NOVELS OF THE NEW CIVIL PROCEDURAL CODE OF THE REPUBLIC OF KAZAKHSTAN*

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Each new legislative act, ideally, must improve the process of regulation of social relationships absorbing the most progressive theoretical research and achievements of judicial practice for the given period of development.

Based on this, the new Civil Procedural Code of the Republic of Kazakhstan (hereafter—the Code) which came into force on January 1, 2016, is not an exception.

Developers of the new Code aimed to:

- simplify civil legal proceedings;
- ensure acceleration of procedural activity of courts in protection and recovery of violated rights and lawful interests of physical and juridical persons;
- facilitate realization of procedural responsibilities by the persons participating in the process, based on criteria of honesty.

Author of this material give a brief analysis of novels of the Code paying a special attention to implementation of these norms in resolving environmental disputes.

In general, the new Code comply with the requirements presented to a regulatory and legal act intended to protect violated or disputed rights, freedoms and lawful interests of the state, physical and juridical persons.

At the same time, some norms of the Code need changes and additions, and a number of the norms need to be profoundly corrected or eliminated.

Let us draw our attention to the main novels of the new Code.

Three-tier Judicial System

The Code establishes a three-tier judicial system which includes courts of the first, appeals, and cassation instances, instead of the previously existed four-tier system, which consisted of courts of the first, appeals, cassation, and supervision instances. Given this, the authorities of the supervision instance in revision of judicial acts which came into a legal force will be performed by the cassation instance represented by a specialized judicial board of the Supreme Court of the Republic of Kazakhstan. Thus, in the system of oblast courts and courts equated to them, the cassation judicial instance was abolished.

It should be noted that according to the Code, courts of the first instance are the district courts, given this, the Court of the city of Astana (appeals instance) reviews and resolves civil lawsuits on investment disputes, applying the rules of a court of the first instance, except for cases within the jurisdiction of the Supreme Court of the Republic of Kazakhstan. The Supreme Court reviews and resolves civil cases on investment disputes which involve a large investor as a party, applying the rules of a court of the first instance. The Supreme Court, as well as the Court of the city of Astana, is not a court of the first instance. Thus, the norms introduced into the Code contradict the instituted three-tier system of instances of the unified civil process. The lawmaker decided to bring investment disputes into a separate category. They are reviewed with abidance of special procedures which are different from those applied during regular civil cases. It would be more logical to create a specialized investment court in the city of Astana, Almaty, and cities of other oblasts of the country that is equated to a district court.

Appeals Instance

Appeals and protests are filed during one month after a decision is made in its final form, and for the persons who did not participate in the court hearing, from the date of filing them a copy of the decision.

Appeals and protests over decisions made by district courts and courts equated to them are reviewed by a civil and administrative affairs appellate judicial board of an oblast court or a court equated to it. The board must consist of, at least, three judges.

In the simplified (written) proceeding order, appeals and protests over decisions made by district courts and courts equated to them, as well as private appeals and protests over a determination are reviewed by one judge.

Reviewing period in a court of the appeals instance was increased to two months (Article 415).

Courts of the appeals instance are returned their authorities to:

- cancel decisions and re-file cases to courts of the first instance for re-examination;

- accept cases into their own proceeding for examination on the merits applying the rules of the courts of the first instance.

A base for cancellation or alteration of a court’s decision in the appeals order was added:

- if a case lacks of a protocol of the court hearings, a separate legal proceeding, when it is required by the Code.

According to the new Code, it is obligatory to go through a court of the appeals instance. If the deadline for appealing judicial acts has passed, the parties must address the court with a request to reinstate the period for appeals.

Cassation Instance

By a general rule, cassation petition and protest can be filed to the Supreme Court during six month beginning from the date when a judicial act entered its legal force.

The Code retained a rule about preliminary hearings of a petition. But instead of three judges, it will be reviewed by a single judge (Article 443 of the Code).

When there is a basis for re-examination of a judicial act, a judge issue a ruling about sending the petition for a review to cassation instances (Article 444 of the Code).

At the cassation instance, cases are reviewed collectively by an odd number (not less than three) judges.

Cases on reviewing cassation instance court rulings are examined collectively by an odd number (not less than seven) of judges presided by the Chairman of the Supreme Court or one of the judges on his/her behalf.

A threshold defining judicial acts which are not subjected to a review in a cassation order was introduced for cases when:

- appeal order was not observed;
- the amount of a lawsuit related to property interests of physical persons is less than two thousand monthly rated indices (about 4 million tenge) or the amount of a lawsuit related to property interests of juridical persons is less than thirty thousand monthly rated indices (about 60 million tenge), and some other categories of judicial acts.

Proofs

According to the new Code, parties and other persons participating in a lawsuit must present all proofs to the court of the first instance at the stage of preparation of the case for the court hearings. In exceptional cases, the proofs can be presented during court hearings, and also to a court of the appeals instance. But the reason why the proofs were impossible to present at the stage of preparation to the court hearings must be justified by the persons who present them.

Proofs which were not presented during preparation of a lawsuit to the court hearings now cannot be presented to the courts of the higher instances. The parties have a right to reference only the proofs which were disclosed during preparation of the lawsuit to the court hearings and, in exceptional cases, during court hearings.

Court's consideration as a proof of audio and video recordings made secretly is still a vital issue. There is no a direct prohibition on that in the new Code. On the contrary, paragraph 2 of the Article 65 stipulates that audio and video recordings, including those made by surveillance and/or fixation devices, photo and/or filming materials, other materials recorded on electronic digital and other material carriers, can serve as allowed proofs.

State Dues

New rules of the state dues amount calculation are defined. For example, when filing lawsuits about collection of compensation for moral damage, the amount of the dues is calculated based on the collection amount claimed.

According to the paragraph 2 of the Article 109 of the new Code, a judge has a right to charge all the judicial expenses related to a case on the person abusing procedural rights or not observing procedural obligations. In particular, a court can resort to this measure, if it regards as the judicial proceeding is being dragged out and obstacles are being created for reviewing the case and for adopting a lawful and justified judicial act. For example, if proofs are presented with violation of the timeframe determined by the court, or the order of the proofs presentation defined by the present Code, is not followed without grounded reasons.

In accordance with the paragraph 5, Article 109 of the new Code, a statement about collection of judicial expenses can be submitted during one month beginning from the date of the last judicial act came into its legal force, by which the lawsuit's examination on its merits ended.

A maximum amount of representation expenses on non-property related requirements is defined not to exceed three hundred monthly rated indices.

If a lawsuit is left without a movement based on subparagraphs 6) and 8) of the Article 279 of the present Code, the claimant is to compensate the defendant with judicial expenses incurred in relation to the lawsuit proceedings.

If a lawsuit is resolved peacefully in a court of the first instance, the state dues are subjected to compensation in the full amount, in the cassation instance—only a half of the state dues paid.

Requirement to pay state dues when filing appeals is repealed.

Order of Notification

The new Code clearly regulates the order of notification and also describes cases when a notification of a party is considered to be made properly. For example, court notice paper or other writs addressed to a juridical person can be handed not only to a representative of a corresponding person carrying out managerial functions. It can be handed to a security officer or other employee of the person who is being notified and called out to a court. The person receiving a writ must sign a writ's slip or on a copy of another notification about its receipt with indication of their title, last name and initials.

The court notice papers or other writs are considered to be delivered to a juridical person at the place of its location, even if the juridical person is absent at the specified address. Refusal of the addressee to accept the court notice or other writs is not an obstacle for the case consideration or execution of procedural actions, and the person is considered to be notified in a proper

manner. Despite of introduction of electronic forms of notification, a mechanism for determination of a delivery date of court notices and other writs was not thought through. This allows counting down at one's own choosing the time period provided for filing of an appeal and other documents.

Requirements to the Form and Content of a Lawsuit

Lawsuit form and content requirements were added. It is obligatory to indicate:

- calculation of monetary funds being collected or disputed;
- a list of documents attached to the lawsuit.

A lawsuit must be accompanied by a document proving that copies of the lawsuit and documents attached to it have been filed to the defendant or his/her representative, third parties.

Preparation of a Case to Court Hearings

Due to the fact that the stage of preparation of a case to court hearings became more significant, time allocated for the preparation was increased from 7 to 15 working days starting from the day of accepting of the lawsuit into the court proceedings. In exceptional case, the preparation period can be prolonged for an additional month. The Code lacks of a norm which would allow to take effective measures on matters related to the environment, which creates obstacles for protection of rights and interests of physical and juridical persons who were subjected to harm or damage as a result of the environmental legislation violation.

Actions of a court and a lawsuit parties are regulated at the stage of the case preparation to court hearings. In particular, the parties can exchange written documents, questions about proofs, necessity of expert examinations, filing a counter-claim, involving new participants into the case are being solved.

Disputes Resolution by Peaceful Means

Possibilities for resolving disputes by peaceful means are broadened, starting from obligatory actions of a judge on reconciliation of the parties at the stage of preparation of a case, and further on, at all stages of legal proceedings. Different kinds of reconciliation procedures are introduced: reconciliation, mediation, participatory procedure, option to address arbitration for resolution of a dispute. A detailed procedure for concluding and implementing an agreement on a lawsuit is described.

An agreement on a lawsuit is concluded in written form and signed by parties or their representatives authorized to do so. When resolving a dispute in the order of mediation, a mediation agreement is concluded in written form between the parties with a facilitation of professional and non-professional

mediators. Resolution of a dispute in the order of participatory procedure is made without a judge by conducting negotiations between the parties facilitated by lawyers from the both parties (Article 181 of the Code).

Other Procedural Norms

Persons participating in a case and citizens present at a court hearing must address the judge as “Respected court” (paragraph 2, Article 187 of the Code).

Copies of a decision (in absentia) must be sent or handed over to parties and other persons participating in a case, who did not come to a court hearing, not later than three working days from the day the decision was adopted in its final form.

Executive writ can be made in a form of an electronic executive document which is certified by an electronic digital signature of a judge (paragraph 4, Article 241 of the Code).

A brief protocol shall be compiled when an auto or video recording has been conducted during a court hearing (paragraph 1, Article 281 of the Code).

If a three months period has passed and has not been recovered when reviewing complaints over actions of state organs and employees, a court makes a decision to deny satisfying a lawsuit.

This norm is not acceptable for cases related to environmental violations, since the latter ones have a protracted and continuous nature. A question about increasing the period for appealing against actions of state organs and employees has been raised multiple times. Besides, when reviewing such cases, courts must follow the norms of the international conventions.

This list of novels is not exhaustive. There are quite a lot of changes, and we described only the main ones which are applied by courts when reviewing environmental cases.

It has been over a year now that the judicial system in our country implements the new Code in practice. During this time, it is no doubt that all participants of civil proceedings were able to appreciate its advantages and merits. But at the same time, the judicial practice revealed some aspects which need to be adjusted because they cause collisions of the law norms.

In particular, according to the paragraph 2, Article 124 of the Code, a court returns complaints and documents submitted after the procedural period, if the parties did not claim its recovery.

Study of facts related to missing a deadline to address a court and period of limitation is conducted at the preliminary court hearings which is stipulated in the Article 172 of the Code and is a novelty in the legislation.

At the same time, according to the paragraph 6 of the Article 172 of the Code, if a deadline to address a court and a period of limitation were missed without a valid reason, a judge adopts a decision to deny the lawsuit without studying

other factual circumstances of the case. Thus, there is an obvious contradiction in the indicated norms, since a period of limitation and a deadline to address a court are two different things. The Civil Code stipulates a general period of limitation of three years. According to the paragraph 1 of the Article 294 of the Code: "A citizen or a juridical person has a right to address a court with a lawsuit during three months starting from the date when they became aware of a violation of rights, freedoms, and lawful interests." Therefore, consequences of missing these terms must be different.

Further on, in accordance with the paragraph 2 of the Article 169 of the Code, simultaneous or made in any order change of the subject and base of a lawsuit means that the claimant calls for a new lawsuit and refuses the earlier submitted one. This leads to termination of a proceeding on a case initiated in response to an earlier submitted statement of claim. Simultaneous or made in any order change of the subject and base of a lawsuit is allowed in case of concluding an agreement on resolving of a dispute (conflict) in the order of mediation. Mediation agreement must be approved by a determination of a court which has the given civil case in its proceedings.

The indicated norm is also a procedural novelty. But in practice, there is a difficulty with its implementation, because in the Article 277 of the Code, this basement for termination of a case proceeding is not listed. A question arises: how a court should act in case if a claimant does not agree to terminate the initial lawsuit?

Also in practice, it causes difficulty to calculate the period of appeal of a court decision, due to the different interpretation of the norms of the Article 223 and Article 403 of the Code from the point of the legal technique.

Thus, according to the paragraph 3 of the Article 223 of the Code, a decision is made immediately after the case investigation. Compiling of an extensive decision can be postponed, but an operative part of the decision must be announced by the court at the court hearings when the case was closed. According to the paragraph 4 of the Article 223 of the Code, the decision in its final form must be made in five working days after announcement of the operative part.

In accordance with the paragraph 3, Article 403 of the Code, an appeal and protest can be filed during one month after the date of making the decision in its final form, except for the cases stipulated in the Code. And for the persons absent at the court hearings, after the date when a copy of the decision was sent to them.

In other words, the moment of adopting a decision and the moment of its making in its final form are two different things, and with one of which the beginning of the procedural term is connected. At this, content and idea

of the operative part of the decision from the moment of its adoption and announcement must be identical with the extensive decision.

This twofold interpretation in practice leads to an optional calculation by the parties of the period of appeal of the court decision which was increased to one month.

A serious gap in the new Code is the fact that decisions of international conventions about compliance by Kazakhstan with their norms are not recognized in the Code as a base for re-consideration of decisions of court instances. In other words, they are neither considered to be newly discovered, nor to be new circumstances which have a significant importance for adopting a correct resolution of the earlier investigated cases (Article 455). This significantly reduces chances for physical and juridical persons to defend interests of citizens, undefined number of people, and the state.

Finally, it should be recalled that in the paragraph 2, Article 1 of the Code, the international obligations of Kazakhstan are recognized as “a component of the civil procedural law.” Despite of this, practice of application of the new Code during investigation of environmental cases allows to make a conclusion that the full compatibility of its provisions with the norms of the environmental conventions is not reached. The Code does not take into a full account the provisions of the normative decree of the Supreme Court dated on July 10, 2008, No.1 “About Application of the Norms of the International Treaties Signed by the Republic of Kazakhstan.” This became one of the reasons for adopting a new decree dated on November 25, 2016, No.8 “About Certain Questions of Application of the Environmental Legislation of the Republic of Kazakhstan by Courts Reviewing Civil Cases,” which also regulates application of international nature protection conventions.

The above listed questions often appear in the law enforcement practice. Elimination of the indicated ambiguities and collisions is necessary to establish supremacy of the law.

* Novel—(lat. no veil ae leges—new laws) jur. change introduced by a newly adopted law into the current legislation. New dictionary of foreign words—by EdwART, 2009.