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## INTERNATIONAL COMMERCIAL ARBITRATION IN CENTRAL ASIA

By  
W. E. Butler\*

Although informal methods of dispute settlement are a long-established part of the cultures of Central Asia (Kazakhstan, Kyrgyzia, Tadjikistan, Turkmenistan, Uzbekistan),<sup>1</sup> international commercial arbitration came to be known in those territories during the Soviet era and became part of international commercial life in those territories in 1992 only after they achieved independent statehood. In this article we examine the legal status of international commercial arbitration and arbitral courts or tribunals in Central Asia on a country-by-country basis and pursue the author's interest in comparative arbitration law.<sup>2</sup> All five of the Central Asian States became members of the United Nations on 2 March 1992.

International commercial arbitration came to be known in Central Asia during the Soviet period simply by reason of the establishment in the Union of Soviet Socialist Republics (USSR) on the territory of the Russian Soviet Federated Socialist Republic (RSFSR) of a permanently-operating foreign trade arbitration commission and maritime arbitration commission in Moscow and their regional predecessors. Knowledge of arbitration would have become accessible to Central Asian jurists through Soviet doctrinal works on the subject. The State monopoly of foreign trade would have ensured that enterprises located on Central Asian territories did not and could not become directly involved in international commercial arbitrations as parties. Although such arbitrations cannot be excluded for the years prior to 1930 with respect to Central Asia, no examples are known to exist.

None of the Central Asian States are parties to the 1970 Moscow Convention.

### I. KAZAKHSTAN

The Republic Kazakhstan is one of the 149 parties to the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (hereinafter: 1958 New York Convention), having acceded on 20 November 1995, with effect from 18 February 1996.

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<sup>1</sup> See, for example, V. Martin, *Law and Custom in the Steppes: The Kazakhs of the Middle Horde and Russian Colonialism in the Nineteenth Century* (2001), pp. 114-139.

<sup>2</sup> See W. E. Butler, "Arbitration from a Russian Perspective", in T. E. Carbonneau and W. E. Butler, *International Litigation and Arbitration* (2d ed.; 2013), Chapter 11.

Kazakhstan signed the International Convention for the Settlement of Investment Disputes (hereinafter: ICSID) on 23 July 1992 but did not deposit an instrument of ratification until 21 September 2000, with effect from 21 October 2000.<sup>3</sup>

Although precise figures are not available, perhaps about thirty permanently-operating international commercial arbitration courts exist in Kazakhstan.<sup>4</sup> Among those created soon after Kazakhstan achieved independence was the Arbitration Commission attached to the Union of Chambers of Commerce and Industry of the Republic Kazakhstan. This was transformed into its legal successor in 2004: the International Arbitration Court and Arbitration Court attached to the Chamber of Commerce and Industry attached to the Chamber of Commerce and Industry of the Republic Kazakhstan (hereinafter: MAC Kazakhstan).

The Kazakhstani International Arbitrage (known by its acronym in the Russian language hereinafter: KMA), attached to the Union of Chambers of Commerce and Industry of the Republic Kazakhstan, was established in 2005, and about the same time, the International Arbitration Center (IAS). Each of these is considered individually below.

#### *A. Legislative Framework*

Kazakhstan, just as the other former union republics of the Soviet Union, was aware of the institution of arbitration insofar as it existed in Soviet civil procedure. In post-Soviet Kazakhstan the Cabinet of Ministers confirmed by a Decree of 4 May 1993, No. 356, the “Model Statute on an Arbitration Court”.<sup>5</sup> This was essentially domestic arbitration and had no discernible impact on international commercial arbitration.

The enactment of the 1999 Code of Civil Procedure of the Republic Kazakhstan led to the decline of arbitration because the Code lacked norms providing for the enforcement of arbitral awards by State courts. Judicial practice was inconsistent, leading the Supreme Court of the Republic Kazakhstan to adopt a Normative Decree on 19 October 2001, No. 14, which required courts to issue rulings for the enforcement of

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<sup>3</sup> See S. P. Mогоz, *Инвестиционное право [Investment Law]* (Almaty, 2006), pp. 374-381.

<sup>4</sup> Because Kazakhstan has enacted two laws on arbitration and used two different words to designate their respective titles (the 2004 Law on Arbitration Courts used the classic Russian *третейский* for “arbitration”, whereas the 2004 Law on International Commercial Arbitration uses the Russian *арбитраж* (“also arbitration” but spelled by the KMA as “arbitrage” (which has an entirely different meaning in English and French) in the English version of its name). In Russian-language materials these words are used to signify under which law an arbitration proceeds within the MAC Kazakhstan and the KMA; the difference is completely obscured in the English language. To add another twist: Kazakhstan does not have the “*arbitrazh*” courts found in many CIS countries, so that use of the term is precluded in Kazakhstan, or to put the matter otherwise, in Kazakhstan the term “*arbitrazh*” courts would refer to a particular species of classical arbitration courts. The difference in terminologies creates difficulties in practice for the formulation of arbitration clauses and the choice of tribunals by the parties, especially when those clauses are drafted in or translated into English.

<sup>5</sup> See M. Suleimenov and A. Duisenova, «Развитие арбитража и медиации в Казахстане» [Development of Arbitration and Mediation in Kazakhstan] in M. Suleimenov, *Частное право Республики Казахстан: история и современность [Private Law of the Republic Kazakhstan: History and Contemporary]* (Almaty, 2011), VI, p. 337.

arbitral awards. The Decree encountered resistance from the General Procuracy and the Ministry of Justice, and the Supreme Court was persuaded to suspend the operation of Decree No. 14.

On 28 December 2004 two laws on arbitration were enacted: the Law “On Arbitration Courts” and the Law “On International Commercial Arbitration”.<sup>6</sup> The Law on Arbitration Courts acts as the general law on arbitration, and the Law on International Commercial Arbitration operates as *lex specialis*. Both courts are open for the consideration of purely domestic or international disputes and any juridical or natural persons, whether resident or non-resident, may have recourse to either type of arbitration court. However, the courts differ in their competence. The international commercial arbitration court may only become a venue for arbitration when disputes are transferred for arbitration by agreement of the parties arising from civil-law contracts if one of the parties is a non-resident of the Republic Kazakhstan.

Whether arbitration is an integral part of the system of justice is an issue that has generated substantial doctrinal controversy in some CIS jurisdictions, but not in Kazakhstan. The Supreme Court of the Republic Kazakhstan on 15 February 2002 issued a Decree which provided unequivocally that: (1) an arbitration court is not part of the judicial system administering justice in Kazakhstan and therefore recourse to arbitration does not represent for natural and juridical persons the realization of their constitutional right to the judicial defense of rights and freedoms guaranteed by the Constitution of Kazakhstan (Article 13); (2) the constitutional principle that “Justice in the Republic Kazakhstan shall be effectuated only by a court” (Article 75, Constitution) extends only to courts which are part of the judicial system and not to arbitral tribunals; (3) the conclusion by the parties of an agreement to refer a dispute to arbitration does not preclude that dispute from being subsequently considered by courts of Kazakhstan. Although this Decree was repealed by Decree of the Constitutional Council of the Republic Kazakhstan on 7 February 2008, the view that an arbitration court is not part of the judicial system in Kazakhstan remains uncontested. One consequence of this position, doctrinal writings to the contrary, is that an arbitration is a private-law means of resolving a dispute and defending civil rights; therefore, an arbitration is not a civil proceeding nor part of the law of civil procedure, notwithstanding that the great majority of civil procedure textbooks contain a chapter on arbitration. On this view, arbitration law is a distinct complex branch of private law.

The Law on Arbitration Courts contains a number of limitations (Article 7(5)) on the competence of arbitration courts, including the exclusion of disputes which affect the interests of State enterprises, minor, persons deemed to lack dispositive legal capacity, disputes arising from contracts for the provision of services, performance of work, or production of goods by subjects of natural monopolies, or bankruptcy cases. These limitations, however, do not extend to cases arising under the Law on International Commercial Arbitration unless they have been stipulated in another law; thus, for example, bankruptcy cases cannot be heard under the Law of International Commercial Arbitration because of bankruptcy legislation, but not by virtue of the Law on Arbitration Courts.<sup>7</sup>

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<sup>6</sup> Translated in W. E. Butler, *Russia & The Republics: Legal Materials* (looseleaf service; 2006-).

<sup>7</sup> Suleimenov and Duisenova, note 5 above, VI, p. 338.

Pursuant to Article 31 of the Law on International Commercial Arbitration, appeal lies to a court if a party to the arbitration considers that specified procedural violations may have occurred during the proceedings. Such an appeal is filed in the form of a petition to the court. A competent court may vacate an arbitral award (presumably upon the petition of a procurator or at its own initiative during an enforcement proceeding) if the arbitral award is contrary to public policy or if the subject-matter of the award is not subject to arbitral consideration under the legislation of Kazakhstan (for example, labor or bankruptcy disputes). An additional ground for reversing an arbitral award is available under the Law on Arbitration Courts: a determination that the award is contrary to the principle of legality; that is, the award must conform in substance to the Constitution of Kazakhstan or to legislative and other normative legal acts. In other words, the arbitrators are not at liberty to come to a “commercial” view of the dispute which is not consistent with legislation.

Arbitral awards may be denied enforcement under the Law on Arbitration Courts and the Law on International Commercial Arbitration for the reasons set out in the 1958 New York Convention and 1976 UNCITRAL Model Law on Arbitration. To these the Law on Arbitration Courts adds one additional ground: that the award of the arbitral tribunal was possible as a result of the commission of a crime confirmed by someone being convicted by a court for such crime.

#### *B. Individual International Commercial Arbitration Courts*

*KMA.* The KMA was established in January 2005 almost immediately after the two laws on arbitration were adopted on 28 December 2004. The KMA is a juridical person registered in Kazakhstan and operates on the basis of its second Reglament, confirmed by Decision of the General Meeting of Participants on 9 March 2010, to fully reflect changes and additions made to Kazakhstan arbitration legislation. Two to three years were required to set up the KMA and receive the first petitions to sue. The first cases were considered in 2006 (two); fifty had been considered in total by the end mid-2013, of which 13 were considered by the KMA and 37 by the Arbitration Court hearing cases between residents of Kazakhstan. Foreign parties included companies from Lichtenstein, Germany, United Kingdom, China, Ukraine, Russia, and Hong Kong.

The Chairman of the KMA is appointed by the General Meeting of Participants and, in turn, appoints his deputy chairman. The Executive Secretary heads the Secretariat of the KMA. The KMA is located in Almaty, Kazakhstan, and proceedings are conducted there unless the parties to a particular arbitration agree to hold the arbitration elsewhere.

The KMA sees itself as a “unified” or “single” arbitral institution. Its List of arbitrators is available for arbitrations under either of the 2004 laws on arbitration, unlike many courts which apparently maintain two separate courts, two separate reglaments, and two separate lists of arbitrators, depending upon under which law an arbitration is instituted.

Hearings are conducted in the Kazakh or Russian languages unless the parties agree that another language should be used. Interpreters may be provided by the KMA at the expense of the parties. Once the panel has been appointed or a sole arbitrator selected, the proceedings are expected, as a rule, to be completed within thirty days.

A party filing a suit at KMA is required to pay a registration fee of 70,000 tenge, exclusive of value-added tax and is nonrefundable. The arbitration fee is imposed to cover remuneration to the arbitrators and the Secretariat, expenses for organizing the arbitration, and the like. This fee is calculated in United States dollars and ranges from US\$700 for amounts of up to US\$10,000 in dispute to 3% of the value or “price” of the suit exceeding one million dollars. The Chairman of the KMA may increase the arbitration fee when the case is especially complex or requires a substantial expenditure of time or additional expenses. Although the arbitration fee is usually payable when the petition to sue is filed by the plaintiff, the Chairman of the KMA may allow payment of the fee by installments, although in this event the minimum payment will be 50% of the total arbitration fee. The fee is payable in Kazakhstan tenge is the amount in dispute is recorded in tenge. When the amount in dispute is converted into United States dollars or euros, the official exchange rate of the National Bank of the Republic Kazakhstan is used. When the amount in dispute is recorded in United States dollars or euros, the arbitration fee is payable in those currencies. Other convertible currencies may be used at the plaintiff’s request.

There are reductions in the arbitration fee if the dispute is resolved by a sole arbitrator, or if the plaintiff withdraws his suit before the notice of arbitration is sent, or other circumstances arise which are addressed in the Reglament.

The KMA is supported by a number of international cooperation agreements concluded by the chambers of commerce in Kazakhstan with similar chambers in foreign countries. Not untypical is the Agreement on Cooperation in the Domain of International Arbitration between the Chamber of Commerce and Industry of the Russian Federation and the Union of Chambers and Industry of the Republic Kazakhstan, concluded at Astana on 5 October 2004. The cooperation agreement follows the principles of the 1970 Moscow Convention on international arbitration by offering a draft arbitration clause pursuant to which if the respondent is a Russian natural or juridical person the arbitration will be held at the International Commercial Arbitration Court (MKAC) in Moscow and if the respondent is a natural or juridical person of Kazakhstan, the arbitration would be held in KMA in Astana. In addition, the parties undertake to assist the organization of arbitrations *ad hoc* on their respective territories and provide one another with administrative services, including premises for arbitration proceedings. Exchanges of information and joint seminars or conferences on issues of international commercial arbitration are part of the cooperation package.

Representatives of the KMA have taken part in biannual conferences attended principally by Asian countries (China, Russia, Japan, Kazakhstan, Korea, Kyrgyzia, Mongolia) and co-signed the Declarations adopted on those occasions. These declarations encourage further cooperation between the international commercial arbitration courts. Declarations were adopted at Harbin (28 October 2005), Moscow (25 October 2007), and Seoul (19 November 2009).

In addition, the KMA has concluded a cooperation agreement with the Russian “Inter-Regional Community of Arbitral Proceedings and Mediation” on 22 July 2011. Under this Agreement the parties will encourage the inclusion of arbitration clauses pursuant to which the Kazakhstan and Russian respondents will respectively arbitrate in their own countries and recommend that arbitrators be chosen from their respective Lists

of arbitrators, which would, if implemented, in effective create a tribunal composed of one member from each Court.

On the domestic level, KMA concluded a cooperation agreement on 24 September 2008 with the National Economic Chamber of Kazakhstan Union “Atameken”, pursuant to which, inter alia, the Union “Atameken” agreed to recommend a model arbitration clause to its partners and to natural and juridical persons participating in its activities.

In 2007 the KMA with the support of the Scientific-Research Private Law Institute opened the Arbitration Academy to arrange seminars and continuing legal education programs for legal practitioners. Upon completing a seminar, the participant is awarded a certificate of attendance.

*MAC Kazakhstan.* The antecedent of this organization was the Arbitration Commission attached to the Union of Chambers of Commerce and Industry of the Republic Kazakhstan, established in 1992, and since 2004/05 called the International Arbitration Court and Arbitration Court attached to the Chamber of Commerce and Industry of the Republic Kazakhstan. Between 1992 and 2011 this Court considered more than 160 cases; of these 78 were considered between 2004 and 2011 inclusive. During this period, there were seven parties from Russia, five from China, four from Ukraine, two from England, Kyrgyzia, and Poland; and one each from several other countries (South Korea, Switzerland, Iran, Estonia, Germany, Saudi Arabia, and United Arab Emirates). There are 105 citizens of Kazakhstan and foreigners included on the List of arbitrators.

Following the enactment of two arbitration laws on 28 December 2004, the Chamber of Commerce and Industry of Kazakhstan created two arbitration courts, one for residents of Kazakhstan, called the “Arbitration Court”, and the International Arbitration Court for cases involving at least one non-resident of Kazakhstan. These are not a unified system, and a separate List of arbitrators is maintained for each court. MAC Kazakhstan is regulated by three principal documents: the Statute on the International Arbitration Court attached to the Chamber of Commerce and Industry of the Republic Kazakhstan, confirmed on 22 July 2010 by Decision of the Extraordinary Congress of the Chamber of Commerce and Industry of the Republic Kazakhstan; the Reglament of the said Court confirmed on the same day by the same body, together with Annex No. 1 thereto, comprising the Statute on Expenses of an Arbitral Proceeding. These documents incorporate the 2010 amendments to the two legislative enactments on arbitration.

Arbitrators are elected to the panel and included on the List of arbitrators provided that they are at least 25 years of age, having a higher education, and possess knowledge in the domain of settling disputes relegated to the competence of the MAC Kazakhstan. Inclusion on the List is confirmed by the Congress of the Chamber of Commerce and Industry, which is the highest organ of the Chamber. Each arbitrator is elected for a term of five years. Exclusion from the List for disciplinary reasons is by the Disciplinary Council of the MAC Kazakhstan, consisting of five persons appointed by the President of the Chamber of Commerce and Industry, of whom two represent the Chamber of Commerce and Industry and two come from the List of arbitrators. The President of the Chamber acts simultaneously as chairman of the Disciplinary Council.

The Chairman of MAC Kazakhstan and his deputy are elected for a two-year term by the General Meeting of persons included in the Register of MAC Kazakhstan. The

Secretariat of MAC Kazakhstan organizes the work of the Court, including of the Disciplinary Council and the General Meeting of Arbitrators. A General Meeting of Arbitrators may be convened by the President of the Chamber of Commerce, by the chairman or deputy chairman of MAC Kazakhstan, or by one-third of the arbitrators on the List of Arbitrators. A quorum of not less than two-thirds of the arbitrators is required to hold the General Meeting. Each arbitrator has one vote; absentee voting is permitted. Decisions are adopted if more than 50% of those participating in the General Meeting vote in favor of a decision. Absentee ballots are distributed ten calendar days in advance of the meeting.

The Secretariat is headed by the Executive Secretary, who is required to be present at all oral hearings during an arbitration, to keep minutes, and to have a higher legal education. The Executive Secretary is appointed by the President of the Chamber of Commerce and Industry but accountable to the Chairman of MAC Kazakhstan.

Under the Reglament of MAC Kazakhstan, the Court has seven work days from the moment of receiving an application or petition to decide whether it has the competence or powers to consider the dispute being referred for consideration, including when one party objects to the validity of the arbitration clause. The registration fee is US\$500 and an integral part of the arbitration fee, but not subject to refund (even if part of the arbitration fee is refunded). The arbitration fee is calculated in United States dollars, depending upon the “price” of the suit. The scale begins from US\$500 for suits whose price is up to US\$20,000, and is US\$105,000 plus 0.5% of the amount exceeding ten million dollars at the top of the scale. If the plaintiff is a resident of Kazakhstan, the arbitration fee is payable in tenge; otherwise the fee may be paid in United States dollars unless special arrangements are made.

*IAS.* The International Arbitration Center (IAS) was established in Almaty, Kazakhstan, shortly after the enactment of the 2004 laws on arbitration as a permanently-operating international arbitration court to consider disputes arising out of contractual relations of a foreign economic nature, provided that one of the parties is a non-resident of Kazakhstan. The IAS also has an Arbitration Court separately for the consideration of disputes between residents of Kazakhstan. Even if the arbitration clause stipulates the Arbitration Court, if one party to the dispute is a non-resident, the IAS may nonetheless consider the case. Negotiations to settle the case before filing a petition to sue are not a requirement.

The structure of the IAS consists of the Chairman, deputy chairman, arbitrators specified in the List of the IAS, and secretariat. In both courts the IAS maintains “colleges” of arbitrators who are specialists in the fields of jurisprudence, finances and economics, production technology, and social issues. The Secretariat is comprised of the Executive Secretary and secretaries. Proceedings are conducted in accordance with the Reglament of the IAS, confirmed on 25 October 2008. The Reglament exists in three languages: Kazakh, Russian, and English; in the event of divergences in texts, the Russian language text prevails as the language in which the document was composed.

The IAS offers an expedited procedure for initiating an arbitration under which sending a petition to sue is sufficient to institute an arbitration, in comparison with other arbitral courts where a request to arbitration is submitted and the petition to sue is filed only after the case is accepted for consideration. The arbitration may be conducted by a



sole arbitrator or by a panel of three or more arbitrators, so long as the number of arbitrators is uneven.

The procedure for forming an arbitral tribunal to hear a specific case is regulated by the Statute of the IAS on Forming the Composition of a Court, adopted 25 October 2008. Unless the parties to the dispute have agreed otherwise, the composition of the tribunal must be completed within 45 days from the rendering of a ruling to institute proceedings in the case. The parties may choose an arbitrator from the recommended list or another person not on the list but who otherwise meets the requirements for an arbitrator established by the Reglament of the IAS.

The fees and expenses associated with an IAS arbitration are determined pursuant to the Statute of the IAS on Arbitral Fees and Expenses, confirmed on 25 October 2008. The registration fee of the IAS is 500 euros, exclusive of VAT, and is payable in tenge or, for non-residents, in euros. The arbitration fee is recoverable to cover the expenses of the IAS and the remuneration to the arbitrator(s). The arbitration fee is calculated in euros, as is the “price” of the suit. For suits “priced” up to 50,000 euros, the arbitration fee is 2,000 euros; for suits priced at 50 million up to 100 million euros, the arbitration fee is 391,000 plus 0.4% of the amount exceeding 50 million euros. VAT, if applicable, is additional.

## II. KYRGYZSTAN (KYRGYZIA)

The Republic of Kyrgyzstan acceded to the 1958 New York Convention on 18 December 1996, with effect from 18 March 1997.

Kyrgyzstan signed the ICSID Convention on 9 June 1995 but has never completed the formalities of ratification.

The MAC of the Kyrgyz Republic attended only the International Commercial Arbitration Consultative Meeting held at Moscow on 25 October 2007 of the three such occasions organized by the Asian arbitral organizations.

An Agreement on Cooperation in the Domain of International Commercial Arbitration between the Chamber of Commerce and Industry of the Russian Federation and the Chamber of Commerce and Industry of the Kyrgyz Republic, signed at Bishkek on 1 December 2005, follows the format and substance of the analogous agreement between the Kazakhstan and Russian chambers of commerce and industry described above.

International commercial arbitration in Kyrgyzstan occurs within the framework of the Law on Arbitration Courts in the Kyrgyz Republic of 30 July 2002, No. 135, as amended by Laws of 15 May 2003, No. 93 and of 11 June 2004, No. 73. Pursuant to this Law (Article 3), disputes may in accordance with an arbitration clause be referred for consideration to a permanently-operating arbitration court, defined as an “organization ensuring the effectuation of an arbitral examination” that is a “juridical person” performing its activities in the “form of a non-commercial organization”. The activity of arbitration courts connected with the arbitral examination of a case is not considered to be “economic activity” and therefore does not engage the legal regulation and taxation implications associated with economic activity.

Within the framework of the 2002 Law on Arbitration Courts, the Statute on the International Arbitration Court attached to the Chamber of Commerce and Industry of the Kyrgyz Republic, confirmed by decision of the Supervisory Council of the said Court

on 16 January 2003, and the Reglament of the International Arbitration Court (hereinafter: MAC Kyrgyz Republic) attached to the Chamber of Commerce and Industry of the Kyrgyz Republic operate as *lex specialis* to regulate arbitrations within the jurisdiction of the MAC Kyrgyz Republic. The Reglament of 16 January 2003, as amended 30 April 2004, was replaced by a new version of 8 February 2007, which entered into force as from 1 July 2007. MAC Kyrgyz Republic was registered as a juridical person by the Ministry of Justice of the Kyrgyz Republic on 26 September 2002 as a non-commercial organization in the organizational-legal form of a social foundation.

The highest organ of the MAC Kyrgyz Republic is the Supervisory Council, which consists of representatives from donor organizations who finance the activities of the Court, associations of entrepreneurs, professional associations of jurists, and others. The Supervisory Council confirms the Reglament, the procedure for calculating the arbitration fee, fixes the registration fee, determines the scales of remuneration for arbitrators, and supervises the activities of the Court.

The 2007 Reglament shows significant influence of the 1976 UNCITRAL Model Rules on international commercial arbitration, but not as substantial as the equivalent Reglament of the International Commercial Arbitration Court of the Russian Federation. By agreement of the parties, disputes arising out of contractual and other civil law relations, including foreign trade and other types of international economic ties and investment disputes, may be referred to MAC Kyrgyz Republic provided that there is an arbitral clause or agreement granting respective competence to the court. The parties may be natural or juridical persons or agencies of State power or local self-government.

Certain types of disputes are specifically excluded, among them: disputes regarding appeals against decrees, actions, or failure to act or refusal to act of a judicial bailiff; disputes concerning the establishment of facts having legal significance; disputes concerning the restoration of rights to lost securities; bankruptcy or insolvency disputes; compensation of harm caused to human life or health; disputes concerning defense of honor, dignity, or business reputation; disputes arising out of inheritance relations; disputes concerning the procedure and conditions for entering into marriage or termination of marriage; and others. Examples, not exhaustive, are given of civil-law disputes that may be referred for arbitration in MAC Kyrgyz Republic: relations relating to the purchase-sale or delivery of goods, performance of work, or rendering of services; exchange of goods and/or services; carriage of goods and passengers; trade representation and mediation; leasing or finance leasing; scientific-technical exchange; licensing operations, investments, credit and settlement operations, insurance, among others. Special mention is made of disputes referred to arbitration under international treaties of Kyrgyzstan or pursuant to the Law on Investments in the Kyrgyz Republic.

MAC Kyrgyz Republic is to resolve disputes in accordance with the norms of material law which the parties have stipulated in the contract or the agreement to arbitrate as being applicable. If the applicable law is not stipulated, the arbitral tribunal determines the norms of law subject to being applied, and insofar as matters are not regulated by the applicable law, then according to the customs of business turnover (Article 2.6, Reglament).

Kyrgyzia recognizes the autonomy of the arbitration clause: “an arbitral agreement shall be deemed to have legal force irrespective of the validity of the contract of which it is a part” (Article 3.2, Reglament). The arbitral agreement must be in written

form and satisfies this criterion if contained in a document signed by the parties, concluded by an exchange of letters, communications by teletype, fax, or with the use of other means of communication, including electronic, ensuring the fixation of such an agreement. A reference in a contract to a document containing an agreement to transfer a dispute for settlement by an arbitration court is deemed to be an agreement if the contract was concluded in written form and the reference is such that it gives grounds for considering the agreement to be part of the contract (Article 3.4, Reglament). An award of MAC Kyrgyz Republic is binding on the parties, final, and not subject to appeal.

Abuse of right is prohibited in MAC Kyrgyz Republic. Actions intended to cause harm to another person, to obstruct the rapid and just settlement of a dispute in substance, or to drag out the periods for an arbitral examination are regarded as examples of abuse of right. Abuse of right in other forms is not permitted. The consequences of abuse of right may be the imposition on the relevant party of the additional costs incurred by the other party or by the arbitration court in connection with this abuse of right (Article 7, Reglament). The Reglament makes provision for the waiver of the right to refer to it when a party knows that some provision or requirement of the Reglament has not been complied with and nonetheless continues to take part in the arbitration without immediately objecting to such failure to comply. Under these circumstances, the party is deemed to have waived its right to object (Article 8, Reglament).

The officers of MAC Kyrgyz Republic are the Chairman, Deputy Chairman, and Executive Secretary. A List of arbitrators is confirmed by the Supervisory Council of MAC Kyrgyz Republic. The List includes more than 187 arbitrators from 23 countries of the world. A natural person who has dispositive legal capacity, is included on the List of Arbitrators, and has the necessary knowledge and respective qualifications to settle disputes within the jurisdiction of MAC Kyrgyz Republic may be an arbitrator. Excluded from being an arbitrator are judges of a competent court of the Kyrgyz Republic, State employees of the Republic, persons having a record of conviction, and persons deemed to lack dispositive legal capacity or to be limited in dispositive legal capacity. Unless the parties have agreed otherwise, no person may be deprived of the right to act as an arbitrator by reason of his citizenship.

The parties to an arbitration are at liberty to choose the language in which the proceedings will be conducted. If the parties have no agreement with respect to language or if it is impossible to conduct the arbitration in the language chosen by the parties (the circumstances of such impossibility are not addressed), the arbitrators may choose the language. An agreement or decision with regard to language extends to any written application of the parties, evidence, or ruling or award of the arbitral tribunal. The arbitral tribunal may require that any documentary evidence be accompanied by a translation into the language agreed by the parties or determined by the arbitral tribunal (Article 15, Reglament).

The place of arbitration is the office of MAC Kyrgyz Republic in the City of Bishkek or any other place chosen by the parties and approved by MAC Kyrgyz Republic, having regard to the circumstances of the case and convenience of the parties. The arbitrators, by agreement with the Chairman of MAC Kyrgyz Republic, may assemble in any place which they consider to be most suitable for consultations between

the members of the tribunal, hearing witnesses or experts, or to inspect goods, property, or documents (Article 16, Reglament).

Notification of the parties has proved to be a problem in many countries who are members of the Commonwealth of Independent States (CIS). MAC Kyrgyz Republic has attempted to clarify a number of issues that exist elsewhere within the CIS. Notices are to be sent by registered letter, or by courier service (which would mean commercial courier services), or through individuals whom the arbitrators assign for this purpose, or may be sent by fax or e-mail, or other means of telecommunications making provision for recording the fact of delivery. If delivered to a natural person personally by handing over the notification, return receipt is required for MAC Kyrgyz Republic or a second example of the receipt is to be signed. Where the individual concerned is not present, delivery may be made to adult individuals residing or working with him or to certain designated organizations. The examples of organizations, however, are based on Kyrgyz categories and not very responsive to foreign counterparts (Article 17, Reglament).

The Reglament addresses in detail the procedure for filing a suit and the requirements of a valid petition to sue in arbitration. The “price” or value of the suit is determined by the amount of money being demanded or by the value of property to be recovered. If the arbitration concerns demands of a nonproperty character, the price of the suit is determined in accordance with the Statute on Arbitration Costs and Fees of MAC Kyrgyz Republic. If the suit comprises several demands, the “price” of each must be calculated separately; the total value of the suit represents the sum of the individual demands. When filing a suit, the plaintiff must pay a registration fee. Until the registration fee is paid, the petition to sue is not accepted or registered. The registration fee is non-refundable.

In addition, the plaintiff is required to pay an arbitration fee in advance; the registration fee is deducted from this advance. Under the Statute on Arbitration Expenses and Fees, confirmed by Decree of the Supervisory Council of the International Arbitration Court attached to the Chamber of Commerce and Industry of the Kyrgyz Republic on 15 January 2004 (hereinafter: 2004 Statute), the registration fee is intended to cover expenses arising before the arbitral tribunal resolves the case. The arbitration fee is to cover general expenses connected with the activity of MAC Kyrgyz Republic, the remuneration to be paid to the arbitrators, and the expenses for organizing the particular arbitration. These are distinguished from “additional expenses”, which constitute the special costs of MAC Kyrgyz Republic for conducting special expert examinations, written translations, remuneration to experts, interpreters, witness expenses, travel, accommodation, and so on. Costs of the parties are the expenses which the parties incur when defending their interests during the arbitration.

Sliding scales operate for the registration fee and arbitration fee, depending upon the “price” of the suit. The registration fee, for example, ranges from US\$150 to US\$500. The highest registration fee is for suits exceeding US\$10,000 in value. The arbitration fee likewise is assessed on a sliding scale ranging from US\$150 for a suit up to US\$1,000 in value to US\$34,750 plus 0.5% of the amount exceeding five million dollars for a suit whose “price” exceeds US\$5,000,000. If the suit relates to disputes arising in connection with a change or dissolution of a contract, or to deem transactions to be invalid, or to apply the consequences of invalidity of a void transaction, or other disputes of a non-

property character, or suit to award the performance of duties in kind, the arbitration fee is based by using the same scale and proceeding from the price of the contract concerned.

Arbitration fees are lowered under stipulated circumstances, for example, if a single arbitrator considers the case rather than a panel of three arbitrators. Remuneration to arbitrators is determined in accordance with the Statute on Remuneration for Cases of the International Arbitration Court attached to the Chamber of Commerce and Industry of the Kyrgyz Republic. The total arbitration fee is covered by an advance payment made to MAC Kyrgyz Republic. Counterclaims are subject to the same rules and procedures at the “price” of the initial suit. It follows that if during the arbitration the parties increase the claim or counterclaim, an additional advance will need to be paid in before the arbitration can continue.

The remuneration to arbitrators in MAC Kyrgyz Republic is regulated by the Statute on Remuneration in Cases of the International Arbitration Court confirmed by the Supervisory Council of the MAC, Protocol No. 24, of 3 October 2007, as amended by Decision of the Supervisory Council, Protocol No. 29, 9 April 2009. The remuneration is paid from the arbitration fee tendered by the plaintiff; not less than 50% of the arbitration fee is to be applied to arbitrator remuneration, which includes the arbitrators on the tribunal, the Chairman, deputy chairman, and executive secretary of the MAC. The remuneration is subdivided into the following percentages: 15% to the chairman of the arbitral tribunal and 10% to each arbitrator; 10% to the Chairman of MAC or deputy chairman; and 5% to the Executive Secretary. If a sole arbitrator acts, 35% of the fee is payable to the sole arbitrator, and the percentages for the Chairman and Executive Secretary of MAC remain the same. The percentages are reduced if the suit is withdrawn after notifications to arbitrate have been sent or if the parties reach an amicable settlement. The arbitrators are paid in the currency in which the arbitration fee was paid and may be made in cash or by bank remittance

The Republic Kyrgyzstan is unique in the CIS in providing for expedited arbitration. The principal relevant document is the Expedited Reglament of the International Arbitration Court attached to the Chamber of Commerce and Industry of the Republic Kazakhstan, confirmed by Decree of the Supervisory Council of the said Court on 15 January 2004, as amended 30 April 2004. An expedited arbitration involves a single arbitrator chosen from the List of arbitrators and a set of short deadlines for the submission of materials by the parties. The arbitration fee is reduced commensurately because only a single arbitrator is involved in the case. MAC Kyrgyz Republic makes every effort so that the arbitral proceedings are completed within one month from the appointment of the single arbitrator or, if one of the parties is a foreign investor, within three months.

Between 2004 through the end of 2012 inclusive, MAC Kyrgyz Republic considered 424 arbitrations and an additional twelve cases carried over to 2013. More than half of these were considered in 2009 and 2010 (238 in all). Eleven cases were completed during the first five months of 2013 and a further 27 were under proceedings.<sup>8</sup>

Various English translations of MAC Kyrgyz Republic documents appear on websites without any indication of whose has undertaken the translations. These are of a very low standard and should be used at your peril.

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<sup>8</sup> Statistics supplied by the Executive Secretary of MAC Kyrgyz Republic, July 2013.

### III. TADZHIKISTAN

Tadzhikistan acceded to the 1958 New York Convention on 14 August 2012, with effect from 12 November 2012. Tadzhikistan will apply the Convention only to awards made on the territory of another Contracting State. Reservations were entered with regard to the retroactive application of the Convention and with regard to applying the Convention to immovable property.

Tadzhikistan is not a party to the ICSID Convention.

### IV. TURKMENISTAN

Turkmenistan is not a party to the 1958 New York Convention. Turkmenistan signed the ICSID Convention on 26 September 1992 and deposited instruments of ratification on that same day. The ICSID Convention entered into force for Turkmenistan as from 26 October 1992.

Turkmenistan has been the recipient of technical assistance from the European Union Tacis programme for the newly independent States in the field of international commercial arbitration. One outcome of the technical assistance is a remarkable manual of materials on international commercial arbitration made available in the Russian language.<sup>9</sup> In a collection of this scale and comprehensiveness, there are no materials from Turkmenistan.

### V. UZBEKISTAN

Uzbekistan acceded to the 1958 New York Convention on 7 February 1996, with effect from 7 May 1996.

Uzbekistan signed the ICSID Convention on 17 March 1994 and deposited instruments of ratification on 26 July 1995, with effect from 25 August 1995.

On 5 April 2006 the Agreement on Cooperation in the Domain of International Commercial Arbitration was concluded at Tashkent between the Chamber of Commerce and Industry of the Russian Federation and the Chamber of Commerce and Industry of the Republic Uzbekistan. Because Uzbekistan does not have its own international commercial arbitration court, the parties could not recommend an arbitration clause, as was done in the case of the Kazakhstan and Kyrgyzia agreements noted above. The parties did agree to assist with the organization of arbitrations *ad hoc*. Exchanges of information and the arrangement of joint seminars and conferences were augmented in the case of Uzbekistan by provisions authorizing the exchange of experience, including visits by each Party's experts to study the activities of arbitration centers.

Unofficial reports indicate that Uzbekistan may be planning to enact a law on international commercial arbitration during 2014.

### VI. CONCLUDING OBSERVATIONS

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<sup>9</sup> See R. Knieper, R. Galkanov, A. Titov, and N. Medvedyeva (comps.), Сборник материалов по международному коммерческому арбитражу [Collection of Materials on International Commercial Arbitration] (Ashkhabad, 2008). 752 p.

Experience with international commercial arbitration has for the Central Asian countries accumulated mostly by trial and error in the literal and metaphorical meanings of that phrase. The lack of an experienced judiciary, international doubts with regard to the integrity of the local judicial system, unfamiliarity on the part of foreign investors with the material law of the respective countries, and the absence of a network of international treaties regulating the recognition and enforcement of judicial decisions are among the major factors encouraging foreign investors to prefer to avoid the local courts and to incorporate arbitration clauses in their contracts with Central Asian parties. The “trial” therefore frequently takes the form of international arbitrations outside Central Asia, commonly in London, Paris, Stockholm, Vienna, or even Moscow, and in the case of ICSID arbitrations, Washington D. C. The “error” is embedded in the failures of Central Asian governments to make satisfactory arrangements domestically to organize involvement in international commercial arbitrations as parties or to provide advisory services to Central Asian enterprises or entrepreneurs involved in commercial arbitrations abroad.

Of the five Central Asian countries, Kazakhstan is by far the most advanced in matters of international commercial arbitration. Nonetheless, the impact of having been socialist legal systems and the concomitant substantial role of the State in entrepreneurial affairs continues to shape the configuration of arbitration in these jurisdictions. The countries concerned do not routinely budget for the costs of retaining counsel to defend their interests, financing an arbitration, or covering losses incurred by virtue of awards against them. They find it difficult to assess the probabilities of losing an arbitration or the balance of benefits and costs to be achieved by a settlement of the claims against them. Often they allow bureaucratic arbitrariness or legislative initiative in investment relations without enquiring into whether such behavior may result in breaches of contracts and consequential liability of the Republic. They are not experienced in selecting counsel to effectively represent the respective State in international arbitrations; when counsel are chosen, often they are not instructed properly or in a timely manner in the course of an arbitration. Central Asian countries’ lack of experience with and knowledge of foreign and comparative law makes it difficult for them to follow and comprehend the intricate issues of international arbitrations. Necessary documents often are not readily available. Delays in paying fees to counsel result in many law firms being unwilling to act for Central Asian countries or lead to higher fees being charged in order to compensate for the risks of delay or failure to pay.