

**Practice of Commercial Arbitration and Recognition and
Enforcement of Foreign Arbitral Awards Concerning Disputes in
Uzbekistan: A Comparison with Germany**

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Abstract

The successful development of International Commercial Arbitration and its institutional significance in the system of International Economic Relations show that the role of the International Commercial Arbitration is increasing steadily in the era of globalization.

In recent years, leading international arbitration institutions acknowledge the rapid growth of arbitration cases involving the countries of the former Soviet Union including the Republic of Uzbekistan. The Uzbek legal framework has significantly improved because of the new legal reforms in the sphere of arbitration. In order to develop a more arbitration-friendly climate in the country, Uzbekistan should initiate more cooperation and communications in the field of International Commercial Arbitration with European countries, since these countries are known with the widest range of sophistication and experience of arbitration.

Taking this into account, the author of this dissertation tries to make a comparison of the arbitration regimes of Uzbekistan and Germany, while Germany as Europe's leading economy, has a long-standing tradition as an arbitration-friendly jurisdiction providing for modern and internationally accepted rules. It should also be noted that the German courts, in contrast with the Uzbek courts recognize and enforce foreign arbitral awards and protect the principle of finality of the arbitral award. In this regard this thesis aims at analysing the hurdles and difficulties relating to recognition and enforcement of foreign arbitral awards in the Republic of Uzbekistan and evaluating the effectiveness of the country's legal framework concerning this procedure.

Today most countries of the world recognize the final and binding force of international arbitral awards, and the recognition and enforcement of these awards is a central element for successful arbitration. This study explores the conflicts of legal cultures and systems apparent during enforcement proceedings of foreign arbitral awards in both countries. The New York Convention of 1958, the most significant reason for the success of International Commercial Arbitration, applies to the recognition and enforcement of foreign arbitral awards in more than 150 states in the world. Despite the fact that the New York Convention has facilitated enforcement of arbitral awards, it has not resolved all the issues, which create difficulties for the domestic courts of the signatories of the Convention in recognizing and enforcing of foreign arbitral awards. Therefore, some countries like Germany adopted some rules that are not contained in the New York Convention, e.g. the NYC leaves some space for review of foreign arbitral awards on the grounds of public policy of the state. These issues will be analysed in this study as well.

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Abbreviations

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| AACU | Association of Arbitration Courts of Uzbekistan |
| ABD | Asian Bank for Development |
| AC | Arbitration Court |
| ADR | Alternative Dispute Resolution |
| APC | Administrative Proceedings Code |
| ArbInt'l | Arbitration International |
| Aufl. | Auflage |
| BayObLG | Bayerisches Oberstes Landesgericht |
| BGBI. | Bundesgesetzblatt (German Federal Law Gazette) |
| BGH | Bundesgerichtshof |
| BGHZ | Entscheidungen des Bundesgerichtshofs in Zivilsachen |
| BIT | Bilateral Investment Treaty |
| BMZ | Federal Ministry for Economic Cooperation and Development |
| CAP | Code on Administrative Proceedings of Uzbekistan |
| CCI | Chamber of Commerce and Industry |
| CEAC | Chinese European Arbitration Centre |
| CETA | EU-Canada Comprehensive Economic and Trade Agreement |
| CIS | Commonwealth of Independent States |
| CPC | Civil Procedure Code |
| DIS | Deutsche Institution für Schiedsgerichtsbarkeit |
| EBRD | European Bank for Recognition and Development |
| ECJ | European Court of Justice |
| ECR | European Court Reports |
| ECT | European Charter Treaty |
| EPC | Economic Procedure Code of Uzbekistan |
| EuZW | Europäische Zeitschrift für Wirtschaftsrecht |
| EWiR | Entscheidungen zum Wirtschaftsrecht |
| FIAC | Frankfurt International Arbitration Centre |
| FTAC | Foreign Trade Arbitration Commission |
| GAFTA | Grain and Feed Trade Association |
| GIZ | Deutsche Gesellschaft für Internationale Zusammenarbeit (German Society for International Cooperation) |
| GMAA | German Maritime Arbitration Association |
| Hrsg. | Herausgeber |

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| ICAC | International Commercial Arbitration Court at the Chamber of Commerce and Industry of Uzbekistan |
| ICC | International Chamber of Commerce |
| ICCA | International Council for Commercial Arbitration |
| ICSID | International Centre for Settlement of Investment Disputes |
| ICSID Convention | Convention on the Settlement of Investment Disputes between States and Nationals of Other States of 1965 |
| ILM | International Legal Materials |
| IntALR | International Arbitration Law Review |
| IMF | International Monetary Fund |
| IPrax | Praxis des Internationalen Privat- und Verfahrensrechts |
| ISDS | Investor State Dispute Settlement |
| JIntlArb | Journal of International Arbitration |
| KG | Kammergericht |
| KTS | Zeitschrift für Insolvenzrecht |
| LG | Landgericht |
| LMAA | London Maritime Arbitrators Association |
| NEP | New Economic Policy |
| NJW | Neue Juristische Wochenschrift |
| NJW-RR | NJW-Rechtsprechungs-Report |
| NYC 1958 | UN Convention on the Recognition and Enforcement of Arbitral Awards (New York Convention) |
| OJ | Official Journal |
| OLG | Oberlandesgericht |
| OSCE | Organization for Security and Cooperation in Europe |
| PCA | Partnership and Cooperation Agreement |
| RGZ | Entscheidungen des Reichsgerichts in Zivilsachen |
| RIW | Recht der Internationalen Wirtschaft |
| RPS | Recht und Praxis der Schiedsgerichtsbarkeit |
| RSFSR | Russian Soviet Federative Socialist Republic |
| SchiedsVZ | Zeitschrift für Schiedsverfahren |
| SOEs | State-Owned Enterprises |
| TIAC | Tashkent International Arbitration Center |
| TTIP | Transatlantic Trade and Investment Partnership |
| UNCAC | United Nations Convention against Corruption |
| UNCITRAL | United Nations Commission on International Trade Law |

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| UNCITRAL ML | UNCITRAL Model Law on International Commercial Arbitration of 1985 |
| UNDP | United Nations Development Programme |
| USSR | Union of Soviet Socialist Republics |
| WM | Wertpapier-Mitteilungen |
| WuB | Entscheidungssammlung zum Wirtschafts- und Bankrecht |
| YBCA | Yearbook Commercial Arbitration |
| ZPO | Zivilprozessordnung (German Code of Civil Procedure) |

Introduction

*“When I travel to another country,
I do not examine the quality of its
laws, but the execution of them, since
good laws exist everywhere.”*

Charles-Louis de Secondat, Baron de La Brède et de Montesquieu

1. Foreword

*“As the world becomes more interconnected through globalisation, there is increased need for effective international policies, rules and institutions. Individual governments acting alone cannot deal with the many and complex issues linked to globalization. These require collaboration across borders and continents.”*¹

After the collapse of the Soviet Union the process of transition to a market economy has been applied in the former Soviet Union. This process is connected not only with the fundamental changes in the economic relations within the Post-Soviet States but also with essential adjustments of the legal environment that concerns every aspect of daily life. The most important aspect of this development is the fact that for many decades all economic activities of the Commonwealth of Independent States (CIS)² including Uzbekistan have been conducted on the basis of a mandatory state planning system which excluded any kind of free competition or private initiative. One of the instant results of leaving the centralised economic system completely was the rapid growth of the number of private enterprises involved in business activity, including cross-border transactions. New modern legal infrastructure was needed to enable global trade and effectively deal with issues arising out of business relationships. Uzbekistan as one of the countries in transition aimed and still aims to integrate its national economy into the current globalisation process of the world economy. Like other CIS countries, Uzbekistan is mainly oriented to the European Union as a large market for its products.³ In today's time, the volume of foreign trade between the EU and the CIS member states is significantly increasing. Several groups of factors are associated with this process.

¹ Report of the Independent World Commission on the Social Dimension of Globalization, *A Fair Globalisation – Creating Opportunities for All*, Geneva 2004, available at

<https://www.ilo.org/public/english/wcsdg/docs/report.pdf>; see also Falke, WTO and ILO: Can Social Responsibility be Maintained in International Trade?, in: Joerges/Falke (eds.), *Karl Polanyi, Globalization and the Potential of Law in Transnational Markets*, Oxford and Portland, Oregon 2011, pp. 279-321.

² See 31 ILM (1992) 143. The Commonwealth of Independent States was established by an agreement signed by Russia, Belarus and the Ukraine in 1991. This regional organization now comprises all the former Soviet Republics, with the exception of the three Baltic States (Lithuania, Latvia and Estonia).

³ See https://webgate.ec.europa.eu/isdb_results/factsheets/country/review_uzbekistan_en.pdf.

The growth of dependence of the industrial countries of Western Europe on energy from outside leads to steady raising of the rates of oil, gas, refined products, as well as electricity from the Russian Federation and other CIS countries. In turn, for a more dynamic development of CIS economies, bulk deliveries of high-tech products, productive equipment and the influx of cheap investment capital from the EU are required.⁴

Thanks to the extraction of gold, oil and gas and the extensive cultivation of cotton Uzbekistan's economy is now developing dynamically and a favourable investment climate has been established in the country. Uzbekistan responded to the global economic crisis by launching comprehensive state support measures, such as infrastructure investments and the promotion of key industries. A promising and rapidly growing market of Uzbekistan is opened for world business structures. German entrepreneurs, like other Western partners are interested in establishing and expanding cooperation with Uzbekistan, including small and medium-sized businesses.⁵

The development of economic relations between these countries is not only considered to be the reason of interests for political stability, but also for legal safety of reliable legal systems and legal infrastructure, governing the recognition and enforcement of foreign arbitral awards. Traditional methods of dispute resolution are not always effective and therefore in most cases preference for dispute resolution is given to international arbitration courts.

The following generally accepted opinion on this point seems to reflect quite objectively in the Western business and legal circles:

“One important aspect of a country's investment and business infrastructure is the quality and effectiveness of the commercial dispute resolution mechanisms that are available. Because investment risks are often perceived to be higher in transition economies, access to dispute resolution systems that investors believe to be efficient and impartial are particularly important. However, for various reasons, the court systems in these countries often do not provide prospective investors with sufficient confidence. Therefore, arbitration and mediation take on an even greater importance than in Western Europe and North America, where arbitration is primarily valued because of its abilities to preserve confidentiality, speed up the process and reduce costs. Indeed, many countries with economies in transition have strong judicial standards in arbitration. Yet these strong standards do not always ensure a strong arbitration mechanism, often due to problems arising out of enforcement, a shortage of adequately trained arbitrators

⁴ As far as EU-28 exports to the CIS were concerned, Germany led the exports for the most common products, with the exceptions of articles of apparel and clothing accessories; telecommunications, sound-recording and reproducing equipment. See e.g. EU-CIS statistics on international trade by EU Member States, extracted in 2014, available at <https://ec.europa.eu/eurostat/statistics-explained/pdfscache/41687.pdf>.

⁵ Presentation of Marcus Felsner (Chairman of the Board of the East European Business Association of Germany – EEBAC) at the “Green Week 2016” in Berlin – designated to support German companies to establish long-term relations with the Uzbek partners for joint investment projects as one of the priorities of the East European Association of Germany, including agriculture. He noted that Uzbekistan could become one of the leaders in the production of high quality food, fruits and vegetables.

*and judges, and a lack of awareness in the business community regarding the use of arbitration and its potential benefits.”*⁶

Therefore, knowing fundamental rules of commercial arbitration’s functioning is an important requirement for successful activity of individuals, engaged in economic sphere of world market, while arbitration is commonly regarded as a preferred dispute resolution method in international commercial contracts.

As it was already noted, relative speed of the process, enforceability, cost-effectiveness, neutrality, confidentiality, the absence of strict legal formalities, the right of parties to appoint the arbitrators and to choose the method of arbitration for the consideration of the dispute, and the choice of law makes arbitration a very attractive tool of alternative dispute resolution compared to state courts.⁷ The ability of the disputing parties to enjoy the above-mentioned advantages is conditional on standards adopted by national legislation. Poorly drafted law may undermine these advantages and make arbitration a less attractive method of dispute settlement, especially in cases where impediments to the recognition and enforcement of arbitral awards exist.⁸

2. Scope of the dissertation

In spite of the fact that the Uzbek legislative framework, governing the enforcement of foreign arbitral awards in the post-Soviet period is being modernized, the post-Soviet Uzbek courts are less inclined to enforce such awards than are the courts of Germany.

The thesis concentrates on the issues of the recognition and enforcement of foreign arbitral awards in Uzbekistan through comparing the German arbitration regime on it. The arbitration laws and practice of Germany and Uzbekistan, which developed their own tradition of hearing cases in the framework of international commercial arbitration were selected and compared in this dissertation. As the researcher’s arbitration practice is based in Uzbekistan, the citations from the national law and practice were incorporated in this research and the German laws were dealt only for comparative purposes.

Along with the recognition and enforcement of foreign arbitral awards, special attention in this study will be given to measures to ensure the claim in arbitration in Uzbekistan, as well as the grounds for refusal of arbitration awards, that are fixed in national legislation of selected

⁶ Cf. Cram-Martos, The UN Economic Commission for Europe and the 1961 Convention on International Commercial Arbitration, *JIntArb* 17:6 (2000), 137-154.

⁷ Asyanov, International Commercial Arbitration as a compulsory step of legal and judicial reform in Uzbekistan, in a compendium of articles “*Materiali mezhdunarodnih nauchno-prakticheskikh konferensiy*”, Tashkent 2010, p. 242.

⁸ Chapaev/Bradautanu, International Commercial Arbitration in the CIS and Mongolia, *American Review of International Arbitration* 17:3 (2006), 411-467.

countries. The analysis was made primarily basing on the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, the UNCITRAL Model Law of 1985 and other international treaties on international commercial arbitration.

3. Structure of the thesis

Chapter I of the dissertation treats the historical development of arbitration in Uzbekistan and Germany.

Chapter II defines the legal framework for the recognition and enforcement of foreign arbitral awards, both in terms of national law and in terms of international standards, without which the functioning of the system of international arbitration of the judiciary would be almost unthinkable. More of this chapter deals with the New York Convention of 1958, the UNCITRAL Model Law of 1985 and the ICSID Convention which form the backbone of the entire system.

Chapter III discusses the recognition and enforcement of foreign arbitral awards, as well as the distinctions in enforcement procedure of foreign court judgements and arbitral awards in selected countries. It highlights the differences concerning the recognition and enforcement of arbitral awards between Germany and Uzbekistan.

Chapter IV covers practical issues related to arbitration courts in Uzbekistan. It examines the practice of commercial arbitration in Uzbekistan by providing affordable and clear information on issues related to the resolution of disputes in Uzbek arbitration courts and recommendations for the conclusion of an arbitration agreement and the most efficient behaviour in the course of the arbitration proceedings.

The chapter answers the following practical questions:

- Which dispute can be referred for arbitration to an Arbitration Tribunal in Uzbekistan?
- How to conclude arbitration agreement and to determine its content;
- What are the rules of process of consideration of a dispute in arbitration court?
- How to prepare a statement of claim;
- How to choose the arbitration judge;
- What rights does a party have in consideration of a dispute?
- How to enforce arbitral awards.

Chapter V attempts to outline the grounds for refusal of enforcement of foreign arbitral awards in Germany and Uzbekistan and makes a comparison between these countries.

Chapter VI of the dissertation will address the author's conclusions and offers relevant recommendations regarding the recognition and enforcement of foreign arbitral awards in Uzbekistan.

It is hoped that the study will assist the foreign arbitration actors in thinking through the many aspects of Uzbek arbitration and spur others' interests in this area of research work.

4. Research questions

The present doctoral thesis undertakes the task of analysing and comparing the commercial arbitration as a method of alternative dispute resolution in Uzbekistan and Germany, treating principally the method of commercial arbitration. If we look through the private and procedural law of Uzbekistan, we shall be aware that Uzbek substantive law does not contain rules on the recognition and enforcement of foreign arbitral awards and does not contain any effective mechanism governing this issue. While Uzbekistan concluded bilateral and multilateral treaties only with a few countries,⁹ the recognition of foreign judgements is regulated in rare cases.

Though Germany and Uzbekistan belong to the same legal family (continental-European), there are some differences, descending from varying historical development of these countries. In this regard the author of this work first of all tries to inform about the legal development of selected countries and then analyses the impediments to the development of a court of international commercial arbitration, which plays an essential role in providing the protection of rights and interests of Uzbek entrepreneurs. The study describes the legal and cultural differences of the systems of Germany and Uzbekistan through the comparison of judiciary and legal traditions in the field of recognition and enforcement of foreign arbitral awards.

The questions posed can be tackled from a methodological-theoretical point of view. The thesis will examine the following questions:

1. What were the influences of the Islamic and the Soviet law on the development of the arbitration system of the Republic of Uzbekistan?
2. Does Uzbekistan have a modern legislation on recognition and enforcement of foreign arbitral awards and how satisfactorily does the current legislative regime for this issue work in the country?
3. What are the challenges of attracting foreign investment into Uzbekistan?
4. What are the differences in recognition and enforcement of arbitral awards between the regimes of Germany and Uzbekistan?

⁹ Today Uzbekistan has not an interstate agreement with Germany.

5. How do the rules of the New York Convention and the UNCITRAL Model Law on recognition and enforcement influence on the Uzbek and German legislations?
6. Why is there still only one type of arbitration court operating under the Law of the Republic of Uzbekistan "On Arbitration Courts" (in force since 1 January 2007)?
7. What is the practice of commercial arbitration in Uzbekistan?
8. Draft Law "On International Commercial Arbitration" and the impediments to the development of International Commercial Arbitration in Uzbekistan.
9. On what grounds can enforcement of arbitral award be denied in selected countries? What is the role of *ordre public* in Uzbek and German legislation?
10. What will be the positive and negative influences of foreign experience?

5. Methodology of the research

The methodological basis of this study is the dialectical method of cognition.

While writing this dissertation, the researcher seeks to provide a theoretical understanding of the research that is the legal regulation of the recognition and enforcement of arbitral awards in the light of the analysis of the relationship between international and domestic legal acts of selected countries. Widely used methods of comparative law, directed at attaining the research's objectives were used in this dissertation.

The comparative approach will be twofold: first, it treats the historical development of arbitration systems in the selected countries and second, it will help to determine how to address the legal issue of recognition and enforcement of foreign arbitral awards in Germany and Uzbekistan regarding commercial disputes. The thesis will also broaden the horizons of legal research, taking into account how foreign experience in the example of Germany promotes a balanced approach in formulating proposals for the improvement of Uzbek legislation.

Using a sociological method is productive for this research, as well. While working on it, the author of the present thesis intended to interview judges of arbitration courts and regular courts both of Germany and Uzbekistan. Moreover, sociological inquiries on the approaches of members of the management of Uzbek enterprises, involved in international economic transactions and their attitudes towards institutions for the settlement of commercial disputes were made. From September to October 2014 three personal interviews with arbitrators of Bukhara arbitration courts under the CCI and the AACU (Bukhara Department), two interviews with aqsqaqs of Uzbek mahallas and two personal communications with eye-witnesses and members of Uzbek families (whose disputes were resolved by mahalla leaders) were made by the author of this dissertation. In August 2016 one interview with the Head of Department

“Investments and the Protection of Investor’s rights” (Ministry of Justice of Uzbekistan, Bukhara region) was made by the author as well.

6. Data collection

Research material was collected based on advice of legal scholars, experts in commercial arbitration, as well as by visiting Uzbekistan to get new adopted legal acts in the sphere of arbitration from the Chamber of Commerce and Industry (CCI) of Uzbekistan, the Centre for the Study of Legal Problems, the Association of Arbitration Courts and Economic Courts of Uzbekistan. The recognition cases were studied in the archives of economic courts of Uzbekistan, particularly of Tashkent and Bukhara cities.

Primary and secondary sources were used to collect data for the study. Primary sources, used in the dissertation include: the Constitution of the Republic of Uzbekistan, constitutional laws, codes, ordinary laws, decrees of the President, decrees of the Cabinet of Ministers, and other legal normative acts and Regulations of governmental and non-governmental bodies. International instruments, like the New York Convention of 1958, UNCITRAL Model Law of 1985 and other international treaties were also used as primary sources.

Secondary sources include books, monographs, periodicals, articles and reference literature of Uzbek and foreign legal scholars, collected by visiting the library of the University of Bremen and the Max-Planck Institute for Comparative and International and Private Law in Hamburg.

7. Originality of the research and its contribution to the existing literature

Both German and Uzbek legal sources do not deal essentially with the recognition and enforcement of foreign arbitral awards in Uzbekistan. Neither the process of the recognition of foreign arbitral awards in Uzbekistan, nor the Uzbek legal culture in general are discussed in European legal literature and the lack of monographs is also seen in these spheres. Existing publications are only limited with stating the practical problems and contrary to it they do not contribute to the theoretical aspects of the recognition institution.¹⁰

The reports of German speaking authors focus mainly on the political transformation process of Central Asia from the perspectives of democratization, civil society formation and the Human Rights.¹¹ The issues of Private law were rarely addressed in these reports. Even CIS literature does not describe in detail the Civil and Economic Procedural Law of Uzbekistan.

¹⁰ It is unique for all CIS (Commonwealth of Independent States) countries. The reason is that the USSR (Union of Soviet Socialist Republics) was a closed community, since it was not almost interested in international commercial affairs.

¹¹ Geiss, *Demokratisierung und gesellschaftliche Reformen in Zentralasien*, Bonn 2002, p. 10, available at <http://library.fes.de/fulltext/id/01154.htm>.

The sources of International Civil Procedure Law show that the information and knowledge on Procedure Codes of the new independent states of Central Asia like Uzbekistan is not sufficient and the Uzbek legal-scientific literature faces practical difficulties in recognition and enforcement of foreign ‘titles’ (judgments and awards).

The present research intends to make contributions to scholarly literature with a view to offering guidance to Uzbek and foreign practitioners, entrepreneurs and others engaged in commercial activities.

First, this study for the first time will discuss in detail the historical development of the arbitration system of Uzbekistan, which has to date received only limited scholarly attention. The analysis of the development of the arbitration system in Uzbekistan could be considered as a plus for the existing literature.

Second, the study will contribute to create a body of knowledge on the challenges of attracting foreign direct investment into Uzbekistan which are connected with the recognition and enforcement of foreign arbitral awards in Uzbekistan. These challenges were mentioned neither in Uzbek (Russian) nor in foreign legal literature until today. This dissertation will examine various arbitration hurdles that foreign entrepreneurs and investors in Uzbekistan are likely to encounter and it will recommend ways to avoid or overcome these obstacles.

Further, the scarcity of good studies in English language on Uzbek commercial arbitration and the enforcement procedure of foreign arbitral awards is another problem that has to be solved. This dissertation seeks to make a contribution to the legal literature related to Uzbek commercial arbitration in English language. Thus this work presents, for the first time, the full working of the Uzbek system to an English-speaking audience.

Lastly, the enforcement of foreign arbitral awards is in many respects linked with the issue of the grounds for refusing enforcement. This is the first comprehensive study of recognition and enforcement of foreign arbitral awards in Uzbekistan, providing a valuable resource.

Chapter I: Historical development of arbitration

§ 1 Historical development of arbitration in Uzbekistan

1.1. “Avesta” as an historical root of arbitration

Arbitration is an old form of dispute resolution and one of the most important institutes of the civil community in Uzbekistan. Though the term “arbitration” has largely been used lately, the basis of the mechanisms of arbitration in the territory of Uzbekistan has historical roots. Turkish peoples have always used customary law¹² before the creation of written legislation in old Turan.¹³

The manuscript “Avesta” is considered as a written source in studying the history of arbitration, court and legal relations of old Uzbekistan, since it contains rich information on the governance before the formation of the early state and on social, political and legal relations. Several researches have shown that Avesta has criminal, family, civil, military and justice norms. Furthermore, it includes information about the conclusion of contracts between tribes and the dispute resolution processes between parties, in particular arbitration.¹⁴

“Avesta” is the collection of the sacred texts of Zoroastrianism. The most ancient Avestian texts are in an old Cathic Avestan. The majority of them are however from a later period, the most are probably from the Achaemenid era (550-330 BC). The Achaemenid Empire was founded by [Cyrus the Great](#), who ruled the [ancient Near East](#), most of [Southwest Asia](#), [Central Asia](#) and the [Caucasus](#).¹⁵ In this period the king was considered as the supreme lawgiver and the judge.

The Bible also confirms it by following: “*Therefore, if it pleases the king, let him issue a royal decree and let it be written in the laws of Persia and Media, which cannot be repealed, that Vashti is never again to enter the presence of King Xerxes. Also let the king give her royal position to someone else who is better than she*”,¹⁶ which means that the Persian and Medes laws were unchangeable and the decree, made by the king was also not mutable.

According to *Xenophon* and *Herodotus*, in important cases, the king administered justice by himself, but for the general convenience, he delegated his judicial authority to the most learned and upright men of his own choice. The person thus selected to occupy the most responsible

¹² Baratov defines “custom” as a collection of unwritten rules of a particular place (being passed from generation to generation), descending from traditions that are directed to regulate social relationships. See Baratov, Customary law, in: *O'zbekiston milliy entsiklopediyasi*, Vol. 6, Tashkent 2003, p. 458.

¹³ “Turan” is an historical land of Central Asian nomads.

¹⁴ Odilkoriyev/Azizov/Madirimov, *History of State and Law*, Tashkent 2013, p. 20.

¹⁵ Schmitt, Achaemenid Dynasty, in: *Encyclopædia Iranica*, I/4, pp. 414-426, available at: <http://www.iranicaonline.org/articles/achaemenid-dynasty>.

¹⁶ Bible, Esther 1:19.

position as a guardian of equity and justice in the empire was generally past fifty,¹⁷ and was appointed for life, unless personal misdemeanour, in the execution of his duties, rendered him unworthy to hold the office.¹⁸ These facts were also proven in Avesta, the texts of which are believed to have been transmitted orally for centuries before they found written form.

The author *Eduljee* in his book “Zoroastrian Heritage” mentions that in existing copies, the Avestan language words are written in Din debireh script, a Sassanid era (226-651 CE) invention.¹⁹ Although the texts are very old, the compendium as we know it today is essentially the result of a redaction that is thought to have occurred during the reign of Shapur II (309-379 CE). However, some portions of the collection have been lost since then, especially after the fall of the Saassanid Empire in 651 CE, after which Zoroastrianism was supplanted by Islam. The oldest existing copy of an Avestan language text dates to 1288 CE.²⁰

One of the three major divisions of the 21 Nasks of the Sasanian [Avesta](#), the Vendīdād – Avestan *widaēwa-dāta* “The Law repudiating the Demons”²¹, was the last of those called dādīg “dealing with law,” and the 19th overall and was fully devoted to legal matters of the book.²² The “laws” contained in the Vendīdād are of various sorts. Some appear to have a basis in civil jurisprudence, for example those dealing with assault, contracts, oaths; many others dealing with pollution fall under what one might call religious law. However, the distinction between civil and religious law is not a concept to be found in the tradition.²³ Thus, Avestan Vendīdād provided for nation’s welfare by keeping society pure and just, respecting good and eliminating bad habits of people.²⁴

According to ancient chronicles, the document indicates that the fulfilment of a promise that has been made, loyalty to an oath and faithfulness to obligations in respect of people were parts of ordinary law. If a person violated his oath or an agreement made by him, to confirm whether he was right or not, the plaintiff used the procedural rules, *i.e.* “ordeal”. There were 33 ways of ordeal for making fair court decisions.²⁵ Much attention in the “Avesta” is paid to the matters of conducting of cases and court proceedings. The book shows the true and strict recognition of all rules and unequivocal compliance with the application of the laws of that era. The

¹⁷ Xenophon, *Cyropaedia*, Book I.

¹⁸ Herodotus, *The Histories*, Book III, Chapter 31.

¹⁹ For a more comprehensive overview of Zoroastrian heritage, see the author's Zoroastrian Heritage website at: <http://www.heritageinstitute.com/zoroastrianism/>.

²⁰ “Zoroastrianism: Holy text, beliefs and practices”, retrieved: 2010-03-01.

²¹ Benveniste, Que signifie Videvdāt?, in: Boyce/Gershevitch (eds.), *W.B. Henning Memorial Volume*, London 1970, pp. 37-42.

²² Odilkoriyev/Azizov/Madirimov (*supra* n. 14), p. 21.

²³ See Malandra, Vendidad: Survey of the history and contents of the text, in: *Encyclopaedia Iranica*, available at <http://www.iranicaonline.org/articles/vendidad>.

²⁴ Odilkoriyev/Azizov/Madirimov (*supra* n. 14), p. 21.

²⁵ Boboyev/Dustjonov/Khasanov, *Avesta – bestsennaya relikviya narodov Vostoka*, Tashkent 2004, p. 20.

execution of court's tasks was the priority of the society. Therefore, "Avesta" reports about the persons who were chosen for fair trial.²⁶

"Avesta", as well as numerous other holy books, is a complex and multilayered book, however, in its most ancient first volumes the data has its superiority, reaching to the very ancient times, in the history of Khorezm²⁷. This period can be attributed to the first half of the First Millennium BC.²⁸ The country "Airyanem Vaejah", which was located on the territory of Khorezm, and where the laws of "Avesta" were followed, at the same time was unique in the world. Therefore, the mechanism of arbitration proceedings described in "Avesta", contributed to the development of Khorezm and other countries, located nearby, such as Bactria²⁹, which was the Greek name for the Old Persian Bactria and Sogdiana.³⁰

1.2. Arbitration in the pre-Islamic period

Before Islam, arbitration was used as a method for the settlement of civil and commercial disputes by Arabs and traditionally it was the least expensive and most popular apparatus for resolving disputes among tribes in the Arabian Peninsula.³¹ Enforcement of the law was generally the responsibility of the private individual who had suffered injury.³² Within the framework of the tribal Arab society, chieftains (sheikhs), soothsayers and healers (kuhān), and influential noblemen played an indispensable role as arbiters in all disputes within the tribe or between rival tribes. Before becoming a prophet, Muhammad (may peace be upon him!) was known as an honest and wise arbiter among the non-Muslim Arab tribes. The authority and stature of arbiters (hakams) in the Pre-Islamic period served as sanctions for their verdicts.³³ The arbitration award was not enforceable if parties contested it, unless the trial chief was in a position to get it enforced;³⁴ the arbitral awards were not legally binding, unless there was an agreement between the parties to this extent.

²⁶ Odilqoriyev/Azizov/Madirimov (*supra* n. 14), p. 21.

²⁷ Khwarezm or Chorasmia is a large [oasis](#) region on the [Amudarya river delta](#) in western [Central Asia](#), bordered on the north by the (former) [Aral Sea](#), on the east by the [Kyzylkum desert](#), on the south by the [Karakum desert](#), and on the west by the [Ustyurt Plateau](#), <http://www.wikipedia.org/wiki/Khwarezm>.

²⁸ Tolstov, *Qadimgi Khorazm madaniyatini izlab*, Tashkent 2010, p. 14.

²⁹ Nowadays Northern Afghanistan.

³⁰ Sogdiana is listed in Avesta as the second best land after Airyanem Vaejah and indicated as an important region from ancient times. Testen, Old Persian and Avestan Phonology, in: Kaye (ed.), *Phonologies of Asia and Africa*, Vol. II, Winona Lake, Indiana 1997, pp. 569-600 (583); Dresden, Introductory Note, in: Azarpay (ed.), *Sogdian Painting: the Pictorial Epic in Oriental Art*, Berkeley, Los Angeles, London 1981, pp. 1-10 (2-3).

³¹ Al-Ramahi, Sulh: A Crucial part of Arbitration, LSE Law, Society and Economy Working Papers 12/2008, No. 08-45, available at <http://ssrn.com/abstract=1153659>.

³² See for example, Hamidullah, Administration of Justice in Early Islam, *Islamic Culture* 11:2 (1937), 163-171.

³³ Amin, *Commercial Arbitration in Islam and Iranian Law*, Worcester 1948, p. 42.

³⁴ See Alqurashi, Arbitration under the Islamic Sharia, *Oil, Gas and Energy Law Intelligence* 1:2 (2003), 30-44.

In that period, there were no specific rules to limit the arbitral subjects. The arbitral proceedings were simple and rudimentary. The arbitrator when hearing the dispute does not abide by any certain procedures, except for a number of certain procedures such as the obligation to hear the disputing parties on equal bases and the respect of the customary rules when examining the proofs presented by the parties.³⁵

A similar point regarding the arbitration process of the Zoroastrian period can be noticed in the Pre-Islamic period and after Islam, too. As stated in “*Medjella of Legal Provisions*”³⁶, the arbitration process relied upon the claimant proving his case and the respondent basing his defense on his oath.³⁷ If a claimant did not prove his case then he could ask the respondent to swear an oath denying the claim. To the opinions of many scholars, arbitration and dispute resolution in some areas of the Arab world, which further had a great impact on Central Asian arbitration, was relatively structured and permanent.

Bassiouni and *Badr* refer to customary practice of arbitration as a legitimate source of law if they do not contradict with Shariah law.³⁸ Today, a major part of the rules of international commercial arbitration has been developing gradually to the level of custom, and some of them are considered to be part of the law.

The customs which were practiced in the Pre-Islamic period continued to be respected and esteemed under Islam, particularly those relating to honor, hospitality and courage in Muslim countries including Central Asian countries, while Prophet Muhammad (may peace be upon him!) also declared that he was sent to perfect the principles of good behaviour.³⁹ Thus, many of the positive tribal customs were incorporated into Islamic teaching and jurisprudence.

1.3. Arbitration under Islamic Jurisprudence and the four Schools of Sharia

The validity of arbitration has been recognised by the four sources of Sharia: the Koran (Quran), the Sunna⁴⁰ (the acts and sayings of the Prophet Mohamed (may peace be upon him!)), Idjma’

³⁵ *Ibid.*

³⁶ “*Medjella of Legal Provisions*” is considered to be the first codification of the Shari’a (Islamic law) under the Ottoman Empire.

³⁷ “*Medjella of Legal Provisions*”, sect. 76.

³⁸ Bassiouni/Badr, *The Shari’ah: Sources, Interpretation, and Rule Making*, *UCLA Journal of Islamic and New Eastern Law* 1 (2002), 135-181.

³⁹ Bellamy, *The Makarim al-Akhlaq* by Ibn Abu-Dunya, *The Muslim World* 53:2 (1963), 106-119.

⁴⁰ I. Faruqi and L. Faruqi in their *The Cultural Atlas of Islam*, New York 1986, p. 114 stated that the Sunna was compiled into collections according to the recorder's name and referred to as “*Hadith*”. By the third century, there were six recognised groups of hadith which are considered to be accurate among the Muslims: al Bukhari (256/870), Muslim (251/865), Abu Daud (275/888), Iso al Tirmidhi (279/892), al Nasa’i (303/915), Ibn Majah (273/886), with the first two collections being more respected and esteemed. Al Bukhari, Al Tirmidhi and Al Nasa’i are the famous Central Asian Islamic scholars of the world.

(consensus of opinion) and Qiyas (reasoning by analogy).⁴¹ According to Koran, Sunna, Ijma and Qiyas, arbitration is a legitimate dispute resolution process because it serves an important social need and it simplifies the resolution of disputes. It is also less complex than court procedures.

Although the concept of arbitration is not new to Central Asia and other Muslim countries, Islamic law scholars have different opinions on it. The scholarship on the arbitration concept argues that it has been considered as an efficient means of dealing with disputes and has long been embedded in Islamic rules for over 1,400 years.⁴²

According to some scholars, arbitration is a form of conciliation, close to “amiable composition”, which is not binding the parties.⁴³ Those favouring this view hold that the arbitrator’s decision is neither binding nor final, unless it is accepted by the parties. Thus, arbitration does not have any jurisdictional nature, but is close to conciliation. In the period of Islam, as in the case of Fath Makkah (winning over Mecca) and Sulh al-Hudaybiyyah (peace treaty at Ḥudaybiyyah), disputes were resolved on the basis of conciliation.⁴⁴

In resolving conflicts, principles such as tolerance, non-violence, patience, forgiveness, peace, harmony and mercy were employed by the Prophet Muḥammad (may peace be upon him!).⁴⁵ The Holy Quran states: *“If you fear a breach between them (the man and his wife), appoint (two) arbitrators (hakam), one from his family and an arbiter from her family. If they both wish for peace, Allah will cause their reconciliation. Indeed Allah is Ever All Knower, Aware With All Things.”*⁴⁶ The word “reconciliation” in the above verse indicates that an arbitral award is not binding and *Imam Shafi* also held that arbitral awards are binding only if parties mutually agree to enforce it.⁴⁷ This verse of the Quran, as *Moussalli* noted, is an example to encourage arbitration of private conflicts.⁴⁸

The second view is that the Sharia knew arbitration in its modern sense. This view is based on the following verse from the Quran: *“Verily! Allah commands you to deliver the trusts to those, to whom they are entitled; and that when you judge between people, judge with justice. Surely,*

⁴¹ Khamidova, *Mowarounnahr's State and Law in Medieval Ages*, Tashkent 2002, p. 11.

⁴² Cf. Al-Saied Haddad, *General Theory of International Commercial Arbitration*, Halabi 2004, p. 102.

⁴³ See Abdul Hamid El-Ahdab/Jalal El-Ahdab, *Arbitration with the Arab Countries*, 3rd ed., Alphen aan den Rijn 2011, p. 16.

⁴⁴ Rusli, The Role of Musalahah in Conflict Resolution: A Historical Perspective, *Hunafa: Jurnal Studia Islamika* 10:2 (2013), 203-220 (210).

⁴⁵ *Ibid.*

⁴⁶ The Qur'an 4:35.

⁴⁷ Muneeza, Is Conventional Alternative Dispute Resolution to Islamic Law?, *Malayan Law Journal* 4 (2010) xvii-cix.

⁴⁸ Moussalli, An Islamic Model for Political Conflict Resolution: Tahkim (Arbitration), in: Said/Funk/Kadayifci (eds.), *Peace and Conflict Resolution in Islam: Precept and Practice*, Lanham 2001, pp. 143-168.

excellent is the exhortation Allah gives you. Surely, Allah is All-Hearing, All-Seeing.”⁴⁹ *“If they come to you, judge between them or turn away from them. If you turn away from them, they can do you no harm. But if you judge, judge between them with justice. Surely, Allah loves those who do justice.”*⁵⁰ Conflicting interpretations of these verses creates misunderstandings and confusions about the binding character of an arbitration award among Islamic law scholars.⁵¹ A further complication is the fact that some scholars come often across with using the word “Hakam” (arbitrator) distinguishing arbitration from conciliation (sulh).⁵²

After becoming a prophet, Muhammad (SAW) usually settled conflicting viewpoints by asking the opposing parties to explain their interpretations of the Qur’an, and then he either confirmed or denied the validity of their perspectives. He appointed arbitrators and accepted their decisions; he chose arbitration to settle the dispute between himself and *Bani Anbar*.⁵³ He also acted as an arbitrator between the Muslim community and non-Muslim people, as well as a mediator for Jewish tribes, for whom he applied Jewish law.⁵⁴ The leading case where arbitration was used by the companions of the Prophet (peace be up on him!) was the famous political case between the Caliph “Ali bin Abu Taleb” (the fourth rightly guided Caliph) and “Muawya bin Abu Sofian”.⁵⁵

Although the Quran and the Sunna confirmed the validity of arbitration, there was an issue with its implementation. Therefore, the four schools of Sharia explained the process of arbitration which obliges each Muslim within each school to follow its teachings.

When we talk about the Sunni Islam, we should mention that there are four main developed schools of thought (Mathhabs).⁵⁶ They are:

⁴⁹ The Quran 4:58.

⁵⁰ The Quran 5:42.

⁵¹ The existence of distinctions in understanding the meaning of Quran verses among Islamic law scholars, led arbitration to be divided into two types: a) arbitration that leads to binding decisions, and b) arbitration leading to non-binding decisions. The recent studies on Islamic Arbitration show that Islamic law acknowledges the existence of the difference between conciliation (that ends with a non-binding decision) and arbitration (that leads to binding decisions). For more details, see Serrano, Bringing arbitration (taḥkīm) and conciliation (ṣulḥ) under the qāḍī’s purview in Mālikī al-Andalus (10th to 12th centuries C.E.), *Revue des mondes musulmans et de la Méditerranée* 140 (décembre 2016), 73-100.

⁵² Cf. Aboul-Enein, Liberal Trends in Islamic Law (Sharia) on Peaceful Settlement of Disputes, *Journal of Arab Arbitration* 2 (2000), 1-19 (2).

⁵³ *Supra* n. 31.

⁵⁴ Moussalli (*supra* n. 48), pp. 149-154; see also Rafeeq, Rethinking Islamic Law Arbitration Tribunals: Are they compatible with traditional American notions of justice?, *Wisconsin International Law Journal* 28:1 (2010), 108-139 (114).

⁵⁵ Muawya had refused to recognise Ali bin Abu Talebs right to the Caliphate. The dispute led to a civil war between the two parties. During the fighting, Muawya bin Abu Sofian demanded the settlement of their dispute through arbitration. Ali bin Abi Taleb accepted that and each party appointed his arbitrator. The two arbitrators were to decide on who would be the Caliph. The two arbitrators were nominated in the arbitration agreement document and drafted an arbitration agreement specifying the dispute. The procedure, duration of the arbitration, place of arbitration and the applicable law were fixed in the arbitration document.

⁵⁶ For details, see Bearman/Peters/Vogel, *The Islamic School of Law: Evolution, Development and Progress*, Cambridge, Mass. 2005.

- the Hanafi School,
- the Shafi School,
- the Hanbali School,
- and the Maliki School.

Minor practical differences can be noticed between these Sharia Schools regarding the interpretation of the texts of Islamic law.⁵⁷ It should be noted that although all four Islamic schools acknowledge arbitration as a substitute for the ordinary courts and define arbitration similarly,⁵⁸ they implement separate rules on settlement of disputes, selection of arbitrator and establishing the arbitration features and scope.

There were also differences of opinion on the enforcement of the decisions made by arbitrators and depending on the Islamic schools of jurisprudence followed, arbitral decisions have different enforcement power.⁵⁹ According to some Islamic law scholars, despite the recognition of arbitration by all sources of Islamic law, arbitration did not reach thorough and detailed attention in the doctrinal writings of the four major Islamic Schools due to the fact that the Islamic Judiciary was sufficient and developed enough to provide suitable solutions to all types of social life problems of that time.⁶⁰ The next sub-sections of this chapter will set forth a brief overview of arbitral procedure under the four Schools of Sharia.

1.3.1. The Hanafi School

The supporters of this school stressed the contractual nature of arbitration and explained that arbitration is legally close to agencies and conciliation. The arbitrator acted as an agent on behalf of a disputant who had appointed him.⁶¹ Hanafi School's scholars acknowledge a strong relationship between arbitration and conciliation. According to them an arbitral award which is closer to conciliation than to a court judgement, is of lesser force than a court judgement. *Saleh* states that the disputing party cannot be relieved from being obligated to abide by the award because the agreement to resort to arbitration binds the parties like any other contract.⁶² The

⁵⁷ The definition and clarification of commercial arbitration by these Sharia Schools depends on how Islamic Sharia is interpreted by each of them.

⁵⁸ These Mathhabs (schools) accentuate differently on three aspects in defining arbitration. They are: resolution of disputes, overseeing (review) of dispute by an arbitrator and the enforcement of an award or judgment.

⁵⁹ Kutty, Faisal, Shari'a in International Commercial Arbitration, *The Loyola of Los Angeles International and Comparative Law Review* 28 (2006), 564-590. See also Bhatti, Managing Shariah Non Compliance Risk via Islamic Dispute Resolution, *Journal of Risk and Management* 13:2 (2020), 3.

⁶⁰ Cf. Al-Ramahi (*supra* n. 31); Hossain, Arbitration in Islamic Law for the Treatment of Civil and Criminal Cases: An Analytical Overview, *Journal of Philosophy, Culture and Religion – An Open Access International Journal* 1 (2013), 1-13.

⁶¹ See Saleh, *Commercial Arbitration in the Arab Middle East: A Study in Sharia and Statute Law*, London 1984, p. 22.

⁶² *Ibid.*

followers of this school spread to Central Asia, Iraq, the region of the Caucasus and the South Asian countries such as Pakistan, India and Bangladesh.

Here it should be mentioned that arbitration (Tahkim), like judiciary, was focused on testimony in accordance with the doctrine of the Hanafi School. *Abdul Hamid El-Ahdab* and *Jalal El-Ahdab* confirm that arbitration cannot be entrusted to an unjust person while justice is a primary requirement in the Hanafi School.⁶³ Furthermore, the scholars of the Hanafi School as well as of the Maliki, Hanbali and Shafi Schools accentuate on the capacity of arbitrators. They have two statements relating to this matter: First, the arbitrator should be an absolute jurist; second, the arbitrator is a jurist only in issues that he settled.⁶⁴ However, in some cases these schools authorised arbitration by an ignorant person, provided that he refers to academics and asks their advice, not to allow the award to be considered as rendered by a person who lacks the knowledge. In fact, an ignorant may not be selected as an arbitrator otherwise, the award, rendered by him would not be enforced.⁶⁵

1.3.2. The Shafi School

According to the Shafi School arbitration is a legal practice, whether or not there is a judge in the place where the dispute has arisen.⁶⁶ However, according to this school, the position of arbitrators is inferior to that of judges since arbitrators under this School are liable to be revoked up to the time of the issuance of the award.

1.3.3. The Hanbali School

The Hanbali School specifies that an award or decision made by an arbitrator (having the same qualifications as a judge) has the same binding nature as a court judgement and it is imposed upon both of the parties who chose him.⁶⁷ If the decision is not finalized, a disputing party is entitled to retract an arbitrator's representation. This is made possible by the fact that arbitration is considered to be similar to the power of an attorney, which the disputing party can renounce at any time.

⁶³ Al-Ayni, *Al Binaya Sharh al-Hidaya*, Vol. III, Beirut 2000, p. 67; see also Abdul Hamid El-Ahdab/Jalal El-Ahdab (*supra* n. 43), p. 38.

⁶⁴ Abdul Hamid El-Ahdab/Jalal El-Ahdab (*supra* n. 43), p. 38.

⁶⁵ *Ibid.*

⁶⁶ Saleh (*supra* n. 61), p. 22.

⁶⁷ Aboul-Enein (*supra* n. 52), p. 19; see also Chern, *Chern on Dispute Boards*, 3rd ed., New York 2015, p. 82.

1.3.4. The Maliki School

The Malikis have a great trust in arbitration; they accept that one of the parties can be chosen as an arbitrator by the other disputing party. This is explained by the fact that one relies upon the conscience of the other party.⁶⁸ Unlike the other three schools, this school stresses that an arbitrator cannot be revoked after the commencement of the arbitration proceedings.

There are also conflicting viewpoints among the schools. Despite these incongruous viewpoints, however, the opinions of each of the schools give credence to the idea that arbitration is an effective means of settling disputes and also exemplify similarities to the United States and the United Kingdom, which discuss the same issues in their statutes and case law pertaining to arbitration.

1.4. Islam and Islamic Law after the Arab invasion of Central Asia

Islam is the latest religion to reach Central Asia. The territory known as Central Asia⁶⁹ nowadays has been a much disputed land in history. It has been coveted by Chinese, Mongol and Greek people, among others. In the seventh century after Christ, some years after the Prophet Mohammed's death, Arab troops conquered the region, calling it the Ma Wara' al-Nahr (which means: "what is beyond the river", the Amu Darya, the old "oxus"), and spread the new faith. Consequently, the Muslim community of believers, Umma, began to encompass ethnicities beyond the Arabs themselves.⁷⁰ The introduction of Islam into Central Asia, as Paksoy mentioned, went through roughly three stages: force of arms and alms; the scholastic madrasa; and Sufism. But the first group to come into contact with Islam in Central Asia were not the Shamanistic or Buddhist Turks, it were the Zoroastrian Persians.⁷¹ A majority of Central Asian local governors accepted Islam in order to keep their immunities and privileges. Thus, Islam played an important role in the government, law, taxation, etc.⁷² Riasanovsky stated that Muslim conquerors of Central Asia sometimes imposed their law and sometimes left local law in place.⁷³

Islam had become the official religion of the Samanid state by 875 and its capital was the city of Bukhara, being independent of Bagdad (the capital of the Abbasid Caliphate). The Samanid period in the 9th-10th centuries is considered a time of cultural florescence when Central Asia

⁶⁸ Saleh (*supra* n. 61), p. 21.

⁶⁹ Kazakhstan, Kyrgyzstan, Tajikistan, Turkmenistan and Uzbekistan.

⁷⁰ The first non-Arabs to accept Islam in large numbers were Persians, whose empire the Arab forces defeated in a series of battles between 637 and 651.

⁷¹ Paksoy, Nationality and Religion: Three Observations from Omer Seyfettin, *Central Asian Survey* 3:3 (1985), 109-115.

⁷² Khamidova (*supra* n. 41), p. 10.

⁷³ Riasanovsky, *Fundamental Principles of Mongol Law*, Bloomington 1965, p. 10.

was the “intellectual epicentre of the world”.⁷⁴ Islam and Islamic law flourished in this period. The sources of law and courts’ activities were based on the rules of Islamic Sharia. Many famous scholars of “Hadith”⁷⁵ and “Fiqh”⁷⁶ from Mavaraunnahr and Khurasan⁷⁷ contributed significantly to Islamic sciences and Islamic law (by interpreting Qur’an, *i.e.* making commentaries on Qur’an and collecting Hadith) through their works which are extremely valuable to all Muslim World. In the Samanid period some works are devoted to unification of Islamic legal relationships to local custom of people. For example, the work of the jurist (Faqih) *Abulays ibn Ahmad Samarqandiy* “*Xazinatul fiqh*” (Treasure of Islamic rules) was used by lawyers as a guidance at courts.⁷⁸

The reign of Saljuqi turks was based on both: Islamic law and customary law. “*Siyosatnoma*” or “*Siyar ul-muluk*”⁷⁹ plays a great role in learning main rules and legal matters of state governance of that period.

In the period of Sultan *Jaloliddin Manguberdi*’s rule the courts were divided into six types as follows:

- Sultan *Jaloliddin*’s High Court (it provided with the declaration of Sultan’s High decision on civil, administrative and legal matters; made the High Military decision on military, political crimes and issued the court decisions for enforcement);
- High Sharia Courts (the activities of Sharia Courts’ high judges on making decisions);
- Sharia courts under the Sultanate (“*Dorus salatanat*”);
- Sharia courts under the city, region deputy rulers;
- Sharia courts under the chairmen and elders (*aqsaqals*) of villages and regions (issues regarding the dispute resolution, *e.g.* arbitration were reviewed and the decisions on these issues were made);

⁷⁴ Kadoi/Szanto (eds.), *The Shaping of Persian Art: Collections and Interpretations of the Art of Islamic Iran and Central Asia*, Newcastle-upon-Tine 2013, p. 286.

⁷⁵ “Hadith” which means “report, “speech” or “narrative” refers to various reports on speeches, actions or habits of Prophet Muhammad (SAW). In Islamic jurisprudence, it is considered to be the second only to the Quran, and regarded as essential tool for understanding the Quran and commentaries ([Tafsir](#)) written on it. See for example Ibn Hajar, *Al-Nukat ala Kitab ibn al-Salah*, Riyad 2013, vol. 1, p. 90.

⁷⁶ “Fiqh” means knowledge on Islamic legal rulings from their sources. To *Vogel*, “Fiqh” is the human understanding of the divine law, which means “understanding”. It consists of the opinions of scholars who by their piety and learning have become qualified to interpret the scriptural sources and derive laws. See *Vogel, Islamic Law and the Legal System of Saudi: Studies of Saudi Arabia*, Leiden 2000, pp. 4-5.

⁷⁷ The region under consideration produced celebrated Islamic scholars and jurists such as *Muhammad bin Ismail al-Bukhari*, *Muhammad at-Tirmidhi*, *Hakim at-Tirmidhi*, *Abu ’l-Lays as-Samarqandi*, *al-Nasai*, *Muslim Nishapuri*, *Abu Mansur al-Maturidi*, etc.

⁷⁸ *Odilqoriyev/Azizov/Madirimov (supra n. 14)*, p. 96.

⁷⁹ “*Siyar ul-muluk*” (the life of Sultans) was written in 1091 by *Nizomulmuluk* who worked as a minister (Vazir) of Saljuqi turks for thirty years in the Seljuk Empire.

- Revision and control of “Muhtasib” organs in execution of laws.⁸⁰

To sum up, Islam had a profound impact in all spheres of political, economic, social, legal and cultural life of Central Asian people for centuries. It recognised and confirmed the pre-Islamic methods of settling disputes with some modification and arbitration continued to have a central role in the resolution of disputes.

1.5. Central Asian Customary Law and Islamic Sharia

Islamic law did not lose its significance by the abolishment of the Arab Caliphate by Mongols in the 13th century in Central Asia, but it continued to develop and became a practiced branch of law. Though the Sharia did not mention to divide the law into separate branches, it developed the civil, property and contract relationships.

Studies show that many of the Uzbek traditions practiced today have their roots in ancient religious customs both from Islam and other religious traditions that co-existed with Islam.⁸¹ For example, the Mongols brought the Great Yasa⁸² to Central Asia and strengthened “edgen tradition”,⁸³ four centuries after the Arab occupation. The Great Yasa was more similar to Central Asian customary law than Islamic law that had ruled the area during the four hundred years.

According to the edgen system, the youngest son becomes responsible for taking care of parents and their life-cycle ceremonies, including funeral and funeral ceremonies, even after they pass away.⁸⁴ Islamic law, together with the existence of the Great Yasa, continued to be part of Central Asian society,⁸⁵ including the edgen system, as local custom, incorporated into Islamic law. Islamic jurisprudence recognises a local custom as an important source of law only when such practices do not breach the Islamic principles, even if it relates to a non-Muslim society. *Aghndies* defines “custom” as that which is practiced by the people more often than in a particular geographic area.⁸⁶

⁸⁰ Boboyev/Khidirov, *History of Uzbek Statehood*, Vol. II, Tashkent 2009, p. 141. The *National Encyclopedia of Uzbekistan* defines “Muhtasib” as a supervising official who controlled behaviour of people in social places, as well as an appropriate execution of Islamic traditions and events in accordance with Sharia laws in the Medieval Islamic countries. He was also a supervisor of bazaars and trade, who’s duty was to ensure that public business was conducted according to Islamic principles. In the Emirate of Bukhara “Muhtasib” was the third rank after Sheikh-ul-islam and Mufti. See *National Encyclopedia of Uzbekistan*, Vol. I, Tashkent 2000.

⁸¹ Ishakov/Rahmanov, *Islamic Law*, Tashkent 2012, p. 95.

⁸² The Great Yasa is known as the law of the Mongols, and is considered as the law of the nomads, which was brought by Genghis Khan to Central Asia in 13th century. See also Lane, *Daily Life in the Mongol Empire*, Westport 2009, pp. 205-226.

⁸³ Before Islam, nomads developed an elder-care tradition that exists to this day in Central Asian Countries.

⁸⁴ Riasanovsky (*supra* n. 73), p. 39.

⁸⁵ Morgan, The Great Yāsā of Chingiz Khān’ and Mongol Law in the Ilkhānate, *Bulletin of the School of Oriental and African Studies* 49:1 (1986), 163-176.

⁸⁶ Aghndies, *Islamic Theories of Finance: With an Introduction to Islamic Law and Bibliography*, Piscataway, NJ 2005, p. 104.

Despite the distinctions in inheritance principles between the two systems, this development raises the question of how these two inheritance schemes became reconciled. One possibility is through the practice of *ijtihād*⁸⁷ or legal creativity. It is also arguable that during the period of Mongol rule the doors of *ijtihād* were closed⁸⁸ as Islamic scholars in Central Asia abandoned practices of *ijtihād* in favour of *taqlīd*, an interpretive method that emphasized the reproduction of earlier opinions as opposed to creating new law. The movement from *ijtihād* to *taqlīd* occurred earlier in other parts of the Muslim world.⁸⁹

Conflicting matters on dividing estates of Central Asian customary law, directing the entire bequest to the youngest son and Islamic law requiring strictly defined shares among children with sons receiving twice the allotment of daughters, were resolved neither by *urf* nor by other forms of *ijtihād*, while *ijtihād* is a method of deriving legal rules only in cases where there is not clear guidance from the Quran and Hadith.

1.5.1. “*Hiylah*” (legal rule) – as an alternate form of reasoning

In many instances, Islamic law inclines towards adopting local customs and traditions so long as these practices do not contradict the fundamental Islamic law principles.⁹⁰ However, the Central Asian *edgen* system directly contradicts the Islamic law, which summons the current Central Asian Islamic scholars to use *hiylah* (legal rule) to solve the issue regarding inheritance allotments of Islamic law and customary law.

Schacht states that *hiylah* originates in the Ḥanafī mathḥab which is by far the dominant school of Islamic jurisprudence in Central Asia. Linguistic translations of the term *hiylah* include *trickery* and *deception*. The Ḥanafī definition contemplates an opinion in which the jurist does not reveal his legal method to the enquirer but strives to aid the believer by providing a beneficial solution.⁹¹

Through this rule, Central Asian families are now able to support traditional elder care practices while also complying with Islamic law. In order to meet both the requirements of Islamic law and the Central Asian traditions and culture regarding elder-care system, an imam might employ *hiylah*. Contemporary Central Asian Islamic jurists use *hiylah* in order to maintain an indigenous elder care system for the benefit of their Muslim practitioners. However, it is important to note that there is a big problem in the *edgen* system of Central Asia. It is based on

⁸⁷ *Ijtiḥād* is the formation of an opinion by a jurist using juridical creativity based in accepted sources of Islamic law.

⁸⁸ See Hallaq, *Was the Gate of Ijtihad Closed?*, *International Journal of Middle East Studies* 16:1 (1984), 3-41.

⁸⁹ See Schacht, *An Introduction to Islamic Law*, Oxford 1982, pp. 70-71.

⁹⁰ Abdugafurov/Moran, *Islamic Law and Elder Care in the Central Asian Edgen System*, *Journal of Law and Religion* 31:2 (2016), 197-211.

⁹¹ Schacht (*supra* n. 89), pp. 78-82.

unpaid female labour and female disinheritance, which is considered to be contrary to Islamic law. While female inheritance is a central feature of Islamic law and its goal is to respect women as shown in the female inheritance allotments, the edgen tradition focusing on unpaid female work and disinheritance remains as a problem for the edgen system going forward in Central Asia.

1.5.2. Central Asian Muslim leaders' role in the resolution of disputes

The five Central Asian republics Kazakhstan, Kyrgyzstan, Tajikistan, Turkmenistan, and Uzbekistan are relatively new; they have only been sovereign countries since the fall of the Soviet Union in 1991. Prior to that, they were simply the collective “Turkestan”, a name imposed on them by the Russian tsars who controlled the region and named it based on their limited understanding of the Turkish roots of the native peoples.

The former Soviet states of Central Asia retained their Islamic identity in spite of the Soviet Union’s attempts to replace their religion with atheism. In the 1920s specifically, the Soviet government attempted to eradicate Islam in Central Asia by forcing a state-controlled, Soviet version of the religion on the natives of the region.

Today, Islamic law and jurisprudence is not a source of state law in the post-Soviet countries of Central Asia, including Uzbekistan with Muslim-majority populations and secular governments.

In the 19th century Russian authorities in Turkestan⁹² were not interested in studying Islamic jurisprudence thoroughly and did not profit from the “Orientalist” knowledge, which existed in other Muslim regions of the Russian Empire. This has been observed in the policies of “disregard” of Islamic institutional and cultural activities by General *von Kaufmann*⁹³ who intended not to subject the Islamic authorities (ulama) to a spiritual directorate.⁹⁴ Only after the uprising of Andijan in 1898 the policy of non-interference in Islamic legal matters was felt to be too permissive and was therefore abandoned. The new interest in Islamic courts and jurisprudence that emerged led to stricter monitoring of the sentences handed down by the courts and to some attempts to codify Islamic law.⁹⁵

⁹² The word “Turkestan” was first used to describe the place of [Turkic peoples](#) by Muslim [geographers](#). It was known as [Turan](#) to the Persians, western Turkestan has also been known historically as [Sogdiana](#), Mawara'u'n-nahr by Arab conquerors and [Transoxiana](#) by Western travellers. See for example, Sagdullayev, *Qadimgi O'zbekiston ilk yozma manbalarida*, Tashkent 1996. It was revived by the [Russians](#) as a convenient name for the governorate-general created in 1867.

⁹³ Governor-General of Turkestan between the years 1867 and 1882.

⁹⁴ Usmanova, *Musulmanskie predstaviteli v rossijskom parlamente. 1906-1916* [Muslim Representatives in the Russian Parliament, 1906-1916], Kazan 2005, p. 119.

⁹⁵ Sartori, An Overview of Tsarist Policy on Islamic Courts in Turkestan: Its Genealogy and its Effects, *Cahiers d'Asie centrale* 17/18 (2009), 477-507.

The most ambitious initiative in the sphere of codification of Islamic law in Turkestan was the work done in 1906 by *Count Konstantin K. Palen*, who studied Turkestan's Islamic courts.⁹⁶ Here it is important to mention that during the period of tsarist rule in Turkestan, the Russian administration found the work of *Burhoniddin Marginoniy* "Al-Hidayah"⁹⁷ as the most reliable source of Sharia Law, devoted to matters relating to Sharia courts and judges (Qadi)⁹⁸, their tasks and obligations, punishment and execution of judgement.⁹⁹

Thus, until the end of the 19th century, there existed only Sharia Law in Turkestan and the religious and secular governments were not separated from each other.

Islamic courts and Sharia which existed and prevailed before the Soviet Union were abolished and replaced by the Soviet government with secular Soviet laws and the Soviet Courts¹⁰⁰, which influenced the resolution of disputes by state courts of Central Asia till nowadays. However, even in the period of the USSR Islamic Sharia has kept its role in non-state dispute resolution processes in Central Asia. *Gunn* found that many Central Asian Muslims operated outside of the Soviet system, by practicing in illegal, unregistered mosques. This alternative form of Islam became known as "parallel" Islam, and today it is still prevalent in Uzbekistan and Turkmenistan where forms of practice are still prohibited.¹⁰¹

Keller notes that male and female Muslim leaders acted as counsellors and mediators in pre-Soviet Central Asia¹⁰² who were and still are known as "Aqsaqals"¹⁰³ and "Otinoyilar"¹⁰⁴. *Beyer* by her scientific research on the "customization" of law in Kyrgyzstan found that the resolution of disputes is carried in mosques by Kyrgyz aqsaqals and in the process of disputes they use Sharia rules.¹⁰⁵

⁹⁶ See Palen, *Otchet po revizii Turkestanskogo kraja. Pravovoj byt' tuzemnago naselenija*, St. Petersburg 2010.

⁹⁷ "Al-Hidayah" was not only the source of learning of Sharia in the Muslim world, but also as the judicial source (guidance) in dealing with legal matters of Sharia. It is considered to be one of the most influential compendia of [Hanafi](#) jurisprudence. Odilkoriyev/Azizov/Madirimov (*supra* n. 14), p. 84.

⁹⁸ A Qadi is a magistrate or judge of the Sharia court, who also exercised extrajudicial functions, such as mediation and arbitration, guardianship over orphans and supervision of public works. Hallaq, *An Introduction to Islamic Law*, [Oxford](#) 2009), pp. 175-176.

⁹⁹ Odilkoriyev/Azizov/Madirimov (*supra* n. 14), p. 84.

¹⁰⁰ See, for example, Geiss, *Pre-Tsarist and Tsarist Central Asia: Communal Commitment and Political Order in Change*, New York 2003.

¹⁰¹ Gunn, *Shaping an Islamic Identity: Religion, Islamism, and the State in Central Asia*, *Sociology of Religion* 64:3 (2003), 389-410.

¹⁰² Keller, *To Moscow, Not Mecca: The Soviet Campaign against Islam in Central Asia, 1917-1941*, Westport, CT 2001), p. 11; see also Merrell, *Islam and Dispute Resolution in Central Asia: The Case of Women Muslim Leaders*, *New Middle Eastern Studies* 1 (2011), 1-4.

¹⁰³ Literally it means "white beard" or respected male elders, the old and wise of the community in parts of [Central Asia](#) ("Kishlak", *Encyclopedia of Central Asia*).

¹⁰⁴ *Islom Entsiklopediyasi* (2005) defines "Otinoyilar" as teachers of girls in Central Asian religious schools. They acted as leaders in holding religious ceremonies among women (for example, Muhammad's birthday feast (*mavlud*), commanding the good, forbidding the sinful, etc.) and were also engaged in giving them religious instruction.

¹⁰⁵ Beyer, *According to Salt: An Ethnography of Customary Law in Talas, Kyrgyzstan*, Dissertation, Martin-Luther-Universität Halle, 2009).

These elders have had a role in the justice system and in politics in Central Asian countries for many years. For instance, there are still aqsqaqs courts in Kyrgystan. In Uzbekistan, which has a more urban society¹⁰⁶ than other Central Asian countries, cities are divided up into mahallas¹⁰⁷ with an aqsqaq who acts as the district leader.

Allen Frank emphasizes ‘mahalla’ as a religious institution in the period of imperial Russia and notes that it was a community of Muslims that supported a single mosque and the mosque’s imam, since he had both religious and civil duties as the spiritual head of mahalla.¹⁰⁸

It is important here to point out that today Uzbek mahallas play an essential role in processing the disputes focusing on State law and Islamic traditions at the same time.

Some investigations on Central Asian customary law revealed how the Muslim leaders of mahallas in Uzbekistan and other Central Asian countries invoked the purported stability of customary law while situationally incorporating State law, Sharia and international norms into the legal repertoire, as a practical means and a justifiable claim to order ever-changing lives of people.

There are a lot of examples, that respected Muslim leaders, when they mediate or arbitrate disputes, base on both: State law and Sharia.¹⁰⁹ The types of disputes they process vary from the disputes, resolved by arbitration courts. Comparing to Uzbek arbitration courts, the leaders of Uzbek mahallas process the disputes, arisen from family and administrative relationships that are not resolved by arbitration courts.¹¹⁰ Particularly, male Muslim leaders of mahallas help Uzbek families to solve the family issues.¹¹¹ While one of the tasks of the mahalla is the promotion of social control, it plays a major role in the treatment of domestic crises. This role has been expanded and sanctioned by the government. Family problems are therefore often resolved by mahalla’s less-formal mediation bodies, rather than through the judicial system. A

¹⁰⁶ The Uzbeks were town-dwellers, as opposed to the nomadic Turks.

¹⁰⁷ A mahalla is a country subdivision or neighbourhood in parts of the Arab world, Balkans, Western, Central Asia and South Asia and nearby Nations. It is a unique feature of Uzbek life, a centuries-old form of communal or neighbourhood self-government.

¹⁰⁸ To Frank the *mahalla* should also be understood as a civil institution. Frank, *Muslim Religious Institutions in Imperial Russia: The Islamic World of Novouzensk District and the Kazakh Inner Horde, 1780-1910*, Leiden/Boston/Cologne 2001, p. 66.

¹⁰⁹ Personal interview with aqsqaqs of Uzbek mahallas in October 2014.

¹¹⁰ According to Art. 9 of the Law of Uzbekistan “On Arbitration Courts”, the arbitration courts resolve disputes, following from civil law disputes, including the economic disputes arising between legal entities. The arbitration courts do not resolve disputes, arisen from administrative, family and labour relationships, and also other disputes provided by the law.

¹¹¹ Personal communication in September 2014 with eye-witnesses and members of Uzbek families whose disputes were resolved by mahalla leaders. It should also be mentioned that there are many cases when the leaders of mahallas helped in solving the family disputes of Uzbek women whose rights and interests were violated.

council of elders (aqsaqals) informally advises the mahalla chairman¹¹² and takes part in mediating conflicts.

As demonstrated in a recent study of *Ato*, also male Muslim leaders of Tajikistan process disputes over family issues regarding divorce, alimony and inheritance.¹¹³

Since at least the 19th century, 'Otinoyilar', who acted as women Muslim leaders, have taught Islamic principles, mediate conflicts within families and assisted in preserving Islamic Sharia during the repression of Islam by the Soviets in Central Asia.¹¹⁴ However, some limitations regarding women in Central Asia¹¹⁵ leads to scholars' debate on "how and to what extent Muslim women leaders influence and help the resolution of disputes by using Islamic Sharia", which can contribute to the scholarship on Islam and resolution of interpersonal disputes based on Islamic law in Central Asia.

1.6. Development of commercial arbitration in the USSR

As a rule, Central Asian legal culture is divided into three evolution phases in many sources in the scientific literature: pre-Soviet, Soviet and post-Soviet phases. According to some sources the pre-Soviet period is divided into the *pre-tsarist* and the *tsarist* periods. Some authors state, that the *tsarist* reign has not been of great influence on the development of local legal traditions and many attempts at integration of local legal traditions (customary law and Sharia law) into imperial legislation were not successful.¹¹⁶ However, some studies show that the Russian tsarist authorities published compilations of local customary law and codified them in order to promote more security of law in local courts and to enable tsarist officials to control local judicial decisions in a better way. Imperial laws like the provisional and final Turkistan and Steppe Statutes explicitly referred to these local traditions, took up them and adapted these traditions to the needs of Imperial rule.¹¹⁷

¹¹² The chairman is subject to government approval although he is elected.

¹¹³ Ato, Tajiks Increasingly Turning to Shari'a to Resolve Disputes, Family Affairs, Radio Free Europe, September 7, 2010, available at https://www.rferl.org/a/Tajisk_Increasingly_Turning_To_Sharia_To_Resolve_Disputes_Family_Affairs/2150615.html.

¹¹⁴ Krämer, Crisis and Memory in Central Asian Islam: The Uzbek Example of the 'Otin' and 'Khalfa' in a Changing Environment, in: Neuwirth (ed.), *Crisis and Memory in Islamic Societies: Proceedings of the Third Summer Academy of the Working Group Modernity and Islam Held at the Orient Institute of the German Oriental Society in Beirut*, Würzburg 2001, pp. 365-387 (366-367); Fathi, Otines: The Unknown Women Clerics of Central Asian Islam, *Central Asian Survey* 16:1 (1997), 27-43 (32-34).

¹¹⁵ For example, women in Uzbekistan have restricted access to mosques and still are restricted.

¹¹⁶ See for example, Schaumburg, *Auslandsinvestitionsrecht Usbekistans und Kasachstans*, Münster 2005, p. 13; Astashova, *Die Praxis der Anerkennung und Vollstreckung ausländischer Urteile und Schiedssprüche und des Rechtsverkehrs mit Usbekistan: Eine rechtsvergleichende Untersuchung unter Berücksichtigung von Deutschland und Usbekistan*, Dissertation, Universität Bremen, 2008, pp. 10-13.

¹¹⁷ Cf. Geiss, Legal culture and political reforms in Central Asia, *Central Asia and the Caucasus* 12:6 (2001), 114-125.

In this respect, the Uzbek legal tradition, particularly arbitration during the *pre-tsarist* and *tsarist* periods was not treated separately in this chapter.

By the 1920s, in the result of the Soviet Red Army's invasion of Central Asia, the customary law and Sharia law were replaced by the Soviet laws through political tools and the Soviet culture. The Soviet organs did their best to fully erase Uzbek legal traditions from all spheres of life and the old local legal system was not integrated into the Soviet Union's judicial system.¹¹⁸ In this period Uzbekistan did not have the possibility to overcome problems in dealing with commercial disputes, and there was no word about the international arbitration in Uzbekistan since the Soviet government did not agree with international arbitration courts' decisions which were passed in foreign countries and in which Soviet enterprises were involved. Occasionally, in Uzbekistan people did not have information about some spheres of USSR legislation, particularly, in the sphere of international economic relations. Uzbekistan had no right to participate in foreign economic relations during the times of the Soviet Union. GOST State Standards are an example of USSR legislation, which has hardly been changed wholly.

1.6.1. Statutes on arbitration (1920s – 1980s)

Over a long period of time in the Former Soviet States, including Uzbekistan, the term “treteiskii court”¹¹⁹ was used to mean “arbitration courts” but today in these states the term “arbitraj” is more well-known being similar as arbitration. At the early stages of the Soviet regime, all of the existing courts were disbanded on account of their bourgeois characteristics. At that time, the entire judicial system had to be re-established in the context of socialistic thought. Thus, until national courts were fully established, the system of treteiskii courts had to be the easiest and best way to achieve dispute settlement.¹²⁰

It should be noted that arbitration in Uzbekistan is at present used widely for solving domestic commercial disputes as a new phenomenon since it has not been used for over seventy years for that aim.

Socialist and capitalist economic systems co-existed under the New Economic Policy (NEP), and consequently a new social structure was created. During this time, the private sector enjoyed short-lived foreign trade dealings. In accordance with the NEP, the new Civil Procedure Code was approved on 7 July 1923 ('1923 CPC').¹²¹ According to the 1923 CPC

¹¹⁸ Schaumburg (*supra* n. 116), p. 13.

¹¹⁹ “Treteiskii court” is the original term for arbitration in CIS countries. The stem “tretey” comes from “tretiy” which means 'third' therefore “treteiskii court” literally means the court of the third person.

¹²⁰ Yoshida, History of International Commercial Arbitration and its related system in Russia, *ArbIntl* 25:3 (2009), 365-402 (371).

¹²¹ See Ioffe et al. (eds.), *Sorok let Sovetskogo Prava 1917-1957 Tom I*, Leningrad 1957, p. 653.

international commercial disputes were resolved basing on the traditional system of the treteiskii courts.

Although it seems to be thought that the Soviet system of international commercial arbitration was established from scratch specifically to solve disputes arising from international trade, all the permanent arbitral institutions for international commercial arbitration in the USSR in fact fell into the category of the treteiskii courts.¹²²

Two arbitration commissions existed in the period of the Soviet regime: the Arbitration Commission and the Foreign Trade Arbitration Commission (FTAC).¹²³ These courts exist at present as Arbitrage Maritime Commission and the International Commercial Arbitration Court at the Chamber of Commerce of the Russian Federation. The Arbitration Commission was established in 1922 by the Supreme Soviet of National Economy and its function was to regulate economic disputes among state economic institutions.¹²⁴ The latter institution FTAC was established in 1932 by a Statute of the Central Executive Committee and the Council of People's Commissars of the USSR. It is one of the oldest permanent international commercial arbitral institutions in the world. As *Lebedev* noted, the FTAC was not part of the state judicial or administrative system, but was instead a non-governmental organization which offered arbitration facilities on the basis of a voluntary submission by the disputants. The Commission had its offices at the USSR Chamber of Commerce and Industry which was a non-governmental organization contributing to the development and promotion of trade and economic relations of the USSR with other countries.¹²⁵ Its duty was to regulate the disputes arising from foreign trade between Soviet economic organizations and foreign firms.¹²⁶ The 1949 Rules on the FTAC were the first to recognize an agreement to arbitrate future disputes under statute in the USSR.¹²⁷

In the 1961 Fundamentals of Civil Legislation of the USSR, arbitration courts have been attributed to the bodies realizing the protection of civil rights. Despite the existence of a legislative framework for the development of arbitration courts, in conditions of the

¹²² Yoshida (*supra* n. 120), p. 368.

¹²³ In Russian words it sounds: "Vneshne – Torgovaya Arbitrajnaya Komissiya".

¹²⁴ Kleinman (ed.), *Arbitrazh v SSSR*, Moscow 1960, pp. 22-23.

¹²⁵ Lebedev, Union of Soviet Socialist Republics: The Foreign Trade Arbitration Commission at the USSR, in: Cohn/Domke/Eisemann (eds.), *Handbook of Institutional Arbitration in International Trade: Facts, Figures, and Rules*, Amsterdam/New York/Oxford 1977, pp. 273-295 (275-276).

¹²⁶ Art. 1 of 1932 Statute on the FTAC.

¹²⁷ Yoshida (*supra* n. 120), p. 383.

administrative-command system, the activities of these bodies have not been sufficiently developed in the Soviet Union due to the lack of free enterprises and other economic factors.¹²⁸ The former Soviet state arbitration courts did not relate to the arbitration courts, since they were direct political institutions of the planned economy and failed to meet one of the main requirements of commercial arbitration *i.e.* the establishment of arbitration on the basis of the will of individuals. The former arbitration courts were apparently close to the commercial arbitration courts.¹²⁹ *Lebedev* noted that disputes between Soviet enterprises were solved by economic courts (“state arbitration”), which were nevertheless not arbitration *stricto sensu*.¹³⁰ In accordance with international treaties the Presidium of the Supreme Soviet of the USSR adopted a new Statute on the FTAC in 1975.¹³¹ The 1975 Rules on the FTAC limited its jurisdiction to disputes deriving from contractual and other civil law relations arising between those subject to laws of various countries. Disputes between joint ventures in the USSR did not arise between those subject to laws of various countries but those subject to the USSR law only. Art. 163 of the 1977 Constitution of the USSR elevated state arbitration to an agency of constitutional status, and the Law on State Arbitrazh in the USSR was enacted by the USSR Supreme Soviet on 30 November 1979. Thus, the 1978 Constitution of the RSFSR also provided that the settlement of economic disputes between enterprises, institutions and organisations should be carried out by the agencies of state arbitrazh within the limits of their competence.¹³² The Supreme Soviet adopted the Provisional Statute on Arbitration Tribunal in 1982. It was designed to solve domestic disputes.¹³³

It is important to note that *Gorbachev's* reforms have caused dramatic changes in the Soviet Union. “Perestroika” has encouraged the implementation of free market measures, programs and policies in selected sectors of the economy. *Ward* states that *Gorbachev* removed a lot of ideological and practical restrictions that have traditionally hindered American business involvement in the Soviet Union to strengthen the Soviet economy.¹³⁴ However, other

¹²⁸ Kulikova, Treteiskii court: history, term, organization of its activities and the development's perspectives, in: *Treteyskiye sudi v Uzbekistane. Analiz i tendensii razvitiya. Nauchno-prakticheskoye posobiye*, Tashkent 2004, pp. 6-24.

¹²⁹ Knieper, Arbitration Court and State Proceedings, in: *Treteyskiye sudi v Uzbekistane. Analiz i tendensii razvitiya. Nauchno-prakticheskoye posobiye*, Tashkent 2004, pp. 25-28.

¹³⁰ Lebedev, ASIL/NVIR Proceedings 1993, p. 187.

¹³¹ Vedomosti Verkhovnogo Soveta RSFSR, No. 17, 1975, item 269.

¹³² Art. 175 of the 1978 Constitution of the RSFSR (Vedomosti Verkhovnogo Soveta RSFSR, No. 15, 1978).

¹³³ Lebedev (*supra* n. 130), p. 187. – Today, Uzbekistan like some other states of the former USSR has two laws: one for domestic cases (Uzbek Arbitration Act of 2007) and one for international disputes (Draft Law on International Commercial Arbitration).

¹³⁴ *Cf.* Ward, Arbitration with the Soviets: The Importance of Forum Selection in Dispute Resolution Clauses in Non-Maritime Joint Enterprise Agreements, *University of Chicago Legal Forum* 1990:1, 683-719.

researchers confirm that the hindrance was not directed only to U.S. business, but also to international business in general.

In an effort to encourage foreign investments, the Soviets have been changing the law with notable frequency. In addition, they have concluded private, unpublicized agreements with individual businesses – agreements that subsequently affect the regulation of Joint Enterprises in general.¹³⁵ The 1975 Statute on the FTAC was replaced by the Statute on the Arbitration Court to deal with joint ventures in 1987.¹³⁶ Under the 1987 Statute, the FTAC was renamed as the Arbitration Court (AC) and new Rules of the AC ('1988 Rules on the AC') were adopted by the Presidium of the CCI of the USSR on 11 March 1988.

1.6.2. Treaties under the Soviet regime

The Soviet government concluded several bilateral and multinational treaties on international commercial arbitration. The USSR signed the 1958 UN Convention on the Recognition and Enforcement of Arbitral Awards (New York Convention) on 29 December 1958 and ratified it on 24 August 1960.¹³⁷ The USSR also ratified the 1961 European Convention on International Commercial Arbitration on 14 March 1962¹³⁸, and the 1972 Moscow Convention on the Settlement by Arbitration of Civil Law Disputes Resulting from Relations of Economic and Scientific-Technical Cooperation on 26 May 1972.

Butler expressed the opinion that the Soviet government preferred arbitration in order to avoid litigation in foreign courts and concluded bilateral treaties with the countries, containing provisions of mandatory enforcement of arbitral awards, over which the USSR could politically and economically hold a dominant position.¹³⁹ However, there is no suggestion that arbitration is the sole means of settling disputes.¹⁴⁰ Traditionally, the *treteiskii* courts could only hear disputes which had already arisen in the USSR. This system was contrary to the Economic Treaty between the Soviet Union and Germany of 12 October 1925 which had a provision on the *treteiskii* settlement and the international practice which recognized agreements to arbitrate future disputes.¹⁴¹

¹³⁵ *Ibid.*

¹³⁶ See *Vedomosti Verkhovno Soveta SSSR*, No. 50, 1987.

¹³⁷ *Vedomosti Verkhovno Soveta RSFSR*, No. 46, 1960.

¹³⁸ *Vedomosti Verkhovno Soveta RSFSR*, No. 44, 1964.

¹³⁹ *Butler, Arbitration in the Soviet Union*, London, 1989, pp. 211-247.

¹⁴⁰ *Ibid.*

¹⁴¹ *Yoshida (supra n. 120)*, pp. 372-373.

1.7. Arbitration after the independence of Uzbekistan

The mechanism of conflict resolution by civil institutions as mentioned above has been approved and adapted many times by centuries. It has existed to nowadays in the structure of the Institute of *Mahalla* with a limited range of the issues. The main reason for this limitation is the administrative command economy of the former totalitarian regime, which reduced the status of private property in relation to socialist property.

Since independence of Uzbekistan, the government has increased the mahalla's power in both social welfare and public order functions. Its tasks are regulated in part by law.¹⁴² The Law on Mahalla, adopted in 1993 and subsequently revised in 1999, defines *Mahalla* as “*independent activity by citizens, guaranteed by the Constitution and the Laws of the Republic of Uzbekistan, for the purpose of resolving issues of local importance according to their own interests and history, as well as to national traditions, spiritual values and local customs*”.¹⁴³

The *Mahalla* serves as a community-level governing council, which is considered as a vehicle for reviving national traditions on the one hand, and on the other hand as the lowest administrative level in the government structure.¹⁴⁴ Each *Mahalla* contains a number of committees; the most important for the issue of domestic violence are the women's committee and the reconciliation committee.¹⁴⁵ Thus, the Post-Soviet transformation of the *Mahalla* gradually expanded its role and transformed these communities from unofficial and voluntary associations into official administrative units of a city¹⁴⁶ which are still playing a great role in the resolution of disputes. Besides providing substantial support to the elderly, mahallas use the methods of Alternative Dispute Resolution (ADR) through arbitrating or mediating in cases of domestic abuse (deter divorce), providing adjudication to subdue disputes between neighbours, etc.

Taking into account the importance of the institute of legal proceedings, in the first stage of independence of Uzbekistan, public attention was drawn to develop a truly independent judiciary, which had to be transformed from a punishing organ to a body protecting the rights and interests of people.

¹⁴² Law of the Republic of Uzbekistan “On the Organs of Self-Governance of Citizens”, April 1999, No. 7568-I.

¹⁴³ *Ibid.*, Art. 1.

¹⁴⁴ Abramson, Civil Society and the Politics of Foreign Aid in Uzbekistan, *Central Asia Monitor* 1999, 1-6 (4).

¹⁴⁵ It includes the mahalla chairman, the head of the women's committee, the local police inspector, members of the council of elders, school directors, religious leaders and other respected local figures. The mahalla women's committee reports to and coordinates its work with the deputy mayor who heads the district-level women's committee.

¹⁴⁶ For more details, see Dadabaev, *Identity and memory in Post-Soviet Central Asia: Uzbekistan's Soviet Past*, London/New York 2016.

In 1996 at the VI. session of the Oliy Majlis of the first convocation there were offered consistent democratization and liberalization of the judicial system.¹⁴⁷ It was noted that the widespread use of opportunities of arbitration courts was one of the priorities in improving the court structure. The idea which marked the beginning of a gradual liberalization of the judicial system has not lost its relevance today.

This is confirmed by special considerations of further reforming the judicial system, focusing on the “Concept of further deepening democratic reforms and formation of civil society in the country”, proposed by *Karimov*¹⁴⁸ at a joint session of both Houses of the Parliament. The concept examines the issues of further deepening of democratic market reforms and liberalization of the economy, the implementation of which requires the revitalization of the arbitration proceedings.

Thus, the country’s economic policy pursued to enhance the role and importance of small business and private entrepreneurship in addressing the socio-economic sphere, leads to an increase of the number of business entities. This also contributes to the recently adopted Law “On family business”,¹⁴⁹ which creates favourable conditions for the formation and activities of family enterprises as new organizational-legal forms of business. A number of successes were achieved in the result of the accelerated pace of development of small business as the most important sector. In recent years, the gross domestic product of Uzbekistan has been growing at an annual rate of not less than 8.2 per cent¹⁵⁰ and in 2016 it increased by 7.8 per cent¹⁵¹. Compared with 2000, the gross domestic product grew by 2.9 times, industrial production by 2.6 times; the volume of investment in the economy increased by 3.4 times, while the volume of foreign direct investment increased by more than 20 times. During the years 2005-2011 there were introduced more than five million new jobs in the economy of Uzbekistan, more than 60 per cent of them are in the area of small business and entrepreneurship. Today, more than 90 per cent of all business entities are small businesses. 54 percent of today's gross domestic product, 22 per cent of manufactured industrial, 98 per cent of agricultural production come from the area of small business.¹⁵² Today, the Uzbek State creates opportunities for its citizens

¹⁴⁷ Islam Karimov, ‘The most important tasks of deepening democratic reforms at the present stage’. Speech from 26.08.1996 at the VI session of the Oliy Majlis).

¹⁴⁸ Islam Karimov was the first president of [Uzbekistan](#) from its independence on September 1, 1991 to his death in 2016.

¹⁴⁹ The Law “On Family Entrepreneurship” was introduced in the Republic of Uzbekistan on April 26, 2012, which puts the meaning of family business uniquely different from the one practiced in the world. Enforcement of this law has brought many changes in the domain of entrepreneurship.

¹⁵⁰ International Conference on “The role and importance of small business and entrepreneurship in the implementation of socio-economic policy in Uzbekistan”, Tashkent 2014.

¹⁵¹ It was announced at the session of the Cabinet of Ministers on January 14, 2017, available at <http://www.gazeta.uz>.

¹⁵² *Supra* n. 150.

and entrepreneurs to choose the protection of rights and interests under market economy conditions. Arbitration is one of them.

Thus, today we can speak about the restoration and the development of historical traditions of the arbitration procedure in Uzbekistan as the most popular method of ADR. Like in Germany, a positive factor for the creation and activity of arbitration courts in Uzbekistan is the existence of a legislation, which provides an opportunity for the establishment and operation of such structures. On the other hand, there are some factors, which might be considered as having a significant impact on the future development of arbitration within the legal framework of business in Uzbekistan. *Komarov* indicates these factors as follows:

- following the traditional “formalist approach”¹⁵³ by state courts in dealing with commercial disputes;
- restricted experience of state judges in application of new substantive rules regulating business activities based on private law;¹⁵⁴
- lack of necessary skills in adversarial trial proceedings within the judiciary;
- lack of modern business experience of economic actors and the existence of undeveloped self-mechanisms in business community;
- a huge increase of the state courts’ caseloads concerning commercial disputes.¹⁵⁵

Despite the above factors, it is hoped that Uzbek arbitration institutions, with historical roots that reach back to the first half of the 1st Millennium BC, will foster the growth and development of free enterprises in Uzbekistan.

§ 2 The role of Arbitration Institutions in the development of Arbitration in Uzbekistan

2.1. Centre for the Study of Legal Problems

The development of arbitration as one of the methods of Alternative Dispute Resolution (ADR) deserves special attention in the process of establishing the legal infrastructure for business relations, including corporate governance.

¹⁵³ The English jurist [Sir Edward Coke](#) was among the first to popularize the formalistic approach to law in Anglo-American history. See for more details <http://legal-dictionary.thefreedictionary.com>.

¹⁵⁴ There are a lot of issues regarding recruitment, enumeration and training of judges in Central Asian countries, including Uzbekistan. On the one hand, national courts have lost many experienced judges because of their leaving the bench for private practice; on the other hand, many judges received their training and established their value system during the Soviet period. *De jure*, CIS judges can gain some experience in the legal principles of an “open” legal system, but *de facto*, this requires additional instruction on issues pertaining to the direct application of international treaties and customary law. See for example, Danilenko, Implementation of International Law in CIS States: Theory and Practice, *European Journal of International Law* 10 (1999), 51-69.

¹⁵⁵ See for more details Komarov, Legal Infrastructure of Commercial Arbitration in CIS countries, Experts Group Meeting on Dispute Resolution and Corporate Governance, UNCITRAL Secretariat, Vienna International Centre, June 25, 2003, available at <https://www.oecd.org/corporategovernanceprinciples/4700496.pdf>.

Increase of business entities and economic disputes may affect negatively the competent courts' activity, by expanding their workload. The development of arbitral tribunals as an alternative to state courts would greatly alleviate the burden of the competent courts in the resolution of disputes arising between the parties of economic relations. In this context, the Centre for the Study of Legal Problems in Tashkent in 2002 has carried out the project on creation and strengthening of Uzbek arbitration courts. In order to realize this project, a special commission has studied the creation and activities of arbitration courts of foreign countries.¹⁵⁶ In the result of the above activities the first arbitration court was created in November 2002. The Centre for the Study of Legal Problems produced the Regulation and Charter of the arbitration court. These were the first steps in creating and developing of arbitration courts in Uzbekistan and they have contributed to significant positive changes in many spheres, especially in the dispute resolution system, in strengthening business relationships of actors of small business and entrepreneurship.

2.2. Arbitration Courts

The term "Hakamlar sudi" is used interchangeably for "arbitration courts" in Uzbekistan. The term "Hakam" is the official word from the Arabic "Hakammu", which means for a third, unbiased person to be a judge. Arbitration court in Russian language is called treteiskii court, that is, third parties' (Tretii litsa) court of that context. Both terms are used in the Republic of Uzbekistan depending on the language of arbitration proceedings.

Arbitration courts are fairly new to the Republic of Uzbekistan as an institute of dispute resolution, which has been developed with the adoption of the Law "On Arbitration Courts" of 16 October 2006, which entered into force on 1 January 2007. The arbitration court is a private body for dispute resolution and is not included in the state court system. Nevertheless, arbitration courts are authorized to consider private law disputes and, on the basis of their considerations, to issue awards that are legally binding for the disputing parties and enforceable by law.

The Law of the Republic of Uzbekistan "On Arbitration Courts" gives the following definition of "arbitral tribunal": "The arbitral tribunal is a non-governmental body which resolves disputes arising out of civil relations, including economic disputes between business entities."¹⁵⁷

¹⁵⁶ Dolimov, The main stages of arbitration courts' development in Uzbekistan, in a compendium of articles "*Materiali mezhdunarodnih nauchno-prakticheskikh konferensiy*", Tashkent 2010, p. 229.

¹⁵⁷ Art. 3 of the Law of the Republic of Uzbekistan "On Arbitration Courts". Arbitration courts take acts, which are legally binding on disputing parties.

Arbitration courts differ significantly from state courts, but at the same time they have a large number of similarities. Activities of arbitral tribunals, if necessary, are accompanied by the coercive power of the state.¹⁵⁸ Thus, an arbitral tribunal, along with the state judicial system is one of the judicial bodies for protecting civil rights.¹⁵⁹ As practice shows arbitration is an effective mechanism for resolving disputes, ensuring confidentiality, efficiency and speed of the dispute resolution procedures, by allowing disputing parties to maintain business partnerships despite disagreements, and it is characterized by finality and enforceability of the decision.

Alternative dispute resolution institutions and arbitration courts can only supplement state proceedings, but do not replace them. If citizens and businesses within a State primarily appeal to arbitration courts to resolve their disputes, it is rather a symptom of lack of public confidence in the quality, objectivity or fairness of state courts.

2.3. Arbitration Courts at the Chamber of Commerce and Industry of the Republic of Uzbekistan

The Arbitration Court at the Chamber of Commerce and Industry (hereinafter CCI) of the Republic of Uzbekistan was established on 12 January 2007 and today is one of the most reputable and reliable arbitration courts in Uzbekistan.

On the territorial governance of CCI of Uzbekistan 15 arbitration courts are established and are functioning. Arbitral tribunals shall consider disputes arising out of civil relations, including, but not limited to commercial disputes, in the exercise of entrepreneurial and other economic activities, with the exception of disputes which, in accordance with law, cannot be considered by arbitral tribunals. Currently, more than hundred highly qualified specialists in the field of law, economics, computer science, and others are included to the lists of arbitration courts. Four doctors and five candidates of juridical sciences are among the arbitration specialists in the lists of arbitration courts.

The size of the arbitration fee on the issues stipulated by the Regulation on the Arbitration Court is fixed by the Regulation “On fees, costs and expenses in the arbitration court” of 2007. If the price of the claim is

- to 1 million soums – 1.5 per cent of the amount of the claim, but not less than three times the minimum wage;

¹⁵⁸ For example, in the case of non-fulfilment of the arbitral award by the losing party voluntarily, the legislation provides a mechanism for compulsory enforcement of the decision.

¹⁵⁹ Art. 10 of the Civil Code of the Republic of Uzbekistan.

- more than 1 million soums to 10 million soums – 1 per cent of the amount of the claim, but not less than three times the minimum wage;
- more than 1 million soums – 0.5 per cent of the amount of the claim, but not less than three times the minimum wage.¹⁶⁰

For claims on non-property disputes, if it is impossible to determine the amount of the claim, the arbitration fee is set at ten times the minimum wage.

The arbitration fee is reduced to:

25% – if it is subject to proceedings by the sole arbitrator (its size cannot be less than two times the minimum wage);

25% – if the trial of the case is terminated without judgment;

50% – if the claimant withdrew the claim prior to the first meeting of the arbitration court due to the fact that the parties have settled the dispute by peaceful means, as well as in other cases, obtaining by the arbitration court the application for refusal of the parties on considering the dispute at the arbitration court prior to the first session.¹⁶¹

The statistics presented in the Tables 1 and 2 generally confirm the growth and improvement of arbitration in Uzbekistan in the period 2007-2013, mainly by the arbitration courts under the CCI of Uzbekistan in Tashkent and its regional departments.

Table 1: Number of cases treated by arbitration courts under the CCI of Uzbekistan in Tashkent and its territorial departments¹⁶²

| No. | Years | Number of cases | Price of the claims |
|-----|----------------|-----------------|----------------------------------|
| 1 | 2007 | 2 | 2 115 960 soum |
| 2 | 2008 | 20 | 501 294 290 soum |
| 3 | 2009 | 497 | 30 621 120 320 soum |
| 4 | 2010 | 1 281 | 29 730 095 363 soum |
| 5 | 2011 | 463 | 8 179 480 144 soum |
| 6 | 2012 | 1 226 | 91 898 720 522 soum |
| 7 | 2013 | 668 | 50 080 428 243 soum |
| 8 | 2014 | 1 421 | 47 220 029 thousand sums |
| 9 | 2015 | 1 142 | 57 403 927 thousand sums |
| 10 | 2016 | 882 | 57 669 803 thousand sums |
| | Totally | 7 602 | 373 307 015 thousand sums |

¹⁶⁰ Articles 3 and 4 of the Regulation “On fees, costs and expenses in the arbitration court” of 2007.

¹⁶¹ *Ibid.*, Art. 8.

¹⁶² The data for Tables 1 and 2 were obtained from CCI of Uzbekistan during the researcher’s trip to Uzbekistan during September-October 2014; see also Otakhonov, Foziljon / Radjapov, Husain, Review of Arbitral Tribunals Activity in Uzbekistan (2015-2016), <https://www.ujols.org/files/Otakhonov-UJOLS.pdf>.

Table 2: Number of cases treated by the Arbitral Tribunal at the CCI of Uzbekistan

| No. | Years | Number of cases | Price of the claims |
|-----|----------------|-----------------|----------------------------|
| 1 | 2007 | 2 | 2 116 960 soum |
| 2 | 2008 | 20 | 501 294 290 soum |
| 3 | 2009 | 106 | 1 217 581 663 soum |
| 4 | 2010 | 114 | 3 312 408 017 soum |
| 5 | 2011 | 90 | 1 978 844 032 soum |
| 6 | 2012 | 100 | 16 725 148 841 soum |
| 7 | 2013 | 73 | 29 060 227 296 soum |
| 8 | 2014 | 50 | 16 302 258 thousand sums |
| 9 | 2015 | 46 | 34 018 003 thousand sums |
| 10 | 2016 | 63 | 15 761 399 thousand sums |
| | Totally | 664 | 52 797 620 099 soum |

2.4. Association of Arbitration Courts

Due to the lack of a legal basis for arbitration courts, a lot of problems and hurdles regarding the development and implementation of arbitration courts existed until the adoption of the Presidential Decree No. 3619 "On measures for further improving the system of legal protection of enterprise entities" of 2005. According to this Decree, the Cabinet of Ministers of the Republic of Uzbekistan, the Ministry of Justice of Uzbekistan, the High Economic Court of Uzbekistan and the Chamber of Commerce and Industry of Uzbekistan were engaged in the creation of the legal project on "arbitration courts".

The Association of Arbitration Courts of Uzbekistan (AACU) was created in Uzbekistan in May 2009 to facilitate the creation, development and support of arbitration courts in the country, to provide the protection of the rights and legal interests of the arbitrators,¹⁶³ as well as to assist in providing the necessary instructional literature on arbitration courts. Today there are one High Qualification Commission, five authorities and four departments at the AACU and they function in particular directions in regard to the activities of arbitration courts.¹⁶⁴ From the first years of its creation, the AACU began to establish its representative offices in regions of Uzbekistan. The representative offices of AACU are registered as legal entities at the departments of the Ministry of Justice in the regions.¹⁶⁵

Another perspective of the Association is seen in the establishment of the Academy of Arbitration Courts (a non-state educational institute) at the AACU. It has been established in 2010 for professional training of arbitrators and for the improvement of professional skills of

¹⁶³ Dolimov (*supra* n. 149), p. 230.

¹⁶⁴ *Ibid.*

¹⁶⁵ The first representative offices of the AACU were registered in the regions Bukhara, Samarqand and Surkhandarya.

staff in conducting office-work in arbitration courts. It is important here to mention that the “International Relations Department” at the AACU and the Academy cooperate with international organizations and non-state, non-commerce organizations in order to realize the objectives of the Academy of Arbitration Courts.¹⁶⁶

In the first half of 2012, a number of law propagation activities were conducted by the Association of Arbitration Courts. For example, there were organized 681 scientific and practical conferences, seminars and round tables, 4,292 conversations and reports among the population. 5,153 citizens were consulted individually and the arbitrators of the Association participated in 363 events organized by local government authorities. 277 materials were placed in the media: 110 articles were published, 91 speeches on the radio and 76 TV appearances were made.¹⁶⁷

The above-mentioned measures positively impacted the increase of the arbitration courts’ activities. This is confirmed by the fact that in 2011, 7,852 lawsuits were reviewed of over \$ 80 billion soums, which is significantly higher than the indicators of previous years. In the first half of 2011, 2,871 statements of claims in the amount of 26.4 billion soums were reviewed by the arbitration courts represented by the AACU Association and in in the first half of 2012, 5,452 claims (189% compared to 2011) were reviewed in amount of 38.5 billion soums (145% compared to 2011).¹⁶⁸

¹⁶⁶ Personal interviews in September-October 2014 with arbitrators of Bukhara and the chairman of the AACU (Bukhara Department). According to interview sources, in 2010 the AACU in cooperation with the OSCE Project Co-ordinator has carried out the Project “On improvement of qualifications of arbitrators of Uzbekistan”. In 2011, the International Scientific Conference on International Commercial Arbitration was organized in cooperation with the OSCE Project Co-ordinator in Uzbekistan. In turn, in the same year the chairmen of leading Arbitration Centres and Courts of Uzbekistan participated in the international conferences held in France and Belgium and exchanged their experience.

¹⁶⁷ At present the Law Propagation and Media Authority at the AACU conducts activities concerning with introducing arbitration courts in Uzbekistan, propagating knowledge of the Law “On Arbitration Courts” among the general public and increasing the trust of entrepreneurs in the arbitration system directly or through mass media.

¹⁶⁸ This figure has been obtained from several interview sources during the researcher’s trip in September-October 2014 and is believed to be a rough estimate.

Table 3: Information activities of the Bukhara region Arbitration Court under the Bukhara Department of the AACU in August 2014¹⁶⁹

| No. | Events | Number of events | Times of events |
|------------|---|-------------------------|--|
| 1 | Round tables and lectures for ordinary citizens | 64 | 12 August at 14:00 |
| 2 | TV programs | | |
| 3 | Radio programs | | |
| 4 | Articles in newspapers | 1 | |
| 5 | Scientific-practical conferences and seminars | 2 | 5 August at 15:00 |
| 6 | Personal meetings with citizens | 78 | daily |
| 7 | Participation of Court's members in events held by the government | 2 | Bukhara region and city, government office hours |
| | Totally | 147 | |

Source: The author.

¹⁶⁹ The data were obtained from the Bukhara region Arbitration Court under the Bukhara Department of the AACU during the researcher's trip in September-October 2014.

Table 4: Cases treated by the Bukhara Arbitration Courts under the Bukhara Department of the AACU in August 2014

| No. | Arbitration Courts | Name and surname of the arbitrator | Hearings on the merits | | From this | | Information activities | | | | | | | |
|-----|------------------------------------|------------------------------------|------------------------|--------------------|----------------------|------------|------------------------|-------|-----------|--------------|-----------|--------------|---------|------------|
| | | | Number | Amount | By a sole arbitrator | By a panel | TV | Radio | Newspaper | Subscription | Lecture | Round tables | Seminar | Conference |
| 1 | Court under the Bukhara Department | M.F. Hasanovich | 85 | 822 000 000 | 95 | | | | | | 3 | 61 | | |
| 2 | Bukhara city | Kh.B. Mavlonov | 2 | 120 000 000 | 3 | | | | | | 1 | 6 | | |
| 3 | Bukhara city | O.G. Avazov | 2 | 80 000 000 | 2 | | | | | | 1 | 4 | | |
| 4 | Bukhara city | Z.R. Ruziyev | 2 | 65 000 000 | 2 | | | | | | 1 | 10 | | |
| 5 | Peshku region | Kh.S. Davlatov | 3 | 47 500 000 | 3 | | | | | | 1 | 14 | | |
| 6 | Gijduvon region | S.B. Jamoatov | | | | | | | | | | | | |
| 7 | Romitan region | Kh.S. Davlatov | 45 | 89 500 000 | 4 | | | | | | 2 | 15 | | |
| 8 | Jondor region | V.K. Kazakov | 3 | 74 500 000 | 3 | | | | | | 1 | 10 | | |
| 9 | Olot region | O.N. Kandimov | 4 | 86 300 000 | 2 | | | | | | 1 | 9 | | |
| 10 | Korovul-bozor region | Kh.R. Fayziyev | 6 | 260 000 000 | 3 | | | | | | 1 | 11 | | |
| | Totally | | 152 | 744 800 000 | 117 | | | | | | 12 | 140 | | |

Source: The author.

2.5. International Commercial Arbitration Court (ICAC) at the Chamber of Commerce and Industry of Uzbekistan

2.5.1. The creation of the ICAC

The realization of economic activities is accompanied by transactions between the actors of market relations, in the implementation of which it often occurs, that the terms of contracts and agreements are violated or the obligations are not performed properly, which disrupts the implementation of contracts, leads to a decrease in business activity and inhibits the economic cycle.¹⁷⁰ In such circumstances arbitration, a fast, reliable alternative to litigation, is recognised by the international community as the first port of call for resolving transnational commercial disputes.

Otakhonov states that judicial and legal reform, carried out in Uzbekistan, provides for the development of alternative dispute resolution methods, including arbitration. The development of an alternative system of independent international arbitration courts, will allow business entities to quickly and competently solve legal problems for the protection of their rights and legal interests and to create conditions for the normal functioning of the market economy.¹⁷¹

Thanks to a contribution from the German government the OSCE Project-Coordinator in Uzbekistan could support the drafting of a Law on International Commercial Arbitration in Uzbekistan. The main objective of the project was to ensure legal security for Uzbek entrepreneurs in the global economy and likewise for foreign entrepreneurs in Uzbekistan. As a preparatory step the project analysed international standards and agreements on international commercial arbitration and compiled the relevant Uzbek legislation.

It should be mentioned that like in other former states of the USSR, Permanent Arbitration Courts in Uzbekistan linked to Chambers of Commerce¹⁷² and their rules have been approved by the Chamber of Commerce and Industry in accordance with the legal acts of the government of Uzbekistan.

The International Commercial Arbitration Court (hereinafter ICAC) at the Chamber of Commerce and Industry (CCI) of the Republic of Uzbekistan was established by the Executive Committee of the CCI on 1 February 2011 and placed on an organ registration on 15 February 2011.¹⁷³

¹⁷⁰ Asyanov (*supra* n. 7), p. 239.

¹⁷¹ Otakhonov, Organizational and legal measures for International Commercial Arbitration in Uzbekistan, (article in Russian language), available at <http://www.cisarbitration.com/2014/02/14/арбитраж-в-узбекистане>.

¹⁷² For instance, Russian Arbitration Court for Domestic Disputes, the Ukrainian Court for International Commercial Arbitration, Estonian Arbitration Court and Belorussian Arbitration Courts have been linked to the Chambers of Commerce and Industry. *Cf.* Lebedev (*supra* n. 125), p. 275.

¹⁷³ Certificate number 22 “On the registration of the International Commercial Arbitration Court at the Chamber of Commerce of the Republic of Uzbekistan” was received from the Tashkent City Justice Department in 2011.

The ICAC is an independent Permanent Arbitration Tribunal operating in accordance with the Law of the Republic of Uzbekistan “On Arbitration Courts”, other normative-legal acts, the Regulation of the ICAC, the Rules of the ICAC and the Regulation on fees, expenses and costs of the parties to the Tribunal, which is an integral part of the Regulation of the ICAC.

The ICAC was established in order to:

- establish an effective dispute settlement mechanism, including the creation of a dispute resolution mechanism between foreign and domestic companies;
- provide protection of legal rights and interests of natural and legal persons and individual entrepreneurs;
- promote fast, cost-efficient and confidential dispute resolution procedures within the jurisdiction of the ICAC;
- preserve and further strengthen the business-partner relationships of the disputing parties, despite the disputes existing between them.

According to the Regulation of the ICAC, the ICAC considers disputes arising out contractual and other civil law relationships arising in the course of foreign trade and other forms of international economic relations, if at least one of the parties to the dispute is registered outside the Republic of Uzbekistan, as well as disputes arising between enterprises with foreign investments, international associations and organizations established in the territory of Uzbekistan, between themselves, disputes between their participants, as well as their disputes with other legal entities of Uzbekistan.¹⁷⁴ From the above it is clear that not only foreign companies, located outside Uzbekistan, but also enterprises with foreign investments may sue for the purpose to protect their civil and other rights. The Ministry of Justice noted that the International Arbitration Court in Uzbekistan will make arbitration more accessible and less expensive for local entrepreneurs due to costs associated with travel, attorneys' fees, translators and others.¹⁷⁵

The ICAC consists of a chairman, his deputy, arbitrators, the secretary and other staff. In the course of the arbitration the ICAC attracts specialists, experts, translators, secretary of the arbitral proceedings, and other persons for the provision of arbitration.¹⁷⁶

Otakhonov noted that since the day of its foundation the ICAC has considered six disputes with claims amounting to \$ 1 844 388.96, of which one (\$ 188 600.42) was terminated, and another one (\$ 820 043.10) was set aside. Four arbitral awards have been enforced as a result of

¹⁷⁴ Art. 2 of the ICAC Regulation.

¹⁷⁵ Personal interview in August 2016 with the Head of Department “Investments and the Protection of Investor’s rights” (Ministry of Justice of Uzbekistan, Bukhara region).

¹⁷⁶ Art. 4 of the ICAC Regulation.

consideration of other disputes and a total of \$ 808 535.48 was paid by the respondents.¹⁷⁷ It should be noted that companies of the Republic of Belarus, Kazakhstan, Uzbekistan (claimants) and China, Denmark, Germany and Uzbekistan (respondents) participated in ICAC proceedings.

2.5.2. The ICAC presidium

The presidium of the ICAC consists of *ex officio* the chairman, and his deputy, as well as five arbitrators appointed for a period of five years from the list of arbitrators by the Executive Committee of the CCI of the Republic of Uzbekistan. The chairman of the presidium is at the same time the chairman of the ICAC.¹⁷⁸ If the new appointment of the presidium's members had not been accomplished by the expiry of an indicated period, previously appointed members of the presidium will remain in office until such an appointment. With an advisory capacity, the Executive Secretary of the ICAC participates in the meetings of the presidium of the ICAC.¹⁷⁹ The presidium will perform the functions assigned to its competence by the ICAC Regulation, analyses the arbitration practice, including the application of the Regulation of the ICAC, and considers the matters of information spreading on activities of the ICAC, international relations and other issues relating to the ICAC activities. The ICAC presidium submits the list of arbitrators and proposals for its change to the CCI of the Republic of Uzbekistan for approval.¹⁸⁰

2.5.3. The chairman of the ICAC

The chairman of the ICAC will be appointed by the Executive Committee of the CCI of Uzbekistan for a period of five years from a list of arbitrators. If the new appointment of the chairman of the ICAC had not been accomplished by the expiry of an indicated period, the previously appointed chairman of the ICAC and his deputy will remain in office until such an appointment.¹⁸¹ The chairman of the ICAC will perform the functions within his competence assigned by the Regulation of the ICAC, acts on behalf of the ICAC in Uzbekistan and abroad. The chairman of the ICAC is responsible for the general management of the organization of the ICAC's activities and performs procedural functions under the Rules of the ICAC.

¹⁷⁷ Speech of Otakhonov (Chairman of the ICAC) in the event organized by CCI Uzbekistan, 26 January 2018.

¹⁷⁸ Art. 4 of the ICAC Regulation.

¹⁷⁹ *Ibid.*

¹⁸⁰ *Ibid.*

¹⁸¹ Art. 5 of the ICAC Regulation.

2.5.4. The arbitrators of the ICAC

The CCI of Uzbekistan on the proposal of the presidium of the ICAC will approve the list of arbitrators for a period of five years, where the name and surname of the arbitrator, his education and place of employment, academic degree and title, speciality and knowledge of foreign languages are indicated.¹⁸² In performing their functions the arbitrators are impartial and independent. They are not the representatives of the parties involved in the case. At the moment, the number of arbitrators of the ICAC is seven. Special attention must be paid to the requirements for arbitrators. They must be a citizen of the Republic of Uzbekistan, who is more than twenty-five years old, is able to ensure a fair resolution of a dispute, neither directly nor indirectly interested in the outcome of a dispute, who is independent from the parties of the arbitration agreement and who has agreed to perform the duties of an arbitrator.¹⁸³ These requirements are established in accordance with the Law of the Republic of Uzbekistan “On Arbitration Courts” and will be valid until the adoption of the Law “On International Commercial Arbitration”.

2.5.5. The secretariat of the ICAC

The secretariat is composed of the executive secretary, deputy secretary and other members of the secretariat. The executive secretary and his deputy are appointed by the chairman of the ICAC agreed by the Executive Committee of the CCI. Persons having a higher legal education and English language proficiency can be appointed as executive secretary and his deputy by the ICAC. The division of responsibilities between the executive secretary and his deputy, and between other members of the secretariat is laid down by the chairman of the ICAC. In carrying out the functions related to the consideration of cases in the ICAC, the executive secretary shall be guided by the ICAC Rules and is subordinated to the chairman of the ICAC.¹⁸⁴

2.5.6. The costs of arbitration

In filing a claim or request for the provision of requirements, the plaintiff is obliged to pay the registration fee. The claim or request will not be considered to be submitted before the payment of the registration fee. The registration fee, paid regarding the statement of a claim or the application for the provision of requirements, is not refundable. For each filed claim, the plaintiff is obliged to pay an arbitration fee in advance. The registration fee will be included to the amount, which the claimant has to pay in advance. Prior to the payment of the arbitration

¹⁸² *Ibid.*, Art. 3.

¹⁸³ Art. 14 of the Law “On Arbitration Courts”, Paragraph 2 of Art.5 of the ICAC Regulation.

¹⁸⁴ Art. 7 of the ICAC Regulation.

fee's full amount, the case remains open. The registration and arbitration fees, the order of payment and distribution, as well as the procedure for covering other expenses of the arbitration are laid down by the Regulation "On arbitration fees and expenses", which is an integral part of the Rules of the Tribunal.

2.5.7. Need for a Special Law on International Commercial Arbitration

In conclusion, it should be noted that the main obstacle to the further development of the ICAC in Uzbekistan is the absence of a special Law on International Commercial Arbitration. At present, in accordance with the program of measures to implement the concept of further deepening democratic reforms and the formation of a civil society in the country, proposed by President *Karimov*, the work on the Draft Law "On International Commercial Arbitration" is ongoing. This Draft Law is generally in line with the main principles of the UNCITRAL Model Law on International Commercial Arbitration of 1985. In this process, best practices of leading foreign countries and universally recognized norms of international law are under scrutiny. The Law on International Commercial Arbitration has been in draft form since 2011 and submitted to the Government of Uzbekistan for consideration. It is expected that this Law will mainly aim to regulate arbitration courts for settling foreign or cross-border commercial disputes between business entities and individuals. In accordance with the Draft Law, these tribunals shall be open for all categories of appellants, including residents and non-residents of Uzbekistan. Currently, the ICAC carries out its activities in accordance with the Law of the Republic of Uzbekistan "On Arbitration Courts", norms of International Law and local acts, regulating its activities.¹⁸⁵ The adoption of a special Law on International Commercial Arbitration will give entrepreneurs greater confidence to the ICAC, and its activities will acquire a more legitimate appearance.

2.6. Tashkent International Arbitration Center

In November 2018, the Tashkent International Arbitration Center (TIAC) under the Chamber of Commerce and Industry of the Republic of Uzbekistan was established in Uzbekistan. The TIAC will resolve disputes arising from contractual and other civil law relations between commercial organizations through international arbitration. The TIAC will also resolve disputes related to investments, intellectual property and blockchain technologies.

Accepting applications for dispute resolution through international arbitration, as well as holding hearings and other proceedings, can be carried out online using modern information

¹⁸⁵ Art. 1 of the ICAC Rules.

and communication technologies without the presence of arbitrators and parties. Representatives of parties involved in resolving disputes through international arbitration at the TIAC do not require a license to practice law when reviewing arbitral awards in the competent courts of the Republic of Uzbekistan, nor when considering any issues in the arbitration disputes considered at the TIAC.¹⁸⁶

The TIAC has the right to resolve disputes through a mediation procedure and other alternative dispute resolution methods in the manner prescribed by law. Relevant TIAC arbitration rules are still being considered and have not yet been published.

2.7. The TIAC Court of Arbitration

The TIAC Court of Arbitration is a fully autonomous organ within the TIAC (“Centre”) and is the only body within the Centre’s structure that administers the disputes according to the TIAC Rules of Arbitration in complete independence from the Centre, its founders, the Director or any other entities. The TIAC Court of Arbitration is assisted by the TIAC Secretariat. In order to avoid issues of conflict of interest and to maintain the strictest standards of impartiality, independence and neutrality, the Centre has introduced the rule that no Member of the TIAC Court of Arbitration, nor the TIAC Director or the TIAC Deputy Director can act as arbitrators under the TIAC Rules of Arbitration during their term of service.

The TIAC Court of Arbitration consists of an odd number of prominent arbitrators and members of the arbitration community. Uzbek nationals can comprise up to twenty percent of the Members of the TIAC Court of Arbitration.

The exclusive powers of the TIAC Court of Arbitration comprise:

- confirming, appointing or replacing the arbitrators;
- fixing the arbitration costs and overseeing the arbitral process;
- scrutinizing the awards to ensure their enforceability.

§ 3 Perspectives of the Rule of Law in Uzbekistan

During the first years of independence, the government of the Republic of Uzbekistan has set the goal of building a constitutional democratic state ruled by law and a strong civil society. Human rights, rule of law, democracy and market economy were regarded as new conceptions for the country. Today, these conceptions continue to be realized in Uzbekistan stage-by-stage and in connection with considering national circumstances and international best practices. It

¹⁸⁶ Korobeinikov/Inshakova., Uzbekistan, in: *The Backer McKenzie International Arbitration Yearbook 2019*, available at <https://globalarbitrationnews.com/baker-mckenzie-international-arbitration-yearbook-2019-2020-uzbekistan/>.

is important to note that a fair legal system, ensuring the protection of rights and interests of citizens is an essential component of a democratic state. Over the years, several reforms in strengthening the judicial system, ensuring protection of human rights, rule of law and independence of judiciary have been made.¹⁸⁷ In October 2016 complex legal reforms, which included several anticorruption elements, were announced by the interim President Shavkat Mirziyoyev. He assigned to the Ministry of Justice the responsibility for coordinating reforms affecting the rule of law and judicial system. The new administration presented its goals in this area at the International Hotel in Tashkent on January 27, 2017:

- to ensure that the judiciary is truly independent, to increase the authority of the courts, and to democratize and improve the judicial system on the basis of the best national and international practices;
- to guarantee the protection of citizens' rights and freedoms;
- to improve administrative, criminal, civil and commercial law;
- to fight crime and advance crime prevention, including relevant anticorruption measures;
- to strengthen the rule of law and build public trust in the legal system.¹⁸⁸

3.1. Reforms in the judicial system

The Constitution of 1992 and the Law “On Courts” of the Republic of Uzbekistan of 1993¹⁸⁹ fix the basis and the principles of the present judicial system of Uzbekistan which were further developed and contained in new Codes (Civil, Economic and Criminal Procedure Codes) and other legislative acts of Uzbekistan. The judicial system of Uzbekistan is primarily comprised of three branches: Constitutional Court of Uzbekistan, courts of general jurisdiction and economic courts.

The Constitutional Court of Uzbekistan was established in 1995 and began its activity in 1996, considering international experience of constitutional courts functioning in other countries.

¹⁸⁷ For example, the High Qualification Commission of selection and recommendation of candidatures for becoming a judge (1998) and the Commission on considering the issues connected with an assignment and discharging of judges (1999) were attached to the President of the Republic of Uzbekistan.

¹⁸⁸ Cf. Sever, Mjuša, Judicial and Governance Reform, in: Starr, Frederik S. / Cornell, Svante E. (eds.), *Uzbekistan's New Face*, Lanham et al. 2018: Rowman & Littlefield, pp. 115-145.

¹⁸⁹ The new edition of the Law “On Courts”, dated from 2 September 1993 (as amended up to 27 December 1996), was an important step in the liberalization of the judicial sphere. According to the Law, effective mechanisms for the implementation of the constitutional principle of separation of powers and independence of courts as a full-fledged independent branch of government have been created, and the judicial system was completely derived from the control and influence of the executive power. The appeals procedure and the cassation instance have been reformed for the consideration of cases. The specialization of the courts has improved the quality of cases and increased the guarantees for protection of rights and freedoms of citizens. The law also covered the issues of selection and appointment of the judicial personnel.

Legislative and executive branches' acts are checked by the Constitutional Court; this is considered to be one of the important parts of the judicial system's upper level, ensuring compliance of legislative and executive acts with the Constitution. It is also empowered to judge the constitutionality of treaty obligations and to interpret the Constitution and other laws.¹⁹⁰

Another part is the Supreme Court, which operates as both: a court of first instance and an appellate court for civil and criminal cases. It supervises the activities of the lower level courts, its rulings are final and binding throughout the Republic of Uzbekistan.¹⁹¹

Courts of general jurisdiction were established and the legal framework of the judicial system has been expanded. Today courts of general jurisdiction (first instance) consider annually more than 140,000 cases in disputes arising from civil, family, employment, residential and other legal relationships.¹⁹² The lower level of the Uzbek judicial system includes:

- regional, city and district courts for civil cases;
- regional, city and district courts for criminal cases;
- military courts.

In addition to the above-mentioned courts there is a system of economic courts, specialized in what would be classified roughly as “commercial” in the West.

Effective courts are essential for economic development. As argued by *Dammann* and *Hansmann*, the quality of national judicial systems differs from country to country. The courts of some countries resolve commercial disputes quickly, fairly, and economically, others however, resolve them slowly, inefficiently and they are often incompetent, biased, or corrupt. These differences affect not only litigants but also the nation as a whole.¹⁹³

The creation of the Uzbek system of economic courts became an essential factor in providing the rule of law in economic relations. The High Economic Court has had similar functions as the Supreme Court; the distinction between them has been that the High Economic Court has dealt with commercial disputes, which may arise between entrepreneurs and between legal entities (local and foreign)¹⁹⁴ till present days.¹⁹⁵ It has published periodic bulletins including texts of leading decrees, guiding explanations and decisions in private disputes.

¹⁹⁰ Articles 108 and 109 of the Constitution of Uzbekistan.

¹⁹¹ *Ibid.*, Art. 110.

¹⁹² See Mamasiddikov, Civil procedural code of the Republic of Uzbekistan: some aspects of development and improvement, *Molodoj uchyoniy* 2014:4, 854-856.

¹⁹³ Cf. Dammann/Hansmann, Globalizing Commercial Litigation, *Cornell Law Review* 94:1 (2008), 1-71 (3).

¹⁹⁴ Art. 111 of the Constitution of Uzbekistan.

¹⁹⁵ On 21 February 2017, a Presidential Decree “On measures of core improvement of the structure and efficiency of the judicial system of the Republic of Uzbekistan” was signed and a single supreme judicial authority, *i.e.* the Supreme Court of Uzbekistan, in the field of civil, criminal, administrative and economic courts' governance was created.

Unlike the German judicial system, the division of the jurisdiction into the ordinary and economic courts creates the peculiarity of delimitation of competences of Uzbek courts. This corresponds to a separate Civil and Economic Procedure Code. Ordinary courts, according to the Civil Procedure Code of Uzbekistan (hereinafter CPC)¹⁹⁶ deal with all civil, family, labour, administrative and agricultural disputes, if at least one party is a citizen of Uzbekistan. The jurisdiction of economic courts shall be determined in accordance with Art. 25 of the Economic Procedure Code of Uzbekistan (hereinafter EPC)¹⁹⁷. According to it, economic courts deal with the following economic disputes:

1. cases involving disputes arising out of civil, administrative and other legal relations between legal entities in the sphere of economy and the citizens, engaged in entrepreneurial activities without establishment of a legal entity and acquiring the status of an individual entrepreneur in accordance with legislation;
2. cases on identification of facts that are important for the occurrence, alteration or annulment of rights of organizations and citizens in the sphere of economy;
3. cases on bankruptcy of organizations and citizens;
4. cases related to arbitration proceedings;
5. cases relating to corporate disputes that are determined in Art. 30, excluding labour disputes;
6. cases related to the recognition and enforcement of foreign court judgments and arbitration awards.¹⁹⁸

Economic courts consider relevant matters involving organizations and citizens of the Republic of Uzbekistan carrying out entrepreneurial activities, as well as foreign organizations, foreign citizens, stateless persons, if not otherwise stipulated by international agreements of the Republic of Uzbekistan.¹⁹⁹

The division of jurisdiction into civil and economic courts was the Soviet system's concept which has existed in many CIS countries²⁰⁰ as well as in Uzbekistan. In contrast to the Uzbek procedural codes, the German Code of Civil Procedure²⁰¹ is applicable to civil and legal disputes of all kinds, including between legal entities.

¹⁹⁶ Art. 26 of Civil Procedure Code of Uzbekistan. The CPC of Uzbekistan was approved by the Law of the Republic of Uzbekistan of 22 January 2018, No. ZRU-460.

¹⁹⁷ The Economic Procedure Code of Uzbekistan was approved by the Law of the Republic of Uzbekistan of 24 January 2018, No. ZRU-461.

¹⁹⁸ Art. 25 of the Economic Procedure Code of Uzbekistan.

¹⁹⁹ *Ibid.*

²⁰⁰ Verschinin, Reform des Zivilprozessrechts und des Wirtschaftsprozessrechts in den Ländern der GUS – Grundlegende Richtungen und Probleme, in: Boguslawskij/Trunk (eds.), *Reform des Zivil- und Wirtschaftsprozessrechts in den Mitgliedstaaten der GUS*, Bielefeld 2004, pp. 7-10 (8).

²⁰¹ Zivilprozessordnung – ZPO.

Trunk notes that another big difference between German and Uzbek court's competences is that in Uzbek procedural law, civil, family and labour disputes are not separated from administrative disputes.²⁰² The administrative procedure in Uzbekistan, unlike in Germany, is regulated by the provisions of CPC and EPC of Uzbekistan.

The division of court branches (into ordinary and economic courts) results in difficulties in defining the competences of courts and problems in court practice. *Boguslawski* and *Verschininn* point out primarily the issues related to determining the competences or responsibilities and contradictions in commenting the substantive civil law.²⁰³ The matter of delimitation of competences is not still discussed from a scientific perspective in Uzbek literature. *Tanikulov* was of the opinion that the adoption of the new EPC of Uzbekistan would be a big step in the judicial reform in Uzbekistan.²⁰⁴

One may assume that the reorganization of the Uzbek judiciary will be realized in a short term, as on 21 February 2017 the President of the Republic of Uzbekistan *Mirziyoyev* signed the Decree "On measures of core improvement of the structure and efficiency of the judicial system of the Republic of Uzbekistan".²⁰⁵ This Decree explains that the existence of two supreme judicial bodies (the Supreme Court and the High Economic Court of the Republic of Uzbekistan) leads to a repetition of responsibilities related to the governance of the judicial system and the lack of a uniform judicial practice. It provides:

- incorporation of the Supreme Court and the High Economic Court of Uzbekistan, creation of a single supreme judicial authority, *i.e.* the Supreme Court of the Republic of Uzbekistan, in civil, criminal, administrative and economic proceedings;
- organization of competent administrative courts (of the Republic of Karakalpakstan, regions, Tashkent city and districts (city)), authorised to consider administrative disputes arising from public-legal relationships as well as disputes on administrative offences;
- transfer of the Military Collegium of the Supreme Court, the Military Court, district and territorial military courts to the Supreme Court of the Republic of Uzbekistan;
- formation of a department to ensure for the activities of the courts under the Supreme Court of the Republic of Uzbekistan on the basis of the Department of Execution of

²⁰² Trunk, Reform des Zivil- und Wirtschaftsprozessrechts in den GUS-Staaten – Bemerkungen aus deutscher Sicht, in: *Boguslawskij/Trunk (supra n. 200)*, pp. 11-18 (14-15).

²⁰³ Verschinin (*supra n. 200*), p. 8; *Boguslawskij*, Internationales Zivilprozessrecht in den GUS-Staaten, in: *Boguslawskij/Trunk (supra n. 200)*, pp. 19-32 (23).

²⁰⁴ Tanikulov, Das vereinfachte Verfahren der Behandlung von wirtschaftlichen Streitigkeiten nach der Gesetzgebung der Republik Uzbekistan, in: *Boguslawskij/Trunk (supra n. 200)*, pp. 155-166.

²⁰⁵ The Decree came into force on 1 June 2017.

Court Decisions, logistical and financial support of the courts under the Ministry of Justice of the Republic of Uzbekistan;

- transformation of the Research Centre for Democratization and Liberalization of Legislation and Procuring of the Independence of the Judicial System at the Supreme Court into the Research Centre for the Study of Justice Issues at the Supreme Council of the Judiciary of the Republic of Uzbekistan.²⁰⁶ The former Research Centre was created in 2008. Its main activities were:
 - analysis of law-enforcement practice;
 - analysis of judicial practice;
 - analysis of the state of provision the independence of the judiciary;
 - elaboration of suggestions on improvement of legislation.

The Presidential Decree also provides for other measures aimed at improving the efficiency and authority of the judicial power in the Republic of Uzbekistan.

Court decisions or enforcement actions are appealable through an appeals process that can be initiated in accordance with the Economic Procedure Code and other applicable laws of Uzbekistan.

In the period 2013-2015, the system of economic courts and civil courts implemented a mechanism, allowing the submission of necessary documents for proceedings in electronic form. Using videoconferencing in the activities of economic courts became another step in globalizing of commercial litigation.²⁰⁷

The development of the ‘E-SUD’ electronic case management system was among the crucial achievements of the project ‘Civil Justice Reform: Effective Court Management’.²⁰⁸ It was presented by Uzbekistan at the 68th session of the United Nations General Assembly in New York in September 2013.²⁰⁹ According to the facts provided by the court for civil cases of

²⁰⁶ Presidential Decree “On measures of core improvement of the structure and efficiency of the judicial system of the Republic of Uzbekistan” of 21 February 2017.

²⁰⁷ To strengthen this reform, several legal-normative acts, *e.g.*, the Presidential Decree ‘On measures of core improvement of social protection of judges and judicial staff’ (August 2012), the Regulation of the Cabinet of Ministers of the Republic of Uzbekistan ‘On measures of implementation of modern communication-information technologies into the courts’ (December 2012), as well as the Law of Uzbekistan ‘On the openness of public authorities and administration’ (2014) were adopted. These normative acts focus on improving the effectiveness of public institutions, administrative bodies, and the judicial system.

²⁰⁸ Since 2012 the Supreme Court of Uzbekistan and UNDP has worked cooperatively within the framework of the project, aimed at strengthening the institutional framework of the civil courts of Uzbekistan through creating favourable conditions for the further improvement of civil justice both in legislation and in practice. One of the tasks of the project was to enhance the accessibility of justice through e-Justice implementation.

²⁰⁹ See USAID, The Supreme Court of the Republic of Uzbekistan, UNDP Uzbekistan, Project Newsletter “The Rule of Law Partnership in Uzbekistan”, Tashkent 2014, p. 3, available at http://www.uz.undp.org/content/dam/uzbekistan/docs/projectdocuments/ggu/ruleoflaw/un_uzb_ROL_Bulletin_Eng.pdf.

Tashkent city and by the inter-district civil courts of the Tashkent region, more than 187,000 applications have been received electronically to date.²¹⁰

Several reforms in the Ministry of Justice, the Ministry of Internal Affairs, the General Prosecutor's Office and other law-enforcement agencies are being realized along with the judiciary system: The Supreme Court is preparing to establish an academy to train judges, candidates for judgeships, assistants to judges (a newly introduced category), and other court personnel. The training of both new candidates and incumbent judges is currently carried out by the Training Center of the Ministry of Justice. The government is also focusing on reforming the process of licensing lawyers. Candidates who have completed their legal training are still required to take courses conducted by the Ministry of Justice, while the licensing of exams is carried out by commissions staffed by representatives of the Chamber of Advocates and the Ministry of Justice. The government has begun to consider allowing foreign lawyers, both to teach their Uzbek colleagues and to assist them in professionalizing their practice, especially in corporate law and international arbitration.²¹¹

In 2016 the Law “On Parliamentary Control” was enacted. It was one of the important democratic reforms in strengthening the legal system of Uzbekistan. This law is aimed at regulating relations in the field of the organization and implementation of parliamentary control;²¹² monitoring the public authorities and their officials’ activities on observance of the Constitution and other laws, Parliaments’ decisions, and execution of tasks assigned to them.²¹³ The Law also emphasizes the legislative establishment, the scope of the Parliamentary control over the Prosecutor's Office and prosecutors’ activities, to improve the effectiveness of their efforts in ensuring the rule of law in the country, protection of citizens’ rights and freedoms, interests of society and the state.²¹⁴

Separate articles providing softer penalties for illegal acquisition of material compensation, abuse of authority, etc. were added to the Criminal Code of Uzbekistan. Liberalization of criminal legislation has been realized, in the result of appropriate measures, taken on lessening the liability of officials engaged in administrative-distributive and administrative-economic powers in business structures and other non-governmental organizations.

²¹⁰ As of 1 May 2017, about 90,000 statements and statements of claim have been submitted through the E-SUD national electronic case management system. The figure is available at <http://www.uz.undp.org>.

²¹¹ Cf. Sever (*supra* n. 188), pp. 115-145.

²¹² Art. 1 of the Law of Uzbekistan “On Parliamentary Control” of 11 April 2016 No. ZRU-403.

²¹³ *Ibid.*, Art. 4.

²¹⁴ *Ibid.*, Art. 19.

The Code of Administrative Liability²¹⁵ was amended. In accordance with new amendments, the confiscation of property for administrative offences is now conducted only basing on court decisions.

The procedure for the consideration of corporate disputes has been defined clearly in the Economic Procedure Code of Uzbekistan. Improvements of the procedure for considering complaints, concerning compensation for damage caused to businesses as a result of adoption of illegal acts by a state body, citizens' self-government body or commission of illegal action (inaction) by their officials, were conducted in the EPC.

In January 2018, Uzbekistan adopted three new procedural codes which came into force on 1 April 2018:²¹⁶

- the Civil Procedure Code of the Republic of Uzbekistan (the “CPC”)²¹⁷;
- the Economic Procedure Code of the Republic of Uzbekistan (the “EPC”)²¹⁸ and
- the Code on Administrative Proceedings of Uzbekistan (the “CAP”).²¹⁹

3.2. Developments in the Human Rights Dialogue

As *John R. Pottenger* noted, today’s Uzbekistan finds itself at the theoretical and practical crossroads of the Soviet legacy of authoritarianism and the liberal society’s promise.²²⁰

The new Constitution of the Republic of Uzbekistan in its Preamble declares its commitment to human rights, democratic principles and primacy of international legal norms.²²¹ Uzbekistan has signed and ratified the majority of international covenants, treaties and framework conventions in the sphere of human rights protection at the international level after attaining its independence. The Universal Human Rights Declaration was the first international document to which Uzbekistan joined in 1991.²²²

The following international documents were ratified by Uzbekistan:

²¹⁵ Approved by the Law of the Republic of Uzbekistan of 22 September 1994, No. 2015-XII.

²¹⁶ The new Procedural Codes, setting forth rules for reviewing disputes, were adopted as part of the reform of Uzbekistan's judicial system initiated in 2017 by Uzbekistan's new President, Shavkat Mirziyoyev. These codes formalize the division of jurisdictions between (i) courts of general jurisdiction and (ii) the economic and administrative courts.

²¹⁷ Civil Procedure Code of the Republic of Uzbekistan, approved by the Law of the Republic of Uzbekistan No. ZRU-460 dated 22 January 2018. The existing CPC of Uzbekistan approved by the Law of the Republic of Uzbekistan No. 477-I dated 30 August 1997 ceased to be effective.

²¹⁸ Economic Procedure Code of the Republic of Uzbekistan, approved by the Law of the Republic of Uzbekistan No. ZRU-461 dated 24 January 2018. The existing EPC of Uzbekistan approved by the Law of the Republic of Uzbekistan No. 478-I dated 30 August 1997 ceased to be effective.

²¹⁹ Code of the Republic of Uzbekistan on Administrative Proceedings, approved by the Law of the Republic of Uzbekistan No. ZRU-462 dated 25 January 2018.

²²⁰ Pottenger, Civil society, religious freedom, and Islam Karimov: Uzbekistan’s struggle for a decent society, *Central Asian Survey* 23:1 (2004), 55-77 (56).

²²¹ 23 articles of the whole volume of the Constitution (128 articles) are dedicated to human rights provisions.

²²² Resolution of the Supreme Soviet of the Republic of Uzbekistan No. 366-XII.

- International Covenant on Civil and Political Rights (ICCPR)²²³;
- International Covenant on Economic, Social and Cultural Rights (ICESCR)²²⁴;
- Convention Against Torture and other cruel, inhuman and degrading treatment and punishment (CAT)²²⁵;
- International Convention on the Elimination of all forms of Racial Discrimination (CERD)²²⁶;
- Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)²²⁷
- and the Convention on the Rights of the Child (CRC)²²⁸.

According to the Constitution of Uzbekistan, everyone is guaranteed judicial protection of his/her rights and freedoms, the right to appeal any unlawful action of state bodies, officials or public associations, and the right to professional legal assistance at any stage of investigation and court proceedings.²²⁹ In this regard, as *Saidov* stated, “works are being carried out to reform the advocacy institution”²³⁰, aimed at ensuring effective protection of human rights and freedoms. The National Centre for Human Rights and various civil and Ombudsman institutions were established for this purpose.

The concept of further deepening democratic reforms and the formation of a civil society in the country identifies the methods of increasing the level of citizens’ legal awareness and legal culture, expansion of the scope of the “habeas corpus” institute, ensuring independence, objectivity and impartiality of the courts, enhancing competitiveness in the trial and liberalization of criminal legislation, etc.²³¹ In order to increase the efficiency of legal protection of human rights and freedoms, the Human Rights Department and its subdivisions were established in the Ministry of Justice of the Republic of Uzbekistan on the basis of the Resolution of the Cabinet of Ministers No. 370 of 27 August 2003.

²²³ Ratified on 28 September 1995.

²²⁴ Ratified on 28 September 1995.

²²⁵ Ratified on 28 September 1995.

²²⁶ Ratified on 28 September 1995.

²²⁷ Ratified on 19 July 1995.

²²⁸ Ratified on 29 June 1994.

²²⁹ Articles 43, 44, 116 of Uzbek Constitution.

²³⁰ Saidov, Statement on Rule of Law of Uzbekistan, Human Dimension Implementation Meeting, OSCE, Warsaw, 29 September – 10 October 2008.

²³¹ This policy document was adopted by the Supreme Assembly (Oliy Majlis) on the initiative of the first President of Uzbekistan, I.A. Karimov, in November 2010.

The following tables show the number of complaints of citizens and the types of cases in the field of human rights during the first five months of 2017, which were received and considered by the authorities of the Ministry of Justice.²³²

Table 5: Number of complaints of citizens in the field of human rights (January to May 2017)

| Year | Applications and suggestions | Claims | “Hotline” complaints | Complaints addressed to the “single interactive state services portal” | Totally |
|-------------|-------------------------------------|---------------|-----------------------------|---|----------------|
| 2017 | 432 | 1,518 | 255 | 1,490 | 3,695 |

Source: The author.

Table 6: Complaints in the field of human rights – certain categories of cases (January to May 2017)

| Year | Com-plaints on social cases | Com-plaints against court decisions | Com-plaints on labour cases | Complaints against the activities of law enforcement bodies | Com-plaints on housing issues | Complaints on other cases |
|-------------|------------------------------------|--|------------------------------------|--|--------------------------------------|----------------------------------|
| 2017 | 11.3% | 10.5% | 8.7% | 5.2% | 7.3% | 57% |

Source: The author.

Table 7: Number of measures to prevent human rights violations and number of claims filed to courts (January to May 2017)

| Year | Number of measures to prevent human rights violations | Results | Number of claims filed to courts |
|-------------|--|---|---|
| 2017 | 1,150 | 290 officials were disciplined. Of these, 19 were dismissed. | More than 120 (337,975 mln. Soum) |

Source: The author.

The cooperation of the Ministry of Justice of Uzbekistan with international organizations in human rights as well as its activities on the implementation of international conventions are of great importance. It should be mentioned that the “EU’s Rule of Law Initiative” which was set out in the EU’s Central Asia Strategy in 2007 has intended “to support on-going modernisation of the legal sector, as part of a more comprehensive strategy to foster and consolidate stability, prosperity and respect for human rights in Central Asian countries”.²³³

²³² The data were provided by the Ministry of Justice of the Republic of Uzbekistan.

²³³ See Isaacs, EU’s Rule of Law Initiative in Central Asia, *EUCAM Policy Brief* No. 9, August 2009, p. 1.

However, there existed some problems concerning the implementation of this project and some normative limitations, particularly in the field of human rights. As *Rico Isaacs* argued, “it leaves the EU open to criticism that its role as a fully realised normative power is weakened in this instance”.²³⁴ Therefore, nowadays many European projects, including German Programmes focus on the commercial and trade rewards that transforming the legal and judicial systems can bring rather than the good governance and human rights benefits.²³⁵

3.3. Implementation of international legal standards

Since the beginning of the 1990s, a dialogue with the European Union has been actively developed and a number of joint projects to support reforms in the judicial sphere has been implemented in Uzbekistan. For example, GTZ²³⁶ which operated on behalf of the Federal Ministry of Economic Cooperation and Development (BMZ) supported the process of legal and economic reforms in Central Asia through exchanging German legal practices and experiences and through cooperation projects.²³⁷ GTZ Reports, as *Verschinin*, noted, stress the consultations of Western experts which are important to reform the legal and court systems of Central Asian countries.²³⁸

The GIZ²³⁹ project ‘Promotion of the Rule of Law in Central Asia’, commissioned by BMZ has already been operating in Uzbekistan since 1994 as part of other previous projects in the region. Its main objective is to support Uzbekistan in the reform of the legal and judicial sectors in conformity with the rule of law. Another objective is to increase people’s faith in the legal system and its institutions. In 2012, the programme shifted its focus to the promotion of sustainable economic development by improving the relevant legal framework, with a particular emphasis on public law.²⁴⁰

The following measures are set out in the GIZ Programme:

- introduction of a modern administrative law,
- promotion of regional cooperation and international networks,
- publication of legal literature, law commentaries and textbooks.²⁴¹

²³⁴ *Ibid.*, pp. 1-2.

²³⁵ *Ibid.*, p. 1.

²³⁶ Deutsche Gesellschaft für Technische Zusammenarbeit (German Society for Technical Cooperation).

²³⁷ See for example, Dieke, Die Tätigkeit der Deutschen Gesellschaft für Technische Zusammenarbeit GTZ, in: Boguslawskij/Knieper (eds.), *Wege zum neuen Recht: Materialien internationaler Konferenzen in Sankt Petersburg und Bremen*, Berlin 1998, pp. 256-258.

²³⁸ Verschinin (*supra* n. 200), p. 7.

²³⁹ Deutsche Gesellschaft für Internationale Zusammenarbeit (German Society for International Cooperation).

²⁴⁰ See Pudelka, Promotion of the Rule of Law for Sustainable Economic Development, published by GIZ, October 2015, available at <https://www.giz.de/en/downloads/giz2016-en-promotion-rule-of-law-usbekistan.pdf>.

²⁴¹ *Ibid.*

It is important here to mention that the Uzbek government attaches great importance to intensifying Uzbekistan's cooperation with UNDP, OSCE and other international organizations in promotion of the rule of law in Uzbekistan.²⁴² International financial institutes like the World Bank, the International Monetary Funds (IMF), the European Bank for Reconstruction and Development (EBRD) and the Asian Bank for Development (ABD) support decision making policies of transforming countries in creation of transparent legal systems and fighting against corruption. Here it should be noted that the Presidential Decree "On measures of ensuring reliable protection of private property, small business and private entrepreneurship, the removal of barriers to their rapid development", signed by the President of Uzbekistan on 15 May 2015, is a large-scale document, which promotes the reformation of criminal legislation through implementation of a number of international legal norms. In particular, the document incorporated the United Nations Convention against Corruption (UNCAC).²⁴³

To sum up, Uzbekistan's judicial and legal reforms, which are based on the principles of humanism and aimed at ensuring the rule of law and protection of citizens' rights and interests led to the country's progress in terms of its economy, social development, the establishment of democracy and civil society. Thus, Uzbekistan established itself as an independent and recognized member of the international community.

§ 4 Historical development of arbitration in Germany

4.1. Historical background of arbitration

The arbitration method of dispute settlement was known in Europe from the ancient times and even then the arbitrators would have to be people external to the parties of the dispute. According to information reaching us from the Greek lawyer of the first century BC *Diodorus* of Sicily, in a dispute between the Athenians and Megaryans of Salamis, three judges from Sparta had been elected to settle the dispute.²⁴⁴ In ancient times the state, cities, religious associations and other entities in which the parties can trust could play the role of arbitration courts. In the Middle Ages in Europe, the Pope, the higher clergy, law faculties of universities, parliaments, the Emperor of the Torah, consuls and individuals played this role.

²⁴² For example, in December 2015, the National Centre for Human Rights in cooperation with UNDP, Office of the OSCE Project Coordinator in Uzbekistan, the Konrad Adenauer Foundation, the Friedrich Ebert Foundation and other national institutions of Uzbekistan organized the International Conference on the theme "Ensuring protection of the rights and freedoms – major direction of democratic renewal and modernization of country: experience of Uzbekistan", Tashkent 2015.

²⁴³ UNCAC was adopted by the [United Nations General Assembly](#) on 31 October 2003 by Resolution 58/4.

²⁴⁴ Kleandrov, Proshloye treteyskix sudov po razresheniyu ekonomicheskix sporov, *Treteyskiy sud* 2000:5, 64-76.

According to *Lazarev*, there are four periods of the history of the development of arbitration court institutions:²⁴⁵ The first period begins in the antiquity and continues to the end of the first millennium BC, when arbitration procedure attracted the residents of the ancient East, ancient Greece and Rome. In the second period (XI-XVIII centuries) arbitration procedures were rarely taken because of the unlimited power of monarchs. In the third period (the end of the XVIII until the beginning of the XX century) the establishment of capitalist relations led to the re-development of the institution of arbitration proceedings. As the beginning of the fourth period, which continues to the present time, can be considered the date of the Hague Peace Conferences of 1899 and 1907 and the establishment of the House of a Permanent Arbitration Court.

In his historical-dogmatic work, *Volkow* investigated the history of the origin of arbitration in Roman law, its development in the Middle Ages (when commercial arbitration courts appeared), as well as in the 18th and 19th centuries during the rapid development of trade.²⁴⁶ However, the emergence of commercial arbitration in its own legal and social understanding and as a kind of modern arbitration can probably be observed since the XVIII century, being known as an active period of development of both law and practice of arbitration. To *Komarow* and *Pogorezky* only in the 20th century, commercial arbitration gained wide recognition and the corresponding legal status.²⁴⁷

The origin of arbitration as a way of solving commercial problems lies in mediaeval Western Europe.²⁴⁸ The basic idea of mediaeval arbitration is connected with the story of two traders who are in dispute over a certain price or quality of a good; they had to take a third opinion of a person whom they knew and trusted. So they would finally settle the dispute. People would act in this way “not because of any legal sanction, but because this was expected of them within the community in which they carried on business”.²⁴⁹ People recognised that legal rules and procedures were too strict in those days. Therefore, an arbitration agreement as a method of dispute resolution between the parties had been welcomed by the law. However, the parties were only allowed to consult an arbitrator after the dispute had arisen.

In his book “Arbitration in International Trade” *René David* stresses the arbitration was mainly conceived of in the past as an institution of peace to maintain harmony between persons who were destined to live together. To him, the arbitrator was a squire, a relative, a mutual friend or a man of wisdom, chosen by the parties who trusted him, and it was expected that he would be

²⁴⁵ Lazarev, *Mejdunarodniy arbitrazh*, Moscow 1991, pp. 178-179.

²⁴⁶ See Volkow, *Torgovii treteiskii sudi. Istoriko-dogmaticheskoye issledovaniye*, Moscow 1913.

²⁴⁷ Komarov/Pogorezky, *Mejdunarodniy kommercheskiy arbitraj*, Kharkov 2009, p. 7.

²⁴⁸ Mustill, Is it a bird..., in: *Liber Amicorum Claude Reymond*, Paris 2004, pp. 209 et seq.

²⁴⁹ See for example, Redfern/Hunter, *Law and Practice of International Commercial Arbitration*, 4th ed., London 2004, p. 3.

able to devise a satisfactory solution for the dispute.²⁵⁰ Arbitration agreement and arbitral award had no real legal effect in accordance with Roman law. This issue was solved through making “double promise” (*compromissum*).²⁵¹ It played a great role in making penalty to be payable in the case of non-execution of the arbitration agreement or of the arbitral award by a party. Thus, the court could enforce the payment of the penalty in case of non-compliance, but it could not enforce the arbitration agreement itself.²⁵²

Krause also states that in Roman law existing disputes might be arbitrated, but no effect was given to agreements to refer future disputes to arbitration. This attitude was maintained by the canon law.²⁵³ The ancient Germanic law, however, recognized the binding nature of agreements to submit future disputes to arbitration, granting a stay of proceedings where a party resorted to the courts in violation of such agreement.²⁵⁴

The reception of the Roman law in Germany led to some limitations of arbitration in considering the existing disputes, since the Roman-canonical “*compromissum*” displaced the major part of German rules. In the result of territorial sovereignty during the XVII and XVIII centuries and the development of the ordinary courts rather than arbitral tribunals, the practice of submitting disputes to arbitration disappeared.²⁵⁵ The restrictions by the Judicial Codes of Bavaria (1753) and of Prussia (1794)²⁵⁶, which hindered the development of arbitration in Germany, were removed only after the enactment of the German Code of Civil Procedure in 1879²⁵⁷ allowing to conclude arbitration agreements for the submission of future disputes and to authorize the courts to appoint arbitrators.

Germany has a long tradition of arbitration; arbitration is widely used in particular in the areas of commerce and business.²⁵⁸ The German arbitral system has been historically practiced by merchants, since the country lacked a centralized government for centuries. Latest editions of German arbitration acts, established at the end of the 19th and the beginning of the 20th century²⁵⁹ and today’s commentators declare that “arbitration tribunals have at all times been

²⁵⁰ David, *Arbitration in International Trade*, Deventer 1985, p. 29.

²⁵¹ Some scholars argue that Roman law never gave effect to agreements to submit future disputes. The *compromissum* required that the arbitrators should be appointed at the time of the agreement. Such agreement to submit existing disputes to arbitration was not enforceable in classical times; nor was an award. See Lorenzen, Commercial Arbitration – International and Interstate Aspects, *Yale Law Journal* 43:5 (1934), 716-765.

²⁵² See David (*supra* n. 250), pp. 84-85.

²⁵³ Krause, *Die geschichtliche Entwicklung des Schiedsgerichtswesens in Deutschland*, Berlin 1930, p. 3.

²⁵⁴ *Ibid.*, p. 39.

²⁵⁵ Cf. Lorenzen (*supra* n. 251), p. 721.

²⁵⁶ *Ibid.*; see also Krause (*supra* n. 253), p. 84.

²⁵⁷ Lorenzen (*supra* n. 251), p. 721.

²⁵⁸ Hanefeld, Germany, in: Weigand (ed.), *Practitioner’s Handbook on International Commercial Arbitration*, 2nd ed., Munich 2010, pp. 475-542.

²⁵⁹ See for example, Ingenberg (Hrsg.) *Preussische Schiedsmannsordnung*, Münster 1948; Schiedsmanns-Ordnung vom 29.03.1879, 8. Aufl. Berlin 1880; Kaufmannsgericht Berlin, in: Magistrat Berlin (Hrsg.), *Berliner*

regarded as an urgent necessity by the community of merchants and legislation has always granted them a place alongside the ordinary courts”.²⁶⁰

The arbitration law on the federal level was first codified in the 10th Book of the German Code of Civil Procedure (Zivilprozessordnung – ZPO) in 1879, which adopted a favourable approach to arbitration. It consisted of 24 sections, and was to a large extent already based upon the same principles of arbitration as “*party autonomy*” and “*limited court intervention*”, which underlined the critical parts of the UNCITRAL Model Law on International Commercial Arbitration.²⁶¹

German commentators state that at the end of XIX century arbitration agreements were taken into consideration though it was signed before or after the dispute arose, which could exclude the courts’ jurisdiction. At the same time, arbitral awards were treated equally as court judgments, which could be refused to be enforced only through few grounds. The award was not reviewed on the merits. The disputing parties had been authorized with a great freedom arranging their arbitration proceedings. All of those basic principles formed the general principles, recognized nowadays. Thus, even under few modifications, in particular the rules for recognition and enforcement of foreign arbitral awards, the initial German Arbitration Law of 1879 was effective during a long period of time, until the latest perfection of it on 1 January 1998.²⁶²

Since the uniform arbitration legislation was promulgated in the late 19th and early 20th century, the German courts supported the arbitral process simultaneously, including pioneering the development of what would later termed as the “doctrine of separability” to facilitate the enforcement of arbitration agreements.²⁶³ However, in the following decades, the German courts acted to guard their rights with extreme jealousy. For instance, the courts were too inclined to set aside arbitral awards focusing on even a minor failure to comply with the provisions of the ZPO. Legal scholars consider that the mistrust of arbitration and respective commentaries developed with particular vigour by German courts between the two World Wars. Nevertheless, besides the hostile attitudes of the domestic courts, Germany ratified the Geneva Protocol on Arbitration Clauses from 1923 on 5 November 1924 and the Geneva Convention on the Execution of Foreign Arbitral Awards from 1927 on 1 September 1930,

Gemeinderecht, 2. Aufl., Berlin/Heidelberg 1915, pp. 292-330. Moreover, scientific and practical monographs, such as Bangert, *Die Bindung des Schiedsgerichts an das materielle Recht*, Osnabrück 1932, explained the essence, tasks and the principals of the functioning of arbitration courts.

²⁶⁰ See Born, *International Commercial Arbitration*, Alphen aan den Rijn 2009, p. 49.

²⁶¹ Böckstiegel/Kröll/Nacimiento, Germany as a Place for International and Domestic Arbitrations: General Overview, *Transnational Dispute Management* 6:1 (2009), 3-61.

²⁶² *Ibid.*

²⁶³ See for details, Born, *International Arbitration: Cases and Materials*, 2nd ed., Austin et al. 2014.

which had been a relevant promotion for recognition and enforcement of cross border commercial arbitration clauses and arbitral awards. Subsequently, Germany participated in the negotiation of the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention), and became one of the signatory parties on 10 June 1958. It then ratified the Convention on 30 June 1961. Further, Germany signed and ratified the European Convention on International Commercial Arbitration of 21 April 1961 on 27 October 1964. Under these multilateral arbitration conventions, Germany has gradually changed its previous practice and reduced judicial obstacles to both domestic and international commercial arbitration under its territory.

Like in the former socialist countries, international arbitration was not of great importance to the lawmakers in the German Democratic Republic (GDR). The organization of international arbitration before the German Re-Unification was exclusively exercised by the Court of Arbitration at the Chamber of Foreign Trade of the German Democratic Republic.²⁶⁴

The revised German arbitration law which came into force on 1 January 1998 was adopted to better facilitate domestic and international arbitration proceedings in Germany,²⁶⁵ that is, this law provided a new arbitration environment fit for modern domestic and international dispute resolution. In the result of the 1998 reform, the old German arbitration law was totally replaced by a new arbitration law based on the UNCITRAL Model Law on International Commercial Arbitration of 1985²⁶⁶. The German Arbitration Act was modelled after the Model Law to answer the international standards in the sphere of arbitration. One of the guiding principles in drafting the revised law was indeed to keep at a minimum any changes to the Model Law that would inevitably be necessary to accommodate existing national laws.²⁶⁷ The lawmakers of Germany were persistent in maintaining this principle so that German law does not bear unwelcome surprises for the ignorant arbitral party.²⁶⁸ As *Wagner* noted “the implementation of the UNCITRAL Model Law was not a product of a new legal design, but merely translations of the original rules of the UNCITRAL Model Law”.²⁶⁹ The new provisions of German

²⁶⁴ Remarks by Melis in the Chapter “The Effects of Changes in Eastern Europe on International Arbitration”, in: *Proceedings of the 2nd Joint Conference “Contemporary International Law Issues: Opportunities at a time of momentous change”*, held in The Hague, July 22-24, 1993, Dordrecht/Boston/London, pp. 182-185.

²⁶⁵ Rützel/Wegen/Wilske, *Commercial Dispute Resolution in Germany*, Munich 2005, p. 111.

²⁶⁶ UNCITRAL Model Law on International Commercial Arbitration (UN documents A/40/17, Annex I and A/61/17, Annex I), as adopted by the United Nations Commission on International Trade Law on 21 June 1985, and as amended by the United Nations Commission on International Trade Law on 7 July 2006, available at https://www.uncitral.org/pdf/english/texts/arbitration/ml-arb/07-86998_Ebook.pdf.

²⁶⁷ Berger, *Das neue Recht der Schiedsgerichtsbarkeit / The New German Arbitration Law*, Köln 1998, pp. 44-45.

²⁶⁸ Wilske/Chen, International Arbitration Practice in Germany, *Comparative Law Yearbook of International Business* 2004, 641-656.

²⁶⁹ See for more details Wagner, Germany, in: Weigand (ed.), *Practitioner's Handbook on International Commercial Arbitration*, Munich 2002, pp. 685-830.

arbitration law count not only for international arbitrations but for all types of arbitrations in Germany.

The 10th book of the German Code of Civil Procedure (§§ 1025-1066 ZPO) as an essential federal law²⁷⁰ constitutes the legal framework for arbitration. It represents a complete codification²⁷¹ and an “overhaul” of the then existing legal arbitration regime,²⁷² which was widely recognized as anachronistic. It was argued that there are no current plans for law reform since the German law of arbitration has just been overhauled completely.²⁷³

Referring to the specific contents of the new arbitration law, the basic framework and contents of the UNCITRAL Model Law has been incorporated in. It is appreciated that *“from the various provisions of the law, some characteristic features of the German arbitration law can be traced. These include the principle of territoriality, the prevailing role of party autonomy, the guarantee of due process and effective proceedings and the limitation of court interference. In concert with the generally arbitration friendly approach adopted by German courts, these features shape the practice of arbitration in Germany.”*²⁷⁴ With the perfected arbitration law and the efficient court assistance, which insists invoking the more-favourable-right provision under Art. VII (1) of the New York Convention, barriers to international commercial arbitration will be further reduced or eliminated in Germany.

Jorg Risse argued that “the reason for this trend (suitable for arbitration) is not only the acceptance of the well-known and arbitration-friendly Model Law. Germany as a designated place of arbitration compares favourably with its international competitors given its very efficient court system that willingly supports arbitral tribunals, if required.”²⁷⁵

4.2. German Arbitration Institutions

Exact statistics concerning the frequency, with which parties resort to arbitration as opposed to litigation, are not available in Germany. The fact is that significant portions of arbitrations are conducted as unreported *ad hoc* arbitrations, though it is undoubtedly that in Germany the importance of arbitration has increased over the recent years. This especially is true for

²⁷⁰ Available at <http://www.disarb.org/en/51/materials/german-arbitration-law-98-id3>. A Commentary in the English language can be found in: Böckstiegel/Kröll/Nacimient (eds.), *Arbitration in Germany – The Model Law in Practice*, 2nd ed., Austin et al. 2014, pp. 51-582.

²⁷¹ Synkova, *Courts' Inquiry into Arbitral Jurisdiction at the Pre-Award Stage: A Comparative Analysis of the English, German and Swiss Legal Order*, Cham et al., p. 193.

²⁷² Rützel/Wegen/Wilske (*supra* n. 265), p. 111.

²⁷³ Wagner, Germany, in: Weigand, Frank-Bernd (ed.), *Practitioners Handbook on International Commercial Arbitration*, Munich 2002: C.H. Beck, pp. 685-830.

²⁷⁴ Böckstiegel/Kröll/Nacimient (*supra* n. 261), pp. 17-18.

²⁷⁵ Risse, *Arbitration in Germany: Schieds VZ Journal – SchiedsVZ Journal Promotes Arbitration in Germany*, *German Law Journal* 4:2 (2003), 199.

international cases.²⁷⁶ In international matters as well as in some branches of commerce, arbitration has become the rule rather than the exception.²⁷⁷ It has been estimated that 80% to 90% of all international commercial contracts contain an arbitration clause and presumably this also applies to contracts with German parties.²⁷⁸

According to recent information of the International Court of Arbitration of the International Chamber of Commerce (ICC), German parties are frequently involved in ICC proceedings. For instance, 511 parties participated in ICC proceedings in the period of 2005 to 2008. It also should be mentioned that the number of arbitrators involved in ICC proceedings was considerable and higher than in some other developed countries like US, UK and France over the period 2005 to 2007. In this period, 267 German arbitrators were appointed. Not reflected in any statistics are the numerous *ad hoc* arbitrations that happen in Germany and involve German parties. It is estimated that 1,000 cases per year are resolved by *ad hoc* arbitration.²⁷⁹ ICC statistics for 2017 rank German parties the 2nd (128 parties) and German arbitrators the 5th (99 arbitrators) most represented in arbitrations.²⁸⁰

4.2.1. German Institution of Arbitration (Deutsche Institution für Schiedsgerichtsbarkeit – „DIS“)

The German Institution of Arbitration (Deutsche Institution für Schiedsgerichtsbarkeit e.V. – hereinafter “DIS”) is the most renowned arbitration organization in Germany. It was originally founded in 1920 and since 1992 has incorporated the arbitration institutions (by way of a merger of the German Arbitration Committee and the German Arbitration Institute²⁸¹) of the former GDR.²⁸² Nowadays the DIS is the primary provider of arbitration services in Germany and is known for its commitment to excellence and efficiency. It has approximately 1,400 members from Germany and abroad.²⁸³ The DIS aims at promoting both: national and international arbitration for all kinds of arbitration. It offers an administered arbitral procedure under the DIS

²⁷⁶ See von Hase, Germany, in: Warne, (general ed.), *International Commercial Dispute Resolution*, Haywards Heath 2009, pp. 285-342 (321).

²⁷⁷ Kröll, National Report for Germany, in: Paulsson/Bosman (eds.), *ICCA International Handbook on Commercial Arbitration*, Supplement 2007, The Hague et al. 2007, p. 5.

²⁷⁸ See Hanefeld (*supra* n. 258), p. 476.

²⁷⁹ Wilske, Ad hoc Arbitration in Germany, in: Böckstiegel/Kröll/Nacimienta (eds.), *Arbitration in Germany: The Model Law in Practice*, Austin et al. 2007, pp. 809-836 (811).

²⁸⁰ See Bücheler/Flecke-Giammarco, Arbitration procedures and practice in Germany: Overview, April 2018, available at <https://uk.practicallaw.thomsonreuters.com/4-385-8191>.

²⁸¹ Mark/Plassmeier/Quinke, Developments in German Arbitration Law, in: *The Baker & McKenzie International Arbitration Yearbook 2008*, Moscow 2009, 163-186 (164).

²⁸² Born (*supra* n. 263), p. 19.

²⁸³ For more details see the official website of the DIS at: <http://www.disarb.org/en/>.

Arbitration Rules²⁸⁴. According to these Rules, there is no general monitoring of the proceedings or scrutiny of draft awards.

In order to further accommodate the needs of parties and arbitration practitioners, the DIS has established a set of Supplementary Rules for Expedited Proceedings (in 2008)²⁸⁵ and for Corporate Law Disputes (in 2009).²⁸⁶ Drafted to allow parties to conduct arbitration in a time-frame of six (in case of a sole arbitrator) or nine (in case of a three-member tribunal) months, the Supplementary Rules feature shortened time limits for nomination of arbitrators and for submissions of briefs. These Supplementary Rules intend to strike a right balance between the lately often debated “need for speed in arbitration” and the parties’ interest that their dispute be resolved in a just and equitable manner.

In order to adapt to the needs of the users and to increase transparency and efficiency of the arbitration proceedings and with the aim to attract more international cases, the DIS has initiated a revision of its arbitration rules in 2016.²⁸⁷ The current DIS Arbitration Rules²⁸⁸ came into force on 1 March 2018 and can be applied to all industry sectors, internationally, domestically and trans-regionally, for the settlement of disputes. Today, the new 2018 DIS Rules are among the most modern sets of arbitration rules which promote time and cost efficiency as well as amicable solutions.

In addition to the 2018 DIS Arbitration Rules the following rules for the resolution of disputes are available:²⁸⁹

- the DIS Mediation Rules²⁹⁰ for all cases in which the parties wish to conduct mediation proceedings;
- the DIS Rules on Expert Determination²⁹¹ for all cases in which the parties wish to achieve a decision by a third party with preliminary or final binding effect;

²⁸⁴ DIS Arbitration Rules 98 (in force as of 1 July 1998), <http://www.disarb.org/en/16/rules/dis-arbitration-rules-98-id10>. A Commentary in the English language can be found in: Böckstiegel/Kröll/Nacimienta (eds.), *Arbitration in Germany – The Model Law in Practice*, 2nd ed., Austin et al. 2014, pp. 583-724, in the German language in: Nedden/Herzberg, *ICC-SchO, DIS-SchO. Praxiskommentar zu den Schiedsgerichtsordnungen*, Köln 2014, Teil 2 (S. 633-986): Kommentierung der DIS-SchO.

²⁸⁵ DIS Supplementary Rules for Expedited Proceedings 078, Annex to the DIS Arbitration Rules 1998 (in force as of April 2008), <http://www.disarb.org/en/16/rules/dis-supplementary-rules-for-expedited-proceedings-08-srep-id4>. See Berger, *The Need for Speed in International Arbitration*, *Supplementary Rules for Expedited Proceedings of the German Institution of Arbitration (DIS)*, *JIntArb* 25:5 (2008), 595-612.

²⁸⁶ DIS Supplementary Rules for Corporate Law Disputes 09 (in force as from 15 September 2009), <http://www.disarb.org/en/16/rules/dis-supplementary-rules-for-corporate-law-disputes-09.scrold-id15>.

²⁸⁷ Kasolowski/Wendler, *Commercial Arbitration 2017: Germany*, *Global Arbitration Review*, available at <http://globalarbitrationreview.com/jurisdiction/1000190/germany>.

²⁸⁸ DIS Arbitration Rules (effective as of 1 March 2018), <http://www.disarb.org/en/16/rules/-id38>.

²⁸⁹ See <http://www.disarb.org/en/57/content/about-the-dis-id46>.

²⁹⁰ DIS Mediation Rules (in force as from 1 May 2010), <http://www.disarb.org/en/16/rules/dis-mediation-rules-id31>.

²⁹¹ DIS Rules on Expert Determination (in force as from 1 May 2010), <http://www.disarb.org/en/16/rules/dis-rules-on-expert-determination-id28>.

- the DIS Rules on Expertise²⁹² for all cases in which the parties wish to receive a determination by a third party which is not binding, but merely a determination by an expert and contains a recommendation for the resolution to the dispute;
- the DIS Rules on Adjudication²⁹³ for all cases in which the parties which implement a dispute board at the outset of a project responsible for the resolution of all disputes during the course of the project.

In addition, the parties may chose the DIS Conciliation Rules²⁹⁴ which do not contain any specific guidelines with respect to the procedural role of the intermediary.

The DIS Arbitration Rules (hereinafter Rules) shall grant the parties autonomy for the organisation of the arbitration to the greatest possible extent. Art. 2.1 of the Rules determines as role of the DIS to “*administer arbitrations under the Rules and provide support to the parties and the arbitral tribunal for the efficient conduct of the arbitration*” and makes clear, that the DIS does not resolve disputes itself. According to Article 2.2 sentence 2 of the Rules “*Dispute Managers advice and assist the parties in selecting the dispute resolution mechanism best suited for resolving their dispute*”. According to Article 10.1 sentence 2 of the Rules “*the parties may agree that the arbitral tribunal shall be comprised of a sole arbitrator, of three arbitrators, or of any other odd number of arbitrators*”. Provided that all of the parties to the arbitration have agreed thereto, “*claims arising out of or in connection with more than one contract may be decided in a single arbitration (‘Multi-Contract Arbitration’)*” (Article 17.1 sentence 1 of the Rules). Under certain conditions Article 18 of the Rules makes it possible that claims made in an arbitration with multiple parties (‘Multi-Party Arbitration’) may be decided in one arbitration. Regarding the rules of procedure “*the arbitral tribunal shall apply all mandatory provisions of the arbitration law applicable at the seat of the pending arbitration*” (Article 21.4 of the Rules). Of special interest and characteristic for the DIS Arbitration Procedure are the provisions on the Rules of Law Applicable to the Merits in Article 24 of the Rules: “*The parties may agree upon the rules of law to be applied to the merits of the dispute*” (Article 24.1). In the absence of such an agreement “*the arbitral tribunal shall apply the rules of law that it deems to be appropriate*” (Article 24.2). “*The arbitral tribunal shall decide on the merits in accordance with the provisions of the contract between the parties, if any, and shall take into account any relevant trade usages*” (Article 24.3). Article 24.4 gives clear

²⁹² DIS Rules on Expertise (in force as from 1 Max 2010), <http://www.disarb.org/en/16/rules/dis-rules-on-expertise-id29>.

²⁹³ DIS Rules on Adjudication (in force as from 1 July 2010), <http://www.disarb.org/en/16/rules/dis-rules-on-adjudication-id30>.

²⁹⁴ DIS Conciliation Rules 02 (in force as from 1 January 2002), <http://www.disarb.org/en/16/rules/dis-conciliation-rules-02-id9>.

priority to a legal solution of disputes: *“The arbitral tribunal may not decide ex aequo et bono or at as an amiable compositeur, unless the parties have expressly agreed thereto.”* Contrary to this, Article 26 of the Rules encourages – in consent with the parties – amicable settlements: *“Unless any party objects thereto, the arbitral tribunal shall, at any stage of the arbitration, seek to encourage an amicable settlement of the dispute or of individual disputed issues.”* Article 27.1 of the Rules encourages the arbitral tribunal and the parties to *“conduct the proceedings in a time- and cost-efficient manner, taking into account the complexity and economic importance of the dispute”*. The Dispute Management Rules in Annex 6 of the 2018 Dis Arbitration Rules provide for a procedure in which a Dispute Manager appointed by the DIS upon request of a party will determine together with the parties – ideally within a few days after a conflict has arisen – how this conflict may be resolved.²⁹⁵ According to Article 27.4 of the Rules the arbitral tribunal shall – *“with a view to increasing procedural efficiency”* – discuss the following with the parties: each of the measures set forth in Annex 3²⁹⁶, the provisions of Annex 4²⁹⁷ and *“the possibility of using a mediation or any other method of amicable dispute resolution to seek the amicable settlement of the dispute or of individual disputed issues”*. Each arbitral award shall be binding on the parties (Article 38 of the Rules). Article 41.1 of the Rules stipulates that *“at the request of the parties, the arbitral tribunal may record a settlement in an award by consent, unless it considers that there are serious ground not to do so”*. The same is valid for *“a settlement agreement or a decision arising out of proceedings pursuant to the DIS Mediation Rules, the DIS Conciliation Rules, the DIS Rules on Adjudication, the DIS Rules on Expertise, or the DIS Rules on Expert Determination”* (Article 41.2 of the Rules). Article 44.1 obliges *“the parties and their outside counsel, the arbitrators, the DIS employees, and any other persons associated with the DIS who are involved in the arbitration”* to *“not disclose to anyone any information concerning the arbitration”*, *“unless the parties agree otherwise”*. According to Article 32 of the Rules the costs of the arbitration shall include: *“(i) the arbitrators’ fees and expenses; (ii) the fees and expenses of any expert appointed by the arbitral tribunal; (iii) the reasonable costs of the parties that were incurred in connection with the arbitration (...); and (iv) the Administrative Fees”*²⁹⁸. With the aid of a Cost Calculator²⁹⁹, parties may calculate the estimated total costs of a DIS Arbitration.

²⁹⁵ <http://www.disarb.org/en/57/content/about-the-dis-id46>. For more details, see Article 27 of the Rules and the Dispute Management Rules in Annex 6 of the Rules.

²⁹⁶ Measures for Increasing Procedural Efficiency.

²⁹⁷ Expedited Proceedings.

²⁹⁸ For more details, see the Schedule of Costs in Annex 2 of the Rules.

²⁹⁹ <http://www.disarb.org/en/22/costcalculator2018/overview-id0>.

Table 8 illustrates a substantial increase in arbitration proceedings under the DIS Arbitration Rules in the period 2012-2018.

Table 8: Arbitration proceedings under the DIS Arbitration Rules in the period 2012-2018³⁰⁰

| Year | Number of DIS proceedings | Value of disputes (Mio. €) | Involvement of Foreign Parties (in %) | | |
|------|---------------------------|----------------------------|---------------------------------------|-------------|---------|
| | | | on both sides | on one side | without |
| 2012 | 125 | 940 | 3 | 26 | 71 |
| 2013 | 132 | 1,534 | 8 | 28 | 64 |
| 2014 | 147 | 2,024 | 4 | 26 | 70 |
| 2015 | 140 | 2,009 | 6 | 23 | 71 |
| 2016 | 172 | 1,031 | 9 | 38 | 53 |
| 2017 | 160 | 1,041 | 11 | 33 | 56 |
| 2018 | 162 | 1,085 | 2 | 37 | 61 |

The DIS has numerous other tasks as the leading German Arbitration Institution. It operates as the appointing authority for proceedings under the [UNCITRAL Arbitration Rules](#) and is often designated as the appointing authority in national and international *ad hoc* arbitration proceedings. A database at the official website of the DIS contains the German case law of arbitration in Germany.³⁰¹

In Germany besides the DIS, there exist numerous other arbitration institutions. A large amount of them are specialized in certain sectors of industry, as for example the German Maritime Arbitration Association (GMAA). Some of the regional Chambers of Commerce, such as the Handelskammer Hamburg offer arbitration services, too.

4.2.2. Frankfurt International Arbitration Centre

The Frankfurt Chamber of Commerce and Industry (Frankfurt CCI) has been offering a range of ADR services for many years;³⁰² Frankfurt is the German leading marketplace for financial and other services. In view of the continuing development of ADR procedures, the globalization of markets and the demand of businesses for ADR services, the Frankfurt CCI and DIS have founded in 2005 the Frankfurt International Arbitration Centre (FIAC).³⁰³ By a cooperation

³⁰⁰ Source: <http://www.disarb.org/en/39/content/statistik-id72>.

³⁰¹ A database on arbitration-related case law of German courts is available on the official website of the DIS, at: <http://www.disarb.org/en/47/datenbanken/rsprspezial-id2>.

³⁰² Arbitration services are also provided by the Conciliation Centre for Business Disputes (*Schlichtungsstelle für kaufmännische Streitigkeiten*) and the Centre for the Settlement of Competition Disputes (*Einigungsstelle für die Beilegung von Wettbewerbsstreitigkeiten*) at the Frankfurt CCI.

³⁰³ See at <https://www.frankfurt-main.ihk.de/imperia/md/content/pdf/recht/broschuere.fiac-eng.pdf>.

agreement between the DIS and ICSID from 2005, FIAC is generally recognized as a potential place for the conduct of ICSID arbitrations under the ICSID Convention.³⁰⁴

The facilities of FIAC are available for the conduct of domestic and international arbitrations as well as for other ADR procedures, regardless of the underlying procedural rules. FIAC offers significant practical advantages like modern and efficient infrastructure.

4.2.3. Other German Arbitration Organizations

4.2.3.1. Arbitration Court of the Hamburg Chamber of Commerce

The Arbitration Court of the Hamburg Chamber of Commerce³⁰⁵, which was established in 1893, is one of the oldest currently-operating arbitral institutions in the world. In spite of the fact that the court's caseload is based on the business community of Northern Germany, a significant number of the arbitrations which it administers are international arbitrations. Moreover, the Court administers, under contract, cases submitted to the Chinese European Arbitration Centre (CEAC) and to the Court of Arbitration of the German Coffee Association.³⁰⁶ To implement modern international arbitration standards, the Hamburg Arbitration Court has completely revised its Rules of Procedure³⁰⁷ in 2000 and further adapted in 2003.³⁰⁸ The Court has some distinctive features deriving from its early history. One of these features is the involvement of a "legal advisor" in the proceedings. At present, it remains unclear whether the legal advisor should be subject to the same regime of civil liability as the arbitrators, while he or she participates actively in the hearings and discusses the merits of the dispute with the members of the tribunal.³⁰⁹ Nevertheless, the business community of Northern Germany accepts the approach of the Hamburg Court to the administration of arbitrations as an approach that is simply not available at any of the other larger and more prominent arbitral institutions.³¹⁰

4.2.3.2. German Maritime Arbitration Association (GMAA)

The German Maritime Arbitration Association (GMAA)³¹¹ was founded in 1983 by members of the shipping trade and layers specialised in maritime law from Hamburg and Bremen. Their

³⁰⁴ *Ibid.*

³⁰⁵ <https://www.hk24.de/en/fairplay/arbitration-mediation-conciliation/arbitration/court-arbitration/1168698>.

³⁰⁶ See Cole et al., *Legal Instruments and Practice of Arbitration in the EU*. Study for the Committee on Legal Affairs of the European Parliament, PE 509.988, Brussels 2014, p. 106, available at [http://www.europarl.europa.eu/RegData/etudes/STUD/2015/509988/IPOL_STU\(2015\)509988_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2015/509988/IPOL_STU(2015)509988_EN.pdf).

³⁰⁷ Rules of the Court of Arbitration of the Hamburg Chamber of Commerce (lastly revised on 12 December 2003), <https://www.hk24.de/en/fairplay/arbitration-mediation-conciliation/arbitration/court-arbitration-rules/1168690>.

³⁰⁸ Nacimient, Germany, in: Kolkey/Chernick/Neal (eds.), *Practitioner's Handbook on International Arbitration and Mediation*, 3rd ed., New York 2012, pp. 785-854 (792).

³⁰⁹ Cole et al. (*supra* n. 306), p. 107.

³¹⁰ *Ibid.*

³¹¹ <https://gmaa.de/en/>.

aim was to offer the maritime business a cheaper and effective alternative to other arbitration systems abroad such as at the London Maritime Arbitrators Association (LMAA) and to promote maritime arbitration as practised in Hamburg and Bremen.³¹² Based on German procedural law and the UNCITRAL rules, the GMAA has established sector-oriented arbitration rules³¹³ which ensure high quality, legal certain, independent, quick, efficient and cost-effective proceedings and awards which are enforceable worldwide.³¹⁴ It is the only specialized German organization for maritime dispute resolution, offering *ad hoc* maritime arbitration.³¹⁵ According to § 13 of the GMAA Arbitration Rules the arbitrators have to work towards an amicable settlement at all stages of the proceedings and, when it is possible, even suggest to the parties the terms of settlement. Thus, an arbitral award is made only if the arbitrators do not succeed in steering the parties towards a compromise; as a result, a quick and cost-effective solution can be achieved in the majority of cases.³¹⁶ In contrast to the level of document disclosure traditional in common law systems, the GMAA Arbitration Rules do not provide for significant disclosure of documents between parties.³¹⁷ *Tony Cole et al.* understand the GMAA as a “*facilitator of ad hoc arbitration within a particular industry, rather than as an arbitral institution in the traditional sense*”. In their view, “*the maritime community has a clear preference for institutions seen as a part of their community*”.³¹⁸

§ 5 Summary

This chapter discusses the historical development of arbitration in Germany and Uzbekistan, and highlights briefly the differences and similarities of the legal systems of both countries. By using an historical approach, it deals with the role of arbitration in conflict resolution in the German and Uzbek societies.

From a historical analysis it is concluded that the concept of arbitration predated Islam, and played a vital role in resolving disputes in Central Asia until the Soviet period. Islamic arbitration (Tahkeem) has had a long history since the Arab pre-Islamic tradition. Conflicts,

³¹² <http://www.dispute-resolution-hamburg.com/de/institutions/gmaa/>. Cf. Nacimiento (*supra* n. 308), p. 792; Cole et al. (*supra* n. 306), pp. 107-108.

³¹³ The GMAA Rules came into force in 2007 and are similar with the terms of LMAA. See GMAA Arbitration Rules (version as from 13 January 2017), https://gmaa.de/images/GMAA_Arbitration_Rules_2017_aktuell.pdf.

³¹⁴ <http://www.dispute-resolution-hamburg.com/de/institutions/gmaa/>.

³¹⁵ See Weigand/Baumann, Introduction, in: Weigand (ed.), *Practitioner's Handbook on International Commercial Arbitration*, 2nd ed., Munich 2010, pp 1-119 (21); Herber, *Seehandelsrecht: Systematische Darstellung*, 2. Aufl., Berlin 2016, p. 454; Trunk/Musin, *International Commercial Arbitration and International Maritime Law from a German and Russian Perspective*, Münster 2004, p. 166.

³¹⁶ See Overview of the German Maritime Arbitration Association, <https://gmaa.de/images/international/GMAA%20ueberblick%20englisch.PDF>.

³¹⁷ *Ibid.* Cf. Cole et al. (*supra* n. 306), p. 108.

³¹⁸ Cole et al. (*supra* n. 306), p. 108.

mainly of a commercial nature, were settled by this method of dispute resolution. In this regard, arbitrators should be guided not by the norms of the law, but by the principle of general justice. The decision of the arbitrators was final and binding for the disputing parties.³¹⁹

Like in many other Central Asian countries, different legal systems operate in Uzbekistan at present: newly introduced elements of Western law (Roman-German law), a traditional system based on customary law (Adat) and Islamic Sharia. Being closely linked, the latter existed even in the Soviet period and were adapted to Communist state-party hierarchies. However, it is important to note that religious legal systems of post-Soviet states are weaker today, since seventy years of secular education have left their mark.³²⁰ According to some scholars, Sharia is a conceptual framework for divine law and is applied and understood in various ways. *Bhatti* refers to the term “classical Sharia” as a body of Islamic jurisprudence based on the four schools of thought³²¹ which were discussed in this chapter.

While the Russian law system borrowed much from the German legal system, the “Sovietization” of the Uzbek legal system brought it consequently closer to continental European legal systems. Having deep historical roots in the resolution of disputes between merchants, particularly, among the business community in Western Europe, arbitration courts were considered as the most respected courts with reputable persons, *i.e.* arbitrators chosen by those merchants.

There is an opinion among legal scholars that the civil procedural law has not changed in the last 2,500 years, when talking about inseparable relationships between Roman and German civil procedural law.³²² Borrowing progressive elements of culture from Europe led to directly or indirectly borrowing the legal norms that regulated the life of society, too. Philosophical treatises and legal doctrines of European thinkers were popular among the Russian nobility, primarily monarchs. Everything which was new has become gradually the norm of peoples’ everyday life. For example, before the First World War, the legislation of tsarist Russia continued to be influenced by the law of the German Empire, having its own Civil Procedure Code of 1879.³²³ German law has most consistently approached the regulation of arbitration,

³¹⁹ Kovyreshina, Al'ternativniye sposoby razresheniya sporov v stranakh Arabskogo Vostoka, *Advokat* 2012:6, 73-77.

³²⁰ Morozova, Legal systems and political regimes in post-socialist Central Asia, *IIAS Newsletter* 34, 2004, p. 16, available at http://iias.asia/sites/default/files/IIAS_NL34_FULL.pdf, p. 16.

³²¹ See for more details Bhatti, *Islamic Law and International Commercial Arbitration*, Abingdon 2019: Routledge.

³²² See for more details F. Schulz, *History of Roman Legal Science*, Oxford 1946, p. 5.

³²³ *Adam Samuel* stresses that it contained detailed provisions on arbitration, which remain largely in force today not only in that country, but also in Austria and Japan. See Samuel, *Arbitration in Western Europe – A Generation of Reform*, *ArbIntl* 7:4 (1991), 319-364.

since the German ZPO of 1879 provided for voluntary arbitration as well as for the binding nature of arbitral awards.³²⁴

Thus, the legislation of Germany and Russia adequately reflected the nature of arbitration as an alternative method of resolving disputes related to business transactions which are based on treaties and which exclude the jurisdiction of state courts to review specific cases. Indeed, this became the defining moment for the subsequent development of arbitration and other alternative methods of resolution of commercial disputes.³²⁵

In turn, the Soviet legal system had a strong influence on the formation of a new legal system of the German Democratic Republic after the end of the Second World War. At the end of the 20th century, the gap in the development of legal systems of the CIS countries has been overcome, and these CIS countries entered the 21st century with new and modern legal systems, including arbitration systems. Like in other CIS countries, consultative support in the legal sphere includes entirely various projects in the legislative field and the judicial system of Uzbekistan. In this context, German commitment aims to promote the development of a legal system which follows principles of the rule of law in all spheres, including arbitration.³²⁶

As mentioned in this chapter, prior to the Soviet era and the establishment of the modern Central Asian Republics, the resolution of disputes was one of the primary tasks of social institutions like *mahalla* among its various other functions. In Soviet times the special system of state agencies combining adjudication and management functions dealt exclusively with economic disputes, and domestic arbitration was *de facto* non-existent in all Soviet Union Republics, including Uzbekistan. In other words, the role of an arbitrator in disputes between economic actors which were mainly state-owned enterprises was played by the State itself, and disputes between individuals were handled by courts of general jurisdiction. The state's role was not only to solve the disputes but also to exercise the regulatory power in the interests of the national economy as a whole.³²⁷

Although there was a possibility to refer disputes to *ad hoc* arbitration, it did not work in practice, since the Soviet legislation expressly prohibited arbitrators from receiving any fees for their work, and very few lawyers wanted to act as an arbitrator on a *pro bono* basis.³²⁸ Since

³²⁴ Alexandrow, *Internationale Schiedsgerichtsbarkeit in Deutschland und in den GUS-Staaten*, Dissertation, Ruhr-Universität Bochum, 2003, p. 8.

³²⁵ *Ibid.*

³²⁶ IRZ Annual Report 2016, p. 80.

³²⁷ GOST State Standards are an example of USSR legislation, which has hardly been changed wholly.

³²⁸ See for more details Khvalei, Arbitration in CIS countries: The same as everywhere?, in: Association for International Arbitration (ed.), *Arbitration in CIS countries: Current Issues*, Antwerpen/Apeldoorn/Portland 2012, 21-39.

international trade was completely monopolised by the state, only a minor part of people was familiar with cross-border transactions and international commercial arbitration.

The situation changed in the early 1990s after the collapse of the USSR, and international commercial arbitration began to be recognised as the most adequate dispute settlement mechanism in the field of international trade as well as foreign investment in Central Asian countries, including Uzbekistan. The symbiosis of traditional society and socialist legacy, as argued by *Morozova*, is the main stumbling block for legislative reform in Central Asia today.³²⁹ In particular, one of the directions of successive reforms of liberalization of the judicial system is the development of arbitration trials as an important step in this area in raising legal consciousness and legal culture of the population. By acting as a mediator between business entities, by observing the confidentiality of the process and by creating conditions for the preservation of trade secrets, arbitration courts will facilitate the resolution of disputes on the spot, without bringing the matter to trial and while maintaining business relations between the parties. Systematic study of arbitration courts' activity provides an opportunity to identify the key problems of economic relations and legal practice in the field of civil transactions. Also it will increase the opportunity for involvement in the implementation of arbitration proceedings of not only lawyers, but also experts with economic and technological knowledge of stock and financial markets as arbitrators in dispute resolution.

As compared to Uzbekistan, Germany with its new legal regime has become a fertile ground for domestic and international arbitration, today. With an extensive infrastructure, a large and well-qualified bar and an arbitration-friendly legal environment, arbitration institutions, in particular, the German Institution of Arbitration (DIS), which has been gaining increased recognition in international arbitration, Germany offers nowadays all the necessary prerequisites of a favourable place of arbitration in Europe.³³⁰

³²⁹ Morozova (*supra* n. 310).

³³⁰ Cf. Rützel/Wegen/Wilske, *Commercial Dispute Resolution in Germany*, 2nd ed., Munich 2016, p. 112.

Chapter II: General principles and the legal framework for the recognition and enforcement of foreign arbitral awards

§ 1 General principles concerning recognition and enforcement of foreign arbitral awards

1.1. Definition of the terms “recognition” and “enforcement”

The terms “recognition” and “enforcement” are not defined in the New York Convention 1958 and are rarely interpreted by case law. Many authors are of the opinion that “recognition” refers to the process of considering an arbitral award as binding but not necessarily enforceable, since “enforcement” means giving effect to an award.³³¹ There is a basic difference between the two terms “recognition” and “enforcement”. An award may be recognized without being enforced, but if the award is enforced, then it is necessarily recognized by the court which orders enforcement.³³² Another problem regarding the definition of the terms “recognition” and “enforcement” is that whether a party seeks them together³³³ or separately.³³⁴

1.1.1. Definition of the terms “recognition” and “enforcement” in German Law

The difference is reflected in the wording of §§ 1060 and 1061 German Civil Procedure Code (ZPO). The “recognition” of an award by a domestic court is required only in the case of a foreign award, *i.e.* an award that has resulted from an arbitration whose seat was outside Germany.³³⁵ § 1061 (1) ZPO, dealing with foreign awards, therefore mentions the “recognition” and “enforcement” of foreign arbitral awards.³³⁶ The domestic court in Germany, in recognizing a foreign award, proves that this award has the same value and effect as a German award. However, it is not necessary in the case of a German award. § 1055 ZPO, which applies to German awards regarding § 1025 (1) ZPO states that an award has the same effect as a court judgement. The “recognition” of an award, however, may be used as a precautionary shield, in that it is aimed at blocking any attempt to raise issues that have already been decided in the

³³¹ Cf. Gaillard/Bermann (eds.), *Guide on the Convention on Recognition and Enforcement of Foreign Arbitral Awards*, Leiden/Boston 2017, p. 14; Ehle, Commentary on Art. I, in: Wolff (ed.), *New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 10 June 1958: A Commentary*, Munich et al. 2012, p. 77.

³³² Redfern/Hunter, *Law and Practice of International Commercial Arbitration*, 4th ed., London 2004, para. 10-10.

³³³ For example, the German Supreme Court (BGH) in its decision of 1981 interpreted the terms “recognition” and “enforcement” as two interrelated actions, which could not be sought separately. See BGH, 8 October 1981, YBCA 8 (1983), 366.

³³⁴ Gaillard/Bermann (eds.), *Guide on the Convention on Recognition and Enforcement of Foreign Arbitral Awards*, Leiden/Boston 2017, p. 14.

³³⁵ Berger, *Private Dispute Resolution in International Business: Negotiation, Mediation, Arbitration, Volume II: Handbook*, 2nd ed., Alphen aan den Rijn 2009, p. 676.

³³⁶ *Ibid.*

arbitration.³³⁷ The court will then declare the award enforceable focused on this “recognition”. In the case of domestic awards, § 1060 (1) ZPO provides that formal recognition is not necessary.³³⁸ The provision obviously shows that the enforcement of a domestic award will occur once a court finds it enforceable. The wording of both § 1060 and § 1061 ZPO also makes clear that the term “enforcement” is a misnomer in this context. The point is the court is not ordering enforcement measures, but it is just issuing a declaration of enforceability, which is considered to be the official basis of further enforcement measures by the competent enforcement organs of that state.

So we should bear in mind that the terms of ‘*recognition*’ and ‘*enforcement*’ are misleading. In particular, in two respects they are incoherent. First, proceedings for ‘*recognition and enforcement*’ in the sense of the New York Convention 1958 or §§ 1060, 1061 ZPO must be clearly distinguished from proceedings in the proper sense. In the German legal system the enforcement of rights is composed of a two-step process, which involves two separate and various sets of proceedings. German law differentiates between the *Erkenntnisverfahren*³³⁹ and the *Vollstreckungsverfahren*.³⁴⁰ In the first stage the existence of an alleged rights’ determination has an important role. The second stage is concerned with the execution of the first stage’s findings against a party or its property. Proceedings for recognition and enforcement of awards according to the New York Convention 1958 or to §§ 1060, 1061 ZPO, belong to the first stage. A separate proceeding for the recognition of the other non-enforcement related effects of awards is rare in Germany and it is not necessary, while the recognition occurs automatically.

Another point of misleading of terminology is that the terms ‘*recognition and enforcement*’ are tightened much.³⁴¹ The German Civil Procedure Code clearly compares both concepts. The difference is especially cleared in relation to domestic awards. Different sections of the ZPO regulate both concepts.³⁴² According to German law, it makes a difference whether a party wants to require the active enforcement of an award, or whether it wants to prevent the re-litigation of considered issues. *Berger* defines these concepts as follows: *Recognition* means the acceptance of a foreign award as having the same effects as a domestic award. Focused on this recognition, the court will declare the award *enforceable*. Both decisions are usually

³³⁷ Redfern/Hunter (*supra* n. 332), paras. 10-13.

³³⁸ *Ibid.*

³³⁹ *Erkenntnisverfahren* is regulated in the first seven books of the ZPO.

³⁴⁰ *Vollstreckungsverfahren* is regulated in the 8th book of the ZPO.

³⁴¹ Cf. Wieczorek, *Zivilprozeßordnung und Nebengesetze, Band IV, Teil I: ZPO, 8. Buch: Zwangsvollstreckung*, §§ 704-863, Berlin 1958, p. 29.

³⁴² For instance, § 1055 ZPO (recognition) and § 1060 ZPO (enforcement).

rendered in the same judgement. The award may then be enforced against the losing party by the competent enforcement organs of that state.³⁴³

In many legal systems, a special proceeding to obtain a declaration of enforceability is necessary for the active enforcement of an award and the recognition of non-enforcement related effects (in particular, *res judicata*) happens automatically.

1.1.2. Definition of the terms “recognition” and “enforcement” in Uzbek Law

While the recognition institute is new for Uzbek legal science, the term ‘recognition’ has not been defined from the scientific point of view until now in Uzbek legal literature. Related monographs are entirely lacking the term and the authors of publications in this field confine themselves by stressing practical difficulties in dogmatic clarifications of the recognition institute and thus not mentioning the theoretical aspects of the terms “recognition” and “enforcement”.³⁴⁴

The recognition of a foreign title has not been discussed as well. The comments on procedural law do not address the topic. This situation is unique for many CIS countries, while it traces to the Soviet Law. The USSR was a closed community, since it was not almost interested in International Commercial Affairs. Some Uzbek laws are silent in relation to the supremacy of international legal treaties in some spheres,³⁴⁵ though in some spheres the Uzbek legal system accords the priority to international agreements.³⁴⁶

The term ‘recognition’ is not defined in the CIS agreements. Bilateral mutual legal aid treaties of Uzbekistan do not discuss this problem, too. The exception is the Treaty between Uzbekistan and China, which defines the legal effect of recognized court judgements.³⁴⁷ Art. 20 of this treaty however remained unclear and its meaning is interpreted differently.

According to multilateral agreements of the CIS the recognition is not distinguished as a separate stage, being necessary for enforcement of foreign court judgments. For example, such recognition is done automatically in accordance with the Kiev Convention. Enforcement of foreign court judgments is done directly by a court enforcement officer, without involvement of the competent courts of the state where enforcement is sought.

³⁴³ Berger (*supra* n. 335), p. 677.

³⁴⁴ Amanova, *Arbitration Courts: Advantages and Limitations*, Ekonomicheskoye obozreniye 1999, p. 8.

³⁴⁵ The Law on International Treaties of 1995 also contains no primacy clause with respect to treaties.

³⁴⁶ Art. 2 of the Law “On foreign investments” of 1998 accords priority to international treaties concluded by Uzbekistan with respect to investment disputes. On the other hand, Art. 2 of the Law “On Arbitration Courts” accords priority to an international treaty if it establishes other rules than those provided in the legislation of Uzbekistan on arbitration courts.

³⁴⁷ Art. 20 of the Bilateral Treaty between Uzbekistan and China on Mutual Legal Aid of 1992.

The Minsk Convention, on the other hand, does not differentiate between recognition and enforcement. These are two elements of the same concept. A court decision of a contracting state is submitted to the competent Uzbek court for recognition and enforcement, which is done by issuance of an enforcement order by such competent court.

1.2. Definition of “foreign award”

The New York Convention of 1958 employs two criteria to determine when awards are foreign. The characterization may be the result of a territorial criterion or a functional criterion.³⁴⁸ An award is foreign if it is considered “non-domestic” by the enforcing court. The term “non-domestic” appears to embrace awards which, although made in the state of enforcement, are treated as “foreign” under its law because of some foreign elements in the proceedings, *e.g.* another State’s procedural laws are applied.³⁴⁹

1.2.1. Definition of “foreign award” in German Law

As stated in legal literature, the place of arbitration is the underlying criterion to distinguish between foreign awards and domestic awards.

German law treats domestic and foreign awards differently in three main respects:

- the statutory recognition of domestic awards,³⁵⁰
- time limit for defences,³⁵¹
- effects of rejection of an application for recognition and enforcement.

According to German Law an arbitral award is foreign if the seat of the arbitration tribunal is in a country other than Germany.³⁵²

The character of “foreign award” is no longer determined by the “procedural theory”, relying on the law applicable to the procedure as the relevant criterion.³⁵³ In line with the internationally prevailing practice, Germany now follows the “territorial theory” where the place of arbitration determines the classification of an award as foreign or domestic. It can be deduced from § 1025 (1) and (4) of the ZPO that an arbitral award is regarded as foreign, if the place of arbitration is not located in Germany.

³⁴⁸ Lew/Mistelis/Kröll, *Comparative International Commercial Arbitration*, The Hague et al. 2003, p. 701.

³⁴⁹ UNCITRAL Secretariat, *Guide on the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958)*, New York 2016, p. 23.

³⁵⁰ § 1055 ZPO.

³⁵¹ § 1060 (2) sentence 3 ZPO.

³⁵² § 1025 (1) ZPO.

³⁵³ According to the procedural theory an award rendered in a foreign country was still regarded as a domestic one, if the parties had opted for German law as the procedural law; *cf.* BGHZ 96, 40, at p. 41.

In this regard the German law makes a clear distinction between the place of arbitration and the place where the hearings take place.³⁵⁴ If the parties have agreed on a place of arbitration it is the place which determines the “nationality” of an award, irrespective of whether all hearings were held at a different place. In practice it is rare that neither the parties nor the tribunal³⁵⁵ has clearly determined the place of arbitration, since often the relevant arbitration law requires that the award sets out the place of arbitration.³⁵⁶ The OLG Düsseldorf has, however, held that not every reference to the place where the award was signed must constitute a reference to the place of arbitration. It may also be just a reference to the arbitrators’ place of residence. The court determined that in those cases the place of arbitration will be at the place where the last hearing took place.³⁵⁷

1.2.2. Definition of “foreign award” in Uzbek Law

The Uzbek Law does not determine the “foreign award” and it defines only the term “international arbitration”. The Draft Law of Uzbekistan “On International Commercial Arbitration Courts” defines it as follows:³⁵⁸ *“Arbitration is international if*

- a) the commercial enterprises of the parties to the arbitration agreement are in different states at the moment of its conclusion; or*
- b) one of the following places is outside the state, in which the parties have their commercial enterprises:*
 - i) the place of arbitration, if it is specified in the arbitration agreement or in accordance with it;*
 - (ii) any place where a significant part of obligations arising from trade relations must be executed, or the place which is most closely connected with the subject of the dispute;*
- c) the parties expressly agreed that the subject matter of arbitration agreement is connected with more than one country;*
- d) if one of the enterprises is a joint venture with foreign capital participation.”*³⁵⁹

³⁵⁴ OLG Stuttgart, 6 December 2001 (1 Sch 12/01); Schwab/Walter, *Schiedsgerichtsbarkeit*, 6. Aufl., München 2000, chap. 30, para. 7; Schütze, *Schiedsgericht und Schiedsverfahren*, 6. Aufl., München 2016, paras. 140 *et seq.*

³⁵⁵ According to § 1043 (1) of the ZPO if the parties have not made use of their right to determine the place of arbitration it is for the tribunal to do so. Such determinations will also be recognized at the enforcement stage.

³⁵⁶ See § 1054 (3) of the ZPO; Art. 31 (3) of the UNCITRAL Model Law.

³⁵⁷ OLG Düsseldorf, *EWiR* 2000, 795 (note of Kröll).

³⁵⁸ Projekt Zakona Respubliki Uzbekistan „O Mejdunarodnom Kommercheskom Arbitraje“ (The Draft Law of Uzbekistan “On International Commercial Arbitration Courts”) in *“Materiali mezhdunarodnih nauchno-prakticheskikh konferensiy”*, Tashkent 2010, p. 295.

³⁵⁹ Art. 1 (3) of the Draft Law of Uzbekistan “On International Commercial Arbitration”.

1.3. Types of awards

The wide range of several types of awards is in the first place due to the broad discretion of arbitral tribunals regarding the means of conducting and concluding proceedings. Final, interim and partial awards are considered to be possible ways for the arbitral tribunal to render a decision under Art. 32 (1) of the UNCITRAL Arbitration Rules.³⁶⁰ However, like the Model Law, there is no generally accepted definition of these different types of awards neither in the Uzbek nor in the German legislation.

§ 300 of the German ZPO might overcome this issue, which deals with the comparable classification of state court judgements.

1.3.1. Interim award

As *Berger* mentioned, international arbitrators often feel the need to render a formal decision which they call an “interim” or “interlocutory award” on procedural issues or on interim measures of protection.³⁶¹ Art. 26 (2) UNCITRAL Arbitration Rules clearly states that the tribunal may issue an order for interim relief in the form of an interim award. Such decisions must be characterized as mere procedural orders in the guise of an arbitral award (even though they are closed as a final award). By their very nature they are neither final nor enforceable; even they might not be attacked with an action to set aside before the domestic court at the seat of arbitration,³⁶² unless this law contains special provisions on setting aside interim awards.³⁶³ Therefore, the award, containing a reservation in connection with the tribunal’s subsequent decision on a cross-claim taken by the respondent in means of a set-off during the arbitration was evaluated as a non-final “interim award” by the German Federal Supreme Court (Bundesgerichtshof – BGH).³⁶⁴ It is necessary for the practitioners of arbitration to realize the importance of the distinction between partial and interim awards, as both terms are often used interchangeably in arbitral practice.

Interim awards don’t contain a final decision but address in advance specific procedural or substantive issues, which are of relevance for the entire arbitration. Unlike partial awards, interim awards may neither be challenged nor enforced.³⁶⁵ They are binding for the tribunal as regards its subsequent final decision. While it is disputed whether the terminology “interim

³⁶⁰ von Schlabrendorff/Sessler, § 1055 – Effect of the Arbitral Award, in: Böckstiegel/Kröll/Nacimient (eds.), *Arbitration in Germany: The Model Law in Practice*, Austin et al. 2007, pp 397-409 (400).

³⁶¹ *Berger, International Economic Arbitration*, Deventer/Boston 1993, p. 633.

³⁶² *Ibid.*, p. 589.

³⁶³ *Ibid.*, p. 656.

³⁶⁴ BGHZ 10, 325, 326.

³⁶⁵ Hanefeld (*supra* n. 258), p. 514.

award” or “interlocutory award” is preferable,³⁶⁶ there is a general agreement on the common characteristics of such a decision by the arbitral tribunal. Many legal authors acknowledge that there is some dispute if a tribunal’s interim decision affirming jurisdiction under § 1040 (3) ZPO constitutes an interim award or rather a preliminary ruling in accordance with German law. In any event, the decision may only be challenged by way of the specific procedure provided by § 1040 (3) ZPO. Contrary to it, a decision denying jurisdiction is not an interim but a final decision. It can be reviewed in proceedings under § 1059 ZPO.

1.3.2. Partial award

The tribunal has discretion to issue a partial award that disposes of certain parts of the dispute, if the legal issues at hand are separable from the remainder of the issues and ready for decision. Under § 1054 ZPO, partial awards meet the same formal requirements as final awards.³⁶⁷ They can be separately challenged by or enforced against a party. These kinds of awards are final and binding for an arbitral tribunal. They have a binding effect to the extent that the award finally resolves a claim and fulfils all formal requirements according to § 1054 ZPO. After the rendering of the partial award, if an arbitrator has been successfully challenged and removed on grounds that prevailed even before the partial award was made, the award will not be rendered void automatically,³⁶⁸ but the aggrieved party may challenge the award in the courts.

1.3.3. Final award

Not all the types of awards just mentioned are characterized by the finality of the arbitrators’ decision and their *res judicata* effect. Only those arbitral decisions which decide, partially or wholly, on the subject matter of the arbitration thus leading to a total or partial termination of the proceedings and to a settlement of the dispute can be characterized as genuine final arbitral awards.³⁶⁹ The German Federal Supreme Court (BGH) has stated this matter in the following way:

“This is the unanimous view in case law and legal doctrine, that only a final decision on the merits as a whole or on a separable part of them can be regarded as an award within the meaning of the ZPO. The award must always terminate the arbitration, be it that the

³⁶⁶ Lionnet/Lionnet, *Handbuch der internationalen und nationalen Schiedsgerichtsbarkeit*, 3rd ed., Stuttgart 2005, p. 403. “Interim” and “interlocutory” awards are the same and they are both names for the German “Teilschiedsspruch”; an “interlocutory” award is called in German “Zwischenschiedsspruch”.

³⁶⁷ BGHZ 10, 325 *et seq.*

³⁶⁸ Hanefeld (*supra* n. 258), 514.

³⁶⁹ Gaillard/Savage (eds.), *International Commercial Arbitration*, The Hague/London/Boston 1999, p. 741.

tribunal decides in the award on all legal issues, which are independent from the rest, as is the case in an award that decides on some of the claims raised.”³⁷⁰

Based on these considerations, the Federal Court refused to categorize a decision by an arbitral tribunal as a final award in which the tribunal decided on the merits of the dispute, but included the reservation that it would later decide on the cross-claim raised by the respondent by means of a set-off defence.

A final award disposes of all yet undecided issues presented in the arbitral proceedings. The final award terminates the arbitral proceedings (§ 1056 (1) ZPO).³⁷¹ It may be challenged by a party or enforced against it in the procedures provided for in §§ 1059 et seq. ZPO. The final award shall contain a decision on the costs of the arbitration (§ 1057 ZPO).

1.4. A comparison between the German and the Uzbek legal terminology concerning arbitration

The richness of legal vocabulary is measured by the legal traditions and features of the legal system’s construction of a particular country. Moreover, the culture of a society affects significantly all aspects of that society, including its legal system and its use of language. When we intend to make any kind of international economic relationship and expect it to be successful for both sides, we must be informed about obstacles to understanding established by cultural, legal and linguistic differences.

Traditionally, it is believed that the regulation of legal institutions is similar in structure and content in countries, sharing the same legal family (so-called continental or Anglo-American). However, in the result of a detailed study of similar legal acts of different countries, the differences that are important in the work of practicing lawyers become apparent.

For example, due to the brevity of a formulation of legal terms, clearness and completeness of the meanings, German legal terminology has always been considered to be special. Russian legal terminology³⁷² also based largely on the terminology of Roman law, which derived from the Latin language, not only the phonation, but also the construction of legal speech acts that are used in articles of legal-normative acts. The similarity of such phrases was revealed in the process of studying and comparing Uzbek, Russian and German laws regulating the same circle of social relations.

³⁷⁰ BGHZ 10, 325 et seq.

³⁷¹ Cf. OLG Karlsruhe, 15 July 2008, *SchiedsVZ* 2008, 311.

³⁷² In spite of the fact that the official language of Uzbekistan is Uzbek, in major cities Russian is widespread – more than 5% of the population use Russian as their primary language and 70% of the population speaks at least some Russian. The texts of legal-normative acts are still prepared in two languages: Uzbek and Russian. Cf. Ilkhamov/Zhukova (eds.), *Ethnic Atlas of Uzbekistan*, Tashkent 2002: Open Society Institute, p. 452.

A comparative study shows that both German and Uzbek (and also Russian) laws belong to the continental legal system, *i.e.* the legislators basically focus on concrete meanings of the terms and the semantics of certain legal terms in the legal acts. Thus, both civil material and civil procedural law of both countries have the unique basis: Roman law and German legal system which has a great impact on the Uzbek legislative process.

Legislation on arbitration of both countries also has a number of similarities concerning the use of a certain frame of legal terms and phrases considered as standards in legal practice of Germany and Uzbekistan. At the same time, there are some inconsistencies between Russian (Uzbek) and German terminology regarding several key concepts. Based on the 10th Book of the Civil Procedure Code of Germany and the Law “On Arbitration Courts” of the Republic of Uzbekistan, several examples will be given.

The meanings of the terms “*arbitraj sudi qarori*” (arbitration award), “*hal qiluv qarori*” (decision), “*ajrim*” (determination or provision) and “*qaror*” (decree) have their equivalents in the German language in the words “*Schiedsspruch*”, “*Entscheidung*”, “*Entscheid*”, “*Bestimmung*”, “*Beschluss*” which do not fully correspond to the Uzbek language. However, the terms “*sud qarori*” (court judgment) and “*(gerichtliche) Entscheidung*” are equivalents; the term “*Bestimmung*” means both “*decree*” and “*determination*”; “*Beschluss*” corresponds to the Uzbek words “*hal qiluv qarori*”, “*ajrim*”, “*qaror*”, although the meanings of the last words, related to the civil process, are completely different, whereas “*hal qiluv qarori*” (decision) refers to the act of justice, the decision of the court of first instance, which resolves the matter in substance,³⁷³ and “*ajrim*” (determination or provision) usually means an act under which the matter is essentially not resolved.³⁷⁴

Some partial inconsistencies also exist between the terms “arbitration agreement”, “arbitration clause” and “*Schiedsvereinbarung*”, “*Schiedsklausel*” and “*Schiedsvertrag*”. However, these inconsistencies are not often manifested in the study of regulatory-normative acts.

The specialized dictionaries published in the CIS and Germany are often dense and confusing to readers; unclear definitions and phrases were chosen not precisely by non-professionals.³⁷⁵ In this respect, it is very important, to think about the true terminological equivalent of a particular word, instead of “word-for-word translation”.

³⁷³ For example, the definitions of the inter-district city courts of the Tashkent region in civil cases in 2014. See also Art. 135 of the EPC of the Republic of Uzbekistan.

³⁷⁴ *Ibid.*, Art. 135 of the EPC.

³⁷⁵ For example, Deutsch-russisches Rechtswörterbuch (“Russo”), Moscow 1995; Deutsch-russisches Wirtschaftswörterbuch (“Real”), Moscow 1995.

§ 2 International Conventions

2.1. The United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention of 1958)

The centrepiece of the legal regime governing international arbitral awards and international agreements is the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (hereinafter the “New York Convention”).³⁷⁶ In 1958 the Convention was drafted under UN auspices and has been ratified by more than 150 countries, including virtually all significant trading states. The Convention was designed to enhance the enforceability of international awards and agreements. It is widely regarded as having contributed to the significant increase in the use and efficacy of international commercial arbitration in recent decades. However, as *George A. Bermann* noted: “*The New York Convention is dependent for its efficacy on the behaviour of national actors. Moreover, the Convention’s efficacy also depends on the adequacy of the Convention’s application on the ground in all States regardless of their general views of international law.*”³⁷⁷

The New York Convention, in broad outline, requires national courts to:

- recognize and enforce international arbitration agreements, subject to certain exceptions;³⁷⁸
- recognize and enforce foreign arbitral awards, again subject to specified exceptions.³⁷⁹

In the result of implementation of international awards by national legislations, they are typically subject to an avowedly pro-enforcement international legal regime.

2.1.1. Germany as a signatory to the New York Convention

Nowadays every substantial commercial country is considered to be a member of the New York Convention. Germany, to be one of the most developed trading countries in the world has ratified the New York Convention and today the country enforces all foreign arbitral awards according to this Convention, regardless of the state of origin providing no other treaty applies.³⁸⁰

³⁷⁶ Born, *International Arbitration and Forum Selection Agreements: Drafting and Enforcing*, 3rd ed., The Hague et al. 2010, p. 122.

³⁷⁷ Bermann, *Recognition and Enforcement of Foreign Arbitral Awards: The Interpretation and Application of the New York Convention by National Courts*, in: Bermann (ed.), *Recognition and Enforcement of Foreign Arbitral Awards: The Interpretation and Application of the New York Convention by National Courts*, Cham et al. 2017, pp. 1-78 (2).

³⁷⁸ Art. II (1), II (3) of the New York Convention 1958.

³⁷⁹ Articles III and V of the New York Convention 1958.

³⁸⁰ For example, the European Convention on International Commercial Arbitration of 21 April 1961.

Germany signed the New York Convention on 10 June 1958 and on 30 June 1958 the ratification of it occurred. The treaty entered into force on 28 September 1961.³⁸¹ The former German Democratic Republic acceded to the Convention in February 1975 with the commercial and reciprocity reservations provided for in Art. I (1) and (3) of the Convention. In 1877 the German Code of Civil Procedure (ZPO) was enacted. As the German constitution proves, as a matter of federal law, the provisions of the ZPO apply to the 16 German states and their courts, and the states are precluded from adopting their own laws of civil procedure.³⁸²

Recognition and enforcement of foreign arbitral awards was governed by two regimes: German courts applied the Convention only to those awards rendered pursuant to the procedural laws of a contracting state, and all other foreign awards (those rendered according to the procedural laws of non-members of the Convention) were subject to the provisions of national law.³⁸³

Because of the fact that the causes for unenforceability of a foreign award provided for a national law were practically similar to those contemplated in the Convention, the ZPO was amended on 22 December 1997. § 1061 (1) of the “New German Arbitration Law”, which entered into force on 1 January 1998, provides: “*Recognition and enforcement of foreign arbitral awards shall be granted in accordance with the Convention on Recognition and Enforcement of Foreign Arbitral Awards of 10 June 1958.*”³⁸⁴ The provisions of other treaties on the recognition and enforcement of arbitral awards shall remain unaffected. German literature speaks about indirect implementation of the UN Convention into the German legal system by reforming the tenth Book of the German Code of Civil Procedure.³⁸⁵

After this amendment on 31 August 1998, Germany lifted its first reservation that it would apply the Convention only to recognition and enforcement of arbitral awards which were made in the territory of another contracting state.³⁸⁶ Consequently, Germany nowadays applies the Convention to both awards rendered in contracting and non-contracting States.³⁸⁷

³⁸¹ UNCITRAL Status of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtmsg_no=XXII-1&chapter=22&lang=en.

³⁸² German Constitution, Articles 72, 74 (1) No. 1.

³⁸³ BGH, *RIW* 1984, 685; OLG Hamm, 2 November 1983, *IPRax* 1985, 218.

³⁸⁴ BGBl. 1961 Part II, p. 121.

³⁸⁵ Schwab/Walter, *Schiedsgerichtsbarkeit*, 6. Aufl., München 2000, p. 61.

³⁸⁶ *Supra* n. 383.

³⁸⁷ Rubinstein/Fabian, The Terrestrial Scope of the New York Convention and its Implementation in Common and Civil Law Countries, in: Gaillard/Di Pietro (eds.), *Enforcement of Arbitration Agreements and International Arbitral Awards: The New York Convention in Practice*, London 2008, pp. 91-138 (123).

2.1.2. Uzbekistan as a signatory to the New York Convention

On 20th of December 1995, the Oliy Majlis (the legislative and the highest representative body of Uzbekistan)³⁸⁸ adopted the Decree on joining of the Republic of Uzbekistan to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958. Being a party to the New York Convention, the Republic of Uzbekistan has the obligation to recognize and enforce foreign arbitration awards in its territory. At the same time, without having international arbitration, the country becomes a “net importer” of such awards, *i.e.* foreign arbitral awards are enforced in the country but it has not its own awards that can be enforced abroad.³⁸⁹

It should be noted that the ratification of the New York Convention also has been completed by the ratification of the 1954 Hague Convention on Civil Procedure and on Access to Justice which led to the access of an apostille in Uzbekistan. As a result, lengthy and costly delays in legalizing documents concerning different investment activities ended in the country.³⁹⁰

2.2. UNCITRAL Model Law on International Commercial Arbitration of 1985

The United Nations Commission on International Trade Law (UNCITRAL), which was established on 17 December 1966, is a body of world-experts, aiming at progressive harmonization and unification of domestic laws governing international trade. Although the New York Convention strengthens the possibility of the enforcement of foreign arbitral awards, the issue of the judicial enforcement of these awards is still existing. Some countries’ domestic courts apply the New York Convention and other international treaties directly, others do not apply them; it first should be implemented by national legislation. Various types of arbitration legislation have been adopted by various nations. Furthermore, countries apply varying standards in the sphere of arbitration. These distinctions can have significant practical results for parties seeking to enforce an international arbitral award.

As *Born* notes in recent years, there has been a growing tendency towards uniformity of national arbitration acts, partly by virtue of the UNCITRAL Model Law (ML). Despite the tendency is going on, practical realities of arbitration and judicial responses to it in different countries still

³⁸⁸ In accordance with the results of the Referendum of 27 January 2002, the structure of the Oliy Majlis was changed. The Oliy Majlis of the Republic of Uzbekistan was enacted on 1 June 2004 as a bicameral parliament and consists of a Legislative Chamber and a Senate.

³⁸⁹ Kuchkarov, *International Commercial Arbitration: An Early Measure or a Vital Necessity*, in a compendium of articles “*Materiali mezhdunarodnih nauchno-prakticheskikh konferensiy*”, Tashkent 2010, p. 235.

³⁹⁰ Cf. Butler, *Uzbekistan Legal Texts: The Foundations of Civic Accord and a Market Economy*, The Hague et al. 1999, p. xii.

have wide distinctions. As a practical matter, this has substantial effect on the enforceability of arbitration awards in various jurisdictions.³⁹¹

Numerous major trading states, including Germany adopted domestic laws focused on the United Nations Commission on International Trade Law (“UNCITRAL”) Model Law on International Commercial Arbitration. Several provisions of the ML were revised in 2006.

The adaptation of the UNCITRAL Model Law has undoubtedly enhanced Germany’s image as an attractive venue for arbitration proceedings.³⁹² According to the opinions of legal specialists and lawmakers in the near future there are no plans to substantially revise German arbitration law.

Although the provisions of the Model Law were drafted for application in international commercial arbitration Uzbekistan applied the UNCITRAL Model Law both to its national arbitration³⁹³ and to the Draft Law “On International Commercial Arbitration”.³⁹⁴

The aim of the Model Law is to make international agreements and awards more predictably, readily and uniformly enforceable. The UNCITRAL Model Law is composed of 36 articles, dealing with the issues that arise in national courts relating with international arbitration. With respect to judicial review and enforceability of international arbitral awards, the Model Law effectively mirrors the exceptions to enforceability fixed in Art. V of the New York Convention.³⁹⁵

2.2.1. German provisions and the Model Law

The German legislator has adopted its own approach that differs from that of the ML in two respects:

- a) Whereas under the ML a single regime exists for the recognition and enforcement of foreign and domestic awards, the German law regulates both separately.
- b) The ML provides in Art. 36 for a completely autonomous “national” regime for the enforcement of foreign awards and has its own list of grounds for refusal which are incoherent with the regime of the NYC. Contrary to it, German law does not support the

³⁹¹ Born (*supra* n. 376), p. 126.

³⁹² See Mark/Plassmeier/Quinke, New Developments in German Arbitration Law, in: *The Baker & McKenzie International Arbitration Yearbook 2007*, Moscow 2008, pp. 41-62.

³⁹³ Uzbek domestic Arbitration Act of 2007 followed the structure and the content of the UNCITRAL ML.

³⁹⁴ The Draft Law of the Republic of Uzbekistan “On International Commercial Arbitration” is based on the UNCITRAL Model Law.

³⁹⁵ For more details, see Mark/Plassmeier/Quinke, Developments in German Arbitration Law, in: *The Baker & McKenzie International Arbitration Yearbook 2008*, Moscow 2009, pp. 163-186.

autonomous “national” regime for the enforcement of foreign awards, although it was stated in the old German law.³⁹⁶

In German law there is a deviation regarding the domestic awards to be recognized and enforced. As is mentioned above, under the ML regime, though it does not require any special proceedings for the recognition of an award, it still depends on the absence of any ground for refusing recognition and enforcement. Contrary to it German law entitles to unconditional statutory recognition of their non-enforcement-related effects.³⁹⁷ § 1060 ZPO *de facto* excludes that constituting a title for enforcement is not dependent on the absence of possible defects. German law is more favourable regarding the domestic awards than the Model Law.³⁹⁸ With the exception of the defences which must be taken into account *ex officio*³⁹⁹, according to § 1060 (2) ZPO, a party is precluded from raising any defence which can no longer form the basis of setting aside proceedings.

2.2.2. Uzbek Law and the Model Law

The main provisions of the Law of the Republic of Uzbekistan “On Arbitration Courts” of 2007 are based on UNCITRAL Model Law principles. Nevertheless, there are some significant distinctions. For example, an arbitral tribunal may only apply Uzbekistan legislation, and therefore, the breach of this rule leads to a ground for setting aside an award. Furthermore, the provisions of the Draft Law “On International Commercial Arbitration Courts”⁴⁰⁰ are also based on the principles of the UNCITRAL Model Law.

2.3. Other International Arbitration Conventions

In spite of the fact that the New York Convention is the international treaty most affecting commercial arbitration, there are other more specialized treaties which also have their role in commercial arbitration.

³⁹⁶ BGH, 10 May 1984, *NJW* 1984, 2763 (2764).

³⁹⁷ § 1055 ZPO states that every domestic award has the same effect between the parties as a final and binding court judgment.

³⁹⁸ The Model Law contains no time limit for raising defenses. For a declaration of enforceability, German law provides a time limit of three months, which is also applied for setting aside proceedings.

³⁹⁹ § 1059 (2) No. 2 ZPO.

⁴⁰⁰ The Chamber of Commerce and Industry of Uzbekistan has prepared a draft Law of the Republic of Uzbekistan “On international commercial arbitration” on the basis of the UNCITRAL Model Law on International Commercial Arbitration. It was discussed by an international roundtable on “Current issues of international commercial arbitration development in Uzbekistan” on 25 September 2018 in Tashkent; see <https://www.uzdaily.uz/en/post/45900>. For the preparation of this draft see further Chamber of Commerce and Industry of Uzbekistan, Memorandum of cooperation signed, 14.08.2018, <https://www.chamber.uz/en/news/2886>; International Arbitration Court could be established in Uzbekistan, The Tashkent Times, 05.01.2017, <https://tashkenttimes.uz/national/388-international-arbitration-court-be-established-in-uzbekistan>.

2.3.1. European Convention on International Commercial Arbitration of 1961

In 1961 the European Convention on International Commercial Arbitration was drafted and entered into force in October 1965. Signatory states of this Convention take obligations many of which are fixed in the New York Convention; today it has been ratified by 31 countries, including a significant number of countries in Eastern Europe and the former Soviet Union.⁴⁰¹ Uzbekistan is not a member to this Convention. Germany is a party to the European Convention on International Commercial Arbitration of 1961 and the Agreement relating to Application of the European Convention on International Commercial Arbitration of 1962.

2.3.2. ICSID Convention of 1965

In 1965 under the auspices of the United Nations and the World Bank the Convention on the Settlement of Investment Disputes between States and Nationals of other States (the ICSID Convention)⁴⁰² was drafted. This Convention provides a specialized arbitration regime for “investment disputes” between states and foreign investors which agree to arbitrate pursuant to the Convention. Where an award or agreement is subject to the ICSID Convention, its regime overrides inconsistent provisions of other treaties, including the New York Convention.⁴⁰³

As *Born* stated the ICSID Convention contains a number of unusual provisions concerning international arbitration which are different in their circle.⁴⁰⁴ Besides the clauses concerning choice-of-law, it includes an internal process for reviewing and potentially annulling arbitral awards;⁴⁰⁵ and theoretically direct enforceability of the ICSID arbitral awards without judicial review in member states’ domestic courts.

The enforcement of an award against a State has always been a crucial aspect of investment arbitration.⁴⁰⁶ According to the ICSID Convention each Contracting State must recognize an award as binding and enforce monetary obligations arising from it as if it were a final judgment of a court in that State.⁴⁰⁷ To many legal scholars the main characteristic of the ICSID Convention is that it creates a legal framework which is not dependent upon national and

⁴⁰¹ Born (*supra* n. 376), p. 125.

⁴⁰² Convention on the Settlement of Investment Disputes between States and Nationals of other States (the ICSID Treaty) of 1965, also called as “Washington Convention”.

⁴⁰³ Born, (*supra* n. 376), p. 124.

⁴⁰⁴ Born, *International Commercial Arbitration: Commentary and Materials*, 2nd ed., Ardsley 2001, p. 25.

⁴⁰⁵ According to Art. 52 of the ICSID Convention if an award is annulled it may be resubmitted to a new arbitral tribunal. This annulment mechanism was criticized due to its allowance to the appellate review. See Redfern, ICSID – Losing its Appeal?, *ArbIntl* 3:2 (1987), 98-118.

⁴⁰⁶ Bernardini, Investment Arbitration under the ICSID Convention and BITs, in: Aksen et al (eds.), *Global Reflections on International Law, Commerce and Dispute Resolution: Liber Amicorum in Honour of Robert Briner*, Paris 2005, pp. 89-108 (90).

⁴⁰⁷ ICSID Convention, Art. 54 (1).

international legal systems.⁴⁰⁸ A private investor may bring a claim against the host State without the support of its own State, having equal treatment in the proceedings.⁴⁰⁹

Foreign investors typically insist on a contract clause specifying that binding arbitration in a third country will be the exclusive means of resolving disputes. Uzbekistan and Germany⁴¹⁰ are parties to several investment and juridical cooperation treaties with foreign countries containing dispute resolution clauses and the ICSID Convention is one of them.⁴¹¹ Thus, certain disputes with both countries may be eligible for arbitration under the auspices of the Convention.

However, there is an important point in case of Uzbekistan, being a Contracting Party to the ICSID Convention, to refer the dispute to arbitration under this Convention. Art. 25 (1) of the ICSID Convention stipulates:

“The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State (or any constituent subdivision or agency of a Contracting State designated to the Centre by that State) and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre. When the parties have given their consent, no party may withdraw its consent unilaterally.”

Uzbek laws in this regard do not contain an express agreement to arbitrate disputes with foreign investors. The Law of Uzbekistan “On Guarantees and Measures of Protection of Rights of Foreign Investors” of 1998 entails the only relevant provision which will be discussed further in paragraph 3.1 of this Chapter.

2.3.3. Bilateral Investment Treaties

In the 1960s and 1970s developing countries accepted new rules, improving the legal framework of investment protection and assisting to put aside strong criticism, amongst other things, the criteria for assessing compensation in the event of nationalization or expropriation.⁴¹² The critical position taken by developing countries towards the traditional principles of public international law was an expression of the “old international economic order”, and foreign investment flows have been fostered by the new legal framework as well as

⁴⁰⁸ Bernardini (*supra* n. 406), p. 90.

⁴⁰⁹ *Ibid.* See also Broches, Bilateral Investment Protection Treaties and Arbitration of Investment Disputes, in: Schultz/van den Berg (eds.), *The Art of Arbitration: Essays on International Arbitration, Liber Amicorum Pieter Sanders*, Deventer 1982, pp. 63-72 (64).

⁴¹⁰ Germany plays an increasingly important role in international investment arbitration. 16 new cases with German claimants were registered at the ICSID in the period of 2015 to 2017. See Bücheler/Flecke-Giammarco (*supra* n. 280).

⁴¹¹ Uzbekistan signed the ICSID Convention on 17 March 1994 and ratified it on 26 July 1995. Germany signed the ICSID Convention on 27 January 1966 and ratified it on 18 April 1969, available at <https://icsid.worldbank.org/en/Pages/about/Database-of-Member-States.aspx>.

⁴¹² Bernardini (*supra* n. 406), p. 92.

by providing for international arbitration as the means of resolution of investment disputes in all Bilateral Investment Treaties (BITs).⁴¹³

In the period of the 1980s and 1990s, BITs were acknowledged to be common as a tool of encouraging capital investment in developing markets. The numbers of BITs were concluded between developing states and most capital-exporting states. Currently, more than 3,000 BITs are in force worldwide and the number is increasing every year.⁴¹⁴

It is acknowledged that BITs have substantially contributed to giving certainty to the legal framework of many newly independent States in the field of foreign investment. It is beyond the scope of this Chapter to investigate the reasons for this extraordinary development. Most BITs let investors choose between ICSID Arbitration, ICC Rules of Arbitration and *ad hoc* arbitration under UNCITRAL Arbitration Rules.⁴¹⁵

In a typical BIT, the host country takes the responsibility to accord fair and equitable treatment to investments; to equally treat investors and investments from the host state or any third state; to promise unlimited transfer of investments and returns; and not to expropriate the investment except for a public interest.⁴¹⁶

The reason of mentioning the BITs herein is, that many BITs provide for some form of arbitration. According to Art. I (2) of the New York Convention the term “arbitral award” shall include not only awards made by arbitrators appointed for each case but also those made by arbitral bodies to which the parties have submitted as, for example, the International Centre for Settlement of Investment Disputes (ICSID). Some BITs permit *ad hoc* arbitration. The possibility of “arbitration without privity” under a BIT is often an option to be considered in international commercial disputes. Therefore, it should be taken into consideration, if the disputes under a special contract may fall within the scope of a BIT and if they have an effect on the available dispute resolution procedures.⁴¹⁷

2.3.3.1. Enforcement of BIT awards in Germany

Germany is the country that invented the bilateral investment treaty (BIT). The country concluded its first BIT as early as 1959 with Pakistan⁴¹⁸ and since 1959 the government of

⁴¹³ *Ibid.*

⁴¹⁴ See Singh/Ilge, Introduction, in: Singh/Ilge (eds.), *Rethinking Bilateral Investment Treaties: Critical Issues and Policy Choices*, Amsterdam/New Delhi, 2016, p. 2, available at <https://www.somo.nl/wp-content/uploads/2016/03/Rethinking-bilateral-investment-treaties.pdf>, Born (*supra* n. 376), p. 125. The BIT between Uzbekistan and Germany was signed in Bonn in April 1993 and entered into force in May 1998. See BGBl. 1997 II, 2106-2115.

⁴¹⁵ Bernardini (*supra* n. 406), p. 92.

⁴¹⁶ Born (*supra* n. 376), p. 125.

⁴¹⁷ *Ibid.*

⁴¹⁸ See BGBl. 1961 II, 793.

Germany has accompanied German investors abroad by concluding BITs with developing and emerging countries, as well as countries in transition.⁴¹⁹ Since the 1980s these treaties have also provided for Investor State Dispute Settlement (ISDS) to deal with investment protection disputes. Earlier treaties only provided for state-state-settlement procedures, which led to a high level of politicisation of investment disputes.⁴²⁰ Germany is currently a party to more than 130 effective BITs⁴²¹, the ICSID Convention⁴²² and the Energy Charter Treaty (ECT), which also contains investment protection provisions.

Indeed, as argued by *Krumpholz*, BITs serve three aims for Germany:

1. to “provide a basis for the German federal government to intervene on a diplomatic level on behalf of German investments in need of protection”;
2. to “provide sufficient legal protection in the host country, which is a precondition for the German government’s agreement to grant investment guarantees for German direct investments against certain political risks in developing and emerging countries as well as in countries in transition”;
3. “if the treaty provides for ISDS, it is also the basis for investors to ensure the respect of the investment protection provision in ISDS proceedings. So far, only one ISDS case has been initiated against Germany on the basis of a bilateral investment treaty, whereas two procedures have been initiated against Germany pursuant to the Energy Charta Treaty.”⁴²³

In Germany a foreign BIT award is recognized and declared enforceable under the New York Convention; this is usually done without any problems. Considering the fact that the beneficiary of a BIT award against a host country tries to have this award enforced and executed in Germany, most host countries maintain their assets in this country.⁴²⁴ However, the execution

⁴¹⁹ Krumpholz, International Investment Treaties – New developments and their effects on Germany, *CESifo Forum* 2/2015, 20-22, available at <https://www.cesifo-group.de/DocDL/forum-2015-2-krumpholz-fdi-june.pdf>.

⁴²⁰ *Ibid.*

⁴²¹ German Federal Ministry for Economic Affairs and Energy, Investitionsschutzverträge, online: <https://www.bmwi.de/Navigation/DE/Service/Investitionsschutzvertraege/investitionsschutzvertraege.html>.

⁴²² Today in Germany there is a public debate on ICSID Case ARB/12/12 – *Vattenfall AB and others v. Republic of Germany*, available at <https://www.talaw.com/cases/1654>, which was made public through streaming on the ICSID website; the proceedings have been largely non-transparent. Cf. Krajewski, *Wirtschaftsvölkerrecht*, 4th ed., Heidelberg 2017, p. 170; Hofmann/Tsolakidis, Internationaler Investitionsschutz, in: Ehlers/Fehling/Pünder (eds.), *Besonderes Verwaltungsrecht*, Band 1, 3. Aufl., Heidelberg 2012, pp. 202-233 (224); Schill, *Vattenfall, Philip Morris, Bilcon: Pathologies of the System?*, *European Yearbook of International Economic Law* 2016, pp. 309-341 (329-338).

⁴²³ Krumpholz (*supra* n. 419), pp. 20-21.

⁴²⁴ The German Federal Court of Justice (BGH) deals with a foreign BIT award like any other arbitration award concerning commercial dispute. It is therefore not complicated for the foreign state to hinder the enforcement by claiming that the asset into which the beneficiary of the award intends to execute is serving sovereign purposes of the state. See Raeschke-Kessler, Germany, in: Carter (ed.), *International Arbitration Review*, 7th ed., London 2016, pp. 214-228.

into the assets held in Germany by a foreign host state is difficult because of the sovereign immunity doctrine.⁴²⁵ For example, in 1998 the beneficiary of a BIT award rendered in Stockholm against Russia did not avail to have this award executed against assets held by the Russian state in Germany. Russia successfully hindered the execution of an award by claiming sovereign immunity for the seized assets. This was confirmed by the BGH by a decision of 1 October 2009.⁴²⁶

Another example is given by *Raeschke-Kessler*: If the creditor would try to execute into, for example, the building of the embassy that the guest state maintains in Berlin. However, it is less obvious if the creditor tries to execute into claims for lease payments of property owned by the host state in Germany that the host state has leased to third parties. The BGH held that the income derived from the lease is used for sovereign purposes within Germany is sufficient to block the execution. It diminished the usual standard of proof in favour of the host country. In order to rely on sovereign immunity against execution of an arbitral award, it is sufficient for the responsible officer of the foreign state – the ambassador or his or her deputy – to affirm and declare that the seized assets are used for sovereign purposes of that state within Germany in the execution proceedings.⁴²⁷

2.3.3.2. Enforcement of BIT awards in Uzbekistan

Uzbekistan signed a number of BITs⁴²⁸ on reciprocal promotion and protection of investment which have also provisions on possibilities of commercial dispute resolution by means of arbitration.⁴²⁹ The content of these treaties is traditional. They contain the scope of definition of covered investment, admission and establishment, treatment of foreign investment (national treatment, most-favoured-nation treatment, fair and equitable treatment, non-discrimination), compensation of damages to the investor in emergency events, prohibition of expropriation of the investment except for extraordinary cases, guarantee of transfer of funds, and dispute settlement mechanism, both state-state and investor-state arbitration. The body of Uzbek

⁴²⁵ Raeschke-Kessler, Hilmar, Germany, in: Carter, James H. (ed.), *The International Arbitration Review*, 7th ed., London 2016: Law Business Research Ltd., pp. 214-228.

⁴²⁶ BGH, 1 October 2009 – VII ZB 37/08, NJW 2010, 769.

⁴²⁷ Raeschke-Kessler (*supra* n. 424), p. 226.

⁴²⁸ To date, Uzbekistan has signed BITs with 53 countries. Several agreements, including those with Bahrain, Saudi Arabia and the United States, have not yet entered into force. See Investment Climate Statements for 2018, available at <https://www.state.gov/e/eb/rls/othr/ics/investmentclimatestatements/index.htm>.

⁴²⁹ Korobeinikov, Uzbekistan, in: *The Baker & McKenzie International Arbitration Yearbook, 10th Anniversary Edition 2016-2017*, New York 2017, pp. 499-507; see in Russian textbook: *Mejdunarodniy kommercheskiy arbitraj: Gosudarstva Zentralnoy i Vostochnoy Yevrope*, 2001, p. 349.

investment law consists of both national and international legal norms and in case of conflict between investors and Uzbekistan, BIT's usually play a significant role in their resolution.⁴³⁰

2.3.4. Investment arbitration cases

Uzbekistan is one of the most active host states in the CIS in terms of investment arbitration. Since 2006 investment cases against Uzbekistan have rapidly increased and they cover different sectors of the economy such as transportation, mining, textiles, gas distribution systems, wholesale and retail trade and cement production.

The results of the interviews and the analysis of national legal acts of Uzbekistan show that the country has been preserving the *status quo* with regard to its investment treaty commitments. As a result of first encountering with investor-State arbitration, Uzbekistan raised its level of awareness about the reach of investment treaties and their financial implications for the government.⁴³¹ Despite the growth of levels of investment arbitration awareness, Uzbek government officials tried to restrict it through being involved in defending the State in investment arbitration cases.

2.3.4.1. Romak S.A. v. Uzbekistan award and the concept of “investment” under the Swiss-Uzbekistan BIT

A number of investment arbitration cases have been reviewed lately and *Romak S.A. v. Uzbekistan* is one of them.

The Swiss-based firm Romak S.A. has lost a protracted dispute against the Republic of Uzbekistan regarding alleged non-payment for wheat shipments to the country during the mid-1990s. On 26 November 2009 an arbitral tribunal⁴³² dismissed Romak's claims against the Republic of Uzbekistan on jurisdictional grounds. Romak S.A. began arbitral proceedings against Uzbekistan under the Swiss-Uzbek BIT in accordance with the UNCITRAL Arbitration Rules with administrative support from the Permanent Court of Arbitration at the Hague.⁴³³ The tribunal was faced with the question whether an arbitration award entered on the basis of a set

⁴³⁰ Cf. Salacuse, *The Law of Investment Treaties*, 2nd ed., Oxford 2015, p. 5.

⁴³¹ See Sattorova, Reassertion of Control and Contracting Parties' Domestic Law Responses to Investment Treaty Arbitration: Between Reform, Reticence and Resistance, in: Kulick (ed.), *Reassertion of Control over the Investment Treaty Regime*, Cambridge 2017, pp. 53-80 (59). See also Sattorova/Omiunu/Erkan, How Do Host States Respond to Investment Treaty Law? Some Empirical Observations, in: Haskell/Rasulov (eds.), *New Voices and New Perspectives in International Economic Law* (Special Issue of the European Yearbook of International Economic Law Cham 2020: Springer, pp. 133-152.

⁴³² It was composed of Fernando Mantilla-Serrano, Nicolas Molfessis and Noah Rubins.

⁴³³ Leading the government's defense was Baker & McKenzie Partner Jean-Pierre Harb (Paris) and Of Counsel David Fraser (London), assisted by the associates Christophe Lobier (Paris), Alexis Martinez (London) and Ziyod Azizov (Tashkent).

of wheat supply contracts together with other wheat supply contracts can constitute “an investment”.⁴³⁴

Romak brought this action claiming damages of more than USD \$30 million and alleged that Uzbekistan violated the BIT by refusing to enforce the award of the Grain and Feed Trade Association (GAFTA) and through the acts of the Uzbek companies to the contract for the supply of wheat. At issue was whether an arbitration award or a contract for the supply of wheat can be considered an “investment” under a BIT.⁴³⁵ The Tribunal found that the GAFTA Award was so “inextricably linked” to the contract between Romak and the Uzbek entities that any determination as to whether there was an “investment” under the BIT could not be made without reference to the entire economic transaction at issue.⁴³⁶ The Tribunal agreed with Uzbekistan that the term “investment” under the BIT has an inherent and defined meaning irrespective of whether the investor resorts to ICSID or UNCITRAL arbitration.⁴³⁷ The Tribunal further agreed with Uzbekistan that the economic transaction at issue, *i.e.* the contract for the supply of wheat, was a contract for the sale of goods and could not be considered an “investment” under the BIT. As a result, the Tribunal rendered an award dismissing the case for lack of jurisdiction under the treaty.⁴³⁸

In sum, Romak did not own an “investment” within the meaning of Art. 1 of the BIT. Romak’s rights arise out of a sales contract which is a one-off commercial transaction according to which Romak undertook to deliver wheat against a price to be paid by the Uzbek parties. In the absence of any investment underlying the dispute, Uzbekistan has not consented to arbitrate this dispute in accordance with Art. 9 of the BIT, and the arbitral tribunal does not have jurisdiction in the present matter.⁴³⁹

It should be noted that this award will be viewed as a great contribution to investment treaty arbitration as it brings clarity to the definition of investments under BIT disputes submitted to UNCITRAL arbitration panels.

⁴³⁴ See Laird/Sabahi/Sourgens/Haque, *International Investment Law and Arbitration: 2008/2009 in Review*, in: Sauvant (ed.), *Yearbook on International Investment Law & Policy 2009-2010*, Oxford 2010, pp. 87-176 (106). See also *Romak S.A. v. Republic of Uzbekistan*, UNCITRAL Case No. AA280, award from 26 November 2009, para. 209, available at <https://www.italaw.com/cases/documents/919>.

⁴³⁵ *Romak S.A. v. Republic of Uzbekistan*, award.

⁴³⁶ *Ibid.*

⁴³⁷ Harb, *Definition of Investments Protected by International Treaties: An On-Going Hot Debate*, *MEALAY’S International Arbitration Report* 26:8 (2011), 1-19.

⁴³⁸ *Romak S.A. v. Republic of Uzbekistan*, award.

⁴³⁹ *Ibid.*

2.3.4.2. Metal-Tech Ltd. v. Republic of Uzbekistan

The ICSID Tribunal, on 4 October 2013, issued its decision in the investment treaty dispute between the Israeli company Metal-Tech Ltd. and Uzbekistan.⁴⁴⁰ The tribunal dismissed the claim based on a lack of jurisdiction, stating that investments made by the claimant could not be protected by guarantees in a BIT,⁴⁴¹ because these guarantees were made in consequence of a corruption of Uzbek government officials.⁴⁴² The Tribunal's decision to dismiss Metal-Tech's claims on the ground of lack of jurisdiction was rather "technical", relying mainly on the interpretation of the BIT, Uzbek law and the ICSID Convention.⁴⁴³

2.3.4.3. Oxus Gold PLC v. Republic of Uzbekistan

On 21 December 2015, the arbitral tribunal rendered its decision in the investment arbitration dispute between the UK company Oxus Gold PLC and Uzbekistan. Oxus Gold, under the UNCITRAL Arbitration Rules, claimed for compensation for loss of its investment in: (i) the Amantaytau Goldfields project in the Kyzylkum desert and (ii) the Khandiza base metals project in the Surkhandarya region.⁴⁴⁴ The arbitration court dismissed the claims with regard to Oxus Gold's investments in the Amantaytau Goldfields. It found that fair and equitable treatment standard was breached under the UK-Uzbekistan BIT while Uzbekistan did not keep its promise to provide all guarantees fixed in the UK-Uzbekistan BIT through the tax regime changes.⁴⁴⁵

Unexpected and frequent legislative changes in national foreign investment law can have negative impact on foreign investments and can lead to large financial losses for foreign investors.⁴⁴⁶ The stabilization clause is considered to be important in protecting foreign investors from regulatory changes adopted by the host country during the investment period.⁴⁴⁷ The host country is obliged not to change the legal framework for foreign investment. But

⁴⁴⁰ *Metal-Tech Ltd. v. Republic of Uzbekistan*, ICSID Case No. ARB/10/3, award from 4 October 2013, available at <https://www.italaw.com/cases/2272>.

⁴⁴¹ The BIT between Israel and Uzbekistan was concluded in July 1994 and came into force in February 1997.

⁴⁴² Korobeinikov (*supra* n. 429), p. 502.

⁴⁴³ Meshel, *Metal-Tech Ltd. v. Republic of Uzbekistan – Is Really No One Getting Punished?*, Kluwer Arbitration Blog, 3 January 2014, available at <http://arbitrationblog.kluwerarbitration.com/2014/01/03/metal-tech-ltd-v-republic-of-uzbekistan-is-really-no-one-getting-punished/>.

⁴⁴⁴ Korobeinikov (*supra* n. 429), p. 503.

⁴⁴⁵ According to the award Uzbekistan as a respondent was liable for a breach of Art. 2(2) of the BIT in connection with the tax regime changes implemented in 2006 and in 2009. *Oxus Gold plc v. Republic of Uzbekistan*, the State Committee of Uzbekistan for Geology & Mineral Resources, and Navoi Mining & Metallurgical Kombinat, UNCITRAL, award from 17 December 2015, available at <https://www.italaw.com/cases/781>.

⁴⁴⁶ Muminov, *Uzbekistan: An Overview of Foreign Investment Law*, *Usbek Journal of Legal Studies* 10 (2018), p. 8, <https://www.ujols.org/wp-content/uploads/2018/12/Uzbekistan-An-Overview-of-Foreign-Investment-Law.pdf>.

⁴⁴⁷ The stabilization clause is the most common clause in the context of BITs and investment contracts. See also Umirdinov, *The End of Hibernation of Stabilization Clause in Investment Arbitration: Reassessing its Contribution to Sustainable Development*, *Denver Journal of International Law and Policy* 43:4 (2015), pp. 458-459.

countries frequently change their laws and regulations in response to changing economic circumstances or changing political, economic or social considerations. Those changes may make certain activities less profitable or even uneconomic to continue. It is apparent that the host country should follow the requirements in the stabilization clause when taking measures or changing regulations.

2.3.4.4. Spentex Netherlands, B.V. v. Republic of Uzbekistan

In September 2013, Spentex Netherlands⁴⁴⁸ started investment arbitration proceedings under the ICSID Convention, claiming that the government of Uzbekistan illegally ceased tax benefits provided to the Uzbekistani subsidiary of Spentex Netherlands, which resulted in its bankruptcy. The total amount of the claim was about USD 132 million.⁴⁴⁹ According to the respondent (Uzbekistan), claims focused on illegal acts such as bribery should be rejected since they are contrary to international public policy.⁴⁵⁰ As a result, in December 2016, the ICSID arbitral tribunal rejected the claim in full, confirming that there were no breaches of the investor's rights⁴⁵¹ since corruption in the making of an investment constituted a serious violation of the good faith principle as well as the international public policy and that a claimant who comes with dirty hands to a tribunal should not be heard.⁴⁵²

2.3.4.5. Vladislav Kim et al. v. Republic of Uzbekistan

Kazakh investors filed a suit against Uzbekistan under the ICSID Convention and the Kazakhstan-Uzbekistan BIT (1997) in 2013. The investment constituted an indirect majority shareholding in two Uzbek cement companies. The claims arose out of a series of regulatory and judicial measures, taken by different branches of the Uzbek government, leading to the unlawful nationalisation of the two cement companies.

The tribunal in *Kim v. Uzbekistan* found that jurisdiction was proper because the alleged corruption occurred during the performance of the investment, and not when it was made, *i.e.* that corruption pertained 'only' to the initial investment.⁴⁵³ The tribunal cleared that the alleged

⁴⁴⁸ It is a subsidiary of the Indian company Spentex Industries, incorporated in the Netherlands.

⁴⁴⁹ *Spentex v. Republic of Uzbekistan*, ICSID Case No. ARB/13/26, award from 27 December 2016, para. 328, available at <https://www.italaw.com/cases/2252>.

⁴⁵⁰ In order to define foreign public bribery and to determine what kind of acts should be considered contrary to international *ordre public*, the Arbitral Tribunal cited Articles 1(1) of the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions and Art. 16(1) of the United Nations Convention against Corruption (UNCAC). See Betz, *Proving Bribery, Fraud, and Money Launder in International Arbitration: On Applicable Criminal Law and Evidence*, Cambridge 2017, p. 130.

⁴⁵¹ Korobeinikov (*supra* n. 429), p. 503.

⁴⁵² *Spentex v. Uzbekistan*, para. 819.

⁴⁵³ *Vladislav Kim v. Republic of Uzbekistan*, ICSID Case No. ARB/13/6, decision on jurisdiction, 8 March 2017, para. 553, available at <https://www.talaw.com/cases/5403>.

corruption could not breach the relevant legality requirement since that requirement was limited to illegal action in the making of the investment.⁴⁵⁴ In coming to this conclusion, the tribunal stated that its approach in considering the corruption allegations was “*guided by the principle of proportionality*”⁴⁵⁵ and its focus was on jurisdictional matters. It thus found that it was required to “*balance the object of promoting economic relations by providing a stable investment framework with the harsh consequence of denying the application of the treaty in total*”.⁴⁵⁶

In recent years allegations of corruption have become a common issue in investment arbitration;⁴⁵⁷ they are not expected to decrease in the coming years. Tribunals, meeting these allegations, will accordingly try to develop a coherent approach that balances the significance of promoting anti-corruption with fairness to the parties.⁴⁵⁸

The outcome of the above-mentioned investment arbitration cases shows that a new tendency is seen in Uzbekistan’s behaviour in the resolution of disputes with investors. If previously the Uzbek government preferred to settle claims of foreign investors amicably, lately it has decided to take a very aggressive position and argue its cases before the arbitral tribunals.⁴⁵⁹

2.3.5. The CIS multilateral treaties

2.3.5.1. Kiev Agreement of 1992

On 20 March 1992 the Agreement on the Settlement of Disputes Relating to the Exercising of Economic Activity (“Kiev Agreement”) was adopted in Kiev. It entered into force on 8 April 1993 and the Republic of Uzbekistan ratified it in 1993 on the 6th of May. The main purpose of its adoption was to liquidate the legal vacuum, which appeared after the collapse of the Soviet Union, under which the court judgements of one CIS country were not executed and enforced in the territory of another CIS country.⁴⁶⁰ This agreement was the first treaty among the CIS Member States on the recognition and enforcement of judgments and awards.⁴⁶¹ It contains

⁴⁵⁴ *Ibid.*, para. 377. The Tribunal rejected all four of the respondent’s objections associated with claimants’ nationality, “passive” investment, its legality and corruption allegations.

⁴⁵⁵ *Vladislav Kim v. Republic of Uzbekistan*, para. 413.

⁴⁵⁶ *Ibid.*, para. 396.

⁴⁵⁷ [Kendra/Bonini, Dealing with Corruption Allegations in International Investment Arbitration: Reaching a Procedural Consensus?](#), *JIntArb* 31:4 (2014), 439-453.

⁴⁵⁸ [Friedman/Lavaud/Marley](#), Corruption in International Arbitration: Challenges and Consequences, in: [The Arbitration Review of the Americas 2018](#), August 2017, available at <https://globalarbitrationreview.com/insight/the-arbitration-review-of-the-americas-2018/1146893/corruption-in-international-arbitration-challenges-and-consequences>.

⁴⁵⁹ Korobeinikov (*supra* n. 429), p. 503.

⁴⁶⁰ See in Russian textbook: *Mejdunarodniy kommercheskiy arbitraj. Gosudarstva Zentralnoy i Vostochnoy Yevropi*, 2001, p. 31.

⁴⁶¹ Agreements on co-operation between commercial and arbitral courts of Belarus, the Russian Federation and Ukraine of 21 December 1991 and the Agreement on co-operation and collaboration of arbitral courts of

rules on the settlement of disputes and enforcement of corresponding judgments and arbitral awards of the contracting CIS states' competent courts among legal persons and entrepreneurs.⁴⁶² In Art. 3 of this Agreement the competent courts are defined as including arbitration courts. According to Art. 8 only CIS Member States can be signatories to the Kiev Agreement. Uzbekistan has also signed and ratified this agreement.

The rules on mutual recognition and enforcement of judgments of commercial courts read as follows: The CIS Member States mutually recognise and enforce judgments of competent courts which have the effect of *res judicata*. Judgments rendered by competent courts of one CIS Member State shall be enforced on the territories of other CIS Member States. Judgments rendered by a competent court of one CIS Member State which provide for execution to be levied upon the debtor's property shall be enforced on the territory of another CIS Member State by authorities appointed by a court or determined in accordance with the laws of this State.⁴⁶³ A judgment is to be enforced upon request of the interested party.

With the request are to be enclosed:⁴⁶⁴

- obligatorily, a properly certified copy of the judgment to be enforced;
- an official document confirming that the judgment has the effect of *res judicata*, if it is not apparent from the text of the judgment;
- evidence that the debtor was served with the summons;
- the enforcement document.⁴⁶⁵

It should be noted that above-mentioned documents do not comply with the documents fixed in the New York Convention. The enforcement document, mentioned in the Kiev Agreement, in practice creates difficulties, since on rendering the decision by an arbitration court on the place of dispute settlement; the enforcement document is not usually given. Enforcement of a judgment may be refused upon request of the party against which it is directed only if this party delivers evidence of the following to the competent court in the State where enforcement is sought:⁴⁶⁶

Kazakhstan and the Russian Federation of 27 March 1992 were “predecessors” to the Agreement “On Modalities of Resolution of Disputes arising out of Business Activity” (“Kiev Agreement”) of 1992. The status of both agreements is disputable: they were concluded by the heads of the highest commercial courts of the countries concerned. The Kiev Agreement does not mention them wholly.

⁴⁶² Art. 1 of the Kiev Agreement.

⁴⁶³ *Ibid.*, Art. 7.

⁴⁶⁴ *Ibid.*, Art. 8.

⁴⁶⁵ Enforcement document is an enforcement order issued by the court of origin on the basis of the judgment.

⁴⁶⁶ Art. 9 of the Kiev Agreement.

- a) court of the State addressed had earlier rendered a judgment which has the effect of *res judicata* in a case between the same parties, concerning the same subject matter and on the same grounds;
- b) a judgment of a competent court of a CIS Member State or of a court of a non-CIS Member State, rendered in a dispute between the same parties concerning the same subject matter and on the same grounds, has already been granted recognition;
- c) the dispute was solved by a court incompetent according to this Treaty;
- d) the other party was not served with the summons;
- e) the three-year limitation period for filing the judgment for enforcement has expired.

The highest commercial courts of the main CIS Member States, including Uzbekistan declared that they would apply their national regime to the enforcement of judgments and arbitral awards falling under the Kiev Agreement, *i.e.* accepted the abolition of the exequatur procedure. The Kiev Agreement does not contain any provisions on the relationship with other instruments. To summarize, the matter of enforcement of court judgements or arbitration awards is questionable, when some CIS countries are parties of the Kiev Agreement and the New York Convention at the same time. For instance, if there is a case on enforcement of an arbitration award of the International Commercial Court under the CCI of Russia in the territory of Uzbekistan, which Treaty's rules will be used: the rules of the Kiev Agreement or the New York Convention? The main point is that in Uzbekistan both treaties, despite some distinctions between them, are utilised for the enforcement of foreign arbitral awards or court judgements.

2.3.5.2. Minsk Convention of 1993

The Minsk Convention on Legal Assistance in Civil, Family Relations and Criminal Matters of 1993 is applicable to court judgments on compensation of damages under criminal law cases, to court judgments over civil law and family law disputes and to decisions of other state bodies competent to make decisions on civil law and family law disputes. Recognition and enforcement of interim/interlocutory orders are not covered by the Minsk Convention.

The Minsk Convention provides for a procedure whereby a court decision or a decision of the competent state body needs to be recognised in the state where enforcement is sought, and as the result of due recognition, the court of the state where enforcement is sought issues an enforcement order that is mandatory for enforcement in the territory of that state.

Pursuant to the Convention, recognition and enforcement of a foreign court judgment may be refused by the competent Uzbek court if:

- the judgment did not enter into legal force or is not subject to enforcement, unless the judgment is enforced prior to its entering into legal force;
- the defendant did not participate in the hearing due to not being properly served;
- there is a recognised judgment of the competent Uzbek court or a third state over the same dispute between the same parties, or the Uzbek state body has commenced proceedings on the case;
- pursuant to the provisions of the Minsk Convention, or, in case not provided by the Minsk Convention, under the legislation of Uzbekistan, the dispute falls under the exclusive jurisdiction of the state bodies of Uzbekistan;
- the document confirming the agreement of the parties over the competent jurisdiction is absent; and
- the limitation period for mandatory enforcement of the judgment set in Uzbekistan has expired.⁴⁶⁷

2.3.6. Bilateral agreements of Uzbekistan

The Republic of Uzbekistan concluded few agreements with other countries on mutual legal assistance which also contain the bases of rules on recognition and enforcement of foreign judgments or awards. All international agreements of Uzbekistan contain the same provisions on mutual recognition and enforcement of foreign judgments or awards in civil and economic spheres. These kinds of treaties differ from each other only on occasions.

The Republic of Uzbekistan signed bilateral agreements on mutual legal assistance and legal relations with following countries:

Turkey in citizenship, trade and criminal matters in 1994 (Ankara),⁴⁶⁸

Latvia in civil, family, labour and criminal matters in 1996 (Tashkent),⁴⁶⁹

Kyrgyzstan in civil, family and criminal matters in 1996 (Tashkent),⁴⁷⁰

Turkmenistan in civil, family and criminal matters in 1996 (Tashkent),⁴⁷¹

Azerbaijan in civil, family and criminal matters in 1997 (Tashkent),⁴⁷²

Kazakhstan in civil, family and criminal matters in 1997 (Tashkent),⁴⁷³

Lithuania in civil, family and criminal matters in 1997 (Tashkent),⁴⁷⁴

⁴⁶⁷ Art. 55 of the Minsk Convention.

⁴⁶⁸ Ratified on 23.09.1994 with the Decree of Oliy Majlis No. 2026-XII.

⁴⁶⁹ Ratified on 27.12.1996 with the Decree of Oliy Majlis No. 358-I.

⁴⁷⁰ Ratified on 25.04.1997 with the Decree of Oliy Majlis No. 430-I.

⁴⁷¹ Ratified on 25.04.1997 with the Decree of Oliy Majlis No. 424-I.

⁴⁷² Ratified on 30.08.1997 with the Decree of Oliy Majlis No. 488-I.

⁴⁷³ Ratified on 25.04.1997 with the Decree of Oliy Majlis No. 487-I.

⁴⁷⁴ Ratified on 25.04.1997 with the Decree of Oliy Majlis No. 431-I.

China in civil and criminal matters in 1997 (Peking),⁴⁷⁵
the Ukraine in civil and family and criminal matters in 1998 (Kiev),⁴⁷⁶
Czech Republic in civil and criminal matters in 2002 (Tashkent),
Bulgaria in civil and criminal matters in 2003 (Tashkent),
Korea in civil and economic matters in 2012 (Korea),⁴⁷⁷
and United Arab Emirates in criminal matters in 2016 (Tashkent).

Bilateral agreements between the Chambers of Commerce and Industries are also worth mentioning in enforcement of foreign arbitral awards. These agreements provide for the finality of arbitral awards and the exchange of information on commercial arbitrations in corresponding countries. In spite of the fact that these agreements are in most cases aimed at governing cooperation between the different Chambers of Commerce, they can also influence the enforcement of foreign arbitral awards.

§ 3 Domestic laws on arbitration

3.1. The main acts regulating the procedure for organization and activities of arbitration courts in Uzbekistan

After gaining the independence in 1991, the Republic of Uzbekistan took steps on liberalization of economy which was based on the Soviet regime. The need for an effective commercial arbitration system was felt in Uzbekistan to attract foreign investors. Under the Welfare Improvement Strategy⁴⁷⁸ *“Encouraging property rights’ protection and other rights and guarantees of investors by means of alternative ways and institutions for the settlement of commercial disputes, especially arbitration tribunals”* is determined as one of the significant objectives of legal reforms.

Today for the Republic of Uzbekistan the system of arbitration is almost new. A lot of positive changes in this area have been made in recent years. The provision of the legal framework for the arbitration tribunals’ functioning is seen in the adoption of some legal acts as the Presidential Decree “On measures for further improving the system of legal protection of enterprise entities” of 14 June 2005. The next step was followed by the adoption of the Law “On Arbitration Courts” of 26 August 2007. The Law’s fundamental aim is to overcome the defects and imperfections of legal regulations on establishment, functioning and termination of arbitration courts’ activity in Uzbekistan. The establishment of the arbitration court system

⁴⁷⁵ Ratified on 01.05.1998 with the Decree of Oliy Majlis No. 626-I.

⁴⁷⁶ Ratified on 01.05.1998 with the Decree of Oliy Majlis No. 642-I.

⁴⁷⁷ Ratified on 03.04.2013 with the Decree of Oliy Majlis No. 346.

⁴⁷⁸ This Strategy was adopted on 27 August 2007 at the Meeting of the Presidium of the Cabinet of the Ministers of the Republic of Uzbekistan.

assists to ameliorate the business climate in the country, since arbitration has some significant advantages over litigation before economic courts.

State courts are created and operate in accordance with relevant laws defining their status, organization and legal status;⁴⁷⁹ they are based on Codes governing the procedure of dealing with disputes and cases. In particular, the process of dispute resolution in economic courts is regulated by the Economic Procedure Code (hereinafter EPC), in civil courts by the Civil Procedure Code (hereinafter CPC) of the Republic of Uzbekistan. They are mandatory and fully regulate the procedure for dealing with the dispute, while neither judges, nor disputing parties will have the right to choose a particular model of procedural behaviour.

These Procedural Codes also regulate the issues concerning arbitration. For example, the EPC governs the issues considered by economic courts related to arbitral awards. These issues include the applications for:

1. interim measures to secure the claim,
2. challenging of arbitration court award,
3. granting a writ of execution for enforcement of arbitral awards.⁴⁸⁰

Similar provisions are contained in the CPC of Uzbekistan. It governs the issues considered by civil courts related to arbitral awards. These issues include the applications for:

1. setting aside an arbitration award,
2. granting a writ of execution for enforcement of arbitral awards.⁴⁸¹

According to Art. 36 of the Law of Uzbekistan “On the Contractual-Legal Base of Activities of Economic Entities”⁴⁸² all disputes, arising between the parties in connection with conclusion, execution, amendment and cancellation of economic contracts as well as reimbursement of losses are considered by the economic court in accordance with the legislation, and these disputes are considered by the arbitration court in cases provided for by the contract or by agreement of the parties.

A similar provision is fixed in Art. 29 of the EPC of Uzbekistan. According to it, any dispute, which arises or may arise out of civil law relations and which is related to the jurisdiction of the economic court, can with the consent of the parties be referred to the arbitration court before the economic court renders its decision. The EPC provides that foreign parties shall have the same procedural rights and duties as Uzbek parties in matters before an Uzbek court.⁴⁸³

According to the provisions of the Law of Uzbekistan “On execution of courts acts and acts of

⁴⁷⁹ Law of the Republic of Uzbekistan "On Courts" of 1993.

⁴⁸⁰ Art. 28 of the EPC of Uzbekistan of 2018, available at (in Uzbek) <http://www.lex.uz/docs/3523891>.

⁴⁸¹ Art. 346 of the CPC of Uzbekistan of 2018, available at <http://www.lex.uz/docs/3517337>.

⁴⁸² Law No. 670-I, issued on 29 August 1998 and last revised on 29 January 2018.

⁴⁸³ This provision also applies to arbitrations, which are seated in Uzbekistan.

other bodies”, the enforcement orders granted by courts to the judgments, awards of arbitration courts and foreign arbitral awards are executed in the territory of Uzbekistan.⁴⁸⁴

Unlike the German Arbitration Act, the Law of the Republic of Uzbekistan “On Arbitration Courts” defines only general provisions and rules (the order of formation of the arbitration courts, their competence and general rules of arbitration), without regulating in detail all procedural aspects of dispute resolution. In the Permanent Arbitration Courts detailed rules on arbitration and procedural matters of dispute resolution are fixed by local acts that are approved by a legal entity which is organized by the arbitral tribunal. These local acts are the **Regulation** and the **Rules** of the Permanent Court of Arbitration.

The Regulation of the Permanent Court of Arbitration is a local act, approved by a legal entity which is organized by the arbitral tribunal. It regulates the legal status, organization and procedures of the Permanent Court of Arbitration, and defines its relationship with the legal entity and with other entities organized by this arbitration court.

The Rules of the Permanent Court of Arbitration is a local act, approved by a legal entity which is organized the arbitral tribunal; it contains rules of arbitration.

Due to the fact that the above-mentioned acts are not regulatory acts in accordance with the Law of the Republic of Uzbekistan “On Normative Legal Acts” of 14 December 2000, the rules contained in the Regulation of the Arbitration Court do not actually have legally binding character in contrast to the relevant codes and laws governing the dispute resolution procedure in the state courts. However, the parties who conclude the arbitration agreement to refer a dispute to the arbitration court may make the Regulation of the Permanent Court of Arbitration to an integral part of their arbitration agreement, and thus give their consent to obey and follow the rules contained in this regulation. For the resolution of the dispute those rules will be binding on the parties to an arbitration agreement.

The Law of the Republic of Uzbekistan “On Arbitration Courts” as well as the Rules of the Arbitration Courts are usually quite flexible and allow enough freedom to define and regulate the rules of arbitration to the parties, who may agree these rules in the arbitration agreement or in the course of the dispute. As a result, the use of arbitration provides an effective dispute resolution on terms that are best suited to the interests of the parties to an arbitration inspiring their confidence in an effective resolution of a dispute. At the same time, in some cases, if

⁴⁸⁴ Articles 5, 6, 7 of the Law No. 258-II of Uzbekistan “On Enforcement of Judicial Decisions and Decisions of Other Authorities”, adopted on 29 August 2001.

necessary, to use coercive power of the state on specific issues arising during or after arbitration proceedings (e.g. the issuance of interim measures on securing the claim, the enforcement of an arbitral award), these issues are resolved by state courts (without investigation of the circumstances of the dispute and review of the decision on the merits) in accordance with the economic or civil procedural law.

Thus, the main acts regulating the organization and activities of arbitration courts in Uzbekistan and the procedure of dispute resolution are:

- the Economic Procedure Code and the Civil Procedure Code of Uzbekistan;
- the Law of Uzbekistan “On Enforcement of Judicial Decisions and Decisions of Other Authorities”;
- the Law of the Republic of Uzbekistan “On Arbitration Courts”;
- the Regulations and the Rules of Arbitration Courts.

3.2. Law “On Arbitration Courts” of the Republic of Uzbekistan

Before the adoption of the Law of the Republic of Uzbekistan “On Arbitration Courts”, arbitration proceedings were governed by the Regulation on Arbitration Courts⁴⁸⁵, adopted in 1963 during the Soviet Period. This Regulation applied only to disputes between individuals and allowed parties to execute the arbitration agreement only if a dispute between them already existed.⁴⁸⁶ Alternative dispute resolution is being developed and regulated by the Law “On Arbitration Courts”. It introduces the possibility of establishing arbitration courts as an alternative to settling commercial disputes in state economic courts.

Until quite recently only a few legislative acts contained references to the establishment of arbitration courts in Uzbekistan. It was the Law “On Arbitration Courts”, which was adopted in 2006 and came into force on 1 January 2007,⁴⁸⁷ that provided a comprehensive legal framework for the recognition and enforcement of arbitral awards.⁴⁸⁸ There are two types of arbitration courts, which are allowed to be established in Uzbekistan:⁴⁸⁹ *permanent* Arbitration Courts, which can be established under any legal person and entitled to review cases, filed by business entities and individuals;⁴⁹⁰ and *ad hoc* (temporarily created) arbitration courts, which are established to settle one specific dispute.⁴⁹¹ The Arbitration Law of Uzbekistan allows

⁴⁸⁵ Annex 3 to the Civil Procedure Code.

⁴⁸⁶ Korobeinikov (*supra* n. 429), p. 499.

⁴⁸⁷ The Law “On Arbitration Courts” dated 16 October 2006, as amended.

⁴⁸⁸ The Law “On Courts” of Uzbekistan covers only the organization and activities of State Courts.

⁴⁸⁹ Art. 5 of the Law “On Arbitration Courts” of the Republic of Uzbekistan of 2006.

⁴⁹⁰ *Ibid.*, Art. 6.

⁴⁹¹ *Ibid.*, Art. 7.

arbitration courts to resolve disputes by appointing either a single arbitrator or a panel of arbitrators.

Furthermore, arbitration courts can be established in Uzbekistan under the agreement of both sides with independent experts as a third party. It should be noted that the Law “On Arbitration Courts” is restricted to and regulates activities of domestic arbitration courts only; its scope does not cover foreign arbitration courts.

The Law “On Arbitration Courts” gives the opportunity to parties to choose the organ to resolve the dispute. As a rule, such a choice is made by the parties at the conclusion of the contract, by specifying the right organ in it. In order to refer the dispute to the arbitration court it is necessary to change the wordings of relevant paragraphs of the contract which contain a clause on dispute resolution “in accordance with the law” or “in court”, into the arbitration clause, as follows:

“Any dispute, controversy, and claims arising out of this agreement (contract, treaty, etc.), or in connection with it, including those related to its conclusion, alteration, execution, violation, termination, and validity are to be settled by the Arbitration Court at the Chamber of Commerce of the Republic of Uzbekistan in accordance with its Regulation by a sole arbitrator. The decision of the Arbitration Tribunal shall be final and binding on the parties.”

The above-mentioned clause may be included to the contract at its conclusion or may be included into a valid contract by signing an additional agreement to resolve an already existing dispute. The arbitral tribunal will consider the dispute only if there is a mutual consent of the parties to refer the dispute to arbitration, expressed in the form of a clause in the contract.⁴⁹²

3.3. German Arbitration Act 1998 and its major characteristics

As noted above, German arbitration is regulated by the German Arbitration Act, which came into force on 1 January 1998 and forms the Tenth Book of the German Civil Procedure Code (ZPO).⁴⁹³ Though major characteristics of the German Arbitration law were presented by many scholars, *Böckstiegel* aptly mentioned several important provisions of the new German Arbitration Act that are broader than the UNCITRAL ML provisions. According to him, the new German Act incorporates the UNCITRAL ML both for international and domestic arbitrations. The purpose of this aspect is to avoid difficult distinction between international and domestic arbitrations.⁴⁹⁴

⁴⁹² Cf. Asyanov/Kulikova/Isayeva, Commentary to the Law “On Arbitration Courts” of Uzbekistan, Tashkent 2007, p. 15; Art. 3 of the Law “On Arbitration Courts”.

⁴⁹³ The German ZPO as promulgated on 5 December 2005, BGBl. I, p. 3202; 2006 I, p. 431; 2007 I, p. 1781, last amended by Art. 1 of the Act, dated 31 August 2013 (BGBl. I, p. 3533).

⁴⁹⁴ Cf. Böckstiegel, An Introduction to the new German Arbitration Act based on the UNCITRAL Model Law, *ArbIntl* 14:1 (1998), 19-32 (22).

Secondly, unlike the UNCITRAL ML, the application of the Tenth Book of the ZPO is not limited to “commercial” arbitration but covers all arbitrations in Germany.⁴⁹⁵ Actually, the scope of arbitrable disputes is relatively broad in Germany. According to § 1030 (1) of the ZPO any claim involving an economic interest (“vermögensrechtlicher Anspruch”) may be the subject matter of an arbitration.⁴⁹⁶

Thirdly, fewer formal requirements for the existence and validity of arbitration agreements are spelled out in the German ZPO, unlike the UNCITRAL ML. The German ZPO clearly states:

*“The form requirement of subsection 1 shall be deemed to have been complied with if the arbitration agreement is contained in a document transmitted from one party to the other party or by a third party to both parties and – if no objection was raised in good time – the contents of such document are considered to be part of the contract in accordance with common usage.”*⁴⁹⁷

Moreover, in addition to what is described here, it should also be noted that the form requirements for arbitration agreements listed in Art. II of the New York Convention 1958 are considerably narrower than those contained in § 1031 of the German ZPO.

Finally, the German Arbitration Act permits the arbitral tribunal, which is the arbitrator or the panel of arbitrators, to determine a different procedure to be followed, when there is a disagreement between the parties on which substantive law is to apply. In such circumstances, the arbitral tribunal shall apply the law of the State with which the subject-matter of the proceedings is most closely connected.⁴⁹⁸ This is in contrast with the provisions of the UNCITRAL ML on applicable law⁴⁹⁹, providing that, in the absence of the parties’ choice of the applicable law, the arbitral tribunal shall apply the law determined by the conflict of laws rules that it considers applicable.

§ 4 Legal regulation of investment protection in Uzbekistan and in Germany

In many countries, arbitration is the only effective recourse a foreign investor may have against the state, so a reputation for non-compliance with awards can affect inward foreign investment. Parties may come under commercial or reputational pressure to honour an award, especially States in high profile investment treaty arbitration cases. For ICSID awards, the ICSID Convention, as well as many BITs, allow the exercise of diplomatic protection. Today domestic

⁴⁹⁵ *Ibid.*

⁴⁹⁶ The exceptions involve disputes regarding the existence of residential leases, and certain issues concerning the land title register and the company register, divorce, child custody matters, issues of family status and criminal law matters. See for example, § 1030 (2) of the German ZPO.

⁴⁹⁷ § 1031 (2) of the German ZPO.

⁴⁹⁸ § 1051 (2) of the German ZPO.

⁴⁹⁹ Art. 28 of the UNCITRAL ML.

arbitration laws in both developed and developing countries still offer much room for improvement.

Investment arbitration is much more exposed to the national and international political environment which changes frequently. As *Böckstiegel* noted, changes of government or of the political structures in states will, for understandable reasons, lead to conflicts with foreign investors and then to disputes and arbitrations. States will continue to need and try to attract foreign investment. They will only be successful in such efforts if they provide some legal security for such investments including the option for the settlement of disputes. But, on the other hand, parties who have been on the losing side in a number of arbitrations will see the fault in the system rather than in their own conduct.⁵⁰⁰

To avoid really major faults of a tribunal in procedure or substance, national arbitration laws provide options for corrective action.

In investment contracts between a state and a foreign investor will mostly have an express reference that the substantive law of the host state is applicable. Such a choice of law clause will generally have to be interpreted as also meaning that the investor has to accept later changes of the domestic law. However, such a conclusion will often be rejected by the investor claiming that the state changed its law with the intention to improve its own position and delete or devalue contractual rights of the investor. This is rather obvious when a law expropriates, but less clear where a similar effect is reached by new tax or other economic laws. Similar difficulties appear in contracts with state enterprises when the state changes the law or issues administrative acts which either improve the contractual position of its state enterprises to the detriment of the investor or prevent the state enterprises from fulfilling certain contractual obligations which it then justifies by referring to the state's acts as *force majeure*.⁵⁰¹

4.1. Investment protection in Uzbek Law

To the opinions of many investors Uzbekistan has become a great opportunity in the CIS. The country is considered to be politically stable, by attracting foreign investment conditions to serious investors. Uzbekistan's investment legislation is one of the advanced amongst legislations of the CIS, incorporating major provisions of international investment law, particularly, regulations on guarantees of the rights of foreign investors, certain preferences for investors and others. A number of innovations were fixed in the Law "On Foreign

⁵⁰⁰ Böckstiegel, Commercial and Investment Arbitration: How different are they today?, *ArbIntl* 28:4 (2012), 589-590.

⁵⁰¹ Ibid.

Investments”⁵⁰² which are not mentioned in most of other CIS countries. Besides this law, the laws of Uzbekistan “On Investment Activities”⁵⁰³, “On Guarantees and Measures for the Protection Foreign Investors’ Rights”⁵⁰⁴ and “On the Contractual Legal Base of Activities of Business Entities”⁵⁰⁵ form the basis of the investment environment and its protection in Uzbekistan.⁵⁰⁶

The government of Uzbekistan has recently recognized the need to improve and streamline business and investment legislation which is still perceived to be rather complicated, often contradictory, and not fully consistent with international legal norms. The important point which should be mentioned here is that the Law “On Guarantees and Measures for the Protection of Foreign Investors’ Rights”, mentioned above, contains a provision that could lead to misunderstandings regarding the agreement to arbitrate disputes with foreign investors. Pursuant to Art. 10 (1) of this Law:

“A dispute associated with foreign investments (investment dispute) directly or indirectly, can be settled on agreement of the parties by consultation between them. If the parties are not able to achieve an agreed settlement, the dispute shall be solved either by an economic court of Uzbekistan or by arbitration in accordance with the rules and procedures of international agreements (conventions) on the settlement of investment disputes, which Uzbekistan has joined.”

In order to obtain an official interpretation⁵⁰⁷ and avoid the possibility of any misunderstanding of Art. 10 of the Law, the Cabinet of Ministers applied to the Uzbek Constitutional Court to clear the issue whether Art. 10 of the Law implies the agreement of the Republic of Uzbekistan to submission of a dispute for the resolution by arbitration under the ICSID Convention. In November 2006 the Constitutional Court of Uzbekistan issued a decision that this ruling cannot be treated as consent to arbitrate disputes with foreign investors. The article’s reference to arbitration is declaratory, since this article contains the different forms of dispute resolution

⁵⁰² The Law No. 609-I of the Republic of Uzbekistan “On Foreign Investments” was adopted on 30 April 1998 and last revised in 2014.

⁵⁰³ The Law No. 719-I “On Investment Activities” was adopted on 30 April 1998 and last revised in 2014.

⁵⁰⁴ The Law No. 69-II “On Guarantees and Measures of Protection of Rights of Foreign Investors” was issued on 25 May 2000 and last revised in 2012.

⁵⁰⁵ The contractual law of Uzbekistan is established by this Law. It determines the legal basis of the conclusion, execution, change, and termination of economic agreements, the rights and obligations of business entities and also the competence of relevant public authorities and state bodies in the field of contractual relations.

⁵⁰⁶ See *Uzbekistan Country Study Guide, Volume 1: Strategic Information and Developments*, Washington 2015: International Business Publications, p. 142.

⁵⁰⁷ The existing data on investment arbitration claims brought against Uzbekistan suggests that the request for interpretation could be the result of arbitral proceedings initiated in the PCA Case between *Romak S.A (Switzerland) v. Republic Uzbekistan*, UNCITRAL Case No. AA280 and *Newmont USA Limited and Newmont Uzbekistan Limited v. Republic of Uzbekistan*, ICSID Case No. ARB/06/20, available at <https://www.italaw.com/cases/3351>.

acceptable under the national law, and does not include the written consent by the Republic of Uzbekistan (as a party to a dispute) to arbitration under the Art. 25 of the ICSID Convention.⁵⁰⁸ Thus, in Uzbekistan disputes concerning foreign investments can be resolved in one of the following ways:

- by negotiation between the parties to the dispute,
- by taking a decision by the economic court of Uzbekistan,
- through arbitration in accordance with rules and procedures, established by international agreements on investment disputes to which Uzbekistan is a party.

Moreover, there are also other legislative normative acts issued in the form of Presidential Decrees and Governmental Resolutions of the Republic of Uzbekistan. For example, the Governmental Decree No. 55 “*On the creation and State registration of enterprises with foreign investment in Uzbekistan*” substantially simplified and accelerated the procedure for the creation of joint ventures.⁵⁰⁹ Legislation on banking, securities, economic societies and partnerships, bankruptcy and legislation on intellectual property except copyright is in force.

Foreign investors have the following rights in accordance with the legislation of Uzbekistan:

- a) to decide on the amount, kinds and channels of investments;
- b) to conclude agreements with legal entities and individuals to carry out investment activity;
- c) to own, use and dispose investments and the results of investment activity;
- d) to patent inventions, useful models, and industrial samples belonging to the foreign investor in Uzbekistan;
- e) to freely repatriate profits from Uzbekistan or to reinvest them into Uzbek legal entities;
- f) to obtain financial resources in the form of credits and loans;
- g) to convert local currency into foreign currency;
- h) to possess and use land on terms provided by the legislation;
- i) to receive adequate compensation for investments and other assets in case of their expropriation by the state;
- j) to receive adequate compensation for losses incurred as a result of illegal activity or decisions of the state authorities.

Foreign investors also have other rights provided by the legislation of the Republic of Uzbekistan.⁵¹⁰

⁵⁰⁸ Cf. Korobeinikov, Uzbekistan, in: *The Baker & McKenzie International Arbitration Yearbook 2012-2013*, pp. 559-562 (560).

⁵⁰⁹ The Uzbek government issued the Decree No. 55 on 12 February 1996. Cf. Butler (*supra* n. 382), p. x.

⁵¹⁰ Art. 10 of the Law “On Foreign Investments” of 30 April 1998.

On 10 April 2012 the President of Uzbekistan issued the Decree “*On additional measures to stimulate foreign direct investment*”. According to this Decree, newly established enterprises with foreign investment where contribution of foreign investors is equivalent to at least USD 5 million and where modifications have been made to the tax laws, have the right, within ten years from the date of official registration, to apply those rules and regulations to pay corporate income tax, value added tax⁵¹¹, property tax, tax on the improvement and development of social infrastructure, unified social tax, single tax as well as mandatory contributions⁵¹² that were in force on the date of registration.

With investment projects worth more than USD 50 million and where the share of foreign investors is at least 50%, construction of the necessary external (outside the production site), engineering and communication networks is financed from the national budget and other domestic sources of financing.⁵¹³

The above-mentioned tax privileges are granted to enterprises when the volume of direct foreign investment is as follows:

- from USD 300 thousand to USD 3 million – for three years;
- over USD 3 million to USD 10 million – for five years;
- over USD 10 million – for seven years.⁵¹⁴

These tax-related privileges apply in the following cases:

- location of the said enterprises in a city, town or village of the Republic of Uzbekistan, with the exception of Tashkent and the Tashkent region;
- direct private foreign investment by foreign investors without receiving a guarantee from the Republic of Uzbekistan;
- share of foreign investor in the authorized capital of the enterprise should be not less than 33 per cent;
- foreign investment made in hard currency or as up-to-date manufacturing equipment;

⁵¹¹ Turnover on the sale of goods, works and services.

⁵¹² These include contributions to the Republican Road Fund and the Fund for the reconstruction, refurbishment and equipping of educational and medical institutions that were in force on the date of registration. See Presidential Decree of Uzbekistan “On additional measures to stimulate foreign direct investment” of 10 April 2012, also in *Invest in Uzbekistan*, Investment Guide edited by the Ministry for Foreign Economic Relations, UZINFOINVEST and UNDP Uzbekistan, Tashkent 2014, available at <http://www.infomercatiesteri.it/public/images/paesi/142/files/Invest%20in%20Uzbekistan%20brochure.pdf>, p. 72; *Doing Business in Republic of Uzbekistan*, Brochure edited by UHY Tashkent LLC, 2017, available at <http://www.uhy.com/wp-content/uploads/Doing-Business-in-Uzbekistan2.pdf>, p. 7.

⁵¹³ *Invest in Uzbekistan* (supra n. 512), p. 73; *Doing Business in Republic of Uzbekistan* (supra n. 512), p. 7.

⁵¹⁴ *Invest in Uzbekistan* (supra n. 512), p. 73; *Doing Business in Republic of Uzbekistan* (supra n. 512), p. 7.

- reinvestment of at least 50 per cent of proceeds generated through the tax preferences received during the applicable period into further development of the company.⁵¹⁵

When selling state property to foreign investors to set up an enterprise with foreign investments, the right is provided to sell low liquidity assets which belong to the local government at zero redemption cost, without bidding but through direct contracts with the investor under specific investment obligations. Twelve months entry and multiple visas are provided for managers and professionals of foreign companies involved in the implementation of investment projects, following a request to the appropriate ministries, departments and business associations. Enterprises with foreign investment, that are specialized in the production of consumer goods, where the share of foreign capital is over 50 per cent, are exempted from the mandatory sale of proceeds in foreign currency for five years from the date of registration thereof. These enterprises shall be deemed to be specialized in the production of consumer goods, when the share of domestic production of these products is more than 60 per cent of total revenues from business activities.⁵¹⁶

Foreign companies engaged in the prospecting and exploration of oil and gas, as well as foreign contractors and subcontractors recruited by them, are exempted from the payment of:

- all kinds of taxes and mandatory contributions to extra-budgetary funds for the period of exploration works;
- customs duties (except customs clearance fees) for the import of equipment, material and technical resources and services required to carry out prospecting, exploration and other associated works.

Oil and gas production joint ventures with foreign companies that carried out prospecting and exploration of oil and gas, are exempted from income tax for a period of seven years from the beginning of the oil or gas exploration period.⁵¹⁷

The following are exempted from custom duties:

- property imported into the Republic of Uzbekistan by foreign investors and enterprises with foreign investments with a share of foreign investments in the authorized capital of at least 33 per cent for their own manufacturing needs,
- property imported for the personal needs of foreign investors and foreign nationals residing in the Republic of Uzbekistan in accordance with labour contracts signed with foreign investors,

⁵¹⁵ *Invest in Uzbekistan* (supra n. 512), p. 73; *Doing Business in Republic of Uzbekistan* (supra n. 512), p. 8.

⁵¹⁶ *Invest in Uzbekistan* (supra n. 512), p. 73; *Doing Business in Republic of Uzbekistan* (supra n. 512), p. 8.

⁵¹⁷ *Invest in Uzbekistan* (supra n. 512), p. 73; *Doing Business in Republic of Uzbekistan* (supra n. 512), p. 8.

- goods imported by foreign legal entities which have made direct investments into the economy of the Republic of Uzbekistan for a total amount of over USD 50 million provided that the imported goods are their own products,
- process equipment imported into the Republic of Uzbekistan in accordance with the legally approved list as well as spare parts provided that their delivery is stipulated by the terms and conditions of the process equipment delivery contract.⁵¹⁸

Enterprises with foreign investment, apart from the relevant tax and customs privileges and incentives, may also enjoy all kinds of tax and customs privileges stipulated for legal entities of the Republic of Uzbekistan, for instance, in the production of export-oriented and import-substituting products, production of consumer goods of high demand, export of goods (works, services), import of process equipment, transfer of property as investment obligations, etc.⁵¹⁹

Another Presidential Decree of the Republic of Uzbekistan “*On measures for further radical improvement of business environment and providing more freedom to entrepreneurship*” was issued on 18 July 2012. The purposes of this Decree are: radical improvement of business environment; creation of more favourable conditions for business; reduction, simplification and improvement of the transparency of all procedures related to the enterprises operations; introduction of an internationally accepted system of evaluation criteria of the business environment and further improvement of international rating of the business and investment climate of the country.⁵²⁰

In accordance with this Decree, Uzbekistan should establish procedures, where the business entities have the right, at their own discretion, to carry out electronically following operations for the relevant state administration and economic governance bodies:

- payment of taxes and other mandatory payments via remote service for bank accounts, including Internet Banking,
- declaration of goods by business entities at the custom clearance of goods,
- registration of ownership of legal entities for real estate through “one-stop shop” approach,
- submission of claims and applications of business entities to economic courts.

In accordance with this legal act, commercial banks are recommended to reduce, by at least 20%, the fees charged for the account management of small businesses, which make payments electronically.⁵²¹

⁵¹⁸ *Invest in Uzbekistan* (supra n. 512), pp. 73-74; *Doing Business in Republic of Uzbekistan* (supra n. 512), pp. 8-9.

⁵¹⁹ *Invest in Uzbekistan* (supra n. 512), p. 74.

⁵²⁰ *Ibid.* p. 74.

⁵²¹ *Ibid.*, pp. 74-75.

On 16 July 2012 the President of the Republic of Uzbekistan issued the Decree “*On measures for radical reduction of statistics, tax, financial reporting, licensable businesses as well as permit issues procedures*”. The aim of this document is to improve the business environment; to create more favourable conditions for business activity by eliminating bureaucratic barriers; to reduce and simplify the licensing procedures, to improve the reporting system and the submission procedures, taking into account the requirements of the market economy and international standards.⁵²² 80 licensing procedures (26% of the total number) and 15 licensable activities (20%) are abolished in Uzbekistan since August 2012. The Decree prohibits refusal to issue licenses and allows new reasons for business entities’ re-submission of applications with the removal where previously found error have been eliminated.⁵²³

Moreover, the Presidential Decree, issued on 5 October 2016 “*On additional measures to ensure the accelerated development of entrepreneurial activity, comprehensive protection of private property and substantial improvement of business climate*” also aims to improve the business environment and investment climate in the country. Recently, officials of the Uzbek government publicly suggested improvements to the regulatory system by arguing that the existing regulatory system, including regulatory enforcement mechanisms, is critical for the overall business climate, while today interpretations for the reforms of the regulatory system are still needed. In the past five years, new or updated legislation has continued to leave room for interpretation and has contained rather unclear definitions. In many cases private businesses still face difficulties associated with enforcement and interpretation of the legislation.⁵²⁴

A new five-year development strategy⁵²⁵, adopted in February 2017, aims to increase the role of civil society, non-governmental organizations and local communities in regulatory oversight and enforcement. It includes the following objects for upcoming reforms:

- ensuring reliable protection of private property rights,
- removal of all barriers and limitations for private entrepreneurship and small business,
- creation of a favourable business environment,
- suppression of unlawful interference of government bodies in the activities of businesses,
- improvement of the investment climate,

⁵²² *Ibid.*, p. 75.

⁵²³ According to this Decree a monthly tax report for all types of taxes and other mandatory payments are cancelled from 1 January 2013, except for the tax on profit.

⁵²⁴ The Ministry of Justice and the system of economic courts are formally responsible for regulatory enforcement in Uzbekistan.

⁵²⁵ According to the Action Strategy on Five Priority Development Directions of Uzbekistan for 2017-2021, the new regulatory system, including regulatory enforcement mechanisms is to be developed.

- decentralization and democratization of the public administration system,
- and expansion of public-private partnerships.

To sum up, the legal framework for investment protection in Uzbekistan includes a large number of laws, decrees, resolutions, rules, specific guidelines, and instructions. Public laws are subject to parliamentary approval. Unlike public laws, regulations and rules are usually developed by relevant government agencies and are approved by the President or relevant ministers.

Most rule-making and regulatory authority in Uzbekistan remains at the domestic level, only a minor part of legal, regulatory and accounting systems are transparent and fully consistent with international norms.⁵²⁶ Despite the efforts of the Uzbek Government to unify local accounting rules with international standards, local practices are still document- and tax- driven with an underdeveloped concept of accruals.

Shavkat Mirziyoyev, Uzbekistan's new president⁵²⁷, has recently initiated the publication of draft laws for public review and comments; so far it was rather uncommon in Uzbekistan to publish draft laws for public consideration.⁵²⁸ Uzbekistan's legislation digest <http://www.lex.uz/> serves as a centralized online location for current legislation in effect. There are other online legislative resources with executive summaries and comments that could be useful for businesses and investors, including <http://www.norma.uz/> and a specialized website of the [Uzbek Ministry for Foreign Economic Relations, Investments and Trade](http://www.mfa.uz/) <http://www.mfa.uz/>.⁵²⁹

4.2. The challenges of attracting foreign investment into Uzbekistan

Establishing a favourable business and investment climate that coincides with investors' interests is an important factor of successful cooperation among States in the sphere of international investment activities.

Uzbekistan is the most populous country (over 32 million people) in Central Asia, which also has the potential to become the largest economy in the region.

In spite of the fact that the government has a complex of laws, aimed at attracting greater foreign investment into the country based on the regulation of investment activity, foreign investors still experience substantial difficulties due to variances in enforcement and interpretation of

⁵²⁶ Uzbekistan is not a member of the WTO or any of the existing economic blocs. No regional or other international regulatory systems, norms, or standards have been directly incorporated or thoroughly referenced in Uzbekistan's regulatory system. See Investment Climate Statement for 2018, available at <https://www.state.gov/e/eb/rls/othr/ics/investmentclimatestatements/index.htm>.

⁵²⁷ He is [President of Uzbekistan](#) since 2016. Previously he was the [Prime Minister of Uzbekistan](#) from 2003 to 2016.

⁵²⁸ Investment Climate Statement for 2018 (*supra* n. 526).

⁵²⁹ *Ibid.*

these laws. Many issues have apparently not yet been resolved and investment policy does not fully conform to the WTO and EBRD standards and the principles of the Partnership and Cooperation Agreement between Uzbekistan and the European Communities and their Member States (PCA).⁵³⁰ The PCA provides the full transition of Uzbekistan to free market economy with the purpose of adaptation of national legislation to the legal norms of the European Community and to generally accepted international rules. Title V “Legislative Cooperation” of the PCA provides the approximation of the national legislation of Uzbekistan to that of the EC in the following areas in particular: customs law, company law, laws on banking and other financial services, company account and taxes, intellectual property, rules on competition including any related issues and practices affecting trade, public procurement, etc.⁵³¹ For this purpose the EC shall provide the Republic of Uzbekistan with technical assistance, which may include, *inter alia*, the exchange of experts and the provision of early information especially on relevant legislation.⁵³²

A number of critical remarks and suggestions on perfecting the legislation on investment, customs, banking and anti-monopoly are being made by foreign investors, experts and banks. For instance, several points of criticism of the laws “On Foreign Investments” and “On Guarantees and Measures for the Protection of Foreign Investors’ Rights” of 1998 have been voiced.

If the laws on investment are examined, one can realize the persistent gaps, unclearness, declarative sentences and other legal shortcomings in the laws mentioned above. For example, there is no clear determination of the term “entity with foreign investment” and the Law “On Guarantees and Measures for the Protection of Foreign Investors’ Rights” provides for the possibility of further deterioration of investment conditions which is to be connected with the adoption of new legal acts.⁵³³

Foreign investors face obstacles to the registration as foreign entity which is a major problem in Uzbekistan. Too much documents are required to register such entities and the size of the registration fees are higher than the fees for entities created by national entrepreneurs. There are no concrete reasons or requirements for a refusal of the registration of such objects.

⁵³⁰ The Partnership and Cooperation Agreement between Uzbekistan and the European Communities and their Member States, OJ, 31.08.1999, L 229, pp. 3-52, was signed in 1996 and entered into force in July 1999.

⁵³¹ Art. 42 (2) of PCA.

⁵³² Art. 42 (3) of PCA.

⁵³³ Art. 3 of the Law „On Guarantees and Measures for the Protection of Rights of Foreign Investors”, adopted on 30 April 1998, states: “*If the subsequent legislation of the Republic of Uzbekistan worsens investment conditions, then legislation current on the date of investment is applied to foreign investments within ten years of the date of investment. The foreign investor has the right at his own discretion to apply those provisions of a new legislation which make better conditions of his investment.*” (Part in the edition of the Laws of the Republic of Uzbekistan, dated 16 September 2005, No. ZRU-6).

In spite of the fact that the Ministry of Justice is responsible for the protection of foreign investors' rights and interests,⁵³⁴ the problem of the place for the registration of foreign investment entities has not totally been solved. According to normative documents, a foreign investment entity depending on the size of its charter capital passes state registration either at the Ministry of Justice (and at its territorial subdivisions) or at registration authorities at the city (district) *khokimiyats*⁵³⁵. This causes confusion for entrepreneurs and civil servants, and complicates the management of the registration procedure and the execution of an effective control over compliance with the current legislation. If the sizes of the charter capital of the entities are changeable, then especially those entities, that were registered by *khokimiyats*, must be re-registered by the Ministry of Justice, vice versa. Besides they must be registered at the bodies of statistics, in order to be included to the State Statistics Committee of Uzbekistan. It is necessary to submit again a package of documents, to pass the bureaucratic procedure of registration and spend time on expecting the decision of a specific authority, etc. To unify registration procedures of a foreign investment entity and provide due control over observance of the procedure, it is necessary to delegate the registration-related functions to one single authority and exclude the repeated re-registration of such an entity; this should be extended to registration of all business entities. It would be enough to give a short information to the authority annually about the main summary of the activity of an entity (changes of charter capital, balance sheet, etc.).

Foreign companies have no or limited access to ownership in spheres such as airline and railway services⁵³⁶, mass media⁵³⁷, banking, insurance⁵³⁸ and tourism. Licensing is considered as one of the central restrictive measures over the activities of local and foreign businesses.⁵³⁹

Mandatory surrender of foreign exchange proceeds obtained from export transactions at the Central Bank fix rate, 12 draconian foreign exchange and other prohibitive regulations hold foreign enterprises back from leading full-scale undertakings.

⁵³⁴ It has a department for the protection of rights of foreign investors and enterprises with foreign investments for these purposes.

⁵³⁵ Regional governor's office in Uzbekistan.

⁵³⁶ See Art. 3 of the Law of the Republic of Uzbekistan No. 766-I of 15 April 1999 "On Railway Transport" (Bulletin of Oliy Majlis of the Republic of Uzbekistan 1999, No. 5, item 118).

⁵³⁷ Art. 8 (4) of the Law of the Republic of Uzbekistan No. ZRU-78 of 15 January 2007 "On Mass Media" (new ed., Collection of the Legislation of the Republic of Uzbekistan 2007, No. 3, item 20).

⁵³⁸ With recent (11 April 2012) amendments introduced to the Law of the Republic of Uzbekistan of 5 April 2002 "On Insurance Activity" (Bulletin of Oliy Majlis of the Republic of Uzbekistan 2002, No. 4-5, item 68), foreign insurance companies are confined from providing any insurance services in the territory of Uzbekistan (Art. 27 (2)).

⁵³⁹ The Law No. 71-II of 25 May 2000 "On Licensing of Certain Types of Activity" (Bulletin of Oliy Majlis of the Republic of Uzbekistan 2000, Nos. 5-6, item 142) enumerates an extensive list of activities contingent to obtaining permission.

Uzbekistan adopted Art. VIII of the IMF Charter in October 2003 and, thus, committed to currency convertibility for current account transactions. Foreign investors are guaranteed transfer of funds in foreign currency into and out of Uzbekistan without limitation, provided they have paid all taxes and fulfilled other financial obligations in accordance with legislation. Local authorities may stop the repatriation of a foreign investor's funds in the following cases:

- in case of insolvency and bankruptcy,
- criminal acts made by the foreign investor,
- or when directed by arbitration or a court decision.

The greatest operational concerns facing foreign and private investors are access to currency conversion, frustrating bureaucratic processes, an onerous tax system, overregulated banking, and punitive customs laws and procedures.⁵⁴⁰

Uzbek legislation favouring the free cross-border movement of foreign investors' capital has to deal not only with the access to Uzbekistan as the host country, but also with the substantive and procedural safeguards protecting the investor's rights, including quick and non-restricted conversion of their capital to freely convertible currency. After making the mandatory payments, foreign investors must have the opportunity to repatriate freely their revenues.

Elimination of double taxation should be realised for foreign legal entities, that is the levying the taxes from both the main company and from its affiliate. Affiliates of foreign companies should not be considered as juridical persons according to Uzbek legislation.⁵⁴¹ Foreign enterprises need to satisfy Tax Code exemption requirements to claim double tax treaty benefits for Uzbekistan-sourced income. Non-residents should provide tax residence certificates confirmed by the competent authority in their country of residence to the beneficiary. Not only large investors but also small and medium-sized enterprises with foreign investments must be provided with tax privileges and incentives.

In 1996 the Law of the Republic of Uzbekistan "On competition and restriction of monopolistic activities in the commodities markets" was adopted. It fixes the legal bases for the prevention and restriction of monopolistic activity and unfair competition and is directed towards providing conditions for the formation of a competitive market. It is necessary in the country to exceed the negative consequences of excessive government intervention and discretion in economic activity and to take antimonopoly measures against establishing monopolistic prices. The actions for activating the privatisation process and the practical resolution of antimonopoly issues are essential to open the doors for external capital investments.

⁵⁴⁰ See Investment Climate Statement 2015 for Uzbekistan, <http://www.state.gov/documents/organization/242000.pdf>, p. 4.

⁵⁴¹ Art. 47 of the Civil Code of the Republic of Uzbekistan.

The court protection of property, rights and legal interests of foreign investors should be mentioned here, while foreign investors have not always trust in the national courts, including the economic courts of the Republic of Uzbekistan, particularly in regions where the supremacy of bureaucracy and the loyalty to state interests and national entrepreneurs are observed. The majority of investment disputes with involvement of Uzbek state-owned enterprises (SOEs), reviewed by domestic courts have been suspended prior to a final decision due to plea bargains or have been decided in favour of SOEs. When the court decides in favour of a foreign investor, the Ministry of Justice is responsible for enforcing the ruling. In some cases its authority is limited and co-opted by other elements within the government. Judgments against SOEs are particularly difficult to enforce.⁵⁴²

Taking into account the above-mentioned facts, foreign investors prefer to resolve the disputes at *ad hoc* arbitration or at international arbitration courts outside of Uzbekistan.

If we speak about ADR in Uzbekistan, it should be mentioned that there is no precise legislation but arbitration in Uzbekistan. Enterprises and business individuals can apply to arbitration courts only if they have a relevant dispute-settlement clause in their contract or a separate arbitration agreement. The provisions of the Economic Procedural Code of Uzbekistan require plaintiffs to attempt to settle a dispute amicably before taking any lawsuit to economic courts.⁵⁴³ Providing documentary evidence of an attempt to settle a dispute amicably is a mandatory legal requirement in Uzbekistan. In practice, this mandatory form of mediation is treated as having been complied with, if a pre-judicial notice of default has been delivered to the defendant in writing.

If the parties to a contract have chosen a foreign arbitration tribunal and an award has been made, then the enforcement procedure shall be applicable in Uzbekistan in accordance with the Uzbek Economic Procedural Code and the Law of Uzbekistan “On Enforcement of Judicial Decisions and Decisions of Other Authorities” of 29 August 2001.

Foreign arbitral awards or other acts issued by a foreign country can be recognized and enforced only if Uzbekistan has a relevant bilateral agreement with that country or is obliged by a multilateral agreement. If international arbitration is permitted, awards can be challenged in domestic courts. However, currently local economic courts do not have a solid mechanism for enforcement of foreign courts’ decisions. Foreign businesses may wish to consult with a local law firm in order to avoid delays or other unexpected outcomes of their cases in local economic and arbitration courts.

⁵⁴² Investment Climate Statements for 2018 (*supra* n. 526).

⁵⁴³ Articles 130 et seq. of the Economic Procedure Code of Uzbekistan.

Foreign arbitration awards are enforced by State economic courts of Uzbekistan. While Uzbekistan is a party to the 1958 Convention on Recognition and Enforcement of Foreign Arbitral Awards (New York Convention), in accordance with Art. IV of this Convention, to obtain the recognition and enforcement of a foreign arbitration award it would be necessary to submit the following documents to the economic court of Tashkent city:

- duly authenticated original award or a duly certified copy thereof,
- and original arbitration agreement or a duly certified copy thereof.

Summarizing all the above mentioned, today the priority direction of the social and economic development of Uzbekistan like of any state of the world is aimed at the formation of an attractive investment environment. Therefore, for Uzbekistan consideration of the challenges of attracting foreign investment into Uzbekistan is of great importance in achieving sustainable development, increasing incomes and improving the living conditions of the Uzbek people.

4.3. Investment protection in German Law

Foreign investments are encouraged and welcomed in the same way as national investments in Germany. According to German law, both foreign and national investors enjoy the same treatment. The main laws that regulate foreign investments in Germany on the basis of national interest regardless of the industry sector⁵⁴⁴ are:

- the Foreign Trade and Payments Act (AWG) and
- the Foreign Trade and Payments Regulation (AWV).

Other laws regulating foreign investments in specific sectors are:

- the State Broadcasting Treaty (RStV),
- the Telecommunications Act (TKG),
- the Postal Services Act (PostG),
- the Satellite Data Security Act (SatDSiG),
- the Aviation Compliance Documentation Act (LuftNaSiG),
- the Banking Act (KWG), and
- the Act on the Supervision of Insurance Undertakings (VAG).

As *Niestedt* and *Ziegenhahn* noted, foreign investments' reviews are accomplished confidentially in Germany and accordingly, facts about the process are not made known to the public.⁵⁴⁵ According to §§ 58 and 60 of the amended Foreign Trade and Payments

⁵⁴⁴ Despite the fact that German legislation does not make a difference between domestic and foreign investors, there are rules concerning foreign investments that focus on sensitive industry sectors, namely defence, encryption, and satellite industries.

⁵⁴⁵ Niestedt/Ziegenhahn, Germany, in: *Foreign Investment Review 2014*, 3rd ed., London 2014, pp. 36-41, available at http://www.gvw.com/uploads/tx_news/Foreign_Invest_in_Germany.pdf.

Regulation⁵⁴⁶, about 120 clearance certificates have been issued and a few transactions have been reported to the Ministry of Economics. There have been no refusals up to now; in a limited number of cases, assurances were required from the companies involved or public-law contracts were concluded to protect security interests of the Federal Republic of Germany.⁵⁴⁷

The German federal government is of the opinion that investment protection is significant in relation to countries that have deficits in legal protection and considers it necessary to sign BITs with them at the time of trade negotiations.⁵⁴⁸ Investors from these countries, when investing in Germany, benefit from the broad legal protection and efficient legal remedies offered by German and EU law. Consequently, the German government requests to guarantee a similar level of legal protection for national investors in those countries.⁵⁴⁹ German BITs require the investors to respect host state's laws only if these laws do not constitute breaches of the relevant investment protection provisions. For many decades, the host state's right to admit or refuse investments has been respected by Germany.

Observers consider that there will still be investment protection agreements, but they will probably provide for a lower level of protection, at least in treaties between states with a high level of investment protection according to their national laws. As *Krumpholz* mentioned, *“it remains to be seen what effects this change in investment protection treaties will have on the ability of the German government to provide investment guarantees in its current form”*.⁵⁵⁰

§ 5 Summary (a comparison)

This chapter begins with examining the meanings and purposes of the terms “recognition” and “enforcement” and it explores whether the terms are separable or inseparable. The definition of the term “foreign award” and questions relating to determining where an award is made, when it is considered to be a foreign award and which type of an award qualifies it as being subject to recognition and enforcement procedures under the German and Uzbek regimes, governing the enforcement and recognition of foreign arbitral awards were dealt with in this chapter. Defining precisely which arbitral awards are within the scope of application, especially of the New York Convention is one of the most important issues which the Convention fails to deal with. Another point is that like the UNCITRAL Model Law, there is no generally accepted

⁵⁴⁶ The Foreign Trade and Payments Act (AWG) and the Foreign Trade and Payments Regulation (AWV) were substantially revised. The amended legislation came into force in September 2013.

⁵⁴⁷ Niestedt/Ziegenhahn, (*supra* n. 545), p. 41.

⁵⁴⁸ Germany considers that special agreements for investment protection is not necessary in relation to countries with a rule of law system. Therefore, no BITs were concluded with such countries. See *Krumpholz* (*supra* n. 419), pp. 20-21.

⁵⁴⁹ *Ibid.*

⁵⁵⁰ *Krumpholz* (*supra* n. 419), p. 22.

definition of the final, interim and partial awards neither in the Uzbek nor in the German legislation. Only § 300 of the German Code of Civil Procedure (ZPO) might overcome this issue that deals with the comparable classification of state court judgements. It must also be noted that, unlike Uzbek law, the German ZPO contains the §§ 1040 (3), 1054, 1056 (1), 1057 and 1059 addressing all three types of awards.

International commercial arbitration is undoubtedly a widely recognised and accepted method for the alternative dispute resolution, and its modernisation is demonstrated by international legal instruments. Accordingly, the establishment of international commercial arbitration institutions is also an indication of the development of international commercial arbitration. Today many countries worldwide, including Uzbekistan, are modernizing their respective arbitration laws to harmonize them with international legal standards, established by the main international instruments like the New York Convention 1958, the Washington Convention 1965, the UNCITRAL Model Law 1985 and other international treaties on international arbitration. They all are designed to ensure that individual government control, realized through national courts, is constrained, *i.e.* these international instruments control the extent to which state courts may intervene in the arbitration process. A clear example of this is that these treaties limit the extent to which courts may refuse to recognize a foreign award and set out a simplified procedure, which will be discussed in detail in Chapter V of this dissertation.

Although Uzbekistan has signed and ratified the major international arbitration conventions, existing policies and practices in this country, unlike Germany, are considered to be imperfect in meeting international treaty standards and obligations. It means that Uzbekistan still lacks either the essential ability or the political will for effective implementation of the requirements and standards concerning international conventions on commercial arbitration. For example, the Model Law on International Commercial Arbitration, as it has been argued, has met stiff resistance from parts of the judiciary, prosecutors and government officials in many transformation states.⁵⁵¹ Today, Uzbekistan's Arbitration Act, based on the UNCITRAL ML, only governs domestic arbitration in contrast to the German Arbitration Act.⁵⁵² German legislature, as *van den Berg* noted, simplified matters by broadening the coverage of the ML to domestic arbitration through building a single regime for arbitration in Germany.⁵⁵³

⁵⁵¹ Knieper, Celebrating success by accession to CISG, *Journal of Law and Commerce* 25 (2005-06), pp. 477-481.

⁵⁵² Unlike the Uzbek Arbitration Act, the German Arbitration Act is applicable to all arbitration proceedings seated in Germany, irrespective of whether such arbitrations are of international or domestic character.

⁵⁵³ *van den Berg*, The German Arbitration Act 1998 and the New York Convention 1958, in: Birer et al. (eds.), *Law of International Business and Dispute Settlement in the 21st Century / Recht der Internationalen Wirtschaft und Streiterledigung im 21. Jahrhundert, Liber Amicorum Karl-Heinz Böckstiegel*, Cologne 2001, pp. 783-794.

In the present chapter the author continues the discussion of case law related to the recognition and enforcement of foreign arbitration awards by Uzbek courts and the impact of these awards on investment treaty arbitration.

The attraction and investment of large scale capital depends on its legal protection. Taking into account the specificity of entrepreneurial thinking, the behaviour of business circles and the principle of freedom of contract, the legislations of both countries, Germany and Uzbekistan, promote complete freedom for businesses and enterprises when they enter into a contractual relationship with each other.⁵⁵⁴ Finally, this chapter concludes with a description of investment protection in accordance with Uzbek and German Law.

After the collapse of communism, the growth of foreign investment in Uzbekistan has led to a greater number of disputes between foreign investors and Uzbek entities. Lack of operative interpretations of unclear and doubtful provisions in investment law and lack of procedures by state executive institutions to implement them seriously affect the investors' decisions. The challenges of attracting foreign investment into Uzbekistan continue to exist; they are examined in the present chapter.

In spite of the great prestige of the judiciary in all countries worldwide alternative ways of dispute resolution have been developed. In most cases, such alternative ways of dispute resolution are realized by arbitration courts. Investors intending to commence arbitration against the Republic of Uzbekistan must take into consideration that they should rely on a direct agreement with Uzbekistan or invoke the provisions of a treaty where Uzbekistan clearly consented to arbitration. Investors who cannot rely on such rulings may only take their disputes against Uzbekistan to domestic economic courts.

The universal acceptance of the arbitration courts is based primarily on the opinions of business leaders, including those in Germany, who traditionally turn to them for the resolution of economic disputes.⁵⁵⁵ According to a study on legal instruments and practice of arbitration in the EU, when respondents were asked to select five States they would recommend as the seat of an international arbitration, 43.91% of respondents selected Germany, making it the fifth most preferred arbitral seat amongst the States included in that study.⁵⁵⁶

⁵⁵⁴ The principle of freedom of contract states that every natural and legal person can choose the other contracting party and the subject matter of the contract independently, as long as no rights of third parties or other statutory provisions are affected by the contract. The rule of freedom of contract is rooted in Art. 2 Abs.1 of the German Constitution which guarantees freedom of action ("Allgemeine Handlungsfreiheit"). According to Art. 354 of the Civil Code of Uzbekistan, citizens and legal entities are free in the conclusion of a contract.

⁵⁵⁵ Lörcher/Lörcher, *Das Schiedsverfahren – national/international – nach neuem Recht*, München 1998, p. 1.

⁵⁵⁶ See Cole et al. (*supra* n. 306), p. 102.

The chapter entails an overview of the most important legal rules which apply to foreign investments in Germany. Like the Uzbek legal system, the German legal order does not provide for a special Investment Code regulating the treatment and protection of foreign investment. Unlike in Uzbekistan, in Germany the law applicable to foreign investments is based not only on the domestic legal order, but also on the EU law, *i.e.*, European treaties and secondary legislation (regulations, directives and decisions) enacted by the EU organs.⁵⁵⁷ Investment protection is an important part of the EU's investment policy and European investors often use this existing system of BITs. The individual EU Member States, including Germany have developed it over time.⁵⁵⁸

As mentioned by *Howse*, the number of states which refused basic “Western” protection of contract and property rights and some version of liberal rule of law has declined significantly.⁵⁵⁹ To isolate foreign capital from issues like the lack of governance, corruption and administrative incompetence is not a solution for realizing a good investment policy in Central Asian countries like Uzbekistan. These problems should be solved through optimizing the new impulses for general domestic reforms.

⁵⁵⁷ Cf. Lorz, Germany, in: Shan (ed.), *The Legal Protection of Foreign Investment: A Comparative Study*, Oxford/Portland, Oregon, 2012 pp. 359-394 (360).

⁵⁵⁸ Cf. Malmström, Proposing an Investment Court System, 16 September 2015, blog post, available at https://ec.europa.eu/commission/commissioners/2014-2019/malmstrom/blog/proposing-investment-court-system_en.

⁵⁵⁹ Howse, International Investment Law and Arbitration: A Conceptual Framework, *IILJ Working Paper* 2017/1, (MegaReg Series), p. 36.

Chapter III: Recognition and enforcement of foreign arbitral awards

§ 1 The role of Recognition and Enforcement in the Arbitration Process

The most important advantage of international commercial arbitration over litigation in the international context is the relatively well-developed system of recognition and enforcement of domestic and foreign arbitration awards. As the central elements for the success of arbitration, the provisions on recognition and enforcement increase its system's effectiveness in comparison with the state judicial system.⁵⁶⁰ Actually, parties will only perceive arbitration as a viable alternative to court proceedings if the resulting award, in spite of the private nature of the dispute settlement mechanism, will be accorded the same effects as a state court's judgement. Recognition and enforcement procedures result from the intrinsic difference between arbitral awards and domestic court judgements.⁵⁶¹ Domestic courts render their judgements "In the Name of the People".⁵⁶² Their decision-making power is based on a public law authority granted to them by their respective constitutions.

Here it is important to mention the recognition of foreign judgments of state courts in the CIS states. The practice shows that the enforcement of foreign court judgements is more complicated than the enforcement of foreign arbitral awards in the CIS countries. *Alexandrow* in his doctoral dissertation emphasized that the 1954 Hague Convention on Civil Procedure and on Access to Justice cannot offer a relatively efficient method for the recognition of judgments of state courts in relations between the EU and CIS countries.⁵⁶³ Instead of this Convention other regional and international conventions shall apply to public trial, as, for example, the Regulation (EU) No. 1215/2012⁵⁶⁴ and the Minsk Convention on Legal Assistance and Legal Relations in Civil, Family and Criminal Matters of 1993. They play an essential role in the prevention and resolution of disputes involving parties of the states which ratified these Conventions.⁵⁶⁵

The meaning and the ultimate goal of harmonization of legislation on international commercial arbitration of different states was, *inter alia*, also a simple and reliable procedure for recognition and enforcement of foreign arbitral awards in the modern business world.

⁵⁶⁰ Dmitrieva, *Mejdunarodniy kommercheskiy arbitraj*, Moscow 1997, p. 232.

⁵⁶¹ Berger (*supra* n. 335), p. 676.

⁵⁶² von Bogdandy/Dunlap/Venzke, *In Whose Name? A Public Law Theory of International Adjudication*, Oxford 2014, p. 209.

⁵⁶³ See Alexandrow (*supra* n. 324), p. 124.

⁵⁶⁴ Regulation (EU) No. 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, OJ L 351, 20.12.2012, pp. 1-32.

⁵⁶⁵ For example, the provisions of above Conventions apply to relations between the Uzbek-German joint ventures, registered in Uzbekistan and Turkmen clients, located in Turkmenistan.

Despite the fact that the UNCITRAL Model Law is based on the principle of universally mutual recognition of arbitration awards, not dividing them into national or foreign, and despite the simplification of enforcement proceedings,⁵⁶⁶ basing such unification only on the UNCITRAL Model Law would have been ineffective. This method is fixed in the UN Convention "On the Recognition and Enforcement of Foreign Arbitral Awards" of 1958 (New York Convention) which applies to the recognition and enforcement of arbitral awards made in the territory of a State other than the State in which recognition and enforcement of such awards are sought. It also applies to awards "not considered as domestic awards".⁵⁶⁷

Another provision concerning the enforcement of arbitration awards is contained in the German-Soviet Agreement "On trade and navigation" of 25 April 1958 between the Federal Republic of Germany and the CIS countries as the successors of the USSR.⁵⁶⁸ However, this agreement does not accentuate the origin of the arbitration award in its recognition and enforcement.⁵⁶⁹

In practice, an arbitral award is enforced voluntarily and it complies with the legal nature of that jurisdiction.⁵⁷⁰ Voluntary enforcement of arbitral awards indicates a high level of business culture of opposing parties. It is acknowledged that the laws of the CIS states⁵⁷¹ on International Commercial Arbitration and the new German Arbitration Law contain appropriate provisions on the voluntary execution of the arbitral awards.

§ 2 Recognition and Enforcement of Foreign Arbitral Awards in Germany

The German Arbitration Act of 1998 was adopted to better facilitate domestic and international arbitration proceedings in Germany. The application for having a foreign award recognized and enforced is ruled by this law. The concerning provisions constitute one of the few areas where the German law deviates from the UNCITRAL Model Law on which it is based. Instead of transferring Articles 35 and 36 Model Law directly into German law, § 1061(1) of the ZPO (Code of Civil Procedure) provides:

"Recognition and enforcement of foreign arbitral awards shall be granted in accordance with the Convention on the Recognition and Enforcement of Foreign Arbitral Awards of June 10,

⁵⁶⁶ See Art. 35 (1) of the UNCITRAL ML "On International Commercial Arbitration".

⁵⁶⁷ New York Convention, Art. I (1).

⁵⁶⁸ The source is available (in Russian language) at: <http://www.systema.ru>; BGBl. 1959 II, 221 *et seq.*

⁵⁶⁹ Schwab/Walter, *Schiedsgerichtsbarkeit*, 7. Aufl., München 2005, p. 577.

⁵⁷⁰ At the same time, there is sometimes a need for interim measures to enforce arbitration decisions. See Komarov/Pogorezky (*supra* n. 247), p. 152.

⁵⁷¹ Cf. Russian and Ukrainian laws „On International Commercial Arbitration“.

1958⁵⁷². *The provisions of other treaties on the recognition and enforcement of arbitral awards shall remain unaffected.*”

This deviation from the Model Law was, however, not intended to lead to a change in substance. The grounds to resist enforcement mentioned in Art. 36 of the Model Law are basically identical to those of Art. V of the New York Convention. The reason for the deviation was primarily the fact that the relevant provisions of the Model Law do not distinguish between domestic and foreign awards. Under the pre-existing German law domestic awards only had to be declared enforceable but required no recognition. To keep this privilege for domestic awards required separate regimes for domestic and foreign awards resulting in the reference to the New York Convention,⁵⁷³ for which the “Contracting State Reservation”, made in accordance with Art. I (3) of the NYC, was withdrawn.⁵⁷⁴

While the new German law is to a large extent a modern and internationally acceptable re-codification⁵⁷⁵ of the existing law, the issue of recognition and enforcement of foreign awards is one of the few areas where substantial changes have been made. In the following the new regime governing recognition and enforcement of foreign awards in Germany will be set out. As mentioned before, an arbitral award is rendered by a private tribunal whose decision-making power is based on a private agreement of the parties. An official confirmation by the domestic courts is important for this private award to function as an enforcement title for state enforcement authorities against the losing party. This is the aim of recognition and enforcement proceedings under §§ 1060 and 1061 of the ZPO and Articles 35 and 36 of the UNCITRAL Model Law.

If the operative part of a foreign award does not conform to the rules of the ZPO at first sight, then the court deciding on the enforcement application has to interpret the award in a way enabling its enforcement, if such interpretation is possible without changing the operative part of the award.⁵⁷⁶ For this, the court may have to take evidence connected with the foreign law on which the award has been based. In case of not reaching the similarity of such interpretation, the application to declare the award enforceable may be rejected.⁵⁷⁷

⁵⁷² BGBl. 1961 II, 121.

⁵⁷³ See the official report accompanying the draft of the new law, BT-Drs. 13/5274, pp. 60 *et seq.* The grounds mentioned to resist enforcement of domestic awards are, however, identical to those mentioned in Art. V of the NYC.

⁵⁷⁴ The withdrawal of the reservation was notified to the United Nations on 31 August 1998, see BGBl. II 1999, 7; consequently § 1061 (1) of the ZPO has primarily a declaratory character since the enforcement of foreign awards would anyway be governed by the New York Convention.

⁵⁷⁵ See the official report, BT-Drs. 13/5274, pp. 22 *et seq.*; Berger (*supra* n. 267), pp. 42 *et seq.*; Wagner (*supra* n. 269), paras. 465 *et seq.*

⁵⁷⁶ See Raeschke-Kessler (*supra* n. 424), p. 224.

⁵⁷⁷ *Ibid.*

In general, the recognition and enforcement of foreign arbitral awards is governed by the New York Convention in force in Germany since 1961. It is not only applicable to arbitral awards of contracting states, but also to arbitral awards of non-contracting states.⁵⁷⁸ The matter of the recognition and enforcement of foreign arbitral awards is decided by competent higher regional courts in Germany. If there is a conflict between requirements in the proceedings between New York Convention and the German procedural rule, those provisions which contain lower qualifications prevail. The possibility of relying on the more favourable provisions of other treaties for the recognition and enforcement of foreign awards already follows from the public international law character of such treaties superseding national law.

A party seeking recognition and enforcement of a foreign award in Germany pursuant to the New York Convention bears the burden of proof for the existence of a valid arbitration agreement.⁵⁷⁹ German courts will rule on the objection that there is no valid arbitration agreement without being bound by the findings of the foreign arbitral tribunal on the existence of an effective arbitration agreement. The modernisation of the form requirement related to an arbitration agreement, fixed in Art. 7 Model Law 2006, has recently been recognised by the BGH. It has concluded that an arbitration clause underlying a foreign arbitral award, which is to be recognised and declared enforceable in Germany, is to be interpreted in a broad and recognition-friendly way.⁵⁸⁰

As long as a party consistently objects to the jurisdiction of the arbitral tribunal, it can bring this objection in enforcement proceedings as well. The court will not be bound by the decision of the arbitral tribunal on the matter.

If the application for enforcement is denied, the court cannot set aside the award but can only declare that the award can't be recognized in Germany.⁵⁸¹ If a foreign arbitral award is declared enforceable in Germany and is later set aside abroad, the party can request the repeal of the enforcement decision.⁵⁸² If the court grants the application for enforcement, it must include a translation of the operative part of the award in its own decision.⁵⁸³ Otherwise it will not be possible to enforce the decision in Germany.

Setting aside the award is an important matter for the court's refusal to declare domestic award enforceable. The consequence of not having a foreign award to be declared enforceable is a

⁵⁷⁸ § 1061 ZPO.

⁵⁷⁹ OLG Celle, 4 September 2003 (8 Sch 11/02), *Journal of International Dispute Resolution* 21 (2004), 95, 98.

⁵⁸⁰ Cf. Raeschke-Kessler (*supra* n. 424), pp. 215-216.

⁵⁸¹ § 1061 (2) ZPO.

⁵⁸² § 1061 (3) ZPO.

⁵⁸³ Rützel/Wegen/Wilske (*supra* n. 265), pp. 158-159.

declaration that the award is “not to be recognized” in Germany. German courts have no jurisdiction to set aside a foreign award.

It is important to note that according to German law the foreignness of an award depends on the seat of the arbitration tribunal. Hence, an arbitral award rendered in proceedings seated in Germany but in application of foreign procedural rules is a German, not a foreign arbitral award and the NYC is inappropriate. An award made in a foreign state but in application of German law is to be considered a foreign award and the NYC is relevant.

A foreign award has to be enforced if none of the estoppels in Art. V NYC is applicable. It must be borne in mind that these estoppels may only be averted in case it could not be done during the arbitral proceedings or in a legal remedy in the state of origin; otherwise the affected party is precluded from appealing on these aspects.

2.1. Alternative judicial proceedings

Concerning the enforcement of a foreign award as such there are no alternatives to the application to declare an award enforceable. A party is barred from initiating court proceedings concerning the substantive legal relationship due to the award’s *res judicata* effect.

Even awards, which content cannot be executed, may nonetheless be declared enforceable. Where the award has already been granted an *exequatur* in its country of origin, it may, however, be possible to declare this judgment enforceable in Germany on the basis of §§ 722 et seq, and 328 of the ZPO. The Supreme Court (BGH) has held that at least judgments incorporating the content of the award and giving it a *res judicata* effect can be enforced under § 722 of the ZPO. This is acknowledged by the Supreme Court at least for the U.S.-American “judgment upon the award”.⁵⁸⁴ The OLG Hamburg⁵⁸⁵ adopted the Supreme Court’s opinion in a similar case where a judgment of the English High Court of Justice was concerned. In those cases a party has the possibility to opt for an enforcement of the foreign judgment granting *exequatur* as opposed to having the award itself declared enforceable in Germany.

The consequence of these proceedings is that the examination of the award by the German state courts would be limited significantly. The foreign declaration of enforcement can only be reviewed in regard to possible infringements of the German *ordre public*. A practically more important consequence would be, that interest payments, which were not dealt with in the award could nonetheless be enforced in Germany if contained in the foreign declaration of enforceability.

⁵⁸⁴ BGH, *RIW* 1984, 557.

⁵⁸⁵ OLG Hamburg, *RIW* 1992, 939, at 940.

On the other hand, a party cannot apply to set aside a foreign award in Germany. In this respect the wording of § 1062 (2) of the ZPO, which appears to establish jurisdiction for a German court in such an action, is too wide. That the German legislator did not want to deviate from the widely recognized principle that awards can only be annulled in their country of origin becomes obvious from the systematic of the arbitration law. In relation to foreign awards § 1025 (4) of the ZPO explicitly only refers to §§ 1061 to 1065 of the ZPO and not to § 1059 governing the action to set aside an award.

The procedure to have a foreign award declared enforceable in Germany has in general been considerably facilitated by the new law. The majority of awards are declared enforceable without an oral hearing and without legal representation by a lawyer being required in a summary decision resulting in an order. However, the possibilities to resist enforcement might have increased with the abolition of a second enforcement regime available under the old law. In this respect no final evaluation may yet be given, since for a number of important issues no clear practice of the courts has yet crystallized.

2.2. Juridical effects of an arbitral award

An arbitral award has the same effect on the parties as a final judgment in German law.⁵⁸⁶ Enforcement is only possible if the court has declared the award enforceable.⁵⁸⁷ The rules governing recognition and enforcement define the conditions under which a state is willing to grant legal effects of a court judgement to a private award. Two are of primary importance from different effects associated with a state court judgement:

- *res judicata* (non-enforcement related) effect of a court judgement⁵⁸⁸ and
- *title-quality* (enforcement related) effect.⁵⁸⁹

⁵⁸⁶ § 1055 ZPO.

⁵⁸⁷ § 1060 ZPO.

⁵⁸⁸ A judgement ensures a measure of legal certainty in so far as it precludes that the same claims or issues can be litigated again. This preclusive effect is often described *res judicata* taken from Latin.

⁵⁸⁹ The judgement may constitute the basis for subsequent enforcement proceedings, if it is not complied with voluntarily. In other words, using the German terminology, for such kind of (enforcement-related) effect it has the quality of a “title for enforcement”. The term “recognition and enforcement” is usually used when the base is solely on the award’s “*title quality*”. Contrary, the meaning “recognition” is first of all used in connection with the *res judicata* effect of an award. See Kröll, Introduction to §§ 1060, 1061, in: Böckstiegel/Kröll/Nacimiento (eds.), *Arbitration in Germany – The Model Law in Practice*, Austin et al. 2007, pp. 479-487.

2.2.1. Declaration of Enforceability

Many legal systems fix that awards do not automatically have the quality of an enforceable title, but rather must be first declared enforceable in special proceedings.⁵⁹⁰ Pursuant to § 704 ZPO the declaration of enforceability is only required for enforcement proceedings. All other effects attached to a final and binding judgement are operative with the rendering of the award. It is clearly fixed in § 1055 ZPO. In the result, declaratory awards have their full effects, as they are rendered without the need of a *declaration of enforceability*.⁵⁹¹

Awards which change the legal situation (*Gestaltungsschiedssprüche*), in principle, don't require a declaration of enforceability to bring about their full legal effects. The change of the legal situation effected by the award will happen once the award has been rendered.⁵⁹²

The function of the declaration of enforceability is the recognition of the foreign award with substantive *res judicata effect*⁵⁹³ and to create an *executory title*. According to § 794 (1) No. 4 of the ZPO, it is not the award as such but the declaration of enforceability that is the executory title to be enforced in the execution proceedings. It follows from § 1060 (1) of the ZPO, stipulating that execution only starts after the award has been declared enforceable,⁵⁹⁴ that the proceedings for a declaration of enforceability are not yet part of the execution proceedings, but a necessary precondition for the latter. This fact has several consequences:

First, a court is not hindered to declare an award enforceable even if the concerned party to the dispute has entered insolvency proceedings after the award has been rendered.⁵⁹⁵ Insolvency proceedings bar only execution, not any preceding acts.

Secondly, the declaration of enforceability may also be given to awards the content of which is not executory for the lack of certainty or that have no *executory* content at all.⁵⁹⁶

Thirdly, States or State entities that have submitted to arbitration cannot rely on their sovereign immunity in the proceedings to have the award declared enforceable. The waiver of immunity contained in the submission to arbitration also covers these proceedings.⁵⁹⁷

⁵⁹⁰ The Austrian legal system is considered to be an exception, while in this system domestic awards are enforceable titles without having previously been declared enforceable. The safeguards contained in the national arbitration law are sufficient to ensure that the minimum requirements of a fair arbitral procedure are met.

⁵⁹¹ See Schlosser, in: Stein/Jonas (Hrsg.), *Kommentar zur Zivilprozessordnung*, München 2002, § 1060 (2).

⁵⁹² See Walter, *Die Vollstreckbarerklärung als Voraussetzung bestimmter Wirkungen des Schiedsspruchs*, in: Gottwald (Hrsg.), *Festschrift für Karl Heinz Schwab zum 70. Geburtstag*, München 1990, pp. 530-560.

⁵⁹³ If the place of arbitration is in Germany the declaration of enforceability furthermore excludes any annulment of the award according to § 1059 (3), 4th sentence of the ZPO.

⁵⁹⁴ § 1060 (1) of the ZPO provides: "*Enforcement of the award takes place if it has been declared enforceable.*"

⁵⁹⁵ OLG Dresden, 25 September 1998 (11 Sch 1/98); OLG Brandenburg, 2 September 1999 (8 Sch 1/99).

⁵⁹⁶ See BayObLG, 24 February 1999 (4 Z Sch 17/98), where the court held that though the award did not specify the properties to be returned with the necessary certainty for an execution, it could be declared enforceable since the executability is not a prerequisite for a declaration of enforceability. See also OLG Hamm, 20 June 2001 (8 Sch 2/00).

⁵⁹⁷ See KG Berlin, 16 February 2001 (28 Sch 23/99); OLG Frankfurt, 8 July 1999 (10 Sch 1/98).

Fourthly, actions raising objections to the judgment claim according to § 767 of the ZPO (“*Vollstreckungsgegenklagen*”) can only be directed against the declaration of enforceability, not the award as such.

When applying for the recognition and enforcement of an award before a German court the following documents must be lodged:

- a legalised original of the award or a certified copy,
- the original or a certified copy of the arbitration agreement can be requested,
- a certified translation of the award into German if the award is made in a foreign language.⁵⁹⁸

If other provisions are not foreseen in treaties, § 1064 (1) and (2) ZPO will apply to foreign arbitral awards.⁵⁹⁹ A German public notary (whose office is in the district of the court competent for the declaration of enforceability) may also declare the award enforceable, if the parties agree this.⁶⁰⁰

2.2.2. *Res judicata* effect

Res judicata effect is recognized under the same conditions as exist for a declaration of enforceability. The main distinction is that the recognition of this effect doesn’t require a special declaration rendered in specific recognition proceedings, it takes place on an *ad hoc* basis whenever a party seeks to invoke or rely on an award in the course of other judicial proceedings.⁶⁰¹ Here it should be mentioned that courts or other public authorities investigate if any grounds exist to refuse recognition. In the case of not finding such grounds, the *res judicata* effect or any other effect associated with an award is recognized. In Germany these non-enforcement related effects are automatically recognized on a statutory basis irrespective of whether grounds exist. The central point for this difference between the recognition of the “title-quality” (award’s enforceability) and the recognition of other effects is that the former creates the basis for a direct action by the enforcement personnel of the state. In contrast, it is not generally the point for the preclusive effects, where the award is only used as a shield.

⁵⁹⁸ § 1064 ZPO.

⁵⁹⁹ Considering § 1064 (3) ZPO, one can come to the conclusion that Art. IV of the New York Convention prevails. Cf. van den Berg (*supra* n. 553), p. 787.

⁶⁰⁰ § 1053 (4) ZPO.

⁶⁰¹ Kröll, Introduction to §§ 1060, 1061, in: Böckstiegel/Kröll/Nacimienta (eds.), *Arbitration in Germany – The Model Law in Practice*, Austin et al. 2007, p. 483.

§ 3 Recognition and Enforcement of Foreign Arbitral Awards in Uzbekistan

3.1. Introduction

The issue of recognition of foreign judgments and arbitral awards on commercial disputes was not discussed in detail and was almost ignored in the legislation of Uzbekistan till nowadays. As mentioned before, Central Asian lawyers were aware of the knowledge of international commercial arbitration through the Soviet doctrinal works on this subject. Despite its existence during the Soviet era, international commercial arbitration became part of international economic life of Central Asian countries, including Uzbekistan, only after these countries reached their independence.⁶⁰²

The transition to a market economy in Uzbekistan required the development of civil and procedural legal norms, which are significant for international legal relations. However, the comments on procedural law of 1997 were not fully engaged with the matters of recognition of foreign judgments or arbitral awards in the country.

The lack of legislative regulation in some manners was compensated by the Decree of the Presidium of the Supreme Economic Court from 26 March 1998 “On Court Practice of Enforcement of Foreign Courts’ Decisions and Arbitral Awards” which provided the recognition and enforcement of foreign arbitral awards through the following independent stages:

- the recognition of awards,
- the enforcement of recognized awards.

However, under the Law “On Enforcement of Judicial Decisions and Decisions of Other Authorities”⁶⁰³ the clause of “enforcement” can be declared on the basis of foreign court’s judgments, but the law does not provide how to initiate a clause on “enforcement” (that is by whom and in what procedure). This law does not have a provision about the recognition and enforcement of foreign arbitral awards either.

3.2. Procedural law

The recognition and enforcement of foreign judgments or arbitral awards in Uzbekistan was determined under Art. 391 of the previous Civil Procedural Code (CPC)⁶⁰⁴ till January 2018 as follows: “*The enforcement of foreign judgments and awards in Uzbekistan is regulated with*

⁶⁰² Cf. Butler, International Commercial Arbitration in Central Asia, *Arbitration Law Review* 6 (2014), 255-268.

⁶⁰³ Art. 6 of the Law No. 258-II “On Enforcement of Judicial Decisions and Decisions of Other Authorities” of 29 August 2001, amended on November 23, 2007.

⁶⁰⁴ Since the Economic Procedural Code of Uzbekistan did not contain rules on recognition and enforcement of foreign judgments and arbitral awards, Art. 391 of the previous CPC was also applicable to the enforcement of foreign judgments or arbitral awards arising from commercial disputes.

international treaties to which the Republic of Uzbekistan is a party. Foreign judgments or foreign arbitral awards in Uzbekistan can be compulsorily enforced during the three years from the moment of its enactment legally, if another point is not foreseen by an international treaty of the Republic of Uzbekistan.”⁶⁰⁵

The new Economic Procedure Code of Uzbekistan of January 2018 regulates the review of commercial disputes involving foreign individuals and companies in a much more clear and detailed way compared to the previous Commercial Procedure Code of 1997. Specifically, the EPC defines the types of disputes that are subject to the exclusive jurisdiction of Uzbek courts. For example, disputes regarding the privatization of state-owned property are considered to be one of the categories of those disputes. However, it is still unclear whether dispute resolution clauses providing for arbitration or for jurisdiction of foreign courts may be included in privatization agreements with the Republic of Uzbekistan.⁶⁰⁶

Chapter 33 of the new Uzbek EPC regulates the recognition and enforcement of foreign judgments or arbitration awards. Foreign court judgments and arbitral awards relating to commercial disputes and on other matters will be recognized and enforced by economic courts in Uzbekistan if the recognition and enforcement of these awards are provided for (i) by relevant international treaties or (ii) by the laws of the Republic of Uzbekistan.⁶⁰⁷

An arbitral award, regardless the country in which it was approved, is recognized as binding and enforced when filing a written application to the Higher Economic Court in accordance with the provisions of the Draft Law.⁶⁰⁸

3.3. Application for recognition and enforcement of foreign court decisions or arbitral awards

Chapter 33 of the Uzbek EPC also regulates the procedure for processing applications for the recognition and enforcement of foreign judgments and arbitral awards as well as grounds for rejecting such applications.⁶⁰⁹ An application for recognition and enforcement of foreign court decisions or arbitral awards must be submitted in writing and signed by the collector or his

⁶⁰⁵ Art. 364 of the new CPC and Art. 248 of the new EPC which came into force in April 2018 have the same provision regarding the recognition and enforcement of foreign court judgements and arbitration awards, as stipulated in the previous CPC of 1997. The new CPC is available in Uzbek language at: <http://www.lex.uz/docs/3517337>.

⁶⁰⁶ See Korobeinikov, New Rules for Reviewing Disputes in Uzbekistan, Baker & McKenzie Legal Alert, 20 May 2018, available at: <https://www.bakermckenzie.com/en/insight/publications/2018/05/new-rules-reviewing-disputes-uzbekistan>.

⁶⁰⁷ Art. 248 (1) of the EPC of Uzbekistan, available at: <http://www.lex.uz/docs/3523891#3533449> in Uzbek language.

⁶⁰⁸ Articles 44, 45 of the Draft Law “On International Commercial Arbitration”.

⁶⁰⁹ Articles 249 *et seq.* of the EPC of Uzbekistan.

representative.⁶¹⁰ An application for recognition and enforcement of a foreign state court can be filed to the competent court only by the claimant (interested party). The court can return the application, submitted by other persons in accordance with Art. 248 (2) EPC. In reviewing an application for recognition and enforcement of foreign court decisions or arbitral awards, the parties involved in the case will be notified of the time and place of arbitration in accordance with the EPC.⁶¹¹

Applications for recognition and enforcement of foreign court decisions or arbitral awards are considered according to the rules of the EPC within six months from the day of its receipt by the economic court, unless otherwise provided for by international treaties of the Republic of Uzbekistan.⁶¹² The application must include:

1. the name of the economic court, which is applied for;
2. the name, location and the composition of the foreign court or arbitration court;
3. the names, places of residence (post addresses) of the disputing parties;
4. information concerning the recognition and enforcement of the foreign court judgment or arbitral award which is sought by claimant;
5. application for recognition and enforcement of foreign court decision or arbitral award;
6. a list of attached documents.

The application for recognition and enforcement of foreign court decisions or arbitral awards may include telephone numbers, fax numbers, e-mail addresses of the claimant or his representative. The application and the attached documents must be executed in the language specified in international treaties.⁶¹³

In accordance with Art. IV of the New York Convention, a party applying for recognition and enforcement must, at the time of the application, supply:

- a) the duly authenticated original award or a duly certified copy thereof,
- b) the original agreement and or a duly certified copy thereof.

If the award or agreement is written in a foreign language, the party applying for recognition and enforcement must submit a properly certified translation of these documents into Uzbek.

3.4. Guidelines on the enforcement of foreign arbitral awards from 2013

It is also of great importance for the clients seeking the recognition and enforcement of a foreign judgment or arbitral award in Uzbekistan to be informed about the Decree of the Plenum of the

⁶¹⁰ Art. 250 (1) of the EPC of Uzbekistan.

⁶¹¹ Articles 124 CPC and 254 (2) of the EPC of Uzbekistan.

⁶¹² Art. 254 (1) of the EPC of Uzbekistan.

⁶¹³ Art. 250 of the EPC of Uzbekistan.

Supreme Court “On providing binding guidelines for economic courts concerning the enforcement of foreign arbitral awards or foreign court judgments as well as the letters of request” of 24 May 2013⁶¹⁴ (hereinafter “Guidelines”). Despite the fact that the Supreme Economic Court in these Guidelines refers to the Kiev Convention in several occasions, they do not include the matters when foreign court judgments are enforced in Uzbekistan directly without the need of their prior recognition, as it is provided in the Kiev Convention.⁶¹⁵ Thus, the procedures of the Kiev Convention as to direct enforcement of foreign court judgments are not applicable in practice.

If there is a dispute between Uzbekistan and a country with which Uzbekistan has concluded a bilateral treaty regarding the enforcement of arbitral awards, then the Uzbek court shall apply the relevant provisions of this treaty. If both are parties to a multilateral treaty with provisions on the enforcement of foreign arbitral awards, the parties shall apply the relevant multilateral treaty.⁶¹⁶

According to the Law “On Courts”⁶¹⁷ of the Republic of Uzbekistan and the above-mentioned Guidelines for the Economic Courts of Uzbekistan, when reviewing cases relating to recognition and enforcement of foreign arbitral awards and foreign judgements as well as the execution of the order of a foreign court, the competent court must apply the New York Convention of 1958, the Kiev Agreement of 1992, the Minsk Convention of 1993, the Hague Convention of 1954, International Treaties of the Republic of Uzbekistan on legal assistance, the Economic Procedural Code of the Republic of Uzbekistan and other legislation.

The Guidelines stipulate that when the competent court makes a positive decision on recognition and enforcement of the foreign judgement or arbitral award, it will immediately issue an enforcement order (writ of execution). Since under the Uzbek laws an enforcement order can be provided for enforcement within three years from the date of entrance of a foreign court decision or arbitral award into legal force, it is important to the enforcement order to include a date when the foreign court judgement has entered into legal force.⁶¹⁸

The Guidelines also provide that recognition and enforcement of foreign arbitral awards and judgements are executed by economic courts, seated at the place of the debtor or the place where

⁶¹⁴ Decree of the Plenum of the Supreme Court “On providing binding guidelines for economic courts concerning the enforcement of foreign arbitral awards or foreign court judgments as well as the letters of request” of 24 May 2013, available in Uzbek version at: <http://www.lex.uz/docs/2207329>.

⁶¹⁵ Akhmadjonov/Dogonkin, Uzbekistan, in: *ICLG – The International Comparative Guide to Enforcement of Foreign Judgments 2016*, London 2016, pp. 171-175.

⁶¹⁶ *Ibid.*

⁶¹⁷ Art. 47 of the Law “On Courts” of Uzbekistan, available in Uzbek version at: <http://lex.uz/acts/68532>.

⁶¹⁸ *Ibid.*, Part 12 (1); Art. 6 of the Law of Uzbekistan “On Enforcement of Judicial Decisions and Decisions of Other Authorities”.

his property exists. If the claimant applies for recognition of a judgement rendered by an arbitration court, it is necessary to act on the basis of the New York Convention.⁶¹⁹

§ 4 Interim measures to secure a claim in arbitration proceedings

Well-timed application and enforcement of interim measures can have an important influence on the enforcement of final arbitration awards, especially when issues regarding asset protection or evidence arise before or during the arbitral proceedings.⁶²⁰ The questions of the definition and the scope of interim measures⁶²¹ to secure a claim in international arbitration proceedings were considered not to be systematically examined from the perspective of the CIS and the EU law until 2016.⁶²²

Since the arbitral awards on disputes involving a foreign element, *inter alia*, (in the economic sense in disputable legal relations) the trend of the movement of capital, goods and services in a certain direction from one state to another, additional protection in the form of provisional measures⁶²³ on securing a claim is needed in conducting of arbitration proceedings rationally. As a result, the risks associated with the withdrawal of assets from the respondent-legal entity can be minimized and the practical effectiveness of arbitration proceedings and its attractiveness to entrepreneurs can be ensured.

As a rule, enforcement of awards of international commercial arbitrations is carried out in accordance with the procedural rules applicable to decisions of state courts. This procedure is reflected both in the Model Law of UNCITRAL and in the texts of national laws on international commercial arbitration and arbitration courts. However, the possibility of protecting the claims of the plaintiff by means of preventive measures, including through measures to secure a claim, is not clearly seen in the national legislations of some countries. It can be said that the *principle of reciprocity* in the relations between the state systems of different countries, which does not always work efficiently and constructively, is not effective in this

⁶¹⁹ Decree of 2013 (*supra* n. 614), Parts 10, 14.

⁶²⁰ Cf. Kaminskiene, Application of Interim Measures in International Arbitration: The Lithuanian Approach, *Jurisprudencija* 2010, 1 (119), 243-260, available at: <https://www.mruni.eu/upload/iblock/bb5/15kaminskiene.pdf>.

⁶²¹ The terms “provisional” or “temporary” measures are used interchangeably in legal literature.

⁶²² The amendments of 2006 to the UNCITRAL Model Law entail a clearer definition and the scope of provisional measures. According to Art. 17 of the UNCITRAL Model Law, an interim measure is any temporary measure, whether in the form of an award or in another form, by which, at any time prior to the issuance of the award by which the dispute is finally decided, the arbitral tribunal orders a party to: (a) maintain or restore the *status quo* pending determination of the dispute; (b) take action that would prevent or refrain from taking action that is likely to cause current or imminent harm or prejudice to the arbitral process itself; (c) provide a means of preserving assets out of which a subsequent award may be satisfied; or (d) preserve evidence that may be relevant and material to the resolution of the dispute.

⁶²³ These provisional measures are aimed at preserving the property of the defendant before the date of the arbitral award.

case either, since other specific legal grounds for enforcement of decisions by judicial interim measures do not exist. Some authors put the question in another way: Is it also possible to apply the provisions of the New York Convention by analogy to the decisions of international arbitration courts regarding the adoption of interim measures to secure a claim?

Analysing the effectiveness and convenience of existing coordination mechanisms between international arbitration courts and bailiffs' services both in the territory of the state where the specific international arbitration court is located and in the territory of other states, it can be said that the situation in this sphere is not satisfactory. Such cross-border processes can often last for a very long time, and the task of any international arbitration court is primarily to provide a qualitative level of the decision on taking provisional measures to secure a claim, so that a foreign court, after receiving this act and having checked its compliance with the *ordre public* could in accordance with the formulations contained therein, make its own ruling within a short period of time on the basis of which the required actions would be committed.

Today three main issues are classified in the legal literature, summoning solutions in the *lex arbitri*. They are: 1) interaction between the court and the arbitral tribunal, 2) the arbitrator's competence to grant interim relief and 3) the enforcement of arbitrator-granted interim remedies. Consequently, two various concepts such as *court-subsidiarity model*⁶²⁴ and *free-choice model*⁶²⁵ of relationship between the court and the arbitral tribunal in applying interim measures in international arbitration are identified in the legislation of countries.⁶²⁶

The analysis of the provisions of the national legislation on international commercial arbitration in Uzbekistan and Germany concerning the powers of arbitration courts to order interim measures to secure a claim gives the following results:

4.1. Legal basis for taking interim measures to secure a claim in German law

§ 1041 (1) of the ZPO provides an independent competence of the arbitration court to decide on the application of measures to secure a claim in the event that the parties to the arbitration have not agreed otherwise.⁶²⁷

The German legislator sets forth possible interim measures enabling arbitral tribunals to rule on these measures. They are:

⁶²⁴ Arbitration Act 1996 (UK), available at <https://www.legislation.gov.uk/ukpga/1996/23/data.pdf>.

⁶²⁵ German Code of Civil Procedure, English version available at https://www.gesetze-im-internet.de/englisch_zpo/englisch_zpo.html.

⁶²⁶ Cf. Schaefer, New solutions for interim measures of protection in international commercial arbitration: English, German and Hong Kong law compared, *Electronic Journal of Comparative Law* 2:2 (1998), available at <https://www.ejcl.org/22/abs22-2.html>; Kaminskiene (*supra* n. 620), p. 250.

⁶²⁷ State courts have similar powers to issue interim orders as arbitration courts and § 1041 (1) of the ZPO applies to both state courts and arbitral tribunals.

- pre-award attachment orders,
- orders to preserve perishable goods,
- orders to post or refrain from invoking security in the form of a bank guarantee,
- orders to refrain from changing the *status quo*,
- orders not to dispose of the property in dispute.⁶²⁸

If a party fails to comply with the arbitral tribunal's order, the other party can seek its execution by state courts⁶²⁹ which are allowed to amend the arbitration court's order to facilitate its execution.⁶³⁰

According to the new DIS Rules, the arbitral tribunal provides for *ex parte* interim measures if prior notice to the opposing party would risk frustrating the purpose of the requested measure.⁶³¹

It is also essential to note that neither the German ZPO nor the DIS Rules contain provisions regarding security for costs orders. Despite this fact, the arbitral tribunal's power to issue such orders follows from its general power to order interim measures or its inherent power to preserve the integrity of the proceedings.

Compared to Uzbek Law "On Arbitration Courts", the German Arbitration Act provides for the enforcement of an arbitrator-granted interim remedy of an arbitration court having its seat outside of Germany.⁶³² Thus, the German law affords an unilateral solution for the cross-border enforcement of arbitrator-granted interim relief.⁶³³

The German *lex arbitri* provides for remodelling of foreign-type measures of protection to meet the preconditions of the German enforcement mechanism.⁶³⁴

Another speciality of German law is that it provides for a provision that the party who enforced an arbitrator-granted remedy has to pay damages if a measure proves to have been unjustified from the start of the proceedings.⁶³⁵ Uzbek law does not deal with the matter of an undertaking as to damages from a party applying for court enforcement of an arbitrator's order.

German law does not impose any restrictions on court support. According to the ZPO, an agreement to arbitrate does not exclude the state courts' jurisdiction for interim relief proceedings.⁶³⁶ There are different ideas and opinions whether parties may directly or even

⁶²⁸ See Bücheler/Flecke-Giammarco (*supra* n. 280).

⁶²⁹ § 1041 (2) of the ZPO.

⁶³⁰ § 1041 (3) of the ZPO.

⁶³¹ Art. 25.2 of the new DIS Arbitration Rules of March 2018, available at: <http://disarb.org/en/16/regeln/-id38>.

⁶³² § 1062 (2) of the ZPO gives competence to court to enforce an arbitrator's interim order, even if the seat of arbitration is outside of Germany.

⁶³³ Cf. Schaefer, (*supra* n. 626).

⁶³⁴ § 1041 (2) of the ZPO.

⁶³⁵ § 1041 (4) of the ZPO.

⁶³⁶ § 1033 of the ZPO.

indirectly opt-out of this provision in their arbitration agreements. Most courts and commentators are of the view that an opt-out is not possible.

To sum up, in Germany parties to arbitration may choose requesting interim measures either from a national court or the arbitral tribunal. Such measures will typically aim to maintain or restore the *status quo*, through prejudgement attachments (arrest) to secure a monetary claim, preliminary injunctions to secure any other claim or a procedure to preserve evidence.

4.2. Legal basis for taking interim measures to secure a claim in Uzbek law

According to the EPC of Uzbekistan the economic court, upon application of a party to arbitration, may initiate provisional measures to secure the claim relating to arbitration proceedings.⁶³⁷ Interim measures may be initiated at any stage of dispute resolution if non-application of such measures may lead to non-enforceability of a court rule.⁶³⁸

The claim for provision of an interim relief must be considered by the court no later than the next day after its receipt without notifying the parties to arbitration.⁶³⁹ After examining the application the court issues the relevant decision either on accepting the claim (leading to granting the requested interim relief), or rejecting such claim. Decisions on interim relief may be appealed on, which nevertheless does suspend their enforcement.

The following interim measures are available under the Economic-Procedural Code:

- seizure of property or money belonging to the defendant,
- prohibiting the defendant from performing certain activities,
- prohibiting other persons from performing certain actions relating to the subject matter,
- suspension of enforcement of the writ of execution or other similar document being contested by the plaintiff, or
- suspension of the sale of property in case of a claim for its release from arrest.⁶⁴⁰

It should be noted that till today an interim measure in the form of seizure of money did not include freeze of the defendant's bank account. Today's EPC of Uzbekistan includes the freeze of bank account operations as an interim measure. In this case the judge will seize the money in the claimed amount in the defendant's bank account.⁶⁴¹ Freeze of assets is permitted by the

⁶³⁷ Art. 93 (5) of the EPC of Uzbekistan of 2018.

⁶³⁸ *Ibid.*

⁶³⁹ *Ibid.*, Art. 96 (6). It should be born in mind that the judge cannot initiate interim measures before accepting the relevant claim for consideration and initiation of the court case on the subject of the claim.

⁶⁴⁰ *Ibid.*, Art. 94.

⁶⁴¹ *Ibid.*, Art. 217 (4).

court if long-term seizure will not affect its qualities. Therefore, Uzbek experts in the field of ADR note that the judge will most probably reject seizure of perishable products.⁶⁴²

A party seeking the suspension of an enforcement order (that has already come into force and is in the process of enforcement by court enforcement officers) must provide the relevant decision to the relevant enforcement officer in time, while the initiation of an internal procedure by the court enforcement officer in connection with interim relief decision takes usually some time.

It should be taken into account that the court decision on suspension of enforcement does not save the situation if the subject matter of the interim relief is connected with the asset that has already been sold or otherwise been disposed of.⁶⁴³

Non-compliance with the court decision requesting the defendant to refrain from certain actions or similar limitation on third parties from actions relating to the subject matter, may lead to fines from 200 minimum wages.⁶⁴⁴ Such practice provides a good enforcement mechanism for interim remedies.

If the court finds it necessary, it can initiate at the same time several interim measures based on the petition of the interested participant of the case.⁶⁴⁵ This allows the parties to maximise their protection, providing an effective enforcement instrument.

When providing an interim relief, the court may request the claimant to guarantee compensation of possible losses to the defendant upon request of the latter.⁶⁴⁶ It can be considered as a protection for the defendant, defending him from possible abuse by the claimant of the rights for interim relief.

Any form of provisional measures may be replaced with another one on request of the claimant. Accordingly the defendant may propose other forms of interim relief instead of ones provided for in the relevant decision of the court. For example, the defendant may choose to provide the claimed money in the escrow account of the court instead of its seizure in his own account.

Any court decision on providing interim measures can be revoked by the party that initiated it. Such decisions can also be revoked in case the main claim is rejected. In such case the court shall pass a separate decision annulling the interim remedies.

⁶⁴² Yuldashev/Ruziev, Uzbekistan, in: Global Legal Insights, Litigation & Dispute Resolution, 4th ed., London, 2015, pp. 318-328 (323-324), available at: http://www.gratanet.com/uploads/user_14/files/GLI-LDR4_Uzbekistan.pdf.

⁶⁴³ *Ibid.*

⁶⁴⁴ This equates to about US\$ 9,250, *i.e.* 50% of the claim price.

⁶⁴⁵ Art. 94 (3) of the EPC of Uzbekistan.

⁶⁴⁶ Art. 94 (4) of the EPC of Uzbekistan.

There is a special Chapter devoted to “Interim Measures” in the Draft Law “On International Commercial Arbitration” in contrast to the Uzbek Law “On Arbitration Courts”⁶⁴⁷. Chapter V of the Draft Law regulates the competence of the arbitration court to grant interim relief⁶⁴⁸, conditions for issuing arbitrator-granted interim relief⁶⁴⁹, amendment, suspension or refusal of interim measure by arbitration court⁶⁵⁰, disclosure of information⁶⁵¹, etc. This Chapter also regulates the procedure for processing applications for the recognition and enforcement of interim measures⁶⁵² as well as grounds for rejecting such applications⁶⁵³.

§ 5 Summary (a comparison)

Compared to Germany, there was no concrete legislation which could determine the procedure of recognition and enforcement of foreign arbitral awards in Uzbekistan until nowadays.⁶⁵⁴ In practice, the only norm of national legislation regulating this issue was Art. 391 of Civil Procedural Code (CPC) of Uzbekistan of 1997. Only after the adoption of the new Codes (CPC, EPC and APC) in January 2018, Uzbek authorities made a positive step which was aimed at improving Uzbekistan's judicial system. Today, all these new Codes of Procedure contain provisions relating to recognition and enforcement of foreign arbitral awards as well as settlement of disputes.⁶⁵⁵

Moreover, in May 2013 the Supreme Economic Court took a pro-arbitration approach, in keeping with international trends. It adopted a Decree providing binding guidelines for economic courts concerning the enforcement of foreign arbitral awards.

However, it should also be acknowledged that, despite the theoretical possibilities on enforcement of foreign arbitral awards, the number of enforcements of these awards is not high enough when compared to Germany. Though the special system of arbitration courts is focused on solving the disputes in place of economic courts, a weak regime for the recognition and enforcement is explained even not only with the lack of legal base, but also with the national

⁶⁴⁷ The Uzbek Law “On Arbitration Courts” does not contain any special rules concerning provisional measures.

⁶⁴⁸ Art. 17 of the Draft Law “On International Commercial Arbitration”.

⁶⁴⁹ *Ibid.*, Art. 18.

⁶⁵⁰ *Ibid.*, Art. 19.

⁶⁵¹ *Ibid.*, Art. 21.

⁶⁵² *Ibid.*, Art. 23.

⁶⁵³ *Ibid.*, Art. 24.

⁶⁵⁴ The provisions of §§ 1061 to 1065 of German Arbitration Act of 1998 apply to the recognition and enforcement of foreign arbitral awards in Germany. Being fully replaced by a new text based on the UNCITRAL ML, the current German Arbitration Act of 1998 is now modernized into an internationally co-ordinated form, which applies to both national and international arbitration. See Böckstiegel, An Introduction to the New German Arbitration Act Based on the UNCITRAL Model Law, *ArbIntl* 14:1 (1998), 19-32.

⁶⁵⁵ For example, according to the new Administrative Proceedings Code of Uzbekistan (*supra* n. 219), the jurisdiction of administrative courts includes disputes initiated by local companies as well as foreign companies and individuals carrying out their activities in Uzbekistan (unless otherwise provided for by international treaties).

specialities of Uzbekistan. As an example, the most important one is the well-known protectionism of the system of state courts regarding national subjects that forces the foreign companies to start proceedings in state courts of the Republic of Uzbekistan. Enforcement proceedings are reasonably quicker in Germany than in Uzbekistan. Nonetheless, German law requires care to be taken in complying with formal requirements. The costs of the court deciding on enforceability depend on the subject and value of the case. Legal fees may be based on hourly rates or on the statutory fees established in accordance with the amount in dispute. This comparison reflects the growth of the importance of and the interest in recognition and enforcement procedure.

As mentioned above, Uzbekistan is a member of numerous multilateral treaties on international commercial arbitration like the New York Convention and the Kiev Agreement. Nevertheless, a complicated situation is seen in Uzbekistan regarding the enforcement of foreign arbitral awards.

One of the unsolved issues is, *inter alia*, an enforcement of judgement or award on demanding payment of a debt expressed in a foreign currency. Despite the legal normative acts⁶⁵⁶ concerning foreign currencies⁶⁵⁷, it is still complicated to enforce a court judgement or award on satisfying the claimant's request demanding foreign currency from the debtor, in case of lack of foreign currency in the debtor's account. Consequently, based on Uzbek legislation, domestic courts operate under the Act of Central Bank of Uzbekistan.⁶⁵⁸

Second, it is acknowledged that timely application and enforcement of interim measures can have a substantial effect on the possibility of the enforcement of final arbitration awards.⁶⁵⁹ Despite the essential amendments concerning the application and enforcement of interim measures in international arbitration under the UNCITRAL Model Law of 2006, the legal regime of Uzbekistan concerning this matter has not changed.⁶⁶⁰ The Law of the Republic of Uzbekistan "On Arbitration Courts" does not have any provisions on interim measures to secure the claim. On the other hand, according to the EPC of Uzbekistan the application and

⁶⁵⁶ Law of the Republic of Uzbekistan "On Currency Control" of 7 May 1993 No. 841-XII (last edition from 29.12.2015); Law of Uzbekistan "On Central Bank of Uzbekistan" of 21 December 1995, No. 154-I; Law of Uzbekistan "On Banks and Banking Activity" of 25 April 1996, No. 216-I (last edition from 18.04.2018); Presidential Decree of 19 September 2017 "On priority measures for the liberalization of monetary policy", UP-5177 cover the provisions concerning foreign currency.

⁶⁵⁷ Until now the national currency of Uzbekistan (Uzbek Soum) was not converted and it was not possible to buy foreign currencies in the inner currency market.

⁶⁵⁸ It was adopted on 29 May 1999, No. 29/199-jur.

⁶⁵⁹ Kaminskiene (*supra* n. 620), p. 243.

⁶⁶⁰ An exception is the Draft Law "On International Commercial Arbitration". According to Art. 17 of the Draft Law, unless the parties agree otherwise, the arbitral tribunal may, at the request of any party, order interim measures. According to Art. 23, the interim measure issued by the arbitration court is recognized as binding and, unless otherwise provided by the arbitration court, is enforced upon application to the competent court, regardless of the country in which it was issued.

enforcement of interim measures in arbitration is vested only in the economic court, not in the arbitral tribunal.

Third, in cases when interim measures are to be taken in a state other than the state in which the international arbitration court is located, the question arises as to whether the practice of applying such measures is existing abroad. In addition, the issues of cross-border measures to secure the claim have not been evaluated in domestic legal literature. Unfortunately, to date, reviews of the practice of international arbitration courts of the CIS countries do not give a response regarding the existence of real precedents for the implementation of their decisions on taking provisional measures abroad.

In contrast to Uzbek law, German law provides for the enforcement of arbitrator-granted interim relief in Germany even if the seat of arbitration is outside Germany. As *Schaefer* noted: “*This is a progressive, unilateral step to solve the cross-border enforcement issue especially relevant with respect to international commercial arbitrations.*”⁶⁶¹ In his opinion, “*if all countries follow this example, the need for an international instrument to provide a cross-border enforcement mechanism for interim measures of protection can be relieved*”.⁶⁶² It would be appropriate if Uzbekistan would implement this example into its legislation, too.

The existing heterogeneity in national legislation should also be taken into account by the parties when drafting the text of the arbitration agreement (clause) and the instructions for the specific international arbitration court and the place of arbitration.

⁶⁶¹ Schaefer, (*supra* n. 626).

⁶⁶² *Ibid.*

Chapter IV: Practice of arbitration in recognition and enforcement of arbitral awards in Uzbekistan

§ 1 Jurisdiction and competence of arbitration courts

According to the Law of the Republic of Uzbekistan “On Arbitration Courts”, the arbitration courts resolve disputes arising out of civil relations, including economic disputes arising between commercial organizations and/or individual entrepreneurs in the sphere of entrepreneurial activity.⁶⁶³ Parties to arbitration are legal entities and natural persons.⁶⁶⁴ In this case, the dispute may be referred for settlement to an arbitration tribunal depending on the existence of an arbitration agreement between the disputing parties. Thus, arbitral tribunal’s jurisdiction over the cases and its competence to deal with the dispute consists of three criteria:

- disputants (disputing parties),
- the subject matter of the dispute (relations serving as the basis for dispute arisen),
- mutually acceptable forms for the resolution of the dispute by the parties.

1.1. Disputing parties

Legal entities, individual entrepreneurs and citizens, including foreign ones, can be disputing parties in proceedings of arbitration courts. Arbitral tribunals have jurisdiction over disputes considered by commercial courts and civil courts as well. Exceptions are public authorities (local authorities, the Cabinet of Ministers and others) and state bodies (ministries, departments, state committees, agencies, etc.) which cannot be a party to arbitration.⁶⁶⁵ Therefore, disputes involving such bodies cannot be transferred to arbitration courts and are exclusively considered by state courts. However, public joint stock companies, banks, industry (branch) associations, despite the existence of state capital in their authorized fund, are separate legal entities, and are not public authorities or control, which may be a party to arbitration.

1.2. The subject matter of the dispute

Arbitration tribunals consider disputes arising out of civil relations and commercial disputes and they combine cases and disputes within the jurisdiction of both the economic courts and the civil courts. By summarizing the main categories of disputes, the following groups can be highlighted:

⁶⁶³ Art. 9 of the Law of the Republic of Uzbekistan “On Arbitration Courts”.

⁶⁶⁴ *Ibid.*, Art. 3 (7).

⁶⁶⁵ *Ibid.*, Art. 5 (2).

- disputes concerning the execution, breach, modification, termination and validity of any civil and commercial contracts (delivery, sale, loan, leasing, rental, securities, etc.) *i.e.* any dispute between the parties relating to or arising from the contract;
- disputes arising from obligations owing to injury (damage to property, goods, etc.);
- disputes concerning the protection of intellectual property rights (trademark, trade name, useful inventions and models, etc.);
- disputes concerning the protection of intangible assets (business reputation, honour and dignity)
- and other disputes arising out of civil relations, *i.e.*, relations regulated by civil law.

Despite the union of jurisdictions of commercial and civil courts in arbitration courts, not all disputes dealt with by state courts can be considered by arbitral tribunals. Thus, arbitral tribunals do not settle disputes arising from administrative, family and labour relations as well as other disputes, which in accordance with the law cannot be considered by arbitral tribunals. Based on the provisions of the Law of the Republic of Uzbekistan “On Arbitration Courts” and on other legislative acts, the following categories of disputes cannot be dealt with by arbitral tribunals and are considered only by state courts:

- cases of administrative offences, which in accordance with the Code of the Republic of Uzbekistan “On administrative responsibility”⁶⁶⁶ are considered by economic courts, administrative courts and by other authorized bodies and officials;
- labour disputes, which in accordance with the Labour Code of the Republic of Uzbekistan⁶⁶⁷ are considered by labour-disputes commissions or by civil courts;
- customs disputes, which in accordance with the Customs Code of the Republic of Uzbekistan⁶⁶⁸ are considered by customs authorities and by national courts (due to the fact that they always involve a government body);
- tax disputes, which in accordance with the Tax Code of the Republic of Uzbekistan⁶⁶⁹ are considered by higher tax authorities or by state courts (due to the fact that they always involve a government body);
- cases arising out of family relationships, which in accordance with the Family Code of the Republic of Uzbekistan⁶⁷⁰ are considered by the civil courts;

⁶⁶⁶ Art. 242 of the Code “On administrative responsibility”.

⁶⁶⁷ Art. 260 of the Labour Code.

⁶⁶⁸ Art. 186 of the Customs Code of Uzbekistan.

⁶⁶⁹ Art. 131 of the Tax Code of Uzbekistan.

⁶⁷⁰ Art. 11 of the Family Code of Uzbekistan.

- bankruptcy cases, which in accordance with the Law "On Bankruptcy" of the Republic of Uzbekistan⁶⁷¹ are considered by economic courts;
- special proceedings, constituting cases on the establishment of facts which have legal significance (judicial determination of paternity, declaration of absence and death, recognition of property rights, etc.) – due to the fact that in this category of cases, there are not two parties, who can conclude an arbitration agreement; the existence of an arbitration agreement is a prerequisite for the submission of a dispute to an arbitration court;
- cases on invalidation (fully or partially) of acts of public authorities, contrary to the law, violating the rights and interests of organizations and citizens (due to the fact that they always involve a government body);
- disputes on the enforcement by the executive or on other documents, which are not subject to execution that serves as a basis for extrajudicial collection (direct/automated debit) procedure (due to the fact that they always involve a government body);
- proceedings on appeal against refusal or cancellation of state registration within the prescribed period (due to the fact that they always involve a government body);
- issues related to imposing of administrative fines by public bodies and agencies (exercising control functions) on organizations and individual citizens, if the law does not provide for extrajudicial collection procedure (due to the fact that they always involve a government body)
- and issues concerning the return of illegally withdrawn funds to the budget by bodies carrying out control functions, regarding to extrajudicial collection (direct/automated debit) procedure (due to the fact that they always involved a government body).

As can be seen from the above, some laws and the involvement of government bodies in certain legal relations are the main criteria for the exclusion of certain categories of cases from the jurisdiction of arbitration courts. For example, state courts have the exclusive jurisdiction for family and labour disputes related to social protection. The state and its organs are always directly involved in disputes arising from administrative legal relations,⁶⁷² which also excludes the consideration of such disputes by non-state (arbitration) courts. All other civil and commercial disputes may be considered by arbitration tribunals.

⁶⁷¹ Art. 5 of the Law of Uzbekistan "On Bankruptcy".

⁶⁷² Tax disputes, customs disputes, proceedings for annulment of acts of public authorities, etc. can be combined to this group.

Another criterion of arbitration court's jurisdiction is that parties have reached an agreement on the dispute resolution process. An important aspect that distinguishes the arbitration courts from the state courts is the need for a mutual agreement of the disputing parties to refer the dispute to the arbitration court, expressed in the form of an arbitration agreement. At conclusion of economic and civil contracts, the parties in accordance with the law should define the dispute resolution procedure in the contract.

Prior to the entry into force of the Law "On Arbitration Courts" in most cases at the conclusion of the contract the parties have not paid much attention to the definition of the procedure for resolving disputes. After all, there were only state courts which considered the disputes within the scope of their jurisdiction *i.e.*, before it was not possible for disputing parties to choose other methods for dispute resolution.

There is a standard clause⁶⁷³ in the agreements and contracts concluded in the Republic of Uzbekistan on settlement of disputes in state courts. Such clauses mean that in case of a dispute, its resolution will be carried out by the economic court or the civil court, depending on their jurisdiction or competences established by law.

With the entry into force of the Law "On Arbitration Courts" the parties have the opportunity to choose the organ to resolve the dispute. As a rule, such a choice is made by the parties at the conclusion of the contract by specifying the responsible organ in it. In order to refer the dispute to the arbitration court it is necessary to change the wordings of relevant paragraphs of the contract which contain a clause on dispute resolution "in accordance with the law" or "in court" into the arbitration clause, as follows:

"Any dispute, controversy, and claims arising out of this agreement (contract, treaty, etc.), or in connection with it, including those related to its conclusion, alteration, execution, violation, termination, and validity are to be settled by the Arbitration Court at the Commerce Chamber of Commerce of the Republic of Uzbekistan in accordance with its Regulation by a sole arbitrator. The decision of the Arbitration Tribunal shall be final and binding on the parties."

The above-mentioned clause may be included to the contract at its conclusion or into a valid contract by signing an additional agreement to resolve an already existing dispute. The arbitral tribunal will consider the dispute only if there is a mutual consent of the parties to refer the dispute to an arbitration court.

Summing up, we can conclude that the dispute is within the jurisdiction of the Uzbek arbitral tribunal, if:

⁶⁷³ For example: "All disputes arising out of this agreement shall be settled by the economic court" or "all disputes shall be resolved in accordance with the order established by the legislation".

- legal entities, individual entrepreneurs and citizens, including foreign ones and organizations, can be disputing parties in an arbitration court; public authorities are exempted;
- the dispute arose out of civil or economic relations, and the law does not limit the possibility of considering such a dispute by an arbitral tribunal; in accordance with the law arbitral tribunals have no competence to consider family, labour, administrative, tax and customs disputes, bankruptcy cases and cases on the establishment of facts which have legal significance;
- the parties have reached an agreement to refer the dispute to an arbitral tribunal.

§ 2 Advantages of arbitration

2.1. Terms of the dispute resolution

One of the advantages of arbitration is the speed of dispute resolution. Strictly regulated procedures and the revision of state court's decisions on the merits in several instances can cause significant delay of the terms of the dispute. The possibility of repeated judicial review leads to the fact that the debtor, by often abusing the law, appeals the taken decision of the state court in order not to execute the decision on time, even if the debt is clear and there is no dispute. As a result of such action, there are cases of referral of the dispute to a new trial, which significantly extends the maturity dates of the debt. The terms of dispute settlement and enforcement of obligations are a very important factor for the efficient conduct of business. Since the failure of one of the partners to fulfil its obligations and the impossibility of solving this problem in a very short period of time can lead to the disruption of ongoing activities, to the inability to meet obligations to other partners and to significant losses, including the loss of profits, which is always very difficult to prove.

It should be noted that the state courts of the Republic of Uzbekistan have occupied a leading position among the Central Asian countries in terms of dispute resolution according to a study of the World Bank and the International Finance Corporation in 2008.⁶⁷⁴ According to it the Republic of Uzbekistan ranks second among the CIS countries. However, even with fairly efficient operation of state courts of Uzbekistan and despite one of the leading places in the ranking of the CIS countries, a period of 195 days may be too long for entrepreneurs.

⁶⁷⁴ *Doing Business 2008: Comparing Regulation in 178 Economies*. A publication of the World Bank and the International Finance Corporation, Washington 2007, reflecting the terms of the settlement of disputes in state courts of different countries.

In connection with a simplified but reliable procedure, the proceedings of an arbitration court take an average of only 20 to 80 days. Furthermore, in contrast to the state court proceedings arbitration provides only one instance, which also significantly reduces the time of the dispute resolution and does not allow the debtor to delay the execution of the arbitration court's award by abusing his right.

2.2. Costs of dispute resolution

In general the expenses related to the resolution of a dispute in arbitration court are similar to those which the parties have to pay in state courts. A state fee must be paid when taking the process in a state court and an arbitration fee when handling the process in an arbitral tribunal. The arbitration fee is charged for each submitted claim to the proceedings in an arbitration court. It is used to cover the total costs associated with the activities of the arbitration court (in particular, arbitrators' fees, salaries and fees of employees of the arbitration court, general expenses on the organization of the arbitration, including the costs of office supplies, provision of facilities and telecommunication services for arbitration as well as the total expenses of material-technical activities of the arbitration court not related to the consideration of the particular dispute).⁶⁷⁵ Dispute resolution in arbitration courts as well as in state courts, in some cases comprises certain official actions like expertise, translations, etc.; the additional costs must be paid by the parties. After the end of the arbitration procedure, arbitration fees and expenses of the arbitral tribunal are divided between the parties in accordance with the arbitration agreement, and in the absence of it basing on the proportionally satisfied and rejected demands. However, arbitration is a more efficient and cost-effective process for the disputing parties than state court litigation.

This is due to the following factors:

- The arbitration fee, paid by the parties when applying to an arbitration court, as a rule, is lower than the state fee paid when referring to a state court.
- Due to the absence of several instances in an arbitration court, the arbitration fee must be paid only once, while in a state court, the state fee has to be paid in all instances. At the time when a decision becomes final, the sum of the costs of state fees may amount to a considerable sum.
- The resolution of a dispute in an arbitration court takes less time and only one instance, reducing the costs of services of representatives.

⁶⁷⁵ Art. 2 of the Rules "On the arbitration fees, costs and expenses of the parties in the arbitration court at the Chamber of Commerce and Industry of the Republic of Uzbekistan".

- The parties to an arbitration court may themselves agree on the necessity of taking actions that require additional costs (expertise, visiting session, etc.), while a state court itself decides on the need for such actions, then all the costs associated with their implementation shall be borne by the parties.

Very often there are situations in which it is impossible to restore the infringed right and to resolve the dispute (usually on large business contracts with high-cost claims) because of the need to cover a large amount of court expenses. There are also cases of suing a company, which is in a tough financial condition.⁶⁷⁶ In those cases, after the resolution of the dispute, court expenses for the enforcement of the decision shall be borne by the defendant in favour of the court in the first place, if they have not been paid by the plaintiff when filing a claim, and only then the principal debt will be levied in favour of the plaintiff. In such cases, if the price of the claim was big enough, all or most of the assets of the debtor goes to cover the court expenses and the plaintiff in fact may not reach the execution of the court decision. Sometimes it is necessary to force the relevant requirements of the law in the judicial recovery of funds under contracts between affiliated persons; in those cases large legal costs are not acceptable to the parties.

Referring the dispute to an arbitration court can solve the above-mentioned problems, since arbitration provides more opportunities for significantly minimizing court expenses, by reducing the size of arbitration fees by an arbitral tribunal based on the complexity of the dispute, of the arbitral tribunal's actual costs associated with the resolution of the dispute and a number of other factors.

2.3. Privacy and confidentiality

Another advantage and attraction of an arbitration process, which distinguishes it from the state court proceedings is its confidentiality. While the hearing in a state court is usually held in open court, any details of a dispute may become known to the public. Privacy is one of the principles of arbitration, defined by the Law of the Republic of Uzbekistan "On Arbitration Courts".⁶⁷⁷ In addition, during the proceedings, the court and the other actors sometimes hear about secret information, the disclosure of which is unacceptable to the interested party. In order to avoid these adverse effects, the proceedings in an arbitration court guarantee the preservation of any

⁶⁷⁶ For example, recovery of bank credit outstanding to the company, which, due to certain factors could not execute a business plan, is in the process of bankruptcy, and at the same time, it recognizes the debt and cannot meet its obligations solely because of the lack of funds. In this respect, the dispute is virtually absent and suing is only a futile formality, fixed by the law.

⁶⁷⁷ Art. 28 of the Law "On Arbitration Courts".

secret information. The following table shows the rules governing confidentiality in arbitration courts, civil courts and economic courts.

| Arbitration Courts | Civil Courts | Economic Courts |
|--|---|---|
| Art. 35 (4) of the Law of Uzbekistan “On Arbitration Courts”: “If the parties to the arbitration proceedings have not agreed otherwise, the arbitration court considers a dispute in a private meeting.” | Art. 12 (1 and 2) of the CPC of Uzbekistan: “Trial of cases in all courts is open; the exception is when it is contrary to the interests of the protection of state secrets, adoption and trade secrets. The court's decision in all cases is made publicly.” | Art. 8 (1) of the EPC of Uzbekistan: “Trial of cases in economic courts is open.” |
| Art. 28 of the Law of Uzbekistan “On Arbitration Courts”: “The arbitrator has no right to disclose the information which has been disclosed during arbitration proceedings, without the consent of the parties of arbitration proceedings or their assignees. The arbitrator cannot be interrogated as witness with respect to the information which he got to know during arbitration.” | Art. 50 (2) of the CPC of Uzbekistan: “If the court finds the prosecutor’s participation to be obligatory, the prosecutor must participate in the proceedings.” | Art. 200 (5) of the EPC of Uzbekistan: “If the court, on considering an economic dispute, finds the actions of the persons a crime, it will inform the prosecutor to solve this issue.” |

2.4. Finality of judicial decisions

In state courts the decision taken by the court of first instance can be re-examined as to the facts and to the law in several instances: appeal, cassation, supervision and an appeal founded on new or newly discovered facts. It can significantly delay the resolution of the dispute. Compared to decisions of state courts, arbitral awards are considered to be final and cannot be reviewed on the merits of the dispute. The decision of an arbitral tribunal may be reviewed by a state court only basing on an exhaustive list of formal grounds (invalidity of arbitration agreement, improper notification of arbitral proceedings, non-arbitrability⁶⁷⁸, irregular constitution of the arbitral tribunal, etc.).

The provisions of the Law “On Arbitration Courts” of the Republic of Uzbekistan about the impossibility of a review of the arbitral award on the merits is still one of the advantages of arbitration. It does not allow any delay of the terms of the dispute resolution and makes an

⁶⁷⁸ Art. 9 (2) of the Law “On Arbitration Courts” of Uzbekistan fixes that the arbitration courts do not resolve disputes, arisen from administrative, family and labour relationships, and also other disputes provided by the law.

arbitration award more favourable and final. It should also be noted that arbitral decisions, unlike the decisions of state courts cannot be appealed and reviewed even on formal grounds. Some lawyers consider the provision of the law mentioned above as a lack of arbitration, while in the process of dispute resolution an arbitrator can make a serious mistake. Although not common, this can sometimes result in what may be seen as an unfair result (certainly from the losing party's perspective), with only a small chance that a court can step in to correct it. It can lead to a violation of the rights and interests of the losing party. However, this point of view does not hold water, because in order to avoid such errors the parties have the opportunity to select a judge to resolve the dispute, who is a professional and reputable expert in the field of dispute resolution. In addition, the possibility of reviewing an arbitral award by a state court on the merits would make the arbitration court to an additional instance of the state proceedings that would be unacceptable, since an arbitration court is not a state institution⁶⁷⁹ and independent in its work from the state and its instruments.

2.5. Enforcement of decisions and rulings

Decisions of the state courts shall enter into force within one month after their adoption and in the case of default on a voluntary basis shall be enforceable if the same court has issued a writ of execution. Arbitration awards, in contrast to decisions of state courts come into force immediately after their adoption and are executed on a voluntary basis in accordance with the order and within the time limits which are established in these awards. It should be noted that the arbitration courts in their proceedings take all measures for a reconciliation of the parties, clarifying to the parties all legal circumstances of the dispute; the search for ways of dispute settlement, which would meet the interests of both parties, contributes to the voluntary execution of the award.

If the arbitration court's award is not executed voluntarily within the time limit established by the decision of the arbitration court, it is subject to compulsory enforcement.⁶⁸⁰ It is guaranteed by law⁶⁸¹ on the basis of a writ of execution issued by a state court. For this, the party in whose favour the decision was taken should apply to the competent state court to issue a writ of execution to enforce the arbitral award. In considering such applications state courts are not entitled to examine the circumstances established by the arbitral tribunal and to review the decision of the arbitral tribunal on the merits.

⁶⁷⁹ Art. 3 of the Law "On Arbitration Acts" of Uzbekistan.

⁶⁸⁰ Art. 50 of the Law "On Arbitration Acts" of Uzbekistan.

⁶⁸¹ Compulsory enforcement of the decision of the arbitration court is carried out in accordance with the Law of the Republic of Uzbekistan "On Enforcement of Judicial Decisions and Decisions of Other Authorities" on the basis of the order of the competent court.

To the decision of a state court the writ of execution is issued by the court that made the decision, and it is not required to submit an additional application to the court. The need to appeal to a state court to issue a writ of execution in order to enforce an arbitral award is considered by some lawyers as a lack of arbitration. This practice is common in the world community due to the fact that arbitration courts are non-governmental bodies, and coercion to commit any action is the exclusive prerogative of the state.

The filing of additional applications is not a waste of time, related to the resolution of the dispute in the arbitration court in comparison with the state court proceedings. Due to the fact that decisions of arbitral tribunals come to effect immediately, the application on taking measures to secure the claim, considered in an arbitration court, must be reviewed by a state court not later than the next day after its adoption. However, the need to supply additional applications to a state court may in fact be seen as a lack of arbitration for disputing parties. To solve this problem the Arbitration Court at the Chamber of Commerce of the Republic of Uzbekistan introduced the practice to make the above-mentioned applications at the same time with the decision or rulings for the provision of a claim.

After the issuance of the writ of execution, the procedure of the enforcement of arbitral awards will be similar to the procedure of execution of state court's decisions, that is, arbitration awards are supported by the coercive force of the state and have the same legal effect as the decisions of state courts. Moreover, the advantage of using the arbitration mechanism for disputes with foreign partners is that arbitration awards are recognized and enforced in the territory of foreign states in accordance with the New York Convention 1958, whereas the decisions of the state courts of Uzbekistan are recognized and enforced in accordance with bilateral and multilateral governmental agreements which cover only about 20 countries, mostly non-CIS countries.

§ 3 Procedural aspects of arbitration

The fundamental difference between arbitration proceedings and state court proceedings is that arbitration proceedings are less formal than the proceedings in state courts. Arbitration parties are strongly endowed with the power to determine the order of the arbitral proceedings in advance or in the course of the proceedings. The simplified procedure for submission of documents, the selection of arbitrators (basing on their professional qualities in a particular field of dispute resolution) and a number of other procedural matters of arbitration distinguishes it from the state court litigation. The dispute referred to the arbitral tribunal shall be considered by the arbitrator alone or by a panel of arbitrators depending on the agreement of the parties. Arbitrators are elected by the parties and if the election is not done until a fixed date the

arbitrators are appointed by the chairman of the arbitral tribunal. The rules of the arbitration are determined by the Regulation of the Arbitration Court as well as may be agreed upon by the parties in the arbitration agreement or in the course of the dispute. In both cases, the arbitration rules should not conflict with the provisions of the Law “On Arbitration Courts”. Despite the fact that arbitration is simplified compared with the proceedings in state courts, it can be divided into several stages, with its procedural characteristics and differences from usual proceedings in state courts.

3.1. The arbitration agreement: execution and conclusion

According to the Law “On Arbitration Courts” the dispute can be referred to an arbitration court if there is an arbitration agreement between the parties,⁶⁸² *i.e.* the existence of an arbitration agreement between the disputing parties is a prerequisite for consideration of the dispute by an arbitration court. The arbitration agreement is an agreement of the parties to refer the dispute to an arbitration court. The arbitration agreement can be included as a clause in the contract or be concluded as a separate agreement. It is considered to be concluded in writing if it is included in the document signed by the parties of the arbitration agreement, or it can be concluded by an exchange of letters or messages through the use of electronic or other communication means that prove the conclusions of such an agreement.⁶⁸³

The arbitration agreement shall contain the provision that

- all or certain disputes which have arisen or can arise between the parties of the arbitration agreement are subject to consideration in the arbitration court;
- and the name of the Permanent Arbitration Court if the dispute is referred to the resolution by the given arbitration court.⁶⁸⁴

Failure to comply with the written form and the mandatory requirements for the content of the arbitration agreement may make it to be void.

The simplest and most frequently used form of the arbitration agreement is the arbitration clause, which is included in the treaty as one of its conditions. At the conclusion of the economic agreement, the parties agree on a mandatory dispute resolution procedure. The relevant paragraph of the contract that defines the procedure for settlement of disputes should be set out, for example, in such a way:

“Any dispute, controversy or claim arising out of this agreement (contract, agreement, etc.) or in connection with it, including those related to its conclusion, change, execution, infringement,

⁶⁸² Art. 11 of the Law “On Arbitration Courts”.

⁶⁸³ Art. 12 of the Law “On Arbitration Courts”; Art. 5 of the Rules of the Arbitration Court at CCI Uzbekistan.

⁶⁸⁴ Art. 13 of the Law “On Arbitration Courts”.

*cancellation, termination and validity are to be settled in the Arbitration Court at the Chamber of Commerce of the Republic of Uzbekistan in accordance with its Rules. The decision of the arbitration court shall be final and binding on the parties.*⁶⁸⁵

Such a clause in the contract means that in the event of a dispute between the parties, the dispute shall be referred to the Arbitration Court at the Chamber of Commerce of the Republic of Uzbekistan and will be considered by the arbitral tribunal, consisting of three judges, in accordance with its Rules. None of the parties can terminate an arbitration clause unilaterally. If there is an agreement between the parties to submit the dispute resolution to an arbitration court, an appeal to a state court with a claim on the dispute does not result in its consideration by the state court. Thus, as an arbitral tribunal may not consider a dispute over a contract containing a clause on consideration of disputes in a state court, a state court cannot adjudicate disputes on contracts containing an arbitration clause.

An arbitration clause may be included in the contract not only at its conclusion, but also in an existing agreement by signing an additional agreement to resolve an already existing dispute, even if the dispute has already been referred to a state court, but only before the adoption of the decision on the dispute by the state court. In this case, the parties may use the following form of an additional agreement to the contract on which the dispute has arisen:

| |
|--|
| <p style="text-align: center;">Supplementary Agreement⁶⁸⁶</p> <p>on amending the contract № ____ of date/month/year on _____</p> <p>(type of contract) _____</p> <p>city _____ date/month/year _____</p> <p>_____, as _____, acting on the basis of _____, and _____, acting on the basis of _____, collectively referred to as the “Parties”, have concluded this Agreement as follows: paragraph ____ (the paragraph containing the procedure for the resolution of disputes) of the contract № ____ of date/month/year on _____ (type of contract) _____</p> <p>shall read as follows:</p> <p>“1. All disputes, controversies and claims arising from the present agreement (contract, etc.) or in connection with it, including those related to its conclusion, alteration, execution, infringement, termination and validity are to be settled by the Bukhara Arbitration Court at the Chamber of Commerce of the Republic of Uzbekistan (Bukhara Department) in accordance with its rules. The decision of the arbitration court shall be final and binding on the Parties.</p> <p>2. This Agreement shall enter into force upon signature by the Parties.</p> <p>3. This Agreement is made in two copies having equal legal force; each Party shall retain one copy of this Agreement.”</p> <p>ADDRESSES, DETAILS AND SIGNATURES OF THE PARTIES</p> |
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⁶⁸⁵ Art. 5 of the Regulation of the Arbitration Court at the CCI of the Republic of Uzbekistan.

⁶⁸⁶ Source: Bukhara Arbitration Court at the Chamber of Commerce of the Republic of Uzbekistan (Bukhara Department).

An important guarantee for the parties, who have signed an arbitration agreement in the form of a clause in the contract, is that in cases, where one of the parties objects to the arbitration proceedings due to the absence or invalidity of the agreement containing the arbitration clause, the arbitration clause which forms a part of the contract shall be treated as an agreement independent of other terms of the contract, and the conclusion of the arbitral tribunal on finding the contract containing the arbitration clause to be null and void, does not entail *ipso jure* the invalidity of the arbitration clause.

In addition to the arbitration clause the parties may use a different form of conclusion of an arbitration agreement – a separate agreement to refer a certain dispute or all disputes to arbitration. As a rule, this form is used when a dispute has arisen or may arise not from the contractual relationships between the parties⁶⁸⁷ as well as in cases where the parties wish to integrate in the arbitration agreement a large number of the rules of the arbitral proceedings or to refer to an arbitration court all disputes within its jurisdiction, arising not only from the particular contract, but also other disputes arising between the parties.

Here is an example of an arbitration agreement between the parties on transferring all disputes arising between them under the jurisdiction of the arbitral tribunal under the Arbitration Court at the Chamber of Commerce of the Republic of Uzbekistan.

| Arbitration Agreement ⁶⁸⁸ | |
|--|-----------------------|
| City _____ | Date/Month/Year _____ |
| _____, as _____, | |
| acting on the basis of _____, and _____, represented by _____, acting on the basis of _____, collectively referred to as the “Parties”, have concluded this agreement as follows: | |
| 1. All disputes arising or which may arise between the parties to this Agreement, in accordance with the law can be dealt with by the arbitral tribunal, whether they are contractual or not, are subject to review by the Bukhara Arbitration Court at the Chamber of Commerce of the Republic of Uzbekistan (arbitral tribunal) in accordance with its Rules and the Laws of the Republic of Uzbekistan. | |
| 2. The place of arbitration proceedings will be the building of the arbitration court. | |
| 3. The Parties have agreed that all disputes will be considered by the arbitrator unilaterally; in this connection, the Parties do not notify the arbitral tribunal on the formation of the arbitral tribunal, except if the arbitrator agreed by the Parties cannot consider the dispute. | |
| 4. In order to expedite the arbitration proceedings, the Parties have agreed that the arbitral tribunal will notify them, first of all, by sending documents via e-mail or fax at the following details: | |
| - for the 1 st party: _____ (e-mail, fax), | |
| - for the 2 nd party: _____ (e-mail, fax). | |
| If there is evidence on sending messages on mentioned details, the message will be considered to be received by the addressee. | |
| 5. In the case of impossibility on sending documents by the above-mentioned method all documents will be sent to e-mail addresses: | |

⁶⁸⁷ “Not contractual relationship” is defined here as compensation for caused damages, the protection of business reputation, etc.

⁶⁸⁸ Source: Bukhara Arbitration Court at the Chamber of Commerce of the Republic of Uzbekistan (Bukhara Department).

| | |
|--|----------------------------------|
| _____ | (for the 1 st party), |
| _____ | (for the 2 nd party). |
| <p>6. The Parties have agreed on a period of notice for the hearing of three (3) days.</p> <p>7. The Parties are obliged to send an authorized representative to attend a meeting of the arbitral tribunal, in the case of their absence the dispute is settled on the basis of the documents submitted to the arbitration court.</p> <p>8. The arbitral tribunal shall have the right not to postpone the consideration of the case because of the absence of the representative, in connection with the impossibility of a representative to participate in the hearing because of his or her illness, travel, employment in another court. In the event of these circumstances, the Party must provide for the attendance of another representative in the court.</p> <p>9. The languages of the arbitration proceedings will be the Russian and Uzbek languages.</p> <p>10. All the evidence needed to resolve the dispute, must be submitted to each other by the Parties and to the arbitration court, before or during the consideration of the case on merits. The Parties waive any links to documents that have not been the subject of study of the arbitration court.</p> <p>11. The decision of the arbitration court is final and is not subject to an appeal.</p> <p>ADDRESSES, DETAILS AND SIGNATURES OF THE PARTIES</p> | |

The arbitration agreement, regardless of whether it is in the form of a separate agreement or in the form of an arbitration clause in a contract, may contain information on the number of arbitrators, place and language of arbitration, the applicable rules of arbitration, and the term of consideration of the dispute.

As already noted, the parties can agree on the applicable rules of arbitration on quite a wide range of issues. The issues that may be agreed upon by the parties and in accordance with the Law of the Republic of Uzbekistan “On Arbitration Courts” and the Rules of the Arbitration Court at the Chamber of Commerce of the Republic of Uzbekistan are the following:

- the number of arbitrators (a single arbitrator or a panel of three arbitrators);
- the name and surname of the sole arbitrator chosen by the parties to the dispute, or the names of the arbitrators chosen by the parties with the peer review of the dispute;
- additional requirements for arbitrators (education, work experience, language skills, etc.);
- procedure of formation of the arbitral tribunal;
- the place of the arbitration;
- the language of the arbitration proceedings;
- the right of the parties to file a counterclaim;
- the right of the arbitral tribunal on the adoption of measures to secure the claim;
- the need to conduct an arbitration protocol;
- which documents, transmitted to the arbitral tribunal by a party, should be transferred to the other side;
- procedures, methods and details for sending documents;

- conduct of arbitration proceedings with or without the participation of the parties;
- the right to the arbitration court for examination;
- consideration of the dispute in a closed or open session;
- the period of the dispute procedure;
- distribution of costs associated with the resolution of the dispute in the arbitral tribunal;
- the right of the parties and the procedure for appeal to the arbitration court for making further decisions.

These rules may be agreed upon by the parties in the arbitration agreement at its conclusion or in the course of the arbitration proceedings.

The rules of the arbitration, agreed by the parties, must comply with the mandatory provisions of the Law “On Arbitration Courts” and the Rules of the Arbitration Court. For example, the parties may agree on the number of arbitrators, but it must necessarily be odd, or the parties may determine the personal composition of the arbitral tribunal to consider the dispute, but the chairman of the panel of arbitrators must have a law degree.

Below is a table with exemplary recommended wordings for inclusion in the arbitration agreement and comments to them. These formulations can be presented as separate items in the arbitration agreement or arbitration clause in the contract of the section that defines the procedure for resolving disputes.

Table 9: Recommended wordings for inclusion in an arbitration agreement when negotiating the rules of arbitration by the parties⁶⁸⁹

| No | Rules of arbitration in the Law "On Arbitration Courts" | Recommended wordings for inclusion in the arbitration agreement | Comments | Rules applicable in the absence of an agreement |
|----|---|---|---|---|
| 1 | Number of arbitrators (Art. 13 (2) and Art. 15 (5)) | “The dispute is subject to consideration by a sole arbitrator.” | The number of arbitrators shall always be an odd number. When deciding on a sole arbitrator or on a panel of arbitrators, it is necessary to base on the complexity of the dispute, its specificity and the importance of the participation of several arbitrators in the consideration of the dispute. The election of a panel of arbitrators will be justified in complex cases, and in cases in which the dispute can be connected not only with legal, but also with technical, financial and other specific controversies that require the election of | In the absence of an agreement on the number of arbitrators, the dispute will be considered by the arbitral tribunal composed of three arbitrators. |

⁶⁸⁹ Source: The Chamber of Commerce and Industry of the Republic of Uzbekistan.

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| | | | specialists in a particular sphere as arbitrators. In simple disputes election of several arbitrators will only lead to an unjustified increase in the cost and delaying the time of the process. After all, when considering a dispute by a sole arbitrator the arbitration fee is reduced by 25%, and the formation of the panel of arbitrators takes much less time. | |
| 2 | Name of the sole arbitrator chosen by the parties to the dispute, or the names of the arbitrators chosen by the parties, at the peer review of the dispute (Art. 15 (5)) | <p>“The dispute is subject to consideration by the sole arbitrator.”</p> <p>OR</p> <p>“The dispute is subject to consideration of the following composition of the panel of arbitrators:</p> <p>- the chairman - _____; (full name)</p> <p>- a member of staff _____; (full name)</p> <p>- a member of staff _____; (full name)”</p> | On agreeing the personal composition of the arbitral tribunal it should be taken into account that the parties may elect arbitrators exclusively from the list of the arbitrators of the respective arbitration court. The definition in the arbitration agreement on the personal composition of the panel of arbitrators provides for reducing the time of the dispute in the arbitration court, by reducing the time on the formation of the arbitral tribunal to 3 days. At the same time, in the absence of such an agreement, the step of forming the composition of the arbitral tribunal may take up to 30 days by an abusing defendant, by expressing the cause of the non-election of an arbitrator independently. | In the absence of an agreement on the personal composition of the arbitral tribunal, the election of arbitrators will be realized by the plaintiff and the defendant in case of dispute and filing a claim to the arbitration court. The order of election is defined by Art. 15 of the Law “On Arbitration Courts” and the Rules of the Arbitration Court. |
| 3 | Additional requirements for arbitrators (education, work experience, language skills, etc.) (Art. 14 (3)) | “As arbitrator may be elected (appointed) a person who has experience in the securities market for at least three years, experience in commercial dispute resolution and is fluent in Russian and Uzbek languages.” | Additional requirements for the arbitrator may be agreed upon by the parties to guarantee that the dispute will be resolved professionally by a person who is a specialist in the disputed legal relations. However, it should be attended that whether or not there are arbitrators who meet such requirements in the list of the corresponding arbitration court, otherwise the arbitration agreement may be unenforceable. | In the absence of such an agreement, the arbitrators shall elect (appoint) the person meeting the general requirements established in Art. 14 of the Law for the resolution of the dispute. |
| 4 | Order of formation of the arbitral tribunal (Art. 15 (5)) | “The arbitral tribunal is formed of three arbitrators appointed by the chairman of the arbitration court for resolution of the dispute.” | The procedure of the formation of the composition of the arbitral tribunal agreed by the parties may also be aimed at reducing the time costs associated with the resolution of the dispute. At the same time, to guarantee the appointment of an arbitrator, who is able to provide qualified dispute resolution, the parties may agree upon additional requirements for the arbitrator. A different procedure for the | In the absence of such an agreement, the election of the arbitrators will be carried out by the plaintiff and the defendant in the event of a dispute and filing a claim to the arbitration court. The order of election is defined by Art. 15 of the Law “On Arbitration Courts” and |

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|-----------|---|---|--|--|
| | | | formation of the composition of the panel of arbitrators can also be agreed by the parties. | the corresponding Regulations of them. |
| 5 | Place of arbitration (Art. 13 (2)) | “The arbitration proceedings will be carried out at the company of the defendant.” | The place of arbitration may be agreed by the parties on the basis of facilities for the examination of documents and other evidence. | In the absence of such an agreement, the place of arbitration proceedings is determined by the arbitral tribunal. As a rule, arbitration proceedings are held in the courthouse. |
| 6 | Language of the arbitral proceedings (Art. 13 (2)) | “The language of the arbitration shall be Russian.” “The language of the arbitration is the Uzbek language.” “The languages of the arbitration shall be the Russian and Uzbek languages.” | The Parties can agree on the language(s) of the arbitration on the basis of convenience for the parties of submitting the documents and conducting the proceedings in any language or languages. | In the absence of such an agreement, the proceedings are conducted in the official language or in the language in which the arbitration agreement has been concluded. |
| 7 | Right of the parties to bring a counterclaim (Art. 31 (1)) | “A counterclaim may be brought against the defendant not later than the first meeting of the arbitral tribunal, otherwise it should be considered in a separate process.” | Such provision does not allow to delay the consideration of the initial claim and it is a guarantee that the defendant would not be able to delay the review of the initial claim unduly. | In the absence of such a provision, the defendant is entitled to submit a counterclaim before a decision by the arbitral tribunal. The counterclaim will be read in conjunction with the original subject to the requirements established by Art. 31 of the Law “On Arbitration Courts”. |
| 8 | Right of the arbitration court to take measures to secure the claim (Art. 32 (2)) | “The arbitral tribunal shall have no right to take measures to secure the claim.” | Such provision may be useful if the parties apply to the arbitration court, seeking an amicable settlement of the dispute, in order to avoid possible conflicts due to the measures taken to secure the claim. | In the absence of such a provision, the arbitral tribunal shall be entitled to take measures to ensure the claim at the request of the parties of the arbitration proceedings. |
| 9 | Necessity of conducting an arbitration protocol (Art. 36) | “The Arbitration hearing shall be conducted without the preparation of minutes.” | Such provision may be used for simple disputes and for disputes where the parties have agreed to hear the case without their participation. | In the absence of such a provision, the minutes are presented to arbitration hearing. |
| 10 | Which documents, presented to the arbitral tribunal by one of the parties, should be transferred to the other party (Art. 34 (1)) | “Documents, consisting of trade secrets and presented to the arbitration court by one party, are not transferable to the other party.” | Such provision is carried out to maintain trade secrets from the other party, if it is necessary to transfer documents containing such secrets to the arbitration court by a party of arbitration. | In the absence of such a provision, all documents presented to the arbitration court of one of the parties should be transferred to the other party. |

| | | | | |
|----|--|---|---|---|
| 11 | Procedure, methods and details for sending documents (Art. 34 (2)) | <p>“The arbitral tribunal shall notify the parties, first of all, by sending documents via E-mail or fax at the following details:</p> <p>- for the 1st party: _____ ;</p> <p>(E-mail, fax)</p> <p>- for the 2nd party: _____ .</p> <p>(E-mail, fax)</p> <p>If there is evidence of sending a message on specified details, the message will be received by the addressee.”</p> | The approval of a different order and ways of sending documents can significantly speed up the arbitration proceedings compared to the ordinary post. Furthermore, the party or its representative may not be at the specified postal address or reside at the place of residence. | In the absence of such a provision, all documents are sent to the arbitration court at the last known location of the legal person (postal address) or place of residence of the individuals, which are parties to the arbitration proceedings. |
| 12 | Participation of the parties in the arbitration court session (Art. 35 (2)) | “The arbitral tribunal conducts arbitration on the basis of submitted documents without participation of the parties in the session of the arbitral tribunal.” | Such a provision is possible for simple disputes, in which all the facts of the case are documented. However, in case of a failure of the submitted documents and materials, the arbitral tribunal may appoint an oral hearing. | In the absence of such a provision, the arbitration proceedings shall be conducted with the participation of the parties or their representatives. |
| 13 | Consideration of the dispute in a closed or open session (Art. 35 (4)) | “The consideration of the dispute is carried out in open court.” | Such provision is permissible, if the parties wish to waive confidentiality of arbitration proceedings and involve the public in a dispute. | In the absence of such a provision, the dispute is carried out in a closed session. |
| 14 | Timeframe for consideration of the dispute (Art. 13 (2)) | “The arbitration proceedings must be completed within three months. If within the specified time the trial is not completed, the effect of the arbitration agreement is terminated, and the dispute may be submitted to the Supreme Court.” | Such provision can be a guarantee not to tighten the arbitration proceedings. At the same time, it should be mentioned that because of the absence of a few instances and the simplified, robust and reliable procedure of dispute settlement legal proceedings are generally carried out faster in arbitration than in a state court. | In the absence of such a provision, the arbitration shall be completed within the timeframe established by the Regulations of the corresponding arbitration court. |
| 15 | Distribution of the expenses related to the resolution of the dispute in the arbitration court (Art. 22 (1)) | “All expenses related to the resolution of the dispute in the arbitration court are distributed equally between the parties.” | Such provision is carried out if the parties apply to the arbitration court, seeking an amicable settlement of the dispute. It is also possible if a procedure for distribution of the costs associated with the resolution of the dispute in the arbitration court is approved (e.g. laying of all costs only to the plaintiff or to the defendant only if the parties agree). | In the absence of such a provision, all costs associated with the resolution of the dispute in the arbitration court are distributed proportionally on satisfied and rejected requirements. |

| | | | | |
|----|---|--|---|--|
| 16 | To contact the arbitration court for the adoption of additional solutions (Art. 40 (1)) | “In case when some part of the claim which was declared and considered in the arbitration court was not reflected in the arbitration decision, the party may apply to the arbitral tribunal for an additional award, without notice to the other party.” | This provision is carried out if the Rules of the Arbitration Court provide that the arbitration court shall notify the other party of any statements made by one of the parties independently. Parties may also determine if the stated and discussed requirements are not reflected in the decision, they are to be considered in a separate trial, and not through the adoption of additional solutions. | In the absence of such a provision, either party may appeal to the same arbitral tribunal for an additional award by notifying the other party within ten days after receiving the decision. |
|----|---|--|---|--|

3.2. The rules for filing a claim: the preparation and filing

The arbitration proceedings begin with the filing of the claim by the party of the arbitration agreement considering his or her rights and legal interests to be violated by another party of the arbitration agreement. Filing a claim must be preceded by the payment of the arbitration fee that is paid by transferring or depositing funds to the account of the arbitration court. The arbitration fee is paid in the national currency and, if necessary, in the foreign currency in which the claim is expressed. If the size of the arbitration fee in the period of filing a claim is denominated in a foreign currency it must be paid at the exchange rate fixed by the Central Bank of Uzbekistan to the relevant currency at the time of the payment.

The size of the arbitration fee in the Arbitration Court at the Chamber of Commerce of the Republic of Uzbekistan is established in accordance with the Regulation “On fees, expenses and costs of the parties to the Arbitration Court at the Chamber of Commerce of the Republic of Uzbekistan”. It is 1% of the amount of the claim, but not less than three minimum wages. If the parties have agreed that the dispute shall be resolved by a sole arbitrator, the arbitration fee is reduced by 25%. For claims on non-property disputes, if it is not possible to determine the price of the claim, the arbitration fee shall be equal to ten minimum wages.⁶⁹⁰

For the correct calculation of the arbitration fee, it is important to determine correctly the price of the claim, which is defined as follows:

- in claims for the recovery of money: the sum exacted,
- in claims for the recovery of property: the price of the claimed property,
- in claims for recognition or transformation of legal relations: the legal value of the subject at the time of filing the claim.

⁶⁹⁰ Art. 4 of the Regulation “On fees, expenses and costs of the parties to the Arbitration Court at the Chamber of Commerce of the Republic of Uzbekistan”.

In the claims, consisting of a number of claims, the amount of each claim is determined separately. The price is determined by the total amount of all claims. When calculating the amount of the claim the sum of the arbitration fee shall not be taken into account.

If the parties of arbitration proceedings at the Arbitration Court at the Chamber of Commerce of the Republic of Uzbekistan cannot pay the arbitration fee completely, they can when filing a claim submit one of the following applications:

- on decreasing the size of the arbitration fee (not more than 25%),
- on delaying the payment of the arbitration fee,
- on payment of the arbitration fee in installments.

The petition must contain the reasons for the lack of ability to pay and a request of the party to reduce the size of arbitration fee, to defer the payment or to pay the fee in installments as well as the dates in which the payment of the arbitration fee is entirely possible. The documents confirming the absence of the possibility to pay the arbitral fee⁶⁹¹ must be attached to the application.

After the payment of the arbitration fee, the claimant files the statement of the claim directly to the arbitral tribunal, or sends it by post to the address of the arbitration court. Requirements for the content of the claim are determined by the Law of the Republic of Uzbekistan “On Arbitration Courts” and the Rules of the arbitral tribunal, which will consider the dispute. Thus, according to the Law of the Republic of Uzbekistan “On Arbitration Courts” and the Regulation of the Arbitration Court at the Chamber of Commerce of the Republic of Uzbekistan⁶⁹² the statement of claim should contain:

3.2.1. The date of the statement of the claim

The statement of claim shall contain the concise date (day, month, year), pointing to the commission of such a procedure when filing a claim. If a claim does not contain the data, the person, authorized to accept the statement of claim in the arbitration court, may return the claim to the plaintiff in order to remedy the shortcoming. Return of the claim to the plaintiff by the arbitration court is also possible in other cases of infringement of requirements concerning the claim that are fixed by the Law of the Republic of Uzbekistan “On Arbitration Courts” and the Regulations of the Arbitral Tribunal in order to correct violations. The significance of pointing the date in the claim is manifested in cases when there is a need to consider and resolve the issue of compliance by the claimant with all court deadlines, determined for going to court with

⁶⁹¹ Reference from the bank about the lack of funds in the current account, etc.

⁶⁹² Art. 29 of the Law “On Arbitration Courts” of Uzbekistan; Art. 17 of the Regulation of the Arbitration Court at the Chamber of Commerce of the Republic of Uzbekistan.

the requirements on the protection of the violated rights as well as for the proper determination of the time for the election or appointment of arbitrators for the dispute, etc.

3.2.2. The names and addresses of the parties to arbitration

Parties to arbitration may be legal and natural persons. In all cases, the statement of claim must contain the names and locations (postal addresses) of legal entities, names, surnames, places of residence of individuals who are the parties to the arbitration proceedings. The claimant is also advised to indicate in the statement of claim the contact information (phone, fax, email, etc.) of the other parties. This requirement applies with regard to the need to identify the involved parties, to conduct further correspondence and to send them procedural documents. Specifying an incorrect or inaccurate address may lead to the impossibility to send the documents and notices, and to significantly extending the terms of the proceedings.

3.2.3. Plaintiff's requests

Due to the fact that the purpose of appeal to an arbitration court is to protect violated rights and legal interests, in the lawsuit the plaintiff, based on the nature of the assumptions, should specify his demand by making a reference to the relevant provisions of laws or other legal acts as well as to the terms of the agreement. The plaintiff's claims may be of different character, for example, for recovery of money, reclaiming property, etc. As a rule, the plaintiff's requests are indicated at the end of the statement of claim.

3.2.4. Circumstances on which the plaintiff bases his claim

The claim must specify not only the requirements but also the circumstances on which the plaintiff bases his/her claim. The requirements must be based on certain events occurred. Otherwise, it can lead to misunderstandings of certain requirements by the arbitral tribunal, which considers the dispute, and at the same time it may cause an extension of the proceedings and the emergence of additional expenses for the disputing parties. For example, a credit union when filing a claim for the return of the debt under the credit agreement, must specify in it the following circumstances: the conclusion of the loan agreement between the parties, the borrower's note loan, terms of performance of obligations of the parties, which express the borrower's non-compliance with his or her obligations under the agreement (late return, misuse of credit, etc.) and other circumstances that were the basis for the stated requirements.

3.2.5. The proofs, confirming the ground of the claim

In arbitration proceedings the burden of proof lies on the disputing parties. Art. 33 of the Law “On Arbitration Courts” requires the plaintiff to prove the circumstances to which he or she refers as the grounds for his/her claim. In this regard, the evidences, confirming the plaintiff’s claim, shall be indicated in the petition. The circumstances, set out in the statement of claim, should be confirmed in a certain manner; for that the plaintiff shall attach to the claim copies of the documents that serve as proof of the correctness of the stated requirements. To evidence relate the data, on which the arbitral tribunal bases its conclusions on the circumstances relevant to the case.⁶⁹³

3.2.6. The price of the claim

It is also necessary to specify in the statement of claim the detailed calculation of the exact amount, with comments on the methods and ways of calculation. If the calculation is complex, it can be presented in a separate document annexed to the statement of claim. The price of the claim is determined by the plaintiff and represents his/her requirements in monetary terms. This information is stated in the statement of claim, if the parties have agreed on the personal composition of the arbitration court at the conclusion of the arbitration agreement or the arbitration agreement provides that the appointment of arbitrators for the dispute resolution will be carried out by the chairman of the arbitral tribunal.

3.2.7. List of documents attached to the statement of claim

The statement of claim must be accompanied by:

- a copy of the document, containing the arbitration agreement on referring the dispute to arbitration (the document containing the arbitration clause or the separate arbitration agreement);
- documents, confirming the claim (agreement, payment orders, invoices, acts of reception and transmission, acts of acceptance, evaluation reports, acts of expertise, etc.);
- a document confirming payment of the arbitration fee (payment order or receipt);
- a notification of the election of an arbitrator by the claimant (addressed to the arbitration court and the defendant).

⁶⁹³ In particular, various types of contracts, false invoices, certificates of the executed works and acts of reconciliation, payment orders, official letters, identity documents, the constituent documents of a legal entity, certificates, licenses , etc.

The requests of the plaintiff can also be attached to the statement of claim.⁶⁹⁴ The enumeration of the documents and materials attached to the statement of claim's final part is used for sorting the attached documents in the form of their inventory. The statement of claim shall be signed by the claimant or his representative. The signature confirms the intention and expression of the will of the plaintiff to apply to the arbitration court for the protection of violated rights and legal interests. The statement of claim shall be signed by the plaintiff, a citizen or a citizen-entrepreneur, personally. If the claimant is an organization, the statement of claim shall be signed by a person, performing managerial, administrative or representative functions in the organization in accordance with the constituent documents.

The signing of the claim by the plaintiff's representative, whose powers are confirmed by a letter of authority in accordance with the legislation, is allowed, too. A document confirming the representative's authority to sign the statement of claim is also attached to the claim. Given below is an example of a statement of claim for submission to the Arbitration Court at the Chamber of Commerce of the Republic of Uzbekistan which is significant for the correct preparation of the statement of claim in accordance with the requirements of the Law "On Arbitration Courts" and the Rules of the Arbitration Court.

| |
|--|
| <p>Bukhara Department of the Association of Arbitration Courts of Uzbekistan⁶⁹⁵</p> <p>PLAINTIFF: _____ (full name of the legal entity / physical person)</p> <p>_____ (postal address of the legal entity / place of residence of a natural person)</p> <p>_____ (bank details: settl./acc., banc code, VATIN, IBAN)</p> <p>_____ (phone, fax, e-mail)</p> <p>DEFENDANT: _____ (full name of the legal entity / physical person)</p> <p>_____ (postal address of the legal entity / place of residence of a natural person)</p> <p>_____ (bank details: settl./acc., banc code, VATIN, IBAN)</p> <p>_____ (phone, fax, e-mail)</p> <p>Price of the claim: _____ (UZS)</p> <p style="text-align: center;">Statement of the claim</p> <p>(on _____)</p> |
|--|

⁶⁹⁴ For example, "On the adoption of measures to secure the claim", "On the deferment of payment of the arbitration fee", etc.

⁶⁹⁵ Source: Bukhara Department of the Association of Arbitration Courts of Uzbekistan.

(the subject of the dispute)

The claim sets out:

- the nature of the dispute and the facts on which the plaintiff bases his claim (what documents regulate the relations between the parties, the obligations of the parties, the process of their execution, what was violated or not fulfilled by the defendant, the reference to the provisions of the agreement, etc.);
- evidences, supporting the grounds of the claim (what precisely indicates the non-fulfilment or improper fulfilment of obligations by the defendant, expert reports, acceptance certificate, completed work checking report, invoices, payment orders, etc.);
- references to the laws or other legal acts (which laws or other normative legal acts regulate the relations between the parties, which legal norms were violated, which rules are the basis of the plaintiff's claims, etc.);
- full name of the sole arbitrator or arbitrators selected by the plaintiff and the defendant on agreement between the parties, if the personal composition of the arbitral tribunal agreed upon by the parties in the arbitration agreement, or request on appointment of the arbitrator (arbitrators) by the chairman of the arbitration court, if the parties have expressly authorized him to appoint in the arbitration agreement.

Plaintiff's request on satisfaction of his/her filed claims will further be set out (recovery of money, recovery of property, etc.).

I request:

1. to satisfy the filed claim.
2. to collect from the defendant on behalf of the plaintiff the costs of the arbitration fee in the amount _____ (_____) sum.

Annex on ____ sheets:

- payment order on payment of the arbitration fee;
- the copy of the document, which contains the arbitration agreement to refer the dispute to the arbitration court;
- documents, proving the claim;
- notification on the election of an arbitrator by the claimant (if the personal composition of the arbitral tribunal has been agreed upon by the parties in the arbitration agreement);
- authorization letter of representative (if the statement of claim shall be signed by a representative).
- an application on _____ (if available).

(the essence of an application)

_____/_____/_____
(signature) (name) (date)

The arbitral tribunal adopts a ruling on accepting the claim. The statement of claim after its acceptance by the arbitral tribunal will be sent to the respondent. After that, the defendant may invoke the right to file a counterclaim and/or apply for the revocation of the claim.

The counterclaim is a claim which is taken against the original claim of the plaintiff in order to try both actions. The arbitral tribunal has to take into consideration that a counterclaim can only be provided if it is covered by the arbitration agreement. According to the Law "On Arbitration Courts" a counterclaim can be considered together with the initial claim in the following cases:

1. the counterclaim is directed to offset the initial claim;
2. the satisfaction of the counterclaim excludes fully or partly the satisfaction of the initial claim;

3. there is a correlation between the counterclaim and the initial claim and their joint consideration will lead to a more rapid and correct resolution of the dispute.⁶⁹⁶

The same requirements which are applicable to the initial claim apply to the counterclaim. When filing a counterclaim it is necessary to pay the arbitration fee, calculated according to the general rules provided for the payment of the arbitration fee. The requirements for signing the counterclaim and the review of the statement of claim are similar to those that apply to the signing of the statement of claim.

Review of action is a document which sets out the defendant's explanations on the merits of requirements that are against him. The review includes objections on the jurisdiction of the arbitral tribunal and its composition, the reasons for full or partial rejection of a claim, or information on the recognition of the claim, references to the legislative and normative-legal acts, which, in the defendant's opinion, do not correspond to the claim, or which are not to be applied in resolving the dispute, and an indication of the evidences, supporting the defendant's position in the dispute. The information contained in the review, as a rule, is important and often has a decisive importance in deciding the case. Presenting a review of the claim is the right of a defendant, not his obligation. Thus, he decides whether there is a need to inform the arbitral tribunal on conditions concerning the merits of the dispute before the oral hearing.

In the course of the arbitration proceedings the claimant may amend or supplement the claim. The respondent is granted the same right for his statement of defense. These actions of the parties can relate to the size of the claim as well as the expansion or reduction of the pieces of evidence.

3.3. Formation of the Arbitral Tribunal. Basic rules and recommendations

The meaning of the stage of formation of the arbitral tribunal is expressed in that the arbitral tribunal, elected by the parties to the arbitration agreement, is vested with the competence to consider the dispute between them and as a result of this, to render an award, which is binding on the parties.⁶⁹⁷

The independence of arbitrators from the disputing parties is provided in the formation of the arbitral tribunal. The dependence of the arbitrators from the parties to the dispute may have a variety of forms, which may affect the objectivity of the decision. It can be subordination, financial dependence, and addiction caused by related or kindred relations. Regarding these circumstances the legislator provides a number of requirements that ensure fair and impartial

⁶⁹⁶ Art. 31 of the Law "On Arbitration Courts".

⁶⁹⁷ Art. 21 of Regulation of the Arbitration Court at the CCI of the Republic of Uzbekistan.

legal proceedings based on the independence of the arbitrator who will decide the dispute of the parties to the arbitration proceedings.⁶⁹⁸

The disputing parties elect the arbitrators themselves, based on the professionalism, skills and authority of the arbitrators and their theoretical and practical knowledge in the field of dispute. In spite of the fact that the parties elect the arbitrators themselves, the arbitrators should not act as representatives of the parties and must be independent of them. Parties, referring a dispute to the Permanent Arbitration Court, may elect only an arbitrator, who is included in the list of arbitrators of the relevant arbitration court. In the Arbitration Court at the Chamber of Commerce of the Republic of Uzbekistan the arbitral tribunal for resolution of the dispute is formed of three arbitrators, unless the parties to the arbitration agreement have agreed that the dispute will be considered by a sole arbitrator. It follows from the above that there are two ways of formation of the arbitral tribunal:

- formation of the arbitral tribunal for consideration of the dispute by a sole arbitrator,
- formation of the arbitral tribunal consideration of the dispute by an odd number of arbitrators.

The formation of the arbitral tribunal for the dispute resolution is an attainment of the arbitration agreement regarding the arbitrators, whom the parties trust to resolve their dispute; they have to send information on the chosen arbitrators to the arbitration court. The appointment of an arbitrator can also be realized by the chairman of the Permanent Arbitration Court, if the parties of the arbitration agreement do not agree on the choice of the arbitrator; usually it happens when the defendant does not select an arbitrator in due time.⁶⁹⁹ The stage of formation of the arbitral tribunal may take 3 to 30 days. To reduce this period, the parties to the arbitration agreement are recommended to agree on their chosen personal composition of the arbitral tribunal at the conclusion of the arbitration agreement, because in this case there is no need to send the arbitral tribunal a notification on the election of arbitrators. It leads to a shortened time period for the consideration of a case, to send and receive notifications of candidates elected arbitrators.

If the parties in the arbitration agreement did not agree on the personal composition of the arbitral tribunal, a complete exchange of documents between the parties at the Court of Arbitration at the Chamber of Commerce of the Republic of Uzbekistan is essential.

⁶⁹⁸ Klimenko/Gafarova, *The Guidelines for the Arbitration Proceedings for Legal Practitioners and Parties to the Dispute*, Tashkent 2008, p. 57.

⁶⁹⁹ Art. 15 of the Law “On Arbitration Courts” of the Republic of Uzbekistan.

3.3.1. Arbitrators

A case which is handled in a state court is transferred to one or another judge by the chairman of the court. The parties may influence the selection of judges for consideration of the dispute exclusively by submitting a statement on withdrawal of an appointed judge. Thus, in case of satisfaction of the statement, a new judge is appointed by the chief judge of the court.

In arbitration proceedings the parties can choose the arbitrators for the resolution of a dispute from the list of arbitrators of the arbitration court. That allows the parties to choose the person, whom they really trust, and this can lead to a favourable decision made by this arbitrator and to a high probability of its voluntary execution by the losing party.

The Law “On Arbitration Courts“ of the Republic of Uzbekistan⁷⁰⁰ and the Regulation of the CCI Uzbekistan⁷⁰¹ establish the following requirements for arbitrators:

- more than twenty five years old,
- a citizen of the Republic of Uzbekistan,
- capable to provide an impartial resolution of a dispute,
- expressly or implicitly not interested in the outcome of a dispute,
- independent from the parties of the arbitration agreement and
- willing to perform the duties of an arbitrator.

Moreover, in proceedings with a sole arbitrator the arbitrator must have the high law degree. In proceedings with a panel of arbitrators, the chairman of the panel must have it.⁷⁰²

The law does not impose the requirement of a higher legal education on all arbitrators who are members of an arbitral tribunal. It provides the attraction of other professional specialists of different branches as members of an arbitral tribunal that guarantees the most qualified and effective resolution of specific disputes in which the issue is to a greater extent related to financial, technical or other disputes. The availability of the requirements of higher legal education to the chairman of the arbitral tribunal is a guarantee for the parties that the dispute will be resolved in accordance with the law.

An arbitrator cannot be:

- a person, who is considered by the decision of a court, which has been entered into force, partially or fully incapable;
- a person, who has a criminal record which is pending or not removed;

⁷⁰⁰ *Ibid.*, Art. 14.

⁷⁰¹ Art. 14 of the Regulation of the CCI Uzbekistan.

⁷⁰² *Ibid.*

- a person, who has stopped to work as a judge, a lawyer, a notary, an inspector, a public prosecutor or another employee of law enforcement bodies due to an established commitment of offences incompatible with his professional work;
- a person, who cannot be elected to be an arbitrator, according to his official status, provided by the law.⁷⁰³

It should be noted that additional qualification requirements for the arbitrator may be agreed upon by the parties in the arbitration agreement and may also be determined by the rules of the Permanent Court of Arbitration.⁷⁰⁴

The arbitrators are not permanent employees of the arbitration court; as a rule they occupy leading positions in other organizations and are included in the list of arbitrators of the Permanent Court of Arbitration from which a party can choose when filing a claim. Arbitrators have authority and status as an arbitrator only within the framework of the dispute, on which they were elected by the parties or appointed in accordance with the established procedure. The arbitrators are independent in all matters arising in the course of arbitration proceedings as well as of the legal person, forming the Permanent Court of Arbitration.

As a rule the lists of arbitrators present the most experienced professionals with authoritative representatives of legal science and practice as well as representatives of other professions, who are experts in various legal relations. Candidates are examined thoroughly prior to their inclusion in the list of arbitrators in order to prevent that people with tainted reputation or non-professionals in their field are included into the list. In 2010 a special commission, acting on the basis of the Regulation “On procedure for the admission of arbitrators in arbitration court at CCI of the Republic of Uzbekistan”, was established in the Arbitration Court at the CCI of Uzbekistan to ensure an effective selection of arbitrators. All interested parties (disputing parties) can obtain sufficient information about the arbitrators on the list of arbitrators of the Arbitration Court at the CCI of the Republic of Uzbekistan, which is necessary for an informed election of an arbitrator to consider a dispute.

3.3.2. Election (appointment) of the sole arbitrator

If the parties have agreed that the dispute will be considered by a sole arbitrator, when filing a claim, the claimant shall submit to the arbitral tribunal a notification, which indicates surname, name and patronymic of the candidate proposed by the plaintiff from the list of arbitrators as

⁷⁰³ *Ibid.*

⁷⁰⁴ The Arbitration Court at the Chamber of Commerce of the Republic of Uzbekistan found the additional requirement for the arbitrators to have work experience on specialities not less than three years.

an arbitrator to consider the dispute and requests the arbitral tribunal to appoint an arbitrator if the parties fail to reach an agreement on the candidacy of the arbitrator.

Bukhara Department of the Association of Arbitration Courts of Uzbekistan⁷⁰⁵

To the respondent _____
(full name of the legal entity / full name of individual)

(postal address of the legal entity / place of residence of a natural person)

Hereby, I offer to elect a sole arbitrator under the claim _____ for on _____
(plaintiff's name) (defendant's name)
on _____
(subject of the claim)

arbitrator _____
(name of the arbitrator)

In accordance with Article 19 (1) of the Regulation of the Arbitration Court, I request the respondent to approve the proposed candidacy of the arbitrator. When parties do not reach an agreement on a candidacy of a sole arbitrator within fifteen days (when the arbitration court does not receive a response from the defendant or his opinion on another candidacy), I ask the Court of Arbitration to appoint the sole arbitrator respectively the Rules of the Arbitration Court.

(signature) / _____ (name and job title) / _____ (date)

The above notification together with the statement of claim is sent by the arbitration court to the defendant. If the defendant agrees with the candidacy of the arbitrator proposed by the claimant, he must send to the arbitral tribunal the following reply within fifteen days from the date of receipt of the above notification:⁷⁰⁶

Bukhara Department of the Association of Arbitration Courts of Uzbekistan⁷⁰⁷

I hereby give you notice of my consent to the candidacy
of _____,
(full name of the arbitrator)

offered by the claimant as a sole arbitrator, on the suit _____ to

(claimant's name) (defendant's name)

on _____
(subject of the claim)

(signature) / _____ (name and position) / _____ (date)

After a consent of the parties about the person of the arbitrator a decision will be made on the formation of the arbitral tribunal and the appointment of the case to arbitration, determining the time and place of the consideration of the dispute. In case of disagreement with the candidacy

⁷⁰⁵ Source: Bukhara Department of the Association of Arbitration Courts of Uzbekistan.

⁷⁰⁶ Art. 21 of Regulation of the Arbitration Court at the CCI of the Republic of Uzbekistan.

⁷⁰⁷ Source: Bukhara Department of the Association of Arbitration Courts of Uzbekistan.

of the arbitrator proposed by the plaintiff, the defendant submits within fifteen days to the arbitration court a notification specifying the following meaning:

Bukhara Department of the Association of Arbitration Courts of Uzbekistan⁷⁰⁸

I hereby notify you of my disagreement to the candidacy of _____,
 _____ (full name of the arbitrator)
 proposed by the claimant as a sole arbitrator, on the suit _____

 (claimant's name) (respondent's name)
 on _____
 _____ (subject of the claim)

I propose as a sole arbitrator according to the lawsuit _____.
 _____ (name of the arbitrator)

_____/_____/_____
 (signature) (full name and job title) (date)

The sole arbitrator to consider the dispute shall be appointed by the chairman of the arbitration court and a decision on assignment of the case to arbitration will be made.

3.3.3. Formation of a panel of arbitrators

If the parties have agreed that their dispute should be resolved by a panel of arbitrators, when filing a claim the claimant shall submit to the arbitration court the notification on the election of an arbitrator and requests the arbitral tribunal to appoint respective arbitrators for the resolution of the dispute if the defendant does not elect an arbitrator and/or if the elected arbitrators do not achieve an agreement on the chairman of the arbitral tribunal within the established time frame.

Bukhara Department of the Association of Arbitration Courts of Uzbekistan⁷⁰⁹
To the Respondent

 (full name of the legal entity /full name of individual)

 (postal address of the legal entity / place of residence of a natural person)

I hereby notify you on the election of _____
 (name of the arbitrator)

as an arbitrator on the claim _____ to _____
 (claimant's name) (defendant's name)

on _____
 subject of the claim)

In accordance with Article 19 (1) of the Rules of the Arbitration Court, I request the respondent to elect a second arbitrator to resolve the dispute. If the defendant does not elect an arbitrator within the

⁷⁰⁸ Source: Bukhara Department of the Association of Arbitration Courts of Uzbekistan.

⁷⁰⁹ Source: Bukhara Department of the Association of Arbitration Courts of Uzbekistan.

established time frame and if the elected arbitrators do not achieve an agreement on time on the candidacy of the chairman of the tribunal, I request the arbitration court to appoint respective arbitrators in accordance with the procedure established in the Rules of the Arbitration Court.

(signature)

(name and title)

(date)

The above-mentioned notification shall be sent to the respondent, together with the statement of claim. The respondent shall send to the arbitration court the notification on the election of the second arbitrator within fifteen days from the date of receipt of a copy of the statement of complaint and the notification of the claimant on the election of an arbitrator.⁷¹⁰

Bukhara Department of the Association of Arbitration Courts of Uzbekistan⁷¹¹

Hereby I notify you on the election of _____
(name of the arbitrator)

as an arbitrator on the suit to the _____
(name of plaintiff) (respondent's name)

on _____
(subject of the claim)

(signature)

(name and title)

(date)

If the arbitration court does not receive the notification of the defendant within fifteen days, the appointment of an arbitrator for the respondent is carried out by the chairman of the arbitration court.

The elected (nominated) arbitrators appoint the chairman of the panel of arbitrators from a list of arbitrators of the arbitration court. In case of not reaching an agreement between the arbitrators on the candidacy of the chairman within fifteen days after the date of their election, the appointment of the chairman of the panel of arbitrators will be carried out by the chairman of the arbitration court.⁷¹²

The forwarding of the above notification to the arbitration court is not a sufficient requirement for the election of the respective arbitrators. The executive secretary of the arbitration court shall immediately consult with the respective arbitrators to get their consent on the resolution of the dispute, for which they were elected. An arbitrator is considered to be elected only after the signing of a document, in which he certifies the absence of obstacles to perform the duties of an arbitrator (kinship relations or working relationship with one of the disputing parties,

⁷¹⁰ Art. 21 of Regulation of the Arbitration Court at the CCI of the Republic of Uzbekistan.

⁷¹¹ Source: Bukhara Department of the Association of Arbitration Courts of Uzbekistan.

⁷¹² Art. 15 (1) of the Law "On Arbitration Courts" of the Republic of Uzbekistan.

absence of proficiency in the arbitral language, etc.). The following consent form is used at the Arbitration Court at the Chamber of Commerce of the Republic of Uzbekistan:

| | | |
|---|--|--|
| <p>Consent⁷¹³</p> <p>on the execution of the functions of an arbitrator on the case No. _____</p> <p>I _____</p> <p style="text-align: center;">(name of the arbitrator)</p> <p>agree on the execution of the functions of the arbitrator as</p> <p><input type="checkbox"/> a sole arbitrator;</p> <p><input type="checkbox"/> the chairman of the arbitral tribunal;</p> <p><input type="checkbox"/> a member of the arbitral tribunal</p> <p>on the suit _____ to _____</p> <p style="text-align: center;">(name of plaintiff) (name of the respondent)</p> <p>on _____.</p> <p style="text-align: center;">(subject of the claim)</p> <p>I hereby certify that I meet all the requirements for an arbitrator in accordance with the Law of the Republic of Uzbekistan “On Arbitration Courts”, the Regulation of the Arbitration Court at CCI Uzbekistan and the parties' agreement, and I note that</p> <p><input type="checkbox"/> – I am independent from the parties to the arbitration agreement; and there are no circumstances that could give rise to reasonable doubts to my independence and impartiality;</p> <p><input type="checkbox"/> – I am independent from the parties to the arbitration agreement, but there are some circumstances that might raise doubts to my independence and impartiality:</p> <p>_____.</p> <p style="text-align: center;">(specified circumstances)</p> <p>_____/_____/_____</p> <p style="text-align: center;">(signature) (name) (date)</p> | | |
|---|--|--|

The signed agreement is immediately sent to the parties in order to enable them to exercise their right of withdrawal, if they believe that an arbitrator does not meet the requirements set out in the legislation and the Regulation of the Arbitration Court (independence, having no interest in case outcomes, etc.). A party may challenge the arbitrator by submitting to the arbitral tribunal a written reasoned statement of challenge of an arbitrator not later than the first meeting of the arbitral tribunal. When an arbitration party does not submit the statement till the first session of the arbitral tribunal, it can be considered only if the arbitral tribunal recognizes the causes for the delay of a challenge to be reasonable.

On the sole consideration of the dispute the statement of challenge of an arbitrator is tried by the sole arbitrator. The statement of challenge of all members of the arbitral tribunal is tried by the same panel of arbitrators by a simple majority of votes.

The statement of challenge of a member of the arbitral tribunal is considered by the same arbitrator. In this case, if the arbitrator who is being challenged does not withdraw voluntarily or another party to arbitration does not agree to the challenge of an arbitrator, an application for the withdrawal is considered by other arbitrators, which are members of the arbitral tribunal. If

⁷¹³ Source: Bukhara Department of the Association of Arbitration Courts of Uzbekistan.

there are equal numbers of votes cast for and against the withdrawal, the arbitrator may withdraw as an arbitrator.⁷¹⁴ The need to obtain the consent of an arbitrator to resolve the dispute is that professional arbitrators are quite busy people, occupying leading positions in different organizations, and at the time of submission of the claim to the arbitration court by virtue of employment, business trips, illness or for other reasons, they may not be able to fully perform the functions of an arbitrator to resolve a particular dispute. In the case, if the arbitrator finds that he does not meet the requirements of an arbitrator, for example, in the circumstances, depriving the arbitrator's independence from the parties (kinship or personal relations with the party to arbitration), he refuses to consider the dispute.

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| Refusal⁷¹⁵ to perform the functions of an arbitrator on case number _____ | | |
| I | _____ <div style="text-align: center; font-size: small;">(name of the arbitrator)</div> | |
| refuse to perform the functions of an arbitrator due to _____ _____ <div style="text-align: center; font-size: small;">(reasons for refusal)</div> | | |
| _____ <div style="text-align: center; font-size: small;">(signature)</div> | / _____ / <div style="text-align: center; font-size: small;">(name)</div> | _____ <div style="text-align: center; font-size: small;">(date)</div> |

A refusal to perform the functions of an arbitrator will be sent to the parties, too. If it is rejected, another arbitrator will be appointed by the chairman of the arbitration court. Powers of the arbitrator on dispute resolution are valid from the date of giving consent to the performance of the functions of an arbitrator before the decision on the dispute is made.

The powers of an arbitrator may be terminated in the following cases:

1. by agreement of the parties to the arbitration,
2. due to the resignation or withdrawal of an arbitrator,
3. in the case of the arbitrator's death.

The powers of the arbitrator, terminated in connection with taking a decision in a particular case, can be renewed in the following cases:

- taking an additional judgment,
- clarifying the decision,
- correction of arithmetic errors and misprints.

After performing the above-mentioned actions, the powers of the arbitrator in connection with the case are terminated again. In the event of termination of the powers of an arbitrator during

⁷¹⁴ Art. 17 of the Law “On Arbitration Courts” of the Republic of Uzbekistan.

⁷¹⁵ Source: Bukhara Department of the Association of Arbitration Courts of Uzbekistan.

the proceedings, the new arbitrator shall be elected (appointed) in accordance with the rules that have been applied in the appointment of the former arbitrator.

3.4. Participation of the parties in considering of the dispute by the panel of arbitrators

Parties to arbitration are the claimant and the respondent, who may deal with the arbitration court directly or through duly authorized representatives. Consideration of the dispute by the panel of arbitrators is the centerpiece of the arbitration proceedings. The parties have a real opportunity to meet directly with the arbitrators themselves, to report in detail all the circumstances of the dispute, to make an examination, to submit additional evidence, while the arbitrators have an opportunity to investigate all relevant evidence and to hear the views of the parties. Taking into account the importance of the participation of the parties in considering the dispute by the panel of arbitrators, the legislator emphasizes the requirement for the disputing parties' advance notice of the time and place of arbitration.⁷¹⁶ This requirement is reflected in the regulations of the arbitration courts, too. The time of arbitration is determined by taking into account the arbitrator's workload and busy courtrooms. Special requirements are established by the Rules of the Arbitration Court to the place of the arbitration proceedings. Thus, the Regulation of the Arbitration Court at the Chamber of Commerce of the Republic of Uzbekistan provides that the arbitration proceedings shall be conducted in the building of the arbitration court. Moreover, the disputing parties or the arbitral tribunal itself may decide to hold a meeting at any place on the territory of Uzbekistan depending on the convenience of the parties and the examination of evidence.

The arbitration proceeding is based on the principle of equal treatment of the arbitration parties.⁷¹⁷ This principle is one of the most important in the implementation of the arbitration proceedings, as it reflects the principles of legality and impartiality, and equality of the parties. Compliance with this principle is carried out at any stage of the arbitration proceedings, which is reflected in all articles of the law. For a full understanding of the case by the parties of arbitration, the Law of the Republic of Uzbekistan "On Arbitration Courts" and the Regulation of the Arbitration Court at the CCI of Uzbekistan obliges the parties of the arbitral proceedings to provide a translation of documents and other materials submitted in a language other than the language of the arbitration proceedings.

As a general rule, if the parties conclude an arbitration agreement in any language, this language will be used when considering the dispute by the panel of arbitrators. It is not excluded that the

⁷¹⁶ Art. 35 (3) of the Law "On Arbitration Courts" of Uzbekistan.

⁷¹⁷ *Ibid.*, Art. 35 (1).

parties of the arbitration agreement may agree on the conduct of arbitration proceedings in a language other than the language of the arbitration agreement.⁷¹⁸ The parties have the right to use the services of an interpreter at any stage of the arbitration proceedings. Arbitration proceedings may be carried out in the form of an oral hearing with the participation of the parties of the arbitration or on the basis of documentary evidence without an oral hearing and in the absence of the parties of the arbitration. In the latter case, the proceeding will take place only with the consent of the disputing parties for the resolution of the dispute without their participation. It is possible that the panel of arbitrators may prescribe an oral hearing of the case on its own initiative, if it determines that the evidence is insufficient to resolve the dispute. Any party may file a request to hold an arbitration hearing without his or her participation. It is known that the consideration of a dispute is carried out by the research of presented written and other evidence, hearing of the witnesses and persons who are present at the meeting, examination and implementation of other legal actions to complete the study of all the circumstances of the case. Failure to submit documents and other materials to the arbitration court, as well as the non-appearance of the parties duly notified of the time and place of the meeting of the arbitral tribunal, are not obstacles for arbitration and a decision by the arbitral tribunal, if the arbitral tribunal is informed about the reasons of not committing the above actions to be not justifiable.

Parties to arbitration during the arbitration proceedings may be acquainted with the materials of the case, may modify or supplement their claim or objection against the claim, state the challenge, present evidence, participate in examination of evidence, ask questions, make claims, make applications, give oral and written explanations, present their arguments and conclusions on all issues, object to the claims and arguments of others as well as may perform other procedural actions.

The submission of all documents and the exchange of materials between the parties and arbitrators is carried out by the secretariat of the arbitration court.⁷¹⁹ One of the most justified mechanisms in order to clarify the true circumstances of the case is to conduct forensic studies. In order to clarify issues arising from the consideration of the case, which require special knowledge, the arbitral tribunal may appoint examination at the request of the party to the arbitration or on its own initiative. The parties may also submit the arbitral tribunal the issues that need to be clarified during the legal examination, and the suggestion on the candidacy of experts. The final content of the issues on which expert opinion is required, depends on the

⁷¹⁸ Art. 8 of the Regulation of the Arbitration Court at the CCI Uzbekistan.

⁷¹⁹ *Ibid.*, Art. 15.

panel of arbitrators considering the dispute. If an expert in the examination establishes the circumstances relevant to the case, about which there were no questions, he may include the findings of the circumstances into his conclusion. It is possible that the examination can be entrusted to several experts. The designated experts can consult with each other. If the experts come to a common conclusion on issues laid upon them, the conclusion will be unique. When there is no coincidence on findings, the expert who does not agree with other experts, will give a separate opinion. The expert can get acquainted with the materials of the case, can participate in the meetings of the panel of arbitrators, can ask questions, and request the arbitral tribunal to provide additional materials.

The arbitral tribunal may require any party to the arbitration proceedings to submit necessary documents for the forensic studies and other materials or objects. Expert opinions are transmitted to both parties to arbitration. Disputing parties may also at any stage of the arbitration proceedings (including the time of filing of the claim) apply to the arbitration court to secure the claim, if they decide that failure to take such measures may make it difficult or impossible to execute the decision of the arbitral tribunal.

The procedure for consideration of the interim relief application of the parties to arbitration is identical to the consideration of other applications presented to the arbitration court. After the arbitral tribunal's decision on taking measures to secure the claim, it is necessary to submit an application for interim measures, considered in the arbitration court, in the economic court or civil court of the location of the arbitral tribunal or the location or place of defendant's residence or the location of the defendant's property. In this case, filing proof of claim to the arbitration court and the decision of the arbitration court on measures to secure the claim are attached to the interim relief application.

The economic court or civil court will examine the application for interim measures, considered in the arbitration court, according to the rules established for consideration of the application by those courts of related procedural codes not later than the next day after the receipt of such an application. In the course of the dispute the parties may apply other applications and petitions to the arbitration court.

Below is a list of applications and claims that are most commonly submitted to the arbitral tribunal by the parties to arbitration on filing a claim and the consideration of the dispute.

Table 10: The documents that may be filed by the parties to arbitration proceedings during the dispute resolution in the Arbitration Court at the CCI of the Republic of Uzbekistan

| No | Types of documents | Grounds and the procedure for considering applications | Comments |
|----|--|--|--|
| 1. | Statement of claim | Art. 29 of the Law “On Arbitration Courts”, Art. 17 of the Regulation of the Arbitration Court | The statement of claim is filed by the party to an arbitration agreement, considering that the actions of the other party to the arbitration agreement violate his rights and interests. |
| 2. | Response to the statement of claim | Art. 30 of the Law “On Arbitration Courts”, Art. 20 (2) of the Regulation of the Arbitration Court | The respondent points out his objections to the statement of claim in his response which will be sent to the arbitration court for onward transmission to the claimant. |
| 3. | Counterclaim | Art. 31 (3) and (4) of the Law “On Arbitration Courts”, Art. 20 of the Regulation of the Arbitration Court | It is submitted with an aim to considering it jointly with the initial claim. The requirements applicable to the initial claim are also applicable to counterclaim When filing a counterclaim it is necessary to pay the arbitration fee, calculated according to the general rules. |
| 4. | Notice of the election of the arbitrator (the answer to the notification) | Art. 17 (3), Art. 20 (1), Art. 21 (4) and (5) of the Regulation of the Arbitration Court | It is submitted by both the plaintiff and the defendant for the formation of the arbitral tribunal. |
| 5. | Address Change Letter of the party to arbitration | Art. 7 (3) of the Regulation of the Arbitration Court | During the arbitration proceedings, the disputing parties are obliged to inform the arbitration court of the change of address. |
| 6. | Statement on changes or amendments to requirements of the claim | Art. 25 (11) of the Regulation of the Arbitration Court | During the arbitration a party may amend or supplement his or her claim or defense against the claim. |
| 7. | Application on rejection of the requirements of a claim | Art. 44 (1), (2) of the Law “On Arbitration Courts”, Art. 31 (1) of the Regulation of the Arbitration Court | The plaintiff has the right to renounce his stated claims before the arbitration court takes a decision. In this case, the arbitration proceedings are terminated. |
| 8. | Statement on the conduct of the arbitration proceedings without oral hearing | Art. 25 (1) of the Regulation of the Arbitration Court | It is submitted by both parties when they reach an agreement to resolve the dispute on the basis of written submissions without an oral hearing. In this case, the dispute is carried in the session of the arbitral tribunal without the participation of the parties. |
| 9. | Statement of proceedings without the participation of the parties of arbitration proceedings | Art. 35 (2) of the Law “On Arbitration Courts”, Art. 25 (4) of the Regulation of the Arbitration Court | It is submitted by the party to arbitration if it is not possible to take a direct part in the consideration of the dispute in the courtroom, or if the party decides that his participation is not necessary. |

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| 10. | Statement on the absence of an arbitral tribunal's competence to consider the dispute | Art. 24 (2) of the Law "On Arbitration Courts", Art. 4 (5) of the Regulation of the Arbitration Court | The party to the arbitration proceedings has the right to object to the competence of the arbitration court prior to the arbitration court's consideration on the merits of the case, provided by law (the absence of the arbitration agreement, the arbitral tribunal has not the jurisdiction of the dispute in accordance with the law, etc.). |
| 11. | Statement exceeds the arbitral tribunal's competence to consider the dispute | Art. 24 (3) of the Law "On Arbitration Courts", Art. 4 (6), Art. 31 (1), (3) of the Regulation of the Arbitration Court | If in the course of the arbitration proceedings, there will be an issue which is not provided by the arbitration agreement or which cannot be subject to arbitration in accordance with the Law. |
| 12. | Application on holding the hearing of the arbitration proceedings outside the court building | Art. 26 of the Law "On Arbitration Courts", Art. 9 of the Regulation of the Arbitration Court | At the discretion of the parties a hearing may be held outside of the arbitration court. In this case, any additional expenses related the hearing which is held outside the building of the arbitration court will be borne by the disputing parties. |
| 13. | Application for withdrawal of an arbitrator | Art. 16 of the Law "On Arbitration Courts", Art. 22 of the Regulation of the Arbitration Court | Withdrawal of an arbitrator may be challenged by the parties of arbitration proceedings in cases of non-observance of the requirements provided by Art. 14 (the requirements to the arbitrator) of the Law of the Republic of Uzbekistan "On Arbitration Courts". |
| 14. | Application for reimbursement of costs incurred in connection with the resolution of the dispute in the arbitration court | Art. 22 of the Law "On Arbitration Courts" | Expenses related to the fee of the representative of the party to the arbitration, to whose favour the arbitration court's decision was made, and also other expenses connected with the resolution of dispute in the arbitration court, can be transferred to the other party of the arbitration, if the claim for compensation of the incurred expenses during arbitration proceedings is made to and satisfied by the arbitration court. |
| 15. | Application for interim relief | Art. 32 of the Law "On Arbitration Courts", Art. 30 of the Rules of the Arbitration Court | Securing a claim is permitted if failure to secure the claim may complicate or make impossible the execution of the arbitral award. |
| 16. | Withdrawal of interim relief application | Art. 32 of the Law "On Arbitration Courts", Art. 30 of the Regulation of the Arbitration Court | In the case of the adoption of interim measures at the request of one of the parties to arbitration, the other party will be entitled to apply for cancellation of the claim. |
| 17. | Application for modification of the interim measures | Art. 32 of the Law "On Arbitration Courts", Art. 30 of the Regulation of the Arbitration Court | In the case of the adoption of interim measures at the request of one of the parties to arbitration, the other party has the right to apply for a modification of interim measures. For example, interim measures in the form of seizure of money that were in the current account of the respondent have been taken initially at the request of the party to arbitration. These measures may lead to |

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| | | | adverse consequences for the defendant who will not be able to perform his financial obligations towards other partners. In this case the defendant is entitled to apply to the court for modification measures to secure the claim. ⁷²⁰ |
| 18. | Request for an additional decision | Art. 40 of the Law “On Arbitration Courts”, Art. 35 of the Regulation of the Arbitration Court | With respect to the claims that were filed and considered in the arbitral proceedings but omitted from the award |
| 19. | Request for the explanation of the decision | Art. 41 of the Law “On Arbitration Courts”, Art. 36 of the Regulation of the Arbitration Court | The party to arbitration has the right, having notified the other party of the arbitration about it, within ten days after receiving the decision of the arbitral tribunal, to refer to the same arbitration court by filing the written request to render explanation of the decision. |
| 20. | Request for correction of the noted typos and arithmetic errors in decision | Art. 42 of the Law “On Arbitration Courts”, Art. 37 of the Regulation of the Arbitration Court | The arbitral tribunal which made the decision on dispute has the right to correct under the written request of the party to arbitration the noted typos and arithmetic errors. |
| 21. | Application for approval of an amicable agreement | Art. 38 of the Law “On Arbitration Courts”, Art. 28 of the Regulation of the Arbitration Court | If the parties have reached an amicable agreement on the dispute, the arbitration court approves an amicable agreement if it is not contrary to the law and does not violate the rights and interests of other persons. The content of the amicable agreement is set out in the decision of the arbitral tribunal. |
| 22. | Application on granting deferred payment or payment by installments of arbitration fees | Art. 8 of the Rules on fees, expenses and costs of the parties to the Arbitration Court | In exceptional cases, arising out of the circumstances of the case, based on the decision of the President of the arbitration court or his deputy, deferred payment or payment by installments of arbitration fees may be granted to the party to the arbitration agreement. |
| 23. | Request for reducing the size of the arbitration fees | Art. 8 of the Rules on fees, expenses and costs of the parties to the Arbitration Court | The size of the arbitration fee may be reduced based on the decision of the chairman of the arbitration court or his deputy. |
| 24. | Application for calling witnesses before the arbitration court | Art. 25 of the Regulation of the Arbitration Court | For the full clarification of the circumstances relevant for the dispute |
| 25. | Request for examination | Art. 25 of the Regulation of the Arbitration Court | For the full clarification of the circumstances relevant for the dispute |
| 26. | Request for interpreter services | Art. 8 of the Regulation of the Arbitration Court | If the party of arbitration proceedings does not speak the language used by the arbitration court. |
| 27. | Application to postpone | Art. 25 (8) of the Regulation of the Arbitration Court | For example, if the party to arbitration due to objective reasons (illness, long trip, and others) is not able to participate in the |

⁷²⁰ For example, on the seizure of property.

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| | consideration of the case | | consideration of the dispute. In this case, a party has the right to submit an application to postpone the case to another day. |
| 28. | Application for suspension of proceedings | Art. 25 (8) of the Regulation of the Arbitration Court | For example, in restructuring the organization, the person involved in the case, the interested party may submit an application for suspension of the proceedings. |
| 29. | Application for termination of the arbitral proceedings | Art. 44 of the Law “On Arbitration Courts”, Art. 31 of the Regulation of the Arbitration Court | In cases when the claimant withdraws his claim, and the defendant does not express an objection to the termination of the arbitration proceedings in connection with the presence of his legal interest in resolving the dispute on the merits, or the parties of arbitration proceedings have reached the agreement on the termination of the arbitration proceedings. |
| 30. | Application of the parties for termination of the arbitrator’s powers | Art. 23 (1) of the Regulation of the Arbitration Court | It is submitted jointly if the parties have reached an agreement on this issue or they consider that the arbitrator cannot longer perform his functions due to any circumstances (insufficient qualifications, long-term business trip, etc.). |

Parties are not limited to the above-mentioned list and are free to apply other types of petitions and applications.

3.5. The decision of the arbitration court

The attractiveness of arbitration results from several factors, including the finality of the decision of the arbitral tribunal, as well as the legally guaranteed possibility of its enforcement. By including an arbitration clause containing the requirement to transfer the dispute to the arbitral tribunal in the contract, the parties agree that the decision made by the arbitral tribunal on the dispute arising from this agreement shall be final and the parties of the arbitration agreement shall execute it on a voluntary basis. The parties cannot violate this requirement unilaterally. In connection with this, legislation ensures the enforcement of the arbitral award, in case of non-execution of it.

After examining all the circumstances of the dispute, the arbitration court renders its decision by the majority of votes of the arbitrators, who are members of the arbitral tribunal.⁷²¹ If one of the arbitrators does not agree with the decision, he announces that and attaches a dissenting opinion to the decision.

If the parties in the course of the arbitration proceedings have reached a settlement agreement, by their request the arbitral tribunal will take a decision on the approval of this settlement agreement. In this case, the parties must specify in the application on what conditions they have

⁷²¹ Art. 38 of the Law “On Arbitration Courts” of the Republic of Uzbekistan.

reached a settlement agreement. The settlement agreement is approved by the decision of the arbitral tribunal, if it is not contrary to the law and does not violate the rights and legal interests of other persons. The content of the settlement agreement is set out in the decision of the arbitral tribunal.

The decision of the arbitral tribunal consists of four parts: introductory, descriptive, reasoning and operative parts.

The introductory part of the decision indicates the name of the arbitration court, the date of the decision, the place of arbitration, the case number, the composition of the arbitration court, names and locations (addresses) of legal entities, names, surnames, patronymics, places of residences of individuals who are arbitration parties, names, surnames, patronymics of representatives of the parties of the arbitration proceedings, including their powers.

The descriptive part of the decision, as a rule, contains an explanation of the jurisdiction of the arbitration court, the plaintiff's claims and the objections of the defendant, the applications of the parties.⁷²²

The reasoning part of the decision includes the circumstances of the dispute established by the arbitration court, proofs on which the arbitration court's conclusions about these circumstances are based, the rules which provide the arbitration court with guidance on taking the decision.⁷²³

The operative part of the decision must contain the conclusions of the arbitration court on granting or refusing to satisfy the claim as well as the amount of expenses related to the resolution of the dispute by the arbitration court, and the procedure for the distribution of these costs between the arbitration parties and, if necessary, the term and an order of the execution of the made decision.⁷²⁴

The decision is announced in the meeting of the arbitral tribunal. The arbitral tribunal has the right to declare only the operative part of the decision. The decision of the arbitral tribunal shall come into force immediately after its adoption. In this case the date of the decision shall be the date of its signature by the members of the arbitral tribunal. Before its signature by the arbitrators, the decision is verified by the chairman of the arbitration court or his deputy whether it complies with the prescribed form for decisions. It is important to note that the chairman of the arbitration court or his deputy cannot affect the freedom of the arbitration court in the adoption of the decision; they are only entitled to check the compliance with the prescribed form and the requirements for making a decision and, in exceptional cases, to pay attention to the composition of the arbitral tribunal taking into consideration special circumstances relating

⁷²² Art. 34 of the Rules of Arbitration Court at the CCI of Uzbekistan.

⁷²³ *Ibid.*

⁷²⁴ *Ibid.*

to the substance of the dispute. Finally, the draft of the decision is signed by the arbitrators who have considered the dispute, and stamped by the arbitration court.

A reasoned decision signed by the arbitrators is sent to the parties of the arbitration proceedings within a period not exceeding ten days from the date of the announcement of the operative part of the decision. After receiving the decision, if necessary, either party may refer again to the arbitration court with the following applications:

- on clarification of the decision, if any of its provisions appear incomprehensible and/or are interpreted differently by the parties or third parties; as a result of the application, a court order on clarification of the decision will be made (without changing its content), which becomes an integral part of the decision;
- on adoption of an additional decision, if any requirements that were announced in the course of the arbitration proceedings, and were considered by the arbitral tribunal, were not reflected in the decision; as a result of consideration of the application, an additional award can be accepted or it can be denied;
- on correction of misprints or arithmetic errors in the decision, if such mistakes were made for technical reasons in the decision; as a result of consideration of the application, an order on correction of misprints or arithmetic errors in the decision is made, which becomes an integral part of the decision, or can be refused (if such errors were not made).

The above-mentioned applications are considered by the panel of arbitrators which has considered the dispute.

3.6. Review of an arbitral award

Despite the general rule on the finality of an arbitral awards in exceptional cases it may be challenged by a party of the arbitration on the grounds stipulated by the Law of the Republic of Uzbekistan “On Arbitration Courts”. In this case, the arbitral award can be set aside only in case of violation of certain formal norms.⁷²⁵ There are six grounds for the annulment of an arbitral award and this list is exhaustive:

*1. The arbitration agreement is null and void on the grounds stipulated by legislative acts.*⁷²⁶

The arbitration agreement is considered to be void in case of non-compliance with the written form and the mandatory requirements to its content. In case of cancellation of the arbitral award

⁷²⁵ Non-existence of an arbitration agreement between the parties, improper notification of the parties about the arbitration proceedings, the arbitrator’s inconsistency with the requirements established by law, etc are the examples for formal norms.

⁷²⁶ Art. 352 (1) of the CPC of Uzbekistan; Art. 226 (1) of the EPC of Uzbekistan.

on this basis, in accordance Art. 48 (2) of the Law “On Arbitration Courts” this dispute is not subject to further consideration by the arbitration court.

*2. The arbitral tribunal has rendered a decision to a dispute which is not contemplated by the arbitration agreement or does not fall within the terms of it or contains findings on matters beyond the scope of the arbitration agreement.*⁷²⁷

For example, the parties to a loan agreement have agreed to refer the dispute arisen under this agreement to the arbitration court. The arbitration clause was not included in the contract of pledge, which is a part of the loan package. In this case, the arbitral tribunal will be competent to deal with disputes arising only from the credit agreement and it has no right to take a decision on foreclosure of the mortgaged property. In case of cancellation of the arbitral award on this basis, in accordance with Art. 48 (2) of the Law “On Arbitration Courts” this dispute is not subject to further consideration by the arbitration court.

3. The decision of the arbitral tribunal was issued in violation of Article 10 (1) and (3) of the Law “On Arbitration Courts”.

In accordance with the Law “On Arbitration Courts”, the arbitral tribunal may resolve disputes only by applying legislative acts of the Republic of Uzbekistan.⁷²⁸ This means that the arbitral tribunal may use only the legislation of the Republic of Uzbekistan, and not the law of any other state in considering the dispute and rendering a decision.

The state court considering an application for annulment of the arbitral award is not entitled to cancel the decision of the arbitral tribunal on the ground that the arbitral tribunal incorrectly applied or did not apply legal norms of the Republic of Uzbekistan. In accordance with the Law “On Arbitration Courts”, it is not entitled to examine the circumstances established by the arbitral tribunal or to reconsider the decision of the arbitral tribunal on the merits of the case.⁷²⁹

The state court can examine, whether the arbitral tribunal has applied the legislation of a foreign state, and if that is established, the state court is entitled to cancel the decision. In this case, in accordance with Art. 48 of the Law “On Arbitration Courts” parties to arbitration have the right to apply to an arbitration court again basing on the arbitration agreement.

*4. The composition of the arbitral tribunal or the arbitration does not meet the requirements of the Law “On Arbitration Courts”.*⁷³⁰

This concerns cases of the violation of the requirements for the arbitrators, the formation of the arbitral tribunal, the withdrawal of an arbitrator and the definition of rules of arbitration.

⁷²⁷ *Ibid.*

⁷²⁸ Art. 10 (1) of the Law “On Arbitration Courts” of Uzbekistan.

⁷²⁹ *Ibid.*, Art. 47.

⁷³⁰ Art. 226 (3) of the EPC of Uzbekistan; Art. 352 (3) of the CPC of Uzbekistan, Articles 14, 15, 16 and 25 of the Law “On Arbitration Courts”.

Examples may be: a dispute has been considered by an arbitrator who is not a citizen of the Republic of Uzbekistan; the opinion of a party of arbitration proceedings, who gave a notification on the election of an arbitrator has not been taken into account in the formation of the arbitral tribunal; in the course of the dispute consideration there were applied rules that were not agreed by the arbitration parties or they are contrary to the norms of the Law “On Arbitration Courts”, etc. In the case of cancellation of the arbitral award on such grounds, in accordance with Art. 48 of the Law “On Arbitration Courts” the parties of arbitration proceedings have the right to apply to an arbitration court basing on the arbitration agreement.

*5. The party of the arbitration, against whom the decision of the arbitral tribunal was rendered, was not properly notified of the election (appointment) of arbitrators or the time and place of the meeting of the arbitral tribunal and therefore was unable to present his or her case to the arbitral tribunal.*⁷³¹

Notification of the parties of arbitration proceedings is a prerequisite for consideration of the dispute by the panel of arbitrators, since the preparation of the parties to the court hearing, the collection of the necessary information and evidence regarding the circumstances of the case could affect the terms and the outcome of the case. That is why it is so important for the parties to the arbitration agreement to indicate their correct legal addresses and report to the arbitration court on their changes during the arbitration proceedings. In case of cancellation of the arbitral award on this basis, in accordance with Art. 48 of the Law “On Arbitration Courts” a party of arbitration proceedings shall have the right in accordance with the arbitration agreement to apply to an arbitration court.

6. If the dispute considered by the arbitration court may not be the subject of arbitration proceedings in accordance with legislative acts.

For example, arbitration courts cannot settle the disputes arising from administrative, family and labour relations. In case of cancellation of the arbitral award on this basis, in accordance with the Law “On Arbitration Courts” this dispute is not subject to further review by the arbitration court.⁷³²

When submitting an application for cancellation of an arbitral award, the applying party of arbitration must provide evidence of the grounds on which he or she refers for the purpose of cancellation of the decision. The application for cancellation of the arbitral award according to the jurisdiction will be sent to the economic court or civil court within the scope of their powers. It can be done within thirty days from the date of receipt of the arbitral award.⁷³³ The application

⁷³¹ *Ibid.*

⁷³² Art. 48 (2) of the Law “On Arbitration Courts” of Uzbekistan.

⁷³³ Art. 223 (1) of the EPC Uzbekistan, Art. 349(1) of the CPC of Uzbekistan.

for cancellation of the arbitral award will be considered in the state court within one month of the procedure established by the Economic Procedural and the Civil Procedural Code of the Republic of Uzbekistan. When considering the application for cancellation of an arbitral award, the economic court or the civil court has no right to investigate the circumstances established by the arbitral tribunal or reconsider the arbitral award on the merits.⁷³⁴

3.7. Enforcement of an arbitral award

The award of an arbitration court is enforced voluntarily in a manner and time set out in the award. If the time of enforcement is not set out in the decision of the arbitration court, then it will be the subject to its immediate execution.⁷³⁵ This is the general procedure for voluntary execution of the decision.

According to Art. 50 of the Law “On Arbitration Courts” of Uzbekistan, an arbitral award is subject to compulsory enforcement, if it is not executed voluntarily within the prescribed period. The enforcement of the arbitral award will be made in accordance with the Law of the Republic of Uzbekistan “On execution of judicial acts and the acts of other bodies” on the basis of a writ of execution, issued by a state court. The question of issuing a writ of execution to enforce the arbitral award is considered depending on the jurisdiction of the economic court or civil court at the request of the party of the arbitration proceedings in whose favour the arbitration award was rendered.⁷³⁶

The application for issuance of a writ of execution is submitted to the relevant state court according to the location or place of residence of the debtor; if the debtor's registered office or place of residence is unknown, it is submitted according to the location of its assets.⁷³⁷ This application is submitted in written form and must be signed by the party to the arbitration proceedings or by his/her representative, in whose favour the arbitral award was rendered.⁷³⁸ In the latter case, the statement confirming the representative's right to sign the application will be attached to the application for issuance of a writ of execution.

The followings must be set out in the application for issuance of a writ of execution:

- the name of the state court to which the application is submitted;
- the name and composition of the arbitral tribunal that made the decision and its location;
- the name (first name, middle name) of the parties of the arbitration proceedings, their location (postal address) or place of residence;

⁷³⁴ Art. 225 (1) of the EPC of Uzbekistan, Art. 351(5) of the CPC of Uzbekistan.

⁷³⁵ Art. 49 of the Law “On Arbitration Courts” of Uzbekistan.

⁷³⁶ Art. 354 (2) of the CPC of Uzbekistan, Art. 228 (2) of the EPC of Uzbekistan.

⁷³⁷ *Ibid.*

⁷³⁸ Art. 355 (1) of the CPC of Uzbekistan, Art. 229 (1) of the EPC of Uzbekistan.

- the date of the decision of the arbitration court;
- the date of receipt of the arbitral award by the arbitration party, submitting the application;
- the request to issue a writ of execution to enforce the arbitral award.⁷³⁹

Due to the fact that the national court is not aware of the circumstances of the dispute, the application must be accompanied by:

- a certified copy of the arbitral award (copy of the Permanent Arbitration Court's decision will be certified by the chairman of the arbitral tribunal);
- a duly certified copy of the arbitration agreement;
- documents confirming the payment of state fees in the prescribed manner and amount;
- notification of receipt or other document confirming the direction of the copy of the application to issue a writ of execution to enforce the arbitral award to the other party of arbitration.⁷⁴⁰

A sample of a form for an application to issue a writ of execution to enforce the arbitral award at the economic court is as follows:

| |
|--|
| <p>To the Economic Court of</p> <p>_____</p> <p>(name of the Economic Court at the location / place of residence of the debtor or location of his property)</p> <p>APPLICANT: _____</p> <p>_____</p> <p>(full name of the legal entity / full name of individual)</p> <p>_____</p> <p>(postal address of the legal person / place of residence of a natural person)</p> <p>_____</p> <p>(bank details: settl./acc., MFI, VAT, IBAN)</p> <p>_____</p> <p>(phone, fax, e-mail)</p> <p>DEBTOR: _____</p> <p>_____</p> <p>(full name of the legal entity / full name of individual)</p> <p>_____</p> <p>(postal address of the legal person / place of residence of a natural person)</p> <p>_____</p> <p>(bank details: settl./acc., MFI, VAT, IBAN)</p> <p>_____</p> <p>(phone, fax, e-mail)</p> <p>Application for issuance of a writ of execution to enforce the arbitral award</p> <p>Arbitration Court at the Chamber of Commerce of the Republic of Uzbekistan, Bukhara region (address: 705012, Bukhara, Mustaqillik Street, 1) consisting of</p> <p>_____</p> <p>_____</p> <p>(name of arbitrators (sole judge), who considered the dispute)</p> |
|--|

⁷³⁹ Ibid.

⁷⁴⁰ Ibid.

by examined the case number ____ / of 200- on the suit of _____
 _____ (name of applicant)
 to _____, " ____ " _____ 200__ rendered a decision
 _____ (name of debtor) (date of judgment)
 in Bukhara on _____

(requirements, that are satisfied with the decision, are indicated for example, to recover from the defendant ...)

This decision has been received " ____ " _____ 200__
 _____ (date of receipt of the decision)

In accordance with paragraph 2 of Article 49 of the Law of Uzbekistan "On Arbitration Courts" if the date of performance is not established in the decision of the arbitration court, it is subject to immediate execution.
 Since the decision of the Arbitration Court at the Chamber of Commerce of the Republic of Uzbekistan on the number ____ " ____ " _____ 200__
 _____ (number and date of the decision),
 has not established its period of performance, it is subject to immediate execution.
 However, the decision of " ____ " _____ 200__ was not voluntarily executed by debtor.
 _____ or

In accordance with Article 50 of the Law of Uzbekistan "On Arbitration Courts" if the arbitral award is not executed voluntarily within the period prescribed by the decision of the arbitral tribunal, it is subject to compulsory enforcement.

In accordance with the decision of the Arbitration Court at the Chamber of Commerce of the Republic of Uzbekistan № _____ from " ____ " _____ 200__
 _____ (number and date of the decision),
 it should have been executed till " ____ " _____ 200__.
 However, the decision of " ____ " _____ 200__ was not voluntarily executed by the debtor.
 Given the above, and pursuant to Articles 50, 51 of the Law of Uzbekistan "On Arbitration Courts", Articles 155-6, 155-7 EPC of Uzbekistan, **I request the court to** issue a writ of execution to enforce the decision of the Arbitration Court at the Chamber of Commerce of the Republic of Uzbekistan, Bukhara region № _____ from " ____ " _____ 200__.

Annex on ____ sheets:

1. The decision of the Arbitration Court at the Chamber of Commerce of the Republic of Uzbekistan, Bukhara region № _____ from " ____ " _____ 200__ .
 (original or copy certified by the chairman of the arbitration court).
2. The arbitration agreement or contract containing the arbitration clause (duly certified).
3. A document confirming payment of state duty for filing the application for issuing a writ of execution to enforce the arbitral award (original payment order or receipt).
4. Notification or other document confirming the direction of the copy of the application to issue a writ of execution to enforce the arbitral award to other party of the arbitration (the original postal receipt).
5. The power of attorney or other document confirming the right of the person to sign the application (if the application is signed by a representative).

" ____ " _____ 20__.
 / _____ / _____
 _____ (signature) _____ (name of applicant)

The application for issuance of a writ of execution to enforce the arbitral award may be submitted not later than six months after the end of the term for voluntary execution of the

decision of the arbitral tribunal.⁷⁴¹ When the deadline was missed for reasons deemed valid by the state court, a missed period can be recovered.⁷⁴² The application for issuance of a writ of execution to enforce the arbitral award is considered by a single judge.⁷⁴³ Parties to arbitration will be notified of the time and place of the meeting. The failure of the indicated persons, who were duly notified of the time and place of the meeting, is not an obstacle to consider the application.⁷⁴⁴

Upon review of the application for issuance of a writ of execution to enforce the arbitral award the state court makes an order to issue a writ of execution or to refuse it.

When considering the application for issuance of a writ of execution to enforce the arbitral award, the economic court or civil court has no right to investigate the circumstances established by the arbitral tribunal or reconsider the decision of the arbitral tribunal on the merits.⁷⁴⁵ The state court may refuse to issue a writ of execution to enforce the arbitral award only in cases where a party of the arbitration against whom the decision of the arbitral tribunal was rendered, will present evidence to support the grounds for cancellation of the decision (the grounds have been discussed above (the invalidity of the arbitration agreement, the composition of the arbitral tribunal or the arbitration does not meet the requirements, etc.), and if the decision of the arbitral tribunal has not yet become binding on the parties of arbitration proceedings or has been cancelled.⁷⁴⁶

In the absence of the above reasons, the order to issue a writ of execution to enforce the arbitral award will be taken. It will take effect and be enforced immediately. The writ of execution to enforce the arbitral award will be issued with the order to issue the writ of execution at the same time.⁷⁴⁷ Following the issuance of a writ of execution to enforce the arbitral award, enforcement proceedings are carried out under the general procedure (banking institutions or the Department of the Execution of Court Decisions, logistical support activities of the courts under the Ministry of Justice of the Republic of Uzbekistan) in accordance with the Law of the Republic of Uzbekistan “On the performance of judicial acts and acts of other bodies”.

§ 4 Summary

More than eleven years have passed after the first arbitration court has been created. Despite this fact, many entrepreneurs and practitioners are still not aware of the possibilities of dispute

⁷⁴¹ *Ibid.*

⁷⁴² *Ibid.*

⁷⁴³ *Ibid.*, Art. 230 (1) of the EPC of Uzbekistan; Art. 356 (1) of the CPC of Uzbekistan.

⁷⁴⁴ *Ibid.*

⁷⁴⁵ *Ibid.*

⁷⁴⁶ Art. 357 of the CPC of Uzbekistan; Art. 231 of the EPC of Uzbekistan.

⁷⁴⁷ Art. 358 of the CPC of Uzbekistan; Art. 232 of the EPC of Uzbekistan.

resolution in the arbitration court, or they are not sufficiently familiar with the procedural issues of participation in the arbitration proceedings. It leads them to some difficulties on conclusion of an arbitration agreement and the determination of its content, the preparation of the statement of claim, participation in arbitration proceedings, as well as on enforcing of arbitral awards. Therefore, a number of entrepreneurs and citizens still believe that the only possible way to resolve disputes is to appeal to state court. Chapter IV of this study stops at each issue, mentioned above through answering to the above questions.

The basic samples of documents that can be used by the parties during the arbitration proceedings are presented in this chapter. For example, it presents the basic procedure of the Arbitration Court at the Chamber of Commerce of the Republic of Uzbekistan, which is one of the most reputable and reliable arbitration courts operating in Uzbekistan today. The chapter also contains a collection of documents of the Arbitration Court at the CCI of Uzbekistan as well as regulations and extracts from them on matters relating to arbitration.

Chapter V: Grounds for refusal of enforcement of foreign arbitral awards under the New York Convention 1958

As *Albert van den Berg* noted it is a well-established fact that the major part of arbitral awards are internationally enforced: most of them voluntarily, and others through the courts. However, a minority does not fall in either category. The third category needs to be monitored continuously as it constitutes an indicator of ultimately how effective international arbitration is in the end.⁷⁴⁸ Approximately 10% of the reported cases show that refusals remain more or less stable. The reasons why enforcement of awards was refused are more interesting in terms of qualitative research. Art. III of New York Convention provides National Courts' obligation to recognize and enforce arbitration awards, but it is subject to limited exceptions. Recognition and enforcement may be refused only in the case of the party's ability to prove even one of the exclusive grounds for refusal enumerated in Art. V(1) of the NYC.⁷⁴⁹ This party is the person or entity against whom enforcement is sought. The enforcement may also be refused by the court *ex officio* if the award violates that state's public policy.⁷⁵⁰

The validity of a legal act depends on the territory of the State where it has been issued. Nevertheless, according to International Treaties it can be extended to the territory of another country, focusing particularly on the concept of reciprocity. As is mentioned earlier by the author of this dissertation, a foreign arbitral award, in order to be effective in the territory of Uzbekistan, should pass through two stages: (a) recognition of the legal act and (b) its enforcement. Uzbekistan's bilateral or multilateral agreements with foreign countries play an important role in these stages. Since some international agreements do not contain the rules on setting aside the foreign court judgements and arbitral awards, Uzbekistan shall use the provisions of the New York Convention 1958 and the 1992 CIS Agreement in case of refusal of foreign court judgements and arbitration awards. However, it should be borne in mind that the grounds for refusal of foreign arbitral awards, listed in the Kiev Agreement, in the Minsk Convention and in bilateral treaties of the Republic of Uzbekistan differ from the grounds of the New York Convention.⁷⁵¹

⁷⁴⁸ van den Berg, *Why Are Some Awards Not Enforceable?*, in: *New Horizons in International Commercial Arbitration and Beyond*, ICCA Congress Series 12 (2005), pp. 291-326.

⁷⁴⁹ The original texts of the New York Convention are available at <http://www.newyorkconvention.org>.

⁷⁵⁰ Lew/Mistelis/Kröll (*supra* n. 348), p. 706; van den Berg, *The New York Convention of 1958: An Overview*, in: Gaillard/Di Pietro (eds.), *Enforcement of Arbitration Agreements and International Arbitral Awards: The New York Convention in Practice*, London 2008, pp. 39-68 (55-56); van den Berg (*supra* n. 553).

⁷⁵¹ Under these instruments, the recognition of a foreign court award can be refused by Uzbek courts in the following cases:

- there is a decision of the economic court of the Republic of Uzbekistan in a dispute between the same parties on the same subject and on the same grounds;

§ 1 Invalidity of an arbitration agreement: Art. V (1) (a) NYC

According to this ground, enforcement may be refused, if the party against whom enforcement is sought (defendant) asserts and proves that *“the parties to the agreement referred to in Art. II were, under the law applicable to them, under some incapacity, or the said 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”*.⁷⁵² This provision is implemented into the legislation of Uzbekistan and Germany as well.⁷⁵³ Most parties in practice relying on the lack of a valid arbitration agreement either claim that the form requirements have not been fulfilled or that it lacks substantive validity. Lack of substantive validity exists when the parties never entered into an arbitration agreement at all; it has been stopped or is not valid for other reason.⁷⁵⁴ By contrast the lack of subjective arbitrability, governed by the law applicable to the parties according to Articles 7 and 12 of the EGBGB, has played only a minor role.⁷⁵⁵

§ 2 Violation of due process: Art. V (1) (b) NYC

Enforcement may be refused, if the defendant asserts and proves that he *“was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case”*.⁷⁵⁶

In Germany there was a case before the OLG (Court of Appeal) Hamburg in which the arbitrator had failed to communicate the claimant’s letter directed to the defendant. It was a serious mistake for an arbitrator.⁷⁵⁷ Trying to rescue the award nonetheless, the Court of Appeal considered that a violation of due process exists if it cannot be excluded that the arbitrator would have reached a more favourable result for the defendant, if the complained event had not occurred. That inquiry did not help as the court found that a more favourable result could not be excluded, and the court refused enforcement.

-
- there is a recognised decision of an authorised court of a third state – CIS member state or non-member of the CIS – in a dispute between the same parties on the same subject and on the same grounds;
 - the dispute is resolved by an unauthorised court;
 - the other side was not informed of the trial; or
 - the three-years limitation period on applying the judgment for enforcement has expired.

⁷⁵² Art. V (1) (a) of the NYC.

⁷⁵³ Art. 256 (1) of the EPC of Uzbekistan; § 1059 (2) (1.a) ZPO.

⁷⁵⁴ Kröll, Recognition and Enforcement of Foreign Arbitral Awards in Germany, *IntALR* 5:5 (2002), 160-177 (165).

⁷⁵⁵ See BGH, 23 April 1998, *YBCA* 24 (1999), 928 where a Yugoslavian party did not have the necessary foreign trade permission and for this reason couldn’t validly enter into an arbitration agreement with a foreign party.

⁷⁵⁶ Cf. Art. V (1) (b) of the NYC; Art. 256 (2) of the EPC of Uzbekistan; § 1059 (2) (1.b) ZPO; van den Berg (*supra* n. 748), p. 296.

⁷⁵⁷ OLG Hamburg, *YBCA* 2 (1977), 241 (Germany No. 11).

In another case, the LG Bremen refused enforcement of an award which was made in London. The reason was that the German party against whom enforcement was sought had not been informed of the arguments of the opposing party.⁷⁵⁸ The reported facts of the case show that the German party submitted documents to the arbitral tribunal and had no further communication from the arbitrators until he received an award. A case where the BayObLG denied enforcement of a Moscow award is also considered an example of the refusing of an award. In this case the German buyer had not been duly informed of the arbitration. The Court found that although Russian arbitration law provides that a communication made to the defendant's last-known address suffices if no other address can be found after making reasonable inquiry, there was no evidence here that any attempt had been made to find the correct address of the German buyer.⁷⁵⁹ From the above-mentioned cases it can be concluded that most of the refusals could have been avoided if the arbitral tribunal had paid closer attention to the procedural conduct of the case.

§ 3 Excess of authority: Art. V (1) (c) NYC

Recognition and enforcement of the award may be refused under Art. V (1) (c) NYC,⁷⁶⁰ “*if 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, provided that, if the decisions on matters submitted to arbitration can be separated from those not submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced*”.⁷⁶¹

While the presumption is that the tribunal has acted within its powers, this provision covers two various issues: *extra petitia* (the tribunal's decision rendered outside its jurisdiction or without jurisdiction; *ultra petitia* (where the tribunal has exceeded its jurisdiction).

The second type of the case *ultra petitia*, under the German interpretation falls within the scope of Art. V(1) (c) NYC. The main point here is that the courts looked beyond the wording of the claims which were submitted to establish whether the tribunal awarded more than requested. For instance, the OLG Stuttgart had to deal with an award for the amount of 129,621 DM though the claim submitted only related to 119,621 DM.⁷⁶² The court rejected the defence of *ultra petitia*, because it was cleared from the materials submitted with the request for arbitration that

⁷⁵⁸ LG Bremen, *YBCA* 12 (1987), 486-487 (Germany No. 28).

⁷⁵⁹ BayObLG, 16 March 16 2000, *YBCA* 27 (2002), 445-450 (Germany No. 53).

⁷⁶⁰ Lew/Mistelis/Kröll (*supra* n. 348), p. 713.

⁷⁶¹ Cf. Art. V (1) (c) of the NYC; Art. 256 (3) of the EPC of Uzbekistan; § 1059 (2) (1.c) ZPO; van den Berg (*supra* n. 748), p. 301.

⁷⁶² OLG Stuttgart, 2 June 1981, *IntALR* 2002, 168.

the claimant, in fact, applied for the amount granted while its specified claim was focused on a miscalculation.

§ 4 Irregularities in the composition of the arbitral tribunal or procedure: Art. V (1) (d) NYC

The Geneva Convention of 1927 (the predecessor of the New York Convention) proves that enforcement of the award could be refused if the composition of the arbitral tribunal or procedure had not coherence with both: parties' agreement and the law of the country where the arbitration took place. According to New York Convention, under this ground enforcement may be refused, in the case of asserting that "*the composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place*".⁷⁶³

Under the German law, the improper composition of a tribunal is closely connected with the applicable challenge processes. A different result may influence the composition of the tribunal, if the challenges were conducted properly. For instance, the Bavarian Highest Regional Court has annulled an award because of the tribunal's improper composition, where the challenge proceedings (initiated by the parties) were dealt with by the arbitral tribunal and not – as required by the old German law applicable to the challenge procedure – by the courts.⁷⁶⁴

§ 5 Award is not binding, suspended or set aside: Art. V (1) (e) NYC

The fifth ground to refuse recognition and enforcement is under Art. V(1) (e) NYC, where "*the award has not yet become binding on the parties or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made*".⁷⁶⁵ Compared to Uzbekistan, Germany did not implement this provision of the New York Convention into its legislation. According to German arbitration law only final awards binding in their country of origin can be declared enforceable. German courts interpret the "may" in Art. V of the NYC in a way that it becomes an obligation and does not leave the arbitrator any discretion even when the annulment decision is under appeal and thus not binding yet.

a) Award is not binding: The word "final" was not chosen by the NYC Drafters; instead they chose the expression "not binding". The purpose was merely to avoid the problem of the party

⁷⁶³ Cf. Art. V (1) (d) of the NYC; Art. 256 (4) of the EPC of Uzbekistan; § 1059 (2) (1.d) ZPO.

⁷⁶⁴ BayObLG, 24 February 1999 (4 Z Sch 17/98).

⁷⁶⁵ Art. V (1) (e) of the NYC; Art. 256 (5) of the EPC of Uzbekistan.

seeking enforcement having to request leave for enforcement by the courts at the place of arbitration.⁷⁶⁶ Here it is important to attend that the meaning of the term “binding” has led to debates. The central problem is whether this terms can be interpreted autonomously or is subject to domestic law determination.⁷⁶⁷

b) Award has been set aside or suspended: If the party resisting enforcement has successfully applied for a suspension or setting aside of the award the enforcement court may adjourn its decision.⁷⁶⁸

Under the German Arbitration Act, the applicant may only base his motion to have an award set aside on the grounds listed in § 1059 (2) ZPO. The list is exhaustive and may not be extended by the court. The burden of proving that one of the grounds for setting aside applies, that is, that an exception to the rule of the presumptive validity of arbitral award applies, is on the party seeking to set aside the award.⁷⁶⁹

According to German laws the courts can reverse their decision on enforceability of an award if it is set aside abroad even after it has been declared enforceable in Germany.⁷⁷⁰ Thus, a German decision declaring a foreign arbitral award enforceable may be withdrawn if the award is set aside in the country where it was issued.

A case relating to a ship repair contract, in which an application was made to the German courts for enforcement of an award rendered in Russia, shows the application of the German approach. The OLG Rostock refused to enforce the award focusing on that the award had been annulled by the Russian courts.⁷⁷¹ Following the decision not to enforce by the German Court, the Highest Court of the Russian Federation rendered a final decision which upheld the previously annulled award. As a result, the German Federal Supreme Court (BGH) reversed the prior decision of the Rostock Court and held that the award should be declared enforceable, as Russian courts had ruled that the award was binding.⁷⁷²

The purpose of an action to have the award set aside by a domestic court at the seat of the arbitration is to preserve the integrity of the arbitral process. It must not serve as a means to

⁷⁶⁶ See van den Berg, *The New York Arbitration Convention of 1958: Towards a Uniform Judicial Interpretation*, Deventer 1994, pp. 333-337.

⁷⁶⁷ Verbist, Challenges on Grounds of Due Process Pursuant to Article V (1) (b) of the New York Convention, in: Gaillard/Di Pietro (eds.), *Enforcement of Arbitration Agreements and International Arbitral Awards: The New York Convention in Practice*, London 2008, pp. 679-728 (722).

⁷⁶⁸ Art. VI of the NYC.

⁷⁶⁹ Born, *International Commercial Arbitration*, Alphen aan den Rijn 2009, p. 2562.

⁷⁷⁰ § 1061 (3) ZPO provides that: if the award is set aside abroad after having been declared enforceable, an application for setting aside the declaration of enforceability may be made.

⁷⁷¹ See OLG Rostock, 28 October 1999, *YBCA* 25 (2000), 717, 719. The Moscow Municipal Court had aside the award declared that the Arbitral Tribunal had decided a conflict not provided for in the arbitration agreement.

⁷⁷² BGH, 22 February 2001, *YBCA* 29 (2004), 724.

achieve a review of the tribunal's decision on the merits. The principle of the finality of the award prevents a "*revision au fond*" in setting aside proceedings.

Under the German Arbitration Act, the setting aside of an award leads to the revival of the arbitration agreement with respect to the dispute, thereby excluding the jurisdiction of the otherwise competent domestic courts.

As *van den Berg* noted "*national courts around the world show an increasing willingness to recognize and enforce foreign arbitral awards*".⁷⁷³ The question of enforcement of annulled awards in the country or under whose law it was rendered still remains open.⁷⁷⁴

National courts have taken divergent approaches to the enforcement of annulled awards. This sub-section examines the approaches of domestic courts in Germany.

In deciding whether or not to enforce, the domestic courts have adopted different rationales. The decisions of French courts for example, show France's strong pro-enforcement bias and have been grounded in France's domestic law, made applicable through the more-favourable-right provision of the New York Convention.⁷⁷⁵ This can be contrasted with the German approach, which appears to be more deferential to the status of the award at the arbitral *situs*. German courts will not readily enforce an award that has been set aside at the arbitral *situs*, particularly when the parties' agreement makes no reference to German law.

The annulment of the award after it had been declared enforceable, in addition of being admitted as a new fact in appeal proceedings, also justifies a separate action for the annulment of the declaration of enforceability. It does not automatically affect the declaration of enforceability but only gives the right to an action. The prevailing view in Germany is that, irrespective of the reason underlying the annulment proceedings in the country of origin, the fact that the award is annulled leads to an annulment of the declaration of enforceability. That is even so if the ground relied on has been rejected in the German proceedings leading to the declaration of enforceability. Grounds which would have justified the rejection of an application to have an award declared enforceable but which were only discovered after it had been granted do not as such justify the annulment of the declaration. A party may only try to initiate annulment proceedings against the award in its country of origin on the basis of these grounds and then use its annulment to have the declaration of enforceability annulled, but there is no direct way. The approach adopted in Germany is for enforcing courts to base their decision as to whether

⁷⁷³ *van den Berg*, Refusals of Enforcement under the New York Convention of 1958: The Unfortunate Few, *ICC International Court of Arbitration Bulletin* 10 (1999), Special Supplement, 75-94.

⁷⁷⁴ *Weinacht*, Enforcement of Annulled Foreign Arbitral Awards in Germany, *JIntlArb* 19 (2002), 313-336.

⁷⁷⁵ Art. VII of the NYC.

to enforce on the arbitral award's status in the country where the award was made.⁷⁷⁶ Unlike other European countries' approach which focuses more on the award, the German approach views the award as inextricably linked with the judicial regime of the country where the award was made.⁷⁷⁷

The German approach to enforcement is therefore more sensitive to the status of the award in the arbitral *situs* as it does not view the award as separate from the judicial regime of the country where the award was issued or subject the award to full review in the enforcing country. In connection with the composition of the arbitral tribunal, it has been confirmed that the practice of having a party-appointed arbitrator decide as sole arbitrator if the other side fails to appoint its arbitrator is not a violation of public policy in international cases.⁷⁷⁸

§ 6 *Ordre Public* – Art. V (2) (b) NYC

The public policy exception defines the boundary between party autonomy in the settlement of disputes on the one hand and the state judiciary on the other. According to Art. V (2) (b) of the NYC:

“Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that:

*(b) The recognition or enforcement of the award would be contrary to the public policy of that country.”*⁷⁷⁹

In proceedings to have a foreign award declared enforceable in Germany the public policy exception has been rarely invoked successfully since it has been interpreted very narrowly. In line with an international practice foreign awards are submitted to the narrower *ordre public international*.⁷⁸⁰ According to the constant jurisprudence of the Supreme Court (BGH) an award does not automatically violate the international public policy if the application of mandatory

⁷⁷⁶ § 106 (1) ZPO provides that recognition and enforcement of foreign arbitral awards shall be granted in accordance with the Convention. Therefore, under German domestic law, the main legal standard for the enforcement of foreign arbitral awards is the New York Convention. Although enforcement is also possible pursuant to bilateral and multilateral agreements whereby the more-favourable-right provision will apply. Cf. Gesetz zur Neuregelung des Schiedsverfahrensrechts (Act on the Reform of Law relating to Arbitral Proceedings), 22 December 1997 (BGBl. I at 3224). This Act entered into force on 1 January 1998, revising the ZPO Book X, which deals with the Arbitration Procedure (Schiedsrichterliches Verfahren).

⁷⁷⁷ Smith, Vacated Arbitral Awards: Recognition and Enforcement Outside the Country of Origin, *Boston University International Law Journal* 20 (2002), 355-392 for a more detailed discussion of the approach taken by the German courts.

⁷⁷⁸ BGH, *RIW* 2001, 458 (confirming BGHZ 98, 70, 75). In an earlier decision relating to domestic arbitration the Supreme Court (BGH) had considered such a practice to be contrary to public policy, see BGHZ 54, 392.

⁷⁷⁹ Art. 256 Paragraph 8 (2) EPC of Uzbekistan.

⁷⁸⁰ BGH, *NJW* 1986, 3027, at 3028; BGHZ 123, 268, at 270 (*NJW* 1993, 3269; *EuZW* 1994, 29); OLG Hamburg, *RPS* 1/1999, 16; OLG Brandenburg, *RPS* 1/2001, 21; against such a distinction Schwab/Walter, *Schiedsgerichtsbarkeit*, 7. Aufl., München 2005, Chap. 30, para. 21, fn. 8, according to whom the definition of the domestic *ordre public* is already much wider than in other countries so that there is no need to distinguish between the *ordre public national* and the *ordre public international*.

German law would have led to a different result, but only if its enforcement would violate the basic principles of German public and economical life in such a way that its enforcement seems simply unbearable. The Higher Regional Court of Bremen, for example, declared a Turkish award enforceable in Germany, although the reasons given for the award did not meet the standards of the German national *ordre public*.⁷⁸¹ It took into consideration that the legal traditions of countries differ regarding the legal reasoning applied, and that, in light of this, foreign awards should be subject to much lower requirements.

In practice it is often distinguished between the substantive *ordre public* and the procedural *ordre public* without, however, any legal significance attached to it.

6.1. Substantive *Ordre Public*

The substantive *ordre public* is the only, albeit very limited, gate to a review of the award's content. The Supreme Court (BGH) has made clear that this must not lead to a comprehensive verification of the application of the law, but to verification that the result is compatible with the fundamental principles of the German legal system. It must, however, not result in a revision *au fond*, which is not permitted. In particular, a mere violation of the applicable substantive or procedural rules is not sufficient.

Recently, however, the OLG Hamburg expressed a certain favour for a more limited review of the fact-finding to avoid the threat of a revision *au fond*. The case, already mentioned above in the context of separability, concerned the application to have an ICC award rendered in Switzerland declared enforceable in Germany. The defendant asserted that the claimant, an outside business counsel for the defendant, used the claimed payments arising out of a counselling contract for a project in North Africa for bribery. The arbitral tribunal rejected this allegation since in its view the respondent did not submit sufficient evidence to prove it. In the enforcement proceedings the respondent asked the court to reopen the fact-finding of the tribunal. The court expressed its favour for the view that an enforcement court could only examine the facts established by the arbitrator when it could be shown that the arbitral tribunal violated the rules as to taking evidence. In the end the court left the question, however, undecided since even on the basis of the wider position of the Supreme Court (BGH) no violation of public policy could be established.

In relation to interest, courts have held that neither the ordering of interest considerably above the German rate nor awarding compound interest violates public policy. The same applies in relation to periods of limitations where German courts will only step in where the application

⁷⁸¹ OLG Bremen, *RPS* 2/2000, 18; English summary, *IntALR* 2001, N-26.

or the mere existence of the statutes lead to an exclusion of any period of limitation in practice or to a period of limitation that is too short. Otherwise they will not rule on the correctness of the application of foreign statutes of limitation. Especially in procedural matters the recognition and enforcement of a foreign arbitral award that complies with foreign law could only be denied in exceptional cases, where the basic principles of public and economical life would be infringed to a high degree. Examples of the infringement of the substantive *ordre public* are awards granting punitive damages⁷⁸² and awards infringing compulsory commercial laws, like competition law⁷⁸³, currency regulations⁷⁸⁴, import restrictions⁷⁸⁵ and price fixing⁷⁸⁶.

6.2. Procedural *Ordre Public*

The procedural *ordre public* is violated if the award has been rendered in proceedings which deviate from the basic principles of German procedural law in a way that the procedure cannot be considered as being in accordance with the basic principles of fair trial. The procedural *ordre public* is manifested especially in the right to be heard before the judge or the arbitral tribunal respectively. Consequently parties have often tried to claim an alleged violation of the right to be heard in the context of public policy, albeit with limited success. Though Art. V (2) of the NYC provides that violations of public policy have to be observed *ex officio*, German courts have, particularly in connection with an alleged violation of the right to be heard, required that the party specifies the alleged violation and its effect on the award. For that the party was requested to state how it would have defended itself had it been granted sufficient opportunity to do so.

In connection with the composition of the arbitral tribunal, it has been confirmed that the practice of having a party-appointed arbitrator decide as sole arbitrator if the other side fails to appoint its arbitrator is not a violation of public policy in international cases.⁷⁸⁷

The relevant decision also dealt with the wider question as to the effect of the participation of a biased arbitrator, which will in general not constitute a violation of public policy. The Supreme Court (BGH) has held that a violation of public policy is generally excluded when the lack of impartiality can be raised in proceedings in the place of origin, which fulfil the same

⁷⁸² Schwab/Walter, *Schiedsgerichtsbarkeit*, 7. Aufl., München 2005, Chap. 30, para. 22; Stein, Punitive Damages – eine Herausforderung für die Internationale Wirtschaftsschiedsgerichtsbarkeit, *EuZW* 1994, 18-25 (21).

⁷⁸³ BGHZ 46, 365; see also the decision of the ECJ, 1 June 1999, Case 126/97, *Eco Swiss China Time Ltd v. Benetton International NV* [1999] ECR, I-3055.

⁷⁸⁴ RGZ 108, 139.

⁷⁸⁵ BGH, *KTS* 1964, 174.

⁷⁸⁶ BGHZ 27, 249.

⁷⁸⁷ BGH, *RIW* 2001, 458; confirming BGHZ 98, 70, 75. In an earlier decision relating to domestic arbitration the Supreme Court (BGH) had considered such a practice to be contrary to public policy; see BGHZ 54, 392.

standards as challenge proceedings in Germany. Only where that is not possible or a challenge has been unsuccessful the public policy defence may be invoked. A violation of public policy will in those cases only exist where the arbitrator was clearly biased and that bias influenced the award.

The dispute arose out of the non-performance of a contract for carriage of goods by sea. When no amiable solution could be found the owners appointed the person who had led the negotiations on their behalf as their arbitrator. Since the respondent did not nominate its arbitrator, the claimant's appointee became the sole arbitrator in accordance with the applicable LMAA Rules and rendered an award in favour of the claimant. In the ensuing proceedings to have the award declared enforceable in Germany the respondent raised *inter alia* the defences that enforcement of the award would be contrary to public policy. The lower instances accepted that argument. They considered the right to an impartial arbitrator so important that any violation constituted a violation of public policy irrespective of the existence of challenge proceedings. In those cases where the foreign law provides for sufficient remedies against the award, the right to an impartial tribunal is outweighed by the requirements of legal certainty, which also form part of public policy. The court based the balancing undertaken on the fact that also in German law the challenge procedure is subject to time limits and cannot be initiated after an award has been rendered. The same must apply for foreign awards which are submitted only to the less stringent *ordre public international*.

To what extent the enforcement of an award allegedly obtained by fraud violates the *ordre public* became an issue in proceedings before the Supreme Court (BGH) to have a domestic award declared enforceable.⁷⁸⁸ In the case an award on agreed terms concerning the price to be paid for shares was entered into on the basis of incorrect but certified company accounts. The court held that a violation of public policy can be assumed in all cases that would give rise to an action for restitution under § 580 of the ZPO. In this context the court, however, also considered § 581 of the ZPO to be applicable according to which allegations of fraud only justify an action under § 580 of the ZPO if they have been proven in a criminal court. As in the case at hand, no binding decision had yet been rendered and the Supreme Court (BGH) denied a violation of public policy despite the fact that the accounts were clearly incorrect and criminal investigations had been started. In the end, however, the court denied the declaration of enforceability on the basis of § 826 of the Civil Code, which it considered to be an additional non-regulated ground to deny enforcement.

⁷⁸⁸ BGH, *WM* 2001, 104 with a note of Kröll, *WUB* 2001, 351; English summary, *IntALR* 2002, N-12.

It is submitted that in an international case where no additional ground for refusal exists the court would probably have stayed the proceedings for a declaration of enforcement until criminal proceedings were terminated. In this respect, however, the mere allegation of fraud not supported by appropriate evidence is not sufficient.⁷⁸⁹ The continuance of arbitration proceedings though the party has become insolvent does not violate the procedural public policy.

§ 7 Preclusion to rely on grounds

Most of the defences provided for in Art. V of the NYC would justify challenges of the award in its country of origin or can even be raised in arbitration proceedings to challenge the jurisdiction of the tribunal or objecting to a procedural order. Where the defences can still be invoked in challenge proceedings in the country of origin, they can without doubt also be raised in the German enforcement proceedings. However, often the relevant arbitration law provides that these objections must be raised within a certain period, after which the parties are either considered to have consented to a measure or are at least precluded from raising the defence. To what extent these defences can nevertheless be relied on in proceedings on the enforceability of the award often determines the outcome of those proceedings.

Under the old law, the Supreme Court (BGH) had decided in relation to the allegation that no valid arbitration clause existed that this defence generally had to be invoked in the country where the award was rendered if the law of the place of arbitration provided for recourse. In its decision, the Supreme Court (BGH) relied heavily on the wording of § 1044 (2) no. 1 of the ZPO, which did not provide that enforcement could be resisted if there is no valid arbitration agreement, but instead made the rejection of the declaration of enforceability dependent on the showing that the award is not legally valid under the law applicable to the arbitration proceedings. The court held that when the time for invoking the lack of a valid arbitration agreement in challenge proceedings at the place of arbitration has expired the award becomes legally valid and any reliance on the old § 1044 (2) no. 1 of the ZPO to resist enforcement is generally excluded. The only exception permitted under public policy considerations was where the Arbitration Tribunal had ascertained its jurisdiction in a completely arbitrary way finding no basis whatsoever in the parties relationship.⁷⁹⁰ While the Supreme Court (BGH) appeared to limit the preclusion to the defence of the missing arbitration agreement some higher regional

⁷⁸⁹ OLG Dresden, 20 October 1998 (11 Sch 4/98).

⁷⁹⁰ BGHZ 52, 184 at 190.

courts also considered other defences to be excluded when they had not been invoked at the place of arbitration.

Different views exist as to whether this jurisprudence continues to be valid under the new arbitration law. The OLG Schleswig held that with the replacement of the old § 1044 of the ZPO the jurisprudence on preclusion lost its basis also. In its view the wording of Art. V (1) (a) of the NYC clearly provides that enforcement can be resisted if no valid arbitration agreement exists and does not allow for any preclusion.⁷⁹¹ Also other higher regional courts raised doubts as to the continuing validity of the Supreme Court's (BGH) jurisprudence but could leave the question undecided since they either relied on the public policy exception existing under the jurisprudence or considered it to be limited to the defence of a lack of a valid arbitration agreement.⁷⁹² There is no direct decision of the Supreme Court (BGH) on the issue yet. However, of considerable interest in this respect may be the above-mentioned decision of the Supreme Court (BGH) of 1 February 2001⁷⁹³ dealing with the *ordre public* defences in relation to the participation of an arbitrator lacking the necessary independence. The Supreme Court (BGH) held that as long as the law of the place of arbitration was comparable to German law as to the protection granted, the defence should have been raised in the country where the award was rendered. Even though it did not directly hold the party to be precluded from invoking the defence but only excluded the possibility of any violation of public policy, it provides a clear indication that the Supreme Court (BGH) considers recourse at the place of arbitration, and not in the enforcement proceedings in Germany, to be the appropriate forum to raise defences. The underlying rationale would in no way be limited to the defence of a missing arbitration agreement but also covers all other grounds upon which a challenge can be based. It would be odd if the mere existence of a right of recourse would exclude a violation of public policy but could still be raised as a procedural defence in an action to have an award declared enforceable. A certain note of caution must be made in this respect since the decision concerned the participation of a biased arbitrator where the courts have generally been very reluctant to allow any reliance on the fact after the award has been rendered, so that even without the existence of the right to recourse the participation might not have constituted an *ordre public* infringement.

⁷⁹¹ OLG Schleswig, *RIW* 2000, 706, 708.

⁷⁹² BayObLG, *NJW-RR* 2001, 431.

⁷⁹³ BGH, *WM* 2001, 104 with a note of Kröll, *WUB* 2001, 351; English summary, *IntALR* 2002, N-12.

Closely related to the question of preclusion is that of the extent to which the German enforcement court is bound by a decision rendered in annulment proceedings in the country where the award was rendered.⁷⁹⁴

§ 8 The grounds for refusal of enforcement of foreign arbitral awards and public policy concept in Uzbek law

Like many other CIS countries, Uzbekistan as a part of the former Soviet Union has continued to recognize and apply the legislation of the former Soviet Union, only if it is not contrary to the legislation of Uzbekistan. Actually, in practice, making legislation is almost the same as the former Soviet legislation.

As mentioned above, foreign arbitral awards and foreign court judgments are recognised and enforceable in Uzbekistan. However, the approach regarding the enforcement of these two types of awards is different as a matter of Uzbek law.

Contrary to treatment of foreign court judgments, foreign arbitral awards shall be recognised and enforced in Uzbekistan without re-trial on the merits, as Uzbekistan is a party to the New York Convention. Accordingly, the enforcement of such awards obtained in a state which is a party to the New York Convention may be refused by an Uzbek court, only on the grounds provided by Art. V of this Convention. Despite the fact that Art. V of the New York Convention is implemented into the Uzbek legislation⁷⁹⁵ there are still unsolved problems in court practices in Uzbekistan regarding the recognition and enforcement of foreign arbitral awards because of a lack of essential qualities of law and structural deficiencies in international commercial arbitration. The results of the interviews conducted by the author of this work with judges of economic courts, arbitrators and specialists in the field of arbitration during the research trips to Uzbekistan in 2014 and 2016, show that Uzbek economic courts does not have a unique system of technique for the recognition and enforcement of foreign arbitration awards and considering the cases concerning this procedure. Furthermore, it was acknowledged that the case law on enforcement of foreign arbitral awards is not yet developed in Uzbekistan. According to the research of the acts dealing with enforcement procedures in the archives of the economic courts, it was evident that there are only few cases related to enforcement of foreign arbitral awards and the major part of them were considered in the economic courts of

⁷⁹⁴ This became an issue in proceedings to have a Turkish award declared enforceable in Germany. The respondent objected to the enforcement since the arbitration agreement allegedly did not cover all disputes involved. The OLG Bremen, *RPS* 2/2000, 18 held that in this regard it was bound by the decision of the Turkish courts which had held that the disputes were covered.

⁷⁹⁵ Draft Law of Uzbekistan “On International Commercial Arbitration” (Art. 45) and Economic Procedural Code of Uzbekistan (Art. 256).

Tashkent (the capital of Uzbekistan). The situation in other regions of Uzbekistan (for example, in Bukhara, Samarkand, etc.) is far from the situation in the capital of Uzbekistan.

The legislation of the CIS countries does not give a clear definition of public policy, in most cases referring just to foundations of law and order of the state, or the basis of the rule of law. This uncertainty gives the courts discretionary powers to interpret this concept, and sometimes public policy is interpreted in a very broad manner in order not to enforce awards rendered against state-controlled entities.

Although foreign arbitration users might expect that public policy can be broadly interpreted in the region, in practice most CIS countries rarely set aside or refuse to enforce awards on the basis of expansive interpretation of public policy.⁷⁹⁶

In January of 2018, the Civil Procedure and Economic Procedure Codes of Uzbekistan were amended and a public order rule was established in Article 370 of the Civil Procedure Code and in Articles 255 and 256 of the Economic Procedural Code. According to Article 370 CPC , “decisions of foreign courts or foreign arbitrations shall not be recognized and enforced providing that recognition and enforcement of decisions of foreign courts or foreign arbitrations are contrary to the sovereignty, security and fundamental principles of the law of the Republic of Uzbekistan”. The following differences can be seen in Economic Procedure Code:

- The public order rule is divided into two types which are applicable against decisions of foreign courts (Article 255 EPC) and against decisions of foreign arbitrations (Article 256 EPC).
- Article 255 EPC determines that “decisions of foreign courts shall not be recognized and enforced providing that enforcement of decisions of foreign courts are contrary to the sovereignty, security and fundamental principles of the law of the Republic of Uzbekistan”. In contrast to Article 256 EPC, “decisions of foreign arbitrations shall not be recognized and enforced providing that recognition and enforcement of decisions of foreign arbitrations contradicts or threatens the public policy of the Republic of Uzbekistan”.⁷⁹⁷ This article should be interpreted clearly in decisions of the plenum of the Supreme Court, since uncertainty of that article could lead judges reject recognition of foreign arbitrations even though they do not contradict to public order.⁷⁹⁸

⁷⁹⁶ For Uzbekistan see Oztakhonov, Foziljon / Umirdinov, Alisher, Uzbekistan, in: Hober, Kaj / Kryvoi, Yaraslau (eds.), *Law and Practice of International Arbitration in the CIS Region*, Alphen aan den Rijn 2017: Kluwer Law International, pp. 439-483.

⁷⁹⁷ Cf. Khakimov, A., Public order concept in Uzbek legislation, *Review of law sciences* 2:2 (2018), https://uzjournals.edu.uz/rev_law/vol2/iss2/14.

⁷⁹⁸ Ibidem.

The grounds for refusal of enforcement of foreign arbitral awards are listed in Art. 256 of the EPC Uzbekistan. Uzbek economic courts, as is noted before, shall refuse these awards under the New York Convention and other bi- and multilateral treaties. The enforcement of many foreign arbitration awards was refused in Uzbekistan under the Art. V(2) (b) of the NYC.

Uzbek courts may refuse to accept petitions for enforcement of foreign judgments on technical grounds as provided for in relevant agreements. Such technical issues may include the necessity to present notary-certified copies of decisions, to translate the relevant documents into Uzbek language and other such requirements. After curing the default, such judgment may be re-applied.

Moreover, commercial courts in Uzbekistan refused the enforcement of foreign arbitration awards according to Art. IV(2) of the NYC.⁷⁹⁹ For example, in 2000 the economic court of Tashkent city refused to enforce a GAFTA award⁸⁰⁰ in favour of Romak S.A. from Geneva because the award which was submitted to the Uzbek economic court, was not translated into Uzbek, the official language of Uzbekistan. Through this case we can be sure that “*the multilingual reality*” in International Commercial Arbitration as Varady noted “*is not always readily perceived*”.⁸⁰¹

§ 9 Summary

Chapter V of this dissertation focuses mainly on the analysis and interpretation of German Law regarding the grounds for refusal of enforcement of foreign arbitral awards basing on the New York Convention.

According to the New York Convention the grounds for non-recognition and non-enforcement are:

- Article V(1)(a): Validity of the Arbitration Agreement;
- Article V(1)(b): The Right to a Fair Hearing;
- Article V(1)(c): Award Beyond Scope of the Submission to Arbitration;
- Article V(1)(d): Improper Composition of Tribunal or Arbitral Procedure;

⁷⁹⁹ Art. IV (2) NYC: “*If the said award or agreement is not made in an official language of the country in which the award is relied upon, the party applying for recognition and enforcement of the award shall produce a translation of these documents into such language The translation shall be certified by an official or sworn translator or by a diplomatic or consular agent.*” – After the collapse of the USSR, the Uzbek language became the only official language of Uzbekistan.

⁸⁰⁰ Award of the Grain and Feed Trade Association, London between Romak S.A. Geneva, and FTC Uzdon Tashkent, reported in *MEALAY'S International Arbitration Report* 16:10 (2001), 2; cf. Berman, *Law and Language: Effective Symbols of Community*, Cambridge 2013, p. 172; Varady, *Language and Translation in International Commercial Arbitration: From the Constitution of the Arbitral Tribunal through Recognition and Enforcement Proceedings*, The Hague 2006, p. 5.

⁸⁰¹ Varady, *Language and Translation in International Commercial Arbitration: From the Constitution of the Arbitral Tribunal through Recognition and Enforcement Proceedings*, The Hague 2006, pp. 5-6.

- Article V(1)(e): Award Set Aside in Arbitral Situs;
- Article V(2)(a): Non-Arbitrability;
- Article V(2)(b): Violation of Public Policy.

Accordingly, the German case law dealing with this procedure has been discussed in this Chapter. The grounds for refusal of enforcement of foreign arbitral awards and public policy concept in Uzbek law have been discussed as well.

Unless otherwise agreed by the parties, an arbitration award is final and can only be set aside at the request of one of the parties on one of the grounds listed in §1059 (2) of the German ZPO which is applied by state courts restrictively. In contrast to some common law jurisdictions, the German law does not apply the manifest disregard of the law doctrine, and errors in fact or law generally do not constitute grounds for setting aside an award. This is an important point that should be taken heed. State courts must consider two grounds for setting aside an award on their own motion (*ex officio*), that is, regardless of whether the parties pleaded them or not: the lack of arbitrability of the dispute; the violation of public policy.

State courts only consider the other grounds listed in § 1059 (2) ZPO for setting aside an award if the applicant shows sufficient cause of the lack of a valid arbitration agreement:

- of the invalidity of the arbitration agreement,
- of a violation of the right to be heard,
- of a tribunal exceeding its jurisdiction,
- that the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the Arbitration Act or a valid party agreement, and that this presumably affected the award.

The grounds for annulling or challenging an arbitral award under German law are limited, offering the parties real legal certainty.

In conclusion, parties seeking to resist the enforcement of an award face inevitably hurdles. As noted by scholars, the success of the resistance to enforcement will depend on the grounds that are invoked, as well as on the jurisdiction in which it is sought.⁸⁰² Parties must also bear in mind that their conduct during the proceedings and after the issuance of the award in the place of arbitration may affect their ability to subsequently resist enforcement of an award.

⁸⁰² Scherer/Moss, Resisting Enforcement of Foreign Arbitral Award under the New York Convention, *IPBA Journal "Arbitration and Dispute Resolution"*, No. 51 (September 2008), 17-26 (23).

In Germany the jurisdiction for challenges to arbitral awards lies with the Higher Regional Court at the place of arbitration. The court can set the award aside or can, in appropriate circumstances, set the arbitral award aside and refer the matter back to the arbitral tribunal.⁸⁰³

If the arbitral award is set aside and the matter is referred back to the arbitral tribunal, the proceedings will be continued with the original arbitral tribunal in place. If, however, the award is only set aside without the matter being referred back to the arbitral tribunal, the arbitral proceedings must be repeated from the beginning. In such cases, a new arbitral tribunal must be constituted because the jurisdiction of the original arbitral tribunal terminates when the arbitral award is set aside.⁸⁰⁴

⁸⁰³ §1059 (4) of the German ZPO.

⁸⁰⁴ §1056 (3) of the German ZPO.

Chapter VI: Conclusion and Recommendations

The attraction of international commercial arbitration for representatives of business circles unavoidably led it to be the main form of dispute resolution in the sphere of economic relations nowadays. Therefore, knowing fundamental rules of commercial arbitration's functioning is an important requirement for successful activity of individuals, engaged in the economic sphere of the world market.

The privilege of commercial arbitration includes the high level of its regulation under the frames of conventions which have universal or regional character. In spite of the fact that the existence of international legal acts does not exclude the likelihood of national regulation, it should be noted that the norms of national legislation of many states on international commercial arbitration have been uniformed considerably in recent years. Arbitration has become the normal way of settling international commercial disputes. In order to overcome the needs and desires of the actors in international commerce most States have increased a liberal approach to arbitration. As said *Jean-Baptiste Racine*: “*The characteristic of contemporaneous international arbitration law is its liberalism.*”⁸⁰⁵

Nowadays every world's substantial commercial country is considered to be a member of the New York Convention on the Recognition and Enforcement of Arbitral Awards of June 10, 1958. Germany, being one of the most developed trading countries in the world has ratified the New York Convention and today Germany enforces all foreign arbitral awards according to this Convention, regardless of the state of origin providing no other treaty applies.⁸⁰⁶ Uzbekistan is also a member of the New York Convention, however there is no special Law regulating the operation and activity of International Commercial Arbitration. Without having international arbitration, the country becomes a “net importer” of such awards, *i.e.* foreign arbitral awards are enforced in the country but it has not its own awards that can be enforced abroad. Germany and Uzbekistan were selected for this study to make a comparison of the legal regimes for arbitration of these countries. This dissertation is concerned with the recognition and enforcement of foreign arbitral awards under the relevant regimes in Germany and Uzbekistan. Though informal methods of dispute resolution are a long-established part of the cultures of Central Asia,⁸⁰⁷ including Uzbekistan, the country was familiar with international commercial arbitration during the Soviet era and became part of international commercial life only after it obtained its independence in 1991.

⁸⁰⁵ See in *L'arbitrage commercial international et l'ordre public*, Paris 1999, p. 3.

⁸⁰⁶ For example the European Convention on International Commercial Arbitration of 21 April 1961.

⁸⁰⁷ Cf. Butler (*supra* n. 602); Martin, *Law and Custom in the Steppes: The Kazakhs of the Middle Horde and Russian Colonialism in the Nineteenth Century*, London 2001, pp. 114-139.

Chapter I of this thesis for the first time discusses in detail the historical development of the arbitration system of Uzbekistan, which has to date received only limited scholarly attention. The analysis of the development of arbitration systems in the selected countries (Germany and Uzbekistan) could be considered as a plus for the existing literature.

Chapter II consists of four sections which are essential for general understanding of the international commercial arbitration as well as the role of international conventions containing the provisions for the recognition and enforcement of foreign arbitral awards.

It begins with examining the meanings and purposes of the terms “recognition” and “enforcement” and it explores whether the terms are separable or inseparable. It also discusses the terminological problems concerning recognition and enforcement procedure in selected countries. The definition of the term “foreign award” and the questions relating to determining where an award is made, when it is considered to be a foreign and which type of an award qualifies as being subject to recognition and enforcement procedures under the German and Uzbek regimes, governing the enforcement and recognition of foreign arbitral awards were dealt with in this subchapter.

Secondly, Chapter II continues the discussion of the international legal framework for the recognition and enforcement, the case law related to the recognition and enforcement of foreign arbitration awards by Uzbek courts and the impact of these awards on investment treaty arbitration. Uzbekistan is a party to several investment treaties with foreign countries that contain dispute resolution clauses. Uzbekistan’s membership to the ICSID Convention made it possible for certain disputes with the Republic of Uzbekistan to be referred to arbitration under ICSID auspices. Currently, there are four pending cases against Uzbekistan at the ICSID. Four cases have been concluded, two in favour of the State.

Thirdly, the chapter examines the peculiarities of the Uzbek and German Arbitration Acts.

Finally, Chapter II concludes with a description of investment protection in accordance with Uzbek and German Law. Here it should be noted that the author gives more attention to the ways of dispute resolution regarding the commercial disputes in Uzbekistan. The challenges of attracting foreign investment into Uzbekistan is thoroughly examined and the legislation on investment protection is interpreted. Taking into account the EU investment policy, German attitude to a new EU Model of Investor-State Dispute Settlement is analysed, too.

Chapter III discusses the recognition and enforcement of foreign arbitral awards as well as the distinctions in enforcement procedure of foreign court judgements and arbitral awards in the selected countries. It highlights the differences concerning the recognition and enforcement of arbitral awards between Germany and Uzbekistan.

Chapter IV covers practical issues related to arbitration courts in Uzbekistan. It examines the practice of commercial arbitration in Uzbekistan by providing affordable and clear information on issues related to the resolution of the dispute in Uzbek arbitration courts and recommendations for the conclusion of arbitration agreements and the most efficient behaviour in the course of arbitration proceedings.

Chapter V of this dissertation attempts to outline the grounds for refusal of enforcement of foreign arbitral awards in Germany and Uzbekistan and makes a comparison between these countries. It focuses mainly on the analysis and interpretation of German Law regarding the grounds for refusal of enforcement of foreign arbitral awards basing on the New York Convention. Accordingly, the German case law dealing with this procedure is discussed in this Chapter.

The following conclusions can be drawn from this study:

Today, enforcement of foreign arbitral awards is easier than the enforcement of court judgements in many countries with transition economies.⁸⁰⁸

The former Soviet State arbitration courts did not relate to the arbitration courts in today's sense, since they were the direct political institutions of the planned economy and failed to meet one of the main requirements of commercial arbitration *i.e.* its purpose based on the will of individuals.

Since the enforcement proceedings inevitably depend on the state monopoly of power,⁸⁰⁹ private arbitrators or arbitration courts, under any circumstances, cannot exercise the enforcement proceedings without the participation of state courts. In accordance with universally recognized basic provisions, countries must follow the suggestions of the UNCITRAL Model Law and regulate the procedure of state recognition awards and enforcement mechanisms.

State courts should be legally obliged to recognize arbitral awards and to declare them enforceable, and, if there is a certain prerequisite, they should be given the opportunity to refuse recognition and enforcement. In Uzbekistan, like in other CIS countries, the relevant legislation has an exhaustive list of grounds for denial to grant enforcement of the award being the same as provided for in Art. 36 of the UNCITRAL Model Law on International Commercial Arbitration.

⁸⁰⁸ As noted by *Schramm*, the recognition of foreign awards is considered to be complicated in all CIS states. See Schramm, *Anerkennung ausländischer Entscheidungen*, at: <http://www.cis-legal-reform.org/publication/articles-reports/vollstreckung-auslaendischer-gerichtsurteile-deutschland.de.html>.

⁸⁰⁹ Knieper, *Arbitration Court and State Proceedings* (*supra* n. 129).

Despite the fact that the International Commercial Arbitration Court under the Chamber of Commerce and Industry (CCI) of Uzbekistan has been established in 2011 and is competent to consider disputes between Uzbek and foreign entities, there is still the lack of special rules governing the activities of International Arbitration Courts. The Law “On Arbitration Courts” of 2006 is quite different and not be recognized by the UN Secretariat as being based on the UNCITRAL Model Law. The same complicated situation is seen with the enforcement of foreign arbitral awards, although Uzbekistan is party to all major international treaties establishing the rules for the enforcement of foreign arbitral awards. Unfortunately, Uzbekistan presently has no legislative acts determining the procedure for the enforcement of a foreign arbitral award. This fact gives rise to a lot of difficulties in the practice of execution of such decisions. Since the provisions of the Constitution, the Civil Procedure Code and the Economic Procedural Code of Uzbekistan declare the supremacy of international treaties to which Uzbekistan is party, it is clear that foreign arbitral award must be recognized and enforced in Uzbekistan in accordance with the provisions of the New York Convention 1958 and the Kiev Agreement 1992.

The absence of a special law “On International Commercial Arbitration” is a great obstacle for the development of activities of International Arbitration Courts in Uzbekistan. Consequently, the lack of developed arbitration legislation in Uzbekistan negatively affects its economy and the image of the country which is intending to join the WTO.

As in many transition countries, the majority of the laws of the Republic of Uzbekistan, Bilateral Investment Treaties (BITs) with more than 40 states, other bilateral trade agreements with different investors are aimed at the development of investment processes. The practice shows that in the process of the realization of investment processes there are often different disputes between: the two states which concluded these agreements, the state (in this case the Republic of Uzbekistan) and concrete foreign investors, the participants in investment relations – natural and legal persons, including those who created joint ventures, etc. These disputes require a fair, rapid and effective settlement, which is carried out, according to generally accepted international practice, through negotiations of interested parties, in national (economic) courts, as well as in domestic and international arbitration courts. Partners entering into investment relations should be sure that, in the event of an investment dispute, they can find legal opportunities to protect their interests and that decisions made by the competent courts, including arbitration courts will be executed. The mechanism of such legal protection should be one of the main elements of an effective national regulatory and judicial authority designed to ensure the implementation of the rights of foreign investors in the country.

Recommendations

a) Raising Public Awareness

Informing the public about the arbitration and its advantages to state legal proceedings is a key requirement for the successful development of ARD methods in Uzbekistan. Public awareness raising activities are associated with overcoming certain stereotypes. Not having enough information about arbitration proceedings and ADR methods, citizens and entrepreneurs consider that the only option for resolving disputes is an appeal to state bodies. Work in this direction is already under way. A number of seminars, roundtables and conferences on this issue are held annually.

These events are covering the key provisions of the UNCITRAL Arbitration Rules, legislation and the rules of arbitration in Germany, France, Japan and other countries.

The findings and proposals developed by the participants of the scientific and practical seminars will serve to further improve the legal framework for the protection of the rights and interests of investors, creating favourable conditions for the expansion of trade and investment relations with other countries and strengthen the legal mechanisms for the settlement of investment disputes.

b) Arbitration Clause

The main condition for the consideration of a dispute by an arbitral tribunal is an arbitration clause. This means that the parties must include in the contract the following paragraph: *“All disputes, disagreements, claims arising from this contract, or concerning its violation, termination, invalidity, are subject to final resolution in (the exact, correct name of arbitration court) in accordance with its regulations.”* Parties, when concluding commercial contracts very often make mistakes concerning arbitration clauses, which then lead to unnecessary problems. This means that the parties' agreement on arbitration does not prevent the plaintiff from applying to the economic court and such a dispute should be considered if the respondent does not interfere. Moreover, the petition can be made only in the first instance and not later than the first application on the merits of the dispute. In case of late application, the arbitration clause is considered to be cancelled and the dispute shall be subject to review by the economic court.

This example clearly reflects the lack of a legal mechanism on arbitration courts and testifies to the stereotype of preserving monopoly over arbitration. The interpretation that *“the existence of an agreement of the parties on arbitration procedure does not prevent the parties from applying to the economic court”* contradicts the meaning of Art. 107 (2) of the EPC of Uzbekistan and the world standards in commercial dispute resolution. Here it is important to

mention that Germany as the leading economic power of the European Union is one of the most important economic partners of all the CIS countries including Uzbekistan. Experts in the field of arbitration from the newly independent states should take this fact into account in the preparation of agreements and arbitration clauses in commercial contracts. Accordingly, the study of the peculiarities of the German law on international commercial arbitration is particularly important.

c) Independence of arbitration courts from the state court system

As mentioned earlier, arbitration is a private process in which an independent third-party is appointed to decide the outcome of a dispute between two or more parties.

If the trust of the businesses in the arbitral tribunal provides for arbitration proceedings, then the state intervention in this process is almost unacceptable. The independence of arbitration courts from the state judicial system is needed to be fixed by the Uzbek legislature.

d) Adoption of the Law of the Republic of Uzbekistan “On International Commercial Arbitration”

The adoption of the Law “On International Commercial Arbitration” is of great importance. Moreover, it is caused by the fact that the law provides for the protection of rights in an arbitration court.

The Law on International Commercial Arbitration should become a really working mechanism ensuring the fulfilment by this court of its functions of a simple, effective and prompt resolution of disputes between business entities. The adoption of this law will allow participants in the economic circulation to solve many problems. The parties to arbitration in accordance with the constitutional law will be able to choose the form of justice for the resolution of a dispute: publicly or in an alternative way.

The adoption of such a law will facilitate the development of the institution of arbitration in accordance with the requirements of the civilized market and the world practice of dispute resolution.

The development of the system of International Commercial Arbitration in the Republic of Uzbekistan will lead to a wide use of conciliatory procedures, which will reduce the number of disputes and will promote partnership between entrepreneurs. Compliance by the parties with one of the procedural principles of arbitration, *i.e.* the voluntary enforcement of a court decision, will allow the disputing parties to maintain partnership relations and continue to strengthen the current relations.

International commercial arbitration will be able to quickly, objectively and impartially examine disputes between business entities, which, undoubtedly, will attract foreign participants. Achievement of world-wide recognition of the arbitration courts of Uzbekistan requires a lot of efforts. First of all, it is necessary for Uzbekistan to form a structure similar to the International Centre for Settlement of Investment Disputes created by the Washington Convention of 1965 on the procedure for investment disputes between states and foreign persons, which will make it possible to create a favourable image among foreign publics and organizations of disputes in resolution of disputes between foreign partners. Secondly, the suggestions of Uzbek experts in the field of International Commercial Arbitration on creating an International Association of Arbitration Courts in Central Asia should be supported and realized by the Uzbek government.

The establishment of the institution of International Commercial Arbitration in Uzbekistan is not only one of the directions of democratic reforms, but also a necessary condition for Uzbekistan's accession to the WTO.

e) Adoption of an Investment Code of Uzbekistan

Uzbekistan has quite rich reserves of natural resources. However, this fact does not make the country attractive for foreign investors and they still have fear to invest in Uzbekistan because of the belief that investing in this country is still dangerous. The first step the country has undertaken to change this perspective was to begin creating its national investment legislation and also concluding Bilateral Investment Treaties.⁸¹⁰ The persisting problems, however, still lie in the frequency of legislative changes, wrong interpretation of legal terms, equivocal rules and procedures, lack of protection of property rights and an independent dispute resolution mechanism and the possibility of administrative interference in foreign investor's business.

The adoption of an Investment Code of Uzbekistan, as highlighted by *Ahmedhodjaev*, will lead to *“streamlining governance of all types of investments, introducing a single transparent legal framework, improve legal protection of investor rights and reducing bureaucratic burden”*.⁸¹¹

⁸¹⁰ Kalis, Legal Environment for International Investments in Uzbekistan, available at https://www.law.muni.cz/sborniky/cofola2008/files/pdf/mps/kalis_roman.pdf.

⁸¹¹ Presentation made in an International Round Table on improving the investment climate in Uzbekistan. It was held on 8 November 2017 and organized by the Senate of the Oliy Majlis together with the State Investment Committee, the UNDP 'Improving the Investment Climate in the Republic of Uzbekistan' project and the EBRD Office to Uzbekistan with the media support of the International Press Club.

f) Solving Currency Conversion Issues

Because of strict currency control policy, one of the unsolved problems arising out during the enforcement stage is the problem when the debt is to be paid off in foreign currency. On the other hand, another problem can arise when there are not enough funds on the debtor's bank account. In this case, the debtor's property shall be sold only in national currency, not in foreign currency. Due to these convertibility issues, the enforcement stage may significantly be extended. Therefore, Uzbek legislation favouring the free cross-border movement of foreign investors' capital has to deal not only with the access to Uzbekistan as the host country, but also with the substantive and procedural safeguards protecting the rights of investors, including quick and non-restricted conversion of their capital to freely convertible currency. After making the mandatory payments, foreign investors must have the opportunity to repatriate freely their revenues.

g) Interim Measures

Granting interim orders is one of the forms of the state courts' assistance to international arbitration.

*As Kaminskiene noted, "in international arbitration, timely application and enforcement of interim measures can have a substantial effect on the possibility of the enforcement of final arbitration award, especially when issues relating to the protection of assets or evidence arise before or during the course of arbitration proceedings".*⁸¹²

Despite the substantive amendments to the UNCITRAL Model Law concerning the application and enforcement of interim measures in international arbitration made in 2006, the legal regulation of these matters in Uzbekistan under the Law on Commercial Arbitration remained unchanged.

Regarding remedies against awards, while the state courts of Uzbekistan still have very wide powers, there is no appeal to the decision and the only remedy is annulment of the decision before competent state courts if a party proves there has been a violation of the procedural rules of arbitration. The list of interim measures in accordance with international legal standards should be determined clearly in Uzbek legislation.

In sum, the main element of the arbitration process is its internationality. Therefore, countries should follow the UNCITRAL Model Law, as it was already done by many countries – such as Germany. During the research of the German arbitration regime, the author of this thesis came to conclusion that jurisdiction in Germany is characterised by a high level of reliability and

⁸¹² Kaminskiene (*supra* n. 620), p. 244.

dependability in comparison with international standards. The thorough and lengthy legal education of judges and lawyers ensures the professional and efficient conduct of legal proceedings. The reforms being implemented in the judicial and legal system of Uzbekistan and Germany are similar in essence and relevance. However, the Uzbek government still needs to do more in order to modernize and harmonize the arbitration laws of Uzbekistan.

There is a well-known German proverb: *“Those things that last long will finally turn out well.”* The German Arbitration Act of 1998 was in fact a good law proving that this proverb was rightly said. The preparation of the law, from the beginning of the reform discussions in 1986 to the adoption of the Draft Act by the German Parliament in December 1997, took more than a decade and the new reforms on arbitration are being intended to be made by German legislator in the new future. But the question appears, whether Uzbekistan will succeed in doing good reforms regarding its arbitration regime in the near future. Germany would be a good model for Uzbekistan in this regard and the author of this study will hope that Uzbekistan’s Draft Law “On International Commercial Arbitration” will take into effect this year.

It would be wise to conclude this work with wise words of Montesquieu:

*“Intriguing in a senate is dangerous; it is dangerous also in a body of nobles; but not so among the people, whose nature is to act through passion. In countries where they have no share in the government, we often see them as much inflamed on account of an actor as ever they could be for the welfare of the state. The misfortune of a republic is when intrigues are at an end; which happens when the people are gained by bribery and corruption: in this case they grow indifferent to public affairs, and avarice becomes their predominant passion. Unconcerned about the government and everything belonging to it, they quietly wait for their hire.”*⁸¹³

⁸¹³ Montesquieu, *The spirit of Laws*, 30, translated by Thomas Nugent, 1752, new ed. 2001, Batoche Books, Kitchener.

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