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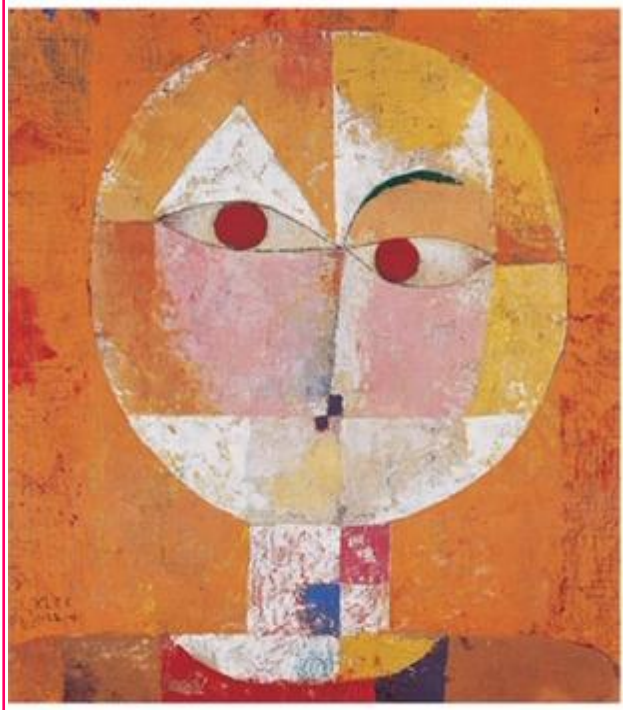

Universidad del Zulia
Facultad Experimental de Ciencias
Departamento de Ciencias Humanas
Maracaibo - Venezuela

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The concept and legal significance of the place of arbitration in Kazakhstan

Suleimenov M.[1]
[1]Research Institute of Private Law of the Caspian University
Suleimenov@law.ac.ru

Ilyassova K.M.[2]
[2]Research Institute of Private Law of the Caspian University
Ilyassova@law.ac.ru

Kaziyeva G.T.[3]
[3]Research Institute of Private Law of the Caspian University
Kaziyeva@law.ac.ru

Duysenova A.[4]
[4]Research Institute of Private Law of the Caspian University
Duysenova@law.ac.ru

Ossipov Y.B.[5]
[5]Research Institute of Private Law of the Caspian University
Ossipov@law.ac.ru

Abstract

The article considers questions about the concept and legal significance of the place of arbitration under the legislation of the Republic of Kazakhstan via comparative qualitative research methods. As a result, the law in force at the place of arbitration (lex arbitri) defines the requirements for arbitration of disputes. In conclusion, the Kazakhstani legislative concept of the place of arbitration does not allow to consider such a concept as conditional or fictitious, since the place of holding the meetings of the arbitration and making a decision is attached to the place of arbitration.

Keywords: arbitration, legislation, resolving disputes, Kazakhstan.

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El concepto y el significado legal del lugar de arbitraje en Kazajstán

Resumen

El artículo considera preguntas sobre el concepto y el significado legal del lugar de arbitraje bajo la legislación de la República de Kazajstán a través de métodos comparativos de investigación cualitativa. Como resultado, la ley vigente en el lugar del arbitraje (lex arbitri) define los requisitos para el arbitraje de disputas. En conclusión, el concepto legislativo kazajo del lugar de arbitraje no permite considerar dicho concepto como condicional o ficticio, ya que el lugar de celebración de las reuniones de arbitraje y la toma de una decisión se adjunta al lugar de arbitraje.

Palabras clave: arbitraje, legislación, resolución de disputas, Kazajstán.

1. INTRODUCTION

Currently, arbitration has become one of the most common bodies involved in the settlement of disputes, especially in the area of commercial relations. But, unlike other alternative means, its decision is obligatory and subject to enforcement in the same way as the decision of the state court. In the figurative expression of Lawrence Friedman, arbitration is a cocktail consisting of a mixture of public and private. (FRIEDMAN, 1993).

Arbitration in Kazakhstan has been in use for more than twenty years, starting in 1993. And during this relatively short time, he managed to go through several stages in its development, and, quite diametrically, from the stage of generation and planned development,

to the stage of the secret and obvious destruction of arbitration courts, from the stage of adoption of the first arbitration laws in 2004 to their consolidation.

On April 8, 2016, the new Law of the Republic of Kazakhstan No. 488-V LRK On Arbitration was adopted, combining the two previously existing Laws. With its adoption, the division of arbitration into arbitration courts and international arbitration was abolished. Unfortunately, the newly adopted Law does not fully comply with international standards, in particular the provisions of the UNCITRAL Model Law On International Commercial Arbitration of June 21, 1985, the New York Convention on the Recognition and Enforcement of Foreign Arbitration Decisions of 1958 and European Convention on International Commercial Arbitration, adopted in Geneva on April 21, 1961.

However, a number of issues that are relevant remain to be insufficiently studied. Issues relating to the competence of arbitration and the arbitrability of certain categories of disputes, the validity and enforceability of arbitration agreements, participation of the state and quasi-state entities, and third parties in arbitration proceedings. Other issues are the interaction of state courts and arbitration, as well as the study of the problem of the application of interim measures in arbitration and many others. This article will address issues of the place of arbitration, the choice of which is important for arbitration.

2. MATERIALS AND METHODS

Place of arbitration is one of the important issues of the arbitration method of resolving disputes. To refer to this concept in foreign sources, the term 'place of arbitration' is widely used (SCVORTSOV ET AL., 2018). In Kazakhstan, the legislator's approach to the issue of the place of arbitration has historically changed. In the Law on Arbitration, the issue of determining the place of arbitration is devoted to Art. 22. This article provides for the right of the parties to determine the place of arbitration. And only in the absence of such agreement, the right to determine the place of arbitration is given to the composition of the arbitration, which must take into account the circumstances of the case, including the convenience factor for the parties.

Before making changes to art. 22 of the Law on Arbitration by the Law of the Republic of Kazakhstan dated January 21, 1919 No. 217-VI, this article provided that the parties are free to determine the place of arbitration, except for the case when the dispute is submitted to permanent arbitration. The foregoing editorship of Art. 22 of the Law on Arbitration was unsuccessful and could give grounds for misinterpretation of its provisions. In particular, it was possible to assume that the place of arbitration in Kazakhstan legislation in relation to institutional arbitration is reduced to the location of permanent arbitration, and that a contractual way of determining the place of arbitration was provided only for ad hoc arbitration or isolated arbitration.

However, when interpreting the aforementioned norm, it is necessary to take into account the legal nature of the regulations of permanent arbitration. Thus, according to paragraph 6 of Art. 8 of the Law of the Republic of Kazakhstan on arbitration, unless the parties have agreed, when referring a dispute to a permanent arbitration, the regulations of a permanent arbitration are considered as an integral part of the arbitration agreement.

3. RESULTS AND DISCUSSION

In accordance with the preamble of the Law of the Republic of Kazakhstan on Arbitration, the Law regulates social relations arising in the course of arbitration activities in the Republic of Kazakhstan, as well as the procedure and conditions for recognition and enforcement of arbitral awards in Kazakhstan. Kazakhstani researchers note that the preamble of the Law on Arbitration does not give a clear idea of its scope. What should be understood by the activity of arbitration in the territory of the Republic of Kazakhstan? Is it about arbitration proceedings subject to Kazakh law? Or arbitration agreement governed by the law of Kazakhstan? Or the physical place of the arbitration hearing (SHAIKENOV & IDAYATOVA, 2017)?

When interpreting the preamble of the previous International Arbitration Act of 2004, co-authors of this article earlier drew attention to the fact that all issues of arbitration activities (and therefore appeals

against its decisions) concern only international commercial arbitrations in the Republic of Kazakhstan; the clause in the Republic Kazakhstan does not apply. In accordance with this law, the term arbitration means international commercial arbitration in the territory of the Republic of Kazakhstan, the authors will conclude that the rules of the Code of Civil Procedure relating to appeals of arbitral awards refer to international arbitrations operating in the territory of the Republic of Kazakhstan (DANELYAN & FARHUTDINOV, 2013).

It should be noted that the provisions of the Preamble of the Law on Arbitration are similar to the provisions of the Preamble of the Law on International Arbitration 2004. In addition, in accordance with Sub. 3) Art. 2 of the Law on Arbitration is an arbitration established specifically for the consideration of a specific dispute, or permanent arbitration, and Art. 4, defining the types of arbitration, indicates only the arbitrations created in the Republic of Kazakhstan (ALWAHDANI, 2019: SETIAWAN ET AL, 2019).

In international practice, the place of arbitration may also be relevant for deciding whether the arbitration is international. In accordance with Art. 1 (3) of the UNCITRAL Model Law arbitration is international if: a) the commercial enterprises of the parties to the arbitration agreement are located in different states at the time of its conclusion; or (b) one of the following places is outside the state in which the parties have their place of business: (i) The place of arbitration, if determined by or in accordance with the arbitration agreement; (ii) Any place where a significant part of the obligations

arising from trade relations must be fulfilled, or the place with which the subject of the dispute is most closely connected; or c) the parties have expressly agreed that the subject matter of the arbitration agreement is related to more than one country (MATZ, 2004).

In Kazakhstan law, the most problematic issues are whether the parties in their choice of the place of arbitration are limited solely to the territory of the Republic of Kazakhstan or can determine the territory of a foreign state by such a place and what are the legal consequences of the choice of the territory outside the Republic of Kazakhstan. Based on the provisions of the Code of Civil Procedure of the Republic of Kazakhstan, if the parties have not provided for the applicable law to the arbitration agreement, the invalidity of the arbitration agreement according to the law of the country where the decision was made is the basis for refusal to issue the writ of execution. Moreover, in respect of disputable arbitration agreements, according to the law of the place of arbitration, evidence of such invalidity must be entered into by court decisions. However, the law of the country where the decision was made may provide grounds for the invalidity of such an agreement.

The validity of an arbitration agreement is determined by the law to which the parties have subordinated it, and in the absence of such an indication, by the law of the country where the decision was made. This rule is contained in a number of international conventions. In the literature, there is a tendency according to which the state courts of the countries parties to the Convention in deciding on the validity,

preservation of force and enforceability of the arbitration agreement under Art. II Convention should use conflict of laws rules. a) Clause 1, Art. V Convention. Although this trend is predominant, in some countries (for example, in the USA), state courts applied local law to resolve this issue (LEBEDEV, 1985).

According to B.R. KARABELNIKOV (2008), for countries that, in addition to the New York Convention, are parties to the European Convention, the decision on the validity, strength and enforceability of the arbitration agreement is facilitated (insofar as the European Convention is applicable to the circumstances of a particular case based on the composition of its participants): 2nd part of VI European Convention is not only prescribed to apply to the question of validity, preservation of force and enforceability of the arbitration agreement rules similar to the rules of the sub. a) Clause 1, Article. V of the New York Convention, but these standards are also developing. So, according to the sub. c) Section 2 of Art. VI European Convention when deciding on the existence or validity of the said arbitration agreement, the state courts of the Contracting States in which the issue is raised will have to be guided, if the matter concerns the legal capacity of the parties, by law, which applies to them, on the law to which the parties have subordinated the arbitration agreement, and if at the moment when the matter is submitted for permission of the state court it is impossible to establish how an arbitration award must be rendered to the country, - by law applicable virtue of the conflict of law rules of the state court in which the case was initiated.

Commenting on the New York Convention, B.R. KARABELNIKOV (2012) notes that the provisions of the European Convention in no way contradict the New York Convention, they only consolidate the tendency to apply the rules of the sub-rules. a) Clause 1, Article. V of the New York Convention to address the issues of Art. II of the Convention, and clarifies which law should be applied if the arbitration agreement does not specify which country should be decided. He acknowledges that this practice of establishing standards applicable to the question of the existence, validity and enforceability of an arbitration agreement is based on the universal acceptance of the principle of autonomy of the arbitration agreement.

Kazakhstani researchers note that some courts deduced the lex arbitri conflict rule from similar rules contained in the laws on the arbitration of their countries, borrowed from articles 34 (2) (a) (i) and 36 (1) (a) (i) of the Model Law UNCITRAL. Thus, according to paragraph 34 (2) (a) (i) of the UNCITRAL Model Law on International Commercial Arbitration, the award may be set aside by the court, referred to in Article 6, only in the event that the party filing this application provides evidence that one of the parties to the arbitration agreement referred to in Article 7 was to some extent incapable; or this agreement is invalid under the law to which the parties have subordinated this agreement, and in the absence of the designation of such legislation - under the laws of the given state (ANUROV, 2013).

According to the sub. 1) Clause 1, Article. 57 of the Law on Arbitration before the amendment of January 21, 1919, it was

stipulated that the court refused to recognize and (or) enforce the arbitral award, regardless of the country in which it was made, if the party against whom the arbitral award was made, submit to the court evidence that the arbitration agreement is invalid under the laws of the state to which the parties have subordinated him, and in the absence of such indication - under the laws of the Republic of Kazakhstan. The provisions of the sub. 1) Part 1 of Art. 255 Code of Civil Procedure of the Republic of Kazakhstan on the grounds for refusal to issue a writ of execution complied with the provisions of the Law on Arbitration (MINAEV, 2014).

Law of the Republic of Kazakhstan dated 21.01.19, No. 217-VI in sub. 1) Clause 1, Article. 57 of the Law on Arbitration and Sub. 1) Part 1 of Art. 255 of the Civil Procedural Code of the Republic of Kazakhstan were amended, as a result of which the relevant provisions of Kazakhstan legislation on the grounds for refusal to recognize and (or) enforce an arbitral award were brought into line with the New York Convention. At the same time, it should be noted that the grounds for setting aside the arbitral award are in accordance with sub. 2) Clause 1, Article. 52 of the Law on Arbitration is the inconsistency of the arbitration agreement with the legislation of the Republic of Kazakhstan in the absence of an indication of the parties on the applicable law to such an agreement.

Another reason for the refusal to issue a writ of execution, in the absence of agreement of the parties on the composition of the arbitration or the arbitration procedure, is their incompatibility with the

laws of the country where the arbitration proceedings were held. With this in mind, the parties need to agree on the provisions relating to the question of the composition of the arbitration and the arbitration procedure. In the part not regulated by such an agreement, it is necessary to comply with the requirements of the law of the country where the arbitration proceeded. In addition, the grounds for refusal to issue a writ of execution may be the establishment by the court that: 1) the enforcement of this arbitration decision is contrary to the public policy of the Republic of Kazakhstan; 2) a dispute in which an arbitral award is rendered may not be subject to arbitration in accordance with the law.

In the sub. 1) Art. 2 of the Law on Arbitration, the public order of the Republic of Kazakhstan is defined as the basis of the rule of law, enshrined in the legislative acts of the Republic of Kazakhstan. As for the contradiction of public order, it is noted that it would like to warn against a very common misconception when public order is identified with public interests. The contradiction of public interest cannot serve as a basis for cancellation of the decision. However, with the expansive interpretation of the concept of ‘public order’ in practice, which is not reasonable and legal, there are risks of expansive interpretation of the grounds for refusal to issue a writ of execution (MITROFANSKAYA, 2007).

As for such a ground for refusal to issue a writ of execution, as a disparity of the dispute, on which the arbitral award was made, to the subject matter of the arbitration proceedings in accordance with the

law, then from the above provision of paragraph 1 of Article. 255 of the Civil Procedural Code of the Republic of Kazakhstan it is not clear what law we are talking about: the place of arbitration, the place of enforcement of the decision, the applicable law to the arbitration agreement. In fact, in this case, in our opinion, this is an arbitration of a dispute.

When interpreting the stated provisions of the Code of Civil Procedure of the Republic of Kazakhstan, it is necessary to take into account that the grounds for refusal to recognize and (or) enforce an arbitral award are provided for in the Law on Arbitration. In accordance with paragraph 1 of Art. 57 of this Law, the court refuses to recognize and (or) enforce the arbitral award, regardless of the country in which it was made. If the court finds that recognition and (or) enforcement of this arbitral decision contradicts the public policy of the Republic of Kazakhstan or that the dispute in which the award is made cannot be subject to arbitration in accordance with this Law.

In view of the foregoing, the arbitrability of the dispute is in accordance with the provisions of paragraph 1 of Art. 255 Code of Civil Procedure of the Republic of Kazakhstan, as well as in accordance with the provisions of paragraph 1 of Art. 57 of the Law of the Republic of Kazakhstan on arbitration must be determined in accordance with Kazakhstan legislation, that is, at the place of application with a request for the enforcement of an arbitral award (SULEIMENOV & DUISENOVA, 2011).

The Russian literature also notes that arbitrability is determined on the basis of the law of the country where the arbitration decision is disputed. Along with this, it is argued that the law in force at the place of arbitration (lex arbitri) defines the requirements for arbitration of disputes. Thus, when the claimants appeal to Kazakhstani courts to enforce arbitral awards of Kazakhstani arbitrations made abroad, there are grounds for refusing to issue enforcement papers due to the requirements of compliance with the public order of the Republic of Kazakhstan and the law of the place of arbitration and (or) making a decision.

When the parties determine the place of arbitration for the territory of a foreign state, there are also issues related to the implementation of the parties' right to appeal the award rendered abroad. According to paragraph 2 of Art. 464 of the Civil Procedural Code of the Republic of Kazakhstan petition for cancellation of an arbitration decision filed in the relevant court of the Republic of Kazakhstan:

1) At the place of consideration of the dispute by arbitration, if the arbitration decision was made in the territory of the Republic of Kazakhstan;

2) At the location of the permanent arbitration, if the arbitral award is made under the law of the Republic of Kazakhstan in a foreign state;

3) At the place of formation of the arbitration in the Republic of Kazakhstan, if the arbitral award is made under the law of the Republic of Kazakhstan in a foreign state.

In relation to the decision of a permanent arbitration, located in Kazakhstan, in sub. 2) Section 2 of Art. 464 of the Code of Civil Procedure of the Republic of Kazakhstan, it is allowed to appeal the arbitration decision in the relevant court of the Republic of Kazakhstan, provided that the arbitration decision is made under the law of the Republic of Kazakhstan in a foreign state. With respect to ad hoc arbitration established in the Republic of Kazakhstan, it is allowed to appeal to the relevant court of the Republic of Kazakhstan if the arbitral award is made under the law of the Republic of Kazakhstan in a foreign state.

Accordingly, if the applicable law of the dispute is a foreign law, then the parties are deprived of the right to appeal such decisions in a Kazakhstan court. In determining the place of arbitration of the territory of a foreign state, the parties, as a rule, may be interested in the fact that they can appeal the decision of the arbitration in foreign courts. However, if it is necessary to execute such decisions, which remain valid, on the territory of Kazakhstan, it is necessary to take into account the peculiarities and problems of the execution of such decisions, which were set forth above.

4. CONCLUSION

All the above indicates that the Kazakhstan legislative concept of the place of arbitration does not allow to consider such concept as conditional or fictitious, since the place of holding the meetings of the arbitration and making a decision is attached to the place of arbitration. Considering the legally established possibility of determining the place of arbitration by agreement of the parties, including the territory of a foreign state, the parties should take into account the peculiarities and shortcomings of the legal regime of execution and appeal of decisions of Kazakhstani arbitrations made abroad.

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