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Confession and Carrying Into Execution of Foreign Arbitration Courts' Decisions: Reciprocity and Public Policy

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ABSTRACT

The article contains a comparative analysis of foreign arbitration courts' decisions, ensuring the reciprocity and public policy. The aim of the study is to explore such aspects as reciprocity and public policy of arbitration courts. The result is the view of the public policy, despite its apparent irrelevance in today's Kazakhstan, which is of fundamental importance in the examination of cases in Western countries. The article also carries the example of the court's decisions in Kazakhstan and the UK, their reciprocity and public policy. In other words, the execution of Kazakhstan arbitral decisions in another country is a necessary condition and basis for the execution of arbitral decisions of other countries in Kazakhstan. The article also examines the confession and carrying into execution of arbitral courts' decisions. In addition, it was revealed that the arbitration court is a non-state court. It is elected by the parties of the dispute, or by those, to whom the parties have entrusted this choice. The novelty of the research is the comparative analytical overview based on foreign arbitration courts.

KEYWORDS
Reciprocity, public policy, arbitral decision, confession, execution, arbitration agreement

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Introduction

The mechanism of execution of foreign arbitral decisions in most countries is formally identical: a written statement (petition) with the execution request is submitted to the competent court of the state, on the territory of which the decision should be fulfilled; relevant documents are attached - original or copy of arbitration agreement and foreign arbitral decision. However, the

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implementation of this mechanism depends on whether there is a reciprocity between the state and the country, in which the decision was held.

What is reciprocity? There are different points of view on this subject, which boil down to the fact that, in accordance with the principle of reciprocity, the state will apply foreign law or establish the rights of foreign entities, depending on whether the other state imposes the same principle. This point of view, the so-called "public and law", in general reflects the concept of reciprocity, but applied to the problem of arbitral decisions' recognition it needs some specification. Reciprocity on the example of the Republic of Kazakhstan will mean that a decision made in a particular country will be recognized and enforced in Kazakhstan only in case if the arbitration decision that was made in Kazakhstan or is regarded as Kazakhstani will be recognized and executed in that particular country. In other words, the execution of Kazakhstan arbitral decisions in another country is a necessary condition and a basis for enforcing arbitration decisions of the other country in Kazakhstan.

We can say that reciprocity is a kind of "acceptance" of the executing country for recognition and execution. Such acceptance may be expressed in three ways:

-multilateral international agreement;

-bilateral international agreement;

-on the basis of national legislation.

However, if arbitral decision is contrary to public policy and the law of the UK, but not contrary to public policy and the law of Qatar - it can be executed. That is why the approach of the UK courts is called "Pro-Executive" - the place of the principal obligation performance is crucial (Bantekas, 2002).

The question arises, on what basis the UK courts, in the arbitral decision making, take into account the basic obligation, if the independence of the arbitration clause from the principal obligation is one of the fundamental principles of arbitration law.

There is a real contradiction between the principle of the arbitration agreement independence from the principal obligation and the principle of conformity with the public policy of the execution country.

The approach of the UK courts to this issue can be called "Pro-Executive". This means that the UK judges in the resolution of several cases involving the so-called "agreements on the acquisition of personal influence," took the view that the arbitration decision will not be executed in the UK if the primary obligation is contrary to the public policy of the country of its execution, whether it is UK or any other country.

As an example, we may consider the case of Lemenda trading Co. ltd. v. African Middle East petroleum ltd. (African Middle East petroleum ltd., 1988) in 1988. The primary obligation was that the intermediary was obliged to use his personal influence to sign the contract in Qatar (the use of such influence, whether it was bribery, threats or other methods of influence, was not mentioned). Arbitral decision, held outside the UK, was executed in the UK, where the defendant's assets turned out to remain. The judge Phillips, who resolved this case, refused to execute a contract based on the principles of morality, because the identical contract violated public policy in the country of execution. The decision says:

"...In this case, Qatar, a country in which the agreement was to be executed and with which, in my opinion, the agreement has the closest connection, has the same public policy that prevails in the UK. In accordance with this procedure, the courts of Qatar will not carry the agreement into execution (Illegal transactions: the effect of Contracts and Torts, 1999). In my judgment, the UK courts could not execute a contract prepared in accordance with UK law that cannot be performed abroad where:

a) it relates to a risky enterprise, which is contrary to principles of English public policy founded on the principles of morality;

b) the same public policy applies to the execution country, i.e., the agreement cannot be executed in accordance with the laws of this country" (International Centre for Settlement of Investment Disputes, 1962).

At the discretion of national courts, the question of to what extent public policy can be used as a reason for refusing recognition and execution of foreign arbitral decisions is passed. It is obvious that the notions of morality, and the principles of law and equity will vary depending on the venue of the petition for recognition (Convention on the Recognition and Execution of Foreign Arbitral Decisions, 1958).

Arbitration court is private. It is elected by the parties of a dispute, or those bodies (persons), to which the parties have entrusted the choice. The decisions of such court should be final and cannot be changed during the execution of these decisions by state authorities. A legal recourse to the arbitration court is an expression of the fundamental principle of the private and civil rights — noninterference of anybody, including the state, in private affairs (rule 2 of the Civil code of the Republic of Kazakhstan, hereinafter CC) (Civil Code No. 269-XII, 1994). The order of the decision execution of the arbitration court is determined by the legislation of the country where it is executed. However, the general rule remains unchanged: when deciding for execution, only the compliance with the procedure of formation of the arbitral tribunal and procedure of the dispute is verified (i.e. only procedural issues), but not the correctness of the decision itself. An exception may be made only for cases when the decision is contrary to the law of the country where it is executed. This is clearly stated in the rule 5 of the New York Convention of June 10, 1958 "On the recognition and execution of foreign arbitral decisions" (Kazakhstan associated to the Convention by virtue of Decree of the President of the Kazakhstan Republic, 1995). In the Convention there is only one substantive ground to refuse the decision execution: the recognition and execution of that decision is contrary to the public policy of the country of execution.

Relevance

The aim of this work consists in the application of arbitral decisions, subject to progressive quantitative and qualitative growth; enhancing the role of arbitration courts, often occurring in the Western practice cases of contradiction to public policy sooner or later will spread in Kazakhstan.

Research questions

How the issue of reciprocity is reflected in the international treaties, where Kazakhstan is a participant?

Methods

The methods of direct impact on the arbitration court decision include attention to the core obligations. Methods of indirect impact include the contradictions between the principles and the basic obligations.

The accepted concept of the arbitral decision execution in most countries is formally the same. Moreover, the reciprocity between the two countries is taken into account. We are talking about the fact that if the arbitral decision contravenes the public policy and the law of one country, but not contrary to the public policy and the rights of the other, it can be executed.

Results

The key international agreement in this area is the New York Convention on the recognition and execution of foreign arbitral decisions of June 10, 1958, to which Kazakhstan joined in 1995. This Convention provides for member countries the opportunity "on the basis of reciprocity declare that it will apply this Convention only to recognition and execution of arbitral decisions made only on the territory of another Contracting State" (p. 3. rule 1 of the Convention) (Convention on the Recognition and Execution of Foreign Arbitral Decisions, 1958). Kazakhstan upon accession did not use such possibility, so the stipulation of rule 3 of the New York Convention would be applicable. This rule states that "each Contracting State shall recognize arbitral decisions as binding and enforce them in accordance with the procedure of the territory, where recognition is sought and the execution of these decisions is made". However, the New York Convention does not take precedence over the national legislation of our country for the reason that the agreement on the participation of Kazakhstan was expressed by accession. As you know, the only ratified international treaties have priority over national legislation. As clearly follows from the decision of the constitutional Council RK of October 11, 2000 № 18/2 “On the official interpretation of paragraph 3 of rule 4 of the Constitution of the Kazakhstan Republic”, international treaties not ratified by our country, do not have such priority (Decision of the constitutional Council of the RK, 2000). Thus, Kazakhstan will play a foreign arbitral decision only on the basis of reciprocity. The paragraph 1 of rule 33 of the Law of the Republic of Kazakhstan "On international commercial arbitration" states that the competent court (which was filed on the execution of foreign arbitral decisions) refuses recognition or execution of an arbitral decision regardless of the country, in which it was issued, if it determines that the recognition and enforcement of the arbitral decision contradicts the public policy of the Republic of Kazakhstan (The law of the Republic of Kazakhstan "On arbitration courts", 2004).

This statement, containing a reference to the rather vague concept of "public policy," up to the present time in our country is not actually used. However, in the world practice of arbitration, the concept of public policy is of great importance and along with the concept of reciprocity plays a key role in resolving the issue of recognition and execution of arbitral decisions. That is why in this article we consider these two concepts together. As well as with the notion of reciprocity, one should firstly be aware of what is the public policy, and in which cases we can talk about its contradiction?

Public policy, in our opinion, represents some fundamental and not violated principles of law and justice. This definition is quite conditional and is given

only in order to reflect the view of the public policy on moral and legal concept, having something in common with human rights, and jus cogens norms.

The tentativeness and vagueness of the definition of public policy can be inferred, primarily, by the fact that to date this concept has not been enshrined in any international agreement. At the moment, there are no universal rules of "international public policy" and even in the New York Convention (rule 5 (2B)) it is said that (The Convention on the recognition and execution of foreign arbitral decisions, 1958):

"Recognition and enforcement of an arbitral decision may also be refused if the competent authority of the country, in which recognition is sought and the execution will find that:

a) the object of the dispute cannot be adjudicated under the laws of this country or

b) the recognition and execution of that decision is contrary to the public policy of this country."

Here it is necessary to pay attention to the expression "this country". Thus, the authors of the Convention give up the unification of the notions of public order, and convey the decision of this question to the discretion of national courts.

The courts of our country at the present time could hardly formulate a common approach to solving this problem because of the almost complete absence of disputes related to this matter. Therefore, this issue is relevant to consider on the example of the UK where there is, as will be shown below, extensive practice on this issue, and where the courts have formed a unified approach to its solution.

The principle arising from the Lemenda case is that the decision is not executed in the UK if it is contrary to:

- the public policy of the execution place of the principal obligation (Qatar);
- the law of the country of principal obligation performance;
- public policy of a place, where an arbitral decision on the basic obligation is enforced (United Kingdom);
- the law of the country, where the arbitral decision on the basic obligation is executed.

In our view, this contradiction shall be resolved in favor of compliance with the primary obligation to public policy at least, because the theory of independence of the arbitration clause should not allow the arbitration parties to violate the law of the country of execution. In addition, we should not forget that the so-called "autonomous" theory of the arbitral decision origin is only one of many theories, although the most common (about other theories see details in the above-mentioned work).

Finally, about the relationship between rules of public policy and norms of jus cogens - peremptory norms of international law. Contrary to popular perception, they are not one and the same, though, because the rules of public policy often include rules of procedural law.

However, rules of jus cogens and public policy intersect close to the case when the case concerns the violation of one of the basic rules of jus cogens -

respect and priority of fundamental human rights. This rule, undoubtedly, is one of the basic rules of public policy too. The decisions taken in accordance with the obligations that imply or can imply the violation of human rights, cannot be performed in any relatively civilized country.

In the mentioned Lemenda case, it was about corruption and attempts of bribery of foreign officials in international transactions. It is well known that the bribery may constitute an act of unfair competition and it poses a serious attempt at the use of basic human rights. This view was reflected in the report of the UN working group on contemporary forms of slavery (July 20, 1999), paragraph 53, which describes corruption as an inevitable element of contemporary forms of slavery (Report of Working Group on Contemporary Forms of Slavery, 1999). Thus, the primary obligation of Lemenda meant a violation of fundamental human rights, and therefore - the violation of jus cogens. Judge Waller in comments on the Lemenda case notes that: "...it is hard to imagine why, apart from the universal condemn, such activities as terrorism, drug trafficking, something minor in corruption or fraud in international trade should not attract the attention of UK public policy in relation to contracts that are not executed under the jurisdiction of the UK courts".

Discussion and Conclusion

As it was mentioned above, the decision execution on the basis of reciprocity requires that the country, which was handed down this decision, recognizes and enforces the decisions of arbitration courts of Kazakhstan. This issue is also addressed by signing the multilateral international treaties.

Kazakhstan has entered the following agreements on the procedure of mutual execution of arbitration courts' decisions:

- An agreement on the dispute resolution, connected with implementation of business activity. (Treaty on the Settlement of Disputes Related to Economic Activity, 1992), ratified by the Supreme Council of the Republic of Kazakhstan of July 2, 1992.

- The agreement on the procedure of mutual execution of decisions of arbitration, economical courts in territories of the states - participants of the CIS, signed in Moscow on 6 March 1998 and ratified by the Republic of Kazakhstan in accordance with the Law of December 30, 1999.

Parties of such agreements are all CIS countries, including Russia. An arbitration decision rendered in these countries will be executed in the Republic of Kazakhstan on the basis of reciprocity principle.

In practice, this means that for resolving disputes with the Kazakhstan enterprises, foreign companies, regardless of their country of residence, it is better to specify the Russian Federation as the location in the arbitration agreement, and the arbitration court of the country (depending on region). In this case, there is a real assurance that the arbitration decision will be executed.

These are the legal aspects of reciprocity. However, the problem has also the economic side.

Departing from the terminology, we can say that reciprocity is trust; trust to the country as a whole and to the companies operating in this country as business partners. In other words, a foreign company, having business with a company from Kazakhstan, needs to be sure that in case of a conflict based on

the Kazakh partner fault, it will be able to claim damage compensation suffered by its assets. In a situation when Kazakhstan court may, on the basis of the reciprocity principle, deny the decision execution against a Kazakh company, adopted, for example, in Canada or Japan, such confidence may not be considered.

On the other hand, the position of the Kazakh legislators is also understandable and easily explainable. Recognition and execution of foreign arbitral decisions, regardless of where they were made, will lead to the fact that the assets of Kazakhstani enterprises-defendants regardless of their location can be withheld in favor of foreign companies-plaintiffs. The country experiencing a lack of investments, usually cannot afford it. However, this position, understandable and explainable in the past, now seems outdated. This is evidenced by the fact that in 2004 Kazakhstan became a party to the Convention on the settlement of investment disputes between states and natural or legal persons of other states (ICSID), of March 18, 1965, which was ratified by our country. In accordance with the provisions of this Convention, each state should recognize the arbitral decision as a compulsory and should fulfill the financial obligations under this decision within its territory.

Coming back to the question of confidence, we can say that the guaranteed execution of foreign arbitral decisions can serve as an incentive to increase the number of foreign companies wishing to work with Kazakh business partners.

It should be noted that countries such as the UK and Singapore, which are major international financial centers are also major centers of international dispute resolution. For example, in London there is London Court of International Arbitration, which is one of the oldest most respected on a global scale arbitration courts. The validity of the arbitration courts and the confidence in their solutions is best for the economy of any country, therefore, in our opinion, the doctrine of reciprocity, reflected in Kazakh legislation, needs to be revised in the direction of liberalization (Bantekas, 2008).

It should be mentioned that the above does not apply to production sharing agreements (PSA). They usually provide for international arbitration and immediate decision execution in a neutral country.

Summarizing, we can note the following: recognition and execution of foreign arbitral decisions is a multi-faceted process, which includes ideas of reciprocity and public policy.

Practical Application and Results

Reciprocity is crucial for the recognition of foreign arbitral decisions, although some ideas about it need to be reviewed.

There is a close relationship between rules of public policy and norms of jus cogens. In turn, notions of public policy, despite its apparent irrelevance in today's Kazakhstan, are of fundamental importance in the examination of cases in Western countries, what we have seen in the UK, and it is expected that a similar situation will soon occur in Kazakhstan.

Disclosure statement

No potential conflict of interest was reported by the authors.

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