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Development of the Institution of Arbitration in Kazakhstan: Problems of Theory and Practice

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Abstract:

The article discusses current issues of the application of the legislation of Kazakhstan on arbitration, provides statistical data on the results of consideration of cases on the cancellation of arbitral awards, on the enforcement of arbitral awards and identifies some problems of theory and practice in this area.
The aim of the study is a comprehensive analysis of judicial practice on the abolition of arbitral awards, as well as issues related to their enforcement, proposals have been developed on the formation of a uniform judicial practice and improvement of legislation. The work uses general scientific and special research methods: analysis, synthesis, abstraction, induction, deduction, logical and comparative legal method. As a result of the study, the author came to the conclusion that, in general, the norms of the Law of Kazakhstan 'On Arbitration', the Civil Procedure Code of Kazakhstan on the procedures for canceling arbitration decisions, recognition and enforcement of decisions of foreign arbitrations are consistent with international treaties.

Keywords: arbitration; international arbitration; arbitral award; alternative dispute resolution.

JEL Classification: K10; K40.

Introduction

The rapid development of world trade in the second half of the twentieth century, the significant expansion of the circle of its participants, as well as the obvious advantages of arbitration as a means of resolving international

commercial disputes stimulated the development of international legal infrastructure to expand the use of arbitration. Both interstate and non-governmental organizations took part in this activity.

Among the many problems currently being resolved by the international community in order to create the most favorable environment for mutually beneficial economic cooperation, an important place is the establishment of strong foundations for regulating the resolution of disputes and disagreements that arise in the process of international economic turnover.

Recent decades have clearly demonstrated that arbitration is the most appropriate way to resolve international commercial disputes, since it is this type of resolving disagreements between partners from different countries, which in modern conditions often represent different legal cultural traditions, to the greatest degree ensures parity in the use of existing legal instruments allowing counterparties to effectively defend their interests in the framework of the relevant procedural forms.

1. Literature Review

Arbitration in Kazakhstan is an independent, independent judicial authority of Kazakhstan for the resolution of disputes arising in economic relations and in the process of managing them within the competence and in the manner established by the Constitution of Kazakhstan and the laws of Kazakhstan.

The development of arbitration as an alternative to the state court in all countries is seen as a positive phenomenon, contributing, in particular, to a significant relief of the burden on state justice in the field of resolving conflicts arising between participants in civil turnover. In addition, in the field of foreign economic relations, international commercial arbitration is seen as an important element that effectively contributes to the development of international cooperation.

Arbitration as an alternative way to resolve commercial disputes in Kazakhstan has been used for more than twenty years. And for this comparatively short time, he managed to go through several stages in his development, moreover, completely diametrical – from the stage of origin and planned development to the stage of secret and explicit destruction of arbitration courts, from the stage of adoption of the first arbitration laws, to their consolidation.

The relevance of the study lies in the fact that strengthening the legal status and authority of arbitration in Kazakhstan, expanding the scope of their activities, improving mechanisms for alternative dispute resolution are urgent problems. The study of these issues is connected not only with the need to improve the national legal system (the prospects for a successful solution are obvious: reducing the burden on state courts, etc.), but also with the fulfillment of the republic's international obligations and ensuring its high political image in the foreign arena.

The first President of Kazakhstan N.A. Nazarbayev, in his article 'Social Modernization of Kazakhstan: Twenty Steps to a General Labor Society,' draws attention to the need to build an effective multi-level mechanism for regulating contradictions in the sphere of labor, civil, family, and other legal relations' (Nazarbayev 2012)

Exploring foreign legal practice, Sabikenov S.N. claims that the trial exists to make a decision, which is considered the only possible from the point of view of the law, while taking into account the personal interests and desires of each of the parties according to the circumstances of the elapsed time (Sabikenov 2015).

Greshnikov P. in his publications says that in sovereign Kazakhstan since 1993 arbitration courts, having established themselves as a reliable, impartial and effective way to resolve economic disputes, have become an integral part of the judicial practice of the Republic (Greshnikov 2015).

The institute of arbitration (arbitration) in the western states has developed over the centuries. Aristotle also wrote: 'The arbiter gravitates to justice, the judge to the law; the arbitration court was created so that justice could be implemented'.

The arbitration court is translated into English as arbitration, therefore the concepts of 'arbitration court' and 'arbitration' are one and the same. Below we will present the statements of scientists in relation to the arbitration courts, respectively, these statements also apply to arbitration.

According to O.Yu. Skvortsov, 'the most important requirement that an arbitrator must meet is his ability and ability to provide an impartial, independent, fair and lawful resolution of the dispute referred to him' (Skvortsov 2017).

Also, the statement by O.Yu. Skvortsov on how 'the state judicial system, performing the functions of the main, most reliable legal mechanism by which rights are ensured and fairly distributed, is extremely costly, expensive and inflexible. Thus, there is a global objective need for the existence of competing legal institutions, the economic value of which would effectively compete with the central link of the jurisdictional system – state courts' (Skvortsov 2017).

The arbitration proceedings led to a special procedure for the interaction of arbitration (arbitration) courts and state courts, which is regulated in normative legal acts and exists on the principles of legality, mutual recognition of procedural acts and actions, and limited control by state courts.

The existence and effective functioning of the arbitration is impossible without the support of the state, since it is the state in the person of the court that ensures the rights and legitimate interests of participants in the arbitration proceedings and makes it possible to execute arbitral awards. As a rule, the interaction of state courts in relation to arbitration is implemented through assistance and control.

Assistance to arbitrations in the implementation of activities for the consideration and resolution of legal disputes is implemented in the following areas:

(1) ensuring the formation of the composition of the arbitration;
(2) taking measures to secure the claim;
(3) assistance in obtaining evidence.

The control function is the second way of interaction between the state and arbitration. According to E.V. Bruntseva, in world practice there are several models of judicial control over the arbitral award and the place of its delivery (Bruntseva 2018):

(1) verification of the decision on the merits (for the correct application of substantive and procedural law and the establishment of facts that are significant for the case, as well as the presence of procedural violations), i.e. actually appeal the decision (verification of arbitral awards in full);
(2) verification of the decision on the subject of the composition of the arbitration tribunal and significant procedural violations committed during the consideration of the dispute (limited control);
(3) the absence of any judicial review;
(4) a mixed model, according to which the arbitral award can be canceled on a strictly limited basis of appeal on appeal in a court of general jurisdiction. This model is used in England and Switzerland. In England, the court can appeal the arbitral award on legal issues in cases where the parties to their agreement (in writing) did not exclude this possibility. In Switzerland, the parties are generally entitled to exclude the judicial review of the arbitral award, conducted as a general rule for significant violations.

Each state chooses its concept of arbitration and its own way of controlling the arbitral award.

T.N. Neshataeva believes that for the effective joint work of state and arbitration courts, a mechanism for monitoring the observance of the rights of the parties in arbitration is vitally important, which allows for taking into account both private and public interests. In her opinion, such a mechanism is the limited control of state courts in relation to arbitration courts, which means the right of a state court to consider and make a decision on fundamental issues of arbitration, affecting the initial provisions of the right to protect civil rights upon application of a party (Neshataeva 2001).

So M.K. Suleimenov believes that the concept of public order is often identified with legality (Suleimenov 2018). The fact is that in Kazakhstan for a long time there was a risk of arbitration being annulled by a court of arbitration. It was a question of the notorious principle of legality and in order to establish a contradiction of the arbitration court decision to any regulatory legal act, the state court should verify such a decision on the merits. In other words, the state court turns into a higher court, verifying the legality of the arbitration court decision on the merits and decides, depending on its own assessment: to maintain or not to maintain the legal force of such a decision. In his opinion, in practice this means that the state court can cancel the decision of the arbitration court in case of the slightest, in the opinion of the state court, violation of any order of the ministry or any decision of the district akim. Not to mention the presence of a large corruption component, this contradicts the main goal of introducing the arbitration court into the legal system of the state, as well as the basic principle of the arbitration proceedings, that it cannot be reviewed in essence. Arbitration proceedings around the world are built on this principle and this is prohibited in all international documents.

However, we cannot agree with this position of M.K. Suleimenov, since we believe that the main role of a state court in arbitration is to ensure its effectiveness as a way to resolve a dispute between the parties. We believe that the state needs mixed control in relation to arbitration, since this is important for observing the rights and interests of the parties to the arbitration and verifying the correct application by the arbitrators of substantive and procedural law (if this is indicated in the agreement) will lead to the observance of the rule of law and stability acts. As practice shows, not all arbitrations are ready to consider disputes in good faith, fairly, taking into account all aspects of the law. In the absence of any control in relation to arbitration, there is a very high risk of corruption origin, since the decisions of the arbitration will not be appealed or checked.

2. Materials and Methods

After gaining independence and the country's transition to a market economy, arbitration and arbitration courts were first established in Kazakhstan in 1993.

The arbitration courts acted on the basis of the Law of Kazakhstan dated January 17, 1992. 'On the Arbitration Court of Kazakhstan', the Law of Kazakhstan 'On the Procedure for the Settlement of Economic Disputes by Arbitration Courts'.

Of Kazakhstan 'dated January 17, 1992, Decisions of the Supreme Council of Kazakhstan dated January 17, 1992 'On the entry into force of the Law of Kazakhstan' On the Arbitration Court of Kazakhstan 'and the Law of Kazakhstan' On the Procedure for the Settlement of Economic Disputes by the Arbitration Courts of Kazakhstan '; Arbitration courts - on the basis of the Model Regulation on the Arbitration Court, approved by the Cabinet of Ministers of Kazakhstan dated May 4, 1993. Number 356

Thus, in the history of the development of legislation on arbitration (arbitration courts) in Kazakhstan, three stages can be distinguished (Table 1).

Table 1. Stages of development of the legislation on arbitration (Arbitration courts) in Kazakhstan

Stages	Years	Law	Remarks
Arbitration	1993 – 1999	The Model Regulation on the Arbitration Court, approved by the Cabinet of Ministers of Kazakhstan dated May 4, 1993, was in force. Number 356 The first arbitration courts were established in Kazakhstan in 1992-1993 - this is the Arbitration Commission under the Union of Chambers of Commerce and Industry of Kazakhstan and the International Arbitration Court 'IUS'	Arbitration proceedings slowly but steadily developed, problems, if any, were not the most acute
The stage of the collapse and destruction of arbitration courts	1999 – 2004	After the adoption of the Code of Civil Procedure, the judicial practice went to pieces. To remedy the situation, the Supreme Court adopted Normative Decision No. 14 of October 19, 2001, which ordered the courts to issue rulings on the enforcement of decisions of arbitration courts. However, the Prosecutor General's Office and the Ministry of Justice opposed this decision. As a result, the Supreme Court was forced to suspend its regulation.	Since the new Civil Procedure Code of Kazakhstan adopted on July 1, 1999 did not contain a norm providing for the enforcement by state courts of decisions of arbitration courts.
Adoption of Arbitration Laws	2005 – 2009	On December 28, 2004, the Law on Arbitration Courts and the Law on International Commercial Arbitration were adopted. February 5, 2010 by the Law of Kazakhstan 'On Amendments and Additions to Certain Legislative Acts of Kazakhstan on the Immunity of the State and its Property, Improving the Activities of Arbitration Courts and International Commercial Arbitration' On April 8, 2016 No. 488-V, a new Law of Kazakhstan 'On Arbitration' was adopted, which combined the two previously existing laws.	The Laws on Arbitration Courts and International Commercial Arbitration have been amended and supplemented to improve the procedure for conducting, first and foremost, arbitration proceedings. Combined the two previous laws
Improvement stage	2009 – 2014	So, in the Law on Arbitration Courts five times - by the Law of Kazakhstan dated 04.05.2009 No. 156-IV 3PK, Law dated 05.02.2010 No. 249-IV 3PK, Law dated 02.17.2012 No. 564-IV 3PK, Law of July	Changes and additions were made to them several times.

Stages	Years	Law	Remarks
		10, 2012 No. 32-V SAM and Law of July 3, 2013 No. 125-V SAM. Changes and additions to the Law on Arbitration were made three times - by the Law of Kazakhstan dated 05.02.2010 No. 249-IV 3PK, the Law dated 03.07.2013 No. 125-V 3PK and the Law dated 02.07.2014 No. 225-V. On April 8, 2016 No. 488-V, a new Law of Kazakhstan 'On Arbitration' was adopted, which combined the two previously existing laws.	Combined the two previous laws
Project development Commercial Arbitration Act Abolished	Under development	The draft of the new Law of Kazakhstan 'On Commercial Arbitration' (hereinafter - the bill), as well as the draft of the Law of Kazakhstan 'On Amendments and Additions to Some Legislative Acts of Kazakhstan on Commercial Arbitration' (hereinafter - the accompanying bill).	The bill aims to consolidate special laws governing the activities of international arbitration and the arbitral tribunal in order to ensure a unified approach to their legal regulation.

Source: Compiled by authors.

It should be noted that the popularity of arbitration, as well as the recognition of its importance by official bodies of various states, led not only to the regulation of commercial arbitration at the international level, but also contributed to the adoption of internal legislative acts on this issue, which is of great importance for the development of arbitration practice.

Today, arbitration is an alternative form of protection of civil law, used along with the judicial form of protection of rights (part 1 of article 6 of the Civil Code of Kazakhstan).

In turn, arbitration is not part of the justice system. In this regard, it should be borne in mind that the transfer of a dispute by agreement to arbitration is a form of implementation of the principles of disparity, freedom of contract, and also means that the parties accept the legal risks of the agreement based on the results of the arbitration.

In general, the general legal basis for the interaction between the court and the arbitration is the Civil Procedure Code of Kazakhstan dated October 31, 2015 (hereinafter the Code of Civil Procedure) [13], the Law of Kazakhstan dated April 8, 2016 'On Arbitration', as well as international treaties, ratified by Kazakhstan.

As mentioned above, the creation of the Law on Arbitration was preceded by disputes, discussions, a lot of work was done, in connection with which, I would like to note the positive aspects of the law:

(1) consolidation of the norm of two previous laws 'On Arbitration Courts' and 'On International Arbitration'. Thus, regardless of who the dispute is being considered between (residents of Kazakhstan or non-residents), the procedures have become unified, which has resolved the issue of repeating and duplicating the same rules;

(2) the absence in the new law of such a ground for appeal as 'contrary to the principle of legality', since it does not comply with the basic principle of arbitration, in which the decision of the arbitration cannot be reconsidered on the merits;

(3) strengthening the principle of autonomy of the arbitration agreement. It was enshrined that the cancellation, amendment or recognition of an invalid arbitration clause does not in itself lead to the termination, amendment or invalidation of the main contract or vice versa;

(4) inclusion in the Law 'On Arbitration' and the Civil Procedure Code of the Russian Federation such a thing as 'assistance in obtaining evidence' through a state court, and the issue of reimbursement of expenses of the parties incurred as a result of applying to arbitration or when applying for a writ of execution was regulated.

November 30, 2016 a significant event for the entire arbitration community of Kazakhstan - the creation of the Arbitration Chamber. The basis for its creation were the provisions laid down in the Law. The Chamber is formed as an independent, non-profit organization, which is a voluntary association of permanent arbitrations and arbitrators. Its goal is to create favorable conditions for the development of the arbitration movement in Kazakhstan and, of course, support the members of the chamber. The organization's tasks include: interacting with government bodies and organizations, assisting in the development of draft laws related to the activities of arbitration, raising

the professional qualifications of arbitrators, organizing education and training, establishing contacts and studying the experience of arbitration in foreign countries. The main task of the Chamber is to build a viable system of arbitration courts in our country.

According to the review of the arbitration practice of Kazakhstan International Arbitration on average for the period 2014-2017. KMA received about 50-60 lawsuits per year, of which:

- about 10 – 12 claims were returned on the basis of subparagraph 2) paragraph 1 of Art. 27 'Return of the statement of claim' of the Law on Arbitration (filing a claim with the arbitration, not provided for in the arbitration agreement);
- about 3 – 5 cases remained without movement in accordance with paragraph 2 of Art. 22 'Arbitration Costs' of the KIA Rules (due to non-payment of registration and arbitration fees).

The vast majority of plaintiffs and defendants are legal entities – 97%, and only 3% of the parties are individuals (individual entrepreneurs).

The so-called internal disputes (between Kazakhstan legal entities) account for about 29% of cases examined by the KIA for the indicated period (Almaty, Astana, Aksu, Aktau, Aktobe, Atyrau, Karaganda, Kostanay, Pavlodar, Semey, Stepnogorsk, Taraz, Ust- Kamenogorsk, Shymkent, Ekibastuz).

The vast majority are international disputes (involving foreign legal entities) – 71%. Nationality of the disputing parties: Australia, Algeria, Belarus, the British Virgin Islands, Great Britain, Germany, Hong Kong, Italy, China, South Korea, Kyrgyzstan, Lithuania, Liechtenstein, the Netherlands, United Arab Emirates, Panama, Poland, Russia, Commonwealth of the Bahamas, USA, Tajikistan, Turkey, Uzbekistan, Ukraine, Finland, Switzerland, Estonia, etc.

Most disputes were considered by the Composition of 3 arbitrators, 72%, and only 28% of the cases by the sole Arbitrator, despite the provisions of paragraph 1 of Art. 4 Provisions on arbitration costs and fees.

The price of the considered KMA for the period from 2014 to 2017 claims ranged from 10 thousand (the minimum price of one lawsuit) to 7 million US dollars (the maximum price of one lawsuit).

The term for consideration of cases is from two months from the moment the arbitral tribunal is formed to 10-12 months for the most complex cases (Popov 2018).

Statistical data on the quantity and quality of the consideration of cases of these categories are based on the data of EAIAS and AIS TURELIK.

On applications for canceling arbitral awards in the generalized period, a total of 1,729 cases were completed, of which 1,612 were issued with a ruling, including 1,364 with the satisfaction of the application, 121 with the refusal of the application; discontinued – 13, without consideration – 83.

Of these, in 2016 the number of completed cases amounted to 464, of which 443 or 95.4% were passed with the determination, including 283 with the satisfaction of the application, 31 with the refusal of satisfaction, 5 with the cessation of proceedings leaving the application without consideration – 12 cases.

In 2017, the number of completed cases amounted to 991, of which 934 or 94.2% were passed with the determination, including 858 with the satisfaction of the application, 73 with the refusal of satisfaction, 7 with the cessation of the proceedings, and the application was left 40 cases without consideration.

In the 1st quarter of 2018, the number of completed cases amounted to 274, of which 235 or 69.8% were issued with a determination, including with the satisfaction of the application – 223, with the refusal of satisfaction – 17, with the termination of the proceedings – 1, with leaving the application without consideration – 31 cases.

From the above statistics it follows that the largest number of cases in this category in this period was completed by the district and equivalent courts of the city of Almaty (1,563), as well as Karaganda (65), West Kazakhstan (56) regions.

According to applications for the recognition and enforcement of arbitral awards in the generalized period, a total of 20 132 cases were completed, of which 19 968 were issued with a ruling, including 19 286 satisfied with the application, 671 denied the application; discontinued – 0, left without consideration – 162.

Of these, in 2016 the number of completed cases amounted to 6,706, of which with the determination of the case – 6,701 or 99.9%, including with the satisfaction of the application – 6,591, with the refusal of satisfaction – 110, with the termination of the proceedings – 0, with the application being left without consideration - 5 cases.

In 2017, the number of completed cases amounted to 11,123, of which 10,998 or 98.8% were issued with a determination, including 10,499 with the satisfaction of the application, 489 with the refusal of satisfaction, 0 with the termination of the proceedings, with the application being left without consideration – 123 cases.

In the 1st quarter of 2018, the number of completed cases amounted to 2,303, of which, with the determination, 2,269 or 98.5%, including with the satisfaction of the application – 2,196, with the refusal of

satisfaction – 72, with the termination of the proceedings – 0, with the application being left without consideration – 34 cases.

From the above statistics it follows that the largest number of cases in this category in this period was completed by the district and equivalent courts of the city of Almaty (11,802), as well as West Kazakhstan (3,291), Karaganda (2,866) regions (Table 2).

Table 2. Statistics of the results of consideration of cases on cancellation and enforcement of arbitral awards for 2016, 2017 and the 1st quarter of 2018

Index	2016	2017	2018 - 1st quarter
The results of consideration of cases on the abolition of arbitral awards			
Received applications	605	1,274	383
Total over	464	991	274
Reviewed	1	3	5
Determination Review	443	934	235
Satisfactorily	283	858	223
Denied	31	73	17
Termination of proceedings	5	7	1
Case without consideration	12	40	31
The case is for jurisdiction	3	7	1
The results of the consideration of cases on the enforcement of arbitral awards			
Received applications	7,306	11,600	3,014
Total over	6,706	11,123	2,303
Reviewed	0	0	0
Determination Review	6,701	10,998	2,269
Satisfactorily	6,591	10,499	2,196
Denied	110	489	72
Termination of proceedings	0	0	0
Case without consideration	5	123	34
The case is for jurisdiction	0	2	0

Source: Compiled by authors based on the source: Bulletin of the Supreme Court of Kazakhstan.

According to Table 2, the rates of receipt of applications for a generalized category over two years and three months increase.

It should be noted that the popularity of arbitration, as well as the recognition of its importance by official bodies of various states, led not only to the regulation of commercial arbitration at the international level, but also contributed to the adoption of internal legislative acts on this issue, which is of great importance for the development of arbitration practice.

The problems of state judicial systems related to budget financing shortages, court overload of cases, the red tape of their consideration, their politicization, and in some cases the judges' corruption, make us look for more effective ways out of conflict situations. In this regard, the author made a Swot analysis, where he identified the strengths and weaknesses, as well as opportunities and development prospects (Table 3).

Table 3. Court of Arbitration Swot Analysis

Strengths	Opportunities
▪ the Arbitration Institute does not function in a vacuum, but in inextricable connection with the surrounding reality; ▪ customer focus; ▪ the opportunity to use the experience of well-known arbitration institutions and take the best from it, as well as more freely introduce and use innovations; ▪ arbitration is not only a method of alternative dispute resolution (ARS), but also a kind of institution of self-regulation of civil society; ▪ low administrative costs and a flexible approach to structuring the fees of arbitrators; ▪ wide opportunities for the consolidation of processes; ▪ confidentiality of litigation related to arbitration proceedings.	▪ the independence and impartiality of the arbitral tribunal provided by the procedure for the election (appointment) of arbitrators; - participation as arbitrators of highly qualified specialists; ▪ the ability of the parties to determine the competence and procedure for resolving the dispute; ▪ ensuring an atmosphere of cooperation, that is, the conclusion of an amicable agreement between them and the preservation of the spirit of trust and cooperation for the future as a result; ▪ the finality of the arbitral award, when no other body has the right to review the original arbitral award; ▪ binding arbitral award for the parties and warranty; ▪ - 'camerality' of the dispute
Weaknesses	Threats
▪ deprived of the attributes of state power, and therefore cannot forcibly call witnesses on its own behalf, demand documents, materials, conclusions from state bodies or third parties, seize property in order to secure the claims of the party that has applied to the arbitration.	▪ experience and qualifications

Source: Compiled by authors.

Based on the study, we note that Kazakhstani international arbitration is one of the most dynamically developing arbitration institutions in the countries of the Central Asian region, as evidenced by the constant increase in the number of disputes that it considers, as well as the quality of disputes. Recently, more and more legally very complex disputes have arisen that require arbitrators of a high level of specialization (Minakov 2016). Today it is quite obvious that the ability to use international arbitration as a means of resolving disputes with its inherent flexibility and dynamism contributes to the ever more energetic involvement of new participants in the international economic turnover.

3. Research Results

According to international law and national law, arbitration may operate in the form of a standing body or being created by the parties to resolve a separate dispute. There are 'domestic' arbitrations created and acting on the basis of the Law of Kazakhstan 'On Arbitration', as well as foreign ones, the status of which, as a rule, is determined by the law of the country at the place of creation of the arbitration.

From the preamble and paragraph 2 of Article 4 of the Law on Arbitration, it follows that this legal act regulates the activities of permanent arbitrations formed in accordance with the legislation of Kazakhstan and created by the parties to resolve a specific dispute (*ad hoc*).

Issues of the enforcement of decisions of national arbitrations, as well as the annulment of their decisions are regulated in the Code of Civil Procedure by chapter 20 'Enforcement of an arbitral award' (Articles 253 – 255) and chapter 56 'Proceedings on a motion to cancel arbitral awards' (Articles 464 – 465).

The basis for the international legal interaction of state courts with foreign arbitrations is: the New York Convention (1958); European Convention on Foreign Trade Arbitration (Geneva 1961); The Washington Convention of 1965 'On the Procedure for the Settlement of Investment Disputes between States and Foreign Persons'.

The provisions of the 1958 New York Convention apply to the recognition and enforcement of foreign arbitral awards, as well as arbitral awards that are not considered 'internal' to the state where recognition and enforcement is sought (paragraph 1 of the Convention).

It should be noted that in international practice, the category of 'domestic' arbitration decisions is even classified as reasonably related to a foreign state (for example, a dispute between local companies subject to foreign law; a dispute between two residents of a country resolved by foreign arbitration, etc. d.).

The New York Convention does not provide provisions for the suspension or reversal of foreign arbitral awards.

This Convention also does not contain the very definition of an award. In international practice, criteria for an arbitral award have been developed. It is believed that the arbitral award is determined not so much by the name of the act as by its compliance with such conditions as: (1) the decision of the arbitrators; (2) the final nature of the resolution of claims; (3) the binding strength of the decision.

Subject to the specified conditions, a preliminary or partial award of the arbitration, as well as a determination or other act of arbitration, having as its subject the approval of the terms of the agreement of the parties on the settlement of the dispute, may be recognized as subject to recognition and enforcement of the arbitral award.

The procedures for the enforcement of decisions of Kazakhstan arbitration and foreign arbitration have common similarities.

In accordance with paragraph 3 of Article 55 of the Law on Arbitration, an application for the enforcement of an arbitral award is submitted to the court in accordance with the civil procedural legislation of Kazakhstan.

An application for the enforcement of an arbitral award that has not been executed within the time limit set forth therein may be submitted by the arbitral tribunal in whose favor the arbitral award (recovered) has been submitted to the court at the place of arbitration or at the place of residence of the debtor or at the location of the legal authority persons, if the place of residence or location is unknown, then at the location of the debtor's property (Part 1 of Article 253 of the Civil Procedure Code).

A similar provision is provided for in Part 1 of Art. 503 Code of Civil Procedure in respect of applications for the recognition and enforcement of decisions of foreign arbitrations.

It should be noted that the jurisdiction of such statements by state courts is determined mainly correctly, based on the provisions of Article 26, 27 Code of Civil Procedure, delineating the consideration of civil cases between district (city) courts and specialized inter-district economic courts.

There is also a general rule on the timing of applications for enforcement of arbitral awards, regardless of territorial status, within three years from the date of expiration of the term for voluntary execution (part 3 of article 253, part 3 of article 503 of the Civil Procedure Code).

The following must be attached to the application for the issuance of a writ of execution for the award of arbitration: the original or a copy of the arbitration award, certified by the head of the arbitration or by a notary public; original or notarized copy of the arbitration agreement concluded in the manner prescribed by law.

A similar provision is provided for in Article 4 of the New York Convention. However, if the decision of the foreign arbitration or the arbitration agreement is not set forth in the official language of the country where the recognition and enforcement of this decision is sought, the party that requests recognition and enforcement of this decision shall submit a translation of these documents into that language. The translation is certified by an official or sworn translator, or by a diplomatic or consular post.

The provisions of paragraphs 1, 3 of Article 1 of the New York Convention allow the applicability of this convention with respect to foreign arbitral awards made in any foreign state, whether it is a contracting state or not. An exception may be made in relation to disputes arising from contractual or other legal relations considered to be commercial under the national law of the state making such a declaration on the basis of Article 1 of the Convention.

The Law 'On Arbitration' does not prohibit the creation of permanent arbitrations in Kazakhstan with the name 'Arbitration Court' in their name. However, the use of the phrase 'Arbitration Court' may mislead interested parties regarding its legal nature.

It should be noted that arbitration courts, in accordance with Article 1 of the Federal Constitutional Law of April 5, 1995 'On Arbitration Courts in the Russian Federation', are federal courts and are part of the judicial system of the Russian Federation. The arbitration courts of the Russian Federation administer justice by resolving economic disputes and considering other cases that fall within their competence by the Federal Constitutional Law, the Arbitration Procedure Code of the Russian Federation and other federal laws adopted in accordance with them. In Kazakhstani legislation, the concept of 'arbitration courts' is not used as such in the normative acts; the term 'arbitration' is used to refer to the arbitration court, which, in turn, is not included in the system of state courts. As the judicial practice shows, there is an erroneous confusion of the concepts of arbitration and arbitration court. In this regard, on the recognition and enforcement of decisions of arbitration courts of the Russian Federation, which are foreign state courts, the provisions of the New York Convention on the recognition and enforcement of foreign arbitral awards not subject to.

4. Denial of Recognition and (or) Enforcement of an Arbitral Award,

Refusal to Issue a Writ of Execution on Arbitral Awards

The legislation of Kazakhstan limits the grounds entailing the cancellation or refusal to execute arbitral awards and this is not connected with the verification of the arbitral awards on the merits of the dispute. It is impossible to cancel, for example, an arbitral award on the grounds of incomplete investigation of the circumstances of the case, incorrect assessment of evidence or the application of the wrong law.

The state court can only verify the arguments of the parties that disagree with the decision regarding the arbitration jurisdiction and proceedings. Cancellation of the decision or refusal to execute it is allowed when the dispute is not subject to arbitration, the party was not notified of the appointment of the arbitrator and the arbitration, the procedure did not comply with the agreement of the parties in other specific cases.

An exhaustive list of such procedural grounds entailing the annulment and refusal to enforce foreign arbitral awards is specified in the 1985 UNCITRAL Model Law on International Commercial Arbitration (hereinafter referred to as the Model Law), as well as in the New York Convention on Recognition and Enforcement foreign arbitral awards.

In fact, the same grounds are duplicated in Articles 52 and 57 of the Law on Arbitration.

Moreover, the norms of the New York Convention and the Law on Arbitration oblige a party submitting a motion to annul an arbitral award or objecting to its enforcement, to provide relevant evidence. If such a request is not contained or evidence is not presented, the court is not entitled on its own initiative to verify and investigate the existence or absence of such grounds.

Article 255 of the Civil Procedure Code provides similar grounds for refusing to issue a writ of execution for the enforcement of an arbitral award.

In all the above cases, the court is exempted from the obligation to collect evidence and if it is not submitted by the party against which the arbitral award has been taken, the relevant decision may be recognized and a writ of execution issued.

At the same time, in domestic judicial practice there are cases when the courts refuse to recognize and enforce arbitral awards on the grounds to be proved by the party, even if the evidence provided for by paragraph 1 of Article 5 of the New York Convention and part 1 of Article 255 of the Code of Civil Procedure is not provided . In such cases, the refusal to recognize and enforce the arbitration, arbitral award violates the important principles of the legality and validity of judicial acts.

Courts, when considering applications for the issuance of a writ of execution on arbitral awards, often seek, on their own initiative, cases from arbitrations, or documents, the requirements of which are not provided for by applicable law.

On its own initiative, a court may refuse to issue a writ of execution only in cases where the recognition and enforcement of an arbitral award is contrary to public policy or when a decision is made on a non-arbitrable dispute (Article 5, paragraph 2, of the New York Convention, part 2 of Article 255 of the Civil Procedure Code).

5. Cancellation of the Award

The decision of the arbitration may be challenged by the party and canceled, as indicated above, in limited cases. Courts of Kazakhstan can only be annulled by decisions of national arbitrations.

The provisions on the procedure for considering applications for canceling an arbitral award and the grounds for cancellation are provided for in Articles 464, 465 of the Civil Procedure Code and Articles 52, 53 of the Law on Arbitration. The grounds for canceling the award are similar to the grounds for refusing recognition and (or) enforcement of the award.

The law sets a deadline for filing an application for the cancellation of an arbitral award, which is equal to one month from the date of receipt of the arbitral award (part 1 of article 464 of the Civil Procedure Code, paragraph 2 of article 53 of the Law on Arbitration). If this period is missed and there is no reason for its restoration, the judge returns the application. In order to prevent abuses of the right to challenge the arbitral award, the courts should exclude an expansive and formal approach to the deadlines for applying for the annulment of arbitral awards.

The grounds for the cancellation of the arbitral award provided for in paragraph 1 of Article 52 of the Law on Arbitration shall be proved by the petitioning party.

An exception is the grounds for canceling the arbitral award provided for in paragraph 2 of Article 52 of the Law on Arbitration, which are subject to determination by the court on its own initiative (the arbitral award is contrary to the public order of Kazakhstan; the dispute over which the arbitral award is made cannot be the subject of arbitration the legislation of Kazakhstan).

Today, the Supreme Court of Kazakhstan, courts of general jurisdiction are forming the practice of applying the provisions of the Law 'On Arbitration' and the provisions of the procedural legislation governing the procedure for performing assistance and control functions in relation to arbitrations. As the data of statistical reporting show, starting in 2016, the state courts of Kazakhstan annually consider more than 400 cases to challenge arbitral awards. In the first half of 2018, the arbitration courts examined 235 cases challenging the decisions of the arbitration.

From the above statistics, it follows that the largest number of cases in this category in this period was completed by the district and equivalent courts of the city of Almaty (1,563), as well as Karaganda (65), West Kazakhstan (56) regions.

From the above statistics it follows that the rates of receipt of applications for the generalized category over two years and three months increase.

6. Public Policy of Kazakhstan

The public policy of Kazakhstan is one of the criteria, the non-compliance with which may serve as the basis for the refusal to recognize and enforce the arbitral award, the cancellation of the arbitral award, or the refusal to issue a writ of execution for arbitral awards.

So, article 255 of the Civil Procedure Code and article 57 of the Law 'On Arbitration' stipulates that the court shall issue a ruling on refusal to issue a writ of execution for the enforcement of an arbitral award if it establishes that the enforcement of this arbitral award is contrary to the public order of Kazakhstan.

In addition, the recognition and enforcement of a foreign arbitral award may be refused if the court finds that the recognition and enforcement of this award is contrary to public policy (subparagraph a) of paragraph 2 of Article 5 of the New York Convention).

At the same time, it is necessary to pay attention to the difference between the wordings set forth in article 5 of the New York Convention, article 255 of the Code of Civil Procedure and article 57 of the Law on Arbitration. These differences affect the issue of judicial discretion.

In particular, considering an application for recognition and enforcement of a decision of a foreign arbitration, a court, in accordance with paragraph 2 of Article 5 of the New York Convention, may refuse to satisfy a claimant's claim if there are grounds for this. This provision of the international treaty gives the court the discretion in making the decision. The norm of the New York Convention does not oblige a court to refuse to recognize and enforce a decision of a foreign arbitration even if such actions are contrary to public policy.

Moreover, the provisions of subparagraph 2 of part 1 of article 255 of the Code of Civil Procedure and subparagraph 2 of paragraph 1 of article 57 of the Law 'On Arbitration' on the refusal to issue a writ of execution for the enforcement of an arbitral award are set out imperatively. The provisions contained in them essentially oblige the court to reject the claimant's application in case of a conflict with the public order of the arbitration decision established by the legislation of Kazakhstan.

What is 'public policy'? In Kazakhstan, the concept of public policy is enshrined in the Civil Code (hereinafter - the Civil Code) and the Law on Arbitration.

Article 1090 of the Civil Code stipulates that foreign law does not apply in cases where its application would be contrary to the foundations of the rule of law of Kazakhstan (public order of Kazakhstan). In these cases, the law of Kazakhstan applies.

Moreover, as indicated in paragraph 2 of this article, the refusal to apply foreign law cannot be based solely on the difference between the political or economic system of the corresponding foreign state and the political or economic system of Kazakhstan.

According to subparagraph 1 of Article 2 of the Law 'On Arbitration', the public order of Kazakhstan recognized - the foundations of the rule of law, enshrined in legislative acts of Kazakhstan.

The concept of 'public policy' may differ in different countries, taking into account the specifics of the legislation, however, in general, it has one general meaning. In general, public policy refers to the totality of political, economic, moral and legal principles that exist in a given state. It should also be understood that not any violations of laws and regulations, but only those that encroach on the fundamental rights and principles of society and the state, may contradict public order.

The concept of 'public policy' is revealed through assessment categories, the content of which will be determined depending on the specific case. Moreover, if the Civil Code points to the foundations of the rule of law of Kazakhstan, the Law on Arbitration already speaks of the foundations of the rule of law 'enshrined in the legislative acts of Kazakhstan'. Thus, the Civil Code interprets 'public policy' more broadly, which includes not only the foundations of the rule of law established in laws, but also a contradiction to fundamental moral standards that are not formally enshrined in law.

In a broad aspect, public policy can be considered as a certain qualitative state of the system of social relations regulated by social norms, where the norms of laws are only one of the existing regulators (Belyanevich 2017).

The Civil Code associates the application of the concept of public policy with the restriction of the application of foreign law. The rules of foreign law must be consistent with the internal public order of the state. Initially, it was the internal public order that determined the framework for regulating the private law relations of the parties.

At the same time, the fact of violation of public order can also be recognized in cases where there is no application of foreign law. In arbitration, the application of national law, contrary to the basic principles of this right or morality, may also indicate a violation of public order.

Thus, as indicated above, the concept of 'public order' is revealed through assessment categories and at the legislative level, to give a concrete and uniform definition of this concept is practically impossible for the following reasons (Lowenfeld 1993):

(1) each state, or rather the judicial system of each state, independently and independently determines the content of this concept;
(2) based on the current conditions in the state, the understanding of public policy may change;
(3) the actual content of the concept depends on the specific circumstances of the case.

The issue of determining public order, its criteria are relevant and debatable in foreign legal science and law enforcement practice.

The public policy clause was legislatively enshrined in the French Civil Code of 1804. Article 6 of this code noted the provision that 'one cannot violate, by private agreements, laws that affect public order and good morals.' In the future, the clause on public policy began to apply not only for internal relations, but also in the international civil process.

The jurisprudence of the USA, Hong Kong, Germany, Switzerland, which develops legislative provisions, understands public order narrowly and correlates it with an understanding of morality and justice, the economic function that underlies the state.

With the 'foundations of law and order' is connected the concept of public order and in the legislation of Russia, in article 1193 of the Civil Code. However, there is no clear definition of what is meant by the rule of law. If we turn to the commentary on this article, it notes that the concept of 'the basis of law and order (public order)' includes four interrelated elements: (a) the fundamental principles of the law of a given country, primarily constitutional; (b) generally accepted moral principles on which the rule of law is based; (c) the legitimate interests of citizens and legal entities, society and the state, the protection of which is the main task of the country's legal system; d) universally recognized principles and norms of international law, which are part of the country's legal system, including international legal standards of human rights '.

Some positions of application of the public policy category in Russia are formulated in the Information letter of the Presidium of the Supreme Arbitration Court of the Russian Federation dated February 26, 2013 No. 156 'Overview of the practice of consideration by arbitration courts of cases on the application of a public order clause as grounds for refusing recognition and enforcement of foreign judicial and arbitral awards.'

In one example of this Survey, it was noted that 'public policy should be understood as fundamental legal principles (principles), which have the highest imperativeness, universality, special social and public significance, form the basis for building the economic, political, legal system of the state. Such principles include, in particular, the prohibition of committing acts expressly prohibited beyond the peremptory norms of the legislation of the Russian Federation (Article 1192 of the Civil Code), if these actions damage the sovereignty or security of the state, affect the interests of large social groups, and violate the constitutional rights and freedoms of individuals '.

In order to ensure consistency and predictability in the interpretation and application of public policy in recognition and enforcement of foreign arbitral awards, the International Commercial Arbitration Committee of the International Law Association (ILA) approved in 2002 recommendations to the attention of state courts (hereinafter – ILA Recommendations).

The ILA Recommendations noted that a violation by an arbitral award of simple peremptory norms (that is, rules that are imperative but do not turn into part of the public order of the state, which are rules of direct application) should not become a basis for refusing to apply it or to bring in enforcement of arbitral awards.

Thus, public order in theory and practice is described by applying such characteristics as, for example, the 'foundations of the rule of law', 'basic legal principles', 'public interests', 'basic values', and 'constitutional order'.

Let us give an example in which case the decision of the arbitration court was cancelled, due to the contradiction of such a decision to the public order of Kazakhstan. So, the applicant N. appealed to the district court No. 2 of the Kazybekbi district of Karaganda with a request to annul the arbitral award, citing the fact that the

microfinance organization 'E.' she was granted a cash loan of 300,000 tenge. N. was forced to take this loan in connection with the organization of the funeral of her only daughter. For two months, N. paid the loan properly, but subsequently she delayed the payment of the loan for 1 month due to the lack of opportunity, and therefore she repeatedly contacted the Microfinance Organization to provide a delay. N. did not refuse her obligation to repay the loan. By the way, N. is an elderly pensioner, and after the death of her daughter, she remained in the care of a young granddaughter, which must be provided. Almost immediately after the delay, Microfinance Organization E. in view of the existence of an arbitration agreement between the parties, she filed a lawsuit in the Karaganda arbitration court to recover the debt with N. along with a fee and a large penalty, the total amount of which amounted to about 1,000,000 tenge! The Arbitration Court of Karaganda satisfies the lawsuit and collects the indicated amount from the elderly woman in full. Considering N.'s request for the cancellation of the arbitral award, the district court concluded that this decision is contrary to the public order of Kazakhstan, i.e. the foundations of law and order enshrined in the legislative acts of Kazakhstan are violated. Namely, according to Art. 297 of the Civil Code of Kazakhstan, if the penalty payable (fine, penalty) is excessively large compared to the losses of the creditor, the court, at the request of the debtor, has the right to reduce the penalty (fine, penalty), taking into account the degree of fulfilment of the obligation by the debtor and the interests of the debtor and the creditor worthy of attention. Since most of the amount owed consisted of a forfeit, which N. requested during the arbitration to be reduced, but this was not done by the arbitration, the district court considered that the arbitral award should be rescinded for reconsideration and subsequently, in order for the arbitration to accept this fact in attention and was guided by the principles of justice, given that the size of the penalty is extremely large in comparison with the losses of the lender. However, subsequently, this determination was cancelled by a higher court, citing the absence of a violation of the public order of Kazakhstan.

7. Some Problems of Arbitration in Kazakhstan

In this regard, I would like to draw attention to such a problem of arbitration in Kazakhstan – these are the so-called 'pocket arbitrations'. 'Pocket' arbitrations (arbitration courts) are understood as arbitrations (arbitration courts), which are created and financed by large organizations, corporations, i.e. major participants in a particular economic sphere. Large organizations, realizing their strength in the market when concluding a transaction, have the opportunity to impose an arbitration clause, according to which a potential dispute will be dealt with specifically in the relevant arbitration. The complexity of this problem lies in the fact that in the existing system it is very difficult to control the impartiality of this type of vessel. Given the fact that the process of creating permanent vessels is quite simple, we get a random system, for which there is no specialized supervision. Therefore, there are statements such as, 'since this organization pays for the content of the arbitration (arbitration court), then this is clearly in order to resolve cases in its favor'. In foreign practice, such a problem in arbitration does not exist. In the United States, more than 50% of commercial disputes are resolved by arbitration tribunals. The main non-profit non-governmental organization in the United States conducting arbitration proceedings is the American Arbitration Association, which, in accordance with its rules, considers disputes of both a domestic nature and international. These statistics indicate confidence in the arbitration courts and their effectiveness.

In accordance with the definition given in Section 7 of the Law on Arbitration, an arbitrator is elected (appointed) by an individual who is not directly or indirectly interested in the outcome of the case, who is independent of the parties and who has consented to fulfil the duties of an arbitrator who has reached the age of twenty-five years and having higher education. In addition, the Law obliges the arbitrator, who alone decides the dispute to have a higher legal education and at least two years of experience in the legal profession. And in the case of a collegial resolution of the dispute, a higher legal education should have the chairman of the arbitration.

The clarification given in this article of the Law regarding collegial permission is somewhat surprising, since, unfortunately, not every lawyer can correctly apply one or another norm of the law, and cases when this can be done by a non-specialist in the field of law is almost an exception . Therefore, an incorrect interpretation of the law can lead to an illegal decision. But one of the main principles of arbitration, according to Section 4 of the Law, is legality. In addition, in the vast majority of cases, it is impossible to challenge the decision of the arbitration. At the same time, there is a temptation to abuse the position, far from jurisprudence, by the arbiter when considering the matter in collusion with one of the parties.

Also, pay attention to the fact that paragraph 4. Article 7 of the same law states that an arbiter cannot be a person elected or appointed by a judge of a competent court in the manner established by the legislative act of Kazakhstan.

The current Constitutional Law of Kazakhstan 'On the Judicial System and the Status of Judges of Kazakhstan' does not explicitly prohibit retired judges from acting as an arbitrator. In paragraph 2 of Art. 28 of this

law states that the position of a judge is incompatible with the deputy mandate, with the occupation of another paid position, except for teaching, scientific or other creative activities, entrepreneurial activities, joining the governing body or the supervisory board of a commercial organization. The only reason for retirement judges to worry is the termination of monthly life support payments, which are suspended if they occupy in the manner established by the legislation of Kazakhstan paid from the republican or local budget or from the National Bank of Kazakhstan, except for a position related to occupation teaching, scientific or other creative activities. However, the arbitrators are not paid a fee from the republican or local budget, therefore, we assume that retired judges can and should act as arbitrators in the arbitration. We believe that the performance by a retired judge of the functions of an arbitrator will significantly increase the level, quality and authority of the institution of arbitration (arbitration). For the purposes of the Law on the Status of Judges, the resignation of a judge is an honorary departure or an honorable removal of a judge from office, therefore, retired judges are people with vast experience in judicial enforcement, with a high level of legal awareness and legal culture, who have proven their human and legal viability, who enjoy well-deserved authority in society. The status of a retired judge serves as a guarantee of the proper conduct of arbitration, provides grounds for presenting high standards to retired judges and allows you to maintain confidence in their competence, independence and impartiality.

Another problem is that today the arbitrators (arbitrators) have the same powers as the courts of general jurisdiction, however, they have dropped out of the field of criminal law regulation in this area. The risk that arbitrators (arbitrators) commit corruption offenses is very high. The scope of their activity (the resolution of legal disputes, where the monetary obligations of the parties are often affected) is well suited to dishonest arbitrators in order to obtain benefits and advantages for themselves and for others. Therefore, it is necessary to introduce criminal liability for such acts, in particular, it is proposed to extend the same penalties for arbitrators, which are now in force for private notaries, appraisers, private enforcement agents, mediators and auditors working as part of an audit organization (Article 251 of the Criminal Code Kazakhstan, hereinafter – the Criminal Code). Amendments should also be made to Art.231 of the Criminal Code, establishing liability for commercial bribery.

Regarding civil liability, Europe often provides for 'civil liability of the contractual nature of an arbitration institution to the parties.' For example, in France, there is a case law where it is recognized that arbitration institutions may bear similar responsibility to the parties for improper consideration of the dispute, since this is actually the service it provides to the parties. We believe that we can also adopt such a practice and oblige the arbitration tribunals to indicate such a clause in the arbitration rules (Morozov and Shilov 2018).

Other problems in Kazakhstan arbitration can also be highlighted. One of them is the underdevelopment of the institution of arbitration in the Kazakh legal sphere. If we compare the situation in Kazakhstan and the United States in accordance with the statistics of the proceedings, it should be said that our country does not have such an established economic system and stable legislation. In Kazakhstan, where the institution of arbitration in its current form was formed with the adoption of the relevant law in 2004 and has existed for about 16 years, many organizations perceive this institution as 'something new' or an opportunity to profit. It should also be noted that in our country a large number of economic sectors are occupied by monopolists. It follows that creating and maintaining arbitration just for show or for weak market players of this organization does not make sense. Due to the lack of competition in the economy, competition in arbitration, the struggle for reputation and the like, also disappear, due to the fact that there is a monopoly and its positions are unshakable. Therefore, a monopoly is obtained in a particular sector of the economy, and a monopoly appears on judicial decisions on disputes related to this sector of the economy.

8. The Basic Concepts of Arbitration as a Form of Protection of Rights in Foreign Countries

As mentioned above, the implementation of activities by arbitrations is impossible without the participation of the state. When the arbitral proceedings are considered in the territory of a certain state, the arbitral award should be included in the rule of law of the state at the place of the dispute. The relationship between state courts and the parties to the arbitration is determined by the development of legal culture, relations of national and international civil circulation, the development of the judicial system. Naturally, the approaches adopted in different countries to the regulation of relations involving state courts and arbitrations differ.

The main criteria and differences between arbitrations of foreign countries lies in the volume and nature of interference by state courts in the activities of arbitrations.

Thus, a distinctive feature of the legal regime of the English arbitration is the provision of broad control powers to state courts in relation to arbitrations, and their decisions. The state court shall have the right to review the arbitral award in essence in full on appeal. If there are grounds, the state court has the right to cancel the decision of the arbitration in whole or in part, change it, return the case to the arbitration for new consideration. This

concept is called as the rule of 'common law' (Common Law Concept of Arbitration). In addition to England, it was used in some countries of Asia and Africa.

The second concept is called the 'Civil Law Concept of Arbitration'. It develops in countries of the continental legal system - such as France, Belgium, the Netherlands, Spain, as well as in countries that have adopted the UNCITRAL Model Law (countries of the Middle East, including Kazakhstan, some African countries, Indonesia, Latin America). In all these countries, the arbitral tribunal recognizes the full scope of the power to review and resolve a dispute. Arbitrators decide issues of fact and law on their own. The award may not be reviewed on the merits by a state court, even if it involves a violation of the law. An arbitral award may be set aside only if the consequences of its execution violate the fundamental principles of building a legal system (public policy). For the same reasons, the state refuses to recognize and enforce the arbitral award.

An important criterion for distinguishing between the concepts of arbitration is the admissibility of resolving the dispute 'in fairness' (*ex aequo et bono*). By agreement of the parties, arbitrators may be empowered to act as amiable compositeurs. In the exercise of such powers, they must achieve a fair result without resorting to specific legal norms. Arbitrators acting as 'friendly intermediaries' will still apply legal principles, but with less reference to the content or literal reading of documents that appear to be contrary to the will of the parties (Mann 2016).

Conclusions and Further Research

The development of arbitration as an alternative to the state court in all countries is seen as a positive phenomenon, contributing, in particular, to a significant reduction in the burden on state justice in the field of resolving conflicts arising between participants in civil turnover. In this regard, it is extremely important to create conditions for the proper application of national legislation existing in this area, which should be based on a proper understanding of the legal nature and role of arbitration as an integral part of the national legal system.

Based on the study, the author concluded that the further successful development of arbitration in Kazakhstan is possible only with the support and understanding of the legal nature of arbitration as an alternative way to resolve disputes by state courts. The interaction of arbitrations and courts occurs mainly in the following cases:

(a) delineation of competence;
(b) securing the claim;
(c) the cancellation of the arbitral award;
(d) recognition and enforcement of the award.

The litigation has intensified a bit. According to the website of the Ministry of Justice of Kazakhstan, the number of permanent arbitration members of the Arbitration Chamber of Kazakhstan is only 21. The number of cases considered by the most active arbitrations per year reaches 50-60, which, of course, is negligible compared to other countries. However, one should keep in mind the small population of Kazakhstan (about 18.5 million).

In the context of the construction and development of a market economy, legal entities and individuals should feel protected, and, most importantly, have an alternative in resolving a contentious situation. The arbitration is designed to serve these purposes - to protect the rights and legitimate interests of institutions, organizations, enterprises, citizens, entrepreneurs and give them the opportunity to choose, also simultaneously solving other tasks, for example, to facilitate the work of state courts, to unload them from a large number of cases. The more perfect and more powerful the system of arbitration courts becomes, the greater will be the opportunities for the normal functioning of business entities in market conditions and, as a result, the state's economy will be healthier and stronger.

The independence of our state is 28 years old, almost the same time ago the first arbitrations appeared in Kazakhstan. Today there have been positive trends for the qualitative development of the domestic arbitration institution. As for the future, there is every opportunity not only to raise the level of Kazakhstani arbitration, but also to create conditions under which Kazakhstan will become the center of international arbitration in the territory of the Eurasian space. We believe that it is high time for our society, following the example of foreign countries, to use arbitration as a convenient and practical alternative to the system of state courts.

Given the importance of developing alternative dispute resolution methods and the need to ensure uniform judicial practice on issues of recognition and enforcement, as well as challenging arbitral awards, it is proposed:

(1) as Kazakhstan practice shows, not all arbitrations are ready to consider disputes in good faith, fairly, taking into account all aspects of the law. In the absence of any control in relation to arbitration, there is a very high risk of corruption origin, since the decisions of the arbitration will not be appealed or checked. In this regard, we propose to establish mixed control over the activities of the arbitration.

(2) in articles 52, 57 of the Law on Arbitration, in the grounds for canceling the arbitration and refusal to execute the arbitral award, remove the uniqueness of the court's decision to cancel or refuse to execute and bring these grounds in accordance with the New York Convention and the UNCITRAL Model Law, in which indicate the possibility of cancellation or denial of execution. Thus, to add an amendment to subsection 52 (2) of the Law on Arbitration, as follows: 'an arbitral award may be quashed by a court if it is determined that:', also amend to amend article 57 (1) as follows: 'In recognition and (or) the enforcement of the award may be refused on the following grounds';

(3) understand by public policy is precisely transnational public order, based on universal values and principles of law and morality. As guidelines for transnational public order, we propose taking the UN Universal Declaration of Human Rights and the European Convention for the Protection of Human Rights and Fundamental Freedoms as a basis. These international instruments contain provisions for the promotion and protection of fundamental human rights. In this regard, a violation of these rights within the framework of arbitration can be qualified as a violation of public order;

(4) state courts should abide by the ILA Recommendations when determining whether a public order violation has occurred by arbitration;

(5) establish more stringent requirements for the composition of the arbitration, in particular in the Law on Arbitration, establish the obligation to have a higher legal education for each of the arbitrators with the collective resolution of the dispute and, accordingly, have at least 5 years of experience in the legal profession. In addition, it is proposed to actively invite retired judges to work as arbitrators. This, of course, will increase the level, quality and credibility of the institution of arbitration;

(6) the introduction of criminal liability for arbitrators, given that at the moment this type of responsibility in Kazakhstani legislation in relation to arbitrators (arbitrators) is not provided. In particular, in Art. 251 of the Criminal Code to amend by adding an arbitrator (arbitrator) as the subject of the crime (for using his powers contrary to the objectives of his activity and for the purpose of deriving benefits and advantages for himself or others, or organizations, or causing harm to other persons or organizations, if this act caused significant harm to the rights and legitimate interests of citizens or organizations or the interests of society or the state protected by law). Amendments should also be made to Art.231 of the Criminal Code, establishing liability for commercial bribery. It is also possible to establish civil liability of both arbitration and arbitrators 'for failure to perform or improper performance of their functions'. In addition, stipulate in the arbitration rules provisions on the disciplinary and civil liability of arbitrators in the event of an improper consideration of a dispute, this may include suspension from activity, a ban on holding certain posts, and liability for damages.

Summing up, it should be said that the last paragraph of the proposals must be implemented gradually, because, the main goal of the arbitration proceedings can be lost. Strict government control destroys the opportunities for self-regulation and confidentiality that arbitration provides. The fight against 'pocket' arbitrations may be a convenient opportunity for the state to take control of the entire arbitration system, depriving it of all its positive qualities and making it an incapable and insignificant appendage of the system of state courts. It is important to solve this problem, and not to prohibit organizations from creating arbitration.

In order to strengthen the role of arbitration in the bill.

It is proposed to refer to the jurisdiction of the arbitration as a single institution all property disputes, with the exception of disputes that affect the interests of minors, persons recognized to be legally incompetent or partially incapable, as well as disputes arising from personal non-property relations, not related to property (related to life and health, privacy, personal and family secrets, the right to a person's name). At the same time, it is supposed to exclude the rules prohibiting the settlement of disputes that affect the interests of the state, state enterprises, natural monopolists and market dominant entities, as well as bankruptcy or rehabilitation disputes that are set for arbitration courts. This restriction primarily contradicts the fundamental (constitutional) principle - the equal protection of property (paragraph 1 of Article 6 of the Constitution). Thus, the current legislative regulation of the activities of arbitration courts puts foreign entities, including foreign investors, in a privileged position compared to national entities. In addition, in accordance with the recommendations of the World Bank, in order to increase the position of Kazakhstan in the ranking of the Global Competitiveness Index of the World Economic Forum and the Doing Business rating, it is necessary to provide for the right of arbitration to consider disputes involving state-owned enterprises, natural monopolists and market dominant entities.

Objective resolution by arbitration of legal disputes:

(1) establish the principle of independence, which means that the arbitrators and the arbitration tribunals are independent in resolving disputes submitted to them, make decisions in conditions that exclude any impact on them (Article 5 of the draft law);
(2) to fix the qualification requirements for arbitrators: reaching the age of thirty-five years; the presence of a higher legal education and continuous work experience in a legal specialty for at least five years (article 11 of the draft law);
(3) extension of the principle of confidentiality and development of measures to ensure its observance by extending this principle to other parties to the proceedings along with the arbitrators;
(4) more detailed regulation of the procedural rules of arbitration, such as the basic conditions, the form and content of the arbitration agreement, the timing of consideration and resolution of disputes by the arbitration, the conditions for their restoration and the consequences of non-compliance by arbitrators, etc;
(5) to fix the provision on the arbitration agreement;
(6) in order to increase public confidence in arbitration and the effectiveness and fairness of arbitral awards, provide liability for violation of the legislation of Kazakhstan on arbitration.

References

[1] Nazarbayev N.A. 2012. *Social modernization of Kazakhstan: twenty steps to the society of universal labor.* Astana. https://www.zakon.kz.

[2] Sabikenov, S.N. 2015. A modern analysis of modern and classic international law. Bulletin of KazNPU named after Abay. *International life and politics*, 1 (43): 11-14.

[3] Greshnikov, P. 2015. *Arbitration court: legislation, theory and experience.* Almaty: Legal. 116.

[4] Skvortsov, O.Yu. 2017. *Arbitration of business disputes in Russia: problems, trends, prospects*. M.: Walters Clover. 240.

[5] Bruntseva, E.V. 2018. *International commercial arbitration*. SPb. 225.

[6] Neshataeva, T.N. 2001. Arbitration and state courts. *Bulletin of Perm University,* 2 (10): 77-91.

[7] Popov, M.A. 2018. *Theoretical and practical problems of the Russian model of regulation of arbitration courts*. Moscow. 39.

[8] Minakov, A.I. 2016. *Arbitration agreement and practice of consideration of foreign economic disputes.* Moscow: Yurid. 57.

[9] Suleimenov, M.K., Duysenova, A.E. 2018. *Interaction of courts and arbitration in the field of alternative dispute resolution. International civil process. Training course*. Astana. 173.

[10] Law of Kazakhstan. 2016. On Arbitration. https://www.zakon.kz.

[11] Civil Procedure Code of Kazakhstan. 2015. http://adilet.zan.kz/rus/docs/K1500000377.

[12] Review of the arbitration practice of Kazakhstan International Arbitration. 2014. https://www.zakon.kz.

[13] Bulletin of the Supreme Court of Kazakhstan. 2019. https://www.zakon.kz.

[14] Actual directions of development of international arbitration. 2015. Center for Arbitration and Third Arbitration of the National Chamber of Entrepreneurs of Kazakhstan. Astana. 59.

[15] United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards. 1958. New York. http://base.garant.ru/10164637/.

[16] European Convention on Foreign Trade Arbitration. 1961. Geneva. http://base.garant.ru/10164136/.

[17] Washington Convention. 1965. On the procedure for resolving investment disputes between states and foreign individuals. https://online.zakon.kz/ Document /? doc_id = 30219652 # pos = 1; 45.

[18] Federal Constitutional Law. 1995. On Arbitration Courts in the Russian Federation. http://base.spinform.ru/show_doc.fwx? Rgn = 1730.

[19] Department of analytics of the Karaganda regional court. 2016. Generalization of judicial practice in cases of recognition and enforcement, on the abolition of arbitral awards for 2016, 2017 and the 1st quarter of 2018. http://krg.sud.kz/rus.

[20] Belyanevich, E.A. 2017. *On violation of public order as the basis for the nullity of the transaction. Civil law. Comments Practice: Favorites.* Almaty, 5 (16): 277-294.

[21] Constitutional Law of Kazakhstan. 2000. On the Judicial System and the Status of Judges of Kazakhstan. https://online.zakon.kz/Document/? Doc_id = 1021164.

[22] Lowenfeld, A.F. 1993. *International Litigation and Arbitration*. St. Paul. 339.

[23] Morozov, M.E., Shilov, M.G. 2018. Commentary on the Federal Law 'On Arbitration Courts of the Russian Federation'. Arbitration Procedure Code of the Russian Federation. Novosibirsk. 204-205.

[24] Mann, F.A. 2016. *Private Arbitration and Public Policy.* Civil Justice. 257.