The History and the Current Development of Commercial Arbitration in Kazakhstan

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ABSTRACT

Kazakhstan has recently been taking steps to a new wave of modernization in order to enter 30 the most developed countries of the world. Such ambitious goal requires not only fast and effective development of all spheres of the economy but also significant improvement of legislation. Revision of legislation in the field of arbitration seeks a twofold goal; to create favorable conditions for the civil rights protection, and to improve the investment climate in particular. In order to obtain this goal, the Draft Law on Arbitration largely reconsidered existing legislation by incorporating progressive regulations, which help to overcome long lasting contradictions and shortcomings in legal regulation. However, this law is far from perfect due to some controversial provisions and quite a dubious model of arbitration system presented in it.

This article attempts to highlight the most important milestones of the historical development of commercial arbitration in Kazakhstan in order to show the way which has led to the current reform. For the sake of further improvement and constructive discussion, the most considerable changes of the new legislative rules will be examined below.

I. HISTORICAL OVERVIEW

A. Before the Time of Soviet Union

Commercial arbitration as an alternative to the litigation has a long history of existence in Kazakhstan. In traditional Kazakh society, the history of arbitration can be traced to the medieval court of biys. The way of dispute resolution by the court of biy’s was quite similar to the modern concept of arbitration. Parties to a dispute chose an esteemed biy of advanced age to arbitrate dispute or crime impartially, independently and fairly.

The position of biy was essential for Kazakh community, it encompassed not only judicial functions, but also political power and authority. Biys acquired the authority to play both roles by demonstrating exemplary wisdom, fairness and knowledge of the body of Kazakh customary law (adat).
The procedure of dispute resolution by courts of biys was regulated in some detail and based on rulings of codified ancient customs such as the Laws of Khan Teuke, Esim Khan's Ancient Path and Islamic law Sharia.

The court of biys was guided by the same system of principles as an arbitration (in its contemporary understanding). The only one significant difference is the principle of confidentiality which was not attributable to the court of biys, which acted openly, publicly and orally in order to make litigation transparent as its possible. Thus, biys made judgments in the presence of at least three witnesses, but local community or larger extensions of tribal groups could observe the proceedings if they so wished.2

The biys acted both individually or collegially depending on the complexity of the case. The panel from 8 to 24 biys was convened in the case of large-scale disputes or grave crimes affecting the interests of extended kinship groups’ levels. The proceedings involving the panel of biys (kenges), was overseen by tobebasi appointed amongst biys as a chairman.3 The impartiality, of biy’s was strictly observed. Therefore, in respect to kinship restrictions judging certain litigants and choosing witnesses to give oaths were forbidden for some biys. To the extent that Kazaks preferred to choose biys from another tribe or tribal union who did not have any relations to the parties.4

Traditionally in dispute resolution biys examined the facts presented by the litigants, evidence of witnesses and if it is necessary, resorted to oath-taking. Traditionally, biys used oath-taking only in case if they failed to resolve a case based on the evidence presented by the parties, when there were no witnesses to the dispute.5 Under the customary law for taking the oath used term zhan beru, which literally means to submit or give one’s soul. When a biy made decision to use the oath as an evidence it was a cleansing oath and the ritual was conducted at the end of the judicial proceedings.

The biy’s final decision was made based on the results of case examination through the prism of his sense of Kazakh customs and by considering personal characteristics of parties to the dispute.6 As Virginia Martin observed ‘a just biy was one who was wise and knowledgeable, not only of judicial traditions but of the needs and means of the litigants who came to him for resolution of their disputes’.7 This means that, the biy made decision accordingly to the kinship status of parties, their wealth based in herd size and other indicators. Usually such decisions were made peacefully because biys mostly acted as mediators and tried

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3 Ibid 49.
4 Ibid 50.
to help the parties negotiate and get mutual agreement on the final decision. Accordingly, such decisions met the expectations of parties in terms of social justice. Therefore, parties used to take responsibility for execution of a decision and biy was not responsible for enforcement.

The court of biys didn’t have any appellate body. However, if it was proved that a case was resolved wrongly or unfairly it could be reconsidered by another biy. In case of arising newly discovered circumstances a case was brought before the same biy for reconsideration.8

For dispute resolution biys always had the right to take an arbitration fee so called *biyliq*. The value of *biyliq* ranged, according to the type of dispute and severity of the crime in criminal cases.9

Such approach of dispute settlement formed by centuries was dominant and the most efficient not only in Kazakh society, but also in all regions of Central Asia.10 However, with the accession of the Kazakh Khanate to the Russian Empire in the 19th century the court of biys was revised. Furthermore, the court of biys was step by step undermined by Russian colonial rules in the period from 1868 to 1898 and later during the time of Soviet Union, the court totally disappeared.

The first judicial reform took place in 1868 after the Alexander II the Emperor of Russia signed the temporary regulations (*Временное положение*) about the application of Russian legislation for ruling in the Kazakh Khanate. This regulation, officially established the judicial position of biy, for adjudication of civil and minor criminal cases. The court of biys was unified in the structure of the ordinary courts with appellate instances.11 The colonial position of a biy was elective and only one biy could be elected for 250 tents. Elections were held in an official assembly with confirmation by the Russian administration.12 After such transformation the court of biy lost its original sense as arbitration.

Paolo Santorini asserts that ‘the basic guidelines for the reorganization of the judiciary in Central Asia under the umbrella of Russian rule are to be found in the judicial reform signed by Alexander II in 1864, which called for avoiding arbitrariness, thus allowing oral argumentations and the holding of public trials’.13 However, it can be argued that the claimed arbitrariness of the court of biy’s is

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12 Ibid 140.
mostly likely an excuse to establish strong judicial power under control of the colonial government.

With the promulgation of the 1891 Steppe Statute another set of restrictions was introduced, but the most important that the title ‘court of biys’ was changed to the ‘people's court’. Ultimately the term biy was removed from legal documents.\(^\text{14}\)

In spite of all reforms, the court of biys as a social institution continued its existence till the 1930’s. During the time of the USSR dispute resolution by biys was the subject of much discussion and struggle in the People's Commissariat of Justice of the Kazakh SSR. In 1921 the People's Commissariat of Justice of the Kazakh SSR adopted a rule On the Abolition of the Arbitration, which particularly refer to the courts of biys.\(^\text{15}\) Eventually the Soviet government completely abolished the court of biys and established its own system of arbitration.

Thus, Kazakh traditional society had a mature analogue of arbitration, which was formed by society and reflected the realities of that time. With the changes in the political regimes the fate of traditional institutions changed rapidly and was adjusted to the needs of strict governmental control over the judiciary. The persistent practice of dispute resolution by the court of biy’s in spite of all governmental restrictions evidences commitment and trust of society to this traditional institution. The analysis of milestones in the development of commercial arbitration shows that the court of biy’s was the best example of efficient dispute resolution naturally formed by society itself to resolve legal conflicts. The further development of an arbitration is characterized by constant governmental intervention and control.

**B. During the Time of the Soviet Union**

During the Soviet era there was established a unique system of arbitration, reflecting the state ownership type of economy. Socialist ownership was characterized by state control over public property of industrial assets and investment. The State was recognized as the only protector of socialist property and it was responsible for the conditions of its growth.\(^\text{16}\) The personal property of citizens was also under the state protection.\(^\text{17}\) Therefore, the state court system was recognized as the most important and reliable source of justice. This authority was associated with state protection. Therefore, the state court system had a monopoly in settlement of all disputes.


\(^{15}\) Aliyev Mirbashir, ‘Deyatel'nost' suda biyev i kaziyev v Kazakhstane’ (Sudy i ikh rol' v ukreplenii gosudarstvennoy nezavisimosti. Materialy mezhdunarodnoy nauchno-prakticheskoy konferentsii poveshchennoy 10-letiyu nezavisimosti Respubliki Kazakhstan, Astana, March 2001).

\(^{16}\) Article 10, of the Constitution (Fundamental law) of the Union of Soviet Socialist Republics 7 October 1977.

\(^{17}\) Article 13, of the Constitution (Fundamental law) of the Union of Soviet Socialist Republics 7 October 1977.
However, individuals enjoyed the right to transfer any dispute which has arisen between them for consideration by an arbitration *ad hoc*.\(^{18}\) Significantly, one of the earliest decrees on the Soviet judicial system made provision for a wide range of civil disputes to be referred to *ad hoc* arbitration tribunals. This decree was adopted in 1918 and six years later it was replaced by the Statue that became an annex to the 1923 RSFSR Code of Civil Procedure.\(^{19}\) The same annex laying down procedures for *ad hoc* arbitration, had the Civil Procedure Code of the Kazakh SSR which was adopted in 1963. Under this regulation, individuals were entitled to create an *ad hoc* arbitration, however such practice was rather an exception since there was a prohibition on receiving arbitrator fees. Thus, article 8 on the Annex No. 3 stated that ‘Cases shall be examined in arbitration courts free of charge’. Consequently the lawyers weren’t eager to act as the arbiters on the *pro bono* bases.\(^{20}\)

Disputes between State-owned enterprises were in the exclusive competence of the *State arbitrazh* (Арбитражный суд). The *State arbitrazh* was recognized as a part of the state court system and it had branches in each Soviet country. Special legal status of *State arbitrazh* was fixed by the Constitution.\(^{21}\) Article 163 of the Constitution provided that ‘Economic disputes between enterprises, institutions, and organizations are settled by state arbitration bodies within the limits of their jurisdiction’. Further regulation of *State arbitrazh* procedure was elaborated in the Law on *State arbitrazh* in the USSR and Rules on Resolution of Economic Disputes by *State arbitrazh*.\(^{22}\) Under this Law neither foreign companies nor Soviet joint enterprises formed with Western parties were not subject to its jurisdiction.

*State arbitrazh* settled disputes solely and publicly, judgments of such courts were subject to execution as the judgements of the general jurisdiction courts. It possessed many attributes of a civil court in spite of special jurisdiction and quite flexible procedural rules. In this regard, William E. Butler rightly pointed out that ‘it would be misleading to translate the Russian term *arbitrazh* in this instance as arbitration’.\(^{23}\)

As for international commercial arbitration, these functions were centralized and undertaken only by the Moscow-based the USSR Chamber of Commerce and Industry of the USSR (hereinafter, Chamber of Commerce). The Chamber of Commerce encompassed all government, corporations, institutions, and agencies involved in foreign trade.

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18 Article 1, Annex No. 3 of RSFSR Code of Civil Procedure.
21 Constitution (Fundamental law) of the Union of Soviet Socialist Republics 7 October 1977.
22 Law on State *State arbitrazh* in the USSR 30 November 1979; Rules on Resolution of Economic Disputes by *State arbitrazh* 5 June 1980.
Arbitration under the Chamber of Commerce had two branches, particularly the Maritime Arbitration Commission (Морская арбитражная комиссия) and the Foreign Trade Arbitration Commission (Внешнеторговая арбитражная комиссия).

The Maritime Arbitration Commission was established in 1930 to resolve maritime disputes arising out of the ship collision or damage caused to a vessel or port facilities; disputes arising out of the relationship for chartering ships, marine insurance, and others.\(^{24}\) Other multiple international disputes arising from transactions in foreign trade, in particular, disputes between foreign and Soviet entities were arbitrated by the Foreign Trade Arbitration Commission.\(^{25}\) This arbitration body was sufficient to resolve all disputes arising from foreign trade because solely the state had the right to enter into such contracts.\(^{26}\)

It should be noted that because of state monopoly on foreign trade the Chamber of Commerce was bound by the instructions of the Ministry of Foreign Trade.\(^{27}\) In view of the fact that the Chamber of Commerce and the Ministry of Foreign Trade were closely connected, the Soviet government had an opportunity to control everything associated with the arbitration procedure per se.\(^{28}\) However, it is only one aspect of the state presence in an international commercial arbitration.

Another solid example of state control was the presence of the Procuratura, which is a soviet analogue of the procurator’s office. The Procuratura had supreme power of supervision over the strict and uniform observance of laws. Literally unlimited power of the Procuratura entitled it to interfere with any proceedings which involve state interest, and arbitration was not an exception.\(^{29}\)

Due to all of these factors the international commercial arbitration was recognized as a branch of the court system rather than an independent alternative to the litigation. Consequently, as Edwin M. Larkin states ‘The possibility of ultimate state determination of the outcome of arbitration is, therefore, always haunting the non-Soviet party to the dispute.’\(^{30}\)

Thus, Soviet arbitration was a unique result of governmental policy at that time. Legal entities established to maintain economic relations with foreign business were private only in the sense that they were not granted the status of government agencies. While in the capitalist countries commercial arbitration was the creation of civil society, particularly business organizations and result of private interests, in the Soviet Union; it was the product of the state. The state

\(^{24}\) Postanovleniye TSIK i SNK SSSR N48 13 December 1930.

\(^{25}\) Postanovleniye TSIK i SNK SSSR N48 17 July 1932.

\(^{26}\) Ibid 22.


\(^{29}\) Ibid.

\(^{30}\) Ibid.
controlled and regulated all spheres of arbitration and only the state was the most powerful engine of commercial arbitration development. Some elements of such an approach are still reflected in the further development of arbitration in all former soviet countries.


Upon the dissolution of the USSR, the Republic of Kazakhstan obtained independence and completely changed priorities in the state economy and policy. During this time, the government was involved in solving of numerous social and economic problems which had emerged after obtaining independence. Thus the court system was not essentially reconstructed and continued to operate guided by the regulations of the former Soviet Union. The aim of establishing appropriate institutions for a well-functioning market economy and the provision of the population by the minimal standards of living underlay the lack of attention to the reformation of the judicial system.

Kazakhstan kept the same model of the judicial system with the state arbitration courts empowered to resolve commercial disputes amongst entities. The disputes arising between individuals were referred to the general jurisdiction courts, which acted according to the Civil Procedure Code of the Kazakh SSR. Regulation of the dispute resolution between entities was implemented by the Law on the Procedure for Settling Commercial Disputes by State arbitrazh of the Republic of Kazakhstan and the Law about State arbitrazh of the Republic of Kazakhstan.

Whereas, the field of international commercial arbitration underwent changes. The first steps towards development of the international commercial arbitration were mostly necessary for foreign investment attraction and improvement of the investment climate. Thus, Kazakhstan has completed the legal basis for international commercial arbitration by ratification and accession of virtually all the major international and regional treaties on commercial arbitration. At the same time, the first institutional arbitration was set under the Chamber of Industry and Commerce of the Republic of Kazakhstan, which exercised absolutely independent dispute resolution, unlike the former Soviet

34 Amongst these international and regional treaties are: UN Convention On the Recognition and Enforcement of Foreign Arbitral Awards (New York, 10 June 1958); European Convention On International Commercial Arbitration (Geneva, 21 April 1961); Convention On the Settlement of Investment Disputes Between States and Nationals of Other States (ICSID) (Washington, 18 March 1965); Agreement on the Procedure of the Settlement of Economic Disputes (Kiev, 20 March 1992), Agreement On the Procedure of the Mutual Enforcement of Awards Made by Arbitration and Economic Courts in the Territories of the CIS Countries (Moscow, 6 March 1998), etc.
prototype. This arbitration body had got high prestige and a reputation as an honest and highly valued arbitration body.\textsuperscript{35}

Consequently, as a result of enormous efforts of the government, Kazakhstan became successful among CIS countries in attracting foreign direct investment.\textsuperscript{36}

In the early 1990\textsuperscript{th} century, it was obvious that the market-based model of the economy demanded completely different approach in the field of dispute resolution and in the way of effective human rights protection. The dispute resolution system was in need of being correlated with the new economic reality of the country.

Eventually, the legal framework of regulation was set by newly adopted legislation which reconsidered the former Soviet concept of the arbitrage. In 1995 the President signed the Decree About Courts in the Republic of Kazakhstan, stating the basic provisions about the structure of the judiciary.\textsuperscript{37} Henceforth, the Kazakhstani court system no longer includes State arbitrazh. Commercial arbitration is totally independent of the government.

The Constitution in article 13 (1) declares that ‘Legal personality of everyone shall be recognized and everyone shall have the right to protect his rights and freedoms with all means not contradicting the law, including self-defense’. In the shadow of the Constitution, the newly adopted Civil Code recognized arbitrage as a means of the civil rights protection.\textsuperscript{38}

However Article 75(1) of the Constitution declares that ‘Justice in the Republic of Kazakhstan shall be exercised only by the court’. Further article 75(3) clarifies that ‘The courts of the Republic shall be the Supreme Court of the Republic, local and other courts of the Republic established by law’. This provision dismissed the authority of an arbitration to exercise justice and caused uncertainty in understanding the legal status of an arbitration.

Thereby, at the dawn of independence, commercial arbitration gradually started to develop as an alternative procedure to the court trial. Unfortunately, the Soviet past in this stage of commercial arbitration development is still reflected on the perception of an arbitration as auxiliary to, and not equal to, the legal power of the court when it comes to the administration of justice.

\textit{D. Since Adoption of the Civil Procedure Code (1999-2004)}


\textsuperscript{38} Article 9 (1), of the Civil Code of the Republic of Kazakhstan 27 December 1994.
The adoption of the new Civil Procedure Code (hereinafter, the CPC) in 1999 dramatically changed the situation.\(^{39}\) All previous laws on arbitration were repealed due to adoption of the CPC.\(^{40}\) However, despite frequent references to arbitration in the Code, there was neither the detailed regulation of procedural rules nor the necessary guarantees for arbitration. Such gap in the legal regulation caused numerous problematic issues, inhibiting the development of arbitration. The essentials of the crises at that time worth to be presented in more detail. The following three issues have been the subject of much uncertainty and controversy.

1. The legal power of an arbitration agreement

The CPC completely changed approach for granting anti-suit injunctions. Thus, the existence of a valid arbitration agreement was not recognized as a barrier for bringing an action to the court. Parties were free to initiate litigation in breach of an arbitration agreement.

This approach was completely new for Kazakhstani legislation because according to the former regulation a court shall not accept an action by virtue of an arbitration agreement unless the agreement is invalid. Thus, the Civil Procedure Code of Kazakh SSR stated that a judge has to refuse accepting the statement of claim if the parties signed an agreement to refer the dispute to arbitration.\(^{41}\) In other words, the existence of an arbitration agreement meant that the parties waive the right to bring an action in court and an arbitration agreement exclude the jurisdiction of courts.

However the CPC changed this approach guided by the constitutional ruling on the absolute right of everyone to judicial defence (article 13 (2)), which according to article 39 (3) of the Constitution shall not be restricted in any event.\(^{42}\)

The new regulation in this matter roughly mirrored the concept of New York Convention and UNCITRAL Model Law. The enforcement of the arbitration agreement is provided for in Article II (3) of New York Convention, which declares that a court of a Contracting State, when seized of an action on the issue which is the subject of an arbitration agreement, shall, at the request of one of the parties, refer the parties to arbitration.\(^{43}\)

This general rule has been incorporated to UNCITRAL Model Law which refers to the will of parties.\(^{44}\) Also, Article 8 of the model law has an additional provision that the request that the court shall ‘if a party so requests not later than when submitting his first statement on the substance of the dispute, refer the parties to arbitration’.\(^{45}\) Based on this model regulation, the CPC in article 249(5)

\(^{41}\) Article 129 (2), paragraph 6, Civil Procedure Code of the Kazakh SSR 28 December 1963.
\(^{43}\) Article 2 (3) of the New York Convention.
\(^{44}\) Article 8 (1) of the UNCITRAL Model Law on International Commercial Arbitration.
stated that a court shall leave an action without consideration because of two reasons in the aggregate:

1) There is an arbitration agreement;

2) The court received the objection to the resolution of a dispute in the court from party to an arbitration agreement against whom legal proceedings are brought.

There is no doubt that national law is free to provide certain means to guarantee the effectiveness of an arbitration agreement. The practice of different jurisdictions proves that. 46 However, in the reality of Kazakhstan the new regulation with the lack of guaranty of enforceability of an arbitration agreement undermined the already immature system of commercial arbitration.

2. The enforceability of the domestic arbitration award

Another serious omission was made concerning the enforcement of domestic arbitral awards. The new legislation did not provide any rules concerning enforceability of awards handed down by domestic arbitrations. Although in this regard the possibility to enforce foreign arbitral awards was clearly stated and with respect to international treaties, diligently performed. 47

This leads to a legally unknown situation when the law recognized he legitimacy of dispute resolution by commercial arbitration but did not provide guarantees for the enforcement of domestic arbitral awards. Such situation caused double standards in the judicial practice. Courts issued writs of execution for the enforcement of foreign arbitral awards whereas they refused to do the same regarding domestic arbitrations.

The main ground for such decisions was an absence of a special provision in the CPC. This reasoning became a patterned ground for the refusal if an enforcement. However, the court practice contains another example of reasoning. The Chamber for Economic Cases of the Supreme Court in its decision dated May 30, 2001, about a refusal to issue a writ of execution in respect of an award of the Arbitration Commission under the Chamber of Commerce and Industry explained, that the parties had voluntarily chosen the body for the dispute resolution, and the decisions are final for them. Therefore, they should submit for the award of an arbitration without recourse to state courts. 48

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48 Suleimenov Maidan, Arbitrazhnyye (treteyskiye) sudy v Kazakhstane: proshloye, nastoyashchee, budushchee (The Kazakhstan International Arbitrage 2007)
In order to fill this legislative gap, the Supreme Court issued the Normative Resolution. This Normative Resolution admitted that awards of domestic arbitrations shall be enforced under the same conditions as the court decisions. This provision was not a new for the legislation since the Civil Procedure Code of the Kazakh SSR had the same regulation regarding this issue.

However, the regulation of the Supreme Court faced resistance from the General Prosecutor's Office and the Ministry of Justice, which insisted on the idea that arbitral awards are not enforceable, but are subject to voluntary compliance. In this regard, the Prime-Minister sent an address to the Constitutional council with a request to give an official interpretation of the Constitution. Particularly, the address specified three following questions:

1. Whether the application of the arbitration is considered as exercising the right to the judicial protection guaranteed by the Constitution?
2. Is the justice in the Republic of Kazakhstan performed solely by the courts of the judicial system or does arbitration fall under this concept?
3. Does an arbitration agreement exclude the subsequent consideration of the dispute by the courts of the judicial system of the Republic of Kazakhstan?

In its decree, the Constitutional Council clearly stated that commercial arbitration shall not be considered as a part of the judicial system. Therefore, the dispute resolution by arbitration cannot be considered as the implication of the constitutional right to judicial protection. Furthermore, an arbitration agreement does not exclude possible consideration of a dispute by courts.

This explanation fixed the unequal legal status of a commercial arbitration and a court, including inequality in recognition and enforcement of their awards. Hence, the Supreme Court’s Normative Resolution became contradictory to the official explanation of the Constitution. On this basis, the General Prosecutor filed the protest against the Supreme Court’s Normative Resolution. As a result, the Supreme Court had to suspend its resolution, which was implemented less than one year. Subsequently the enforceability of awards issued by domestic arbitrations depended only on the will of the parties.

3. The right of a court to check compliance of an arbitration award on its merits with the current legislation

The third problematic issue of that time was a possibility for courts to exercise a general supervisory jurisdiction over an arbitration. The constitutional right to judicial protection opened access for the losing party to challenge an arbitrator’s decision by judicial review. This provision practically destroyed arbitration by empowering the court to revise an arbitration award on the merits.

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As Professor Jan Paulsson has noted, ‘the great paradox of arbitration is that it seeks the co-operation of the very public authorities from which it wants to free itself’. Unfortunately, the new legislation of that time have not set any principles regarding such cooperation. Courts acted with cautious regarding non-state dispute resolution means. The former soviet ideology cemented in the minds superiority of the courts in civil rights protection. Therefore, the courts were eager to check arbitration awards and exercise supervision. Consequently, a relation between the courts and the arbitration was not harmonious and to the certain extend took a shade of subordination.

In order to maintain the delicate balance between the courts and arbitration Article 5 of the UNCITRAL Model Law significantly limits the occasions for Court intervention in arbitral matters.

Article 5 provides that, ‘In matters governed by this law, no Court shall intervene except where so provided in this law’. This article limits the role of courts to specifically provided matters. The UNCITRAL Model Law considers court involvement only in certain cases such as 8 arbitration agreement and substantive claim before court – stay of proceedings (article 8), interim measures (article 9), appointment of arbitrators (article 11), challenge procedure (article 13), failure or impossibility to act (article 14), competence of arbitral tribunal to rule on its jurisdiction (article 16), court assistance in taking evidence (article 27), (setting aside an award (article 34) and recognition and enforcement of awards (articles 35,36). The borders of court involvement show that it should be aimed mostly to assist rather than subvert the arbitral process.

Unfortunately, the approach developed in the UNCITRAL Model Law was neglected by post Soviet courts and did not meet much resistance, except some legal scholars who constantly opened discussions on this ground.

At this stage of commercial arbitration development is clearly seen a misunderstanding of the commercial arbitration concept and realities of independent Kazakhstan with the freedom of civil rights protection. The CPC did not set any standards to establish a harmonious relation between the courts and arbitration. The lack of trust in commercial arbitration was supported by the Constitution which does not recognize it as a source of justice. Moreover, the former Soviet ideology cemented in the minds superiority of the courts in civil right protection. Consequently, without full legal regulation the courts acted with cautious regarding arbitration. Therefore, courts were eager to check arbitration awards and indifferent to the legal sense of an arbitration agreement. However, due to respect of the international treaties in the field of arbitration, non-resident parties to international commercial arbitration enjoyed full legal protection while residents were limited in that.


53 The most actively involved in the discussion amongst legal scholars in this period of time were: Maidan Suleimenov, Petr Greshnikov, Yuri Basin, Zauresh Baimoldina and others.
In this way, the value of arbitration was almost washed out. At this point, imperfection of the legislation on commercial arbitration, as well as the need for early elimination of these gaps in enforcement was obvious.


After extensive examination and discussion, two laws concerning arbitration were adopted in December 2004: the Law on Arbitration Courts and the Law on International Commercial Arbitration. These laws created two different legal regimes for disputes arising between residents of Kazakhstan and disputes with at least one non-resident party. The latter has a better position compared to the former. It should be mentioned that both of the laws were conceptually based on the UNCITRAL Model Law on International Commercial Arbitration though the Law on Arbitration Courts had some provisions contradicting to the main principles of arbitration. Particularly, the Law on Arbitration Courts stated that an arbitral award could be set aside or refused in its enforcement, if a state court determines that the arbitral award is not in compliance with the principle of legality or if it violates public policy. The principle of legality requires a strict observation of Kazakhstani legislation, including the Constitution and all types of legal acts. Such strict compliance with the legislation and its correct application could be verified only through the examination of all the merits of a case. Therefore, the law by implication allowed revision of an arbitration award and made it unstable.

Another feature of these laws is that only disputes, arising from civil contracts were recognized by them as arbitrable. The limitation of jurisdiction was expanded further regarding domestic arbitrations. Namely, Article 7 (5) of the Law on Arbitration Courts banned arbitration of disputes which affect the interests of the state, state enterprises, disputes from contracts for services, works, production of goods by subjects of natural monopolies, subjects with a dominant position on the market of goods and services, as well as bankruptcy or rehabilitation. In contrast, named disputes with at least one party without Kazakhstan domicile was considered as arbitrable. The unequal approach in the regulation of domestic and international arbitration constituted a topic for scholarly discussions in Kazakhstan.


55 According to the article 6 (1) of the Civil Procedure Code of the Republic of Kazakhstan the principle of legality means that ‘The court in resolving cases in the course of civil proceedings must strictly observe requirements of the Constitution of the Republic of Kazakhstan, the present Code and other regulatory legal acts’. The article 4 (2) of the Law on Arbitration Court states that the arbitral proceedings shall be carried out in compliance with the principle of ‘legality, which means that the awarders and the courts in their decisions are governed only by the norms of the Constitution of the Republic of Kazakhstan, legislative and other regulatory legal acts of the Republic of Kazakhstan’.

56 See e.g. Suleimenov Maidan, Arbitrazhnyye (treteyskiye) sudy v Kazakhstane: proshloye, nastoyashcheye, budushcheye (The Kazakhstani International Arbitrage 2007); Greshnikov Igor, ‘Mezhdunarodnyy i vnutrenniy
Nevertheless, in spite of all shortcomings, it is difficult to underestimate the role of the new legislation. It has set the legal concept of commercial arbitration in Kazakhstan in keeping with the worldwide accepted standards in this field and thereby bridged the longstanding gap in the legislation. Certainly, it was expected that the new legislation would make a revolutionary breakthrough in the culture of dispute settlement and indirectly reduce the caseload of the state court system. Unfortunately, the new legislation didn’t meet all great expectations due, not only to some imperfections but also because of the mentality of the population, which still inclined to litigation from the Soviet Union time.

**F. Amendments and Additions to Laws on Arbitration (2013)**

Another crucial reform in the field of arbitration took place in 2013. This year the law on amendments and additions to the legislation concerning arbitration was adopted. The law was aimed at the strengthening of the arbitration system by eliminating of contradictions and gaps in the relevant legislation. The law has elaborated some progressive as well as controversial changes.

Amongst undoubtedly positive amendments, is a reconsideration of the jurisdiction of an arbitration, which has been extended to all types of civil disputes, even non-commercial. The CPC included some guarantees to strengthen the legal effect of arbitral awards and arbitral agreements. Thus, the CPC states that judge must not accept the claim if there is arbitral award on the same subject and grounds.\(^{57}\) This provision indicates the equal legal power of an arbitral award and a court decision. Moreover, it ensures the compliance with the principle *Res judicata*, which easily used to be violated concerning an arbitration award even without justification.

As for an arbitration agreement, the court has been empowered to return the statement of claim if there is an arbitration agreement between parties about the same claim.\(^{58}\) It should be mentioned that this provision is applied only if any of the parties asks to direct the suit to arbitration before the submission of its first application on the merits of a dispute. The only possible obstacle, which could arise, is disclosure by the court that the arbitration agreement is void, invalid or cannot be performed.\(^{59}\) Such provision ensures the performance of an arbitration agreement with caution due to the absolute right of everyone to judicial defense\(^{60}\)

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\(^{57}\) Article 153 (1), paragraph 3, CPC.

\(^{58}\) Article 154 (1), paragraph 5, CPC.


and the autonomy of the parties, who have a right to decide independently issues on an arbitration agreement, including the right to the waiver of it.61

All of the above mentioned changes were the most expected from the time of the CPC enactment when it didn’t provide the bare minimum of guaranties for arbitration. Nonetheless, the arbitration reform has not solved all long lasting problematic issues. Particularly, the legislation kept the same unequal approach in the regulation of arbitration courts and international arbitrations. The arbitration courts still have the same limitations in its jurisdiction. Also, the Law on Arbitration Courts, as previously, includes the principle of legality as the ground for the challenge of an arbitral award with all the associated problems.

II. THE CURRENT REFORM

The president’s speech at the opening of the fourth session of the Parliament of the Republic of Kazakhstan of the fifth convocation on 2 September 2014 is considered to be a starting point of contemporary reform in the field of arbitration. Nursultan Nazarbayev stressed that for the efficient investment, full development of arbitration is needed so that the adoption of measures for the development of domestic arbitration, operating according to generally accepted international standards should be considered.62

Such an interest in arbitration might be explained due to the main strategic goal of Kazakhstan to join the group of 30 most developed countries by 2050.63 This project is called Strategy ‘Kazakhstan – 2050’ and provides a modernization path for all areas. Thus, the President while presenting this programme on 17 January 2014 pointed that ‘as we move towards the top 30 developed countries, we need an atmosphere of creativity, fair competition, rule of law, and high standards of legal culture. We need renewed instruments of interaction between the state, the non-government sector and business’.64 In order to implement this plan Kazakhstan should meet criteria of the Global Competitiveness Report of the World Economic Forum and the Doing Business Report of the World Bank Group, which particularly consider the level of development in the field of arbitration as a factor affecting the ranking of a country.

This strategic plan pursue the principal goals of Kazakhstan to integrate into the broader global economy. This hardly possible by relying only on own

64 Ibid.
resources, without involving foreign investment. As for foreign investors, they also hope that arbitration will contribute to the creation of a favourable legal environment in the countries with transition economies.\footnote{Virginia Cram-Martos, ‘Notes and Current Developments The United Nations Economic Commission for Europe and the 1961 Convention on International Commercial Arbitration’ (2000) 17 J. Int’l Arb. 137.}

In this regard the following opinion of Virginia Cram-Martos seems to reflect quite objectively the wide spread opinion on this issue: ‘One important aspect of a country's investment and business infrastructure is the quality and effectiveness of the commercial dispute resolution mechanisms that are available. Because investment risks are often perceived to be higher in transition economies, access to dispute-resolution systems that investors believe to be efficient and impartial are particularly important. However, for various reasons, the court systems in these countries often do not provide prospective investors with sufficient confidence’.\footnote{Ibid}

Thus, following the President’s speech the Ministry of Justice has begun to explore possible ways for the development of domestic arbitration. The essential question that arose in the course of the analyses was whether a separate set of rules for domestic arbitration should be maintained, or whether it would be possible to regulate both international and domestic arbitration by the same body of rules. It has become apparent that it is preferable to develop the unified law on arbitration.

\textit{A. General Characteristics of the Draft (Overview of the draft)}

After extensive analysis of present legislation and foreign experience in the legal regulation of domestic and international arbitration by one set of rules was designed the draft law ‘On Arbitration’ (hereinafter, the draft). The draft has perceived procedural features of existing legislation and has added some as undoubtedly progressive as well as inconsistent changes.\footnote{Draft Law On Arbitration is available on <http://online.zakon.kz/Document/?doc_id=31630527#sdoc_params=text%3d%25d0%25b0%25b1%25d1%2580%25d0%25b1%25d0%25b8%25d1%2582%25d1%2580%25d0%25b0%25d0%25b6%26mode%3dindoc%26topic_id %3d31630527%26pos%3d1%26Synonym%3d1%26Short%3d1%26Suffix%3d1&sdoc_pos=0> accessed 28 April 2015.}

The draft of the unified law on arbitration contains a general provision on arbitration, which takes place on the territory of Kazakhstan without specification of domestic or international arbitrations. To a large extent, the Draft doesn’t blindly mirror the UNICITRAL Model Law and it establishes the new vision of the arbitration system. There are a large number of peremptory norms and limitations in the contrast to the Laws ‘On Arbitration Courts’ and ‘On international arbitration’. However, the legislative process is ongoing and the
Draft is under consideration by Mazhilis (the lower house of parliament).\textsuperscript{68} Certainly, in the process of discussion and analysis the content of the law will be improved. In order to contribute to the development of the law, let us focus on the most significant provisions provided by the newly designed law.

\textit{B. The principles governing arbitration}

Amongst the most considerable achievements of the Draft should be mentioned the reinterpreted set of principles. The basic principles of the modern arbitration statute may be summarized as follows: autonomy of the parties; legality; independence; contentiousness and equality of the parties; justice; confidentiality and autonomy of the arbitration agreement.\textsuperscript{69} Let us elaborate on some of them.

The principle of legality has found its new regulation. The definition of the principle of legality provides that arbitrators and arbitral courts in their decisions shall only be governed by the provisions of applicable law under to the agreement between the parties. It is noteworthy that this principle is no longer considered as a ground for judicial review. From the first sight, the new regulation resolves the most considerable problematic issue concerning the principle of legality. However, the further analysis of other provisions shows new frameworks of limitation.

Thus, according to the article 44 of the Draft, parties are obliged to follow the law of Kazakhstan if they are citizens of the Republic of Kazakhstan, stateless persons and legal entities registered on the territory of Kazakhstan. Furthermore, local legislation will be applied if at least one of the parties is: a state body; a state enterprise; a subject of natural monopolies; a subject with a dominant position on the market of goods and services; a legal entity which partner or shareholder directly or indirectly is the state. The presence of such party determines Kazakhstani law as applicable. Literal interpretation of this article leads to the conclusion that only foreign citizens and legal entities registered outside of Kazakhstan are entitled to choose the applicable law. Although, this exception is admissible only in cases without the participation of listed above parties who affect determination of the applicable law.

Therefore, it can be concluded that the legislator reduces the choice of the applicable law to a minimum and consequently the principle of legality would be mostly related to the proper application of the Kazakhstani law. Moreover, under the new regulation, the arbitrators will be responsible for the legality of the award


\textsuperscript{69} Article 5, of the Draft.
made by them, for refusal of recognition or enforcement of an award and for its cancellation, if an arbiter is found guilty.\textsuperscript{70}

The principle of confidentiality also has got new regulation under the ongoing reform. It is well known that one of the most common reasons why parties select arbitration as a dispute resolution process is to secure privacy and confidentiality. The parties to arbitration assume that the private nature of the process will ensure that all the facts in the case will be kept private.\textsuperscript{71} Unfortunately the regulation of confidentiality under the laws ‘On International Arbitration’ and ‘On Arbitration Courts’ does not meet these requirements due to two main reasons. Firstly, only the arbiter is considered to be responsible for the violation of the principle of confidentiality.\textsuperscript{72} Secondly, the legislation does not provide for responsibility for violation of confidentiality.

The Draft has attempted to fill the gaps through the expansion of the circle of persons responsible for compliance with the principle and determination of liability for its violation. The new interpretation of confidentiality means that the arbiters and participants of the arbitral proceedings shall not disclose any information that has become known in the course of the arbitral proceedings, without the consent of the parties or their legal successors, and cannot be interrogated as witnesses on the information became known to them in the course of the arbitral proceedings, except in cases provided by the legislation of the Republic of Kazakhstan (article 5(6)). Also, it is considered that principle of confidentiality should be regulated similar to the ruling on confidentiality in mediation, which stipulated by the Administrative Offenses Code. Thus, the divulgence of the information by the participants of the arbitration, which became known during the arbitration proceeding, without the consent of the party that has provided this information, entails a fine in the amount of twenty monthly calculation indices. This provision is included in the article 85 (1) of the Administrative Offenses Code by the Draft Law ‘On amendments and additions to some legislative acts of Kazakhstan on the issues of arbitration’.\textsuperscript{73}

Hopefully such regulation will strengthen the principle of confidentiality and turn it into one of the actual advantages of arbitration.

Another positive change is that for the first time the principle of the autonomy of the arbitration agreement (or separability) will be established by the law.\textsuperscript{74} The principle of separability was not fixed by the law before. Therefore, it

\textsuperscript{70} Article 58(2), of the Draft.


\textsuperscript{73} Draft Law On Amendments and Additions to Some Legislative Acts of Kazakhstan on the issues of arbitration is available on <http://online.zakon.kz/Document/?doc_id=31630532&sdoc_params=text%3d%25d0%25b0%25b1%25d0%25b5%25d1%2580%25d0%25b0%25b2%25d0%25b1%25d1%2582%25d0%25b2%25d1%2580%25d0%25b2%25d0%25b0%25b2%25d0%25b6%26mode%3dindoc%26topicle_id%3d31630532%26pos%3d1%26Synonym%3d1%26tShort%3d1%26tSuffix%3d1&sdoco_pos=0> accessed 28 April 2015.

\textsuperscript{74} Article 5 (7), of the Draft.
was deduced doctrinally without clear legislative regulation on it. According to the new provision, it is clearly stated that the invalidity of the underlying contract doesn’t have an impact on the arbitration agreement. Likewise, the invalidity of the arbitration agreement will not render the underlying contract invalid.

C. Arbitrability

It was expected that the long lasting unequal regulation of arbitrability regarding domestic arbitration would be eliminated by the new law. In order to overcome this problem, the draft attempted to find the middle way in the regulation of arbitrability. However, it seems that the new concept of arbitrability mostly inherited the limitations of the Law ‘on Arbitration Courts’ and spread them regardless of parties’ residence.

Thus, according to the article 8(8) of the Draft the arbitration court may not settle disputes:
- About bankruptcy or rehabilitation;
- Disputes between subjects of natural monopolies and their consumers;
- Arising from personal non-property relations, not related to property, related to life and health, privacy, personal and family secrets, the right to name of the person.

Also the draft reconsidered the limitation concerning disputes affecting the interests of the state and allowed to arbitrate disputes, but only between physical and (or) legal entities of the Republic of Kazakhstan and state bodies, state enterprises, as well as legal entities, fifty percent or more of the voting shares (shares in the authorized capital) are directly or indirectly owned by the state but with the consent of the authorized body of the relevant industry (article 8(10). This provision, on the one hand, allows arbitration of previously prohibited disputes and on the other hand, confines arbitration of the same disputes regarding parties without Kazakhstani domicile. Such an approach seems to be oriented more towards limitation of arbitrability rather than the expansion of it.

D. The new arbitration system

In order to boost the development of the arbitration, the draft introduces the new idea of a unified and centralized arbitration system. The core of this system would be the Arbitration Chamber of Kazakhstan, including the basis of membership being all arbitration institutions of the country. The Chamber will be created in a form of non-profit organization with multiple tasks, such as: pursuing a common policy of development in the field of alternative dispute resolution; monitoring of arbitration practice; representation of interests of its members in relations with state bodies, international and foreign organizations; training of arbiters. The given list of tasks doesn’t represent all possible functions of the
Chamber because according to the Draft this list is open and could be expanded by the constitutive documents of this organization.

It could be assumed that the Arbitration Chamber of Kazakhstan will be an influential organization with unlimited power over arbitration institutions because of self-determination of its competence. In spite of the good intentions behind the idea of the centralized arbitration system, it unlikely it would significantly change the current situation for the better. On the contrary, it probably would lead to the loss of independence by arbitral institutions. As Commercial arbitration as an element of civil society manifests the interests and the will of the parties, therefor, it is supposed to act independently without possible impact from the outside. Hence, it seems that such an approach contradicts the nature of the commercial arbitration. In this regard Usr Weber-Stecher fairly states ‘Arbitration as an alternative way of resolving disputes must meet certain minimum standards of due process to be a real alternative to state court proceedings. One of the main conditions and fundamental principles for this is independence of all authorities and institutions with decision-making power in the frame work of dispute settlement proceedings’.75

III. CONCLUSION

The history of arbitration in Kazakhstan shows that this way of dispute resolution permanently was attributable for Kazakh traditional society. Further development of the arbitration was directly dependent on governmental policy. The analysis of legislative regulation proves that this procedure particularly reflects the main trends in the economic policy of the country and the main engine of progress is a political decision rather than forward development. The idea of strengthening the role of arbitration as a means of alternative dispute resolution pervades all reforms has taken place. Each stage of the development of the legislation on arbitration is characterized by its achievements and problems and the current reform of arbitration is not an exception. With attempts to solve all long-lasting problems in the field of arbitration, the current reform of legislation could create new obstacles its development. Obviously, the Draft Law is not going to be the final word and numerous stages in the legislative process will be taken before its adoption. Even so, carefully prepared as it is, provides fertile ground for discussion and making suggestions for the further development of commercial arbitration in Kazakhstan.