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NEW TRENDS IN INVESTMENT ARBITRATION

Kyrgyzstan

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New trajectory of investment in Kyrgyzstan

Abstract:
This article analyses the mandatory multi-stage procedure for resolving investment disputes (negotiation, mediation, court, arbitration) established by the new Investment Law of the Kyrgyz Republic. The law limits the parties' procedural autonomy by enhancing the role of the state as both intermediary and arbiter. National courts have gained greater significance and have become an unavoidable stage, even in the presence of an arbitration agreement. Arbitration, previously understood as a natural mechanism for dispute resolution, is now more of an exceptional remedy strictly regulated by the law.

In June 2025, the Jogorku Kenesh of the Kyrgyz Republic (Parliament) swiftly passed a new Investment Law that reshaped the architecture of investment disputes and the perception of arbitration[1]. It introduced a more formalized, state-centric approach, limiting investor flexibility and narrowing the avenues for international arbitration. This may be seen as a step toward stronger regulatory discipline, but also as a potential regression in terms of investment protection.

The Definition of Investment Dispute Has Changed

Previously, an investment dispute under Kyrgyz law was defined as a dispute between an investor and public authorities or officials of the Kyrgyz Republic, and other participants in investment activity arising from the implementation of investments. Under the new law, an investment dispute is defined as a dispute related to investments and arising from the investor's investment activity.

The new definition is broader and more ambiguous. The previous version allowed for a clear distinction between investment disputes and other types of commercial or civil disputes. The new Law does not specify the parties involved, which means that any dispute "related to investments," regardless of the parties, could qualify as an investment dispute. This could include disputes between private investors, co-investors, between an investor and a bank, a contractor, etc.

This expansive definition may lead to legal uncertainty: it becomes unclear which disputes are subject to special procedures or investment agreements. This can affect how arbitration or court jurisdiction is

[1] https://kenesh.kg/ru/bills/665459

determined—especially if a dispute is formally related to investments but does not involve the state as a party.

The reasons for the shift away from a strict party-based structure toward a more open approach remain unclear. Was it an attempt to reduce the confrontational "investor vs. state" framing or a move toward greater flexibility in dispute resolution? We do not know for sure.

However, it can be stated with certainty that the aim was not to broaden protection for a larger number of potential conflicts arising from investment activity, thereby improving the investment climate. In other words, the law does not seem to aim at creating a broad procedural umbrella for resolving any investment-related conflicts. The reasons for this conclusion are explained in detail below.

Strict Sequence of Investment Dispute Resolution Stages

Under the new Law, the path to arbitration has become much longer: to resolve a dispute, the investor must first initiate negotiations, then mediation, court proceedings, and only then arbitration (if applicable). Arbitration is only possible if it is provided for in an international treaty or investment agreement.

This hierarchical multi-stage model may, first, significantly increase the time required to resolve a conflict. This creates the risk that legal protection may become irrelevant or that the investor's position may worsen before a resolution is reached.

Second, each dispute resolution stage demands resources—financial, time, and organizational. The investor will have to incur costs for several procedures before reaching the desired (e.g., neutral) dispute resolution mechanism.

Third, requiring parties to go through specific stages before arbitration limits their freedom to choose the most effective or neutral method from the outset.

Finally, legal uncertainty arises: if the dispute reaches court, will this be seen as a "waiver of arbitration"? Or, conversely, if there is an arbitration agreement, why is a mandatory court stage required? These questions may lead to parallel proceedings, jurisdictional conflicts, and legal confusion.

The rationale behind this rigid procedural ladder seems to be the desire to protect state interests and reduce the number of arbitration cases. The preference for domestic procedures may also reflect an effort to preserve sovereignty.

The legislature likely aims to create a filter that prevents immediate recourse to international arbitration (e.g., under UNCITRAL Rules or ICSID), where the state's position may be more vulnerable.

By structuring the dispute resolution mechanism this way, the law effectively "discourages" investors from pursuing arbitration, placing preliminary barriers in their path. This may reflect concerns about losing control over disputes referred to international tribunals.

Domestic Arbitration

The new Law no longer regulates domestic investment disputes (i.e., disputes between investors and private parties). All disputes are now generalized as "related to investments."

If domestic investment disputes formally fall under the general definition of "investment dispute," must they also follow the mandatory procedure (negotiation – mediation – court – international arbitration)? Can parties refer a domestic dispute to domestic arbitration by agreement, or is this now excluded by law?

Since domestic arbitration is no longer mentioned, there is a risk that state courts may refuse to recognize and enforce arbitral awards in investment disputes, and businesses may lose trust in domestic arbitration as a means of investment protection. This could lead to the marginalization of domestic arbitration in the investment context[2].

If disputes between domestic investors and other parties must now go through the full procedural chain, this may make dispute resolution more expensive and burdensome and deprive them of access to quicker, more specialized forms of protection such as domestic arbitration. This is especially relevant for small and medium-sized enterprises that previously used arbitration agreements for speedy dispute resolution.

Excluding arbitration as an alternative path may lead to an increase in investment disputes in state courts and greater pressure on a judiciary that lacks sufficient specialization in investment matters. Overall, this contradicts international practice, which encourages court caseload reduction through ADR and arbitration.

In Conclusion

Several key differences can be identified in the new approach, which is primarily focused on domestic procedures and only allows international arbitration as a last resort:

- The boundaries of an investment dispute have been blurred due to the removal of party-based limitations;

- The new Law strengthens the role of national courts in resolving investment disputes by mandating the involvement of the national judiciary before arbitration, even in international cases. This enhances the role of the state as a controlling party, raising concerns among foreign investors about independence and impartiality;

- International arbitration is no longer regarded as an autonomous or primary right of the investor but rather as an exception, allowed only after prior stages of dispute resolution fail. Although

[2] The Law on Arbitration Courts (*o treteyskikh sudakh*) of the Kyrgyz Republic of 28 June 2002, establishes its application to disputes arising from civil legal relations, including investment disputes if there is an agreement between the parties.

the Law formally references international standards (UNCITRAL, ICSID), it effectively restricts access to them;

- A six-month "cooling-off" period has been introduced, restricting the point at which arbitration can be initiated;

- A fundamental change has occurred in relation to domestic arbitration: whereas previously, parties in disputes between foreign and domestic investors (or other parties) could agree to refer the matter to domestic arbitration, the new law omits any such possibility.