A 'Golden Age' Of International Commercial Arbitration in Central Asia: *QUO VADIS*[1]*, KYRGYZSTAN?*

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I. Introduction

1. International commercial arbitration has become and remains to be a (if not the) preferred mechanism to resolve cross-border disputes.[3] Recognizing the revenue potential of this field[4], jurisdictions across the globe

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[3] *See* e.g. QMUL-White&Case LLP Survey, 2021 International Arbitration Survey: Adapting Arbitration To a Changing World. Available at: http://www.arbitration.qmul.ac.uk/media/arbitration/docs/LON0320037-QMUL-International-Arbitration-Survey-2021_19_WEB.pdf (accessed on 9 July 2021).

[4] *See* e.g.A Study of International Commercial Arbitration in the Commonwealth *(... the use of arbitration and conduct of arbitration-related activities could contribute to the growth of a jurisdiction's economy. Arbitration activity could contribute to a country's economy in several ways including generating income for arbitrators, counsel and all personnel involved in the arbitration; generating associated tourism income such as hotel, transportation, and meal expenses and raising the political profile and reputation of the jurisdiction on the international scene. A study carried out in Toronto, Canada, estimated the total impact of arbitration on the economy of the City of Toronto to be Can$256.3 million in 2012 and Can$273.3 million in 2013*.). Available at: https://thecommonwealth.org/sites/default/files/key_reform_pdfs/A%2BStudy%2Bof%2BInternational%2BCommercial%2BArbitration_PDF_-compressed.pdf (accessed on 9 July 2021).

have engaged in a "*regulatory competition*"[1] striving to achieve a coveted status of a 'safe seat'[2] and/or the hub for international commercial arbitration.

2. Although this claim may not hold true in its entirety for all Central Asian jurisdictions[3], recent initiatives[4] implemented by countries of the region suggest that we are living a 'golden age' of international commercial arbitration in Central Asia.

3. This article focuses on Kyrgyzstan and looks through the prism of the CIArb London Centenary Principles ('Principles') at the state of play and steps the Republic is taking to develop an arbitration-friendly climate.

II. The Principles

4. Celebrating its centenary, the Chartered Institute of Arbitrators devised a set of principles for "*for an effective and efficient*

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1 Elizabeth MacArthur, Regulatory Competition and the Growth of International Arbitration in Singapore, 2018 23 *Appeal: Review of Current Law and Law Reform* 165, 2018 CanLIIDocs 20.

2 Available at: https://www.ciarb.org/media/4357/london-centenary-principles.pdf (accessed on 9 July 2021).

3 For the purposes of this article Central Asian jurisdictions are: Kazakhstan; Kyrgyzstan; Tajikistan; Turkmenistan and Uzbekistan.

4 To name but few: **Kazakhstan.** While two years ago Kazakhstan amended its national arbitration legislation to bring it line with the UNCITRAL Model Law, this jurisdiction has implemented a more radical initiative to win the regulatory race and its share of a global arbitration market. I refer to the establishment of the Astana International Financial Centre ('AIFC') in 2018. AIFC is a common law 'enclave' inspired by the success of the Dubai International Financial Centre, that, in the context of arbitration, can be seen a 'seat within a seat'. **Uzbekistan.** On 5 November 2018, the President of Uzbekistan issued a decree establishing the Tashkent International Arbitration Centre to promote the use of alternative dispute resolution mechanisms in the Republic ('TIAC Presidential Decree'). Further, in February 2021, the President sighed Law No. Q'RQ-674 "On International Arbitration" dated 11 September 2020 ('Uzbek Arbitration Act').

seat in international arbitration"[1] (a so-called 'safe seat').[2] The Principles provide that a safe seat must have:

- "… **Law** A *clear effective, modern International Arbitration law…*";
- "… **Judiciary** A*n independent Judiciary, competent, efficient, with expertise in International Commercial Arbitration…*";
- "… **Legal expertise** *An independent competent legal profession with expertise in International Arbitration…*"; "
- "… **Education** *An implemented commitment to the education…*";
- "…**Right of Representation** *A clear right for parties to be represented at arbitration by… representatives… of their choice…*";
- "… **Accessibility and Safety** *Easy accessibility to the Seat… adequate safety and protection of the participants, their documentation and information*";
- "… **Facilities** *Functional facilities for the provision of services of International Arbitration…"*;
- "… **Ethics** *Professional and other norms which embrace a diversity of legal and cultural traditions…*";
- "… **Enforceability** *Adherence to international treaties and agreements governing and impacting the ready recognition and enforcement of foreign arbitration agreements, orders and awards made at the Seat in other countries*";
- "… **Immunity** *A clear right to arbitrator immunity…*".

5. Of course, the Principles are not binding, in any way. However, they reflect a consensus the international arbitration community

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1 *Supra* note 2, p. 220.

2 On the notion of the 'seat of arbitration' and its importance *see* e.g. Chapter 14: Selection of Arbitral Seat in International Arbitration', in Gary B. Born, *International Commercial Arbitration (Third Edition)*, 3rd edition (Kluwer Law International 2021) pp. 2205 – 2282.

reached on what a preferrable arbitral seat shall provide. As such, the Principles are a perfect litmus test for assessment of the Kyrgyzstan's developments in arbitration.

III. Kyrgyzstan On The Arbitration Map

1. **Law.** The arbitration procedure in Kyrgyzstan is governed by Law No. 135 'On Arbitration Tribunals in the Kyrgyz Republic' dated 30 July 2002 ('KR Arbitration Act')[1] that is largely based on the United Nations Commission on International Trade Law ('UNCITRAL') Model Law 'On International Commercial Arbitration' ('UNCITRAL Model Law').

2. Unfortunately, KR Arbitration Act does depart from the UNCITRAL-recommended text on some quite important issues (e.g. requirements for the validity of the arbitration agreement and post-award remedies,[2] to name but few). While KR Arbitration Act seems to serve its purpose, it may, nonetheless, be advisable to adopt the 2006 UNCITRAL Model Law *in toto*.[3] That way, Kyrgyz courts, that seem to have limited expertise in arbitration-related matters, be able to draw inspiration from jurisprudence

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1 As a former-USSR jurisdiction, Kyrgyzstan inherited a dual regulatory system: arbitration act and national codices of procedure.

2 KR Arbitration Act does not provide for a 'set-aside' procedure. While the absence of a 'set-aside' procedure may seem to be a 'unique selling point' of this jurisdiction, the practice of other jurisdictions shows that this 'innovation' may in fact may drive high-value international and domestic cases away.

3 However, a more progressive move would be to take the 2006 UNCITRAL Model Law merely as a starting point in the drafting process: arguably, this instrument has become outdated and does not accommodate the arbitration realities. On that point see e.g. http://arbitrationblog.kluwerarbitration.com/2013/05/24/are-we-beyond-the-model-law-or-is-it-time-for-a-new-one/ (accessed 9 July 2021). This was the approach Uzbekistan took: Uzbek Arbitration Act follows the text of 2006 UNCITRAL Model Law almost verbatim and when it does not – introduces some quite progressive provisions.

of their more experienced colleagues based in more than 100 jurisdictions.[1]

3. **Judiciary.** A description of the post-USSR's Judiciary as the bane of legal system would not surprise to anyone who has ever had the 'pleasure' to appear before an ex-Soviet court. Yet, the belief that the Judiciary is totally incompetent and corrupt seems now to have become the relic of the past, rather than an accurate portrayal of the reality.[2]

4. Being in its infancy[3], the Judiciary does not have much to demonstrate in terms of experience, be it general, or arbitration specific. However, what the Judiciary has shown is the understanding of prevailing problems and a genuine desire to address them. A successful implementation of various international programs, *inter alia*, to "[e]*ncourage a learning approach within the Judiciary*" and improvement of "*justice sector capacities*" serves the best testament to this.[4]

5. Of a particular note, for the purpose of our analysis, are the courses regularly organized by the International Court of Arbitration in Affiliation with the Chamber of Commerce and Industry of the Kyrgyz Republic ('ICA CCI KR') to educate the Judiciary on the arbitration processes and procedures.

6. **Legal expertise.** Kyrgyzstan has succeeded in building a small, yet very vibrant community of arbitration

1 *See* https://uncitral.un.org/en/texts/arbitration/modellaw/commercial_arbitration/ status (accessed 9 July 2021).

2 In my opinion, standalone cases of alleged corruption shall not cast the shadow on the entire judicial corpus.

3 Compare a 30-year history of the Judiciary in Kyrgyzstan with centuries of experience of their English colleagues.

4 *See* https://www.usaid.gov/kyrgyz-republic/fact-sheets/trusted-judiciary(accessed 9 July 2021). *See* also https://www.idlo.int/what-we-do/initiatives/reforming-kyrgyzstans-judiciary (accessed 9 July 2021) and https://www.venice.coe.int/WebForms/pages/?p=03_Central_asia (accessed 9 July 2021).

practitioners. While the practice of most focuses on domestic cases, some lawyers have built a truly international profile, including our esteemed editor Prof. Natalia Alenkina who, among her many achievements, has been recently re-elected to the International Chamber of Commerce (ICC) International Court of Arbitration.[1]

7. **Education.** Cognizant of the need to widen and deepen the pool of competent counsel and arbitrators, Kyrgyzstan is investing in education of the legal talent. Indeed, in many respects, the Republic is at the forefront of education in alternative dispute resolution. For example, for many years, leading law schools in the Republic have been running programs on international commercial and investment arbitration, which I had the pleasure to be involved in.[2]

8. Further, in 2019, the 'Young Group' of International Council for Commercial Arbitration[3] organized the first-in-the-region[4] skills training workshop on drafting arbitration clauses and careers in international arbitration.[5] Last but not the least, since 2020, Kyrgyzstan has become the home to 'Bishkek Arbitration Days' an annual international conference on dispute resolution where leading experts from around the world debate contemporary issues of arbitration theory and practice.[6]

9. **Right of representation.** According to KR Arbitration Act, the parties have the right to be represented in the

1 According to the QMUL-White&Case LLP Survey, ICC is the most preferred institution in the world. See supra note 3, p. 219.

2 To wit, I delivered two bespoke courses on 'International Commercial Arbitration' for graduate and undergraduate students at the American University of Central Asia (AUCA).

3 *See* https://www.arbitration-icca.org/(accessed on 9 July 2021).

4 To the best of my knowledge.

5 *See* https://www.auca.kg/en/auca_news/3753/ (accessed on 9 July 2021).

6 Recordings of the event are available on PDM's YouTube channel: https://www.youtube.com/channel/UCubc7PToVRQndKPEtX-hANQ/featured.

proceedings.[1] However, in comparison to the arbitration laws of other jurisdictions,[2] KR Arbitration Act is silent on the scope of such right: unfortunately, it leaves the question of *who* can be a representative unanswered.[3]

10. Following the maxim '*ubi jus incertum, ibi nullum*',[4] one may conclude that the parties to Kyrgyzstan-seated arbitrations must be represented by a local counsel[5] and do not enjoy the freedom to choose any representative, including a foreign qualified lawyer. This conclusion would be wrong, I reckon.

11. Looking at KR Civil Procedure Code that allows any authorized representative to appear before Kyrgyz courts[6], and applying the Code by analogy[7], I believe that KR Arbitration Act does not limit the parties' autonomy to authorize any representative in Kyrgyzstan-seated arbitrations. Only practice and time will tell whether I am right or wrong, but if Kyrgyzstan wants to be recognized

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1 Art. 24.

2 For example, Art. 38 of Uzbek Arbitration Act explicitly provides that a party to Uzbekistan-seated arbitration can appoint any representative, including a foreign citizen.

3 The drafters of the ICA CCI KR Rules seem to have recognized this legal lacuna. Art. 34.1 of the Rules reads:

The parties may present their cases in the ICA CCI and in the process of arbitration directly or through duly authorized representatives appointed by the parties at their discretion, including those appointed from among foreign citizens and organizations.

Yet, the question of whether the Rules can 'clarify' KR Arbitration Act's provisions on representation is debatable.

4 Latin: Where the law is uncertain, there is no law.

5 For example, until very recently, only counsel admitted to the Californian Bar were allowed to appear in California-seated arbitrations. *See e.g.* https://business.musickpeeler.com/california-legislature-clarifies-the-rules-for-non-california-counsel-to-participate-in-international-arbitration-seated-in-california/ (accessed on 9 July 2021).

6 Art. 59.

7 Although, *stricto sensu*, such application would be incorrect.

a 'safe seat' it is advisable to fill this, and other regulatory lacunae discussed in the article as a matter of priority.

12. **Accessibility and safety.** Although COVID-19 pandemics has changed the equation, Kyrgyzstan is, in principle, easily accessible by parties, witnesses and counsel in international arbitration. The adoption of an e-docket and an online hearing solution by ICA CCI KR further offsets (to a certain degree[1]) the absence of a so-called 'fly-in-fly-out allowance scheme' implemented in some jurisdictions[2] or a simplified visa issuance procedure.[3] As far as the security and safety is concerned, even amidst periodic political turmoil, this jurisdiction, arguably, provides "*adequate safety and protection of the participants, their documentation and information*".[4]

13. **Facilities.** ICA CCI KR is one of the busiest, if not the busiest arbitral institutions in the region. According to statistics, this institution has administered well over a 1000 domestic and international arbitration cases to date.[5] This number not only shows the trust the Court commands among national and foreign parties, but also evidences the Secretariat's administration experience.

14. As far as the hearing facilities and auxiliary services are concerned, there is still a long road ahead: (a) there is no

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1 In some jurisdictions 'a right to an oral hearing' may translate into the 'right to a physical hearing', a situation in Kyrgyzstan requires a standalone article to cover. *See*https://www.arbitration-icca.org/right-physical-hearing-project-release-20-new-reports-reinforces-core-trends-and-important (accessed on 9 July 2021).

2 See e.g. https://www.aiac.world/news/132/Exemption-for-arbitration-from-the-%E2%80%9Cfly-in-fly-out%E2%80%9D-prohibition (accessed on 9 July 2021).

3 `*See e.g.* https://thac.or.th/what-is-a-smart-visa-are-arbitrators-eligible-to-apply-for-one/ (accessed on 9 July 2021). According to the Presidential Decree, a requirement to obtain work permit has been abolished for foreign arbitrators sitting in TIAC-administered cases and visa issuance procedure has been substantially simplified.

4 *See* CIArb London Centenary Principles *supra* note 2, p. 220.

5 http://www.arbitr.kg/web/index.php?act=view_material&id=95 (accessed on 9 July 2021).

dedicated hearing centre[1] and most hotels are not suited to oral hearings even of medium complexity; (b) it may also be difficult (if not impossible) to find a competent interpreter or court reporter within the jurisdiction.

15. **Ethics.** Members of the Kyrgyz Bar ('advocates') are bound by the Code of Professional Ethics[2], however: (a) the Code does not have any arbitration-specific provisions;[3] and, in any event, (b) its application is not extended to foreign counsel and arbitrators.

16. **Enforceability.** Kyrgyzstan has ratified the Convention "On Recognition and Enforcement of Foreign Arbitration Awards" dated 10 June 1958 ('New York Convention') and both KR Arbitration Act and the Civil Procedure Code provide grounds for refusal of enforcement and recognition of foreign awards similar to that in Art. V of the New York Convention. Yet, the approach of Kyrgyz courts to issues of enforceability remains to be manifested[4] as "*there is no extensive court practice on the recognition and enforcement of foreign arbitral awards in* [Kyrgyzstan]".[5]

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1 *See e.g.* https://www.sihc.se/(accessed on 13 July 2021) or https://www.idrc.co.uk/ (accessed on 13 July 2021), or https://www.maxwellchambers.com/ (accessed on 13 July 2021).

2 http://advokatura.kg/komissiya-po-etike/kodeks-professionalnoy-etiki-advokatov-kr (accessed on 9 July 2021).

3 *See e.g.* Art. 4.5 of the Code of Conduct for European Lawyers

https://www.ccbe.eu/fileadmin/speciality_distribution/public/documents/DEONTOLOGY/DEON_CoC/EN_DEON_CoC.pdf (accessed on 13 July 2021).

4 In comparison to Kyrgyz Judiciary, Uzbek courts seem to have had greater exposure to enforcement matters. To wit, according to one study, in 2015-2017, Uzbek courts have considered 26 applications for recognition and enforcement of foreign awards:the recognition and enforcement was refused in 2 cases only. See Rustam Akramov, Islambek Rustambekov, et al., '4.13 Uzbekistan: Recognition and Enforcement of Foreign Arbitral Awards', in Roman Zykov (ed) infra note41. p. 506.

5 Nurbek Sabirov, '4.7 Kyrgyzstan: Recognition and Enforcement of Foreign Arbitral Awards', in Roman Zykov (ed), *Recognition and Enforcement of Foreign Arbitral Awards in Russia and Former USSR States,* (Kluwer Law International 2021) p. 417 – 423.

17. **Immunity.** It is universally accepted that those involved in administration of justice shall enjoy certain privileges and immunities (e.g. immunity from a suit for damages for a judicial act). as a safeguard to their independence.[1] The question of whether (and, if so, to what extent) such immunities shall be granted to arbitrators has not been settled yet: some jurisdictions accord certain immunities to arbitrators; other – do not.

18. Nonetheless, the Principles recognize that an arbitration law of a preferred seat for arbitrators shall provide for arbitrators' immunity; only then arbitrators may perform their functions properly, having no fear of retaliatory action by a party that lost.[2]

19. Unfortunately, KR Arbitration Act does not grant arbitrators immunity from legal action.[3] Considering the political situation in the country and the fact that high-value regional disputes often involve State-owned enterprises, very few (if any) foreign arbitrators would determine Kyrgyzstan as the seat of arbitration[4] or accept the appointment in this regulatory framework.[5]

IV. Conclusion

1 *See e.g.* https://www.unodc.org/dohadeclaration/en/news/2019/08/judicial-immunity-protects-judges-and-society-at-large.html.

2 *See e.g.* https://globalarbitrationreview.com/bribery-and-corruption/arbitrators-jailed-in-peru-amid-odebrecht-corruption-scandal (accessed on 9 July 2021).

3 However, according to Art. 19(2) of KR Arbitration Act, an arbitrator cannot be called as a witness to testify on any matter he or she became aware of in the course of arbitral proceedings.

4 In the absence of the parties' agreement on the seat of arbitral proceedings.

5 Unlike the Kyrgyz legislator, the drafters of Uzbek Arbitration Act were cognizant that arbitrators should be accorded certain immunities ensuring the independence of their judgement. Art. 6 of Uzbek Arbitration Act provides that arbitrators shall enjoy immunity from liability for all acts or omissions in relation to the arbitral proceedings, unless such acts or omissions were intentional. Further, similar to KR Arbitration Act, Uzbek Arbitration Act provides that an arbitrator cannot be called as a witness in any judicial or other proceedings arising out of the arbitration. Notably, under Uzbek Arbitration Act all these immunities are extended to experts appointed by the arbitral tribunal, arbitral institutions, and their employees.

1. *Quo vadis, Kyrgyzstan?* To say that the Republic *marches* towards becoming the hub of international arbitration in Central Asian region would be overly optimistic, but Kyrgyzstan does undeniably make the right steps in this direction. In comparison to some Central Asian states, the Republic seems to be lagging behind in the regulatory race, there is no need to expedite.
2. The development of the arbitration framework must be evolutionary rather than *re*volutionary: the bitter experience of our common past has taught us that nothing good comes out of a revolution. Following the proposed evolutionary approach to regulation of arbitration a change is due only when all conditions are ripe. Considering the current state of arbitration in the Republic, it is the high time to:

- internationalize KR Arbitration Act;

The least 'painful' way to do this would be to not abolish the law in its entirety or to attempt its revision, but to leave the Act almost untouched as the *lex arbitri* for domestic arbitrations, while adopting a new UNCITRAL Model Law-based legislation to govern international proceedings.

- modernize the way the Judiciary is educated on arbitration;

Though arbitration theory is important, this knowledge may easily disappear in the haste of the proceedings especially considering judges' caseload. As such, it is suggested conducting mock arbitration-related hearings (e.g. enforcement application) with the involvement of foreign judges and counsel.[1]

- develop and implement a standard(s) of conduct for parties, counsel, arbitrators, and other participants in Kyrgyzstan-seated proceedings.

[1] For reasons obvious it may be inappropriate for local counsel to train Kyrgyz judges.

A resolution of ethical issues in arbitration is complicated by the fact that participants in arbitral proceedings often come from different backgrounds and multiple jurisdictions. As noted above, the Code of Professional Ethics binds Kyrgyz advocates only, when the opposing counsel may have different set of regulations to follow, and arbitrators or experts may be bound by none. However, "[t]*he growth in size, range, and complexity of international arbitration raises the stakes for resolving ambiguities about professional conduct of all participants*".[1]

3. I am quite certain that when/if these and other less vital initiatives are implemented, Kyrgyzstan will proudly enter the golden age of arbitration in Central Asia and even may be potent enough to lead the "*regulatory competition*".

[1] Catherine A.Rogers,Ethics in International Arbitration, (OUP, 2014), p. 1.