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## ИЗВЕСТИЯ

НАЦИОНАЛЬНОЙ АКАДЕМИИ НАУК  
РЕСПУБЛИКИ КАЗАХСТАН  
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## NEWS

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OF THE REPUBLIC OF KAZAKHSTAN  
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## **REPRESENTATION OF FOREIGN PERSONS IN CIVIL PROCEEDING**

**Abstract.** The article deals with the institution of representation in civil proceedings. The importance of this issue, the general regulations, peculiarities and problem points of the representation of foreign persons are determined. The authors of the article consider that the representation of the interests of foreign persons in civil proceedings is a complicated issue. The institute of representation of foreign persons in civil proceedings is considered to be relevant due to the fact that an increasing number of cases involving foreign persons are considered and solved by courts of general jurisdiction in the Republic of Kazakhstan.

The article focuses on studying the nature and the importance of the problems identified and expressing the opinions of scientists who do research regarding the institution of representation of foreign persons in civil proceedings. The authors of the article made the following conclusion: the availability of omission in the Civil Procedure Law of the Republic of Kazakhstan and these problems require careful consideration. The main directions for improving the legislative regulation of the institution of representation in civil proceedings in a whole and the representation of foreign persons in particular are shown.

**Keywords:** Representation, foreign persons, civil proceedings, legal representation.

Nowadays in the global economy, Kazakhstan is considered to be one of the countries with emerging markets. The republic has formed all directions and forms of international economic relations: trade, investment, scientific and technical, currency, etc., international economic relations have been widely developed, including cooperation with foreign legal entities and entrepreneurs in civil law. The expansion and activation of partnership between Kazakhstani and foreign counterparties inevitably leads to the increase in the number of disputes arising in the entrepreneurial activity.

It is not always possible to prevent disputes, resolve conflicts between the parties through direct negotiations. In this regard, for the legal security of transactions, the development and creation of conditions that guarantee an objective, competent and timely resolution of possible disputes is of great importance. The determination of the jurisdiction of disputes, the applicable law in the resolution of conflicts and the execution of court decisions are of particular importance.

The jurisdiction in the Kazakhstan civil procedure is a set of procedural rules that provide the distribution of jurisdictional civil cases among domestic courts. As compared with domestic ones, the jurisdiction of cases involving foreign persons means the limits of the jurisdiction of the courts and its limitation from the competence of foreign courts.

According to the rules of jurisdiction provided by paragraph 5 of Article 23 of the Civil Procedure Code of the Republic of Kazakhstan [1], the courts also consider cases involving foreigners, stateless persons, foreign organizations, foreign legal entities, organizations with foreign participation, as well as international organizations, if other cases are not provided by the international agreement, the legislation of the Republic of Kazakhstan or by agreement of the parties.

The courts of the Republic of Kazakhstan investigate cases involving foreign persons if the respondent organization is located or the respondent citizen has a residence in the Republic of Kazakhstan (part 1 of article 466 of the Civil Procedure Code).

The legislative consolidation of the right of foreign citizens and stateless persons to appeal to Kazakhstan courts and to use civil procedural rights on a par with Kazakhstani citizens details the national regime granted to them by the Constitution of the Republic of Kazakhstan in the field of protection of their rights and legally protected interests. In this case, we are talking about the entire set of rights protected by civil procedure. The providing of foreign citizens and stateless persons by the national regime in the field of civil procedure has unconditional nature and means that they are subject to the norms of Kazakhstan's civil procedure legislation on procedural law and legal capacity, on the rights and obligations of persons involved in the case, on court costs, and so on.

Based on the general regulations of international private law, there are two legal regimes - the national regime and the most favored regime [2].

The national regime means that no less favorable regime is provided to the foreign citizens and legal entities than the regime that is granted to national legal entities and citizens.

The most favored regime means that no less favorable regime is provided to the foreign individuals and legal entities than the regime that is granted or will be granted to individuals and legal entities of a third state in the future.

The legislation of Kazakhstan reflects the national regime.

Thus, according to paragraph 1 of article 472 of the Civil Procedure Code of the Republic of Kazakhstan, foreigners and stateless persons, foreign and international organizations have the right to appeal to the courts of the Republic of Kazakhstan in order to protect their rights violated or disputed, freedoms and legally protected interests.

The foreign persons use procedural rights and perform procedural duties on a par with citizens and organizations of the Republic of Kazakhstan. This regulation of paragraph 2, article 472 of the Civil Procedure Code of the Republic of Kazakhstan is of great importance in the issues regarding the representation of the interests of foreign persons in civil cases considered by judicial bodies of the Republic of Kazakhstan.

The implementation of the right to judicial protection in foreign states by citizens and legal entities is ensured by the opportunity provided by law in order to conduct a case in civil proceedings in person or through a representative.

The stage of investigation and resolution of a civil case involving foreign persons causes a number of peculiarities; first of all, it concerns representation. In accordance with article 13 of the Constitution of the Republic of Kazakhstan «Everyone has the right to receive qualified legal assistance. In cases stipulated by law, legal assistance is provided free of charge» [3]. According to article 57 of the Civil Procedure Code of the Republic of Kazakhstan, citizens have the right to conduct their cases in the court not only personally, but also through a representative, while personal participation in the case of a citizen does not deprive him of the right to have a representative in the case. R.A. Sidorov considers that «judicial representation in civil proceedings is intended to provide legal assistance to citizens and organizations, to help protect their rights and legally protected interests, the participation of a judicial representative in civil proceedings contributes to clarifying the actual relations of the parties, taking initiatives and activity of participants in the process» [4, p.3].

Representation is a legal activity of one person on behalf of and in the interests of another person in civil proceedings [5].

The Civil Procedure Code of the Republic of Kazakhstan stipulates that judges, investigators, prosecutors and deputies of the Parliament of the Republic of Kazakhstan or local representative bodies cannot be representatives in court, except for the cases when they participate in the process as the representatives of relevant organizations or legal representatives (article 59 of the Civil Procedure Code of the Republic of Kazakhstan).

The participation of foreign persons in international economic life, which, anyhow, affects the Republic of Kazakhstan, implies the need for foreigners to come into contact with the judicial system of Kazakhstan. Accordingly, as well as civil law (property and personal non-property) can be complicated by a foreign element, so judicial proceedings can be complicated by a foreign element of different content [6].

The full powers of the representatives are confirmed by the procuration executed in writing and signed by the party, or expressed orally at a court hearing and entered into the protocol.

A procurator may provide full powers to conduct a particular case or to perform certain legal proceedings or it is of a general nature - to provide the right to carry out all legal proceedings in civil proceedings, including for receiving deposited expenses and commission of trust.

In order to bring a civil status claim, including a claim that arises from marital relations, as well as to perform legal proceedings to abandon the claim, reduce it, to recognize the claim and enter into a settlement agreement, to receive some amount of money and other valuables, the full powers must be directly expressed for the above mentioned in the power of attorney.

The legal representative may present any claims on behalf of the legally incapable person and answer the claim brought against him. However, the commission of actions that require special powers (by order of the subject of the claim) must be approved by the court. The powers of the foreign representative are determined by the domestic legislation of a foreigner.

In order to execute individual procedural actions, a representative authorized by a party or its legal representative may act instead of a party in the process, if the other is not provided by the law. The powers of a representative may be given to several persons and be implemented by each of them, but each procedural act may be performed only by one of them. If there are discrepancies in the statements or actions of the representatives, the court considers them as discrepancies in statements or actions of the party itself.

It is noted that there are no specifics of the representation of foreign persons neither in the Civil Procedural Law of the Republic of Kazakhstan nor in the Law of the Republic of Kazakhstan «On Advocacy and Legal Aid» [7]. We agree with A.A. Koltsov that «a foreign lawyer is not an expert in Kazakhstani law, but such lawyer is certainly more competent than a Kazakhstan lawyer related to the issues of the application of the laws of his country» [8, p.85]. Therefore, the question arises, which of the judicial representatives will protect the rights and legitimate interests of a foreigner more effectively on the territory of the Republic of Kazakhstan? In our opinion, everything depends on the essence of the dispute itself, namely the type of legal relations, of course, in the cases such as insurance, where there are many specific nuances that are often not familiar to the Kazakhstani legal system, the participation of a foreign representative will be more effective as he actually has the relevant knowledge in this area.

However, we will take into account that restrictions related to providing legal assistance to foreigners, for example, on the issues regarding the state secrets, are quite reasonable. According to A.N. Balashov and M.A. Shalagina, the mentioned restrictions are fully justified and are not of discriminatory nature [9, p.33]. We agree with this statement due to the fact that we can talk about the interests of the Kazakh state.

Most scientists say that only a lawyer should act as a representative in cases where a foreign person participates. This opinion is justified by the presence of specificity and certain nuances in cases involving persons of foreign origin, therefore only a lawyer can provide properly qualified legal assistance [10, c.19]. The issues of the monopoly of a lawyer have been discussed in the science of civil procedural law for a long time, and this applies to all categories of cases [11, p.163-166]. The proponents of such monopolization believe that only the participation of lawyers in the court will help to solve the problem of the quality of legal assistance, that is, the provision of legal assistance should protect citizens from unskilled and unqualified assistance.

In Kazakhstan, after a long discussion of the issue regarding the representation by the Law «On Advocacy and Legal Aid», it was established that for legal assistance in the form of representing the interests of individuals and legal entities in civil cases, the legal consultants must be members of the Chamber of Legal Consultants. At the same time, the legal consultant is obliged to conclude an insurance contract for professional liability for obligations arising from harm to third parties who are provided with legal assistance in accordance with the agreement (article 77 of the Law) [7]. That is the insurance against professional errors: skip procedural deadlines; improper paperwork; not notifying the person to whom the legal assistance is provided in accordance with the contract, the consequences of the committed legal actions that caused harm to him; loss or damage of documents received by the insured (insured person) from the client for providing legal assistance; illegal divulging information that became known to the insured person in the process of providing him with legal assistance.

We consider that the implementation of representation by lawyers only is efficient within the consideration and resolution of civil cases with the participation of foreign persons, only in the case when the court applies the rules of foreign law in the consideration and resolution of the dispute. In view of the

fact that the application of such norms is connected with great difficulties for the court, since the practice of their application has not been formed yet and it is impossible to oblige judges to know the law of another state, and due to the burden of proof on the content of a foreign right to the parties, the lawyers only including foreign ones, will be able to properly establish the content of foreign rules and the rules for their application, since such representative has special knowledge in the field of jurisprudence.

As for the cases when Kazakhstani norms are applied in cases involving a foreign element, there is no need for lawyers to participate, and such monopoly will only limit those whose rights and legal interests are violated in choosing a representative for the case. Perhaps the participation of only lawyers within the framework of these legal relations, regardless of the rules applied is more effective for the arbitration process, due to the presence of economic entities that have great financial capabilities, unlike the parties on the case in the courts of general jurisdiction.

Summarizing the results regarding the institution of representation, we believe that if foreign norms are chosen as the applicable law in the case, only Kazakhstani or foreign lawyers will implement the representation. Based on this, the article 58 of the Civil Procedure Code of the Republic of Kazakhstan should be supplemented as follows:

«Article 58. Representation on behalf of

3. If a court applies foreign rules in a case involving the foreign persons, foreign lawyers may be the representatives of foreign persons».

However, the parties should focus on the knowledge of certain legal issues, based on the stage of consideration and resolution of cases involving foreign persons, for example, compliance with the regulations concerning the international jurisdiction, the application of rules for the submission and legalization of foreign evidence and etc.

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#### **АЗАМАТТЫҚ ПРОЦЕСТЕГІ ШЕТЕЛДІК ТҮЛҒАЛАРДЫҢ ӨКІЛДІГІ**

**Аннотация.** Апелляциялық сатыдағы соттардың еңбек даулары бойынша сот қаулыларын қайта қарауы негіздер болған жағдайларда олардың күшін жоюға әкеп соғуы мүмкін. Авторлар бір қатар азаматтық істерді зерттей отырып, процессуалдық нормаларды формальды түрде бұзу сот қаулыларын қайта қарауға әкеп соқпауы тиіс деп санайды. Еңбек істері бойынша сот қаулыларын жою үшін негіздерді жіктеуді бөліп көрсете отырып, дәлелдеу уақытын дұрыс бөлу мәніне қатысты ҚР Жоғарғы Сотының ұстанымын сыни бағалай отырып, авторлар мұндай іс жүргізушілік бұзушылықтарды шартты ретінде бағалау мүмкіндігін негіздейді. Авторлар дәлелдемелік презумпциялардың мәнін соттың елемей дұрыс емес шешім қабылдауға әкеледі деп санайды.

**Түйін сөздер:** азаматтық процесс, еңбек даулары, апелляция, соттылығы, ведомстволық, сот шығындары, дәлелдеу уақыты.

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#### **ПРЕДСТАВИТЕЛЬСТВО ИНОСТРАННЫХ ЛИЦ В ГРАЖДАНСКОМ ПРОЦЕССЕ**

**Аннотация.** В статье рассматривается институт представительства в гражданском процессе. Определяются значимость данного вопроса, общие положения, особенности и проблемные моменты представительства иностранных лиц. Авторы статьи считают, что представление интересов иностранных лиц



в гражданском судопроизводстве является вопросом определенной сложности. Институт представительства иностранных лиц в гражданском судопроизводстве считается актуальным в связи с тем, что увеличивается количество дел с участием иностранных лиц, рассматриваемых и разрешаемых судами общей юрисдикции в РК. В статье исследуется сущность выявленных проблем и излагаются мнения ученых, проводящих исследования по вопросу института представительства иностранных лиц в гражданском судопроизводстве. Авторы статьи пришли к следующему выводу: наличие пробелов в Гражданском процессуальном законодательстве РК и эти проблемы требуют тщательного рассмотрения. Показаны основные направления совершенствования законодательного регулирования института представительства в гражданском процессе в целом и представительства иностранных лиц в частности.

Ключевые слова: Представительство, иностранные лица, гражданское судопроизводство, судебное представительство.

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