

TOP 5 'MUST-KNOWS' THAT WILL HELP YOU ENFORCE ARBITRAL AWARD IN KAZAKHSTAN

AUTHORS

Ivan Kasynyuk, Partner at AGA Partners Law Firm
 Dmytro Koval, Senior Associate at AGA Partners Law Firm
 Artem Timoshenko, Partner at Unicase Law Firm
 Aybek Kambaliyev, Senior Associate at Unicase Law Firm

Nowadays contractual relations of companies often involve, and sometimes end in, a dispute. To resolve these disputes, parties usually choose between a local court or commercial arbitration.

As a common practice, the dispute resolution procedure in commercial arbitration may take more than a year and once the arbitral award is rendered, the losing party often refrains from voluntary execution of a decision. Consequently, the winning party has no other choice than to enforce such decision in a local court of the jurisdiction where the guilty party resides or keeps its assets.

In this article, we would like to address some aspects which may prevent enforcement of an arbitral award in Kazakhstan. From this perspective, our further recommendations may be of practical value to companies as well as their legal counsels. It is worth noting that some of the recommendations need to be observed before the arbitration to mitigate some of the risks in advance.

Legal framework

Arbitral awards of London Court of International Arbitration (LCIA), the Arbitration Institute of the Stockholm Chamber of Commerce (SCC), The Grain and Feed Trade Association (GAFTA), the International Court of Arbitration of the International Chamber of Commerce (ICC) as well as of other institutions are commonly enforced in Kazakhstan.

Generally, the recognition and enforcement of an arbitral award of an institutional arbitration in Kazakhstan is based on the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 10 June 1958) which was ratified by Kazakhstan.¹

As for the local legislation, there are:

- the Civil Procedural Code of Kazakhstan (31 October 2015);
- the Law 'On Arbitration' (8 April 2016); and
- the Law 'On Enforcement Proceedings and Status of Court Enforcement Officers' (2 April 2010).

Enforcement of arbitral awards in Kazakhstan consists of two main steps:

- Recognition and enforcement of an arbitral award within a competent local court by obtaining an enforcement order; and
- Actual enforcement of an arbitral award by a court officer.



¹ Decree of the President of the Republic of Kazakhstan No. 2485 dated 4 October 1995;

However, in this Article we would like to underline the practical issues of the first step of enforcement, as the pitfalls of the actual enforcement deserve a separate discussion.

Grounds for refusal

It is not surprising that most of the companies lack experience in situations when a local court refuses to recognize and enforce an arbitral award. Therefore, it is not uncommon that a Claimant in the mistaken belief hopes to enforce an arbitral award in Kazakhstan in a short time.

A favorable arbitral award is not the end of the story, as the local legislation provides a Respondent with a variety of legal instruments on escaping the responsibility, apart from insolvency. Consequently, before proceeding directly with our recommendations it is important to describe the common grounds for such refusal.

Based on our experience we may specify the following grounds, among others, for refusal of recognition and enforcement of an arbitral award which are commonly used by the Respondent during court hearings in local courts:²

- a. an arbitral award has not yet become binding upon the parties or was canceled, or its execution was suspended by a court of the country in accordance with the law of which it was rendered;
- b. an arbitral award is rendered in a dispute not covered by an arbitration agreement or is not subjected to its conditions or contains rulings on matters beyond the scope of such arbitration agreement; and
- c. the Respondent was not duly notified of the appointment of an arbitrator or of arbitral proceedings or did not present its explanations to the arbitration for the reasons that were deemed valid by the court.

Thus, it is highly recommended to ensure that an arbitration proceeding is conducted in due course in order to exclude the risk of refusal.

Recommendations

1. Know Your Counterparty

Most of agreements include a warranty clause specifying that each signatory is duly authorized to execute and perform its obligations under a specific agreement. Further, during the execution of an agreement the parties conduct e-mail correspondence on a day-to-day basis and it is often the case that a person receiving such correspondence is not a signatory to the agreement.

In practice, an arbitration secretary sends all the letters and notifications to the parties at the addresses specified in the agreement. These letters and notifications may be received by different individuals, and very often by a person sitting at the reception.

In some cases, the Respondent does not take part in the arbitration proceedings at all but keeps on receiving notifications from a Claimant and an arbitration institution. Nevertheless, this does not prevent the Claimant

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² Article 255 of the Civil Procedural Code of Kazakhstan (31 October 2015)

from receiving an arbitral award and pursuing recognition and enforcement of such arbitral award in Kazakhstan.

However, during the procedure for obtaining an enforcement order at a local court, the Respondent may come out of "nowhere" and state that he or she did not receive any of the notifications or letters in relation to the arbitration proceedings.

This statement of the Respondent may be based on the fact that the address specified in the agreement is not the legal address and consequently the person sitting at the reception is not the Respondent's employee.

As the result, from a legal point of view the court has grounds to refuse to recognize and enforce the arbitral award based on the fact that the Respondent was not duly notified of the appointment of the arbitrator or of the arbitral proceedings at all.

The parties usually do not specify in their contracts whether their signatories are the only persons authorized to receive and/or send the correspondence. Therefore, in order to exclude the risk of delivering correspondence to the wrong person, it is highly recommended to conduct the 'Know Your Counterparty' procedure by:

- obtaining a copy of a certificate on state registration of your counterparty and a document evidencing the powers of the signatory (articles of association, power of attorney, etc.);
- including into the agreement the address of legal registration and the actual address and by specifying the address for correspondence;
- including into the agreement a list of individuals authorized to receive/send the correspondence, with their full contact details (e-mail, address for correspondence, telephone number, etc.);
- instructing employees and an arbitration secretary to send all correspondence to the name of the counterparty's authorized persons;
- including into the agreement the obligations of the parties to notify the counterparty of the change of the authorized persons.

2. Notifications of arbitration proceedings

Generally, most of the Arbitration Rules of the arbitral institutions allow serving notices to the parties by electronic means of communication. For instance, Article 21.1. of the GAFTA Arbitration Rules No. 125 provides that all notices to be served on the parties pursuant to these Rules shall be served by letter, fax, or e-mail or other electronic means.

Consequently, from a legal point of view the GAFTA Arbitrator may refrain from sending the notices by courier service and limit the ways of communication means by using the e-mail only.

However, from a practical point of view there is a high risk that the Respondent may claim that it did not receive any of the notifications of

arbitral proceedings and as the result the arbitral award will not be enforced in Kazakhstan.

Based on the abovementioned, we recommend:

- for the e-mail correspondence – to obtain and keep the delivery and read receipts;
- for the post and courier service of documents – to send the letters with advice of delivery and to keep the confirmation of delivery and receipt (or refusal to receive, as the case may be).

The aforementioned rules on exchange of documents exclude the risk of improper notification of the second party of the ongoing arbitration.

3. Exchange of originals

The Kazakhstan legislation requires the Claimant to provide the court with an arbitration agreement or a contract which contains an arbitration clause (original or its copy). At the same time, as it had been mentioned above, the courts may refuse to recognize and enforce an arbitral award when such arbitral award is rendered in respect of a dispute that is not covered by the arbitration agreement.

In practice, upon submission by the Claimant of the copy of the arbitration agreement or the contract which contains the arbitration clause, these documents may differ from the documents possessed by the Respondent.

Considering the foregoing, the local courts may request the original of the arbitration agreement or the contract which contains the arbitration clause in order to be sure that the arbitration clause exists.

Consequently, the practice of Unicase Law Firm shows that it is vitally important to have the original of the arbitration agreement or the original of the contract which contains the arbitration clause, as the second party may provide an incorrect copy of such documents which may lead to separate court proceedings.

As a general rule, the recommendation on exchange of originals shall be applied to all the documents during the business relations with the counterparty.

4. Obtaining additional certificate from arbitrator

From a practical point of view, the arbitral award may not state that it is final and becomes binding upon the parties. At the same time, as specified above, one of the grounds for refusing to recognize and enforce the arbitral award is when the arbitral award has not yet become binding upon the parties. Consequently, during the process of obtaining an enforcement order in a local court, the successful party may face the necessity to prove this matter.

Therefore, to avoid this risk it is advised to obtain from an arbitration institution, an arbitrator or a chairman of the panel of arbitrators a letter which certifies that the arbitral award is final and binding.

It is worth mentioning that the letter as well as any other documents issued by arbitral institutions located outside of Kazakhstan must be

apostilled, so the process of obtaining this letter should be initiated as soon as possible.

5. Specifying a fixed amount of damages

Generally, the disputes are resolved in accordance to the law applicable to underlying relationships. At the same time, the parties may specify the English law or any other law applicable to their agreement, whereas an arbitral award issued in respect of the said agreement shall be enforced in Kazakhstan.

In practice, such arbitral awards often include damages or interest rate without a fixed amount by reference to formulas or percentage to be paid by the losing party. When an arbitral award is enforced in Kazakhstan, the local courts do not have the authority to fix the amount of damages or interest rate because in practice such formulas are structured by foreign law systems. Consequently, it is required to request additional clarification from the arbitrator in respect of the exact amount of damages.

Taking into account the abovementioned, from a practical point of view we recommend asking arbitrators to specify in arbitral awards fixed amounts of damages or interest rate, if any.

Conclusion

When it comes to recognition and enforcement of an arbitral award in Kazakhstan, practical aspects discussed above should be properly considered before taking any steps in local courts.

The practice of Unicase Law Firm shows that the disregard of proper notification of the Respondent, the importance of exchange of the originals of documents and other seemingly minor and non-essential details may lead to no result and undermine all previous efforts despite the favorable arbitral award.

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