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IS ARBITRATION A SUITABLE AND EFFECTIVE DISPUTE RESOLUTION METHOD IN THE REPUBLIC OF KAZAKHSTAN?

Arbitration is an alternative dispute resolution mechanism, where the parties choose the private dispute resolution over the court trials. The main characteristics and features of arbitration are that it is voluntary, private and binding. Not long ago, those features and the nature of arbitration itself were undermined in Kazakhstan, since the adoption of the Law on Arbitration dated 8 of April 2016 No.488-V[1] and it has raised the question, whether an arbitration clause is effective in Kazakhstan?
This article focuses on some major problems within arbitration in Kazakhstan. Firstly, arbitration can last longer than ordinary court litigation. It takes a lot of time to appoint the date of the hearings, also some arbitration courts take a long time to make an arbitral award, which reflects the duration of the arbitration proceedings overall.

In contrast with ordinary courts, arbitration has no specific terms determined by the legislation of Kazakhstan. Dispute resolution can last several years. For example, the parties of the arbitration agreement have the right to choose an arbitrator or arbitrators to consider their dispute, but it means they have to reach an agreement on a particular candidate, which can be challenging.
Secondly, arbitration generates greater costs than ordinary courts. For example, arbitrator's remuneration and institutional fees, that are absent within the court litigation. Consequently, the costs can be significant, depending on the complexity of the case.

Moreover, the parties of the Arbitration can agree on any jurisdiction to solve their dispute, thus the cost of involvement of the lawyers and specialist from the agreed jurisdiction has to be considered. As a matter of fact, such costs of engaging professional advisers in arbitration are higher than in Kazakh courts.

Thirdly, arbitration is not suitable for resolving multilateral disputes, since arbitration judges cannot force the third parties, which are not parties to the arbitration agreement, to participate in the court hearings.
Finally, the powers of arbitrators are limited compared to court judges, for example, in relation to use of interim measures. Neither Kazakh legislation, nor the New York Convention expressly addresses interim measures, which may cause some issues with enforcement of the arbitration award. Interim measures are usually used to prevent the defendant from hiding the assets before the final award is rendered, but the arbitration court has no power to rule on asset encumbrance.

However, even though, there are some limitations within the arbitration concept, there are also many practical points which make arbitration more attractive.

Firstly, there is certain flexibility in arbitration. The parties may choose the seat of arbitration, the legislation, the language and the number of the arbitrators.

[1] Hereinafter – the Law on Arbitration

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This is a very convenient condition when a foreign company can choose its home country's legislation to solve the dispute. And as it was described above, it may be quite challenging to choose an arbitrator, but unlike in ordinary courts, the parties can choose the best suited person to solve the case, in particular an arbitrator with specific expertise in applicable sector.

Secondly, enforceability of the arbitral award is considered to be easier than the court decisions. This could be the most important reason for choosing arbitration over the court litigation. Kazakhstan and other countries which adopted the New York Convention 1985 can simply recognise and enforce the arbitral award rendered in any of these countries.

Finally, the decision of the arbitration tribunal is final, in contrast to the court decision, which can later be appealed to higher courts.

As it was indicated above, in 2016, the Republic of Kazakhstan adopted a new law which raised controversial discussions within Kazakhstan's legal society. Several practicing lawyers and scholars issued their critical opinions on the Law on Arbitration, claiming that certain provisions are obscure. The most controversial provisions related to the notion of arbitration agreement, such as the right to unilaterally waive the arbitration agreement, the consent of the authorised body for quasi-state organisations and the essential terms of the arbitration agreement. A year later the Law on Arbitration was amended due to the pressure imposed on the legislative body. Since then the Law on Arbitration was amended one more time in 2019. The adoption of amendments was prompted by the fact that the Law on Arbitration contained numerous provisions which were not consistent with the nature of arbitration itself. These amendments have eliminated some flawed sections from the Law on Arbitration. However, theoretical problems still exist and Kazakhstan has a long way to go with regards to recognising arbitration as a suitable and effective dispute resolution method.

So, how an arbitration agreement is concluded in Kazakhstan? First of all, the arbitration agreement is concluded in writing. As it was indicated above, in the first version of the Law on Arbitration, it was strictly stated that the arbitration agreement must contain the intention of the parties to refer the dispute to arbitration, an indication of the subject, an indication of the particular arbitrator and the consent of the authorised body, in case the state has 50 or more percent of participation in legal entity, which sings an arbitration agreement. Moreover, one of the parties of the arbitration agreement could unilaterally waive the arbitration agreement. All of these clauses have not survived the criticism from the legal society, except for the condition of acquiring the consent of the authorised body.

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Nevertheless, the rules are not that strict at present, so, the arbitration agreement must be concluded in the form of an arbitration clause in a document signed by the parties, or concluded through the exchange of letters, telegrams, telephone messages, faxes, electronic documents or other documents defining the subjects and the content of their expression of will. The arbitration agreement is also deemed to be concluded in writing if it is concluded through the exchange of a statement of claim and a response to the claim, in which one of the parties asserts the existence of an agreement, and the other does not object to it. Also, any reference in a contract to a document containing an arbitration clause can be valid. Though, the consent of the authorised body is still required, in case the state has 50 or more percent of participation in legal entity party to the arbitration. But the most important thing was an exclusion of the unilateral waiver[2]. Thus, the legislative body fixed its greatest flaw and made a promising step towards the development of arbitration in Kazakhstan.

To sum up, the amendments introduced within the Law on Arbitration were aimed at developing the arbitration in Kazakhstan. But the legislative body of Kazakhstan still needs to take some actions and adjust the Law on Arbitration in accordance with the UNCITRAL Model Law on International Commercial Arbitration in order to reflect the international principles.

[2] Article 9 of the Law on Arbitration