

THE IMPROVEMENT OF CIVIL LEGISLATION OF THE REPUBLIC OF KAZAKHSTAN BASED ON THE IMPLEMENTATION OF ENGLISH LAW PROVISIONS



V. KONUSSOVA,
Head of the Civil Legislation Department of the SE «Institute of Legislation of the Republic of Kazakhstan», Candidate's Degree in Jurisprudence



Y. NESTEROVA,
Leading Researcher of the Civil Legislation Department of the SE «Institute of Legislation of the Republic of Kazakhstan», Candidate's Degree in Jurisprudence, Associate Professor

In the given article authors, by noting the objective needs of contemporary realities, indicate the necessity to enhance the competitiveness of the legal system of Kazakhstan. One of the ways to enhance this competitiveness is to incorporate positive foreign experience. In this regard, the authors consider the possible ways of improvement of civil legislation of the Republic of Kazakhstan by the introduction of certain provisions of English law. Thus, this paper identifies three possible ways of improving the legislation in the field of Civil Law, which are corporate law, legal regulation of contractual relations and strengthening the role of the court in the regulation of private relations. In addition, some proposals within each of these areas have been made for the modernization of legislation and law enforcement practice.

This article is based on the presentations of the authors at the roundtable dedicated to the issues of implementation of certain provisions of English law into the civil legislation of Kazakhstan, which took place on 11 October 2016 in London, UK.

Keywords: legal system, civil law, English law, contract, corporate relations, precedent, implementation, legislation.

INTRODUCTION

Over the last decades, Kazakhstan has been gradually developing its economy and has become one of the leading countries in Central Asia. However, the legal system of the country is dynamic and develops reflecting not only inner factors of the country, but also factors of the globalized world. In order to meet requirements of modern realities Kazakhstan is currently implementing a number of state projects aimed at economic development, such as the Astana EXPO-2017 International Specialized Exhibition and the creation of the International Financial Centre «Astana» following the successful Dubai project. Recently, Kazakhstan has announced a 'second

wave' of privatization of state-owned entities in different sectors. Another example of such modernization is an enhancement of the national legal system by the implementation of some English law provisions into the civil legislation of Kazakhstan.

LEGAL SYSTEM OF KAZAKHSTAN: MAIN FEATURES AND CURRENT DEVELOPMENTS

The legal system of Kazakhstan is mainly based on the traditions of civil law. However, over the long process of development and due to some historical predispositions, our legal system incorporated elements of different legal systems, amongst them are:

- The Kazakh traditional law (adat),
- The Islamic law (Sharia),
- The Soviet Legal System and
- The continental, Roman-Germanic family of laws.

Nowadays improvement of the national legislation along with other perspectives is aimed at meeting international standards and approximating the most developed legal orders.

The government actively promotes the law making process. Therefore the present time legislation of the country develops according to the priorities proclaimed in the Concept of Legal Policy of the Republic of Kazakhstan (hereinafter – the Concept) adopted by the Decree of the President of the Republic of Kazakhstan in 2009.¹

The Concept defines the main directions of the legal system development up to 2020. Within the framework of the Concept, a number of important laws have been implemented, promoting the progressive pace of the sustainable socioeconomic development of Kazakhstan.

¹Concept of Legal Policy of the Republic of Kazakhstan the period from 2010 to 2020 adopted by the Decree of the President of the Republic of Kazakhstan № 85. August 24, 2009. The source of information: http://adilet.zan.kz/eng/docs/U090000858_ Accessed on 07.10.2016.

It should be noted that along with other priorities this Concept declares the necessity to improve the legal system in order to enhance its competitiveness. In this respect, the Concept declares «*the Kazakh legal system should be able to compete in matters of convenience and reliability with the laws protecting the rights of the developed world. In the context of general globalization and growth in the global competition, many countries are faced with the need to modernize the legal systems and their closest approach to the needs of the people and the interests of investors*».

Priorities declared in the Concept correlate with global trends. In the globalized world, there is a tendency for intensive interaction of legal systems. It could be assumed that because of globalization all countries experience the influence of foreign law and order in varying degrees. Kazakhstan as a member of the international community is not an exception. The law of Kazakhstan is not a domestic object existing in isolation; it is a developing system co-existing with other more efficient and advanced ones, which are easily accessible to economic actors.

Globalized legal infrastructure enables economic actors to refer to foreign legal infrastructure in pursuance of better regulation. In the case of our country, such «outsourcing law» occurs through the deployment of several techniques:

- Introduction and adaptation of certain institutions of foreign law by national legislation;
- Creation of entire segments of domestic activity in order to use foreign infrastructure;
- Selection by companies in Kazakhstan (including state-owned) of foreign law as a governing law for their most important contracts with clauses stipulating dispute resolution outside the jurisdiction of Kazakhstan.

There are numerous examples of such an outsourcing law in our country, let us cite the most vivid of them.

Recently the Constitutional Law on Astana International Financial Centre (AIFC) was issued.² AIFC is expected to create a favorable environment to attract foreign investments. The main feature of the centre is that the AIFC will have a special legal system based on the law of England and Wales. On the basis of the AIFC, a special court and an international arbitration will be created, which will resolve legal conflicts.

Another unprecedented novelty for the Kazakhstan legal system is the creation of a board for investment dispute settlement under the Supreme Court of Kazakhstan. The Civil Procedure Code of Kazakhstan considers that this board will consist of three highly qualified foreign and two domestic judges. In addition, the board is assumed to be a tool to guarantee fair litigation of investment disputes.³

Following these initiatives, aimed mostly at improvement of the investment climate, we are taking steps to incorporate some English law provisions into the legislation of Kazakhstan. This project targets twofold goals to create favorable conditions for the domestic economic actors, which are to increase their business activity potential in general, and to improve the investment climate in particular.

Currently the Ministry of Justice and the Institute of Legislation of RoK (hereinafter – the Institute) work on the issue of the implementation of some English law provisions into the legislation of Kazakhstan.

Together with analyses of foreign practice, the Ministry of Justice and the Institute hold an open discussion to get more suggestions concerning the project. In this regard, the International Conference was held in Astana in November last year. The conference was attended by representatives of state bodies and non-governmental organizations, leading scholars from Kazakhstan, CIS, and other foreign countries.⁴

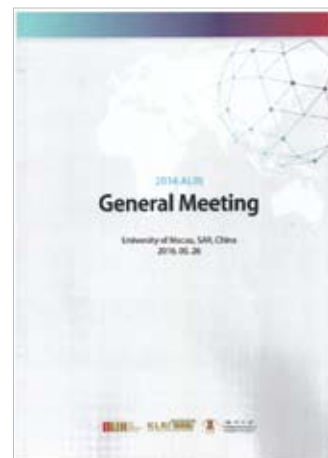
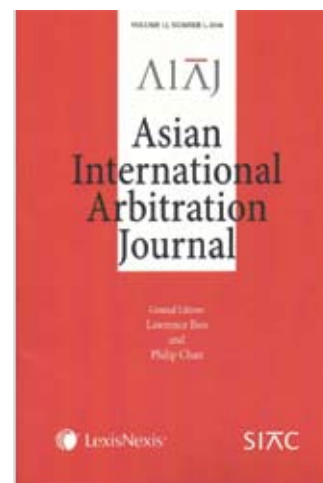
The conference participants developed main approaches to the process of implementation. They agreed that improvement of the legislation considering the experience of the Common Law countries should mainly relate to the contract regulation field and regulation of legal entities.

Following the conference, experts from the Institute drafted conceptual proposals for the modernization of the national legislation.

By the decree of the Minister of Justice, an interagency group on this project has been created, which includes representatives from all governmental and non-governmental bodies and organizations, experts in the field of law and other outstanding representatives of legal society. The members of the interagency group on this project have comprehensively analyzed the Draft concept and provided comments and suggestions for further consideration. All members of this working group emphasizes that in addition to some similarities there is a gap between English and Kazakhstan law systems which is not easily bridged. The two systems have different traditional techniques which make it difficult for a lawyer, who is brought up exclusively under a Civil Law system, to read any legal books dealing with a Common Law system, and vice versa.⁵

SURVEY OF KAZAKHSTAN CIVIL LAW ISSUES WHICH CAN BE IMPROVED BY THE IMPLEMENTATION OF THE ENGLISH LAW PROVISIONS.

In this article we would like to draw attention to the main sections of contemporary private law in Kazakhstan,



²Constitutional law of the President of the Republic of Kazakhstan, № 438-V ЗРК. December 17, 2015 "On the international financial centre «Astana». The source of information: <http://adilet.zan.kz/rus/docs/Z1500000438> Accessed on 07.10.2016.

³Civil Procedure Code of the Republic of Kazakhstan № 377-V ЗРК. October 31, 2015. The source of information: <http://adilet.zan.kz/rus/docs/K1500000377> Accessed on 07.10.2016.

⁴Announcement of the international conference on the implementation of certain provisions of the Common Law into the national legislation, Astana, 30 November 2015 / Bulletin of the Institute of Legislation of the Republic of Kazakhstan. №5 (41). 2015. P. 166.

⁵Lawson F.H. Rational strength of English Law. London, «Stevens & Sons Limited». 1951. P. 5.



which, according to most lawyers' opinion, domestic and international, need to be improved and clarified.

In this regard, we distinguish three main blocks of issues:

- enhancing of the role of the court practice in regulation of private relationships and strengthening the authority of the judges of Kazakhstan;
- creating corporate law in Kazakhstan;
- bridging the gaps in contract law, rejection of Soviet legal principles in contract regulations.

For all three above-mentioned areas, it is essential to analyze the approaches developed in the European Union, especially in England. We believe that the selection of English law by our Government is due to its world-renowned flexibility and fairness.

Kazakhstan rather quickly held codification of its civil legislation, by adopting initially:

- The General part of the Civil Code of the Republic of Kazakhstan (1994);⁶ and then
- The Special part of the Civil Code of the Republic of Kazakhstan (1999)⁷.

The Soviet legal heritage lays partly in the basis of these acts. However, a great influence on the contents of our civil law was made by Model Civil Code of the CIS.

Kazakhstan private law is not isolated and in the process of its development the adoption of foreign legal institutions constantly occurs. For example, today we effectively work with such contractual schemes, as: franchising, factoring, leasing, property trust management, etc. Kazakhstan adopted the Laws «On project financing and securitization», «On concessions»; «On public-private partnership».⁸

Let us elaborate more on the problems of the contemporary Kazakhstan laws listed above, which are planned to solve, through guidance of the provisions of English law.

A. Enhancing of the role of the court practice in regulation of private relationships and strengthening the authority of the judges of Kazakhstan

In the law of Kazakhstan, which is related to the Romano-Germanic family of laws (so-called continental law or law of civil code countries), judicial practice as a source of law has not been consolidated in law.

Article 4 of the Constitution of Kazakhstan establishes a

list of the current sources of law, which does not include court precedents but the regulatory decisions of the Supreme Court of Kazakhstan.⁹ These regulatory decisions are interpretative in nature. Regulatory decisions of the Supreme Court, as a rule, are taken in Kazakhstan on the most common and problematic categories of disputes. Regulatory decisions of the Supreme Court look like directions addressed to the lower courts, containing guidelines for the consideration of a particular category of disputes.

Unfortunately, courts in general and the court practice in particular, comparatively do not have as great level of public trust in Kazakhstan as in England. In this context, we consider the possibility of incorporating into our legislation and legal practice, by analogy with English precedent, the concept of «YLGІ».¹⁰ This word is literally translated from the Kazakh language as «SAMPLE».

«YLGІ» could be a useful tool to improve court practice (regardless of court level). Such a sample would be selected from the judgments based on evaluation of its quality. The selection process is supposed to be held by the authoritative assembly of legal scholars, practicing lawyers and judges.

The selection of «YLGІ» will help to support argumentation in analogous or similar cases. With respect to «YLGІ» a court in the proceedings will have to give evaluation of it.

It is expected that results of the implementation of «YLGІ» will be as follows:

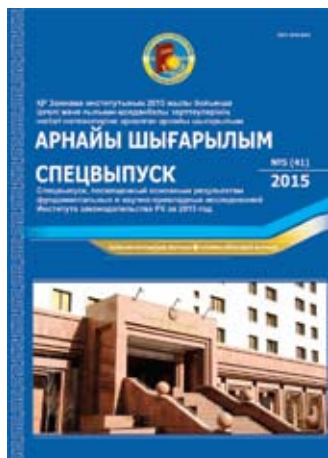
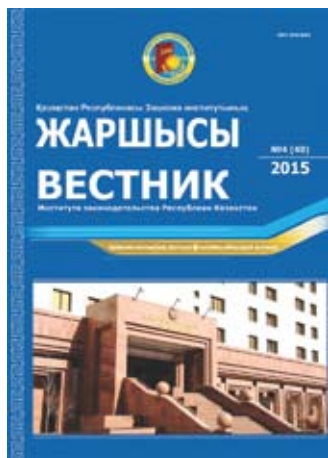
- improved quality of judgments on specific cases;
- reduction in the cancellation of judicial acts;
- strengthened authority of the court practice;
- court practice will become more accessible for examination by concerned parties;
- uniformity of judgments in analogous cases.

B. Creating corporate law in Kazakhstan

According to the legislation of Kazakhstan there are 3 types of private commercial organizations: joint-stock companies; partnerships; cooperatives.

Separate law governs each of these types of private commercial organizations. In particular these legal acts are:

- The Law «On Joint Stock Companies», 2003;¹¹
- The Law «On Limited and Additional Liability», 1998 and Law «On Economic Partnerships», 1995;¹²



⁶General part of the Civil Code of the Republic of Kazakhstan. December 27, 1994. The source of information: http://adilet.zan.kz/rus/docs/K940001000_#z5961. Accessed on 07.10.2016.

⁷Special part of the Civil Code of the Republic of Kazakhstan № 409. July 1, 1999. <http://adilet.zan.kz/rus/docs/K990000409>. Accessed on 07.10.2016.

⁸Law of the Republic of Kazakhstan «On project financing and securitization» No.126. February 20, 2006. The source of information: <http://adilet.zan.kz/eng/docs/Z060000126>. Accessed on 07.10.2016; Law of the Republic of Kazakhstan «On Concessions» No. 167. July 7, 2006. The source of information: <http://adilet.zan.kz/eng/docs/Z060000167>. Accessed on 07.10.2016; Law of the Republic of Kazakhstan «On public-private partnership» № 379-V. October 31, 2015. The source of information: <http://adilet.zan.kz/eng/docs/Z060000167>. Accessed on 07.10.2016.

⁹Constitution of the Republic of Kazakhstan adopted on August 30, 1995 at the republican referendum. The source of information: <http://adilet.zan.kz/eng/docs/K950001000>. Accessed on 07.10.2016.

¹⁰Didenko A. Ylgi – one of the way of strengthening of court authority // Civil law theory: modern challenges. Almaty, 2013. P. 93-100.

¹¹Law of the Republic of Kazakhstan «On joint stock companies» № 415. May 13, 2003. The source of information: <http://adilet.zan.kz/rus/docs/Z030000415>. Accessed on 07.10.2016.

¹²Law of the Republic of Kazakhstan «On Limited and Additional Liability» № 220. April 12, 1998. The source of information: <http://adilet.zan.kz/rus/docs/Z980000220>. Accessed on 07.10.2016; Law of the Republic of Kazakhstan «On Economic Partnerships» N 2255. May 2, 1995. The source of information: <http://adilet.zan.kz/rus/docs/U950002255>. Accessed on 07.10.2016 ;

– The Law «On the production co-operative», 1995.¹³

At the same time, our legislation still has traces of the Soviet legal system with forms of state owned organizations. Thus, state-owned enterprises on one hand are legally recognized as commercial structures, but on the other hand do not have their own property.

Moreover, the legislation of Kazakhstan does not have notions and definitions for “corporation”, “corporate relation” and “corporate acts”. Therefore, the current legislation does not contain uniform rules regulating corporations.

Our legislation is constantly being improved in terms of its liberalization and facilitation of business. As a result, a small business can be opened in the form of the limited liability after registration in an electronic format and without any initial capital. However, on the other hand we have poor legal regulation of corporate law. Such a factor in spite of all progressive reforms could negatively affect further development of business.

In the light of the current development of corporate law, Kazakhstan is facing the following tasks within the frames of prospective legislative work:

a. To include the concept of corporate relations into the Civil Code of the Republic of Kazakhstan (hereinafter – the Civil Code);

b. To improve legal regulation by considering division of legal entities, (along with present division of companies into profit and non-profit) into:

- Corporations, membership-based,
- Institutions (or unitary organization), that do not have a membership.

c. To provide specific corporate legal acts, such as the meetings decisions and corporate agreements (shareholders' agreements);

d. To amend the Civil Code by universal, fair and clear rules related to property liability of corporation officials;

e. To further develop the civil law by the rules of personal responsibility of founders and executives of the legal entity for its debts. This is a «penetrating responsibility», by analogy with the corporate law of England and the United States (“Piercing Corporate Veil”).

C. Bridging the gaps in contract law, rejection of Soviet legal principles in contract regulations.

The next important direction in legislation improvement is the legal regulation of the contemporary contract law.

Objective reality in Kazakhstan is the phenomenon of the internationalization, convergence, harmonization and unification of the law within the frames of the Eurasian Economic Union.

It should be noted that some CIS countries have already integrated certain elements of foreign law, including

English law. We take into account their positive as well as negative practice of the implementation of foreign law in order to avoid the same mistakes and learn from their experiences.¹⁴

Therefore, we carefully observe the process of improvement of the civil legislation in Russia that held a large-scale incorporation of English law provisions into the Civil Code, which now provides such classic English legal institutions as guaranty, warranty, indemnity, option, escrow etc.

However, many well-known Russian lawyers mark excessive urgency and superficiality of these novelties. The scholars also express their concern that the new institutions cannot take root in the unusual legal environment.¹⁵

Taking into account the experience of Russian legislators it should be noted that unification is the most effective form of interaction between legal systems, when, in fact, uniform rules, mostly of a supranational character, are created for several countries. Efficiency of this form of cooperation is proven in terms of strong forms of interstate integration (such as the European Union, the Customs Union of Kazakhstan, Russia and Belarus and the Eurasian Economic Union).

Main terms of improvement of Kazakhstan's contract law on the basis of the implementation of particular institutions of English law could be the following:

a) the objective needs of law practice;

As for the domestic legal system of Kazakhstan, any amendments proposed to the civil law should primarily meet the needs of law practice. Where the applicatory needs are clearly ahead of the legislative process, and practice at its own risk uses rules and terminology well-established in the foreign and international law an accurate intervention of the state is needed. Such an intervention will help to include relevant provisions in the civil law at the legislative level in order to eliminate the problem gaps in the legal regulation of property relations.

b) thorough preliminary study;

Another important factor associated with the degree of investigation of a particular legal phenomenon in the civil law doctrine seems to be taken into account. Foreign ideas cannot be thoughtlessly copied, they need to be critically evaluated and adapted to national conditions.

Thus, the main goal is the definition of civil law ideas

¹⁴Konussova V.T., Abdrakhmanova S.Zh. The experience of the Russian Federation in implementation of the certain provisions of foreign legislation into civil legislation/ Bulletin of the Institute of Legislation of the Republic of Kazakhstan. №5 (41). 2015. p. 206-216.

¹⁵Sukhanov E.A. American corporations under Russian law (on the revised version of the Ch. 4 of the Civil Code of the Russian Federation) // Journal of Russian law. №1 (217). 2015; Karapetov A. RF Civil Code reform of the rules of contract law. The source of information: https://zakon.ru/blog/2015/2/23/reforma_gk_rf_v_chasti_norm_dogovornogo_prava_posle_vtorogo_chteniya_kommentarij_k_osnovnym_polozen Accessed on 07.10.2016.

¹³Law of the Republic of Kazakhstan «On the production co-operative» № 2486. October 5, 1995. The source of information: http://adilet.zan.kz/rus/docs/Z950002486_ Accessed on 07.10.2016.



and constructions that can be accurately implemented into the national legislation from English law with justification of adequate opportunity in the light of the needs of legal practice and achievements of Kazakhstan's civil law doctrine.

Directions of improvement of the contractual law of the Republic of Kazakhstan:

a) determination of the promise as a legal fact and implementation of English legal principle of «estoppel» in the legislation of Kazakhstan in the relation to certain legal situations;

b) addition of the Civil Code subject by obligations immutability and English contract law doctrine of frustration;

c) improvement of the rules of contractual civil liability on the basis of the rules of «abstract losses» and «unproven losses»;

d) introduction of the regulation of contractual conditions that have been widely used in practice, providing assurances about the circumstances (representations and warranties);

e) improving the rules of interpretation of the conditions of a civil contract by a court;

f) introduction to the Civil Code of an independent guarantee;

g) introduction to the regulation of civil law common contractual practices of reservations of damages, losses – «indemnity clause»;

h) amendment of the Civil Code by constructs of a framework and subscription contracts which are applied in practice.

CONCLUSION

We realize that the implementation of certain provisions of foreign law could lead to certain risks as long as each provision of law is a part of larger legal infrastructure with immense interrelations. As a result, the main goal of this project is not to blindly copy foreign law and implement it into a completely different legal system, but rather cautiously improve our legislation using the best practices of English law with fare adaptation of it to our reality and only in cases where it is necessary.

It is expected that, due to this project, we will advance our legislation in a form of a Bill, which will set foundation for clearer and more convenient legal regulations with additional guaranties for the economic actors in business transactions. Furthermore, this project will help us increase competitiveness of relatively young legal system of the Sovereign Kazakhstan on the global stage among other progressive legal systems.

В.Т. Конусова, Е.В. Нестерова: Қазақстан Республикасының азаматтық заңнамасын Ағылшын құқығының жекелеген ережелерін имплементациялау негізінде жетілдіру.

Мақалада авторлар қазіргі уақыттағы шынайылықтың объективті қажеттіліктерін атап өте келе, Қазақстанның құқықтық жүйесін жетілдіру

және оның бәсеке қабілеттілігін арттыру керектігін көрсетеді. Құқықтық жүйенің бәсеке қабілеттілігін арттыру бағыттарының бірі жағымды шетел тәжірибесін қабылдау болып табылады. Осыған орай авторлармен ағылшын құқығының жекелеген ережелерін қабылдау арқылы Қазақстан Республикасының азаматтық заңнамасын жетілдірудің мүмкін бағыттары қарастырылады. Мақалада осы саладағы заңнаманы жетілдірудің үш мүмкін бағыты белгіленген: корпоративтік заңнама, шарттық қатынастарды заңнамалық реттеу, сондай-ақ жеке құқықтық қатынастарды реттеудегі соттың рөлін нығайту. Осы әрбір бағыттың шеңберінде заңнамалық реттеу мен құқық қолдану практикасын жаңғырту бойынша ұсыныстар әзірленген.

Бұл мақала 2016 жылғы 11 қазанда Ұлыбританияда, Лондон қаласында өткізілген Қазақстанның азаматтық заңнамасына Ағылшын құқығының жекелеген ережелерін имплементациялау мәселелеріне арналған дөңгелек үстелде авторлардың жасаған баяндамаларының негізінде әзірленген.

Түйінді сөздер: құқықтық жүйе, азаматтық заңнама, ағылшын құқығы, шарт, корпоративтік қатынастар, прецедент, имплементациялау, заңнама.

В.Т. Конусова, Е.В. Нестерова: Совершенствование гражданского законодательства Республики Казахстан на основе имплементации отдельных положений Английского права.

В статье отмечая объективные потребности современных реалий, авторы, указывают на необходимость совершенствования и повышения конкурентоспособности правовой системы Казахстана. Одним из направлений повышения конкурентоспособности правовой системы является восприятие позитивного зарубежного опыта. В этой связи авторами рассматриваются возможные направления совершенствования гражданского законодательства Республики Казахстан посредством восприятия отдельных положений английского права. В статье обозначены три возможных направления совершенствования законодательства в этой сфере: корпоративное законодательство, законодательное регулирование договорных отношений, а также укрепление роли суда в регулировании частноправовых отношений. В рамках каждого этих направлений сформулированы предложения по модернизации законодательного регулирования и правоприменительной практики.

Данная статья подготовлена на основе выступлений авторов на круглом столе, посвященном вопросам имплементации отдельных положений Английского права в гражданское законодательство Казахстана, который состоялся 11 октября 2016 в Великобритании, г. Лондон.

Ключевые слова: правовая система, гражданское законодательство, английское право, договор, корпоративные отношения, прецедент, имплементация, законодательство.