REVIEW OF TRIBUNAL'S JURISDICTION IN THE COURSE OF SETTING ASIDE OR RECOGNITION AND ENFORCEMENT OF AN AWARD: FINDING A BETTER APPROACH FOR THE KYRGYZ REPUBLIC

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ABSTRACT

Commercial arbitration is actively developing as a mechanism of dispute resolution in the Kyrgyz Republic since its independence. In addition, the Government of the Kyrgyz Republic included arbitration in a developed "*National Strategy of Development of the Kyrgyz Republic 2018-2040"*. The main purpose was to promote further growth of arbitration and the creation of arbitration-friendly regulation in the Kyrgyz Republic. Therefore, the present thesis analyzes one of the fundamental topics in commercial arbitration- the jurisdiction of the arbitral tribunal. Particularly, it provides a comparative overview of the existing legal mechanism for the review of the arbitral tribunal's jurisdiction. For this purpose, it analyzes established legal frameworks in the developed countries: the United Kingdom, Switzerland, France, and Austria. Further, it elaborates on legal regulation on a subject matter under Kyrgyzstani legislation. Chapter I of the thesis provides an overview of main international legal instruments and existing legal frameworks under national laws in the abovementioned jurisdictions with a focus on the review of arbitral awards due to the lack of arbitral tribunal's jurisdiction. Chapter II focuses on legal regulation in the Kyrgyz Republic, identifies existing legal gaps, and provides suggestions for the Kyrgyzstani commercial arbitration legislation.

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INTRODUCTION

Commercial arbitration gained a great number of dispute references as an alternative dispute settlement mechanism. Both developed and developing countries are establishing and improving their legal regulatory framework to create a pro-arbitration environment that will benefit both parties choosing arbitration to decide their dispute and government adopting laws. With regard to commercial arbitration, the seat of arbitration plays an important role. Legal regulation of the seat of arbitration significantly impacts on consideration of review mechanisms established under the domestic legal system. The domestic legal system's legislation on a subject matter of review arbitral proceedings and awards determines conditions, grounds, and competences to initiation of review proceeding by a disputing party. It's important to note that States are adopting and harmonizing their commercial arbitration legislation through international conventions. One of the core legal framework of international arbitration is the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (hereinafter the "New York Convention").[1] The majority of states are parties to this convention[2] and its provisions have influenced domestic legal systems.[3] Moreover, UNCITRAL Model Law on International Commercial Arbitration (hereinafter the "UNCITRAL Model Law") was introduced as a base for establishing a harmonized legal framework among national arbitration systems.[4] However, although States are adopting international conventions and harmonizing their domestic legal regulation, they still often follow different approaches to review mechanism of arbitral proceedings and arbitral awards. They determine the different scope of grounds for review and

[1] *Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, (adopted on 10 June 1958 and entered into force on 7 June 1959), 330 UNTS 3, [The New York Convention], available at: https://www.newyork-convention.org/english.

[2] Contracting States, *The New York Convention*, available at: https://www.newyorkconvention.org/countries, accessed on February 8, 2022.

[3] Allison Tortine, *"The New York Convention: Future Challenges"*, (2018), 2, Arbitration in the Kyrgyz Republic: Current Challenges and Solutions, p. 127.

[4] *UNCITRAL Model Law on International Commercial Arbitration*, (adopted in 1985 and entered into on 21 June 1985), UN Doc A/40/17, Annex I, [UNCITRAL Model Law], with amendments adopted in 2006, available at :https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/19-09955_e_ebook.pdf.

setting aside of arbitral decisions, and sometimes totally or partially exclude such review mechanisms from their regulatory framework.[5] The rationale behind such approaches can be interpreted in several ways. Firstly, States would like to create an arbitration-friendly environment that leads to the attractiveness of the State as a seat of arbitration. Secondly, following an inherent feature of arbitration as an independent dispute settlement mechanism, they ensure the autonomy of commercial arbitration. Generally, based on common conduct such an approach could be beneficial as parties win both in terms of financial and timely resources. The legal regulatory framework needs to guarantee that disputing parties are provided with fair and equal due process and that their disputes are decided by arbitration only if they have agreed to it. Therefore, the judicial review mechanism including on jurisdictional grounds by means of setting aside and enforcement has a central role in determining and analyzing this question.

The commercial arbitration in the Kyrgyz Republic passed several stages of development that determined its constitutional legal position as an institute of dispute settlement. Initially, arbitration as a dispute settlement mechanism was part of the judicial legal system leading to some misunderstanding of the determination of arbitration under the Constitution of the Kyrgyz Republic. Among these, one of the consequences was regarding an established review mechanism under the Kyrgyzstani commercial arbitration legislation. The very fact that the arbitration courts used to constitute a part of the judicial legal system similar to the national courts, the setting aside mechanism was available for review of arbitral awards in the Kyrgyz Republic. The status of arbitration courts was determined by the Constitutional Law of the Kyrgyz Republic "On the status of courts in the Kyrgyz Republic" which indicated that:

> Judicial power is exercised through the constitutional, civil, arbitration, administrative, and criminal judicial proceedings.[6]

[5] For instance, the Kyrgyz Republic and Latvia.
[6] Article 1 of the *Constitutional Law of the Kyrgyz Republic On the status of courts in the Kyrgyz Republic*, adopted on 25 December 1998 and entered into force on 8 October 1999, ceased to be enforced on 9 July 2008, [Law on status of courts], available at: http://cbd.minjust.gov.kg/act/view/ru-ru/268?cl=ru-ru

> The Supreme Arbitration Court of the Kyrgyz Republic, arbitration courts of regions, and Bishkek constitute a system of arbitration courts administering justice in the field of economic relations between economic entities, institutions, and organizations regardless of forms of ownership and types of economic activity, state or other bodies.[7]

Currently, the arbitration courts are treated as independent institutions of dispute resolution in the Kyrgyz Republic. The procedural right to review arbitral awards employing setting aside is no longer enshrined in the commercial arbitration legislation of the Kyrgyz Republic. This mechanism is merely pertinent to national courts' decisions. Despite this, parties are given a right to commence a review within enforcement proceedings. Therefore, the present thesis analyzes the issue of judicial review provided under Kyrgyz laws with a focus on the jurisdiction of arbitral tribunals.

In recent years, it was an attempt to harmonize the Kyrgyzstani legal framework with international legal instruments in the field of commercial arbitration. Even though an attempt was made, there is still no effective regulation and substantial practice on reviewing the tribunal's jurisdiction in the course of setting aside or recognition and enforcement of an award. Therefore, the present thesis focuses on a comprehensive study of the review of the tribunal's jurisdiction in the course of setting aside and enforcement proceedings. The main purpose of the present thesis is to analyze comparative legal regulation of on judicial review mechanism of arbitral tribunals' jurisdiction by means of setting aside and enforcement established in the chosen domestic legal systems: the United Kingdom, Switzerland, France, and Austria, analyze legal regulatory framework in the Kyrgyz Republic, identify problematic issues and gaps, propose solutions and suggestions based on a comparative study of the above-mentioned domestic legal systems and Kyrgyzstani regulation.

This thesis paper is based on a research and comparative analysis methodology focusing on the jurisdictions of the following countries: the United Kingdom, Switzerland, France, and

[7] Article 3 of the *Law on status of courts*, adopted on 25 December 1998 and entered into force on 8 October 1999, ceased to be enforced on 9 July 2008, available at: http://cbd.minjust.gov.kg/act/view/ru-ru/268?cl=ru-ru

Austria. These jurisdictions are chosen due to their developed legal regulatory framework, comprehensive practice on judicial review of arbitral awards, and different approaches developed on the regulation of a subject matter of review of arbitral awards. The legal analysis is made based on the established legal framework in the mentioned jurisdictions, scholarly works and publications, arbitral awards and courts decisions.

The thesis composition is made of two chapters. The first chapter provides a comparative overview of the existing international legal framework and domestic legal systems regulation regarding the judicial review mechanism. The thesis considers the following jurisdictions: the United Kingdom, Switzerland, France, and Austria. The second chapter focuses on and explores the existing regulation under Kyrgyzstani commercial arbitration legislation and analyzes established practices. The second chapter identifies problematic aspects, obstacles in improving regulation and practice. Finally, makes a comparative analysis between chosen domestic legal systems and the Kyrgyz Republic and offers suggestions and amendments to the commercial arbitration legislation of the Kyrgyz Republic.

CHAPTER I: COMPARATIVE REVIEW OF A JURISDICTIONAL OVERVIEW OF ARBITRAL AWARDS

International commercial arbitration is a widely recognized dispute settlement mechanism. An issue of jurisdiction is determined as one of the core procedural questions in international commercial arbitration. The importance of jurisdictional matters in any arbitral proceeding is stipulated by balancing power and authority between the arbitral tribunal and the court.[8] It should be noted that such issues might take a central position in the course of setting aside and recognition or enforcement procedures. Indeed, the main question is a revision of the tribunal's jurisdiction. Therefore, the present chapter will primarily focus on the two key legal instruments in international commercial arbitration that apply and regulate jurisdictional matters in the course of setting aside and recognition and enforcement procedures and provide a comparative review of national laws of the following countries in this regard: the United Kingdom, Switzerland, France, and Austria.

1. International legal framework for review of arbitral awards

In this section, I will analyze and examine how international treaties deal with the review of arbitral awards in the framework of setting aside and recognition or enforcement procedures. Initial elaboration will begin with a landmark international convention- the Convention on Recognition and Enforcement of Foreign Arbitral Awards. Further, a discussion will be devoted to Model Law promulgated by the United Nations Commission on International Trade Law. Therefore, in the following paragraphs focus is made on the regulatory framework set forth by the aforementioned legal instruments.

[8] Vladimir Pavić, *(In)appropriate compromise, Article 16(e) of the Model Law and its Progeny*, in S. Kröll, L.A. Mistelis, P. Perales Viscasillas & V. Rogers (eds), Liber Amicorum Eric Bergsten. International Arbitration and International Commercial Law: Synergy, Convergence ad Evolution, 387-410, (Kluwer Law International 2011).

1.1. Scope and application of Convention on Recognition and Enforcement of Foreign Arbitral Awards

The Convention on Recognition and Enforcement of Foreign Arbitral Awards known as the New York Convention was adopted in 1958.[9] The main reason and purpose for the adoption of the New York Convention were to reduce obstacles to recognition and enforcement of arbitral awards and provide a better approach in this regard.[10] Nevertheless, an award was granted with a binding nature, the New York Convention still provides national courts of the Contracting Parties with permission to review arbitral awards based on Article V. The cornerstone issue of this section is to examine to what extent awards on jurisdiction can be enforced and reviewed under the New York Convention. However, it should be noted that practical implementation regarding this issue is not developed to a huge extent.

The principal importance for my analysis is a regulatory framework set forth by the abovementioned Article V of the New York Convention. This Article outlines grounds based on which disputing parties have a right to oppose recognition and enforcement of an award. Namely, Articles V (1) and Article V (2) of the New York Convention lay down the following exhaustive grounds[11] to review an arbitral award[12]:

- incapacity of parties and invalidity of agreement,
- lack of notice of appointment of the arbitrator or the arbitral proceedings,
- scope of the award exceeds submission by the parties,
- composition of the tribunal contradicts to agreement of the parties,
- the non-binding or set-aside award,
- lack of arbitrability,

[9] The New York Convention, available at: https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/new-york-convention-e.pdf.
[10] *Improving the Efficiency of Arbitration Agreements and Awards: 40 Years of Application of the New York Convention*, ICCA Congress Series No.9 1999, van der Berg ed., (Kluwer Law International 1999), p.602
[11] Gary B. Born, *International Commercial Arbitration*, third ed., (Kluwer Law International 2021), p. 3760-3761
[12] Article V (1) and Article V (2) of the New York Convention.

- violation of public policy.

Principally, I will focus on three main grounds set forth by Article V (1) and Article V (2) which constitute a base for review of the jurisdiction of the arbitral tribunal. It should be noted that the New York Convention concerns defenses on the jurisdiction, while matters of substantive law and merits are not provided with a review procedure. We have to differentiate between grounds forming a base for review of arbitral tribunal jurisdiction raised "at the request of the party against whom the award is invoked" and grounds based on which national court may initiate a review procedure. Therefore, parties to arbitral proceedings may rely on the incapacity of parties and invalidity of agreement, exceeded scope of submission, whereas national court may rely on lack of arbitrability.

Article V (1)(a) of the New York Convention outlines the first ground that constitutes a base for review of the jurisdiction of the arbitral tribunal where parties "under some incapacity" or arbitration agreement is "not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made".[13] It should be noted that the wording of Article V(1) (a) in nature is silent on judicial review standards applicable by national courts.[14] However, when it comes to challenges addressed to recognition and enforcement of arbitral awards, national courts have reviewed matters pertaining to arbitration agreement and jurisdiction of arbitral tribunal based on de novo standard. For instance, a such standard of review was applied by the Supreme Court ofthe United Kingdom.[15] Other courts tend to have a different approach to issues of assessing arbitral tribunal jurisdiction.[16] Therefore, national courts of the Contracting parties

[13] Article V (1)(a), New York Convention.
[14] UNCITRAL "Guide on the Convention on the Recognition and Enforcement of Foreign Arbitral Awards", 2016 ed., p. 126, available at: https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/2016_guide_on_the_convention.pdf
[15] *Dallah Real Estate and Tourism Holding Company v. Ministry of Religious Affairs, Government of Pakistan*, [2010] UKSC 46, available at: https://www.supremecourt.uk/cases/uksc-2009-0165.html
[16] *The Republic of Ecuador v. Chevron Corp.*, [2011], 638 F.3d 384, 2d Cir

have developed various approaches to reviewing the findings of arbitral tribunals on its own jurisdiction.

Another ground for review of arbitral tribunal jurisdiction is outlined in the Article V(1)(c) of the New York Convention. The national courts of the Contracting Parties have the discretion to commence the review of arbitral tribunal jurisdiction in cases when the "award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration".[17] Due to the fact that the arbitral tribunal's competence to arbitrate is dependent on the scope of the arbitration agreement, its adjudicating power is limited to issues agreed by the parties. The national courts assessing awards through the prism of the abovementioned grounds should decide on both subject matter and personal jurisdiction. Similarly, as provisions of Article V (1) (a) Article V(a)(c) do not emphasize a standard of review applied by national courts in determining an arbitral tribunal's jurisdiction.

Whereas two aforementioned grounds provide a disputing party to challenge an arbitral tribunal's jurisdiction, the ground set forth by Article (2)(a) entitles courts to commence challenge of an award when "the subject matter of the difference is not capable of settlement by arbitration under the law of that country". Generally, this concept is referred to as arbitrability. However, there is no uniform standard of subject matters to be arbitrable under law. Thus, arbitrability is determined according to domestic regulations of Contracting States.

To conclude, jurisdictional challenges under the auspices of the New York Convention are raised due to the abovementioned grounds outlined in Article V. The question of lack of arbitral tribunal's jurisdiction is addressed when disputing parties challenge the validity of an arbitral award.[18] Therefore, when raising jurisdictional grounds to invalidate an arbitral award

[17] Article V (1)(c) of the New York Convention.
[18] Michael D Nolan and Kamel Aitelaj, *Jurisdictional challenges*, 2019, The Guide to Challenging and Enforcing Arbitral Awards, J William Rowley QC ed., p. 44, available at:https://www.milbank.com/images/content/1/1/v2/117898/5-Jurisdictional-Challenges.pdf

the validity of arbitration agreement and legal capacity of parties to arbitration dispute, the scope of the submission to the arbitral tribunal, and the arbitrability of matters addressed should be analyzed.

1.2. Scope and application of UNCITRAL Model Law on International Commercial Arbitration

Having discussed jurisdictional grounds of review of arbitral awards under the New York Convention, it is important to proceed with a legal analysis of the mechanism of jurisdictional review established under the UNCITRAL Model Law on International Commercial Arbitration. The text of the UNCITRAL Model Law was adopted in 1985 and subsequently amended in 2006.[19] The primary purpose of UNCITRAL Model Law was to provide a harmonized regulatory framework for international commercial arbitration to be implemented in domestic jurisdictions of states. Inspired by the New York Convention, the UNCITRAL Model Law also addresses procedural matters on the determination and review of the arbitral tribunal's jurisdiction.

When addressing an issue of determination of arbitral tribunal's jurisdiction, it is important to refer to the principle of Kompetenz-Kompetenz (the "competence-competence").[20] This principle is generally recognized mostly by many international arbitration rules.[21] Article16(1) of the UNCITRAL Model Law outlines a general competence of an arbitral tribunal to rule on its own jurisdiction. It provides that:

[19]UNCITRAL Model Law available at: https://uncitral.un.org/en/texts/arbitration/modellaw/commercial_arbitration.

[20] Gary B. Born, *Chapter 7: International Arbitration Agreements and Competence- Competence, International Commercial Arbitration*, 2nd edition, (Kluwer Law International 2014), p. 1048

[21] Article 6(5) of the Rules of the ICC Court of Arbitration, entered into force on 1 January 2021, available at: https://iccwbo.org/dispute-resolution-services/arbitration/rules-of-arbitration/; Article 23(1) of UNCITRAL Arbitration Rules, adopted in 2021, available at: https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/21-07996_expedited-arbitration-e-ebook.pdf ; Article 23 of LCIA Arbitration Rules, entered into force on 1 October 2020, available at: https://www.lcia.org/Dispute_Resolution_Services/lcia-arbitration-rules-2020.aspx ; Article V (3) of European Convention on International Commercial Arbitration, entered into force on 7 Janua 1964, availa-

> the arbitral tribunal may rule on its own jurisdiction, including any with respect to the existence or validity of the arbitral agreement. For that purpose, an arbitration clause that forms part of a contract shall be treated as an agreement independent of the other terms of the contract. A decision by the arbitral tribunal that the contract is null and void shall not entail ipso jure the invalidity of the arbitration clause."[22]

Thus, Article 16(1) of the UNCITRAL Model law also establishes a well-accepted concept of the competence-competence principle. The competence-competence principle defines an arbitral tribunal's discretion to rule on its own jurisdiction.[23] Therefore, in light of this principle, an arbitral tribunal has the authority to decide, consider and review its own jurisdiction. However, the arbitral tribunal's discretion or authority to determine and rule on its jurisdiction should not be considered an absolute one. The UNCITRAL Model Law also provides an opportunity to challenge an arbitral award including on jurisdictional grounds. The lack of jurisdiction of an arbitral tribunal and its review is raised in the course of setting-aside and recognition and enforcement procedures. This reconfirms that the arbitral tribunal's findings on its own jurisdiction made based on the competence-competence principle are subject to consideration of national courts. Grounds to decide on the lack of arbitral tribunal's jurisdiction under the UNCITRAL Model Law are provided in Article 34 and Article 36. It should be noted that grounds for review of jurisdiction determined under the UNCITRAL Model Law echo the ones mentioned under Article V of the New York Convention.

The cornerstone issue relating to the review of the arbitral tribunal's jurisdiction under a framework of the UNCITRAL Model Law was regarding when should a disputing party commence a review procedure. The Contracting parties were split on which procedural stage such review and decision on jurisdiction should be made either at preliminary stages or setting

ble at: https://trties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXII2&chapter=22&clang=_en#:~:text=The%20Convention%20was%20prepared%20and,the%20Economic%20Commission%20for%20Europe%2C

[22] Article 16(1) of the UNCITRAL Model Law

[23] Simon Greenberg, *Direct Review of Arbitral Jurisdiction under the UNCITRAL Model Law on International Commercial Arbitration: An Assessment of Article 16(3)* in Frederic Bachand, Fabien Gelinas ed. The UNCITRAL Model after Twenty-Five Years: Global Perspectives on International Commercial Arbitration, (2013)

aside and recognition and enforcement stages.[24] In light of the above considerations, it was decided not to set a strict stage to address jurisdictional issues. The wording of Article 16(3) of the UNCITRAL Model Law entitles an arbitral tribunal to determine its jurisdiction "*either as a preliminary question or in an award on the merits".*[25] Therefore, an arbitral tribunal is granted a discretion to decide on a procedural framework for determining jurisdiction. In this regard, there are two options provided either to rule on jurisdiction at the final stage of award or at the preliminary stage. Should the decision on jurisdiction of an arbitral tribunal be left until a final award, review in the course of setting aside and recognition and enforcement proceedings will be available. The procedural requirements and grounds for review of an arbitral tribunal's jurisdiction based on Articles 34 and 35 of the UNCITRAL Model Law will be addressed respectively in the following paragraphs.

Before turning to a review of the arbitral tribunal's jurisdiction under setting aside and enforcement proceedings under the UNCITRAL Model Law, it's important to stipulate a standard of review applicable for such proceedings. Due to the fact that wording of the Article 16(3) of the UNCITRAL Model Law does not indicate what specific standard of review should national courts consider when deciding on jurisdictional issues, opinions on this matter are split into the following approaches: de novo and deference.[26] It is important to note that generally, Modal Law jurisdictions tend to apply a de novo standard of review.

From a pro-arbitration perspective inherent to UNCITRAL Model Law, a judicial review of arbitral awards including on jurisdictional grounds is exhaustive. Principally, I will

[24] Michael Polkinghorne and others, "Competence of Arbitral Tribunal to Rule on Its Own Jurisdiction," *UNCITRAL Model Law on International Commercial Arbitration: A Commentary* (Cambridge University Press 2020), p. 295.
[25] Article 16(3), UNCITRAL Model Law on International Commercial Arbitration.
[26] Michael Polkinghorne and others, "Competence of Arbitral Tribunal to Rule on Its Own Jurisdiction," *UNCITRAL Model Law on International Commercial Arbitration: A Commentary* (Cambridge University Press 2020), p. 311.

focus on the review mechanism available in the course of setting-aside and enforcement proceedings. Grounds for setting aside in accordance with Article 34 of the UNCITRAL Model Law in fact similar to grounds for refusing recognition and enforcement under the New York Convention mentioned in the previous section. Therefore, among such grounds directly relating to the review of arbitral tribunal's jurisdiction are incapacity of a party to the arbitration agreement and invalidity of such an agreement[27], exceeded scope of submission to arbitration[28] and lack of arbitrability[29]. Nonetheless, when assessing setting aside of an awards national courts apply the de novo standard of review.[30] National courts in the Contracting states unlikely exercise deference to tribunal's findings.

Article 35 of the UNCITRAL Model Law concerns recognition and enforcement proceedings. Specifically, awards on arbitral tribunal's jurisdiction are of paramount importance for the present analysis. When national courts consider jurisdictional awards, they rather should rely on the de novo standard of review when setting-aside and enforcing awards on jurisdiction.[31] When turning to grounds for refusing recognition and enforcement of arbitral awards under UNCITRAL Model Law, Article 36 simply mirrors provisions provided under the New York Convention. Thus, grounds for jurisdictional challenge under the UNCITRAL Model Law are same.[32]

From the above, I conclude that the UNCITRAL Model Law following an arbitration-friendly approach provides for limited judicial review of arbitral awards.

[27] Article 34(2)(a)(i) of the UNCITRAL Model Law
[28] Article 34(2)(a)(iii) of the UNCITRAL Model Law
[29] Article 34(2)(b)(i) of the UNCITRAL Model Law
[30] Polkinghorne M and others, "Competence of Arbitral Tribunal to Rule on Its Own Jurisdiction," *UNCITRAL Model Law on International Commercial Arbitration: A Commentary* (Cambridge University Press 2020), p. 865
[31] Gary B. Born, *Chapter 26: Recognition and Enforcement of International Arbitral Awards, International Commercial Arbitration*, 2nd edition, (Kluwer Law International 2014), p. 3474
[32] Articles 36(1)(a)(i), 36(1)(iii), 36(b)(i) of the UNCITRAL Model Law

2. Comparative overview of judicial review

2.1 Overview of arbitral jurisdiction under national laws

Having analyzed regulatory framework of judicial review under international commercial arbitration legal instruments, I will focus on how national laws have interpreted provisions of those conventions and deal with jurisdictional challenges of arbitral awards. Principally, this section explains how English, Swiss, and French domestic commercial arbitration legislation seize issues of arbitral tribunal's jurisdiction and its review.

2.1.1 Review of arbitral jurisdiction under English law

The main commercial arbitration legislative act in the United Kingdom is the Arbitration Act 1996 ("Arbitration Act"). The Arbitration Act primarily provides competence-competence principle, validity of arbitration agreement, separability principle, right to challenge and appeal awards as well as on lack of jurisdiction.[33] Moreover, the United Kingdom acceded to the New York Convention in 1975 with a reservation that it applies to enforcement proceedings of foreign arbitral awards. However, it is important to note that the United Kingdom is not a Model law jurisdiction.

Of particular interest for purposes of my analysis is the existing review mechanism of arbitral awards in the course of setting-aside and enforcement proceedings. It's important to note that arbitral awards under English laws may be reviewed based on the tribunal's jurisdiction, arbitral process, and public policy grounds. I will primarily focus on mechanisms of an arbitral tribunal's jurisdiction review and established practice in this regard.

Let me first begin with reference of the tribunal's jurisdiction under the Arbitration Act. Under English arbitral legislation arbitral tribunal's jurisdiction is determined based on:

- whether there is a valid arbitration agreement,

[33] Justin Williams and others, *Arbitration procedures and practice in the UK (England and Wales): overview*, (2018)

- whether the tribunal is properly constituted, and
- what matters have been submitted to arbitration in accordance with the arbitration agreement.[34]

In this manner, Section 30 of the Arbitration Act also admits the competence-competence principle of an arbitral tribunal to rule on its own jurisdiction based on the above-mentioned criteria. However, it should be noted that objections to an arbitral tribunal's jurisdiction may be raised either at the early stages of the proceeding[35] or after an award was rendered.[36]

Nevertheless, should an arbitral tribunal decide that is has a substantive jurisdiction, a disputing party has a remedy to raise a challenge of an arbitral tribunal's jurisdiction relying on mechanisms set forth by Section 66-67 of the Arbitration Act. Section 66(3) states that "*Leave to enforce an award shall not be given where, or to the extent that, the person against whom it is sought to be enforced shows that the tribunal lacked substantive jurisdiction to make the award».*[37] Further, Section 67 (1) of the Arbitration Act ensures the right of a party to challenge an award based on lack of tribunal's jurisdiction.

The jurisdictional challenge under the Section 67 of the 1996 Act is illustrated in *Black Sea Commodities LTD v Lemarc Agromond Ltd* where the court dealt with a question of validity of arbitration agreement.[38] The findings of the courts as per jurisdictional challenge were successful, as arbitration clause was not included into trade agreement signed by the parties.

Moreover, the United Kingdom acceded to the New York Convention in 1975.[39] Particularly, provisions of Articles IV and V of the New York Convention are mirrored in Sections 102 and 103 of the Arbitration Act. Principally, Section 103 deals with grounds on refusal of

[34] Section 30(1) of the Arbitration Act 1996, entered into force in January 1997, available at: https://www.legislation.gov.uk/ukpga/1996/23/section/30
[35] Section 31(1) of the Arbitration Act 1996.
[36] Section 31(4)(b) of the Arbitration Act 1996.
[37] Section 66(3) of the Arbitration Act 1996.
[38] *Black Sea Commodities Ltd v Lemarc Agromond Pte Ltd* [2021] EWHC 287(Comm), CL-2020-000292.
[39] Contracting States, New York Convention available at https://www.newyorkconvention.org/countries.

recognition and enforcement of arbitral awards. These grounds are similar to those mentioned under above section on scope of New York Convention.

2.1.2 Review of arbitral jurisdiction under Swiss law

Switzerland for many years has been regarded as one of the arbitration centers. Such an opinion is fairly mentioned due to a liberal commercial arbitration legislation and generally arbitration friendly approach. The fundamental Swiss commercial arbitration legislation is represented by Chapter 12 of the Swiss Private International Act ("Private Act") dated 1 January 1989 which primarily applies to international arbitration. In terms of domestic arbitral proceedings regulatory framework established by Chapter 3 of the Federal Code of Civil Procedure ("Federal Code") applies. Furthermore, disputing parties are granted with a discretion to choose application of the Chapter 3 of the Federal Code Of Civil Procedure to international arbitration.[40]It is also important to note that Swiss arbitration legislation hasn't implemented provisions of the UNCITRAL Model Law into their national system.

In accordance with Article 186 (1) of the Private Act arbitral tribunal's jurisdiction is determined in accordance with the competence-competence principle. Principally, arbitral tribunal have a right to *"decide on its own jurisdiction".*[41] However, similarly as examined under other national laws tribunal's authority to rule on its own jurisdiction is subject to review by Federal Supreme Court. Such review indeed is exercised in the course of setting aside and enforcement of awards. In determining arbitral tribunal's jurisdiction arbitration agreement play a central topic. Indeed, its validity, scope, its binding powers and arbitrability are essential factors to establish whether the arbitral tribunal has jurisdiction to decide a dispute. Otherwise, in case if the arbitration agreement doesn't fulfill requirements as per its validity set forth by the Article 178 of the Private Act it leads to lack of the arbitral tribunal's jurisdiction. One of

[40] Article 176 of the Chapter 12, Swiss Private International Law Act, entered into force on 1 January, 1989, available at: https://www.fedlex.admin.ch/eli/cc/1988/1776_1776_1776/en
[41] Article 186(1) of the Chapter 12, Swiss Private International Law Act

the essential prerequisites of the validity of the arbitration agreement is its written form.[42] Principally, it's important to note that arbitral tribunal considers the arbitration agreement *prima facie*.[43]

Generally, under Swiss laws arbitral tribunal's jurisdiction should be raised at early convenience otherwise challenge based on lack of jurisdiction might be raised either at setting aside or enforcement proceedings. However, preliminary awards similarly as a final award might be challenged based on lack of arbitral tribunal's jurisdiction.[44] Similarly, the preliminary award might be challenged due to irregular composition of arbitral tribunal.[45] Article 190 of the Private Act outlines exhaustive grounds for challenge or setting aside an award, whereas established grounds are correspond to Article V of the New York Convention. Review of arbitral tribunal's jurisdiction is provided concerning preliminary or final award in case there are significant inconsistency with requirements as per arbitration agreement and arbitrability of a subject matter. Under Article 177 of the Private Act any dispute with "an economic interest" is arbitrable before arbitral tribunal.

Turning to enforcement proceedings under the Private Act which are primarily governed by Article 194 and refers that such proceeding is *"governed by the New York Convtion of 10 June 1958 on the Recognition and Enforcement of Foreign Arbitral Awards".* Switzerland has acceded to the New York Convention in 1965.[46] It's important to note that domestic awards are enforced in a same manner as national court decisions.[47] However, review of foreign awards based on lack of arbitral tribunal's jurisdiction is governed by provisions of Article V of the New York Convention.

[42] Article 178 (1) of the Chapter 12, Swiss Private International Law Act
[43] Loukas A. Mistelis, *Concise International Arbitration*, 2nd edition, (Kluwer Law International 2015), p. 1221.
[44] Article 190(2)(b) of the Chapter 12, Swiss Private International Law Act.
[45] Article 190(3) of the Chapter 12, Swiss Private International Law Act.
[46] Contracting States, New York Convention available at https://www.newyorkconvention.org/countries
[47] Catherine Anne Kunz, *"Annulment and enforcement of arbitral awards in Switzerland"*, in Sophie Goldman ed., Annulment and Enforcement of Arbitral Awards from a Comparative Perspective, (Kluwer Law International 2018), p. 66

2.1.3 Review of arbitral jurisdiction under French law

France is a party to the New York Convention and the European Geneva Convention on International Commercial Arbitration (hereinafter "European Arbitration Convention). France has acceded to them in 1959 and 1961 respectively. France is not a Model Law jurisdiction. French Code of Civil Procedure ("Civil Code of Procedure") mainly set forth regulatory framework applicable on domestic and international commercial arbitration. It's important to note that French commercial arbitration legislation differentiates between an international and domestic arbitration, where international is understood as "*one that involves the interests of international trade"*.[48] Reference to such a difference is relevant with regard to the enforcement procedure.

Pursuant to Article 1465 of the Code of Civil Procedure, an arbitral tribunal *"has exclusive jurisdiction to rule on objections to its jurisdictional power".* Therefore, French commercial arbitration legislation also recognizes the competence-competence principle. However, a decision of an arbitral tribunal made in accordance with authority provided by Article 1465 is not final. The arbitral tribunal's jurisdiction may be reviewed once an award is rendered in the course of jurisdictional challenges established under the Code of Civil Procedure. Thus, indeed arbitral tribunal has the first hand right to rule on jurisdiction, but not "exclusive jurisdiction".

As mentioned above, a disputing party might raise jurisdictional challenges in the course of either setting aside or enforcement proceedings. Article 1520 of the Code of Civil Procedure establishes grounds for setting aside as following:

- lack of arbitral tribunal's jurisdiction,
- irregular constitution of the arbitral tribunal,

[48] Article 1504 of the Book IV French Code of Civil Procedure, adopted on 13 January 2011, available at: http://www.parisarbitration.com/wp-content/uploads/2014/02/French-Law-on-Arbitration.pdf

- the arbitral tribunal rule not in accordance with mission granted to it;
- violation of due process, and
- contradiction of enforcement to public policy.

Based on French regulatory framework and practice, parties are not provided with a right to modify or exclude any grounds for setting aside by their agreement.[49]

For purposes of review of arbitral tribunal's jurisdiction within setting aside procedure, emphasis should be made to ground indicated in Article 1520(1) of Code of Civil Procedure as lack of arbitral tribunal's jurisdiction. The lack of arbitral tribunal's jurisdiction may be raised due to non-existence, invalidity or scope of the arbitration agreement.[50] For instance, drawing a parallel between Swiss commercial arbitration regulation French legislation doesn't require the arbitration agreement to be in written form. Moreover, irregular constitution of the arbitral also leads to a challenge of an arbitral tribunal's jurisdiction.[51] The lack of arbitral tribunal's jurisdiction may be raised based on irregular constitution of an arbitral tribunal in cases when constitution of an arbitral tribunal was not made in accordance with agreement of parties, breach of impartiality and independence of an arbitral tribunal.

2.1.4 Review of arbitral jurisdiction under Austrian law

Commercial arbitration in Austria was previously regulated by the Chapter Four of the Code of Civil Procedure. However, since an adoption of the UNCITRAL Model Law Austria decided to created more favorable and modern regulation. Therefore, following a model of the UNCITRAL Model Law Austria adopted a new Austrian Arbitration Act (hereinafter "Arbitration Act") in 2013.[52] The Arbitration Act constitutes a part of the Austrian Code of Civil

[49] Dominique Hasher, France, THE REVIEW OF INTERNATIONAL ARBITRAL AWARDS, IAI SERIES NO.6, (E. Gaillard ed., 2010), p.98.
[50] Loukas A. Mistelis, *Concise International Arbitration*, 2nd edition, (Kluwer Law International 2015), p. 1179.
[51] Article 1520(2), French Code of Civil Procedure.
[52] Austrian Arbitration Act 2013, Section 577-618, Austrian Code of Civil Procedure, adopted on 1 January 2014.

Procedure.[53] Out of all national systems analyzed in the present thesis Austria is the only Model Law jurisdiction.[54] Additionally, Austria paid particular attention in shaping provisions on setting aside. As will be addressed below.

Provisions of the Arbitration Act to a great degree mirror provisions those of the Model Law. Regarding an arbitral tribunal's competence to rule on its own jurisdiction the Arbitration Act follows a same model as established under the Model Law. One difference appears to be absence of explicit pronunciation of the separability principle.[55] In general jurisdiction of an arbitral tribunal is determined in accordance with Section 592 of the Arbitration Act. Similarly, as mentioned above under other national laws, Austrian Arbitration recognizes the well-established competence-competence principle. Section 592 establishes that the *"arbitral tribunal may rule on its own jurisdiction".* However, the arbitral tribunal's award is subject to review by national court within setting aside proceedings. The cornerstone factors for determining the arbitral tribunal's jurisdiction are matters of arbitrability and validity of arbitration agreement. Section 582 of the Arbitration Act states that *"any pecuniary claim that lies within the jurisdiction of the courts of law can be the subject of an arbitration agreement".* Thus, any dispute involving an economic interest is arbitrable under Arbitration Act. Further, requirements for an arbitration agreement to be valid include a written form and any other mean of exchange that confirms a contract.[56]

The arbitral proceedings closely interact with national courts on jurisdictional issues. The regulatory framework for determining the jurisdiction is set forth by Sections 584-592 of Arbitration Act. The close relationship between arbitral tribunals and national courts is during

[53] Austrian Code of Civil Procedure, RGBL. Nr. 113/1895, adopted on 1 August 1895, amended by the 2013 Amendment to the Austrian Arbitration Act, BGBL. I Nr. 118/2013, adopted on 1 January 2014.
[54] United Nations Commission on International Trade Law, Status, available at: https://uncitral.un.org/en/texts/arbitration/modellaw/commercial_arbitration/status.
[55] Christoph Liebscher, *Austria adopts the UNCITRAL Model Law*, in William W. Park ed., Arbitration International, (Oxford University Press 2007, Volume 23 Issue 4), p. 530
[56] Section 583 of the Austrian Code of Civil Procedure

the setting aside proceedings. Section 611 of the Arbitration Act mostly complies with grounds provided under the UNCITRAL Model Law. It's important to note that among above analyzed domestic legal systems the Austria is the only one that explicitly stipulates setting aside mechanism is applicable to "*arbitral awards by which the arbitral tribunal has ruled on its own jurisdiction*".[57] Particularly, for judicial review of arbitral tribunal's jurisdiction under Austrian act the following grounds play a central role:[58]

- invalidity of the arbitration agreement and incapacity of a disputing party,
- arbitral tribunal denial of jurisdiction despite the existence of a valid arbitration agreement,
- scope of an arbitration agreement, and
- non-arbitrability of the subject matter.

Recognition and enforcement of awards are mainly regulated by the Enforcement Act and the New York Convention which applies to domestic and foreign awards respectively. Thus, grounds for reviewing the arbitral tribunal's jurisdiction correspond to Article V of the New York Convention.

[57] Section 611(1) of the Austrian Code of Civil Procedure
[58] Section 611(2) of the Austrian Code of Civil Procedure

CHAPTER II. LEGAL FRAMEWORK IN THE KYRGYZ REPUBLIC AND RECOMMENDATIONS

Kyrgyz Republic's legal framework for commercial arbitration is in its early stages of development, and, after gaining independence, it enacted new arbitration regulation as late as 2002. Nevertheless, the Kyrgyz Republic is making attempts to create a modern, liberalized, and attractive arbitration regulatory framework in the region. Therefore, in the present Chapter, I will first elaborate on the existing legal framework in the Kyrgyz Republic. Secondly, I will focus on review of arbitral jurisdiction under Kyrgyzstani legislation. In conclusion, the present Chapter provides comparative analysis between domestic legal systems studied in the Chapter I and the Kyrgyz Republic, presents challenges and suggestions to the Kyrgyz laws based on a comparative overview analysis.

2.1 Legal framework of the Kyrgyz Republic

Proper development of commercial arbitration in the Kyrgyz Republic started in 2002. Although Kyrgyz Republic became independent in 1991, commercial arbitration was in its infancy stage at that time - commercial arbitration was not studied in the law schools and practical implementation was not on a sufficient level. Notwithstanding these circumstances, the Kyrgyz Republic acceded to major international conventions in the field of arbitration. Since July 5, 1997, the Kyrgyz Republic has been a party to the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States[59] and acceded to the New York Convention since May 17, 1995.[60] Thus, enforcement proceedings of awards are regulated by the framework set forth by the New York Convention.

[59] Law of the Kyrgyz Republic *On ratification of the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States*, adopted on 5 July, 1997, available at: http://cbd.minjust.gov.kg/act/view/ky-kg/547?cl=ru-ru.

[60] Regulation of the Jogorku Kenesh of the Kyrgyz Republic *On acceding to the Convention on recognition and enforcement of foreign arbitral awards*, adopted on 17 May 1995, available at http://cbd.minjust.gov.kg/act/view/ru-ru/50360?cl=ru-ru

Notwithstanding the modern commercial arbitration law in the Kyrgyz Republic was adopted only in 2002, the legislation which existed before its adoption was to a certain extent influenced by membership of the Kyrgyz Republic in the Union of Soviet Socialist Republics (hereinafter "USSR"). The commercial arbitration legal framework is not an exception, as it was mainly inherited from the USSR. The main legal instruments that regulated commercial arbitration before the adoption of modern commercial arbitration law were: the Law of the Kyrgyz Republic "On arbitration court of the Kyrgyz Republic"[61], Law of the Kyrgyz Republic "On the system of arbitration courts of the Kyrgyz Republic"[62], and Arbitration Procedural Code of the Kyrgyz Republic[63]. The status of arbitration courts as mentioned above was determined by this regulatory framework. It's important to note that arbitration courts were determined to be a part of the judicial system based on the USSR arbitration regulation inherited to the Kyrgyzstani commercial arbitration legislation. However, since the independence of the Kyrgyz Republic, the judicial system has undergone significant changes that impacted commercial arbitration and judicial review mechanisms in particular.

Prior consideration of Kyrgyzstani commercial arbitration legislation, I would like to consider the official status of arbitration under Kyrgyz laws. The fundamental provisions determining the status of arbitration are provided in Article 61 of the Constitution of the Kyrgyz Republic adopted on May 5, 2021, where it's stated that for the out-of-court resolution of disputes arising from civil legal relations, the arbitration courts can be established. The order of formation, powers, and activities of arbitration courts shall be determined by law. The early edition of the Kyrgyz Republic's Constitution also provided a similar wording in Article 58.[64]

[61] Law of the Kyrgyz Republic *On arbitration court of the Kyrgyz Republic*, entered into force on 2 March 1992, and ceased to be enforced on 1 December 1997, available at: http://cbd.minjust.gov.kg/act/view/ru-ru/790

[62] Law of the Kyrgyz Republic *On the system of arbitration courts of the Kyrgyz Republic*, entered into force on 1 December 1997, and ceased to be enforced on 18 July 2003, available at: http://cbd.minjust.gov.kg/act/view/ru-ru/585?cl=ru-ru

[63] *Arbitration Procedural Code of the Kyrgyz Republic*, entered into force on 16 April 1996, and ceased to be enforced on 8 August 2008, available at: http://cbd.minjust.gov.kg/act/view/ru-ru/911?cl=ru-ru

[64] *Constitution of the Kyrgyz Rep*ublic, entered into force on 27 June 2010, and ceased to be enforced on 5 May 2021, available at: http://cbd.minjust.gov.kg/act/view/ru-ru/202913

The principal factor that Kyrgyzstani legislation enshrined is the independence of arbitration as a mechanism of dispute resolution in the Kyrgyz Republic. It should be noted that the very first edition of the Constitution of the Kyrgyz Republic issued on May 5, 1993, defined arbitration as a semi-independent private institution of dispute resolution in the Kyrgyz Republic. Thus, the determination of arbitration as an independent dispute resolution mechanism was a way forward to creating an arbitration-friendly legal framework in the Kyrgyz Republic.

2.1.1 Law of the Kyrgyz Republic on Arbitration Courts in the Kyrgyz Republic

The main law that establishes a legal framework for the regulation of commercial arbitration in the Kyrgyz Republic is the Law of the Kyrgyz Republic on Arbitration Courts in the Kyrgyz Republic issued on 30 July 2002 (hereinafter "Kyrgyz Arbitration Law").[65] Interestingly, the edition of the Kyrgyz Arbitration Law of 2002 named this mechanism as "arbitration tribunals", but later with the introduction of amendments it was referred as "arbitration courts" in 2003.[66] It's should be pointed out that the adoption of the Kyrgyz Arbitration Law marked a new stage of commercial arbitration development in the sovereign Kyrgyz Republic. Since that period, Kyrgyz legislators are trying to make improvements. Thus, the latest amendments to the Kyrgyz Arbitration Law were made in January 2022. One of the significant amendments made was an extension of the scope of arbitrability by including disputes over tax matters.[67]

Overall, the Kyrgyz Arbitration Law determines the procedure for the establishment of arbitration courts and the mechanism of dispute resolution. Unlike some of the studied national laws in the previous chapter the Kyrgyz Arbitration Law does not make a distinction between international and domestic arbitration. Generally, arbitrability under the Kyrgyz Arbitration

[65] Law of the Kyrgyz Republic *On Arbitration Courts of the Kyrgyz Republic* [Kyrgyz Arbitration Law], entered into force on 30 July, 2002, available at http://cbd.minjust.gov.kg/act/view/ru-ru/1092?cl=ru-ru#7

[66] Law of the Kyrgyz Republic *On amendments to the Law of the Kyrgyz Republic On Arbitral Tribunals in the Kyrgyz Republic*, entered into force on 15 May, 2003, available at: http://cbd.minjust.gov.kg/act/view/ru-ru/1217?cl=ru-ru

[67] Law of the Kyrgyz Republic *On enactment of the Tax Code of the Kyrgyz Republic*, entered into force 18 January, 2022, available at: http://cbd.minjust.gov.kg/act/view/ru-ru/112342

Law covers disputes arising from civil matters, investment, and currently as mentioned above tax disputes.[68] The scope of arbitrability determined under national law is a significant factor to consider validity of arbitration agreement, competence of arbitration courts, establishment of arbitral tribunal's jurisdiction and enforcement of arbitral award.[69] Although the Kyrgyz Republic has not adopted the UNCITRAL Model Law, its arbitration law is to a considerable degree influenced by its provisions In particular, it provides identical grounds for the review of the arbitral tribunal's jurisdiction in the course of enforcement proceedings that will be elaborated on in the following sections. Additionally, it mentions that domestic arbitral awards are considered a subject for compulsory enforcement proceedings by an application of a disputing party. Such compulsory enforcement of arbitral awards is primarily regulated by the Civil Procedural Code of the Kyrgyz Republic. Thus, to a certain extent, the Kyrgyz Arbitration Law establishes a necessary legal framework for the regulation of commercial arbitration in the Kyrgyz Republic.

2.1.2 Civil Procedural Code of the Kyrgyz Republic

In terms of regulation of commercial arbitration, the Civil Procedural Code of the Kyrgyz Republic (hereinafter "Kyrgyz Civil Procedural Code") is also of importance. The Kyrgyz Civil Procedural Code is adopted on 25 January 2017 with the latest amendments introduced on 18 January 2022. Article 27 of the Kyrgyz Civil Procedural Code provides for possibility of referring disputes over civil matters addressed to the first-instance courts to arbitration tribunals based on an agreement of the parties. In particular, it provides regulation and establishes a procedure for recognition and enforcement of foreign arbitral awards and issuance of writs of execution for compulsory enforcement of domestic arbitral awards. Whereas I will elaborate

[68] Article 1, Kyrgyz Arbitration Law.
[69] Nurbek Sabirov, *Arbitrability of disputes in the Kyrgyz Republic: some legal aspects*, Arbitration in the Kyrgyz Republic: Current challenges and solutions, 2017.

in detail on enforcement and grounds for review of the arbitral tribunal's jurisdiction in the course of enforcement proceedings, I would like to address the regulation on compulsory enforcement of domestic arbitral awards formulated under the Kyrgyz Civil Procedure Code.

To initiate compulsory enforcement proceedings of domestic awards, a creditor has to apply for the issuance of a writ of execution for compulsory enforcement of the arbitral award.[70] Application can be filed within 3 (three) months from the enactment of the arbitral award. Accordingly, the determination of the duration to commence the compulsory enforcement proceeding raises some practical issues. For instance, if a delivery of the arbitral award expires 3 months, by law the party loses its right to request enforcement of arbitral award. Therefore, the only option for foreign creditors to rely on the New York Convention and commence enforcement in other countries. Hence, creditors from abroad are provided with fewer procedural rights in the Kyrgyz Republic.

Article 420 of the Kyrgyz Civil Procedural Code establishes a procedure for considering the application for compulsory enforcement of arbitral awards. Following an international practical framework, section 4 of Article 420 prohibits the review of the merits of awards rendered by arbitration tribunals by national courts. Of significant importance is Article 421 which defines grounds for refusal of compulsory enforcement of domestic arbitral awards. These grounds will be elaborated on in detail in the following section within the overview of arbitral jurisdiction under Kyrgyz laws.

Moreover, the Kyrgyz Civil Procedural Code establishes a similar regulatory framework for the enforcement of foreign arbitral awards and foreign court decisions. However, a fundamental difference established between the enforcement of foreign arbitral awards and foreign court decisions are grounds for refusal. In particular, Article 439 of the Kyrgyz Civil

[70] Article 418 of the *Civil Procedural Code of the Kyrgyz Republic* [Kyrgyz Civil Procedural Code], entered into force on 25 January 2017, available at: http://cbd.minjust.gov.kg/act/view/ru-ru/111521?cl=ru-ru

Procedural Code on the refusal of recognition and enforcement of foreign arbitral awards is inspired by the New York Convention and mirrors grounds established under it. Therefore, the enforcement of foreign arbitral awards indeed will be regulated by the New York Convention and provide all guarantees ensured by it to disputing parties.

2.1.3 Permanent arbitration institutions established in the Kyrgyz Republic

The adoption of the Kyrgyz Arbitration Law being apart from a cornerstone factor in determining a modern approach to the development of commercial arbitration in the Kyrgyz Republic, it also marked the establishment of the International Arbitration Court of the Chamber of Commerce and Industry of the Kyrgyz Republic ("IAC CCI") in 2002.[71] The IAC CCI is a permanent arbitration institution in the Kyrgyz Republic operation within a framework of a local chamber of commerce and industry. The main mission of the IAC CCI is to promote alternative means of dispute resolution and guarantee fair and equitable dispute resolution mechanisms for economic disputes and beyond this category in accordance with Kyrgyzstani legislation.

Another permanent arbitration institution established in the Kyrgyz Republic is the Bishkek International Court of Arbitration for Mining and Commerce ("BICAMC"). The BICAMC engages with disputes over "*contract and other property right and interest involving natural persons, legal persons, governments, intergovernmental organizations and various other combinations of private parties".*[72]

Both IAC CCI and BICAMC have developed arbitration rules that include provisions on determining the arbitral tribunal's jurisdictions in accordance with the Kyrgyz Arbitration Law.

[71] International Arbitration Court of the Chamber of Commerce and Industry of the Kyrgyz Republic, available at: http://en.cci.kg/podderzhka-biznesa/mezhdunarodnyjj-tretejjskijj-sud.html, accessed on 2 May 2022
[72] Article I of the Arbitration Rules of the Bishkek International Court of Arbitration for Mining and Commerce, available at: https://bicamc.org/rules/, accessed on 2 May 2022

2.2 Review of arbitral jurisdiction under Kyrgyz law

The cornerstone provision enshrined in the Kyrgyz Arbitration Law regarding the arbitral tribunal's jurisdiction is one recognizing the competence-competence principle. Article 14 states that the "*arbitration court independently makes a decision on the validity of the arbitration agreement and its own competence for consideration of a specific dispute*".[73] Article 7 of the Kyrgyz Arbitration Law set forth requirements to estimate a presence of a valid arbitration agreement. As analyzed under other national laws the arbitration agreement is essential in determining the arbitral tribunal's jurisdiction. In accordance with these requirements, the arbitration agreement should be executed in written form. Further, to qualify as valid, the arbitration agreement should be signed and exchanged by one of the means of correspondence through letters, telexes, telegraph, facsimile, or other means of communication.[74] The Kyrgyz Arbitration Law provides for preliminary consideration of the arbitration tribunal's jurisdiction.[75] Accordingly, Article 14(2) of the Kyrgyz Arbitration Law authorizes a disputing party to raise objections due to the invalidity and non-existence of the arbitration agreement which constitutes a fundamental base for review of the arbitral tribunal's jurisdiction. Another significant ground for review of the arbitral tribunal's jurisdiction is the issue of the scope of the arbitration agreement. Therefore, disputing parties have a right to raise a plea regarding a fact that the arbitral tribunal exceeds its jurisdiction by considering matters not covered by the arbitration agreement. Such a plea should be raised by the parties as soon as they became aware of the fact that the arbitral tribunal exceeds the scope of the arbitration agreement submitted by them.[76] The preliminary consideration of the arbitral tribunal's jurisdiction based on invalidity and non-existence of the arbitration agreement results in the issuance of a determination by arbitral

[73] Article 14 of the Kyrgyz Arbitration Law.
[74] Article 7(2) of the Kyrgyz Arbitration Law.
[75] Article 14(2) of the Kyrgyz Arbitration Law.
[76] Article 14(3) of the Kyrgyz Arbitration Law.

tribunals which is sent back to disputing parties with materials provided.[77]

In the following paragraph, I will deal in detail with a mechanism for an overview of the arbitral tribunal's jurisdiction by the courts. However, it's important to note, that even though based on a legal analysis of the national regulatory frameworks a setting aside or annulment of an arbitral award is a well-established mechanism of judicial review of arbitral awards, such mechanism is not established under the Kyrgyz Arbitration Law.[78] The arbitral awards are binding and not considered a subject of an appeal.[79] Therefore, a party to an arbitration dispute is not provided with a right to apply for a judicial review by the national courts of the Kyrgyz Republic against arbitration award, including award on jurisdiction. Article 28 of the Kyrgyz Arbitration Law stipulates that arbitral awards are binding, and no appeal is granted. However, as legal practice shows some disputing parties were appealing this legal norm to the Constitutional Chamber[80] of the Supreme Court of the Kyrgyz Republic (hereinafter "Constitutional Chamber"). In 2015 the Constitutional Chamber took a decision on reviewing the constitutionality of Article 28 of the Kyrgyz Arbitration Law due to appeals brought by three Kyrgyzstani citizens who were parties to separate arbitration disputes.[81] The main reason for applications made was the restrictive nature of provisions of Article 28 which prohibit parties to an arbitration dispute refer to the national courts with the purpose of review of arbitral awards. It was mentioned by the applicants that the:

> impossibility to appeal an arbitral award rendered by the Arbitration Courts based on the provision of Article 28 of the Law of the Kyrgyz Republic "On the Arbitration Courts in the Kyrgyz Republic" violates the constitutional right

[77] Article 14(4) of the Kyrgyz Arbitration Law.
[78] Nurbek Sabirov, *Kyrgyzstan*, in Global Legal Group edition, 1 ed., International Arbitration, available at: http://www.k-a.kg/sites/default/files/gli_ia_kyrgyzstan.pdf, accessed on 15 April 2022
[79] Article 28 of the Kyrgyz Arbitration Law.
[80] In accordance with a new version of the *Constitution of the Kyrgyz Republic* adopted on 11 April, 2021 and entered into force by Law of the Kyrgyz Republic dated 5 May, 2021, available at http://cbd.minjust.gov.kg/act/view/ru-ru/112215, the Constitutional Chamber of the Supreme Court of the Kyrgyz Republic was reorganized to the Constitutional Court of the Kyrgyz Republic.
[81] Decision of the Constitutional Chamber of the Supreme Court of the Kyrgyz Republic on the case reviewing the constitutionality of Article 28 of the Kyrgyz Arbitration Law in connection with the applications of citizens Imanazarova Baktygul Zhakshylykova, Myrzakulova Gulnara and Myachin Viktor Ivanovich, dated 9 December, 2015, No. 16-p, available at: http://cbd.minjust.gov.kg/act/view/ru-ru/9671?cl=ru-ru

> which guarantees everybody the judicial protection of rights and freedom provided by Article 40(1) of the Constitution of the Kyrgyz Republic as well as Article 20(5)(8) of the Constitution of the Kyrgyz Republic according to which the right of judicial protection is not subject to any limitation.[82]

The cornerstone matter for reference to the Constitutional Chamber arose from a breach of obligations of 2 credit agreements and a loan agreement entered by the parties respectively, and these agreements included an arbitration clause that any controversy or dispute arising out of the agreement shall be settled by the IAC CCI. Further, the IAC CCI rendered the awards which parties, unfortunately, may not appeal due to Article 28 of the Kyrgyz Arbitration Law. During the hearing, the representatives of the IAC CCI based their argument on the fact that although arbitrational courts consider civil disputes do not constitute a part of the judicial system of the Kyrgyz Republic, and thus legislators enshrined a norm on the finality of awards.[83] The Constitutional Chamber concluded that:

> the constitutional and legal status of arbitration courts established by Article 58 of the Constitution of the Kyrgyz Republic implies that they are entities that are not part of the judicial system", thus arbitral awards "can be reviewed in the order of consideration of the application for compulsory enforcement of the awards.[84]

To conclude, the Constitutional Chamber confirmed the constitutionality of Article 28 of the Kyrgyz Arbitration Law and noted that a mechanism for review of the arbitral awards is provided in the course of compulsory enforcement proceedings. Thus, the constitutional legal norm regarding a right to appeal decision of the national courts cannot be extended to the arbitral awards rendered by the IAC CCI. However, the government during discussions regarding amendments to the Civil Procedural Code proposed to include a provision on setting aside of arbitral awards based on public policy grounds.[85] This proposal was not supported.

Legislative position on review of the arbitral awards based on jurisdictional grounds

[82] Ibid.
[83] Ibid.
[84] Ibid.
[85] Alexander Korobeinikov, *Kyrgyzstan*, in The Baker McKenzie International Arbitration Yearbook 2017-2018, 11 edition

was different before the adoption of the Kyrgyz Arbitration Law. The review mechanism was established under Chapter 3 of the Arbitration Procedural Code of the Kyrgyz Republic ("Arbitration Procedural Code") and ceased to be in force and effect on 8 August 2004 No. 110.[86] The Arbitration Procedural Code was greatly inspired by Russian arbitration legislation and practice.[87]However, it's decisive to note, that the arbitration courts, constituted in accordance with the 1997 Arbitration Procedural Code and Law of the Kyrgyz Republic "On a system of Arbitration Courts of the Kyrgyz Republic",[88] enforced previously, were considered to be a part of the judicial system.[89] Thus, arbitral courts and arbitral proceedings were considered similar to state courts of general jurisdiction.[90] Accordingly, the reasoning of the Constitutional Chamber in the above-mentioned case was supported by this argumentation. Due to the fact that the arbitration courts were considered judicial bodies, the grounds for setting aside an arbitral award are identical to ones established for judicial decisions.[91] From the above, I conclude that the mechanism of review of arbitral awards based on jurisdictional grounds by means of setting aside is not established under the current Kyrgyz Arbitration Law.

In any case, the above-mentioned legal position on excluding the setting aside mechanism for reviewing the arbitral awards and the reasoning of the Constitutional Chamber are faulty. Providing a disputing party with a procedural right to raise a challenge of arbitral award

[86] The Arbitration Procedural Code of the Kyrgyz Republic, enacted by the Law of the Kyrgyz Republic entered into force on 16 April 1996, available at http://cbd.minjust.gov.kg/act/view/ru-ru/911?cl=ru-ru, and ceased to be enforced in accordance with the Law of the Kyrgyz Republic *On Amendments and additions to the Civil Procedural Code of the Kyrgyz Republic* entered into force on 8 August 2004, available at: http://cbd.minjust.gov.kg/act/view/ru-ru/911?cl=ru-ru.

[87] Gavrilenko V, *Commentary of general provisions of legislations on arbitration courts of the Kyrgyz Republic*, Saint-Petersburg University of State Fire Service of EMERCOM of Russia, Novgorod State University, available at: http://www.bseu.by:8080/bitstream/edoc/77324/1/Gavrilenko_V.A._s_25_30.pdf.

[88] Law of the Kyrgyz Republic *On a system of Arbitration Courts of the Kyrgyz Republic*, [Law on system of Arbitration Courts], entered into force on 1 December 1997, available at: http://cbd.minjust.gov.kg/act/view/ru-ru/585?cl=ru-ru, ceased to be enforced in accordance with Law of the Kyrgyz Republic *On Supreme Court of the Kyrgyz Republic*, entered into force on 18 July 2003, available at: http://cbd.minjust.gov.kg/act/view/ru-ru/1279?cl=ru-ru.

[89] Article 1 of the Law on system of Arbitration Courts, Article 3 of the Arbitration Procedural Code of the Kyrgyz Republic.

[90] Article 3 of the Law on system of Arbitration Courts

[91] Article 145 of the Law on system of Arbitration Courts

exceptionally at the stage of enforcement in certain extent precludes the party to exercise his/her constitutional right on judicial defense.[92] The party loses its right to refer to national courts with a challenge of arbitral award when such award is to be enforced, for instance, the declaratory award. Thus, the only review mechanism warranted to the party during the enforcement proceedings is unavailable.

As mentioned above, the Kyrgyz Republic acceded to the New York Convention, a mechanism for review under Kyrgyzstani legislation ruled by Article V of the New York Convention. Therefore, the grounds for challenging an arbitral award due to a lack of arbitral tribunal's jurisdiction are the same. However, the legal practice of review of the arbitral award is not developed and available to the public. It is said that review of arbitral tribunal's jurisdiction is only available for parties within enforcement proceedings in the Kyrgyz Republic. Thus, should a disputing party raise a challenge based on lack of arbitral tribunal's jurisdiction it should wait until the other party commences enforcement of arbitral award. In accordance with Article 420 of the Kyrgyz Civil Procedural Code the national court within review of arbitral award cannot reconsider merits of the dispute.[93]

Relying on the analysis of the Kyrgyz Arbitration Law and Kyrgyzstani commercial arbitration legislation regarding regulation of review of arbitral awards based on issues of arbitral tribunal's jurisdiction, I conclude that the Kyrgyzstani regulatory framework presents quite a different approach. The fundamental difference of the Kyrgyzstani regulation is elimination of the mechanism for setting aside due to above-mentioned reasons.

[92] Article 61 of the *Constitution of the Kyrgyz Republic*, entered into force on 5 May 2021, available at: http://cbd.minjust.gov.kg/act/view/ru-ru/112213?cl=ru-ru.
[93] Indira Satarkulova, *The problem of enforcement of IAC CCI decisions: review of the court ruling on the issuance of a writ of execution on reopened circumstances*, (2017), Arbitration in the Kyrgyz Republic: Current challenges and solutions, p. 130

2.3 Comparative review and recommendations to the Kyrgyz laws

Based on a comparative overview of the jurisdictional review of arbitral awards under national laws considered within Chapter I of the present thesis and legal analysis of the regulatory framework established under Kyrgyzstani legislation on the same subject matter, the following section will illustrate the main difference between Kyrgyzstani regulation and above-mentioned national systems, and also provides recommendations to be implemented to Kyrgyzstani legislation.

Having analyzed the regulatory framework on judicial review of arbitral awards on jurisdictional grounds in the jurisdictions examined under Chapter I and the Kyrgyz Republic, the main difference existing between the regulatory framework is that the Kyrgyz Republic has no mechanism for challenging an arbitral award or as defined in reviewed national systems the setting aside mechanism. Although as stated above the Kyrgyz Arbitration Law is to a certain extent resembling the UNCITRAL Model Law, it lacks provision for a review mechanism of arbitral awards other than within recognition and enforcement proceedings. The absence of setting aside mechanism under Kyrgyz law may lead to serious consequences, namely parties might be hesitant to refer their disputes for settlement in the Kyrgyz Republic.[94] Presently, the same situation with the elimination of the setting aside mechanism is in Latvia.[95] The possible rationale behind an approach of legislators to exclude the setting aside mechanism during the adoption of the Kyrgyz Arbitration Law in 2002 can be assessed differently. Firstly, it could be attempt to create pro-arbitration regulatory framework by decreasing national court intervention to arbitration proceedings. Secondly, as mentioned above arbitration courts were regarded as a part of a judicial system before adoption of the Kyrgyz Arbitration Law in 2002. However, currently they are not considered to be a "part of the judicial systems", therefore

[94] Elijah Putilin, *A "Golden Age" of International Commercial Arbitration in Central Asia: QUO VADIS, Kyrgyzstan?*, (2021), 4, Arbitration: current changes and long terms trends, p. 219
[95] Toms Krumins, *Absence of the set-aside action under Latvian law: a comparative and historical perspective*, (2021), ISSN 2424-4295, ARBITRAŽAS, TEORIJA IR PRAKTIKA VII

challenge of arbitral awards on any grounds including jurisdiction is possible only within enforcement proceedings. Given that arbitration courts do not constitute part of the judicial system and are indeed considered as an out-of-court dispute resolution mechanism, providing a procedural right for challenge of the arbitral award by means of setting aside proceedings is one of the crucial ones based on comparative overview in the Chapter I. Although commercial arbitration is considered as an alternative dispute resolution mechanism in examined jurisdiction in the Chapter, they still provide regulation for a review of arbitral award by setting aside. Thus, reasoning of the Kyrgyzstani legislators on eliminating setting aside mechanism due to arbitration courts not being part of the judicial system of the Kyrgyz Republic is somehow illogical and deficient. However, the fundamental issue to raise regarding a review of arbitral tribunal's jurisdiction in my opinion based on existing approach in the Kyrgyz Republic is how to reach a balance between a national court's authority to review arbitral proceedings and arbitral award and finality of award rendered by arbitration court.[96] Additionally, it's important to note that the existing regulatory framework which does not provide for a review of arbitral proceedings and award is diminishing the rights of one disputing party to be dependent on the actions of the other party until it initiates enforcement of the arbitral award. Thus, a current position also violates equality of the disputing parties which is one of the fundamental procedural rights. Principally, it's important to evaluate whether challenge of arbitral award including on jurisdictional grounds could be beneficial for State as a seat of arbitration and for disputing parties. Based on comparative overview of jurisdictions conducted within the Chapter

[96] In the referred appeal brought to the Constitutional Chamber in 2015 on constitutionality of Article 28 provisions of the Kyrgyz Arbitration Law, the Constitutional Chamber stated:
In this connection, the provisions of the contested norm providing for the finality of the arbitral award and the impossibility of appealing against it derive from the legal nature of the institution of arbitration courts, which are based on the principle of autonomy of will and freedom of contract; also these provisions are a kind of result of the obligations assumed under the concluded arbitration agreement or the arbitration clause that are an integral part of the contract. When the parties enter into a contract to submit a dispute to an arbitral tribunal, they undertake to fulfil any obligations that may arise from it and, in particular, to enforce the tribunal's award. The arbitration agreement (arbitration clause) and the award of the Arbitration Court are regarded as two parts of a single contract - the contract on transferring a dispute to the Arbitration Court.

I, an answer is obvious.

With reference to a comparative analysis made, there is one recommendation to be implemented to Kyrgyzstani legislation. The recommendation is to establish a mechanism for challenging an arbitral award including on jurisdictional grounds by means of setting aside. There are several approaches followed by States in regard to setting aside proceeding: liberal, restrictive and intermediate.[97] For instance, an example of liberal approach is Switzerland which grants disputing parties a discretion to exclude a possibility to set-aside arbitral award.[98] Moreover, following the Swiss case on parties' consensus to waive setting aside of arbitral aside France also introduces same mechanism.[99] The other approach is restrictive which implies that parties are not provided with a procedural right to waive setting-aside mechanism. Considering a position taken in regard to setting aside, the most favorable approach for the Kyrgyz legal regulatory framework is an intermediate approach. The intermediate approach suggests that it's possible to find an intermediate between a disputing party's procedural rights, finality of arbitral award and independence of arbitration as a dispute settlement mechanism by allowing parties to waive setting-aside by their agreement based on some grounds.[100] In order to implement this, the Kyrgyz Arbitration Law needs to provide exhaustive grounds based on which an arbitral award is subject to review. The central ground that should not be excluded by parties should be an invalidity of arbitration agreement that leads to a review of arbitral tribunal's jurisdiction.[101] The invalidity of arbitration agreement as discussed above is due to invalidity or non-existence of arbitration agreement, incapacity of parties, non-arbitrability of a subject matter and scope of authority of arbitration agreement.

[97] Toms Krumins, *Absence of the set-aside action under Latvian law: a comparative and historical perspective*, (2021), ISSN 2424-4295, ARBITRAŽAS, TEORIJA IR PRAKTIKA VII
[98] Article 192(1), Swiss Private International Law Act
[99] The New French Arbitration Rules, Decree entered into force on 13 January 2011, available at http://www.sccinstitute.com/media/37105/french_law_on_arbitration.pdf.
[100] Toms Krumins, *Absence of the set-aside action under Latvian law: a comparative and historical perspective*, (2021), ISSN 2424-4295, ARBITRAŽAS, TEORIJA IR PRAKTIKA VII
[101] An examples of the intermediate approach are Sweden, Finland, Germany, Russian Federation and the United Kingdom.

Therefore, such approach will ensure the equality of a disputing parties procedural rights and a balance between a judicial control by the review mechanism and independence of arbitration as a dispute settlement mechanism. Based on fundamental base of arbitration which is agreement of the parties, they will be able to negotiate review mechanisms in advance.[102] The establishment of review mechanism will ensure a cooperation between arbitration courts and national courts.[103] Moreover, it will establish a sound environment to challenge an arbitral tribunal's jurisdiction which is one of the fundamental findings to have a fair due process. Additionally, another suggestion would be to bring the Kyrgyz Arbitration Law in compliance with the UNCITRAL Model Law as it will help improve the legal position of the Kyrgyz Republic and create more favorable arbitration regulatory framework. In light of these, I believe the position of Kyrgyz commercial arbitration will be improved and the Kyrgyz Republic will make step further to development of commercial arbitration.

[102] Sanela Ninkovic, Judicial Review of Arbitral Awards and Parties' Right to Expand it, (2014), 4 ZEuS, P. 525, available at: https://www.nomos-elibrary.de/10.5771/1435-439X-2014-4-485.pdf?download_full_pdf=1.
[103] Hannapes Taychayev and Natalia Alenkina *Arbitration in Kyrgyzstan: Evolution and Next Steps Ahead*, , (Kluwer Arbitration Blog 2019), available at:http://arbitrationblog.kluwerarbitration.com/2019/02/22/arbitration-in-kyrgyzstan-evolution-and-next-steps-ahead/.

CONCLUSION

Commercial arbitration is indeed an attractive dispute settlement mechanism. This is a case both in examined domestic jurisdictions under the Chapter I, and the Kyrgyz Republic. However, being the post-Soviet country, the Kyrgyz Republic didn't manage to have a favorable legal regulatory framework and still continues to strengthen its regulation and make it more arbitration friendly. In doing so the principal issue is to determine and establish a healthy environment and balance between judicial control and autonomy of arbitration. Accordingly, the paramount issue to examine this question is a regulation set forth under domestic regulation for the review of arbitral tribunal's jurisdiction. The procedural right ensuring parties a right to challenge an arbitral award due to lack of arbitral tribunal's jurisdiction is a widely accepted form of control over the arbitration by national courts. It's important to note that such review mechanism is established in all domestic legal systems studied in the Chapter I of the present thesis. Based on their legal regulation and practice, it would be sufficient for the Kyrgyz Republic to provide a disputing party with a right to bring a challenge based on jurisdictional grounds not only within enforcement proceedings but also by means of setting aside mechanism. Principally, total exclusion of setting aside mechanism does not ensure the autonomy of the arbitration but creates significant procedural problems. The cornerstone one among others would be avoidance of the Kyrgyz Republic as a seat of arbitration as the present regulatory framework does not ensure fair due process and makes one party dependent on the actions of the other party. Additionally, based on comparative analysis, other suggestion for the Kyrgyz Republic will be to adopt the UNCITRAL Model Law and bring domestic commercial legislation in harmony with provisions of the mentioned legal instrument.

In light of the above, the present thesis tried to find an intermediate between a judicial control and autonomy of arbitration in regard an established mechanism to review the arbitral

tribunal's jurisdiction. Considering the fact, that the Kyrgyzstani commercial arbitration legislation provides with possibility to raise a challenge due to lack of arbitral tribunal's jurisdiction only after the final award is rendered in the course of enforcement proceedings, a possible solution is to establish the setting aside mechanism as well.

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