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Kyrgyzstan

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A. Legislation and rules

A.1 Legislation

International arbitration in Kyrgyzstan continues to be governed by the Law On Arbitration Courts (the "Law"), as enacted on 30 July 2002 and to which no amendments have been made in the past 10 years. The law is mostly based on the UNCITRAL Model Law.

In addition, international commercial arbitration matters are also governed by:

(i) The Code of Civil Procedure of the Kyrgyz Republic dated 29 December 1999, which, among other things, deals with recognition and enforcement of arbitral awards

(ii) The Law of the Kyrgyz Republic On Investments into the Kyrgyz Republic dated 27 March 2003, which confirms investors' right to bring their disputes with the Kyrgyz Republic (and its state agencies) to international arbitration

Kyrgyzstan is a party to a number of bilateral and multilateral agreements that grant investors the right to arbitrate disputes over their investments in Kyrgyzstan. These treaties include the Energy Charter Treaty dated 17 December 1994, as well as BITs and multilateral treaties executed with CIS countries and members of Eurasian Economic Union.

It should be noted that while the Kyrgyz Parliament ratified the ICSID Convention in 1997, the Kyrgyz government still has not submitted the relevant documents to ICSID. Therefore, as of today, the Kyrgyz Republic is not a party to the ICSID Convention.

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A.2 Institutions, rules and infrastructure

After adoption of the Law in 2002 and relevant sub-laws regulating the procedure of establishment and registration of arbitration institutions, the local Chamber of Commerce and Industry decided to establish the International Arbitration Court (IAC) for handling both domestic and international commercial disputes.

The IAC handles all types of commercial disputes between local and foreign companies, except disputes which are non-arbitrable under Kyrgyz law (eg, disputes relating to registration of rights over immovable property, challenge of decisions of state authorities, etc.).

Expedited procedures are available under the IAC Rules of Expedited Arbitration if the parties agree to use these Rules.

The IAC Rules of Arbitration set forth the special rules of joinder of third parties. Specifically, under these Rules, third parties can join the arbitration proceedings only if: (i) all parties to the arbitration proceedings agree; and (ii) the third party is a party of the arbitration agreement used to commence the arbitration proceedings. The application to involve the third party can be filed only before the filing of the statement of defense.

B. Cases

While recent court decisions relating to the enforcement or setting aside of arbitral awards are generally in line with international practice, it should be noted that the Kyrgyz courts do not have a wide range of experience with arbitration-related cases, and this lack of experience can lead to controversial decisions.

B.1 Kyrgyz courts refuse to accept the transfer of an arbitration clause

The Supreme Court of the Kyrgyz Republic reviewed the claim of a foreign company relating to the transfer of shares in a Kyrgyz telecom company.

The claim was based on a multilateral share purchase agreement. The claimant was not in the initial list of parties to this agreement and became a party to it as a result of an assignment agreement with one of the initial buyers.

The lower court dismissed the claim based on the fact that the multilateral agreement contained an arbitration clause referring to arbitration under the LCIA Rules in London.

However, the Supreme Court overruled the above decision of the lower court, stating that the claimant was not a party to the arbitration clause because it did not sign the multilateral agreement.

In addition to that, the Supreme Court stated that the arbitration clause did not comply with the mandatory requirements of the Law, because it did not contain the name of the arbitration institution, which was agreed upon by the parties for the settlement of their disputes and referred only to arbitration rules.[2]

It should be noted that the above decision of the Supreme Court was highly criticized by local scholars and practitioners. In addition, there were suspicions that it was issued as a result of political influence over the Supreme Court Panel.

Regardless of this decision, the respondent managed to commence arbitration proceedings under the LCIA Rules, and prevailed in this arbitration.

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[2] Clauses 3 and 4 of Article 7 of the Law provide the following:
3. Arbitration agreement shall state that any dispute, controversy or requirement, arising between parties out of a dispute, shall be settled by an arbitration tribunal, as well as the name of the arbitration tribunal, considering the dispute.
The arbitration agreement may contain information on a number of arbitrators, location of arbitration proceeding, language of hearing, applicable law and rules, period of a dispute consideration.
4. In the event of inconsistency with the rules provided or in clause 2 and paragraph 1 of clause 3 of the hereby Article arbitration agreement shall be considered to be null and void.

This decision of the Supreme Court evidenced that Kyrgyz courts may still issue debatable decisions which raise concern over influence by the state or parties.

B.2 The Kyrgyz Supreme Court interprets statutory requirements in the context of the arbitration clause

In 2007, the Supreme Court issued another controversial decision in a dispute between two local companies arising out of a contract for the purchase of cotton.

This decision confirmed the very conservative approach used by the Supreme Court when interpreting arbitration agreements.

In particular, in line with its rules, the Supreme Court determined as void the arbitration clause that referred to the settlement of disputes between parties by an arbitral tribunal created at the Liverpool Cotton Association.

While the Supreme Court's arguments were not entirely listed in the decision, the most logical interpretation is that the Supreme Court decided that the arbitration clause was void because it did not state that *any* dispute between parties shall be settled in arbitration.

While this decision was also criticized by local scholars and practitioners, it can be seen as an additional example of the very narrow interpretation of the Law used by the Supreme Court.

B.3 Arbitral tribunals cannot settle disputes relating to ownership rights to land plots

In 2008, the Supreme Court of the Kyrgyz Republic came to the conclusion that local arbitral tribunals cannot settle disputes relating to ownership rights over land.

In particular, during the review of a claim by local authorities seeking the return of a plot of land that was acquired by the respondent without authorization, the latter provided the court with the award

issued by the arbitral tribunal, which confirmed his ownership rights over the disputed land.

The respondent argued that due to the provisions of the Law, which state that local arbitral awards cannot be appealed, the local court did not have any other option but to accept the *res judicata* effect of the award and reject the claim.

However, the Supreme Court ruled that, due to statutory restrictions, local arbitral tribunals cannot consider claims relating to ownership rights over land. Therefore, regardless of the fact that an award cannot be appealed, local courts should ignore it.

While references of the Supreme Court to relevant statutory provisions are not entirely correct, the above decision can be used as an example of the Kyrgyz courts' intention to prevent abuse of the right to settle disputes in arbitration.

B.4 Kyrgyz courts consider alternative arbitration clause invalid

A Kyrgyz telecom company commenced legal action in the local court against another telecom company under an internet connection agreement (ICA).

The respondent challenged the jurisdiction of the Kyrgyz courts, claiming that the ICA contained a dispute resolution clause allowing parties to settle their disputes either in arbitration located in Copenhagen (Denmark) or in Danish state courts.

However, the Kyrgyz courts of all levels (including the Supreme Court) considered the above dispute resolution clause to be invalid.

Particularly, local courts stated that the alternative clause did not clearly reflect the intention of the parties to settle their disputes in arbitration because it allowed them the alternative option to commence legal action in the Danish courts. In turn, under Kyrgyz law, two local companies cannot settle their disputes in foreign state courts.

This decision of the Kyrgyz courts is very debatable and may jeopardize the validity of alternative dispute resolution clauses which are widely used in loan agreements and other financial arrangements between local companies and foreign banks.

B.5 Narrow interpretation of the arbitration clause

In 2014, the Kyrgyz state authorities continued their attempts to collect fines for alleged environmental violations from Kumtor Gold Company (the local subsidiary of the biggest foreign investor in Kyrgyzstan – Centerra Gold).

Particularly, the local environmental protection inspectorate filed a claim against Kumtor Gold Company seeking a court order to collect the environmental fines.

Kumtor argued, among other things, that this dispute should be settled in line with the arbitration clause contained in the Revised Investment Agreement executed between Kumtor Gold and the government in 2009.[3] This argument was supported by the Court of Appeal, which dismissed the claim of the environmental authority.

However, the Supreme Court stated that the arbitration clause of the Revised Investment Agreement was not clear enough and it had reasonable doubts that it could be enforced. Particularly, it argued that the word "may," which was used in the arbitration clause, does not fully exclude the jurisdiction of local courts.

This decision of the Supreme Court is based on a very narrow interpretation of the wording of the arbitration clause. Therefore, we cannot exclude the possibility that it was issued under the pressure of the Kyrgyz government, which will use this decision to push Kumtor

[3] The arbitration clause states that the parties to the agreement may commence arbitration proceedings for settlement of disputes arising out or in connection with the agreement under the UNCITRAL Arbitration Rules or ICSID Arbitration Rules (if the Kyrgyz Republic becomes a party to the ICSID Convention).

Gold to reconsider the conditions of its agreements with the Kyrgyz government.

B.6 Bankruptcy proceedings cannot be used to evade arbitration clause

In 2015, the Supreme Court completed its review of a case where a creditor tried to commence insolvency proceedings against its local debtor in local courts, despite the fact that the contract between these parties provided for the settlement of disputes by arbitration.

The local debtor objected to this application by the creditor, claiming, among other things, that by commencing bankruptcy proceedings, the creditor was trying to evade the contractual dispute resolution clause, which provided for pre-arbitration negotiations and the settlement of disputes by arbitration.

As a result of the review of this case, courts of all levels supported the position of the debtor and dismissed the creditor's bankruptcy application. This case illustrates the pro-arbitration approach of local courts.

B.7 Constitutional Chamber confirms that the Law does not contradict the Constitution

In 2015, provisions of the Law relating to arbitration costs and the final and binding effect of local arbitral awards were challenged in the Constitutional Chamber of the Supreme Court. In both cases, the Constitutional Chamber confirmed that these provisions do not contradict the Constitution of the Kyrgyz Republic. These cases show the pro-arbitration position of the Constitutional Chamber.[4]

[4] Under Kyrgyz law, the Constitutional Chamber of the Supreme Court (previously the Constitutional Court) reviews claims challenging Kyrgyz laws based on claimed contradiction of the Constitution.

C. Trends and observations

As can be seen from these decisions of the Supreme Court, Kyrgyz court practice relating to international arbitration is still contradictory. In addition, Kyrgyz courts may be biased due to influence from the state or parties.

Also, it should be noted that during the past 10 years, provisions of the Law were challenged several times based on accusations that the Law and the main principles of arbitration proceedings contradicted the Constitution.

However, the Constitutional Court and the Constitutional Chamber of the Supreme Court consistently rejected such claims and showed their pro-arbitration position.

At the same time, the government proposed to include in the new draft of the Civil Procedure Code, which will come into force on 1 July 2017, special provisions that set forth rules for challenging arbitral decisions issued in Kyrgyzstan.

This proposal of the government was based on concerns that even if local arbitral awards contradict public policy, they still cannot be set aside by local courts. The fact that the government raised such concerns shows that arbitration is being used in Kyrgyzstan more frequently, and the government would like to have additional rights with which to defend public interests.

Recently, a number of investors began arbitration proceedings against Kyrgyzstan. Most of them relate to the expropriation of foreign and domestic investments by the government of Kyrgyzstan that came to power as a result of the April 2010 Revolution.

As a result, the Kyrgyz government decided to establish a special body – the Centre of Representing the Government in Court Proceedings. This Centre is responsible for handling any claims filed against the Kyrgyz government or state authorities by foreign investors.

As a result of these efforts of the Kyrgyz government, it managed to receive solid evidence for appealing awards on the most discussed cases that were heard by the International Arbitration Court of the Moscow Chamber of Commerce.

In these cases, the claimants stated that the Arbitration Court of the Moscow Chamber of Commerce had the right to review investment claims against Kyrgyzstan based on provisions of the 1997 CIS Moscow Convention for the Protection of Investor Rights. Specifically, the claimants stated that the general dispute resolution provisions of the Convention, which establish the rights of foreign investors to seek resolution of investment disputes in international arbitration institutions, must be interpreted as the consent of the parties to this Convention to solve investment disputes in any international arbitration institution chosen by foreign investors. This Convention was ratified by most CIS countries, including Russia, Kazakhstan, Kyrgyzstan and Belarus.

However, in September 2014, the CIS Economic Court (a court established by CIS countries for settling disputes between these countries and interpreting CIS treaties), based on the application of the Kyrgyz government, issued a decision where it provided the official interpretation of the provisions of the Convention. In this decision, the CIS Economic Court supported the position of the Kyrgyz government and stated that the provisions of the Convention cannot be treated as the consent of the state to consider disputes in international arbitration.

Based on this decision of the CIS Economic Court, the award of the Arbitration Court at the Moscow Chamber of Commerce was set aside.

In addition to that, in 2015, the Kyrgyz Republic managed to settle another long-term ICSID arbitration proceeding arising out of the withdrawal of a subsoil use license for the development of one of the biggest gold deposits – Jerooy.

Also, in July 2016, the Kyrgyz government managed to prove in the Ontario Superior Court of Justice that investors who have awards against the Kyrgyz Republic cannot enforce their awards against shares in the Toronto mining company Centerra Gold owned by Kyrgyz state-owned JSC Kyrgyzaltyn.

This decision had a very positive effect for the Kyrgyz government, because Centerra Gold operates the biggest Kyrgyz gold deposit — Kumtor — and dividends from shares in this company are viewed as significant income for the state. Therefore, it can be said that, despite the fact that there are a number of ongoing investment arbitration proceedings against the Kyrgyz Republic, local government has become much more experienced in international arbitration and has taken effective measures to protect its position against claims of foreign investors in different arbitration proceedings and state courts.