim to court, review and appeal process

District court

A civil case is commenced by filing a statement of claim. A statement of claim must satisfy the requirements to its form and contents as stipulated in Articles 148 and 149 of Civil Procedure Code of the Republic of Kazakhstan (CPC). A judge has five business days to decide whether the claim is admissible and if so, initiate civil proceedings.

Upon commencement of trial, a judge and parties have 15 business days to prepare the case for trial, namely: clarify parties to the dispute; present evidence; apply for production of evidence; clarify the subject matter of the claim and legal grounds; file a counter-claim; etc. Parties cannot present new evidence, involve additional parties to the dispute, modify the claim, or make other similar arrangements after completion of the preparation stage. The preparation stage could be extended to an additional 30 days.

Following completion of the preparation stage, the proceedings on merits would commence. The district court must review the claim within two months following completion of the preparation stage. This term is strictly observed by courts, sometimes even to the detriment of the quality of judgments.

Appeal process

The judgment of the district court enters into effect 30 days after it is prepared in writing. During this time frame the judgment may be appealed. If appealed, the judgment would not enter into effect until the Court of Appeals completes review of the appeal. It usually takes two months for the Court of Appeals to review an appeal. Although the resolution of the Court of Appeals becomes binding upon announcement, resolutions may be appealed further to the Cassation Court (Supreme Court) within six months.

The appeal process at the Cassation Court envisages a two-tier procedure:

(i) first, a judge of the cassation panel initially reviews the motion of a party to reconsider the acts of inferior courts and analyses if there are grounds to reconsider the case;

(ii) if the judge finds that there are grounds to reconsider the case, he (she) advances the motion further to the cassation panel of the Supreme Court.

• Enforcement

Enforcement is probably one of the few truly strong features of Kazakhstan's judicial system. Since 2016, the enforcement process has been almost entirely liberalised. That is, enforcement of the vast majority of commercial judgments could be transferred to special licensed private entrepreneurs – private enforcement officers (private EOs).

Since 1 January 2016, private EOs enforce all judgments in favour of legal entities and individuals on an exclusive basis, except judgments which fall within the competence of public EOs. Private EOs charge the debtor 3 to 25% of the collected amount or value of property. Because private EOs charge a fee and operate in a competitive environment, they have proved to be very efficient as compared to public EOs.

Public EOs enforce judgments where, among other things, the state or companies affiliated with the state (owned by 50% or more by the state) are debtors. Public EOs are civil servants and they charge a flat 10% penalty to the debtor for the failure to enforce the judgment voluntarily. Enforcement against entities affiliated with the state may be an issue.

Both categories of EOs may undertake the following measures against a debtor:

• recover the debtor's property, including money, securities, shares in common or pledged property, transfer the debtor's property to a creditor, or both;
• recover the debtor's property held by third parties;
• retain the debtor's salary and other income;
• enforce against the debtor's monetary and other related rights;
• arrest the debtor's property;
• compel the debtor to execute an action or restrain from an action;
• reinstate an employee at work;
• remove the debtor from a dwelling;
• impose a fine or hold the debtor criminally liable for the failure to enforce a judicial act; or
• impose a restriction on travel of the debtor outside the country.

It usually takes no more than two to three months to enforce a judgment, unless special procedures are required, such as sale of debtor's assets or searches.

• Miscellaneous

A claimant may use a judicial online platform to file procedural documents and monitor the status of proceedings at http://office.sud.kz

2 . Integrity of process

Integrity of process is probably one of the most serious issues of the judicial system when it comes to large-scale or politically sensitive litigation. In relatively small to medium-scale litigation, the system operates reasonably well. The Supreme Court is taking steps to ensure that the system is transparent. A new Code of Civil Procedure has been adopted to address this issue as well. However, these reforms have not yet proved to be effective.

3 . Privilege and disclosure

Kazakh law recognises attorney-client privilege and work product protection to a limited extent. The degree of privilege generally depends on whether a person is represented by a licensed advocate or a professional lawyer without the licence of an advocate (non-advocate). Under Kazakh law, a lawyer must have a state licence of an advocate to act in criminal proceedings and certain categories of administrative proceedings. This requirement does not apply to civil proceedings. Thus, in practice, the vast majority of professional lawyers representing clients in civil disputes do not possess a state licence of an advocate.

Communication between an advocate and client, as well as work products of an advocate, are protected and cannot be disclosed. An advocate cannot be questioned in court as a

witness.

Professional lawyers who do not possess a state licence of an advocate cannot be questioned as witnesses in relation to the circumstances of the case in which they acted. The CPC is silent on any other protections available to non-advocates. Thus, communication and work products between a non-advocate and a client are not protected by legal privilege. In practice, however, the absence of an advocate's licence in a civil case does not create significant risks regarding the disclosure of confidential information.

4 . Costs and funding

Generally, each party bears its own costs in connection with the proceedings. Costs generally comprise state duty payable for filing the claim and a cassation appeal, attorneys' fees and other expenses. Upon request of a party, the court may order the losing party to make a full reimbursement of the costs or pro rata to the extent to which the claim was granted or rejected. The CPC also allows the court to order costs to a party which delays the proceedings or fails to observe its procedural duties. Also, costs would be automatically imposed on a party which failed to observe a mandatory pre-trial procedure. Attorneys' fees cannot exceed 10% of the claim in monetary claims or approx. US$ 1,900 in non-monetary claims.

A party can also be compensated for loss of time caused by a frivolous lawsuit, delays or groundless objections. The claimant is not required to provide security for the respondent's costs.

There is no prohibition upon third-party funding, although in order to have the opportunity to be reimbursed for costs, if the litigation is successful, it is generally advisable to channel funds through the party to the proceedings that incurred the costs, because it would be impossible for non-parties to the proceeding to be reimbursed for costs.

Compensation schemes based on a contingency arrangement are not prohibited by law. In fact, this compensation mechanism is popular among domestic law firms and private lawyers. The size of the contingency fee is a matter of contractual agreement. Although there is no obligation to disclose a contingency fee arrangement, because a copy of the legal services agreement must be disclosed to the court to support the fees, it is generally made known to the counterparty.

5 . Interim relief

The CPC provides for a number of categories of interim relief, such as the arrest of property, prohibiting the defendant from taking certain actions, prohibiting third parties from performing obligations for the defendant or transferring property to him or her, suspending the legal effect of an act of a state authority, and other categories not prohibited by law.

Parties may request the court to grant interim relief when the failure to do so would make the enforcement of the judgment impossible or difficult. The injunction must be comparable with the claim that is the subject matter of the proceeding.

The same categories of interim relief are available in aid of foreign arbitration proceedings. However, some courts tend to refuse to grant interim relief in support of foreign arbitration. The practice in this aspect differs. Interim relief is not available in aid to foreign litigations, except according to international treaty.

Under Kazakh law, interim relief is not available before commencing trial. Interim relief application may be filed simultaneously with the statement of claim or later in the proceedings. If filed simultaneously with the statement of claim, the judge decides on interim relief application without inviting the respondent at the time the court decides to commence proceedings. The respondent would be allowed to object to interim relief application only if such application is made during the court hearing.

Thus, once placed, an interim relief order is relatively difficult to remove. In this case,

the respondent may ask the District Court to cancel its order − which is rare − or appeal the order to the Court of Appeals.

6 . Cross-border litigation

Generally, Kazakh courts recognise and enforce foreign judgments, if this is required by law or an international treaty to which Kazakhstan is a party. Kazakh courts would view foreign litigations as having the effect of lis pendens, or otherwise recognise foreign litigation only to the extent there is international treaty with the relevant foreign state.

Kazakhstan is a party to more than 10 bilateral treaties on the recognition and enforcement of foreign judgments (e.g., with China, India, Turkey, the UAE). No treaties have been signed with western jurisdictions. Kazakhstan is also a party to two multilateral treaties signed within the framework of the Commonwealth of Independent States on the recognition and enforcement of judgments within several of the former states of the USSR.

Also, current CPC (effective from 1 January 2016) has introduced an Article 501(1) to the effect that judgments of foreign courts may be recognised and enforced by the courts of Kazakhstan, if recognition and enforcement is provided for by the laws of Kazakhstan and (or) international treaty ratified by Kazakhstan, or on the basis of reciprocity.

Therefore, Article 501(1) of CPC provides for a possibility for Kazakh courts to recognise and enforce foreign judgments in the absence of an international treaty between Kazakhstan and a relevant foreign state, provided that there is reciprocity. The CPC does not elaborate further on reciprocity within the context of enforcement. Thus, it seems that general rules applicable to enforcement of foreign arbitral awards may apply by analogy (as described below). Accordingly, it seems that a party seeking enforcement would have to prove reciprocity, for example, in English courts in relation to enforcement of Kazakh court judgments.

There is also a debate whether reciprocity alone would be enough to enforce a foreign judgment. Article 501(2) of CPC further states that conditions and procedure for recognition and enforcement of the acts mentioned in Article 501(1) shall be determined by law, if an international treaty ratified by Kazakhstan does not provide otherwise. Some authors believe that the reciprocity principle therefore should be enshrined in a separate law applicable to enforcement of foreign judgments, which again suggests the need for a mutual legal assistance treaty between Kazakhstan and relevant jurisdiction.

This contradiction, and the reciprocity principle applicable to enforcement of foreign judgments, have not been yet tested in practice. It remains to be seen whether the traditionally conservative Kazakh courts would be willing to enforce foreign judgments on the basis of reciprocity alone.

7 . International arbitration

Foreign arbitral awards are recognised and enforced by Kazakh courts in accordance with the Convention on Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958), European Convention on International Commercial Arbitration (1961), and civil procedural legislation of the Republic of Kazakhstan. Kazakhstan is also a party to the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID, Washington D.C., 1965).

To enforce an arbitral award, a party seeking enforcement shall file a respective application to the competent court at the place of location of the debtor or the assets of the debtor. The application must be supported by an application fee (a state duty of approx. US$ 32), a certified or original copy of the arbitral award and the arbitration agreement, relevant certified translations, etc. The application is reviewed by the court within 15 business days. The court invites the counterparty to express objections to the application.

Kazakh courts are not allowed to review the case on merits, and enforcement may only be refused under procedural grounds outlined in the NY Convention, which are also duplicated in Kazakh law. The court's ruling to recognise and enforce an arbitral award, or to refuse the same, may be appealed to the Appellate Court and further to Cassation Court. If the court issues a ruling to recognise and enforce an arbitral award, the court issues an enforcement writ, which is submitted to relevant enforcement officers to enforce the award.

On 8 April 2016, a new law "On Arbitration" was adopted (New Arbitration Law or NAL). The New Arbitration Law combined previously existing two laws, "On Arbitration 'Treteiski' Courts" (which applied to arbitrations between Kazakh residents), and law "On International Arbitration" (which applied to arbitrations involving at least one foreign party).

The main features of the New Arbitration Law may be described as follows:

- the doctrine of separability of an arbitration agreement has been made explicit;
- restrictions have been imposed on disputes involving the state and companies affiliated with the state. Such entities would be required to obtain prior approval from a competent state authority to enter into the arbitration agreement. Also, NAL mandates that arbitral tribunals apply Kazakh law to review disputes involving such entities; and
- an unusual move − the right of a party to unilaterally renounce the arbitration agreement has been introduced.

State courts may cancel an arbitration award mainly due to procedural violations, as described below. The court's powers cannot be overridden by agreement, and such agreements are usually not enforceable. A domestic arbitral award can be appealed to state court in either of the following situations: if a party seeking cancellation of the award provides evidence that proves that:

- one of the parties to the arbitration agreement is declared by the relevant state court to have lacked legal capacity, or the arbitration agreement is invalid according to the law selected by the parties or, in the absence of such, according to the laws of Kazakhstan;
- a party to the dispute was not properly informed of the appointment of an arbitrator or of the arbitration proceedings, or was unable to present its case for other reasons recognised by the court as being valid;
- the award was issued in a dispute that was not envisaged by or does not fall under the conditions of the arbitration agreement, or contains findings beyond the scope of the arbitration agreement;
- the arbitral award has not been executed in written form or signed by the tribunal;
- the composition of the tribunal or the arbitration procedure did not comply with the agreement between the parties or the rules of arbitration; or
- the court finds that the arbitral award contradicts the public policy of Kazakhstan or the subject matter of the arbitration nor is capable of being settled by arbitration under Kazakh law.

The court's ruling issued upon review of the appeal against an arbitral award can be appealed.

8 . Mediation and ADR

ADR, apart from arbitration, is not commonly used. Mediation is slowly gaining popularity, although it will take a long period of time for mediation to become widely used in Kazakhstan. Other types of ADR include settlement of dispute by way of participatory procedure (through attorneys of the parties).

Parties to litigation or arbitration are not required mandatorily to consider ADR. In the course of civil proceedings, the court must inform the parties of the possibility to settle disputes by way of mediation or otherwise. Sometimes, judges may recommend mediation to parties.