



COMPARATIVE ANALYSIS OF ENFORCEMENT OF CONTRACTS IN LITHUANIA AND KAZAKHSTAN

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Article History: Received on 25th February 2019, Revised on 30th April 2019, Published on 25th May 2019

Abstract

Purpose of Study: The aim of the study is to investigate the comparative analysis of the enforcement of contracts in Lithuania and Kazakhstan.

Methodology: Comparative qualitative research methods.

Results: The enforcement by arbitration or mediation is not permitted in Kazakhstan. Even now, Kazakhstan fails to rely on the institutions of arbitration or mediation and neither their awards are enforceable by the civil courts.

Implications/Applications: Enforcement of contracts is still developing in Kazakhstan while it has been developed and fully adopted as per international standards in Lithuania.

Keywords: *Analysis, Contract Law, Legal System, Lithuania, Kazakhstan*

INTRODUCTION

Contract law plays a pivotal role in contract law. It helps in building business relationships by also ensuring their legal existence. These relationships are sensitive and hence require an effective set of rules to govern them. Contract law helps in providing a legal mechanism for equal and fair realization of business relationships. Enforcement of contracts is fundamental to the contract. If a contract cannot be enforced, then it becomes null and void. For every contract to be valid, it must be enforceable by law. In a layman's language, enforcement of contract means the contract must be effective and valid to be worked upon. Enforcement of contracts is considered together with dispute resolution under the contract law. Efficient practices of contract enforcement reduce uncertainty whereby enhancing the predictability of healthy contractual relations. Settlement of contractual disputes leads to enforcement of the contract, which is largely done as per the laws of the State. Therefore, with the principles of contract law, legal institutions also play an important role in ensuring implementation and enforcement of the contracts. These legal institutions comprise the courts, judiciary, personnel of the legal profession, arbitration, mediation, and other such institutional mechanisms.

With cumbersome and bureaucratic procedures relating to enforcing of commercial transactions, resolving of contractual disputes becomes costly and time-consuming. Such a weak system of contract enforcement reduced the pace of trade and investment and thereby affects the overall growth of an economy. Thus, the study of the enforcement of contracts in countries is done before investing in their business projects. The principles of enforcement of contract help in securing the rights and obligations of the parties, in case the parties fail to act as per the provisions of the contract with which they were bound. The aim of this article is to understand and analyze the provisions of contract law relating to the enforcement of contracts and thereby comparing these provisions as under Lithuania and Kazakhstan. The principles of contract laws are based on principles of equity and common law and hence in most of the countries, they stand the same. However, there are changes in them to suit the needs and demands of the individual countries. These similarities and differences would be highlighted in the paper below. This paper would study the aspects of judicial and non-judicial enforcement and the process related to them. Further, it would analyze the problems related to enforcement of contracts in both these countries so that efficacious solutions can be found ([Alpeisso et al. 2018](#); [Etcuban & Pantinople, 2018](#); [Trámpuz, Juan Pablo, and Daniel Barredo Ibáñez. 2018](#)).

LEGAL FRAMEWORK OF CONTRACT LAW

Lithuanian Legal System

On July 18, 2000, The Seimas (Parliament) of the Republic of Lithuania had adopted the new Civil Code of Lithuania whereby replacing the Civil Code of 1964. This step of the Parliament was appreciated and described as bringing the new Constitution of Private Law. Under the civil code, various new rules relating to family law, company law, property law, succession, the law of obligation and others were introduced. Moreover, significant changes took place under contract law. In the 1964 Civil Code, the contract law included only certain general and specific rules of the contract. With the new code, new rules governing contracts came to ensure the transformation of results relating to contracts. Book 6 titled

Law of Obligations of the Civil Code contains the major rules relating to contract law. Most of the laws were borrowed from the principles of the European Contract of Law and UNIDROIT Principles of International Commercial Contracts.

Kazakhstan Law

The legal framework in Kazakhstan is normative. The legislation, including the 1995 Constitution, 2000 Constitutional law and others ensure implementation of significant principles determined by the courts. Even for contract legal relations, a normative legal basis of the administration of justice and enforcement of judgments is formed. The contract law is divided under the General Part (1994) and the Special Part (1999) of the RK Civil Code. These laws together regulate the general and specific provisions and principles of contract law, also including the various types of individual contracts. However, the current legislation is not sufficient in coping with the mechanisms of the enforcement of the contract. The existing Civil Code cannot effectively deal with business disputes and their resolutions as to contracts. The present framework requires special regulations that can ensure an adequate way of dealing with dispute resolutions ([Patrick, 2015](#), Selomo, M. R., and Govender, K. K. 2016).

METHODS OF DISPUTE RESOLUTION

Court Litigation

Enforcement of contracts is done by bringing the other party to the court, who is not working as per the terms agreed in the contract. The court ensures the rights and obligations of the contract are fulfilled between the parties. The parties to contract are required to work as per the agreed conditions under the principle of good faith; however, when they fail to do so, the aggrieved party can apply the same before the court and mandate the other party to work. The main methods of dispute resolutions followed in Lithuania are litigation before the court, arbitration, and mediation. Litigation is the most trusted amongst others. Arbitration is practiced only in a handful of cases, whereas mediation is a newly introduced concept. For initiation of litigation, the applicant must always concern in his mind the periods of limitation within which such litigation can be brought before the court. The general period of limitation for bringing claims before the court is ten years; however, there are certain specific circumstances wherein the period is shorter than ten years. No parties to the contract have the right to modify the period of limitation. Also, this period of limitation begins on the day when the right to bring action arises ([Lyailya, 2015](#); [Luo et al., 2018](#)).

An agreement between two or more persons regarding establishment, termination or modification or civil rights and liabilities is defined as a contract under the Civil Code of the Republic of Kazakhstan. The definition provides that from a contract not only rights but also liabilities are a part of the contract. However, the practice in Kazakhstan shows that contracting parties often fail to perform their duties under good faith and at certain times even completely fail to perform the obligations. This leads to damage and loss to the other party to contract. This non-performance requires enforcement of contracts by way of litigation. The obligations under contracts are enforced by awarding fine and penalty. The most common way of minimizing the risks related to unconscionable behavior in contract law is by awarding a penalty. The penalty is of two types i.e. contractual and legal penalty. Article 295 of the Civil Code of RK provides that the lender has the right to demand penalty, as determined under the legislation in the case of the failure of the other party to act as per the contract. The contractual penalty is mentioned under Article 293 of the Civil Code of RK. Other ways, which help in ensuring obligation, is by a pledge, guarantee, surety, deposit and hold and guarantee fee ([Mami, 2002](#); [Bakhshandeh, Sedrposhan, & Zarei, 2015](#)).

Arbitration

In Lithuania, both arbitration and mediation are used as methods for enforcement of contracts. Arbitration is governed by the Law on Commercial Arbitration and mediation by the Rules of Court Mediation. This dispute resolution method applies only with the consent of both the parties to the contract. When the parties agree then they can get their dispute resolved by arbitration. The involvement of court gets limited to procedural issues including recognition, interim measures and enforcement of the arbitral award. However, neither the courts nor the adverse parties can compel any party to use the mode of arbitration or mediation. Article 29, of the Arbitration Law, provides that if the parties to the dispute agree, they can appoint an expert for the resolution of the dispute. There are no provisions dealing with confidentiality of information under the Arbitration Law, however the same has been provided under the Vilnius Court of Commercial Arbitration Rules. In Lithuania, the VCCA is the most prominent institution of arbitration ([Butler, 2014](#); Dmitriyeva, E. N., & Nikiforova, E. P. 2016; [Baroughi, & Zarei, 2013](#)).

The situation of arbitration tribunals in Kazakhstan is complex and complicated. As per the Constitution, the state judicial system of Kazakhstan does not include within itself the arbitration tribunals. However, under civil legislation, the

possibility of protecting civil rights through such tribunals is present. Moreover, various international treaties and conventions have been ratified by the Republic of Kazakhstan that guarantees resolution of commercial disputes using mechanisms of arbitration. Arbitration tribunals have been rapidly developing in the Republic. These tribunals are not only used by the people of Kazakhstan to get their contractual issues resolved but also by foreign investors. The major problem with dispute resolution through arbitration in Kazakhstan is that the Civil Code 1999 does not provide for enforcement of awards by the tribunals. This served as a ground for refusing the orders of arbitration tribunals by the civil courts and thereby depriving these awards of any legal effect. This puts the arbitration tribunals in an unequal position with the courts. Initially, the Supreme Court passed a Resolution in 2001 whereby stating that the awards passed by the arbitration tribunals of Kazakhstan should be enforced in a like manner as the judgment of a civil court. However, a different stand was taken by the government of Republic, thereby vitiating the Resolution of Supreme Court. In present, the arbitration tribunals are not yet recognized under the Constitution and there stands no enforcement of arbitration awards. Thus, in reality, the arbitration tribunals do not function in Kazakhstan ([Haggai, 2012](#)).

ENFORCEMENT OF JUDGMENT

State Judgement

Once the rights and obligations of the parties under the Contract are decided by the State Courts and judgment is given by such court then the claimant can ask the court for issuing writ of execution as a matter of right. Such writ is submitted for execution. Until enforcement of the judgment, the contract remains unenforced. Such writ of execution can be issued in summary without any further recognition by the court and it can be submitted directly for execution. In Kazakhstan, the judgments of the court are given mandatory protection under the judicial sphere to ensure their enforcement. The Civil Code of RK provides that any judgment by the court that enters legal force shall be mandatorily enforced in the territory of Kazakhstan. However, in practice enforcement of judgments is a serious issue. The main reason for the same is an absence of an efficient mechanism for enforcing the acts of the judiciary. Currently, there exist fundamental gaps in the current legislation even when strict responsibility for non-enforcement of judgments is provided ([Mikelenas, 1996](#)).

These gaps are not only related to the judgment debtors but also officials of state agencies and other law enforcement officials. The Republic of Kazakhstan requires new laws relating to enforcement proceedings and the status of bailiffs as well as law enforcement officers while enforcing a judgment. Prompt decisions are required to be made to improve the technical and material support activities provided to law enforcement officers. As an initiative to work efficiently, there pay scales are required to be increased while also reducing the excessive burden from them. For the same, in 2002 the Supreme Court adopted a normative Resolution titled Responsibility for Malicious Non-Enforcement of Judicial Acts. It provided for enhancement of judicial performance to ensure enforcement and also providing for the guilt of persons having a responsibility to enforce the judgment. Thus, the courts in Kazakhstan are actively working to ensure that the judgments are enforced as against the debtor so that rights and liabilities are protected ([Mikelenas, 2000](#)).

Foreign Judgment

In Lithuania, the jurisdiction to hear cross-border litigation or to recognize foreign judgments vests with the Court of Appeal. To recognize a foreign judgment, it must either be a signatory to the Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, 1988 or the EFTA Convention (Lugano Convention) or the Regulation (EC) No. 44/2001 (The Brussels Regulation). Apart from the above, the foreign judgments must comply with the general requirements, including it should be legal as per the laws of another jurisdiction, both the parties should have fully participated in the legal proceedings and the issuing court must be competent. Also, no judgment of the foreign court would be enforceable in Lithuania unless it complies with the Lithuanian Constitution or the Private International Law of Lithuania or the Judgment of the Lithuanian Court on a similar matter.

In Kazakhstan, the law is conservative in relation to the enforcement of a foreign court's judgment. As per the general rule which was effective until 2015, the judgment of foreign courts was recognized and enforced by the state courts, when an international treaty with the foreign state on mutual legal assistance existed. However, there are only a few of such mutual legal assistance treaties. Thus, in practice, the enforcement of foreign judgments was not possible in the legal scenario of Kazakhstan. In contrast, the foreign arbitral awards are enforced without many issues by the courts, since Kazakhstan is a party to the ICSID Convention 1965, European Convention on International Commercial arbitration 1961 and New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958. In Kazakhstan, the situation relating to the enforcement of foreign judgments is changing with the adoption of the new Civil

Code effective from January 1, 2016. Now, judgments of foreign courts may be recognized and enforced is the same is provided under the laws of Kazakhstan and/or ratified by Kazakhstan under the international treaty or as per reciprocity.

RESULTS

As per the comparative analysis above, the following are the views of the authors:

1. The contract law of Lithuania recognizes well-known provisions from international instruments and is effective in practice. With the institutions in practice, interests of both the parties are reasonably balanced and do not give much scope of gross disparity or abuse of dominant position in contractual relationships. On the other hand, Kazakhstan has a traditional approach in relation to securing contractual relations. For the purposes of the enforcement of contracts, it primarily depends on legislation and judicial interventions. Kazakhstan does not follow international conventions and treaties in the same manner as done in Lithuania.

2. In Lithuania, for the implementation of international uniform rules, contracts follow the standard procedures and their enforcement is also at par with that followed in developed foreign countries. From the above analysis, from my view that in Lithuania the courts are concerned for enforcement of contracts and for the same, there are provisions in the law for enforcing the contract by way of approaching the courts or opting for either arbitration or mediation. On the other hand, in Kazakhstan, the provisions under the Civil Code, relating to contract law are simple and do not correspond to the international standards. The enforcement of contracts is difficult if one party is international or not subject to the Kazakhstan laws.

3. In Lithuania, contract enforcement is done by resolution of disputes. Further, once the dispute is resolved either by the state courts or foreign courts, the judgment is mandatorily required to be enforced to ensure that the rights of the parties are secured as under the contract. Even in Kazakhstan, there are laws for the enforcement of judgment relating to dispute resolution, however, due to the intervention of judicial officers, the level of enforcement is weak. Considering the same, new laws have been passed to ensure that every judgment is enforced.

4. The Lithuania Civil Code also recognizes enforcement of the contract by arbitration and mediation. These remedies are available to the parties with their consent. Dispute resolution and enforcement can be done through arbitration and mediation and the award passed by such tribunal are enforceable by the civil courts as the judgment of the court as per the Civil Code. However, the enforcement by arbitration or mediation is not permitted in Kazakhstan. Even now, Kazakhstan fails to rely on the institutions of arbitration or mediation and neither their awards are enforceable by the civil courts. Even though arbitration is provided as a remedy which can be opted by the parties, but domestic arbitral awards are not enforced by the courts, and the legislation of Kazakhstan does not consider arbitration as a part of the judiciary. With the new Civil Code of 2015, foreign courts' judgment and foreign arbitral award are now allowed to be enforced by the courts of Kazakhstan. However, in both the countries judgments of foreign courts and foreign arbitral award are enforceable by the civil courts.

CONCLUSION

This comparison suggests that enforcement of contracts is still developing in Kazakhstan while it has been developed and fully adopted as per international standards in Lithuania. Contractual provisions are significant in regards to the economic growth of a country. Similarly, the mechanisms of dispute resolutions are studied by international companies before investing in a country. Considering this, Kazakhstan needs to update its law and enforcement to ensure the protection of rights to the parties.

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