GLOBAL LEGAL INSIGHTS

International Arbitration

First Edition

Contributing Editor: Joe Tirado
Published by Global Legal Group

CONTENTS

Kyrgyzstan

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Introduction

The Kyrgyz Republic is one of the post-Soviet countries, and gained independence in 1991. As in many post-Soviet states, arbitration as an alternative dispute resolution mechanism was not popular. Arbitration started developing in the Kyrgyz Republic in 2002 when the Law of the Kyrgyz Republic "On Arbitration Courts in the Kyrgyz Republic" (the "Kyrgyz Arbitration Law") was adopted. This law contains some elements of the UNCITRAL Model Law on International Commercial Arbitration (the "UNCITRAL Model Law"). However, the Kyrgyz Arbitration Law does not specify criteria for international arbitration. Therefore, it is assumed that this law shall apply to both international and national arbitration.

It should be noted that arbitration in the Kyrgyz Republic is in the process of its formation and development. This explains the level of application of generally accepted principles of international arbitration in the Kyrgyz Republic. It is obvious that 13 years are not enough to educate the new generation of lawyers/arbitrators with the relevant knowledge and skills in the area of arbitration. It is evident, however, that arbitration has a strong tendency to progress in the Kyrgyz Republic.

Since March 18, 1997, the Kyrgyz Republic has been a party to the New York Convention, to which it acceded without reservation. Apart from this Convention, the Kyrgyz Republic is not party to any similar agreement on the recognition and enforcement of foreign arbitral awards.

The answers below are based on Kyrgyz law, not arbitration rules of Kyrgyz permanent arbitral institutions.

Arbitration agreement

In accordance with Kyrgyz Arbitration Law, the form and substance of the Arbitration Agreement must comply with the following requirements:

(i) the Arbitration Agreement must be executed in writing. An agreement is considered executed in writing if it is contained in the document signed by the parties or executed by way of exchange of letters, telex, telegraph, facsimile or other means of communication, including electronic ones, ensuring the recording of such Agreement; and

(ii) the Arbitration Agreement must state that any[1] dispute, controversy or claim arising out of the dispute between the parties shall be referred to arbitration and give the name of the arbitral tribunal to which the dispute shall be referred.

Failure to comply with the above requirements shall entail invalidity of the Arbitration Agreement.

Only civil disputes and investment disputes are arbitrable. There is a list of non-arbitrable disputes[2], but it is not exhaustive.

The competence-competence principle is generally applicable, but the principle of separability is not stipulated in the Kyrgyz Arbitration Law.

Arbitration procedure

As a rule, an arbitration proceeding is initiated by filing a claim. Generally, there is no practice of filing a Request for Arbitration and Statement of Claim separately.

Hearings can take place outside of the seat of arbitration. It should be noted that in the Kyrgyz Republic, arbitration is in the process of formation and development and the international arbitration rules such as the UNCITRAL Notes on Organizing Arbitral Proceedings, IBA Rules on the Taking Evidence in International Arbitration, IBA Guidelines on Conflict of Interests in International Arbitration, etc., are not being used very actively.

Kyrgyz Investment Law provides for the confidentiality of an arbitrator who shall not, without the written consent of the parties, disclose information acquired by him in the course of arbitration. However, as a rule, in practice, arbitration is confidential, which applies to all materials of the arbitration case. In this case, the parties may mutually agree on a list of confidential and non-confidential information.

Arbitrators

The parties are entitled to determine the number of arbitrators (an odd number) and the order of appointment of arbitrators. However, if the parties are unable to determine the number of arbitrators and the procedure for their appointment, the following rules apply:

(i) In an arbitration with three arbitrators, each party shall appoint one arbitrator, and the two arbitrators thus appointed shall appoint the third arbitrator who shall act as a chairman. If a party fails to appoint the arbitrator within 30 days of receipt of a request to do so from the other party, or if the two arbitrators fail to agree on the third arbitrator within 30 days of their appointment, the appointment shall be made, upon request of a party, by the chairman of the permanent arbitration court.

(ii) In an arbitration with a sole arbitrator, if the parties are unable to agree on the arbitrator, he shall be appointed, upon request of a party, by the chairman of the permanent arbitration court within 30 days from the date of receipt of request.

(iii) Where, under an appointment procedure agreed upon by the parties, a party fails to act as required under such procedure or the parties, or two arbitrators, are unable to reach an agreement expected of them under such procedure; any party may request the chairman of the permanent court of arbitration to resolve this issue on his own, including the issue of appointing an arbitrator. The corresponding decision of the chairman of the permanent court of arbitration cannot be appealed.

An arbitrator may be challenged for cause[3]. Challenge and self-recusal must be declared prior to the consideration of a case on merits. During consideration of a dispute, a challenge is permitted only in cases where the grounds for challenge became known after the start of consideration of the dispute.

If an arbitrator being challenged does not reject or the other party does not agree to the challenge, the challenge is decided by the arbitral tribunal.

If applying any procedure for challenging an arbitrator agreed by the parties, and no decision or agreement on challenge has been reached between other arbitrators, either party

may request the chairman of the permanent court of arbitration to decide on the issue. Such a decision cannot be appealed. While such a request is pending, the arbitral tribunal may not continue the arbitral proceedings and make an award.

The powers of an arbitrator shall terminate upon expiration of 60 days from the date of issuance of the decision in the case. The powers of an arbitrator may also be terminated due to his self-recusal, challenge or otherwise provided by agreement of the parties.

At the same time, the powers of an arbitrator shall not be terminated if the court has refused to issue a writ of execution to enforce the arbitral award. The permanent court of arbitration shall provide re-consideration of a dispute involving the same arbitrators who ruled on a dispute at its own expense.

The arbitrators do not have any immunity, except that they cannot be questioned as witnesses on information made known to them in the course of arbitration proceedings.

Interim relief

The parties are not limited in the choice of types of interim relief, with some exceptions. In particular, in the Kyrgyz Republic, there is no practice of anti-suit injunctions or anti-arbitration injunctions. With that, anti-arbitration injunctions are possible. But the adoption of anti-suit injunctions by Kyrgyz courts is unlikely. The principle of the right to judicial protection exists in Kyrgyz laws, one element of which is that the waiver of the right of access to court is not valid. Consequently, the restriction of the right to appeal to court is not allowed. In this regard, Kyrgyz courts likely will not take anti-suit injunctions, since such measures shall be construed as restricting the right of access to court. The approach that a person has a right to go to court is likely to dominate, that this right is not subject to limitation, and that if a dispute arises out of the contract which provides for the arbitration clause, then the court will refuse to accept a claim or terminate a proceeding even if the court accepts and initiates the proceeding. However, as such the court may not prohibit a person to go to court with a particular statement.

The parties have the right to apply for interim relief both in courts and tribunals. However, there is no clear legal regulation of compulsory enforcement of interim relief by courts, which is adopted by tribunals. Therefore, if there is a risk of refusal to enforce interim relief adopted by tribunals voluntarily, the party which requires the adoption of interim relief would be well advised to turn directly to the court for interim relief. It should be noted that the right of a party of the arbitration proceeding to apply to court for interim relief was stipulated only in 2013. We know that this works for domestic arbitration. But as far as I know, the court practice of consideration of statements of the parties of international arbitration proceedings for interim reliefs is not yet established in the Kyrgyz Republic. It is possible that the courts of the Kyrgyz Republic may interpret that they are entitled to issue an interim relief only for domestic arbitrations (but not if there is an international arbitration).

Arbitration award

In the Kyrgyz Republic, there are certain requirements for the form and substance[4] of the arbitration award. The arbitration award must be made in writing and signed by the composition of the tribunal. In the allocation of costs, as a rule, the arbitrators are guided by the ratio between the volume/quantity of satisfied and refused claims. It should be noted that for the purposes of enforcement of the arbitration award in the Kyrgyz Republic it is required that the award clearly specifies the obligations of a debtor. For example, if a

decision is taken to recover an amount, the amount should be clearly stated, because under the procedure for recognition and enforcement, as a rule, neither court nor bailiff will make any calculation of an amount at the time of execution.

The written arbitration award shall be sent to the parties no later than five days from the announcement of an operative part of the award. The decision is taken by the majority of the tribunal. The arbitrator who does not agree with the decision of the majority of members of the arbitral tribunal shall be entitled to present his dissenting opinion, which is attached to the award.

Challenge of the arbitration award

In the Kyrgyz Republic, the arbitration award cannot be challenged in court. The competence of the court is that it has the right to refuse enforcement of the arbitration award. However, the court has no authority to cancel the arbitration award on the application of a party of arbitration proceeding. Thus, the party that believes that arbitration was conducted with certain violations does not have an active right to protection. On the contrary, the party is forced to wait for the winning party to go to court to enforce the award. Accordingly, if the court considers the claim for enforcement of the arbitration award, the relevant party may argue that there are grounds for refusal of enforcement of the award. Thus, in this particular case, the losing party is made dependent on the actions of the winning party.

For example, if the seat of international arbitration was the Kyrgyz Republic or the applicable law was Kyrgyz Law, the party of arbitration will not be able to apply to the courts of the Kyrgyz Republic to cancel the arbitration award.

Enforcement of the arbitration award

Recognition and enforcement of international arbitration awards in the Kyrgyz Republic is carried out in accordance with the New York Convention and Kyrgyz laws. However, there are a number of features related to the recognition and enforcement of arbitration awards. In particular, Kyrgyz law expands a list of the grounds for refusal of recognition and enforcement of foreign arbitration awards in comparison with a list of the grounds referred to in the New York Convention. For example, the list of the grounds for refusal of recognition and enforcement of foreign court judgments[5] is also applicable to foreign arbitration awards ("Additional List of Grounds"). I am not aware that the Kyrgyz courts have applied the Additional List of Grounds, but the Kyrgyz Law formally stipulates such opportunity.

For the recognition and enforcement of a foreign arbitration award in the Kyrgyz Republic one must submit to the court of the Kyrgyz Republic the duly authenticated original award or a duly certified copy thereof, and the original arbitration agreement or a duly certified copy thereof. If the award or arbitration agreement is in a foreign language, the party shall submit a certified translation thereof into the state (Kyrgyz) or official (Russian) language.

Investment arbitration

The Kyrgyz Republic has entered into a number of bilateral treaties on mutual support, encouragement and protection of investment (capital expenditure). Such treaties have been signed with a number of countries such as[6]:

- the People's Republic of China (1995);
- the Republic of Turkey (1996);

- the Republic of Ukraine (signed in 1993, not yet effective);
- the United States of America (1994);
- the Republic of Armenia (1995);
- the United Kingdom of Great Britain and Northern Ireland (1998);
- the Republic of France (1997);
- the Islamic Republic of Iran (2002);
- the Republic of Azerbaijan (1997);
- the Federal Republic of Germany (2006);
- the Republic of Georgia (1997);
- the Republic of India (1998);
- the Republic of Kazakhstan (2005);
- the Republic of Belarus (2001);
- the People's Republic of Mongolia (2001)
- the Swiss Confederation (2003);
- the Republic of Tajikistan (2001);
- the Kingdom of Sweden (2003);
- the Republic of Moldova (2004);
- the Republic of Finland (2004);
- the Republic of Korea (2008);
- the Republic of Latvia (2009);
- the Republic of Lithuania (2008);
- Denmark (signed in 2001);
- Malaysia (signed in 1995);
- the Islamic Republic of Pakistan (signed in 1995);
- the Republic of Indonesia (signed in 1997); and
- the Republic of Uzbekistan (signed in 1997).

The Government of the Kyrgyz Republic has approved draft agreements on mutual support, encouragement and protection of investment with the Czech Republic[7], the Kingdom of the Netherlands[8] and the United Arab Emirates[9].

* * *

Endnotes

1. This provision of the Kyrgyz Arbitration Law is in conflict with Article II (1) of New York Convention that Each Contracting State shall recognise an agreement in writing under which the parties undertake to submit to arbitration all or any disputes ... .
2. The following cases are not arbitrable:
   (i) appeals against decisions or acts (omissions, waivers) of the bailiff;
   (ii) ascertaining facts of legal significance (legal acts);
   (iii) claims for restoration of rights under lost securities;
   (iv) bankruptcy (insolvency) cases;
   (v) claims for compensation for damages arising from death or injury of a citizen;
   (vi) claims for protection of honour, dignity and business reputation;
   (vii) inheritance cases;
   (viii) marriage and dissolution of marriage cases;
   (ix) family disputes;
   (x) adoption, guardianship, trusteeship, foster care disputes;
   (xi) civil registration disputes; or
   (xii) disputes defined by law as not arbitrable.

3. An arbitrator may not participate in the consideration of a dispute and shall be challenged on the following grounds:
   (i) if he is a relative of the parties in the case or its representative;
   (ii) if he is personally, directly or indirectly interested in the outcome of a dispute or there are other circumstances giving rise to doubts as to his impartiality or independence;
   (iii) if an arbitrator is a person who cannot be an arbiter (judge of the competent court, a civil servant, a person with a criminal record, a person recognised as incapable or partially capable); or
   (iv) if he does not possess qualifications required by the arbitration agreement, or Kyrgyz Arbitration Law.
4. The award of the arbitral tribunal shall contain:
   (i) the date of its adoption, composition of the arbitral tribunal, time and place of the proceedings;
   (ii) the names of the parties of arbitration (dispute), names and positions of their representatives, indicating powers;
   (iii) the subject of a dispute, applications, petitions, explanations of persons participating in the proceedings;
   (iv) the circumstances of the case established by the arbitral tribunal, evidence on which the conclusions of the arbitration court about these circumstances are made, legislation and other regulatory legal acts which the arbitral tribunal used in making decisions;
   (v) the grounds on which the decision is based;
   (vi) an operative part, which shall include: content of the award; distribution of the costs of proceedings; and date and manner of execution of the award.
5. This list of the grounds (relating to foreign judgments) also applies to recognition and enforcement of a foreign arbitration award:
   (i) if the award under the law of the State in which it was taken has not entered into force or is not enforceable;
   (ii) if the party against whom the award was taken was not timely and properly notified of the time and place of hearing or was otherwise unable to present its explanation to court;
   (iii) if the proceedings in accordance with the laws or international treaties entered into force in accordance with the law to which the Kyrgyz Republic is a party, fall within the exclusive competence of the court in the Kyrgyz Republic;
   (iv) if there is a decision of the court in the Kyrgyz Republic, entered into force, adopted on a dispute between the same parties on the same subject and on the same grounds;
   (v) if the pending court case in the Kyrgyz Republic is a dispute between the same parties on the same subject and for the same reasons, the proceedings of which were instituted prior to the initiation of proceedings in a foreign court;
   (vi) where the statute of limitations brings a foreign award for enforcement and this term has not been restored by court; and
   (vii) if execution of the foreign award may impair the sovereignty of the Kyrgyz Republic, or threaten the safety of the Kyrgyz Republic.
6. In parentheses are the years in which the respective treaties came into effect in the Kyrgyz Republic.
7. Ordinance No. 125-r of the Government of the Kyrgyz Republic dated April 12, 2000.
8. Ordinance No. 594-r of the Government of the Kyrgyz Republic dated October 1, 2003.
9. Ordinance No. 367-r of the Government of the Kyrgyz Republic dated September 9, 2013.

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