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PARTICIPATION OF FOREIGN
PERSONS IN INTERNATIONAL
PROCEDURAL LAW OF RUSSIA
AND KAZAKHSTAN**

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**PROCEEDINGS WITH PARTICIPATION
OF FOREIGN PERSONS IN INTERNATIONAL PROCEDURAL LAW
OF RUSSIA AND KAZAKHSTAN²**

This article is dedicated to one of the most interesting aspects of International Procedural Law – litigation with participation of foreign persons. Author focused on a comparative analysis of Russian and Kazakh legislation concerning the regulation of international procedural relations. Article includes two paragraphs: the first one considers international jurisdiction of Russian arbitrazh courts and Kazakh economic courts on commercial matters; the second one examines the recognition and enforcement of foreign judgments in commercial matters on the territory of Russia and Kazakhstan. Author deeply scrutinized a wide range of legal documents including domestic legislation and multilateral international treaties of regional character in order to show the convergences and divergences in Russian and Kazakh law concerning participation of foreign persons in international commercial litigation.

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Introduction

From the time of the breakup of the Soviet Union and transformation of the republics, comprising the Soviet Union, into independent sovereign states, their common history called into existence some integration processes flowing on different levels and with different speed. All former Soviet republics, excluding the Baltic states, were involved in the process of political, economical and legal integration, institutional forms of which are represented by regional international organizations. At the present time we can talk about three integration processes of multilateral character that take place within the limits of international communities, including the Commonwealth of Independent States (CIS)³, the Eurasian Economic Community (EurAsEC)⁴ and the Common Economic Space (CES)⁵.

Cooperation of states is dynamically developed within the EurAsEC that, in perspective, can be transformed into the Eurasian Union that is the most perfect form of economic integration⁶. Taking into account the above-mentioned, the examination of the legal systems of the states of the EurAsEC is considered to be quite interesting and relevant. Along with this, the above-mentioned international organization cannot be examined separately from the CIS, that, in its turn, can be evaluated as “the laboratory of comparative jurisprudence”⁷. On the other hand, the Eurasian legal space exists. All member states are geographically close to each other, and in the legal sphere they are united by common legal heritage. They use common working legal language (Russian). They are united by long experience of cohabitation within the institutional model (the CIS). The problem here is how to correctly use this common legal space while attempting to adjust to harmonization of the relationship with the larger communities (WTO, EC, CE, OECD).

Without highly developed comparative law in the CIS member states the perspectives of the Eurasian legal space will remain rather vague. Comparative law is the important tool serving to choose the direction and regulating the speed of establishment of the legal community in the

³ See EG Moyseev, ‘Legal Basis for Establishment of the Commonwealth of Independent States and Its International Legal Status’ (2010) 8 Eurasian Legal Journal; EG Moyseev, ‘20th Anniversary of the CIS – Hard Way to Eurasian Economic Integration’ (2011) 9 Eurasian Legal Journal; DM Akulov, ‘Eurasian Economic Integration within the Framework of the CIS (International Legal Aspects)’ (2012) 5 Eurasian Legal Journal.

⁴ See YV Mishalchenko, ‘Eurasian Economic Community: Up-to-date Status and Development Prospects’ (2009) 7 Eurasian Legal Journal.

⁵ See VI Kamyshevsky, ‘Some Aspects of Legal Groundwork for Establishment of the Customs Union and Common Economic Space within the Framework of the EurAsEC’ (2010) 1 Eurasian Legal Journal; SN Yaryshev, ‘Common and Unitary Economic Space of the EurAsEC’ (2010) 2 Eurasian Legal Journal; YN Maleev and SN Yaryshev, ‘Role of Subjects of the Russian Federation in the System of the Common Economic Space’ (2011) 12 Eurasian Legal Journal.

⁶ See VI. Kamyshevsky, ‘From the EurAsEC to the Eurasian Union’ (2011) 8 Eurasian Legal Journal; EG Moyseev, ‘Perspectives for Establishment of the Eurasian Union’ (2011) 11 Eurasian Legal Journal; VM Shumilov, ‘Treaty on EAEC: Basis of Eurasian Integration’ (2012) 5 Eurasian Legal Journal.

⁷ See WE Butler, ‘Law Reform in the CIS’ (1996) 1:1 Sudebnik 9-32.

Eurasian legal space. Notwithstanding the nature of the sub-national law or regulations based on the international agreements, application of the comparative legal method and wisdom of comparative law are extremely important for the lawyers of the Eurasian legal space. Therein, comparative law for Russia is the medium-term research and investment in education, future dividends of which are uncountable⁸. The present article, devoted to consideration of some aspects of proceedings with the participation of foreign persons in Russian and Kazakh procedural law, is a succeeding step out of the set of articles conceived by the author and related to comparative analysis of international civil procedure of the EurAsEC member states, after publication of several works in this sphere related to Belarus, Ukraine and Kyrgyzstan⁹.

Choosing the institute of the proceedings with the participation of foreigners as the subject of the comparative research was stipulated by its growing role in the up-to-date environment, that is enabled by at least two circumstances: first, extension of involving of foreign element into economic life of Russia and Kazakhstan as an objective conformity of internationalization of business relations and, as a result, increase of the number of economic disputes with the foreign element (especially in connection with the establishment of the Customs Union of the EurAsEC, uniting Russia, Kazakhstan and Belorussia, and also accession of Russia to WTO in August 2012); second, rapid development of private international law in both states, including such an important branch of law as the international civil procedure. The author assumes that comparative characteristic of the institute of proceedings with the participation of foreigners in Russian and Kazakh legislation shall make a succeeding step in academic conceptualization of one of the most important branches of private international law in both countries¹⁰.

1) International Jurisdiction of Russian Arbitrazh Courts and Kazakh Economic Courts in Cases with the Participation of Foreign Persons

The jurisdiction of Russian arbitrazh courts over cases with the participation of foreign juridical persons and individual entrepreneurs is determined by Russian legislation of procedure, in this instance the Code of Arbitrazh Procedure of the Russian Federation of 24 July 2002,

⁸ See WE Butler, 'Eurasian Legal Space – Laboratory of Comparative Jurisprudence' (2011) 7 Eurasian Legal Journal 6-9.

⁹ See WE Butler and NY Erpyleva, 'Proceedings with Participation of Foreign Persons in International Procedural Law of Russia and Belarus' (2005) 7 State and Law 31-41; WE Butler and NY Erpyleva, 'Proceedings with Participation of Foreign Persons in International Procedural Law of Russia and Ukraine: Innovation of Legal Regulation' (2011) 10 State and Law 54-64; WE Butler and NY Erpyleva, 'Proceedings with Participation of Foreign Persons in International Procedural Law of Russia and Kyrgyzstan' (2012) 11 Legislation and Economics 43-61.

¹⁰ This study concentrates upon proceedings with the participation of foreign persons in international economic disputes, that is, disputes linked with entrepreneurial and other economic activity by juridical persons and individual entrepreneurs. In Russia these disputes are resolved by way of an arbitrazh proceeding and in Kazakhstan by a civil court proceeding.

which entered into force on 1 September 2002, as amended to 25 June 2012 (hereinafter: CAP Russia)¹¹. Russian arbitrazh courts, despite a seeming calque of terminology, have nothing to do with arbitration. They are an integral part of the Russian judicial system, together with the Russian federal courts of ordinary jurisdiction, but are not courts of ordinary jurisdiction (Article 4(3), Federal Constitutional Law on the legal system of the Russian Federation of 31 December 1996, as amended of 08 June 2012¹²; Article 1 of the Federal Constitutional Law on the arbitrazh courts of the Russian Federation of 28 April 1995, as amended of 06 December 2011¹³).

The jurisdiction of Kazakh economic courts in cases with the participation of foreign juridical persons and entrepreneurs is established by civil procedure legislation, namely the Code of Civil Procedure of Kazakhstan as of 13 July 1999, as amended of 10 July 2012¹⁴ (hereinafter: CCP Kazakhstan). The Kazakh economic courts are an integral part of the courts of ordinary jurisdiction of Kazakhstan and relate to inter-regional specialized courts (Article 3, the Constitutional Law on the judicial system and status of judges of the Republic of Kazakhstan of 25 December 2000, as amended of 16 February 2012¹⁵; item 1 of Order of the President of the Republic of Kazakhstan № 803 on establishment of specialized inter-regional economic and administrative courts of 09 February 2002¹⁶).

Section V of the CAP Russia (Chapters 32 and 33) is devoted to a “Proceeding with Regard to Cases with Participation of Foreign Persons” and Section V of CCP Kazakhstan is devoted to a “International procedure”¹⁷. In accordance with Article 254, CAP Russia, foreign persons¹⁸ enjoy procedural rights and bear procedural duties equally with Russian organizations and citizens. Foreign persons have the right to bring an action in arbitrazh courts of the Russian

¹¹ C3 PΦ (2002), no. 30, item 3012; (2012), no. 26, item 3439.

¹² C3 PΦ (1997), no. 1, item 1; (2012), no. 24, item 3064.

¹³ C3 PΦ (1995), no. 18, item 1589; (2011), no. 50, item 7334. Both laws are translated in WE Butler, *Russian Public Law* (2nd edn, OUP 2009). On both systems of courts generally see WE Butler, *Russian Law* (3rd edn, OUP 2009) §§ 6.41.-6.68.

¹⁴ <URL: <http://www.online.zakon.kz>>.

¹⁵ <URL: <http://www.online.zakon.kz>>.

¹⁶ <URL: <http://www.online.zakon.kz>>.

¹⁷ In present time in the science of private international law there is no generally accepted terminology for defining procedural jurisdiction on civil cases with participation of foreign persons. Usage of multiple expressions (“international particular jurisdiction”, “jurisdiction”, “general competence”, “international systemic jurisdiction” and etc.) causes in theory dramatic collisions: such, quite frequently, one and the same expression is used for defining different legal phenomenon by different researches (e.g. “jurisdiction”). And vice versa, one and the same legal phenomenon is described by different researches in different expressions (e.g. distribution of powers on consideration of civil cases between the courts of different states is defined by different researches as “international systemic jurisdiction”, “international particular jurisdiction” and etc.) According to the opinion of Mamaev, the most appropriate expression for definition of distribution of powers on consideration of civil cases with participation of foreign persons between judicial and other organs of different states is “**international procedural jurisdiction**”. In its turn, the unitary complex institution of international procedural jurisdiction will be divided into “**international judicial jurisdiction**”, “**international administrative jurisdiction**”, “**international arbitral jurisdiction**” and etc. Under international judicial jurisdiction, according to Mamaev, the following shall be meant: a range of competence of judicial organs of a particular state for resolution of a particular civil case, in other words, such institution that is in nowadays called “international systemic jurisdiction”. See AA Mamaev, *International Judicial Jurisdiction in Cross-border Civil Cases* (Moscow 2008) 36-44. In the present article such expressions as “international jurisdiction” and “international systemic jurisdiction” are synonyms.

¹⁸ Foreign persons in Russian legislation is a term understood to mean foreign organizations, international organizations, foreign citizens, and stateless persons engaging in entrepreneurial and other activity. See Article 247(1), CAP Russia.

Federation pursuant to the rules of particular jurisdiction and systemic jurisdiction in order to defend their violated or contested rights and legal interests in the sphere of entrepreneurial or other economic activity. Foreign persons participating in a case must submit evidence to the arbitrazh court confirming their legal status and the right to engage in entrepreneurial and other economic activity. If such evidence is not submitted, the arbitrazh court has the right at its own initiative to demand such evidence.

In accordance with Article 413(1-3), CCP Kazakhstan, foreign persons¹⁹ have the right to bring an action in courts of the Republic of Kazakhstan in order to defend their violated or contested rights, liberties and interests protected by law. Foreign persons enjoy procedural rights and bear procedural duties equally with Kazakh organizations and citizens. Proceedings in courts on the cases with participation of foreign persons shall be carried out in full accordance with CCP Kazakhstan and other laws.

The Russian Federation has retained a provision first introduced during the Soviet²⁰ era that retaliatory limitations might be introduced with respect to foreign persons of those foreign States in which special limitations have been introduced with respect to Russian organizations and citizens (Article 254(4), CAP Russia)²¹. The CAP Russia further authorizes, in principle, procedural privileges for foreign persons if an international treaty of the Russian Federation so provides (Article 254(1)).

The Republic of Kazakhstan has also retained a provision that restrictive measures might be introduced with respect to foreign persons of those foreign States in which special restrictive measures have been introduced with respect to the Kazakh organizations and citizens (Article 413(4), CCP Kazakhstan). It is obvious that Russian and Kazakh legislative positions on this issue fully coincide, taking into account two exceptions. Firstly, Russian Code states that foreign persons can be granted procedural privilege if this is determined by international treaty of the Russian Federation (Article 254(1), CAP Russia). The Kazakh Code omits any mention of retorsion and does not presuppose the possibility of a more favorable procedural regime for foreign subjects of economic management that is accorded to Kazakh organizations and citizens. Secondly, the CAP Russia designated the Government of the Russian Federation as the agency empowered to introduce procedural limitations on foreign persons by way of retorsion in the form of decrees. The CCP Kazakhstan states that the retorsion can be introduced by the Republic

¹⁹ Foreign persons in Kazakh legislation is a term understood to mean foreign citizens, and stateless persons, foreign organizations and international organizations. See Article 413(1), CCP Kazakhstan).

²⁰ See Article 59, Fundamental Principles of Civil Procedure of the USSR and Union Republics, of 8 December 1961. Ведомости Верховного Совета СССР (1961), no. 50, item 526; transl. in WE Butler, *The Soviet Legal System: Legislation and Documentation* (OUP 1978) 447.

²¹ See PP Kolesov, 'Procedural Guarantees of the Legal Status of Foreign Persons' in SV Bakhin (ed), *Urgent Problems of International Civil Procedure: Materials of an International Conference* (Spb., 2003) 58-66.

of Kazakhstan. The Parliament or the President of the Republic of Kazakhstan is empowered to introduce such retorsion.

The basic principles for establishing the subject-matter jurisdiction of Russian arbitrazh courts and Kazakh economic courts with regard to international economic disputes are quite different respectively in the CAP Russia and CCP Kazakhstan. Under the CAP Russia, arbitrazh courts consider cases with regard to economic disputes and other cases connected with the effectuation of entrepreneurial and other economic activity with the participation of foreign persons if:

(1) the defendant is situated or resides on the territory of the Russian Federation or property of the defendant is situated on the territory of the Russian Federation;

(2) the management organ, branch, or representation of a foreign person is situated on the territory of the Russian Federation;

(3) the dispute arose from a contract with regard to which performance should take place or did take place on the territory of the Russian Federation;

(4) the demand arose from the causing of harm to property by an action or other circumstance which occurred on the territory of the Russian Federation or when harm ensued on the territory of the Russian Federation;

(5) the dispute arose from unjust enrichment which occurred on the territory of the Russian Federation;

(6) the plaintiff with regard to the case concerning defense of business reputation is situated in the Russian Federation;

(7) the dispute arose from relations connected with the circulation of securities whose issuance occurred on the territory of the Russian Federation;

(8) the applicant in the case concerning the establishment of a fact having legal significance points to the existence of this fact on the territory of the Russian Federation;

(9) the dispute arose from relations connected with the State registration of names and other objects and rendering of services on the Internet on the territory of the Russian Federation;

(10) in other instances when there is a close link of the contested legal relation and the territory of the Russian Federation (Article 247(1), CAP Russia)²².

A case accepted by an arbitrazh court for its own consideration in compliance with the rules for international particular jurisdiction must be considered by it in substance even if in the course of the proceedings with regard to the case it becomes relegated to the competence of a

²² See VA Musin, 'Certain Peculiarities of the Participation in an Arbitrazh Proceeding of Foreign Persons' (2004) Russian Yearbook of Civil and Arbitrazh Procedure, 2002-2003; AI Kharsontsev, *Competence of Arbitrazh Courts with Regard to the Consideration of Cases with the Participation of Foreign Persons* (Ekaterinburg, 2002).

foreign court in connection with a change of location or place of residence of the persons participating in the case or with other circumstances (Article 247(4), CAP Russia)²³.

Kazakh legislation contains different approach to the jurisdiction of economic courts in Kazakhstan over disputes with the participation of subjects of economic management. The main difference from Russian legislation is that Kazakh legislation allocates cases of special proceeding including foreign persons into a special group. Following the general rule, Kazakh courts consider cases with the participation of foreign persons if the defendant is situated or resides on the territory of the Republic of Kazakhstan (Article 416(1), CCP Kazakhstan). The courts also consider cases with the participation of foreign persons if:

- the management organ, branch, or representation of a foreign person is situated on the territory of the Republic of Kazakhstan;
- property of the defendant is situated on the territory of the Republic of Kazakhstan;
- the claim arose from the causing of harm to property by an action or other circumstance which occurred on the territory of the Republic of Kazakhstan or when harm ensued on the territory of the Republic of Kazakhstan;
- the dispute arose from a contract with regard to which full or partly performance shall take place or did take place on the territory of the Republic of Kazakhstan;
- the dispute arose from unjust enrichment which occurred on the territory of the Republic of Kazakhstan;
- the plaintiff with regard to the case concerning defense of honor, dignity and business reputation is situated in the Republic of Kazakhstan (Article 416(2), CCP Kazakhstan).

The list of grounds for ascertaining the subject-matter jurisdiction by Kazakh courts is open, since the courts consider other cases when the legislation of the Republic of Kazakhstan establishes that the courts are competent to consider such cases (Article 416(3), CCP Kazakhstan). The above-mentioned dramatically differs Kazakh legislation from Russian one, which also contains an open list of grounds for ascertaining the subject-matter jurisdiction by Russian arbitrazh courts; however, such other grounds shall meet the criterion of close link of the disputed relationship with the territory of Russia. Kazakh legislation must directly relate other cases to the competence of Kazakh economic courts. Herewith, any mentioning of the criterion of close link is fully omitted.

²³ It should be noted that the Code of Civil Procedure of the Russian Federation contains analogous provisions (Article 402) regulating the competence of courts of ordinary jurisdiction with respect to civil-law disputes with the participation of foreign persons. See AI Muranov, 'Competence of Courts of Ordinary Jurisdiction to Consider Entrepreneurial Disputes with the Participation of Foreign Persons in Light of the New Code of Arbitrazh Procedure of the Russian Federation' (2002) 3 Moscow Journal of International Law.

The CAP Russia and CCP Kazakhstan contain principles for determining the **exclusive systemic jurisdiction** of their respective courts in international economic disputes which differ significantly. The CAP Russia relegates certain cases with the participation of foreign persons to the exclusive systemic jurisdiction of arbitrazh courts:

(1) disputes with respect to property in the State ownership of the Russian Federation, including disputes connected with the privatization of State property and compulsory alienation of property for State needs;

(2) disputes whose subject-matter is immovable property if such property is on the territory of the Russian Federation, or rights thereto;

(3) disputes connected with the registration or issuance of patents, registration and issuance of certificates for trademarks, industrial designs, utility models, and the registration of other rights to the results of intellectual activity which require the registration or issuance of a patent or certificate in the Russian Federation;

(4) disputes on deeming invalid entries in State registers (or cadastres) made by a competent agency of the Russian Federation keeping such register (or cadastre);

(5) disputes connected with the founding, liquidation, or registration on the territory of the Russian Federation of juridical persons and individual entrepreneurs, and also contesting judgments of the organs of these juridical persons (Article 248(1), CAP Russia).

In addition to the foregoing, the CAP Russia mentioned another principle extending the jurisdiction of arbitrazh courts to cases with the participation of foreign persons arising from administrative and other public-law relations (Article 248(2), CAP Russia).

Kazakh legislation on this issue is rather laconic. The CCP Kazakhstan relegates certain cases with the participation of foreign persons to the exclusive systemic jurisdiction of Kazakh courts: 1) disputes arising from the rights on immovable property if such property is on the territory of the Republic of Kazakhstan; 2) suits against carriers arising from contracts of carriage (Article 417(1), CCP Kazakhstan). Along with this, CCP Kazakhstan quite fully specifies cases for special proceeding arising from public relations with the participation of foreign persons that are covered by the exclusive systemic jurisdiction of Kazakh courts. Kazakh courts consider the following cases for special proceeding:

- the dispute in which the applicant in the case concerning the establishment of a fact having legal significance resides on the territory of the Republic of Kazakhstan or the fact existed or exists on the territory of the Republic of Kazakhstan;

- the dispute concerning the property in respect of which there is a claim on its acknowledgement as ownerless, is located on the territory of the Republic of Kazakhstan;

- the dispute concerning securities in respect of which there was a claim on acknowledgement of the security being lost and on restoration of respective rights on such security (procedure to declare lost documents void), was issued by a natural person or a legal entity residing or situated on the territory of the Republic of Kazakhstan;
- disputes arising from notarial actions (refuse in their commitment) that were committed by a notary public or other organ of the Republic of Kazakhstan (Article 417(2), CCP Kazakhstan).

Thus, the Article 248 of the CAP Russia and the Article 417 of the CCP Kazakhstan relegate exclusive systemic jurisdiction of Russian arbitrazh courts and Kazakh economic courts on consideration of international commercial disputes of certain category, that shall be differentiated from the exclusive jurisdiction of the arbitrazh court or an economic court on consideration of a certain case arising as a result of conclusion of the prorogation agreement between the parties.

The rules concerning a **contractual jurisdiction** in Russia are to be found in Article 249 of the CAP Russia. If the parties, one of which is a foreign person, have concluded an agreement in which they determined that an arbitrazh court in the Russian Federation has jurisdiction to consider a dispute which arose or might arise connected with the effectuation by them of entrepreneurial or other economic activity, the arbitrazh court in the Russian Federation will have exclusive jurisdiction for the consideration of this dispute on condition that such an agreement does not change the exclusive jurisdiction of a foreign court. **The agreement concerning the choice of jurisdiction must be concluded in written form**²⁴. A choice of forum agreement thus has in view an arrangement between the parties in dispute or a potential plaintiff and defendant to transfer a dispute for settlement to the court of a particular State. Such an agreement acts as a legal form of realizing the rules concerning contractual systemic jurisdiction contained in domestic law.

In accordance with the Article 419 of the CCP Kazakhstan “Contractual jurisdiction” the competence of the foreign court can be determined by the written agreement made by the parties, except for the cases stipulated in the Article 33 of the CCP Kazakhstan. Should such written agreement exist, the court upon the petition of the defendant leaves the claim without consideration if such petition was presented before the court which started to consider the case in substance. The Article 33 “Exclusive systemic jurisdiction” states that:

²⁴ On the legal nature, form, and validity of such agreements determining systemic jurisdiction, see YuE Monastyrsky, ‘Basic Peculiarities of Prorogation Agreements in the Russian Federation’ (2002) 2 Moscow Journal of International Law 174-185; see also SA Dergachev, ‘Peculiarities of Choice of Forum Agreements Establishing National Jurisdiction with the Participation of Foreign Element’ (2010) 6 Public and Private International Law.

1) the disputes regarding the rights on land plots, buildings, premises, constructions and other objects closely linked with the land (immovable property), on release of such property from being under arrest are considered at the location where such objects or arrested property is situated;

2) the disputes made by the creditors of the antecessor and filed before the acceptance of an inheritance by the heirs shall be considered by the court at the location where the inherited property is situated or where the main part thereof is situated;

3) the disputes in relation to the carriers arising from the contracts of carriage of cargo, passengers, and baggage are filed at the location of the management organ of a transport organization against whom a claim was filed in the established procedure;

4) disputes concerning compensation of harm occurred in the result of violation of the jurisdiction immunity of the Republic of Kazakhstan or its property by a foreign State, shall be filed at the location of the plaintiff if other is not determined by an international agreement concluded by the Republic of Kazakhstan.

The formulation of the heading of the Article 249 of the CAP Russia is not wholly satisfactory. It refers in substance to the form of a choice of forum agreement, whereas what it should actually refer to is a choice of forum rather than the agreement which is merely the legal form of the expression of choice. It would be more accurate to entitle Article 249 “Contractual Systemic Jurisdiction of Cases with the Participation of Foreign Persons”, a formulation that would, first, enable the types of systemic jurisdiction to be distinguished – **general (Article 247, CAP Russia; Article 416, CCP Kazakhstan), exclusive (Article 248, CAP Russia; Article 417, CCP Kazakhstan), and contractual (Article 249, CAP Russia; Article 419, CCP Kazakhstan)**. Second, this formulation would help to distinguish between a choice of forum agreement as a mean of determining systemic jurisdiction in the form of realizing contractual systemic jurisdiction from the concept of systemic jurisdiction itself as a complex of rules for establishing the competence of a particular State court. In our view it should be stressed that a choice of forum agreement may change only the rules for determining general systemic jurisdiction, but never exclusive systemic jurisdiction. To undertake the last would risk the clause being deemed to be invalid. Contractual choice of forum clauses may be treated as tools of **changing general systemic jurisdiction by agreement between the parties in dispute or potential parties in dispute**²⁵.

²⁵ For an analysis of the categories of general and exclusive systemic jurisdiction, see NA Shebanova, ‘Procedural Peculiarities of the Consideration of Cases with the Participation of Foreign Persons in Arbitrazh Courts of the Russian Federation’ in MM Boguslavsky and AG Svetlanov (eds), *Private International Law: Modern Practice: Collection of Articles* (Moscow 2000) 290-299.

A principal rule regulating jurisdictional issues with a foreign element is the location of the defendant or respondent (juridical or natural person). This rule is reflected in Russian and Kazakh procedural legislation (Article 247(1)(1), CAP Russia; Article 416(1), CCP Kazakhstan). The CAP Russia, however, contains an unusual innovation as a criterion for establishing the jurisdiction of a Russian arbitrazh court – the existence of a close link between the legal relation in dispute and the territory of Russia (Article 247(1)(10), CAP Russia). No other country known to us has such a criterion in procedural legislation. The category of a “close link” is, of course, a conflict link only with respect to the choice of applicable material law but does not operate as such when choosing a forum. The reason is that factual circumstances underlie the rules enabling the jurisdictional organ to be chosen which unequivocally link the Russian arbitrazh court or Kazakh economic court and the dispute which it is proposed to refer for its consideration (for example, the management organ, branch, or representation of a foreign person is situated on the territory of the Russian Federation or the Republic of Kazakhstan – Article 247(1)(2), CAP Russia and Article 416(2)(1), CCP Kazakhstan). The category of a “close link” does not enable one to unequivocally select a Russian arbitrazh court as a jurisdictional organ for the settlement of a dispute since the link of the legal relation in dispute with the territory of Russia itself requires an agreed choice. The innovation introduced in the CAP Russia can hardly be considered to be convincing.

Kazakh procedural legislation has one significant peculiarity, *i.e.* such inclusion of conflict rules that determine procedural legal capacity of foreign persons²⁶. In accordance with the Article 415 (1-5) of the CCP Kazakhstan, civil procedural capacity of **foreign natural persons** is determined by their *lex personalis*. *Lex personalis* of a natural person is the law of the state of his nationality. If a natural person along with the nationality of foreign state has the nationality of the Republic of Kazakhstan, the *lex personalis* shall be the law of Kazakhstan. The courts of the Republic of Kazakhstan do not recognize foreign nationality of a natural person. If a natural person has several foreign nationalities, his *lex personalis* shall be the law of the state with which a natural person is most closely connected. *Lex personalis* for stateless natural persons shall be the law of the state where a natural person has a permanent place of residence; and upon the absence of such place of residence – the law of the state of a person’s habitual residence. If a natural person does not have procedural legal capacity, he may be recognized legally capable on the territory of the Republic of Kazakhstan, provided that a natural person has procedural legal capacity in accordance with the legislation of Kazakhstan.

²⁶ See IM Mahniboroda, ‘Characteristics of International Procedural Legal Capacity’ (2010) 11 Modern Law.

In accordance with the Article 415(1-2) of the CCP Kazakhstan the **procedural legal capacity of a foreign juridical person** shall be determined in accordance with the laws of a foreign state where such juridical person was established. A foreign juridical person that does not have procedural legal capacity under the above-mentioned law may be recognized legally capable on the territory of the Republic of Kazakhstan in accordance with Kazakh legislation. Procedural legal capacity of an international organization shall be determined on the basis of an international treaty, in accordance with which it has been established, its charter documents or the agreement with the competent state bodies of the Republic of Kazakhstan. Russian procedural legislation does not contain any conflict rules on determination of the law applicable to procedural legal capacity of foreign persons. It may be stated that in this case general conflict rules referring to *lex personalis* of natural and juridical persons, that are contained in Section VI “Private International Law” of the Third Part of the Civil Code of the Russian Federation of 26 November 2001, as amended 05 June 2012, shall be applied.²⁷

The principles for determining the jurisdiction of courts contained in Russian and Kazakh legislation are similar to those contained in the 1993 Minsk Convention on Legal Assistance and Legal Relations in Civil, Family, and Criminal Matters (hereinafter: the Minsk Convention), as amended by the Moscow Protocol of 1997²⁸. The Minsk Convention is a regional multilateral international treaty which establishes the basic principles for natural persons and juridical persons from one Contracting Party to have recourse to the courts on the territory of another Contracting Party. Both Russia and Kazakhstan are the parties of the Minsk Convention and the Moscow Protocol. **The principle of national regime** (Article 1) and **the principle of delimitation of the territorial systemic jurisdiction on the basis of place of residence or location of the defendant** (Article 20) are the principal conventional provisions important for determining international systemic jurisdiction.

Article 1 of the Minsk Convention provides that citizens of each of the Contracting Parties, as well as persons residing on the territory thereof, enjoy on the territories of all other Contracting Parties the same legal protection as own citizens of the particular Contracting Party. Thus, the citizens of each Contracting Party, and other persons residing on the territory thereof, have the right to freely and without obstruction apply to the courts of other Contracting Parties within whose competence civil and family cases are (hereinafter: justice institutions), may appear in them, file petitions and suits, and perform other procedural actions on the same

²⁷ СЗ РФ (2001), no. 49, item 4552; (2012), no. 24, item 3068.

²⁸ Бюллетень международных договоров, (1995) no. 2; no. 4 (2008). The Minsk Convention entered into force on 19 May 1994. For Russia it entered into force on 10 December 1994 and for Kazakhstan on 19 May 1994. The Moscow Protocol entered into force on 17 September 1999, for Russia on 9 January 2001, and for Kazakhstan on 17 September 1999.

conditions as citizens of that particular Contracting Party. The Convention provisions also apply to juridical persons created in accordance with legislation of the Contracting Parties.

Article 20 of the Minsk Convention stipulates that suits against persons having a place of residence of the territory of one Contracting Party are to be filed irrespective of their citizenship in the courts of that Contracting Party, and suits against juridical persons are filed in the courts of the Contracting Party on whose territory the management organ of the juridical person or a representation of branch thereof are situated. If several defendants take part in a case who have a place of residence or location on the territories of different Contracting parties, the dispute is considered at the place of residence or location of any defendant, at the choice of the plaintiff. The courts of the Contracting Parties are competent also in instances when on the territory thereof:

(1) trade, industrial or other economic activity of an enterprise or a branch of the defendant is carried out;

(2) obligations from a contract which is the subject-matter of a dispute is performed or should be performed in part or entirely;

(3) the plaintiff with regard to a suit concerning the defense of honor, dignity, and business reputation has a permanent place of residence or location.

Under the Minsk Convention, courts at the location of property have **exclusive jurisdiction** with regard to suits concerning the right of ownership or other rights to a thing to immovable property. Suits against carriers arising from contracts of carriage of cargo, passengers, and baggage are filed at the location of the management of a transport organization against whom a claim was filed in the established procedure. These last two grounds are examples of the Minsk Convention establishing **the exclusive jurisdiction** of a court of a particular Contracting Party which may not be changed by arrangement of the parties and, accordingly, may not be the subject-matter of a choice of forum agreement. If there were such a choice of forum agreement, upon the application of the defendant the court would terminate the proceedings in the case.

The Minsk Convention also regulates **contractual systemic jurisdiction**. According to Article 21 of the Minsk Convention, courts of the Contracting Parties may consider cases also when there is a written agreement of the parties to refer a dispute to those courts. The exclusive systemic jurisdiction stipulated by Article 20 of the Minsk Convention and by other rules as well as from the internal legislation of the respective Contracting Party cannot be changed by the agreement of the parties of the dispute. If there were such a choice of forum agreement, upon the application of the defendant the court shall terminate the proceedings in the case.

The Kiev Agreement on the Procedure for the Settlement of Disputes Connected with the Effectuation of Economic Activity (hereinafter: the Kiev Agreement) also contains provisions regulating the establishment of systemic jurisdiction in cases with the participation of foreign persons²⁹. The Kiev Agreement regulates, *inter alia*, the consideration of cases arising from contractual and other civil-law relations between economic subjects (Article 1). To this end, the Kiev Agreement contains norms concerning general, exclusive, and contractual systemic jurisdiction. A court of a Contracting Party is competent to consider a dispute with regard to cases in which foreign persons participate where:

(1) the defendant has a permanent place of residence or location on the day the suit was filed;

(2) trade or industrial or other economic activity of an enterprise or branch of the defendant is carried out;

(3) an obligation from a contract which is the subject-matter of the dispute was performed or should have been performed in full or in part;

(4) an action or other obligation serving as grounds for a demand concerning compensation of harm occurred;

(5) the plaintiff in a suit concerning the protection of business reputation has a permanent place of residence or location;

(6) a supplier, independent-work contractor, or person rendering a service or performing work as a contracting party is situated, and the dispute concerns the conclusion, change, or dissolution of contracts (Article 4(1), Kiev Agreement).

With respect to the **exclusive jurisdiction**, the Kiev Agreement provides that suits filed by subjects of economic management concerning the right of ownership to immovable property are to be considered solely by the court of the Contracting Party on whose territory the property is situated (Article 4(3), Kiev Agreement). Similarly, cases to deem invalid in full or in part, acts not having a normative character of State and other agencies, or suits concerning compensation of losses caused to economic subjects by such acts or losses which arose as a consequence of the improper execution by the said agencies of their duties with respect to economic subjects, are considered solely by a court at the location of the said agency (Article 4(4), Kiev Agreement). A similar rule is applicable to a counter suit or a demand for set-off arising from the same legal relation as the basic suit – these are subject to consideration in that court which considers the basic suit (Article 4(5), Kiev Agreement).

²⁹ Информационный вестник Совета глав государств и Совета глав правительств СНГ «Содружество» (1992), no. 4. The Kiev Agreement entered into force on 19 December 1992, for Russia on 19 December 1992, and for Kazakhstan on 20 April 1994.

Contractual systemic jurisdiction determined by the Kiev Agreement assumes that the courts of the Contracting Parties consider cases if there is a written agreement of the parties to refer a dispute to this court. When there is such an agreement, the court of another Contracting Party terminates the proceedings in the case upon the application of the defendant provided that such an application is made before the judgment is adopted in the case (Article 4(2), Kiev Agreement). A choice of forum agreement may not change the exclusive systemic jurisdiction of a court competent to consider a case in accordance with Article 4(3)-(4), Kiev Agreement. The Kiev Agreement is, therefore, for its Contracting Parties the principal international treaty of a special character regulating systemic jurisdiction with regard to economic disputes. Georgia and Moldova are not parties to the Kiev Agreement, which means that the Minsk Convention applies to determine systemic jurisdiction with regard to economic disputes with the participation of juridical persons and citizens of those States – the Minsk Convention having more parties than the Kiev Agreement does.

There are several bilateral treaties either of Russia, or of Kazakhstan that address legal assistance in civil, family, and criminal cases in which issues of systemic jurisdiction with regard to economic disputes are addressed. As a rule, the court of the Contracting Party competent to consider a dispute is the court at the place of residence on the territory of that State of the natural person or the location of the management organ, representation, or branch of a juridical person. The question naturally arises as to the correlation of the multilateral and bilateral treaties to which Russia and Kazakhstan are parties with the rules of domestic legislation set out in the CAP Russia and CCP Kazakhstan.

Guided by the general principles of public and private international law, we would suggest the following. When disputes fall within the purview of bilateral treaties of Russia and Kazakhstan on legal assistance, those treaties should be applied to determined systemic jurisdiction with respect to disputes with the participation of foreign persons from those two States on the principle of *lex specialis*. Systemic jurisdiction with regard to economic disputes with the participation of Russian and Kazakh citizens between themselves, or with juridical persons and citizens of other CIS countries, should be determined on the basis of the Kiev Agreement or, if citizens of Georgia and/or Moldova are involved, the Minsk Convention. The rules of the CAP Russia or the CCP Kazakhstan would apply when determining systemic jurisdiction if a participant of a foreign economic transaction emanates from a State with which Russia and Kazakhstan have no bilateral or multilateral treaties containing rules on ascertaining the jurisdiction of courts with regard to economic disputes with the participation of foreign persons.

2) Recognition and Enforcement of Foreign Judgments on the Territory of Russia and Kazakhstan

The ultimate issue for international civil procedure is whether a judgment rendered in one State can be recognized and enforced in another, because it is this procedural stage which represents the final disposition of the legal relations in dispute between parties in the form of the material satisfaction of the plaintiff's demands. The difficulty is that a judgment, being an act of public power of one State adopted within the limits of its jurisdiction, must be recognized and enforced on the territory of another State to which the public power of the first State does not extend. The generally-recognized international legal principles of territorial integrity and the sovereign equality of States mean that a foreign judgment will be recognized and enforced on the territory of a State only when either the legislation of that State so permits, or an international treaty of that State so permits, or both. Russian and Kazakh law offer both alternatives³⁰.

Chapter 31 of the CAP Russia is titled as "Proceeding with Regard to Cases Concerning Recognition and Enforcement of Foreign Judgments and Foreign Arbitral Awards". The CAP Russia provides (Article 241(1)) that judgments of foreign States adopted by them with regard to disputes and other cases arising when effectuating entrepreneurial and other economic activity (foreign courts) shall be recognized and enforced in the Russian Federation by arbitrazh courts if recognition and enforcement of such judgments is provided for by an international treaty of the Russian Federation and a federal law³¹.

Kazakhstan regulates this issue in the Article 425 of CCP Kazakhstan. In accordance with the above-mentioned Article, judgments of foreign courts shall be recognized and enforced in Kazakhstan if the recognition and enforcement thereof is provided for by the law or international treaties, to which the Republic of Kazakhstan is the party, or on the basis of the principle of reciprocity. CCP Kazakhstan precisely singles out the principle of reciprocity as an autonomous ground for the recognition and enforcement of foreign judgments on the territory of Kazakhstan. A formal logical analysis of Russian legislation hardly enables one to come to an

³⁰ This is a subject of tremendous theoretical and practical interest in Russia and Kazakhstan, reflecting the greater involvement of both countries in foreign economic and investment relations. See AI Muranov, *Enforcement of Foreign Judgments and Arbitral Awards: Competence of Russian Courts* (Moscow, 2002); AI Muranov, *International Treaty and Reciprocity as Grounds for Enforcement of Foreign Judgments in Russia* (Moscow, 2003); DV Livitsky, *Recognition of Foreign Judgments in Civil Cases (Comparative Legal Analysis of French Legislation, Judicial Practice, and Legal Doctrine)* (Spb., 2005); RV Zaitsev, *Recognition and Enforcement in Russia of Foreign Judicial Acts* (Moscow, 2007). A number of works appeared in Imperial Russia on the subject. See P Markov, 'On the Enforcement of Decisions of Judicial Instances of Foreign States' (1864) XXII Journal of Ministry of Justice 25-46, 211-224; IE Engelman, 'On the Enforcement of Foreign Judgments in Russia' (1884) 1 Journal of Civil and Criminal Law 75-121.

³¹ See VA Kanashevsky, 'On the Grounds for Recognition and Enforcement of Foreign Judgments According to Russian and Foreign Law' (2006) 4 Journal of Private International Law.

analogous conclusion. The possibility of the recognition and enforcement of foreign judgments on the basis of a federal law means the introduction of a new ground for such recognition and enforcement – the principle of reciprocity, which shall be consolidated in individual federal laws³². There is only one example of such law - the Federal Law on Insolvency (Bankruptcy) as of 26 October 2002, as amended of 28 July 2012³³.

Article 1(6) of this law says that the judgments of foreign states rendered in cases of insolvency (bankruptcy) shall be recognized on the territory of Russia in accordance with the international treaties of Russia. In case of an absence of such treaties the judgments of foreign states rendered in cases of insolvency (bankruptcy) shall be recognized on the territory of Russia in accordance with principle of reciprocity if otherwise is not provided by the federal law. In above-mentioned rule of federal law we are talking only about the recognition of foreign judgment on the ground of reciprocity, but not about its enforcement. Moreover, the principle of reciprocity serves as the basis for the recognition and enforcement of only those foreign judgments which have been rendered with regard to disputes arising from insolvency (bankruptcy) proceedings. In above-mentioned rule of the federal law we are talking only about the recognition of foreign judgment on the ground of reciprocity, but not about its enforcement. Thus, it must be stresses that in Russia, unlike Kazakhstan, the principle of reciprocity serves as the basis for the recognition and enforcement of only those foreign judgments which have been rendered with regard to disputes arising from insolvency (bankruptcy) proceedings.

The procedure for recognition and enforcement of a foreign judgment is as follows. An application or petition to recognize and enforce a judgment of a foreign court is filed by a party to the dispute in whose favor the judgment was rendered in an arbitrazh court of a subject of the Russian Federation at the location or place of residence (or presence) of the debtor or, if the location or place of residence (or presence) of the debtor is unknown, at the location of property of the debtor. The said application is filed in written form and must be signed by the recovering party or a representative thereof (Article 242(1), CAP Russia). Russian legislation adds that this application also may be filed by means of completing a form on the official website of the arbitrazh court (Article 242(2), CAP Russia).

³² See DV Litvinsky, 'Reciprocity in the Domain of Recognition and Enforcement of Judgments of Foreign States' (2002) 2-3 Journal of Private International Law; VO Abolonin, 'Concept of Reciprocity in International Civil Procedure' (2004) 3 Arbitrazh and Civil Procedure; K Branovitsky, 'Principle of Reciprocity in International Civil Procedure' (2005) 8 Arbitrazh and Civil Procedure; DV Litvinsky, 'Principles of "Reciprocity" and "Right to Trial" in Domain of Exequatur for Enforcement in Russia of Foreign Judgments: Decree of the Federal Arbitrazh Court of Moscow District of 2 March 2006' (2006) 4 International Commercial Arbitration; DV Litvinsky, "'Never Refuse to Enforce': Once More on the Question of the Possibility of Enforcing Judgments of Foreign Courts on the Territory of the Russian Federation in the Absence of an International Treaty' (2006) 4-5 Herald of Supreme Arbitrazh Court of the Russian Federation; VYu Knutova, 'Enforcement of Foreign Judgment in the Russian Federation in the Absence of an International Treaty on Legal Assistance' (2010) 4 Arbitrazh Practice; P Martinez-Fraga, *The New Role of Comity in Private Procedural International Law* (Global Law Collection Series, 2007).

³³ C3 PΦ (2002), no. 43, item 4190; (2012), no. 31, item 4333.

There must be appended to the application or petition to recognize and enforce the foreign judgment:

(1) copy duly certified of a foreign judgment for whose recognition and enforcement the recoverer petitions;

(2) document duly certified and confirming the entry of a foreign judgment into legal force unless this is specified in the text of the judgment itself;

(3) document duly certified and confirming that the debtor was timely and duly notified about the proceedings in a foreign court, for the recognition and enforcement of whose judgment the recoverer petitions;

(4) power of attorney or other document certifying duly and confirming the powers of the person who signed the application to the arbitrazh court;

(5) document confirming the sending to the debtor of a copy of the application concerning recognition and enforcement of a foreign judgment (Article 242(3)(5), CAP Russia);

(6) duly certified translation of the documents specified in points (1) to (5) of the present paragraph into the Russian language (Article 242(3), CAP Russia).

The application or petition to recognize and enforce a foreign judgment is considered in a judicial session by one judge sitting alone within a period not exceeding **three months** from the day of receipt at an arbitrazh court in the Russian Federation³⁴. The arbitrazh court notifies the parties in writing about the time and place of the judicial session. The failure of interested persons or their representatives to appear without justifiable reasons at the judicial session is not an obstacle to consideration of the petition. Upon the consideration of the petition the court during the judicial session establishes existence or absence of the grounds for recognition and enforcement of foreign judgments by the way of researching of the evidence provided to the court, foundation of the demands and notice of opposition. During judicial session **the arbitrazh court is not entitled to revise the foreign judgment on the subject-matter** (Article 243, CAP Russia).

The arbitrazh court in Russia will render a ruling to authorize **the enforcement of a foreign judgment on the territory of Russia** in full accordance with the rules established in CAP Russia for such cases after having considered the application or petition. The ruling of the arbitrazh court authorizing enforcement of a foreign judgment may be appealed to a court of appellate or cassational instance within a month from the date of the day of the rendering of the ruling (Article 245(3), CAP Russia).

³⁴ See SV Tarnopolskaya, 'Systemic Jurisdiction over Cases concerning Enforcement of Arbitral Awards and Cases concerning Recognition and Enforcement of Foreign Judgments and Arbitral Awards' (2008) 1 Law.

A foreign judgment is enforced in Russia on the basis of a writ of execution issued by a Russian arbitrazh court, which have rendered a ruling to recognize and enforce the foreign court judgment by way of what is called an “execution proceeding” and that is determined in the Article 246(1), CAP Russia and in the Federal Law on execution proceeding as of 02 October 2007, as amended of 28 July 2012³⁵. **The period of limitation for submitting a foreign judgment for execution is three years from the day of the entry thereof into legal force.** The period can be restored by the arbitrazh court upon the petition of the recoverer should the period expire (Article 246(2), CAP Russia)³⁶.

A refusal is permitted in the following instances, the list of which is exhaustive in Russian legislation³⁷:

(1) the judgment according to the law of the State on whose territory it was adopted has not entered into legal force;

(2) the party against whom the judgment was adopted was not timely and duly notified about the time and place of consideration of the case or for other reasons could not submit its explanations to the court;

(3) consideration of the case in accordance with an international treaty of the Russian Federation or legislation of Russia is relegated to the exclusive competence of an arbitrazh court in the Russian Federation;

(4) there is a judgment of a court in the Russian Federation which has entered into legal force adopted with regard to a dispute between the same persons, the same subject-matter, and on the same grounds;

(5) a case with regard to a dispute between the same persons, on the same subject-matter, and on the same grounds is under consideration of a court in the Russian Federation, the proceeding with regard to which was instituted before the instituting of the proceeding with regard to the case in a foreign court, or the court in the Russian Federation was the first to accept an application for its own proceeding with regard to the dispute between the same persons, on the same subject-matter, and on the same grounds;

(6) the period of limitations has expired for enforcing the judgment of a foreign court and this period is not restored by a court;

³⁵ C3 PΦ (2007), no. 41, item 4849; (2012), no. 31, item 4333.

³⁶ See TN Neshataeva, ‘On the Recognition and Enforcement of Foreign Judgments and Arbitral Awards’ (2004) 11 Arbitrazh Practice; DV Konev, ‘Individual Issues of the Recognition and Enforcement of Foreign Judgments’ (2007) 1-2 Arbitrazh and Civil Procedure; IuA Svirin, ‘Theoretical and Legal Foundations of Enforcement of Foreign Judgments in the Russian Federation’ (2008) 2 Advertising and Law.

³⁷ See EV Vinter, ‘Grounds for Refusal to Recognize and Enforce Foreign Judgments’ (2006) 4 Moscow Journal of International Law.

(7) enforcement of a judgment of a foreign court would be contrary to the public policy of the Russian Federation (Article 244(1), CAP Russia)³⁸.

Procedural practice on consideration of cases in relation to recognition and enforcement of foreign judgments was analyzed in Survey of Practice of Consideration by Arbitrazh Courts of Cases Concerning Recognition and Enforcement of Foreign Judgments, Contesting of Arbitral Awards, and Issuance of Writs of Execution for Enforcement of Arbitral Awards prepared by the Higher Arbitrazh Court of the Russian Federation (No. 96 as of 22 December 2005)³⁹.

The most important findings of the higher court instance can be presented as follows:

1. Arbitrazh court upon consideration of the claim on recognition and enforcement of the foreign judgment is not entitled to revise the subject-matter of the foreign judgment (item 4);
2. Arbitrazh court shall satisfy the claim on recognition and enforcement of the foreign judgment upon existence of proof evidencing the fact that there is a judgment of the Russian court that has come into legal force on other dispute between the same parties (item 5);
3. Arbitrazh court upon consideration of the dispute about summoning the party against which the judgment was rendered shall inspect if the party had a possibility to defend in connection with the absence of real and timely notification about the time and place of the proceedings (item 6);
4. Arbitrazh court makes a ruling on recognition and enforcement of the foreign judgment provided that such a judgment has come into legal force in accordance with the legislation of the state where it has been rendered (item 7);
5. Arbitrazh court has the right to refuse to recognize and enforce the foreign judgment provided that it has found that this judgment is rendered in the dispute falling within the exclusive jurisdiction of the Russian arbitrazh courts (item 8);
6. Arbitrazh court makes a ruling on satisfaction of the claim on obligatory execution of the foreign judgment provided that the way of execution prescribed in the judgment shall not conflict with the public policy of the Russian Federation (item 31).

Terms and conditions as well as the order of recognition and enforcement of foreign judgments in Kazakhstan are determined by legislation if otherwise is not provided by international treaties, to which the Republic of Kazakhstan is a party. **The judgment of the foreign court can be submitted for recognition and enforcement within three years from**

³⁸ See BR Karabelnikov, 'Public Policy Clause in Recent Practice of Russian and Foreign Courts' (2006) 1 International Commercial Arbitration; SV Krokhaev, *Category of Public Policy in International Civil Procedure* (SPb., 2006).

³⁹ Вестник Высшего арбитражного суда РФ (2006), no. 3.

the day of the entry thereof into legal force. This period may be restored by Kazakh court should the period expire upon justifiable reason (Article 425(2-3), CCP Kazakhstan). In Kazakhstan the following foreign judgments are recognized, that do not require enforcement by its character:

- 1) referring to personal status exclusively of the citizens of the state where the judgment was rendered;
- 2) referring to divorce and voidance of marriage between citizens of the Republic of Kazakhstan and foreign states provided that in the moment of divorce at least one of the spouses lives out of the territory of Kazakhstan;
- 3) referring to divorce and voidance of marriage between citizens of the Republic of Kazakhstan provided that in the moment of divorce both spouses live out of the territory of Kazakhstan (Article 426, CCP Kazakhstan).

As follows from the above-mentioned article, foreign judgments rendered in economic disputes shall be enforced, not only recognized. Kazakh economic court in the location of the debtor or the debtor's property shall be the competent court on rendering the rulings on the enforcement of the foreign judgment. In accordance with the Article 5 of the Law of the Republic of Kazakhstan on execution procedure and status of court bailiffs as of 02 April 2010, as amended of 01 March 2011⁴⁰, the order of enforcement on the territory of Kazakhstan of the judgments of international and foreign courts shall be determined by the respective international treaties, ratified by the Republic of Kazakhstan, and by the present law. Writ of enforcement issued by Kazakh court on the basis of the foreign judgment shall be submitted for execution within three years from the day of the entry thereof into legal force.

As fairly mentioned by S Akimbekova, Kazakh legislation on present day does not determine the order of applying with a petition on recognition and enforcement of a foreign judgment on the territory of the Republic of Kazakhstan⁴¹. Along with this the procedure for execution of a foreign judgment is determined in detail in the Normative Decree of the Supreme Court of the Republic of Kazakhstan No. 5 on judgment as of 11 July 2003⁴². Enforcement of a foreign judgment shall be made upon the petition of the interested party by **a ruling** of the court of the Republic of Kazakhstan in accordance with the rules for systemic jurisdiction as determined in the CCP Kazakhstan, at the location of the execution of the judgment. As a rule, the following documents are attached to the petition:

⁴⁰ <URL: www.pavlodar.com>

⁴¹ See SA Akimbekova, 'Recognition and Enforcement of Foreign Judgments on the Territory of the Republic of Kazakhstan (2011) 11 Eurasian Legal Journal 38.

⁴² <URL: www.pavlodar.com>

(1) duly certified copy of the judgment, the permission for an enforcement of which is required;

(2) an official document that the judgment has entered into legal force unless this follows from the judgment itself;

(3) proofs evidencing that the party or its authorized representative was duly notified about the proceedings in case of procedural incapacity of the party against which the judgment was rendered;

(4) writ of execution with the remark on partial execution of the judgment, if such document exists;

(5) in cases of contractual jurisdiction a document confirming the choice of court agreement between the parties.

The court considering the petition on recognition and enforcement of the foreign judgment shall be limited by establishment of the circumstances allowing the execution of the judgment. The court is entitled to refuse the execution upon presentation by the party in respect of which the execution of the foreign judgment is required, of the following evidence:

1) resolution of the dispute by an incompetent court;

2) consideration of the case in the absence of the party having failed to be duly notified about the proceedings;

3) lapse of a three-year limitation period given for submission of a judgment for an enforcement;

4) existence of a judgment that came into legal force between the same parties, on the same subject-matter and on the same grounds (item 30 of the Decree).

The procedure for the recognition and enforcement of foreign judgments is also regulated by treaties entered into by Russia and Kazakhstan⁴³. The Minsk Convention, in particular, contains Section III devoted to “Recognition and Enforcement of Decisions”⁴⁴. In the Minsk Convention the term “decision” encompasses the decisions of justice institutions relating to civil and family cases, including judgments and other decisions of the courts, amicable agreements confirmed by the court with regard to such cases and notarial acts with respect to monetary obligations. Decisions rendered by justice institutions of each of the Contracting Parties that have entered into legal force not by their nature requiring enforcement are recognized on the territories of the other Contracting Parties without a special proceeding provided that:

⁴³ See AA Matveev, ‘Russia and International Treaties on Recognition and Enforcement of Foreign Judgments’ (2004) 2 Moscow Journal of International Law.

⁴⁴ See AA Egorov, ‘Recognition and Enforcement of Judgments of Member Countries of the CIS Minsk Convention’ (1998) 12 Legislation and Economics.

(1) the justice institution being requested has not previously rendered a decision with regard to this case which has entered into legal force;

(2) the case under the Minsk Convention or in instances not provided for by it, under legislation of the Contracting Party on whose territory the decision is to be recognized, is not within the exclusive competence of justice institutions of that Contracting Party (Article 52, Minsk Convention).

A petition to enforce a decision is filed in the competent court of the Contracting Party where the decision is subject to being enforced. It may be filed also in the court which rendered the decision in the case at first instance. This court then refers the petition to the court competent to render a decision on the petition. There must be attached to the petition:

(1) the decision or a certified copy thereof, and also an official document that the decision has entered into legal force and is subject to enforcement, or that it is subject to enforcement before entry into legal force unless this follows from the decision itself;

(2) a document from which it follows that the party against whom the decision was rendered and who did not take part in the proceeding was duly and timely summoned to court, and in the event of the lack of procedural dispositive legal capacity, was duly represented;

(3) a document confirming the partial enforcement of the decision at the moment of referral thereof;

(4) a document confirming the agreement of the parties with regard to cases based on contractual systemic jurisdiction.

The petition to authorize enforcement and the appended documents must be accompanied by a certified translation into the language of the Contracting Party being requested or into the Russian language (Article 53). **These petitions are then considered by the courts of the Contracting Party on whose territory the enforcement is sought.** The court considering the petition is to confine itself to determining whether the conditions provided for by the Minsk Convention have been complied with. If they have, the court renders a decision to enforce. The procedure for enforcement is determined by legislation of the Contracting Party on whose territory the enforcement is sought (Article 54, Minsk Convention)⁴⁵. Enforcement may be refused if:

(1) in accordance with legislation of the Contracting Party on whose territory the decision was rendered it has not entered into legal force and is not subject to enforcement, except for instances when the decision is subject to enforcement prior to entry into force;

⁴⁵ In practice this means that if the enforcement is to be in Russia or in Kazakhstan, the provisions of Chapter 31 of the CAP Russia or Section V of the CCP Kazakhstan will be applied.

(2) the defendant did not take part in the proceeding because neither he nor anyone else duly empowered was properly and timely summoned to the court;

(3) a decision was rendered and has entered into legal force with regard to a case between the same parties, same subject-matter, and same grounds on the territory of a Contracting Party where the decision is to be recognized and enforced, or there is a recognized decision of a court of a third State, or a proceeding with regard to this case was instituted by a judicial institution of this Contracting Party previously;

(4) under the Minsk Convention or in instances not provided by it, under the legislation of the Contracting Party on whose territory the decision was recognized and enforced, the case is within the exclusive competence of an institution thereof;

(5) the document confirming an agreement with regard to a case of contractual systemic jurisdiction is absent;

(6) the period of limitations for enforcement provided by legislation of the Contracting Party whose court is enforcing the decision has lapsed (Article 55, Minsk Convention).

The other regional international treaty of relevance to the recognition and enforcement of foreign judgments is the Kiev Agreement. Pursuant to that Agreement, the Member States assumed an obligation to reciprocally recognize and enforce the judgments of competent courts which have entered into legal force (Article 7). The precise formulation of the Kiev Agreement is that **judgments rendered by the competent courts of one Member State are subject to recognition on the territory of other CIS Member States**. This means that the Kiev Agreement does not make provision for a judicial proceeding to authorize enforcement. Accordingly, a petition to enforce the judgment by an interested party is not a petition to authorize enforcement.

Therefore, among the documents to be appended to the petition (duly certified copy of the judgment whose enforcement is being sought; official document that the judgment has entered into legal force unless this is evident from the text of the judgment itself; evidence of notification of the other party about the proceeding) is a document of enforcement (Article 8)⁴⁶. The Kiev Agreement merely provides for a judicial proceeding with regard to a refusal to enforce a judgment at the request of the party against whom it is directed and consolidates the list of

⁴⁶ According to the Information Letter of the Presidium of the Supreme Arbitrazh Court of the Russian Federation, No. 96 (point 1), "Survey of Practice of Consideration by Arbitrazh Courts of Cases Concerning Recognition and Enforcement of Foreign Judgments, Contesting of Arbitral Awards, and Issuance of Writs of Execution for Enforcement of Arbitral Awards", of 22 December 2005, when a Russian arbitrazh court considers an application to enforce a judgment of a court rendered on the territory of a party to the Kiev Agreement, in the absence of the document of enforcement mentioned in Article 8 of the Kiev Agreement, the court of first instance in Russia must leave the application without movement and establish a period during which the petitioner is to submit the document of enforcement. In the event of the failure to submit the document within the established period, the court must return the application to the petitioner on the basis of CAP Russia (Article 128(4)).

evidence which must be presented to the competent court at the place where enforcement is being sought. Among such evidence to be presented is:

(1) that a court of the requested CIS State has previously rendered a judgment that has entered into legal force in a case between the same parties, the same subject-matter, and on the same grounds;

(2) there is a judgment of a competent court of a third CIS country whose judgment has been recognized, or a court of a State which is not a member of the CIS, with regard to a dispute between the same parties, on the same subject-matter, and on the same grounds;

(3) the dispute was settled by a court lacking competence;

(4) the other party was not notified about the proceeding;

(5) the three-year period of limitations for enforcement of the judgment was lapsed (Article 9, Kiev Agreement).

The Kiev Agreement accordingly does not require a court proceeding for the recognition and enforcement of a foreign judgment rendered by a competent court of a party to the Agreement, which means the recognition and enforcement thereof without a judicial proceeding.

In this context the petition to enforce the judgment is the equivalent to an application to institute an execution proceeding. It should be noted that the Kiev Agreement makes provision for the possibility to execute judgments not only by court bailiffs, but also by other agencies designed by a court or by legislation at the place where execution is to occur. These might be credit institutions having certain powers with respect to property of the defendant against which execution is to be levied by decision of a court.

The question arises as to the correlation of rules contained in the Minsk Convention and the Kiev Agreement since both treaties regulate the recognition and enforcement of foreign judgments on the territory of the CIS Member States. TN Neshataeva argues that the Minsk Convention does not extend to the enforcement of decisions of economic or arbitrazh courts with regard to disputes connected with economic activity⁴⁷. She came to this conclusion on the basis of analyzing Article 82 of the Minsk Convention, which provides that it does not affect the provisions of other international treaties by which the Contracting Parties are bound. The Kiev Agreement is such a treaty, being *lex specialis* which regulates the resolution only of economic cases (that is, cases arising from contractual and other civil-law relations between economic subjects and from their relations with State and other agencies) (Article 1)⁴⁸. However, the Kiev

⁴⁷ TN Neshataeva, 'On the Recognition and Enforcement of Judgments with Regard to Economic Disputes of Courts of Member States of the CIS on the Territory of the Russian Federation' (1997) 2 Journal of Private International Law 9.

⁴⁸ It should be borne in mind that the Kiev Agreement regulates the recognition and enforcement of judgments only of competent courts, that is, those courts whose competence to resolve a dispute in substance meets the criteria of the Kiev Agreement (Article 4). Thus, a court considering a dispute in substance and rendering a judgment subject to enforcement beyond the limits of its

Agreement does not extend to judgments rendered on the territory of Georgia or Moldova, as these States are not parties to the Kiev Agreement. In their case, the Minsk Convention would be applicable.

It should be noted that the provisions of the Kiev Agreement and the Minsk Convention have been elaborated in another treaty specially devoted to the recognition and enforcement of judgments in economic disputes on the territory of the CIS: the Moscow Agreement of the CIS on the procedure for the Mutual Enforcement of Judgments of Arbitrazh and Economic Courts on the Territory of the CIS Member States of 6 March 1998 (hereinafter: Moscow Agreement)⁴⁹. The basic purpose of the Moscow Agreement is to eliminate a judicial proceeding to authorize enforcement of a foreign judgment, which would mean that the enforcement of such a judgment would be equated to the enforcement proceedings of own courts in accordance with national legislation. In effect, foreign judgments for these purposes would enjoy the same status as domestic judgments.

The Moscow Agreement (Article 4) expressly provides that the priority, procedure, and limits of recovery and measures to secure the enforcement of a judgment of a competent court are determined by the legislation of the Contracting Party on whose territory recovery is to be made. Recovery is therefore on the same conditions as would obtain for the enforcement of a decision of a court of the Contracting Party; that is, national regime. Enforcement is levied against property of a debtor in accordance with the legislation of the State where the debtor is located upon the petition of the creditor to the competent court of the Contracting Party to the Moscow Agreement. The applicant must submit:

(1) a duly certified copy of a judgment of the competent court with confirmation of its entry into legal force, unless this is evident from the text of the judgment itself, whose enforcement is being petitioned for;

(2) the document of a competent court confirming the participation of the debtor in the judicial session and, if that party failed to appear, confirmation of proper notification of the time and place of the judicial session;

(3) the writ of execution.

The Moscow Agreement (Article 3) thus provides that a judgment of a competent court of one Contracting Party which has entered into legal force is enforced on the territory of another Contracting Party in an uncontested proceeding.

jurisdiction must possess competence in two aspects: first, to be competent according to procedural rules of the respective national legislation which regulates them; second, to be competent under Article 4 of the Kiev Agreement.

⁴⁹ Информационный вестник Совета глав государств и Совета глав правительств СНГ «Содружество» (1998), no. 1. The Moscow Agreement entered into force on 9 January 2001. Russia is not a party of the Moscow Agreement. For Kazakhstan it entered into force on 09 January 2001.

Conclusion

Three distinct regimes thus operate in Russia and the Republic of Kazakhstan with respect to proceedings in cases with the participation of foreign persons. The first is within the framework of bilateral international treaties concerning legal assistance in civil, family, and criminal matters. The second is within the framework of multilateral treaties (Kiev Agreement and Minsk Convention, with the prospect one day, perhaps, of the Moscow Agreement). Third is the framework of national legislation of the Russian Federation (CAP Russia) and the Republic of Kazakhstan (CCP Kazakhstan).

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