

1. Supreme Court of the Republic of Kazakhstan, 31 October 2012, 3gp-946-12¹

Parties: Claimant: OOO ChKZ-Eksport (Russia)
Respondent: TOO Mezhregionkomplekt-Astana (Kazakhstan)

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Subject matters: – double exequatur
– jurisdiction over requests for the enforcement of foreign arbitral awards in Kazakhstan
– applicability of the Minsk Convention and the Kishinev Convention to international commercial arbitral awards (no)

Topics: ¶

Summary

The

On 14 September 2010, an arbitral tribunal under the auspices of the Arbitration at the Moscow Chamber of Commerce and Industry made an arbitral award in a dispute between Russian OOO ChKZ-Eksport and Kazakh TOO Mezhregionkomplekt-Astana by which it ordered the latter to pay the former a main debt at an amount of RUB 12,327,570.00, damages at an amount of RUB 2,200,000.00, and an additional RUB 606,080.07 for the costs of the arbitration.

On 28 December 2010, the Arbitrazh Court of the City of Moscow rejected OOO ChKZ-Eksport's request to issue an enforcement letter (Case No. A40-133433/2010) because TOO Mezhregionkomplekt-Astana had its seat in Astana, Kazakhstan, and OOO ChKZ-Eksport had not demonstrated to the court's satisfaction that TOO Mezhregionkomplekt-Astana had assets on the territory of the City of Moscow. This decision was confirmed by the Ninth Arbitrazh Appellate Court on 13 April 2011 (Case No. 09AP-2127/2011), the Federal Arbitrazh Court for the Moscow District on 3 August 2011 (Case No. F05-7011/2011), and the Supreme Arbitrazh Court of the Russian Federation on 1 September 2011 (Case No. VAS-11492/2011).

On 8 September 2011, OOO ChKZ-Eksport filed a request for the enforcement of the award in the Specialized Inter-Rayon Economic Court of the City of Astana. That court rejected the request on 20 September 2011, holding that the “court at the place of the examination of the dispute by the arbitral tribunal” had jurisdiction. This decision was confirmed by the Appellate Judicial College of the City Court of Astana on 1 February 2012.

It appears from the Supreme Court of the Republic of Kazakhstan's website that on 2 February 2012, Mr. Nadtochiy, a representative of OOO ChKZ-Eksport, sent a letter to the president of that court through its website in which he asked, in essence, why the two Kazakh courts had referred his company to a court in Moscow when the request that had been filed was aimed at an enforcement of a Russian award in Kazakhstan. An answer was published on the Supreme Court of Kazakhstan's website:¹

“...In accordance with the legislation in force in the Republic of Kazakhstan, decisions of foreign courts and arbitral tribunals are recognized and enforced if this is provided for by the law or an international treaty of the Republic of Kazakhstan based on reciprocity (Article 425 Civil Procedure Code of the Republic of Kazakhstan). In case that an arbitral award is not complied with voluntarily within the time frame it establishes, the party in whose favor the arbitral award was rendered (the creditor) has a right to

1. The General Editor wishes to thank Mr. Michael Wietzorek, Lawyer [Assessor] in Düsseldorf for his invaluable assistance in providing this decision and translating it from the Russian original.

¹ The letter and the answer are available at http://supcourt.kz/rus/questions/8/question_0010.html.

apply to the court at the place of the examination of the dispute by the arbitral tribunal with a request for compulsory enforcement of the arbitral award in accordance with the rules provided for by Article 425-1 Civil Procedure Code of the Republic of Kazakhstan. Thus, you must submit a request for the compulsory enforcement of the arbitral award in the competent court of the Russian Federation at the place of the examination of the dispute by the arbitral tribunal. In case the court grants the request ..., you have a right to [file a request] for the recognition and for a leave to compulsory enforcement of the judicial act on the territory of Kazakhstan in the competent court of the Republic of Kazakhstan through the Department for the Maintenance of the Activities of the Courts at the Supreme Court of the Republic of Kazakhstan ... [The request shall be accompanied by:] a duly authenticated copy of the decision to be enforced ..., an official document [confirming that] the decision has become binding in case this is not evident from the text of the decision itself, evidence that the other party has been duly notified of the process, [and] the enforcement document."

The Cassation Judicial College of the City Court of Astana confirmed the two previous Kazakh decisions on 15 March 2012.

On 31 October 2012, upon a protest filed by the Kazakh general state attorney, the Supreme Court of the Republic of Kazakhstan reversed the three previous decisions and remanded the case to the first instance.

A detailed report of these decisions is available online at <www.kluwerarbitration.com/document.aspx?id=KLI-KA-.....>.

Excerpt

[1] "...the supervision college of judges, having examined the materials of the Claimant's request, deems it necessary to satisfy the protest for the following reasons.

[2] "The Claimant filed a request for the compulsory enforcement of the final award of the [Arbitration at the Moscow Chamber of Commerce and Industry] of 14 September 2010 in the Specialized Inter-Rayon Economic Court of the City of Astana and asked for the issuing of an enforcement document.

[3] "The first instance court, when examining the request, came to the conclusion that in accordance with Article 425(1) of the Civil Procedure Code,² the Specialized Inter-Rayon Economic Court is not competent to issue an enforcement document for the compulsory enforcement of decisions of the [Arbitration at the Moscow Chamber of Commerce and Industry], but rather the court at the place of the arbitration.

² Article 425 Civil Procedure Code reads:

"(1) Decisions of foreign courts and arbitral tribunals are recognized and enforced in the Republic of Kazakhstan if this is provided for by the law or by an international agreement of the Republic of Kazakhstan based on reciprocity.

(2) The conditions and the proceedings for the recognition and enforcement of decisions of foreign courts and arbitral tribunals are determined by the law, unless otherwise established by an international agreement of the Republic of Kazakhstan.

(3) A decision of a foreign court or arbitral tribunal may be submitted to compulsory enforcement within three years from the moment that the decision came into legal force. If this time period was missed due to a valid reason, it may be restored by a court of the Republic of Kazakhstan according to the proceedings provided for by Article 128 of this Code."

[4] “The appeals instance court, when examining the partial appeal against the decision of the first instance court, came to the conclusion that according to Article 425-1 Civil Procedure Code,³ the Claimant has a right to file a request for the compulsory enforcement of an arbitral award in the court at the place where the dispute was examined by the arbitral tribunal.

[5] “The court of the cassation instance recognized that the view of the appeals instance on the application of Article 425-1 Civil Procedure Code was wrong and came to the conclusion that the court at the place of the arbitration must decide on the request for the compulsory enforcement of the arbitral award.

[6] “When examining the request of the Claimant, the lower courts applied the applicable provisions of the law and of international agreements of the Republic of Kazakhstan incorrectly.

[7] “According to Article 6 of the Law of the Republic of Kazakhstan “On International Commercial Arbitration”⁴ and Article 7 of the Law of the Republic of Kazakhstan “On Domestic Arbitration”⁵, [the question whether arbitration is domestic or international]

³ Article 425-1 Civil Procedure Code reads:

“(1) If a decision of an arbitral tribunal is not voluntarily complied with within the time period established by it, a party in whose favor the decision of the arbitration was rendered (creditor) has a right to apply to the court at the place of the examination of the dispute by the arbitral tribunal with a request for compulsory enforcement of the decision of the arbitral tribunal according to the rules provided for by this Article.

(2) The duly authenticated original decision of the arbitral tribunal or a duly authenticated copy thereof and the original arbitration agreement or a duly authenticated copy thereof shall be attached to a request for the issuing of an enforcement letter. If the decision of the arbitration or the agreement is made in a foreign language, the party must submit a duly authenticated translation of such document into the state language or the Russian language.”

⁴ Article 6 of the Law of the Republic of Kazakhstan “On International Commercial Arbitration” in force at the time of the decision read:

“Submitting a Dispute to Decision by Arbitration

(1) A dispute may be submitted to examination by arbitration if there is an arbitration agreement between the parties.

(2) An arbitration agreement may be concluded by the parties with regard to disputes which have arisen or may arise between the parties out of any specific civil law contract.

(3) An arbitration agreement with regard to a dispute which is under examination in the competent court may be concluded until said court has made a decision in the dispute. In that case, the competent court shall render a decision on leaving the request without examination.

(4) Disputes arising out of civil law contracts between natural persons and commercial and other organizations may be submitted to arbitration by agreement of the parties if at least one party is a non-resident of the Republic of Kazakhstan.

(5) If the parties have not agreed differently, when submitting a dispute to a permanently operating arbitration court, the rules of the permanently operating arbitration court shall be considered an inseparable part of the arbitration agreement.

(6) The effect of an arbitration agreement may be cancelled by an agreement of the parties in the same way as it had been concluded.

(7) An arbitral tribunal has no jurisdiction over disputes which touch upon the interests of minors or persons who have, in accordance with the law, been declared to be incapable of acting.”

⁵ Article 7 of the Law of the Republic of Kazakhstan “On Domestic Arbitration” in force at the time of the decision read:

“Submitting a Dispute to Decision by Domestic Arbitration

(1) A dispute may be submitted to examination by domestic arbitration if there is an arbitration agreement between the parties and in accordance with the legislation of the Republic of Kazakhstan on commodity exchanges.

(2) An arbitration agreement may be concluded by the parties with regard to disputes which have arisen or may arise between the parties in connection with any specific legal relationship.

(3) An arbitration agreement on the decision of a dispute out of a contract whose conditions have been determined by one of the parties in forms or in other standardized documents and could be accepted by the other

depends on the status of the parties to the dispute. If a party to the dispute is a non-resident of the Republic of Kazakhstan, the arbitral tribunal shall acquire the status of international commercial arbitration and shall examine the dispute by applying national or foreign laws. If the parties to the dispute are residents of the Republic of Kazakhstan, such dispute shall be examined by the arbitral tribunal by applying the provisions of national laws.

[8] “The handling of compulsory enforcement on the territory of the Republic of Kazakhstan of a final international commercial arbitral award and a [domestic award] differs under the mentioned laws, the international agreements of the Republic of Kazakhstan, and the provisions of the Civil Procedure Code.

[9] “As the Arbitration at the Moscow Chamber of Commerce and Industry examined a dispute which arose out of an undue performance of contractual obligations between legal persons from Russia and Kazakhstan under the laws of the Russian Federation, that Arbitration acquired the status of international commercial arbitration.

[10] “In accordance with Article III and IV [New York Convention], Article 35 UNCITRAL Model Law and Article 32 of the Law of the Republic of Kazakhstan “On International Commercial Arbitration”⁶, a final arbitral award shall be recognized as binding. The recognition and compulsory enforcement of an international commercial arbitral award is carried out in accordance with the civil procedure laws of the Republic of Kazakhstan.

[11] “[The Claimant shall submit] a duly authenticated copy of the international commercial arbitral award and the original arbitration agreement or a duly authenticated copy thereof together with the request, [and furthermore,] a document on the payment of the state fees at the amount established by Article 535(1)(11) of the Code of the Republic of Kazakhstan “On Taxes and Other Binding Payments to the Budget (Tax Code)”⁷.

party by means of accession to a whole suggested contract (contract by accession) is valid if such agreement has been concluded after the grounds for making the claim have arisen.

(4) An arbitration agreement with regard to a dispute which is under examination in the competent court may be concluded until said court has made a decision in the dispute.

(5) A domestic arbitral tribunal does not have jurisdiction over disputes which touch upon the interests of the state, of state enterprises, minors, persons who have, in accordance with the law, been declared to be incapable of acting, persons who are not participants of the arbitration agreement, and over disputes out of contracts over the performance of services, the completion of works, the production of goods by the subjects of original monopolies or the subjects which occupy a dominating position on the market of goods and services, and also not in cases over the bankruptcy or rehabilitation, with the exclusion of the cases provided for by the laws of the Republic of Kazakhstan.”

⁶ Article 32 of the Law of the Republic of Kazakhstan “On International Commercial Arbitration” in force at the time of the decision read:

“Recognition and Enforcement of Arbitral Awards in the Republic of Kazakhstan

An arbitral award shall be recognized as binding and, upon submission of a written request to the competent court, be enforced in accordance with the civil procedure legislation of the Republic of Kazakhstan.”

⁷ Article 535(1)(11) Code of the Republic of Kazakhstan “On Taxes and Other Binding Payments to the Budget (Tax Code)” reads:

“Tariffs of State Fees in Courts

(1) When submitting to a court statements of claim, requests in a special procedure, requests (appeals) in cases of a special procedure, requests on making a judicial order, requests for issuing a copy of an enforcement letter, requests on issuing enforcement letters for international and domestic arbitral awards and foreign court decisions, requests on a repeated issuing of a copy of judicial acts, enforcement letters and other documents, state fees shall be taken at the following amounts:

...

11. For a request on issuing a copy of an enforcement letter and requests on issuing enforcement letters for international and domestic arbitral awards and foreign court decisions – 500 per cent;”

[12] “It is not required to submit other documents for the examination of a request for the recognition and enforcement of an international commercial arbitral award in the Republic of Kazakhstan.

[13] “The request shall be submitted to the court at the seat of the debtor. The recognition of the international commercial arbitral award shall be carried out by the court if [it is presented with] the duly authenticated copy of the award and the original arbitration agreement between the Claimant and the debtor or a duly authenticated copy thereof. The compulsory enforcement of an international commercial arbitral award which has been recognized by a court in the Republic of Kazakhstan is carried out in accordance with Articles 236, 425-2 and 425-3 of the Civil Procedure Code and the Law "On the enforcement procedure and the status of judicial enforcers".

[14] “The argument that a court in the Russian Federation at the seat of the Arbitration must issue an enforcement document for the enforcement of the award of the Arbitration is in contradiction to the above-mentioned international treaty and the laws of the Republic of Kazakhstan.

[15] “The courts of the appellate and cassation instances did not correct the incorrect interpretation and application of the applicable laws and international treaties of the Republic of Kazakhstan by the court of first instance.

[16] “The arguments contained in the protest of the state attorney on the provisions of the [Minsk] Convention of 22 January 1993 “On Legal Aid and Legal Relations in Civil, Family and Criminal Cases” are not taken into consideration by the supervision court. That international agreement of the Republic of Kazakhstan, just as the [Kishinev] Convention “On Legal Aid and Legal Relations in Civil, Family and Criminal Cases” of 7 October 2002, regulate questions of the enforcement of judicial acts of the national court system on the territory of the contracting States of the convention, but not questions of the enforcement of international commercial arbitral awards.

[17] “The court at the supervision instance does also not take into account the arguments presented in the protest on the possibility of applying Article 155 Civil Procedure Code. That provision of procedural law is applied by a court only when making a procedural decision on the content of the claim or the request in a dispute which is subject to examination in a court [that belongs to] the court system of the Republic of Kazakhstan. When examining the question whether to issue an enforcement document ..., the court shall make one of the procedural decisions foreseen by Article 425-2 or 425-3 Civil Procedure Code.

[18] “The examination of a request on the recognition of an international commercial arbitral award and its enforcement in the territory of the Republic of Kazakhstan belong to the exclusive jurisdiction of the court of first instance. Yet the court of first instance did not establish or duly apply the applicable provisions of the international agreements of the Republic of Kazakhstan and of the Civil Procedure Code.

[19] “The Claimant's request for the recognition and enforcement of the Arbitration's award is to be remanded for a new examination to the Specialized Inter-Rayon Economic Court of the City of Astana.

[20] Guided by Articles 384(3), 398(4)(2), 400, the supervision judicial college

decided

To reverse the decision of the Specialized Inter-Rayon Economic Court of the City of Astana of 20 September 2011, the decision of the Appellate Judicial College of the City Court of Astana of 1 February 2012, and the decision of the Cassation Judicial College of the City Court of Astana of 15 March.

To remand the materials of the request of OOO ChKZ-Eksport on the recognition and enforcement of the award of the Arbitration of the [Moscow Chamber of Commerce and Industry] of 14 September 2010 in the Republic of Kazakhstan to the Specialized Inter-Rayon Economic Court of the City of Astana for a new examination.

To satisfy the protest of the general state attorney of the Republic of Kazakhstan.

This decision becomes final and binding in the moment it is made as is not subject to any further appeal or protest.