

Distinguishing between different types of disputes involving investors and governmental authorities in light of the adoption of the Administrative Procedure and Process-Related Code

1. INTRODUCTION

Kazakhstan's Administrative Procedure and Process-Related Code (the "APPC") will enter into force on 1 July 2021. As soon as the APPC becomes effective, disputes arising out of public relations will be heard by the courts under the rules of the APPC with the exception of disputes falling within the competence of the Constitutional Council and disputes resolution of which is governed by the rules of criminal procedure, civil procedure and administrative offenses¹.

APPC will replace the provisions of Chapters 27, 28, 29 of the Civil Procedure Code (the "CPC") which govern special action proceedings arising out of public law relations in the area of state governance, and these CPC Chapters will be repealed upon APPC's entry into force.

As a result of significant innovations introduced into the administrative procedure rules by the APPC, the judicial dispute resolution mechanism will change remarkably.

From the effective date of the APPC, disputes involving investors arising out of public law relations will be heard by the courts according to the rules of the APPC². The rules of the CPC will apply to disputes involving investors and state bodies that do not arise out of public law relations, except for disputes on legality of

regulatory legal acts, which will be heard pursuant to the CPC.

Aside from the latter category, it is the legal nature of a dispute (either a civil law dispute or a public law dispute) which will determine the applicable procedure, the rules of the CPC or the APPC.

CPC and APPC differ significantly in their regulation of a number of procedural aspects such as burden of proof, limitation period, procedural timeframes for filing appeals or cassation appeals, etc.

Such considerable differences require that clear and precise criteria be in place in order to determine a category of a dispute and the applicable resolution procedure between (i) investment disputes considered under the CPC rules; and (ii) investors' claims appealing the acts or actions of administrative bodies that are considered under the APPC's rules.

In this article, we set forth our analysis of the legislative distinction between disputes involving investors, the position of the Supreme Court on this issue and discuss possible "gray" areas caused by this divide with proposals for improvement.

¹ Article 3.7 of the APPC.

² Except for the categories of disputes listed in Article 3.7 of the APPC.

2. DISTINGUISHING BETWEEN DIFFERENT TYPES OF DISPUTES INVOLVING INVESTORS

a. Types of disputes involving investors and state bodies after the APPC's entry into force

Upon APPC becoming effective:

- (1) Disputes arising out of public law relations, other than those listed in Article 3.7 of the APPC, will be heard under the rules of the APPC.

As a general rule, such disputes will be considered according to the rules of the APPC by specialized district and equivalent administrative courts acting as the courts of first instance.

At the same time, claims of investors specified in Article 27.4 of the CPC (foreign legal entities, Kazakhstan legal entities with 50% or more foreign participation, investors being parties to investment contracts with the state) will be heard by the court of the City of Nur-Sultan acting as the court of first instance.

- (2) The following disputes between investors and state bodies will be considered under the rules of the CPC:

- investment disputes;
- claims of state bodies against investors related to investment activities;
- other disputes that do not arise out of public law relations (e.g. a civil law dispute arising out of an office lease agreement);
- disputes on legality of regulatory legal acts.

Investment disputes and claims of state bodies against investors specified in Article 27.4 of the CPC (foreign legal entities, Kazakhstan legal entities with 50% or more foreign participation, investors having investment contracts with the state) related to investment activities will be heard by the court of the City of Nur-Sultan acting as the court of first instance³.

Aside from cases related to legality of regulatory legal acts, the fundamental task in choosing the applicable judicial proceedings is to determine the legal nature of the dispute, since resolution of a dispute under the rules of the APPC presumes the existence of public law relations whereas resolution of the one under the rules of the CPC presumes civil law relations.

For the purpose of analyzing the distinction between public law disputes involving investors and civil law disputes between investors and state bodies, let us first consider the current legislative regulation of this issue as well as the position of the Supreme Court.

b. Regulation under the applicable law. Clarification by the Supreme Court

In accordance with the current legislation, disputes involving investors are divided into (i) investment disputes (a party to which is a major investor or other investors), (ii) other disputes between investors and state bodies related to investment activities, and (iii) other disputes involving an investor, which do not relate to investment activities.

Investment disputes are defined as disputes arising out of contractual obligations between investors and state bodies in connection with their investment activities⁴.

Investment disputes, one of the parties to which is a major investor⁵, are considered by the Special Panel of the Supreme Court acting as the court of first instance⁶.

Other investment disputes and disputes related to investment activities between state bodies and investors specified in Article 27.4 of the CPC (foreign legal entities, Kazakhstan legal entities with 50% or more foreign participation, investors who are parties to investment contracts with the state), are considered by the court of the City of Nur-Sultan in its capacity of the court of first instance⁷.

Other disputes involving investors that do not relate to investment activities fall within the jurisdiction of district (or city) and equivalent courts⁸.

³ Article 27.4 of the CPC as will be put in effect on and from 1 July 2021.

⁴ Article 296.1 of the RK EC.

⁵ A major investor shall mean an individual or a legal entity making investments in the Republic of Kazakhstan in an amount at least equal to two million times the monthly calculation index (Article 274.4 of the Entrepreneurial Code of the Republic of Kazakhstan (the "RK EC")).

⁶ Article 28 of the Civil Procedure Code.

⁷ Article 27.4 of the Civil Procedure Code.

⁸ Article 27.5 of the Civil Procedure Code.

The above provisions of the law lead to the conclusion that investment disputes are civil law disputes arising out of contractual relations between an investor and the state. Such contractual relations may be in the form of investment contracts, including contracts for subsoil use, concession agreements, and public-private partnership agreements.

Thus, we understand that the distinction between public law disputes involving investors, which will be considered under the rules of the APPC, and investment disputes, which will be considered under the rules of the CPC, will be based on the current distinction between investment disputes and other disputes between investors and state bodies related to investment activities.

Since the adoption of the current CPC and the introduction of special rules of jurisdiction governing investor disputes, a large number of questions regarding the distinction has arisen in practice:

- (1) (Whether a dispute had arisen from contractual obligations between investors and state bodies or not; and
- (2) Distinction between (i) disputes with investors related to investment activities and (ii) the disputes with investors that do not relate to investment activities.

The above problem of categorizing investor disputes was addressed by the Supreme Court as follows (the “**Supreme Court’s Commentary**”):⁹:

- (1) The Supreme Court explains that an investment contract may have a different title or be without a title but it should contain the following main distinctive features: a subject-matter (investment target), the amount of investments and all the other material terms applicable to this type of contract.
- (2) According to the Supreme Court, the term ‘state body’ should be understood to mean state bodies which entered into the contract with the investor on their own behalf or on behalf of the Republic of Kazakhstan.

Thus, as a general rule, investment disputes may only occur between the investor and the state body which are parties to an investment contract.

In addition, the Supreme Court further explains that disputes arising out of the targeted preferences provided to an investor by the state also constitute investment disputes. Therefore, based on the Supreme Court’s Commentary and subject to the prevailing judicial practice, we understand that disputes concerning the application of special preferences provided for by investment contracts (e.g. tax preferences) are treated as investment disputes as well, even though such a dispute is between an investor and, for instance, a state revenue authority, which is not a party to the investment contract.

- (3) According to the Supreme Court, the following disputes are treated as investment disputes:

- disputes related to execution, amendment or termination of investment contracts;
- disputes related to performance by an investor of its tax, customs, social, environmental or other obligations arising out of an investment contract, including disputes in which an investor contests the amounts accrued under the contract;
- disputes in which investors appeal against the actions (inaction) of the state body in the course of checking compliance with the terms of an investment contract;
- disputes related to the return of property granted to an investor as a state in-kind grant, or the recovery of the cost of such a grant by the state body in case of early termination of the investment contract;
- other disputes, on both investors’ and state bodies’ claims, related to the performance of mutual obligations under an investment contract.

- (4) The Supreme Court also clarifies that tax, customs, environmental or other public law disputes involving investors that are not related to the performance of contractual obligations are qualified as “other disputes related to the investor’s investment activities” and fall within the jurisdiction of the Astana City Court.

⁹ Document titled “Investment Disputes: Jurisdiction of the Supreme Court and Answers to Other Urgent Questions” published on the official website of the Supreme Court: <https://sud.gov.kz/rus/content/investicionnye-spory-podsudnost-verhovnogo-suda-i-otvety-na-drugie-aktualnye-voprosy>.

c. Distinction between public law disputes involving investors, which will be heard under the rules of the APPC, and investment disputes, which will be heard under the rules of the CPC

In view of the rules of the APPC and the CPC discussed above and the existing distinction between investment disputes and other disputes between investors and state bodies related to investment activities, we believe that the distinction between public law disputes involving investors, which will be considered under the APPC rules, and investment disputes, which will be considered under the CPC rules, will be based on the following key approaches:

- (1) Investment disputes between investors and state bodies will be heard under the CPC rules, if they concurrently meet the following criteria:
 - (a) the dispute arises out of the contractual obligations between the investor and the state body, that is, out of the investment contract;
 - (b) the investment contract may have a different title or be without a title, but should contain the following main distinctive features: a subject-matter (investment target), amount of investments, and all the other material terms applicable to this type of contract;
 - (c) the dispute must be related to the performance of mutual obligations under the investment contract (a list of such disputes is given in the Supreme Court's Commentary);
 - (d) as a general rule, investment disputes may only occur between the investor and the state body which are parties to an investment contract. In addition, disputes related to the performance by an investor of its obligations arising out of an investment contract (tax, customs, social, environmental or other obligations) are treated as investment disputes, even though such a dispute is between an investor and a state body that is not a party to the investment contract.
- (2) The following disputes between investors and state bodies will also be considered under the rules of the CPC: (a) claims of state bodies against investors related to investment activities; (b) other disputes that do not arise out of public

law relations (e.g. a civil law dispute under an office lease agreement); (c) claims contesting legality of regulatory legal acts.

- (3) Even if there is an investment agreement, tax, customs, environmental and other public law disputes involving investors that are not related to the performance of contractual obligations constitute public law disputes, which will be heard under the rules of the APPC.

3. AREAS OF CONCERN ARISING OUT OF THE ABOVE DISTINGUISHING BETWEEN DISPUTES WITH INVESTORS.

In our opinion, establishment of various forms of judicial proceedings for investment disputes and disputes over investors' claims against acts or actions of administrative bodies requires: (1) defining more clearly and expressly the criteria for distinguishing between the two specified categories of disputes; (2) consolidating such criteria at the legislative level or at the level of a normative resolution of the Supreme Court (taking account of the judicial practice that has formed within the framework of the existing distinction between investment disputes and other disputes between investors and state bodies related to investment activities).

The need to define clearer criteria at the legislative level is caused by the significantly different rules that are established in the CPC and the APPC governing various aspects of resolution of civil law and public law disputes (burden of proof, limitation period, procedural timeframes for filing appeals and cassation appeals, etc.).

Below are some examples of "gray" areas which, in our opinion, require clearer criteria for drawing a distinction.

a. Appealing an administrative act, which formalizes the decision adopted by the state body in exercising its rights and obligations under an investment contract, to which such state body is a party

The following hypothetical situation may serve as an example::

- *The state body (1) takes a decision to terminate an investment contract (e.g. a subsoil use contract or an investment*

contract for the implementation of an investment priority project) and issues its decision as an order of the deputy head of the relevant state body; and (2) then serves upon the investor a notice of termination of the investment contract.

• The investor believes that termination of the investment contract (1) violates the terms of the contract and the rules of substantive law (e.g. subsoil laws or the Entrepreneurship Code) that represent grounds for terminating an investment contract; (2) violates the regulations of the state body, in so far as the issuance of such an order falls within the competence of the head of the state body, rather than his/her deputy; (3) violates the statutory procedure, in so far as the issuance of such an order required the investor's explanations regarding the alleged violation that gave rise to the termination order. Accordingly, the investor elects to file an appeal with the court against the decision of the state authority on the termination of the investment contract.

In this situation, in our opinion, the investor will face the following questions regarding the method of protecting its violated rights, the jurisdiction of the dispute, and the limitation period::

(1) First, whether the investor should appeal against the termination order of the state body, or whether it is sufficient to only request that the termination of the contract is held invalid and inconsistent with the terms and conditions of the contract, without the formal cancellation of the order that formalized such a termination?

That is, may the court dismiss the claim for invalidation of termination of the contract on the ground that the termination order has not been invalidated and canceled?

(2) If the investor goes to court under the rules of the CPC and only requests to hold the termination of the contract invalid and inconsistent with the terms and conditions of the contract (without seeking invalidation and cancellation of the order), does the investor have the right to invoke any procedural violation committed when issuing the order?

(3) Would the investor be allowed to include in its statement of claim filed under the rules of the CPC the request to invalidate and cancel the order, in addition to the request to invalidate the termination of the contract? In other words, would those two claims be treated as a dispute arising out of contractual obligations, i.e. an investment dispute?

(4) Conversely, would the investor be able to go to court under the rules of the APPC and request: (1) invalidation and cancellation of the order; and (2) invalidation of termination of the contract as being inconsistent with the terms and conditions of the contract?

We understand that the second approach is expressly prohibited by the provisions of Article 107.6 of the CPC, according to which it is not allowed to consolidate into a single case several claims that require consideration in different types of judicial proceedings, unless this Code provides otherwise. In such a case, claims that are not related to public law disputes and may not be separated should be singled out and directed to the appropriate district (city) court at their location.

(5) If the answer to the third question is yes (that is, the investor is allowed to include in its statement of claim filed under the rules of the CPC the request to invalidate and cancel the order, in addition to the request to invalidate the termination of the contract), then what limitation period will apply to the specified claims: (a) the general limitation period provided for in Article 178.1 of the RK Civil Code (three years); or (b) the filing period provided for in Article 136.1 of the APPC (one month)?

In this regard, the Resolution of the Supervisory Judicial Panel for Civil and Administrative Cases of the Supreme Court dated 24 October 2012 in case No. 3рп-887-12 appears to be of interest. In that case, the claimant requested the court to cancel the order on termination of the subsoil use contract and hold such termination invalid. The Supreme Court found as follows:

“The subject of this civil law dispute is to contest the decision of the state body related to termination of the subsoil use contract, as one of the types of civil law transactions, on the ground of improper performance by the other party of its contractual obligations; therefore, the case may not be heard under the rules of Chapter 27 of the CPC, but should be heard as a civil case in property and non-property disputes... Article 178.1 of the RK Civil Code, according to which the general limitation period is set at three years, should apply.”

The above example clearly demonstrates that the legislative developments do not allow one to precisely determine the legal nature (civil law or public law) of a dispute related to the appeal against an administrative act, which formalizes a decision of a state body adopted by it in exercising its rights and obligations under an investment contract, to which such a state body is a party.

The answer to this question will determine the procedure within which the dispute should be considered: either under the rules of the CPC, since the dispute is an investment dispute, or under the rules of the APPC, since this dispute is a public law dispute arising out of the investor’s claim appealing the act of the administrative body.

b. Disputes related to the performance by an investor of its tax, customs, social, environmental or other obligations arising out of an investment contract

According to the Supreme Court’s Commentary, investment disputes refer to disputes related to the performance by an investor of its tax, customs, social, environmental or other obligations arising out of an investment contract, including those dealing with the investor’s appeal against amounts accrued under the contract.

Thus, the disputes related, for instance, to the appeal against the results of a tax audit, in which the tax authority refuses to apply the tax preference provided for by the investment contract, constitute investment disputes. We understand that such disputes will have to be considered under the rules of the CPC rather than the APPC.

In this regard, the question arises regarding the appeal against the results of the comprehensive tax audit, where a dispute between an investor and a taxpayer arises not only in respect of the application or non-application of tax preferences provided for by the investment contract, but also in respect of the additional assessment of other taxes provided for by the general tax legislation, the application of which is not regulated by the investment contract.

Will the claim appealing against the results of such tax audit be an investment dispute to be considered under the rules of the CPC, or will it be treated as a dispute regarding an appeal against the administrative act, the resolution of which should be governed by the rules of the APPC?

c. Limitation period and filing periods

Article 136 of the APPC determines the time limits for filing claims based on their type. In particular, a claim contesting an administrative act is filed within one month from the date on which the administrative act was delivered or communicated to the claimant.

Chapter 29 of the CPC, which governs the procedure for appealing decisions and actions (inaction) of state bodies, provides that a claimant may file a claim with the court to contest the decision and actions (inaction) of the state body within three months from the moment when the claimant became aware of the violation of his rights, freedoms or legitimate interests. As mentioned above, the provisions of Chapters 27, 28, 29 of the CPC will be repealed upon entry into force of the APPC.

Thus, after the effective date of the APPC, the special three-month filing period, as provided for by Chapter 29 of the CPC for contesting decisions and actions (inaction) of state bodies, will be excluded from the CPC.

As discussed above, according to the Supreme Court’s Commentary, the disputes related to the performance by an investor of its tax, customs, social, environmental or other obligations arising out of an investment contract constitute investment disputes, will have to be considered, from our understanding, under the rules of the CPC rather than the APPC.

Thus, we understand that the general three-year limitation period provided for in Article 178.1 of the RK CC will apply to claims, for example, appealing the results of a tax audit, within which the tax authority refuses to apply the tax preference provided for by the investment contract.

In this regard, the following questions arise: (1) whether the noted significant difference in the filing periods will entail a revision of the existing distinction between the public law disputes involving investors, which will be considered under the rules of the APPC, and

investment disputes, which will be considered under the rules of the CPC; or (2) whether an amendment will be made to the provisions of the CPC regarding filing periods for investment disputes; or (3) whether the significant difference in filing periods between the investment disputes (in all categories specified in the Supreme Court's Commentary), which will be resolved under the rules of the CPC, and the public law disputes involving investors, which will be considered under the rules of the APPC, represents the legislator's conscious position that will not change?

4. CONCLUSIONS AND PROPOSALS

Thus, upon APPC becoming effective, a number of points arises concerning the resolution of disputes involving investors. In particular, there are "gray" areas in distinguishing between the investment disputes to be considered under the rules of the CPC, and the disputes over claims of investors appealing against acts and actions of administrative bodies, the resolution of which is governed by the APPC.

The significantly different rules established in the CPC and the APPC for consideration of civil law and public law disputes (burden of proof, filing periods, procedural time limits for appeal and cassation appeal, etc.) necessitate the establishing of clearer criteria.

Taking into account the foregoing, we believe it necessary to, prior to the effective date of the APPC, establish at the regulatory level the clear distinction between disputes involving investors, which are subject to review under the rules of the CPC and the APPC.

Further, it is necessary to determine the regulation of the following issues: (a) the priority of application of the rules of the CPC or the APPC when consolidating several related claims, including claims when filing counterclaims, (b) filing periods for all categories of investment disputes.

We believe that a detailed regulation of such an important aspect as dispute resolution involving investors would contribute to improving of the investment climate of Kazakhstan.

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