

International Arbitration (comparative analysis)

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Kazakhstan is on its way to obtain the membership in the WTO and is interested in developing alternative methods of the settlement of civil legal disputes and in approximating the activities of arbitral courts to international standards, according to the Conception of the Legal policy of the Republic of Kazakhstan approved by the Presidential Decree No. 949 on 20 September 2002. In this respect, the objective of this lecture is to describe briefly the legislative acts on arbitration and arbitral courts of four European countries (Switzerland, Austria, Turkey and the United Kingdom) and to make a comparison with the legal status of arbitral courts in Kazakhstan.

International commercial arbitration is recognized as an important component of private international law, largely through the wide acceptance of the 1958 "New York" Convention on the Recognition and Enforcement of Foreign Arbitral Awards. International commercial arbitration may either be "ad hoc" pursuant to the UNCITRAL Arbitration Rules, or "institutional", following the rules of arbitration promulgated by private organizations such as the International Chamber of Commerce (ICC), the American Arbitration Association (AAA), or the London Court of International Arbitration, inter alia. The International Court of Arbitration of the International Chamber of Commerce is a major source of expertise in international commercial arbitration.

1. International Commercial arbitration institutions:

1. International Council for Commercial Arbitration (ICCA)
2. International Centre for the Settlement of Investment Disputes (ICSID)
3. United Nations Commission on International Trade Law (UNCITRAL)
4. WIPO Arbitration and Mediation Centre
5. European Court of Arbitration, Strasbourg
6. International Chamber of Commerce (ICC), International Court of Arbitration, Paris
7. Permanent Court of Arbitration, The Hague

1.2. THE INTERNATIONAL COUNCIL FOR COMMERCIAL ARBITRATION (ICCA)

The International Council for Commercial Arbitration (ICCA) is the leading worldwide organisation devoted to promoting international arbitration and other forms of dispute resolution. In order to carry out its purposes, ICCA regularly convenes Congresses and Conferences for presentation of papers and discussion of topics concerning both the scientific and practical aspects of international dispute resolution. These meetings attract a large number of participants from all parts of the world and have made significant contributions to the development and improvement of dispute resolution theory and practice.

ICCA's principal publications, prepared with the assistance of the Permanent Court of Arbitration in Hague, include the Yearbook on Commercial Arbitration, International Handbook on Commercial Arbitration and ICCA Congress Series, consisting of the collected papers presented at ICCA meetings. ICCA has official status as a non-governmental organisation (NGO) accredited by the United Nations, and in that capacity

has actively participated in the preparation of the UNCITRAL Arbitration Rules, the Conciliation Rules, the Model Arbitration Law and other UNCITRAL projects.

ICCA is governed by Council Members, who are recognised specialists in the field of dispute resolution and who serve in their individual capacities. ICCA's Statement of Purposes and Procedures provides that the Members "shall be elected from various parts of the world, from different legal and economic systems, and from developed and developing nations". Persons who have served as Members for long periods are eligible to be designated life time Advisory Members. There are presently 42 Members, including Honorary Officers and 12 Advisory Members, coming from 31 countries.

1.3. International Centre for the Settlement of Investment Disputes (ICSID)

ICSID was established under the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the Convention), which came into force on October 14, 1966. ICSID has an Administrative Council and a Secretariat. The Administrative Council is chaired by the World Bank's President and consists of one representative of each State, which has ratified the Convention. Annual meetings of the Council are held in conjunction with the joint Bank/Fund annual meetings.

The 154 States have signed the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States on the dates indicated. The names of the 140 States that have deposited their instruments of ratification are in bold, and the dates of such deposit and of the attainment of the status of Contracting State by the entry into force of the Convention for each of them are also indicated (as of November 3, 2003).

[Kazakhstan signed the Convention on 23 July 1992, deposited its ratification instrument on 21 September 2000, the convention entered into force for Kazakhstan on 21 October 2000.](#)

Three main activities of ICSID:

- Providing facilities for the conciliation and arbitration of disputes between member countries and investors who qualify as nationals of other member countries
- Additional Facility Rules authorizing the ICSID Secretariat to administer certain types of proceedings between States and foreign nationals, which fall outside the scope of the Convention
- Appointing authority of arbitrators for ad hoc (i.e., non-institutional) arbitration proceedings.

2. European National Commercial Arbitration Courts:

1. London Court of International Arbitration (LCIA) London
2. Stockholm Chamber of Commerce, Arbitration Institute Stockholm
3. Swiss Arbitration Association, Basel, CH
4. Austrian Federal Economic Chamber, International Arbitral Centre (VIAC)
5. Belgian Centre for Arbitration and Mediation (CEPANI) Brussels
6. Czech Republic - Arbitration Court attached to the Economic Chamber Prague
7. German Institution of Arbitration (DIS) Bonn
8. International Chamber of Commerce (ICC) Deutschland Cologne

Totally, there are about 32 national international arbitration courts in the world.

3. Legislation of foreign countries on arbitration

3.1. Switzerland has ratified only two international conventions: UN Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958) and Convention on the Settlement of Investment Disputes between States and Nationals of other States

(Washington, 1965). It also adopted the Intercantonal Arbitration Convention, on March 27/August 29, 1969 as a part of national legislation.

Chapter 12-1 of Federal Statute of Private International Law relates to International arbitration and consists of Articles 176-194 and regulates the following issues: Scope of application, seat of the arbitral tribunal, arbitrability, arbitration agreement, arbitral tribunal, including challenge of arbitrators, *lis pendens*, provisional and protective measures, taking evidence, jurisdiction, decision on the merits, partial award, finality, setting aside, exclusion agreements, deposits and certificates of enforceability, and, finally, foreign arbitral awards. The final provision directly refers the recognition and enforcement of a foreign arbitral award to the New York Convention. There are other legislative acts as:

- Swiss Private International Law Act - Chapter 12: International Arbitration (and selected articles), 18 December 1987
- Swiss Federal law on Private International Law, 1999
- Swiss Federal Act of Private International Law
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3.2. The United Kingdom has ratified three international conventions in this sphere: UN Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958), European Convention on International Commercial Arbitration (Geneva, 1961), and the Convention on the Settlement of Investment Disputes between States and Nationals of other States (Washington, 1965).

The most significant academic discovery for me is that the United Kingdom is a UNCITRAL Model Law Country, while Switzerland, Turkey, Austria and Kazakhstan are not. Consequently, it has a Model Law Jurisdiction for Scotland UNCITRAL Model Law on International Commercial Conciliation, as adopted on 28 June 2002.

Surprisingly, as the UK is a state of Anglo-Saxon Legal System, the UK legislation seems to be one of the most comprehensive as it includes a large number of written acts on the issue as: 1996 No. 3146 (C. 96) Arbitration, The Arbitration Act 1996 (Commencement No. 1) Order 1996 (Made 16 December 1996); Arbitration Act 1996. Chapter 23; Law Reform (Miscellaneous Provisions) (Scotland) Act 1990, Arbitration (No. 2) Bill 1989; Arbitration Act 1979; Administration of Justice (Scotland) Act 1972 (1972 c. 59), as amended 1982; Arbitration (International Investments Dispute) Act – 1966; Arbitration Act 1950; Law Reform (Miscellaneous Provisions) Act (Northern Ireland), 1937; Arbitration (Scotland) Act, 1894.

3.3. Austria has also acceded to three international conventions: UN Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958), European Convention on International Commercial Arbitration (Geneva, 1961), Convention on the Settlement of Investment Disputes between States and Nationals of other States (Washington, 1965). However, its legislation does not envisage any specific law on arbitration and is regulated by the Code of Civil Procedure (as modified by Federal Law of February 2, 1983) Judicature Act (as modified by Federal Law of February 2, 1983) Austrian Code of Civil Procedure as modified by Federal Law of February 2 1983, Federal Statute on Private International Law (Federal Law of June 15, 1978).

3.4. Turkey has ratified the same international conventions and regulates the activities of arbitral courts by two legislative acts: International Private and Procedural Law (20 May 1980, No. 2675) and the Code of Civil Procedure (18 June 1927, No. 1086).

4. Arbitration Courts in Kazakhstan

Currently, in Kazakhstan there are 15 or so arbitral courts, which have been established since the day of the declaration of independence.

1. Arbitration Commission under the Chamber of Commerce and Industry of the Republic of Kazakhstan
2. Arbitration Commission under the Kazakhstan Stock Exchange of the Republic of Kazakhstan
3. International arbitration Court of the Republic of Kazakhstan
4. International Arbitration Court of the Juridical Centre IUS
5. Arbitral Court under the Banks association of the Republic of Kazakhstan
6. Arbitral Court under the Grain (Corn) Union of Kazakhstan
7. City Arbitral Courts (tribunals)

5. Arbitration legislation of Kazakhstan

Up to date, Kazakhstan has acceded to three main international conventions on arbitration such as 1958 New York Convention (by the Presidential decree on Accession of the Republic of Kazakhstan to the Convention as of 4 October 1995, ratified on 20 November 1995), 1961 European Convention on International Commercial Arbitration (by the Presidential Decree on Accession to of the Republic of Kazakhstan to the Convention of 4 October 1995 No. 2484) and 1965 Convention on the Settlement of Investment Disputes between states and nationals of other states (signed the Convention on 23 July 1992, deposited its ratification instrument on 21 September). It has also ratified four regional international conventions with the CIS countries: 1992 Kiev Agreement on the Order of the settlement of disputes connected with commercial activities, 1993 Minsk Convention on legal help and legal relations in civil, family and criminal cases, and 1998 Moscow Convention on the procedures of mutual enforcement of arbitral awards, commercial and economic judgements on the territory of the CIS countries.

It is important to note that Kazakhstan had excellent legislative acts on arbitration as 1992 Law on Arbitration Court of the Republic of Kazakhstan and 1992 Law on the procedures of settlement of economic disputes by arbitral courts of the Republic of Kazakhstan, which were abolished by the presidential decree in 1999 for unexplainable reasons. Furthermore, it is still unclear whether 1995 Resolution of the Plenum of the Highest Arbitration Court of the Republic of Kazakhstan on the Enforcement of arbitral awards is in force or not.

However, current national legislation does not have any specific legal act, which would regulate international commercial arbitration, except the Draft Law on International Arbitration Court, which is under the consideration of the Senate of the Parliament at the moment. At the same time, the Parliament is considering another Draft law on Arbitral Courts (so-called Treteiskiy Sud), which overlaps with the Draft Law on International Arbitration Court and confuses foreign participants of civil legal relations. Many jurists recommend combining these two drafts into one legislative act in order to avoid the repetition and confusion mentioned above. The adoption of the draft law on arbitral courts will lead to the adoption of the draft law on changes and amendments.

Recommendation: the Kazakhstan legislators introduce the UNCITRAL Model Law on International Commercial Arbitration and Conciliation as a pattern for the Draft Law on International Arbitration Court of the republic of Kazakhstan.