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Research Article

SUBJECTIVE ARBITRABILITY IN PUBLIC-PRIVATE CONCESSION DISPUTES: LEGAL FRAMEWORK OF THE REPUBLIC OF KAZAKHSTAN

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ABSTRACT

Background: *Concession agreements are becoming increasingly important in Central Asian countries as a contractual mechanism for interaction between state authorities and a foreign private entity. Furthermore, this question is becoming increasingly relevant as foreign investment in this region becomes more appealing. In this context, international arbitration, while maintaining sufficient neutrality, is becoming increasingly relevant for resolving disputes under such agreements.*

Furthermore, the issue of arbitrability in public-private arbitration disputes warrants additional attention, given the underexplored nature of the concept and its regulation. In this regard, the review of the arbitration framework in Kazakhstan serves a dual purpose: providing a foreign investor with information to better understand this issue and identifying areas for improvement in the current regulation. Such alignment is vital to maintaining legal certainty and enhancing this region's attractiveness as a destination for foreign investment, particularly in sectors reliant on long-term, capital-intensive partnerships.

Method: *This study is empirically grounded in a comprehensive examination of national legislation governing concession agreements and commercial arbitration, and Kazakhstan's jurisdiction, with particular emphasis on the extent and nature of limitations on subjective arbitrability in disputes arising from concession agreements. Furthermore, this analysis is supplemented by a comparative legal method that examines arbitration frameworks in other relevant jurisdictions. In this context, a comparative analysis is undertaken to explore the similarities and differences in the legal regulation of Kazakhstan and Kyrgyzstan. In addition, the research applies logical and legal reasoning to identify the most relevant legal doctrines that intersect with the problem of arbitrability in concession agreement disputes.*

Results and conclusion*: The findings indicate a lack of legal certainty in Kazakhstan's legislation regarding the subjective arbitrability of disputes involving state entities under concession agreements. To minimize the risk of arbitration proceedings being challenged by Kazakhstan based on grounds of subjective arbitrability, which may lead to concerns among foreign investors, it is recommended that the Kazakh arbitration legislation be amended to establish a clear requirement for state entities to obtain the prior consent of a duly authorized government agency before concluding arbitration agreements. In addition, legislation should clearly define the procedure and time frame for obtaining such consent to ensure consistency and legal predictability. Given that the concession agreement model is widespread in Kazakhstan, this legislative change will increase foreign investors' trust, potentially leading to higher investment inflows. At the same time, at the current stage, it is advisable for foreign companies considering investing in Kazakhstan to specify the seat of arbitration, which minimizes the impact of Kazakhstan legislation governing the legal capacity of state entities to enter into arbitration agreements or as a more preferable option to require the state entity to obtain the prior consent of an authorized government agency to enter into such agreements and participate in arbitration proceedings.*

1 INTRODUCTION

A society can flourish only in a corridor where the state and society restrain each other. This statement was the main paradigm of the idea of sustained liberty presented by Daron Acemoglu and James A. Robinson.[1] This topic is related to maintaining a certain balance in the relations between the state and society, which will restrain state authorities from exceeding their powers. Courts and the media play an important role in this limitation.

However, in authoritarian countries, this balance is disrupted, and the court system is directly dependent on political will. In this regard, especially for countries where an influx of foreign investment is required due to significant natural resource reserves or the need to improve infrastructure, the ability to attract independent, private, inclusive institutions is of

1 Daron Acemoglu and James A Robinson, *The Narrow Corridor: States, Societies, and the Fate of Liberty* (Penguin Press, 2019).

paramount importance. Concerning the resolution of disputes between public and private parties to the concession agreement, international commercial arbitration, with a neutral jurisdiction serving as the seat of arbitration, is an effective and flexible means of resolving such disputes. In this context, this dispute-resolution mechanism is a definite guarantee of the return of contributions.

Given the practical significance of international commercial arbitration in providing such legal safeguards, the arbitrability of disputes, particularly those involving a foreign investor and a state acting in its sovereign capacity, is a fundamental issue at the outset of any arbitration proceedings. In this regard, a correlation can be observed between the nature of a state's political regime and the structure and development of its arbitration legislation, which may, in turn, influence the scope and effectiveness of international arbitration as a dispute resolution mechanism.

Attracting foreign investment is crucial for the economic development of many states, particularly those rich in natural resources or in need of substantial infrastructure improvements and capital-intensive projects. Among the factors influencing investment decisions, legal risk plays a central role, and the independence of the host country's judiciary is a key indicator. This judicial independence is often shaped by the prevailing political regime; in authoritarian contexts, concerns over potential interference by domestic courts in investor–state relations become especially pronounced. To mitigate such risks, international arbitration serves as a reliable and neutral dispute-resolution mechanism, enabling foreign investors to enter into contractual relationships with state entities despite political or economic uncertainties. However, the effectiveness of international arbitration can be undermined if national courts in the host state interfere in the arbitral process following the conclusion of an arbitration agreement. Such interference, particularly when it compromises the arbitral forum's exclusivity, introduces significant legal uncertainty and may adversely affect the perceived level of protection afforded to foreign investments.

It is important to highlight Patrick C. Osode's developments in connection with the implementation of the arbitration mechanism in the state contract.[2] He argued that it is inequitable for international commercial arbitrators, as well as the relevant governments and institutions, to consistently undervalue the "right to development", the significance of national interests, and the pressing developmental needs that are particularly pronounced in the domestic contexts of developing countries. This concern is especially pertinent given the historical precedent wherein currently developed nations, during their own phases of economic and social transformation, were not subject to similar constraints. At that time, efforts to curtail state regulatory authority or to restrict its capacity to act in pursuit of public welfare were not endorsed. However, regardless of the historical concept of interaction between developed and developing countries, it can be stated that, for developing countries,

2 Patrick C Osode, 'State Contracts, State Interests and International Commercial Arbitration: A Third World Perspective' (1997) 30 Comparative and International Law Journal of Southern Africa 37.

one of the most critical factors in attracting foreign direct investment is establishing sufficient trust among international investors. In this context, deficiencies or ambiguities in the legal and regulatory framework that may create perceived risks to investment security can significantly undermine investor confidence.

The developing countries in Central Asia are typical examples of the above description, both in their post-Soviet past, with the preservation of some features of this state system, and in their need to develop legislation to adapt the commercial paradigm and attract foreign investment. Undoubtedly, in this context, arbitration legislation is one of the elements of commercial law that requires adaptation to the requirements of foreign business to increase investment inflows.

In this context, the Republic of Kazakhstan, as one of the developing countries the Central Asia, is an excellent example for this research given the similar system of government with other countries in this region due to the presence of a common territorial border, similar features in political, legal and economic systems, as well as the establishment of one of the main policy directions in the form of attracting and increasing the flow of foreign investment.[3] Historically, Kazakhstan has been committed to increasing foreign investment inflows and has joined all major investment and arbitration conventions, including the New York Convention of 1958 and the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (1965).[4]

In the statement of the Nation Address dated 8 September 2025, President Kassym-Jomart Tokayev[5] emphasized that, despite the intensifying global competition for capital, attracting large-scale investment remains a top priority for Kazakhstan's development. He stressed the need to initiate a new investment cycle, acknowledging that the existing investment policy framework has not been sufficiently effective.

In the field of socio-economic policy, Kazakhstan's commitment to achieving this goal is confirmed by the adoption of the Concept of Civil Society Development for 2020-2025. The official purpose of this document is to strengthen cooperation between the state, business, and civil society, as well as to promote the participation of society and expert communities

3 Maidan K Suleimenov, 'Recognition and Enforcement of Foreign Arbitration and State Courts' Decisions on Investment Disputes: Kazakhstan's Experience' (*Paragraph: Yurist*, 13 May 2009) <https://online.zakon.kz/Document/?doc_id=31644606&pos=6;-106> accessed 14 April 2025.

4 United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 10 June 1958) [1959] UNTS 330/3; Convention on the Settlement of Investment Disputes between States and Nationals of Other States (18 March 1965) [1968] UNTS 575/159.

5 Kassym-Jomart Tokayev, 'Kazakhstan in the Era of Artificial Intelligence: Current Challenges and Solutions through Digital Transformation: Address of the President to the People of Kazakhstan' (*President of the Republic of Kazakhstan*, 8 September 2025) <https://www.akorda.kz/en/president-kassym-jomart-tokayevs-state-of-the-nation-address-to-the-people-of-kazakhstan-kazakhstan-in-the-era-of-artificial-intelligence-current-challenges-and-solutions-through-digital-transformation-1083029> accessed 14 September 2025.

in relevant integration processes.[6] At the same time, progress in this area is determined by the continuous development and modernization of the regulatory framework.

Furthermore, to inform foreign investors, the OECD's Integrity Review of Kazakhstan found that Kazakhstan has demonstrated a strong commitment to addressing corruption as a strategic priority under its economic development policy, recognizing that a coherent and comprehensive integrity system is essential for economic growth. However, despite Kazakhstan's strong efforts to solve corruption issues, it should be noted that key anti-corruption institutions are still subject to undue interference.[7]

Consequently, this article will present an assessment of Kazakhstan's potential state party status to the concession agreement with foreign entities from the perspective of subjective arbitrability.

The issue of arbitrability in contract-based arbitration is complicated by the frequent use of broadly formulated arbitration clauses in concession agreements. Considering some research developments in taxation disputes, it is intellectually unsatisfactory to assert that a dispute becomes arbitrable merely by virtue of the parties' consent.[8] In practice, even where a state authority has signed such an agreement, this does not preclude the possibility that it may later contest the arbitrability of the dispute both at the commencement of arbitration proceedings and at the stage of recognition and enforcement of the arbitral award.

Summarizing research trends in this area, the regulatory restrictions of a state organization regarding the conclusion of an arbitration agreement are based on the traditional doctrine, according to which the transfer of disputes to a court not controlled by the state undermines sovereign authority.[9] Consequently, the potential invalidity of the arbitration agreement as a result of such regulatory restrictions on subjective arbitrability may lead to a decrease in the level of trust of foreign investors and investment inflows. This risk persists despite the presence of treaty-based arbitration mechanisms and Kazakhstan's participation in numerous bilateral investment treaties. In practice, commercial arbitration often serves as the first-line mechanism for foreign investors to protect and restore their rights, making its effectiveness and legal certainty critically important.

The main aim of this research article is to analyze the concept of subjective arbitrability, considering the specifics of International Public-Private contract-based Arbitration under

6 Decree of the President of the Republic of Kazakhstan No 390 of 27 August 2020 'On approval of the Concept for the Development of Civil Society in the Republic of Kazakhstan' [2020] SAPP RK 33-34/249.

7 OECD, *OECD Integrity Review of Kazakhstan: Advancing Integrity for Economic Development* (OECD Public Governance Reviews, OECD Publishing 2025). doi:10.1787/d705d02f-en.

8 Lauren Brazier, 'The Arbitrability of Investor-State Taxation Disputes in International Commercial Arbitration' (2015) 32(1) Journal of International Arbitration 1. doi:10.54648/joia2015001.

9 Julian DM Lew, Loukas A Mistelis and Stefan M Kröll, *Comparative International Commercial Arbitration* (Kluwer Law International 2003) 26.

concession agreements. Secondly, to provide an analysis of the legal framework of the Republic of Kazakhstan regarding the subjective arbitrability of disputes between a private entity and the state, represented by a government agency or a state-owned enterprise (SOE). Special attention will be paid to the model of the concession agreement, which has become widespread in the development of infrastructure projects and mining in Kazakhstan. As a result, this analysis will be based on the conceptual foundations of subjective arbitrability from the scientific and practical perspectives.

Considering the foregoing, this article seeks to address the following research questions:

For the Republic of Kazakhstan: How should the current legislative framework governing subjective arbitrability be reformed to enhance legal certainty and increase foreign investor confidence?

For foreign private entities: How should an arbitration clause as part of a concession agreement be effectively drafted to prevent potential challenges by the Republic of Kazakhstan based on issues of subjective arbitrability?

The structure of this article is based on an approach in which the analysis of the above research questions, from the legal framework and judicial practice of Kazakhstan, presented in section 5, requires the preliminary formation of the relevant conceptual framework. Consequently, first, consideration of the concept and nature of international public-private contract-based arbitration enables the definition of a research field in which the issue of subjective arbitrability is examined.

Second, disclosure of the specifics of the concession agreement model enables the assessment of the emerging legal relations between the public and private parties to the agreement, thereby explaining the relevance of this contractual mechanism to the issue of subjective arbitrability.

Finally, analyzing the issue of subjective arbitrability in public-private concession disputes within Kazakhstan's legal framework of is impossible without considering the nature of this concept, as well as international approaches and arbitration practice. In this regard, these questions are presented in the following sections of this research article.

2 INTERNATIONAL PUBLIC-PRIVATE CONTRACT-BASED ARBITRATION

What are the primary benefits of international arbitration? For which party to a dispute under concession agreements are such benefits significant? Some scholars argue that international arbitration functions as a tool of neocolonialism, primarily safeguarding the interests of foreign investors from economically developed nations at the cost of less developed host states. This perspective suggests that the arbitration system reinforces global economic hierarchies by prioritizing investor protection over the regulatory autonomy and developmental needs of the Global South. At the same time, establishing

such a mechanism as an alternative to the host nation's national court system provides an additional safeguard for the preservation of investments by foreign investors. In this context, arbitration is an effective form of resolving cross-border commercial disputes, not only because it has certain unique features such as confidentiality and autonomy of the parties, but also from the point of view of procedural issues, the choice of neutral venues for arbitration proceedings prevails.[10] This, in turn, contributes to an improvement of the investment climate within the state. In the long run, the host state gains even more benefits, as it not only enhances the investment climate but, to some degree, is compelled to align its domestic legislation and economic practices with international norms and standards if it has not previously followed such standards.

By its nature, international commercial arbitration (contract-based) from a public-private arbitration perspective is a private legal mechanism grounded in an arbitration agreement between the state and the foreign entity, in which both parties operate on an equal footing. Despite it being a private dispute resolution mechanism, it has some degree of support from states that are bound by signed international conventions and agreements.[11]

At the same time, the jurisdiction of international investment arbitration (treaty-based) is founded on a bilateral investment treaty (BIT) established between the host state and the investor's home state. Consequently, treaty-based disputes concern matters related to the violation of the agreed investment regime in the host state.[12] One of the distinguishing features of international investment arbitration from commercial arbitration is that a foreign investor does not participate in the negotiation of the BIT's terms, since these are negotiated at the level of the contracting states. Another difference is that although inter-state arbitration is governed by the rules of public international law, there is no common institutional framework that could support or oversee the proceedings, as in the case of international commercial arbitration.[13]

The so-called umbrella clause, typically found in the provisions of BITs, acts as a safeguard for the investor's rights granted under a private investment agreement with the host state and protects against breaches by the state, such as through the enactment or modification of legislation or other governmental actions. In parallel, the conclusion of investment contracts gives the state the right to ensure the fulfillment of obligations assumed by the

10 Steve Ngo, 'International Commercial Arbitration for Belt and Road Initiative – Some Thoughts on China, Singapore and Hong Kong SAR as Dispute Resolution Locales' (China-ASEAN Civil and Commercial Law Forum: Proceedings Paper, Guangxi University for Nationalities, Law School, 20 December 2018) https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3323302 accessed 14 April 2025.

11 Nigel Blackaby and others, *Redfern and Hunter on International Arbitration* (6th edn, OUP 2015).

12 Katia Fach Gómez, *Key Duties of International Investment Arbitrators: A Transnational Study of Legal and Ethical Dilemmas* (Springer 2019) 23.

13 Jacomijn J van Haersolte – Van Hof and Erik V Koppe, *International Arbitration and the Lex Arbitri* (Grotius Centre Working Paper Series 2014/33-IEL, Grotius Centre for International Legal Studies, Universiteit Leiden 2014) 10.

investor through arbitration, most often under the International Centre for Settlement of Investment Disputes (ICSID), and contractual obligations of investors can serve as the basis for counterclaims by states in (treaty) arbitration between investors and the state.[14]

Another difference concerns the level of transparency in these arbitration mechanisms. For instance, the application of the UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration applies to investor-state arbitration initiated under the UNCITRAL Arbitration Rules in accordance with an international treaty concluded on or after 1 April, unless otherwise agreed by the parties.[15]

Disputes within the framework of international investment arbitration also have some specifics on the issue of arbitrability.[16] In cases such as *KT Asia Investment Group B.V. v. Republic of Kazakhstan,*[17] and *Caratube International Oil Company LLP v. Republic of Kazakhstan*,[18] the respondent state challenged the tribunal's jurisdiction by questioning whether the claims met the substantive requirements of an "investment" including involvement of a real economic contribution, as well as by the nature of dispute and international treaty's protection scope.

In *AES Corporation and Tau Power B.V. v. Republic of Kazakhstan*[19] the tribunal noted that Kazakhstan remains free to amend its domestic legislation regarding internal procedures, without automatically affecting its consent to arbitration under investment agreements. In particular, the tribunal found that even if there were changes in domestic legislation after the investment, Kazakhstan's consent to arbitration of disputes related to investments made during the term of the agreement remains in force, namely, the consent extended to pre-existing investments.

Thus, in international contract-based commercial arbitration, emphasis is placed on the arbitration agreement itself and, in the case of state entity participation in the agreement, on obtaining the consent of an authorized state body to conclude it, which

14 Sondra Faccio, 'Investment Contracts and the Reform of Investment Arbitration: Towards Sustainability' (2023) 38(3) ICSID Review – Foreign Investment Law Journal 625. doi:10.1093/icsidreview/siad026.

15 UNCITRAL, *UNCITRAL Rules on Transparency in Treaty-based Investor–State Arbitration* (UN 2014).

16 UNCTAD, 'Investment Dispute Settlement Navigator: Kazakhstan' (*UN Trade & Development (UNCTAD): Investment Policy Hub*, 2025) <https://investmentpolicy.unctad.org/investment-dispute-settlement/country/107/kazakhstan/investor> accessed 14 April 2025.

17 *KT Asia Investment Group BV v Republic of Kazakhstan* Case No ARB/09/8 (ICSID, 17 October 2013) <https://investmentpolicy.unctad.org/investment-dispute-settlement/cases/358/kt-asia-v-kazakhstan> accessed 14 April 2025.

18 *Caratube International Oil Company LLP v Republic of Kazakhstan* Case No ARB/08/12 (ICSID, 5 June 2012) <https://investmentpolicy.unctad.org/investment-dispute-settlement/cases/297/caratube-v-kazakhstan> accessed 14 April 2025.

19 *AES Corporation and Tau Power BV v Republic of Kazakhsta*n Case No ARB/10/16 (ICSID, 1 November 2013) <https://investmentpolicy.unctad.org/investment-dispute-settlement/cases/381/aes-v-kazakhstan> accessed 14 April 2025.

requires compliance with internal procedures. In contrast, international treaty-based investment arbitration, as noted above, is based on the treaties concluded between states and, consequently, operates at the public international level. In this regard, some arbitrability issues in international investment arbitration tend to focus on the scope and definition of an "investment" and the scope of protection under the international treaty, as shown in the above cases.

Despite their differences, both international commercial arbitration and investment arbitration share the primary goal of safeguarding foreign investments. In this regard, given that concession agreements typically provide for both types of international arbitration mentioned above, this key distinction sets this type of contract apart from others.

Given the existence of international investment agreements guaranteeing investment arbitration and the lack thereof in relation to commercial arbitration, it is important to note that a commercial arbitration dispute, based on an agreement between the parties, is more "vulnerable" to challenges to the jurisdiction of the arbitral forum in comparison to international investment arbitrations.

At the same time, a third category of dispute resolution mechanisms can be identified as applicable to disputes arising under concession agreement models. Notably, international dispute resolution expert Charles N. Brower introduced the term "investomercial arbitration" or contract-based public-private arbitration to describe this contract-based mechanism, which blends elements of both public and private law in resolving disputes between investors and states.[20] According to Brower, it is evident that contractual disputes involving both private and public entities inherently engage issues pertaining to both the private and public dimensions of economic regulation. Nevertheless, contract-based arbitration is frequently, and, in his view, erroneously classified solely as a form of international commercial arbitration, despite the evident interplay between public and private legal relations in such cases.[21]

Building upon Brower's conceptual framework, it is important to note that public-private contract-based arbitration in such contexts, by the nature of the dispute, is classified as commercial and does not entail the application of umbrella clauses typical of treaty-based arbitration. However, the involvement of the public sector introduces distinct legal considerations that differentiate these disputes from purely private commercial ones. These include issues regarding the arbitrability of disputes involving a government authority or SOE, and the applicability of sovereign immunity.

20 Charles N Brower, 'State Parties in Contract-Based Arbitration: Origins, Problems, and Prospects of Private-Public Arbitration' (2019) 1(2) ITA in Review <https://www.itainreview.org/articles/Fall2019/state-parties-in-contract-based-arbitration.html> accessed 14 April 2025.

21 ibid

In this regard, the following statements require discussion in this article:

1) The arbitrability of disputes arising from concession agreements is determined by the specific characteristics of this type of agreement and by legal interpretations and categorizations of arbitrability.

2) The implementation of this concept and features within the legislative frameworks of the jurisdictions under research.

Moreover, the reasons for outlining the conceptual framework of international public-private contract-based arbitration in this section, and for examining the article's topic within the context of this dispute resolution mechanism, have the following grounds:

Firstly, the key issue in international public-private contract-based arbitration is determining whether a state, as a subject of public law, can be a party to an arbitration agreement and, under what conditions, such an agreement will be recognized as valid and enforceable. In the context of the correlation of this issue with the legal system of Kazakhstan, this issue is directly related to the matter of subjective arbitrability, where obtaining the consent of an authorized government body to conclude an arbitration agreement is not limited to signing such an agreement, but must comply with the applicable mandatory norms of the legislation of Kazakhstan.

Secondly, the effective application of the arbitration mechanism and the stability of the legal regime for foreign companies depend on the legitimate possibility of obtaining the above consent of an authorized government body.

3 OVERVIEW OF THE CONCESSION AGREEMENT MODEL

Examining existing studies on investment arbitration, the traditional one-way nature of investment flows has led to a widely accepted conceptual distinction in international investment law between developed countries as "home" states and developing countries as "host" states. The most common legal basis for such investment arrangements is a contract between the state and the investor.

In this context, this agreement serves as an effective framework for contractual interaction between the state and the foreign investor. For the state, concessions primarily serve as a driver of the economy through infrastructure development and natural resource exploration. For foreign private organizations, such a predictable and structured framework helps them accumulate capital through investments.

The first conceptual framework for defining a concession agreement centers on its purpose and subject matter. From this perspective on the nature of a concession agreement, it should be noted that one form of this contractual arrangement is a contract between a government entity or SOE and a private party, in the form of an international transaction governed by private law with an administrative aspect.

Under Directive 2014/23/EU of the European Parliament and of the Council of 26 February 2014,[22] the defining characteristic of a concession is the granting of the right to operate works or services, which necessarily entails the transfer of economic operational risk to the concessionaire. This risk includes the possibility that the concessionaire may not be able to recover its investment and operating costs under normal operating conditions, even if some of the risks remain with the contracting authority.

Concession agreements can also be defined as reciprocal legal agreements through which a state delegates the exercise of certain sovereign rights or functions to a foreign private entity or consortium. In doing so, the delegated party takes part in carrying out public functions and, as a result, obtains a special or advantageous status compared to other private law actors within the state's jurisdiction. The private party as a service provider earns a substantial portion of its income directly from the end users, primarily through various forms of fees and unlike in a standard service agreement where the provider is paid by the contracting authority and does not assume any operational or financial risk, in a service concession, the provider bears the risk associated with the service's performance and profitability.[23]

In this context, the international nature of a contract involves several aspects. First, regarding the agreement's subjective content, one of the parties is an international investor from a foreign jurisdiction. In this regard, this article explores scenarios in which a foreign investor operates as a private party, thereby analyzing the international concession agreement model from the perspective of the parties involved.

Second, even though the law of the host state governs concession agreements as substantive law, this does not preclude the possibility that such a contractual arrangement may be considered international. In the *Texaco Overseas Petroleum Co. v. Libya*[24] case, it was concluded that whenever general principles of law are referred to in the context of international arbitration, this has always been considered a sufficient basis for the international nature of a contract. While the contract itself is based on Libyan law, the court observed that Libyan law does not preclude the application of international law and that both should be applied to ensure compliance with Libyan and international law.

From an implementation perspective, concession projects are primarily carried out in sectors involving natural resources and in the development of construction initiatives to enhance the state's infrastructure. In the natural resources extraction sector, specifically the oil and gas industry, a common contractual form is a service contract or a production

22 Directive 2014/23/EU of the European Parliament and of the Council of 26 February 2014 'on the award of concession contracts' [2014] OJ L 94/1.

23 Christoph Ohler, 'Concessions' *Max Planck Encyclopedia of Public International Law* (2013) <https://opil.ouplaw.com/display/10.1093/law:epil/9780199231690/law-9780199231690-e1512> accessed 14 April 2025.

24 *Texaco Overseas Petroleum Co v Libya* (Int'l Arbitral Award, 19 January 1977) [1977] J Droit Int'l 104/350; tr [1978] ILM 17/1 <https://www.casebriefs.com/blog/law/international-law/international-law-keyed-todamrosche/chapter-14/texaco-overseas-petroleum-co-v-libya/> accessed 1 April 2025.

sharing agreement (PSA). The PSA model is a contractual arrangement between a sovereign state and a private investor, in which the investor undertakes, at their own financial risk and expense, the exploration, development, and production of petroleum resources within a defined time frame. In exchange, the state grants the investor a proportionate share of the extracted petroleum. Typically, the investor is initially allocated "cost oil," to recover exploration and development expenditures, followed by "profit oil" also referred to as "compensation oil" as remuneration for production activities, which the investor may then sell on the international market.[25]

This mechanism distinguishes a PSA from a service contract where the investor is compensated for services rendered, while the host state retains greater control and oversight over the exploration and development of its natural resources. In this context, under a service contract, international oil companies, as the investor, receive predetermined compensation rather than a share of profit oil, in contrast to the arrangement under PSAs.[26]

Historically, the negotiation and renegotiation of major concession agreements inherently involve political dynamics, as they are influenced by the relative bargaining power of the foreign investor and the host nation. In cases where there are significant shifts in this power balance, the outcomes of such agreements may be affected.[27]

The second conceptual approach to defining a contract focuses on the specific characteristics that distinguish it from other contractual agreements. In this context, such contracts can be conceptualized as economic development contracts, based on several defining characteristics:

(i) they are not limited to isolated transactions involving the sale of goods or the provision of services, but instead aim to facilitate broader economic engagement through the transfer of investment and technical expertise to developing countries, particularly in areas such as mineral resource exploration, research, and the construction of industrial infrastructure on a turnkey basis, thereby contributing to the host country's economic and social development;

(ii) their typical long-term nature necessitates sustained and cooperative interaction between the state and the private investor; and

(iii) the inclusion of stabilization clauses serves to mitigate the risks associated with changes in the host state's legal or regulatory framework, thereby offering investors protection

25 Chukwuma Samuel Okoli, 'Production Sharing Agreements and Licences: A Distinction Without a Difference?' (2012) 282 International Energy Law Review 1. doi:10.2139/ssrn.2171506.

26 Rdhwan Shareef Salih and Akram Yamulki, 'Petroleum Exploration and Production Contracts as Regulatory Tools: The Kurdistan Region Production Sharing Contracts' (2020) 101 Journal of Law, Policy and Globalization 165. doi:10.7176/jlpg/101-17.

27 Theodore H Moran, 'The Evolution of Concession Agreements in Underdeveloped Countries and the United States National Interest' (1974) 7(2) Vanderbilt Journal of Transnational Law 197.

against legislative instability or unilateral government actions that could lead to the annulment or termination of the agreement.[28]

Another important aspect of the concession model is the level of state attribution, especially if the public partner in the agreement is a state-owned company. The ILC's Articles on Responsibility of States for Internationally Wrongful Acts (Articles 4, 5 and 11) establishes several criteria when the conduct of a state-owned company is attributed to the state, namely (i) if the company qualifies as a public authority under domestic law, (ii) if it is legally authorized to exercise elements of a public authority and acts in that capacity, (iii) or if the state subsequently recognizes and takes over the conduct of the company as its own, even if the company is otherwise separate from the state.[29]

To summarize the above, the correlation between the concession agreement model and subjective arbitrability in Kazakhstan's legal framework is evident in the requirement that successful implementation of concession projects requires not only economic and infrastructural validity but also legal predictability. At the same time, the disclosure of the nature of the concession agreement in this section, as a long-term public-private contract with the distribution of rights, duties, and risks between the parties, creates relevance for applying arbitration as a commercial dispute resolution mechanism, which may be possible under the subjective arbitrability test.

4 SUBJECTIVE ARBITRABILITY IN INTERNATIONAL COMMERCIAL ARBITRATION

In simple words, a dispute is arbitrable if it can be submitted to an arbitration tribunal. There is no answer in international law about which legal framework regulates the matter of dispute arbitrability.[30] Furthermore, given the lack of guidance on this issue in the New York Convention, according to the commentary to this Convention, national courts should determine whether a particular subject of dispute can be settled through arbitration, either by referring to the legislation applicable to the arbitration agreement, or by referring to their own legislation.[31]

The position of Gary Born should be noted in respect of Article II of the New York Convention regarding the recognition of international arbitration agreements by the

28 Chin Leng Lim, Jean Ho and Martins Paparinskis, *International Investment Law and Arbitration* (2nd edn, CUP 2021) 54.

29 International Law Commission, *Responsibility of States for Internationally Wrongful Acts 2001* (UN 2005) <https://legal.un.org/ilc/texts/instruments/english/draft_articles/9_6_2001.pdf> accessed 1 April 2025.

30 Andrew Barraclough and Jeff Waincymer, 'Mandatory Rules of Law in International Commercial Arbitration' (2005) 6(2) Melbourne Journal of International Law 205.

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

Contracting State.[32] According to his opinion, a Contracting State cannot evade its obligations to recognize international arbitration agreements by adopting special rules of national legislation that invalidate such agreements, for instance, in terms of obtaining consent to conclude an arbitration agreement since such actions are incompatible with the obligations of the state with respect to good faith and the principles of estoppel applicable as general principles of law and required by the New York Convention. This issue may also be influenced by the separability doctrine, which implies (i) the invalidity of the main agreement does not necessarily mean the invalidity of the arbitration agreement, and (ii) the arbitration agreement and the main agreement may be governed by various applicable laws.[33] In this regard, before considering this issue, it is important to understand the nature and conceptual approaches of subjective arbitrability.

The possibility of resolving a dispute through arbitration is inherently more procedural than substantive, representing a preliminary issue that must be resolved before the arbitration tribunal can consider the case on its merits. If it is determined that the dispute cannot be resolved by arbitration or that the arbitration tribunal lacks jurisdiction, the proceedings cannot continue. Another key aspect that highlights the procedural nature of dispute arbitrability is the legal framework governing the concept. In addition, the choice of the applicable law, particularly the legislation of the seat of arbitration, plays a crucial role in this context.

In this regard, when considering the participation of a public partner in a concession agreement, the concept of arbitrability of a dispute includes three key elements: (i) the legal capacity of a state body or organization to conclude an arbitration agreement and be bound by it under the concession agreement (subjective arbitrability), (ii) the objective possibility of arbitration or the nature of the dispute arising in connection with a concession agreement that may be submitted to international commercial arbitration (objective arbitrability), and (iii) the jurisdiction of the arbitral tribunal in relation to disputes over concession agreements.

In this context, it is important to determine which legal system may be applicable to assess the possibility of arbitrating disputes arising from the concession agreement. The definition of this issue is crucial to ensure legal certainty and effective enforceability of arbitration agreements.

The first option is to consider the legislation of the jurisdiction in which the award will be enforced. According to paragraph 2 (a) of Article V of the 1958 New York Convention,[34] recognition and enforcement of an arbitral award may be refused if the dispute cannot be resolved through arbitration in accordance with the laws of the state of the place of enforcement of the arbitral award. Although the above does not explicitly

32 Gary B Born, *International Commercial Arbitration* (3rd edn, Kluwer Law International 2021).
33 ibid.
34 United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (n 4).

indicate that the law of the jurisdiction in which an arbitral award is enforced governs the question of whether a dispute is subject to arbitration, it can be concluded from the above that the definition of "that state" refers to the jurisdiction in which the award will be enforced, which must be consistent with the possibility of arbitration proceedings on the issue under consideration.

The silence of international arbitration conventions and national laws on the applicable law in such cases has led to conflicting opinions. It is accepted that arbitrators should evaluate the possibility of arbitration in accordance with the legislation applicable to the substance of the dispute. However, tribunals have sometimes considered this issue from the perspective of the law of the seat of arbitration, since arbitrators' powers of derive from that law. [35] Furthermore, it can be argued that the determination of the possibility of resolving a dispute through arbitration should be carried out at the initial stage of the arbitration proceedings by the arbitral tribunal itself and not postponed to the enforcement stage. In cases where national courts are tasked with assessing the possibility of arbitration, the court at the arbitration seat often has jurisdiction. Consequently, such a court, as a rule, evaluates the possibility of arbitration in accordance with the substantive and procedural laws of the seat of arbitration. In this regard, the legislation of the seat of arbitration may be used to determine the arbitrability of the dispute as a second option.

Moreover, as Professor Bermann indicated, the concept of dispute arbitrability covers a wide range of issues, including, but not limited to: 1) the existence of a valid arbitration agreement; 2) the possibility of enforcement of the arbitration agreement; 3) the binding nature of the agreement for the parties and whether the subject of the dispute falls under the arbitration agreement.[36] In this context, the legal framework governing the arbitration agreement plays a crucial role, especially in terms of subjective arbitrability, namely the legal ability of the party to conclude an arbitration agreement. This consideration is particularly relevant in the context of concession agreements, when one of the contracting parties is represented by a government agency, organization, or SOE.

Furthermore, according to paragraph 1 (a) of article V of the 1958 New York Convention, recognition and enforcement of the award may be refused if the parties to the arbitration agreement did not have legal capacity in relation to the conclusion of the arbitration agreement according to the law governing their legal capacity. In this case, it means that the party lacks the legal capacity under the law applicable to it to conclude an arbitration agreement. Such applicable law is understood as the law of a legal entity with respect to its nationality. Therefore, in relation to a state entity, it is necessary to consider the applicable

35 Penny Madden KC and Ceyda Knoebel, 'Arbitrability and Public Policy Challenges' in J William Rowley KC (ed), *The Guide to Challenging and Enforcing Arbitration Awards* (4th edn, Global Arbitration Review, Law Business Research Ltd 2025) 35.

36 George A Bermann, 'The "Gateway" Problem in International Commercial Arbitration' (2011) 37(1) Yale Journal of International Law 8.

law of the jurisdiction to which the organization belongs. Some Kazakh studies are also inclined towards this approach. Thus, considering the strict conflict-of-laws binding of the civil legal capacity of a legal entity, it is assumed that the Kazakh regulator, regarding the issue of obtaining consent to conclude an arbitration agreement, hardly intended to establish appropriate requirements only for those cases when arbitration proceedings and arbitration agreements are regulated by the legislation of the Republic of Kazakhstan.[37]

In such cases, the applicable law determines not only the formal validity of the arbitration agreement but also the representative' powers acting on behalf of the state. Accordingly, it should be emphasized that the three legal frameworks mentioned above are not mutually exclusive; instead, they function in a complementary and integrated manner.

Based on the above, the legislation of the jurisdiction covering issues of subjective arbitrability can be considered the law of the place of enforcement of the arbitration award, the law of the seat of arbitration, and the legal capacity of the party to enter into an arbitration agreement.

One of the well-known arbitration cases on the issue of challenging subjective arbitrability under the concession agreement dispute by a state party based on the lack of consent to sign an arbitration agreement is the case of *Malicorp Limited v. the Arab Republic of Egypt*.[38] The representative of Egypt referred to Article 1 of Egypt's Arbitration Law No. 27 of 1994, according to which the signing of an arbitration agreement as part of a concession agreement requires the consent of the Minister or other authorized official with respect to a public juridical person. However, the Tribunal refused this request, citing that the signatory was a public authority of Egypt (the Public Civil Aviation Authority), established by Presidential Decree No. 2931 of 1971. Given that the Public Civil Aviation Authority is under the supervision of the State Minister for Civil Aviation matters, the Tribunal confirmed that the Chairman of the Public Civil Aviation Authority, who signed every page of the concession agreement, including the arbitration clause, had full authority to sign it. In this regard, despite such a positive arbitration practice, which, in our opinion, obtaining consent to sign an arbitration agreement was implied under applicable law, the risk of a public party challenging the tribunal's jurisdiction under the concession agreement dispute on this basis remains.

37 Valikhan Shaikenov and Ardak Idayatova, 'The Problem of Choosing Applicable Law to Arbitration and the Arbitration Agreement in the Context of the Kazakhstan Legislation' (2017) 1(46) Bulletin of Institute of Legislation and Legal Information of the Republic of Kazakhstan 121.

38 *Malicorp Ltd (UK) v the Government of the Arab Republic of Egypt, Egyptian Holding Company for Aviation, Egyptian Airports Company* Case No 382/2004 (CRCICA, 7 March 2006) <https://www.italaw.com/cases/4400> accessed 1 April 2025.

5 LEGAL FRAMEWORK OF THE REPUBLIC OF KAZAKHSTAN AND COMPARATIVE ANALYSIS WITH THE KYRGYZ REPUBLIC JURISDICTION

It should be noted that the development of the arbitration legal framework in Kazakhstan has become quite relevant. For instance, according to previous studies on Kazakhstan's regulation of international arbitration, Kazakhstan should more actively implement and adapt model documents of international law, such as the UNCITRAL Model Law on International Commercial Arbitration (as amended 2006). This is justified by the possibility of recognizing the conclusion of an arbitration agreement in electronic form, considering the current digitalization of processes.[39]

A clear example of objective arbitrability is found in the restrictions established by the Law of the Republic of Kazakhstan "On Arbitration"[40] ("Law on Arbitration"). It is noteworthy that this law does not define "arbitrability" but instead focuses on delineating the jurisdictional competence of the arbitration tribunal. According to Article 8 of this Law, certain categories of disputes are excluded from the scope of arbitration proceedings. These include disputes affecting the interests of minors, individuals recognized as legally incompetent or with limited legal capacity, issues related to rehabilitation and bankruptcy, as well as disputes arising from personal non-property relations.

As for subjective arbitrability, the Law on Arbitration stipulates that disputes between government agencies and quasi-public sector entities are not subject to arbitration. At the same time, within the framework of the concession agreement, the state party participates exclusively as a contracting party, and its counterparty is a private party. However, the Republic of Kazakhstan's arbitration legislation imposes certain limitations on the legal capacity of state entities in concession agreements. Consequently, under the first part of paragraph 10 of article 8 of the Law on Arbitration, the arbitration tribunal cannot consider disputes between individuals and or legal entities of the Republic of Kazakhstan and government agencies or SOEs, except in cases where the competent authority has consented to an arbitration agreement.

Furthermore, the above-mentioned paragraph 10 of article 8 contains the second part, under which government agencies or SOE must send a request to the authorized body of the relevant industry (in relation to republican property) or the local executive body (in relation to communal property) on giving consent to executing such an agreement, indicating the projected costs of the arbitration. In this case, the legislator did not clearly distinguish whether the second part of paragraph 10 of article 8 applies to disputes between

39 Azamat Nurtan and Maygul Abilova, 'Enforcement of Foreign Arbitral Awards in Kazakhstan: A Comparative Legal Analysis of European and Asian Mechanisms' (2025) 8(3) Access to Justice in Eastern Europe 237. doi:10.33327/AJEE-18-8.3-a000117.

40 Law of the Republic of Kazakhstan No 488-V of 8 April 2016 'On Arbitration' [2016] Bulletin of the Parliament of the Republic of Kazakhstan 7-II/54.

a state organization and a resident of the Republic of Kazakhstan, or whether it also applies to disputes with non-residents.

On the one hand, this second part is part of paragraph 10 and should be a logical continuation of the provisions of the first part of paragraph 10. However, the content of the second part of paragraph 10 has no relationship to the first part of paragraph 10 and can be interpreted as an independent provision, as well as relating to both residents and non-residents. Such an asymmetry of regulation seems illogical, especially given the strategic importance of concession agreements affecting key government assets and the relevant industry.

The explanation of "the authorized body of the relevant industry" is provided in paragraph 9 of the Regulatory Resolution of the Supreme Court No. 3 dated 2 November 2023[41] ("Regulatory Resolution"). Under this provision, in the case of an arbitration agreement, a state body that may be an authorized body of the relevant industry should be guided by the norms of legislation governing the subordination of state bodies, for instance, the authorized body for the Ministry in accordance with the Constitution and the Law "On State Property"[42] is the Government of the Republic of Kazakhstan. In this context, under paragraph 10 of article 8 of the Law on Arbitration, the authorized body of the relevant industry or the local executive body, in considering a request for such consent, must consider economic security and the interests of the state. At the same time, the legislation does not provide for a procedure for obtaining such consent.

Moreover, given the level of the bureaucratic state system and the accepted level of responsibility of the public authority, foreign companies, as non-residents, planning to conclude a concession agreement containing an arbitration clause, must consider the practical difficulty of obtaining the consent of the authorized body to conclude an arbitration agreement by the state party.

On the other hand, the private party may rely on the Regulatory Resolution, which provides that obtaining the above consent to enter into an arbitration agreement with non-residents of the Republic of Kazakhstan is not required. However, according to local legislation, the law is higher in the hierarchy of legal acts than the Regulatory Resolution. Therefore, the question remains open as to why the above-mentioned provision of the Regulatory Resolution was not initially included in Article 8 of the Law on Arbitration.

With the repeal of the Law on Concessions[43] at the beginning of 2025, the primary legal framework governing concession agreements has been replaced by the Law on Public-

41 Resolution of the Supreme Court of the Republic of Kazakhstan No 3 of 2 November 2023 'On Some Issues of Application of Arbitration Legislation by Courts' [2003] Bulletin of the Supreme Court of the Republic of Kazakhstan 11.

42 Law of the Republic of Kazakhstan No 413-IV of 1 March 2011 'On State Property' [2011] Bulletin of the Parliament of the Republic of Kazakhstan 5/42.

43 Law of the Republic of Kazakhstan No 167 of 7 July 2006 'On Concessions' [2006] Bulletin of the Parliament of the Republic of Kazakhstan 14/88.

Private Partnership dated 31 October 2015[44] ("PPP Law"). Under the PPP Law, public-private partnerships are executed through contractual arrangements, including a public-private partnership agreements, concession agreements, or service contracts. Moreover, under the PPP Law, a concession agreement is a form of public-private partnership agreement entered into by a public partner and a private partner. This agreement stipulates that the private partner is entitled to receive remuneration directly from consumers for the provision of goods, work, or services as part of the implementation of the public-private partnership project (a consumer-based payment model).

Attention should be given to Article 57 of the PPP Law, which governs the resolution of disputes arising from concession agreements and addresses both subjective (pertaining to the parties involved) and objective (pertaining to the nature of the dispute) aspects.

Moreover, to apply an objective test in the assessment of the legislation of the Republic of Kazakhstan on the research question requires a comparative analysis with another legal system. Selecting a jurisdiction with a similar legal tradition helps identify specific issues that require consideration.

The choice of the Kyrgyz Republic's legislation as a comparative jurisdiction is determined by a combination of methodological factors. First, Kazakhstan and Kyrgyzstan share post-Soviet legal tradition, shaped by similar institutional mechanisms for regulating legal relations. This ensures comparability of the basic categories of private law, including the legal capacity of subjects and the criteria for subjective arbitrability. Furthermore, an important argument is the coincidence of the strategic directions of the legal policy of these two states. In this regard, Kazakhstan and Kyrgyzstan are focused on creating favorable conditions for doing business, attracting investments, and expanding cross-border trade.

Although it is in the same region as Kazakhstan, the Kyrgyz Republic has its own legal framework. Pursuant to Article 28 (2) of the Law of the Kyrgyz Republic dated 30 July 2002 ("Law on Arbitration Courts"),[45] an arbitral award may be subject to challenge if the party against whom the award is rendered is a state authority, local self-government body, state or municipal institution or enterprise, or another legal entity with state or municipal ownership participation. Pursuant to Article 36/1(2) of the Law on Arbitration Courts, an application for the annulment of an arbitral award must be submitted to the district or city court at the seat of the arbitral tribunal. Moreover, the filing of such an application suspends the enforcement of the arbitral award. In this context, it is important to highlight that this provision contradicts the fundamental principles of international commercial arbitration, particularly regarding the limited, clearly defined grounds on which arbitral awards may be challenged and the national court's intervention in the arbitration process. This provision

44 Law of the Republic of Kazakhstan No 379-V LRK of 31 October 2015 'On Public-Private Partnership' [2015] Bulletin of the Parliament of the Republic of Kazakhstan 20-VII/116.

45 Law of the Kyrgyz Republic No 135 of 30 July 2002 'On Arbitration Courts in the Kyrgyz Republic' [2002] Regulatory acts of the Kyrgyz Republic 17.

applies exclusively to disputes involving state authorities or SOEs, including those arising from concession agreements.

Pursuant to Article 36/1 (3) of the Law, one of the grounds for setting aside an arbitral award is the lack of legal capacity of the parties at the time of entering into the arbitration agreement. This ground inherently involves an evaluation of subjective arbitrability.

According to the Law of the Kyrgyz Republic "On Concessions and Concession Enterprises in the Kyrgyz Republic"[46] with amendments and additions as of 30 July 2013 ("Law on Concessions"), a concession refers to an authorization granted by the Government of the Kyrgyz Republic to an investor, permitting the conduct of specific entrepreneurial activities involving the temporary utilization of state-owned assets, including land and subsoil resources. In this context, the legislation notably acknowledges the dual nature of a concession, recognizing it as both an investment activity and a commercial enterprise.

It is also noteworthy that Article 12 of the Law on Concessions, which outlines the essential terms of a concession agreement, does not explicitly address dispute resolution. Instead, this matter is relegated to an optional or supplementary provision to be included at the discretion of the contracting parties.

Finally, the legal provision governing the dispute-resolution mechanism under a concession agreement lacks sufficient clarity. Specifically, Article 24 of the Law on Concessions permits the resolution of disputes not only through the courts but also through arbitration. However, it fails to specify whether such arbitration may be conducted at the international level or is limited solely to domestic arbitral institutions.

A comparative analysis of the two jurisdictions shows that Kazakhstan adheres to a less strict regulatory framework than the Kyrgyz Republic.

It is noteworthy that the Kazakh arbitration legislation does not provide a direct legal mechanism for challenging arbitral awards against state bodies, whereas the Kyrgyz Republic's arbitration legislation explicitly does.

At the same time, within the Kazakh jurisdiction, a significant regulatory issue concerns the requirement that state entities obtain the consent of an authorized government body before entering into arbitration agreements. Although under Kazakhstan law, the Regulatory Resolution clarifies that such consent is not mandatory when concluding arbitration agreements with non-resident parties, this does not exclude the possibility that government authorities will subsequently challenge the arbitration proceedings for lack of such consent. This may also apply to attempts to prevent the enforcement of arbitral awards by invoking public policy exceptions. In addition, the lack of a clearly defined procedure and time frame for obtaining the required consent contributes to legal

46 Law of the Kyrgyz Republic No 850-XII of 6 March 1992 'On Concessions and Concession Enterprises in the Kyrgyz Republic' (amended 30 July 2013) <https://cbd.minjust.gov.kg/4-762/edition/460511/kg> accessed 29 May 2025.

uncertainty. Consequently, there is an urgent need to introduce a legislative obligation to obtain the consent of an authorized government body, applicable to arbitration agreements with both residents and non-residents, accompanied by clearly defined procedural frameworks and strict deadlines for their compliance.

Nevertheless, given the current regulation, foreign entities may, as a practical measure to mitigate the above legal uncertainty, choose a seat of arbitration under a legal framework that limits the impact of legislation on the legal capacity of state entities to enter into arbitration agreements. In this context, it would be unfair to allow a State to evade arbitration in situations where the other party could reasonably believe that a government agency had the necessary authority to accept an arbitration clause, even if such authority did not actually exist.[47] This approach can serve as a strategic means of reducing the risk of problems arising from the lack of relevant consent. For instance, in Swiss Confederation jurisdiction under article 177 of Federal Act on Private International Law (PILA), 18 December 1987[48] (Status as of 1 January 2021) a State or a state-owned or state-controlled organization that is a party to an arbitration agreement may not invoke its domestic law to challenge its legal capacity to enter into arbitration or to challenge the possibility of arbitration of a dispute falling within the scope of this agreement.

Another approach concerns the choice of arbitration rules, which may also limit the application of the requirements of Kazakhstan's Law on Arbitration. This approach is considered in the context of the tendency when arbitration institutions have long been exploring ways to adapt the procedure to the specifics of the case and reduce the time and costs associated with arbitration.[49]

A practical illustration of this approach is the AIFC court's decision (CASE No: AIFC-C/CFI/2021/0008) dated 24 January 2022) on consideration of the arbitral award issued by International Arbitration Centre ("IAC") of the AIFC in connection to the dispute between Success K LLP ("Success") and the Ministry of Health of the Republic of Kazakhstan ("the Ministry") based on the public-private contract.[50] In this context, the AIFC Court is part of the Astana International Financial Center (AIFC), established on the territory of Astana,

47 Stavros Brekoulakis, 'Rethinking Consent in International Commercial Arbitration: A General Theory for Non-signatories' (2017) 8 Journal of International Dispute Settlement 610. doi:10.1093/jnlids/id:x0 12.

48 Federal Act of the Swiss Confederation of 18 December 1987 'On Private International Law (PILA)' (amended 1 January 2021) <https://www.fedlex.admin.ch/eli/cc/1988/1776_1776_1776/en> accessed 29 May 2025.

49 UNCITRAL, *Settlement of Commercial Disputes Issues Relating to Expedited Arbitration: Note by the Secretariat* (A/CN.9/WG.II/WP.207, 16 November 2018) <https://docs.un.org/en/A/CN.9/WG.II/WP.207> accessed 29 May 2025.

50 *Success K LLP v Ministry of Healthcare of the Republic of Kazakhstan* Case No AIFC-C/CFI/2021/0008 (AIFC Court of First Instance, 24 January 2022) <https://court.aifc.kz/judgments/case-no-8-of-2021/> accessed 29 May 2025

Kazakhstan, which is a separate jurisdiction designed to develop the financial market and attract investments with its own legal system and tax regime.

One of the applications of the Ministry was that the arbitration award should be annulled, as the arbitration agreement is invalid because it was concluded without the approval of an authorized state body, as required by paragraph 10 of Article 8 of Kazakhstan's Law on Arbitration. Consequently, the Ministry held that the law of the Republic of Kazakhstan applied to the arbitration agreement. However, the AIFC court rejected the Ministry's application on the following grounds.

First, the court understands that the substantive law governing the contract between parties is the law of the Republic of Kazakhstan; however, the court distinguishes that law from the law applicable to the arbitration process.

Second, even though the Republic of Kazakhstan was chosen as the seat of arbitration in the dispute, the parties chose the Rules on Arbitration and Mediation at the International Arbitration Centre ("IAC Rules") as the arbitration rules of the process, and the IAC has its own legal regime, different from the law of Kazakhstan. Under paragraph 7 of the AIFC Arbitration Regulations 2017, the requirements of the Law on Arbitration of the Republic of Kazakhstan do not apply to arbitrations conducted under these Regulations.[51] In this regard, it can be stated that arbitration under IAC Rules is not subject to the Law on Arbitration of the Republic of Kazakhstan.

Finally, the Ministry referred to Article 18 of the IAC arbitration rules on this issue.[52] However, according to this article, the arbitration court undertakes to decide on the merits of the dispute based on the applicable law of the relevant arbitration agreement. At the same time, any designation by the parties of the legislation of this state is considered to relate to the substantive law of this state, and not to its conflict-of-laws rules. In this context, the Court concluded that the above article referred to by the Ministry concerned only the law applicable to the substance of the dispute, and not to the arbitration procedure.

Based on the above, the Court concluded that the arbitration agreement is valid under AIFC law and, therefore, paragraph 10 of Article 8 of the Law on Arbitration of the Republic of Kazakhstan does not apply. Therefore, the absence of consent of an authorized state body does not affect the validity of the arbitration agreement.

However, these approaches do not exclude the possibility of challenging an arbitral award under Article V(1)(a) of the New York Convention when the parties to the arbitration agreement were, under the law applicable to them, under some incapacity. Therefore,

51 Resolution of the AIFC Management Council of 5 December 2017 'AIFC Arbitration Regulations' <https://iac.aifc.kz/wp-content/uploads/2025/07/aifc-arbitration-regulations-eng.pdf> accessed 29 May 2025.

52 International Arbitration Centre, *Rules on Arbitration and Mediation at the International Arbitration Centre* (Astana International Financial Centre 2022) art 18 <https://aifc.kz/wp-content/uploads/2024/06/iac-arbitration-and-mediation-rules-2022-eng.pdf> accessed 29 May 2025.

requiring consent from an authorized government authority remains the preferred option on this matter. In this regard, criticism of the above AIFC court decision may relate to the fact that the approach to regulating subjective arbitrability was based solely on the law governing the arbitration agreement, and the law governing the party's legal capacity under the arbitration agreement was not considered. This issue is becoming particularly relevant, given that the Ministry is a state body.

Furthermore, it should be noted that there is a significant difference in the approach to determining subjective arbitrability between the AIFC Court and the national courts of Kazakhstan. In this regard, the Kazakh courts do not pay much attention to the law governing arbitration agreement, and the seat of arbitration, and are guided solely by the Law on Arbitration of the Republic of Kazakhstan.

The following decisions of the Kazakh courts are the justification for this conclusion:

In case No. 7119-21-00-2/4352 dated 1 July 2021 on the claim of APEX Consult LLP against the Ministry of Health of the Republic of Kazakhstan, the Court of First Instance confirmed that the arbitration clause of the contract between the parties to the dispute is invalid.[53] This conclusion was made due to the Ministry's lack of consent from the authorized body in accordance with the requirements of paragraph 10 of Article 8 of the Law on Arbitration. In the reasoning part, the court considered the arbitration agreement as a civil law agreement and referred to paragraph 1 of Article 158 of the Civil Code of the Republic of Kazakhstan[54], according to which a transaction, the content of which does not comply with the requirements of the law, as well as a transaction made for a purpose knowingly contrary to the fundamentals of law and order, is contested and may be declared invalid by the court.

On the other hand, it is not entirely clear why the court applied the law of the Republic of Kazakhstan in this case, as there were no references to the law of legal capacity or the law governing the arbitration agreement in the reasoning. Moreover, Kazakhstan was not a seat of arbitration. It should be noted that another problem was arbitration clause's the lack of key elements, but at the same time, it contained a clear intention of the parties to submit the contract dispute to arbitration rather than to the national court. Consequently, the specified intention and the claimant's right of to arbitration were violated due to the issue of subjective arbitrability and the provisions of the legislation of the Republic of Kazakhstan.

In another court case No. 7599-18-00-2a/4188 dated 29 May 2019 between SMU Burvodstroy LLP and Kyzyl Orda Su Zhuyesi Nuclear State Enterprise on debt collection based on the public-private contract, the arbitration clause was not pathological and contained all the necessary elements, including the place of arbitration and UNCITRAL

53 *APEX Consult LLP v Ministry of Health of the Republic of Kazakhstan* Case No 7119-21-00-2/4352 (Specialized Interdistrict Economic Court of Nur-Sultan, 1 July 2021) <https://sb.prg.kz/lawsuits/3525778> accessed 29 May 2025.

54 Civil Code of the Republic of Kazakhstan No 268-XIII of 27 December 1994 (amended 2025) <https://adilet.zan.kz/eng/docs/K940001000_> accessed 29 May 2025.

arbitration rules.[55] However, the court also confirmed that the arbitration clause of the contract between the parties to the dispute is invalid based on paragraph 10 of Article 8 of Kazakhstan's Law on Arbitration.

At the same time, the court also noted that, to determine the national court's jurisdiction in this dispute, the interested party must additionally file a claim with the court to invalidate the arbitration clause, despite the parties' lack of intention to refer the dispute to the national court. Consequently, another practical problem is that the lack of subjective arbitrability may render dispute resolution impossible or delay it, as the parties cannot refer to arbitration, and the national court is not mentioned in an arbitration clause.

Finally, in the recent court case No. 1513-24-00-2/4263 dated 29 January 2025 between Amarant LLP and Kazvodkhoz State Enterprise, the court decided that, on the basis of paragraph 10 of Article 8 of the Kazakhstan's Law on Arbitration, despite the existence of an arbitration agreement, the claimant must file a claim to the national court at the place of registration of the respondent, which also implied the invalidity of the concluded arbitration agreement.[56]

The considered judicial practice of the Kazakh national courts additionally confirms the relevance of the issue of subjective arbitrability under current consideration, which results in violations of the principle of preserving the direct intention of the parties to the arbitration agreement to submit the dispute to arbitration.

Based on this judicial practice, as a practical recommendation for a party to an arbitration agreement with a state authority or entity of the Republic of Kazakhstan, greater attention should be paid to the provisions and to the inclusion of all important elements of the arbitration agreement, including the seat of arbitration and the arbitration rules. Furthermore, for the private party to the arbitration agreement, as noted above, it is extremely important to neutralize as much as possible the application of the law of the Republic of Kazakhstan (in the current version) to the issue of subjective arbitrability by choosing the appropriate seat of arbitration or arbitration rules. For Kazakhstan, on the other hand, it is important to make the above-mentioned changes to the arbitration legislation, which not only could save the right and intention of the party to arbitration from a subjective arbitrability perspective, but also, in the future, would bring this jurisdiction closer to the number of arbitration-friendly jurisdictions.

55 *SMU Burvodstroy LLP v Kyzyl Orda Su Zhuyesi Nuclear State Enterprise* Case No 7599-18-00-2a/4188 (The Appellate Judicial Board for Civil Cases of the Almaty City Court, 29 May 2019) <https://sb.prg.kz/lawsuits/1179187> accessed 29 May 2025.

56 *Amarant LLP v Kazvodkhoz State Enterprise* Case No 1513-24-00-2/4263 (Specialized Interdistrict Economic Court of Aktobe region, 29 January 2025) <https://sb.prg.kz/lawsuits/6176125> accessed 29 May 2025.

6 CONCLUSIONS

The analysis of the concept of subjective arbitration and the comparative review of its legal regulation enable us to formulate several conclusions following from this study.

When considering the conceptual foundations of subjective arbitration in the framework of a concession agreement, it becomes obvious that the existing legal regulation regarding the requirement to obtain the consent of an authorized state body, especially in cases where a SOE or a state body is a party to the agreement, does not provide a definitive solution to this issue. Considering the research issue related to foreign private investors, it should be emphasized that in accordance with the current legal framework of the Republic of Kazakhstan, an arbitration clause in a concession agreement should not only reflect the State's waiver of sovereign immunity, but also explicitly confirm that the State contract party has received the necessary permission from the competent government authority to conclude such an arbitration agreement and participation in the specified arbitration procedure. Alternatively, for foreign companies entering into arbitration agreements with government agencies or SOEs of the Republic of Kazakhstan, a reasonable approach may be to choose relevant arbitration rules or a seat of arbitration in a jurisdiction that allows 'neutralization' of the law governing the state party's capacity.

At the same time, the Republic of Kazakhstan's arbitration framework should establish a clear and unambiguous requirement that the state party obtain prior authorization from a duly authorized government agency before concluding arbitration agreements. Such a requirement would strengthen the position of a private party in cases where the state disputes the possibility of resolving the dispute through arbitration. Prior consent would demonstrate the state party's intention to submit potential disputes to arbitration, an aspect often recognized and emphasized by arbitration tribunals. In addition, legislation should clearly define the procedure and specific time frame for obtaining such consent to promote consistency, transparency, and legal predictability. It is expected that the creation of this coherent legal framework will increase the confidence of foreign investors, thereby supporting the broader policy objective of the Republic of Kazakhstan to attract and expand the inflow of foreign investment.

Finally, the problem of subjective arbitrability is comprehensive and extends beyond the issue of obtaining consent to enter into an arbitration agreement or to participate in arbitration proceedings. It is inextricably linked to broader legal doctrines, including sovereign immunity, public policy, the doctrines of state attribution and piercing the sovereign veil. Accordingly, this concept is planned to be considered in the framework of correlation with these legal doctrines in further research.

REFERENCES

1. Acemoglu D and Robinson JA, *The Narrow Corridor: States, Societies, and the Fate of Liberty* (Penguin Press 2019)
2. Barraclough A and Waincymer J, 'Mandatory Rules of Law in International Commercial Arbitration' (2005) 6(2) Melbourne Journal of International Law 205
3. Bermann GA, 'The "Gateway" Problem in International Commercial Arbitration' (2011) 37(1) Yale Journal of International Law 1
4. Blackaby N and others, *Redfern and Hunter on International Arbitration* (6th edn, OUP 2015)
5. Born GB, *International Commercial Arbitration* (3rd edn, Kluwer Law International 2021)
6. Brazier L, 'The Arbitrability of Investor-State Taxation Disputes in International Commercial Arbitration' (2015) 32(1) Journal of International Arbitration 1. doi:10.54648/joia2015001
7. Brekoulakis S, 'Rethinking Consent in International Commercial Arbitration: A General Theory for Non-signatories' (2017) 8 Journal of International Dispute Settlement 610. doi:10.1093/jnlids/id:x0 12
8. Brower CN, 'State Parties in Contract-Based Arbitration: Origins, Problems, and Prospects of Private-Public Arbitration' (2019) 1(2) ITA in Review https://www.itainreview.org/articles/Fall2019/state-parties-in-contract-based-arbitration.html accessed 14 April 2025
9. Faccio S, 'Investment Contracts and the Reform of Investment Arbitration: Towards Sustainability' (2023) 38(3) ICSID Review – Foreign Investment Law Journal 625. doi:10.1093/icsidreview/siad026
10. Gómez KF, *Key Duties of International Investment Arbitrators: A Transnational Study of Legal and Ethical Dilemmas* (Springer 2019)
11. Lew JDM, Mistelis LA and Kröll SM, *Comparative International Commercial Arbitration* (Kluwer Law International 2003)
12. Lim CL, Ho J and Paparinskis M, *International Investment Law and Arbitration* (2nd edn, CUP 2021)
13. Madden KCP and Knoebel C, 'Arbitrability and Public Policy Challenges' in Rowley KCJW (ed), *The Guide to Challenging and Enforcing Arbitration Awards* (4th edn, Global Arbitration Review, Law Business Research Ltd 2025) 35.
14. Moran TH, 'The Evolution of Concession Agreements in Underdeveloped Countries and the United States National Interest' (1974) 7(2) Vanderbilt Journal of Transnational Law 197

15. Ngo S, 'International Commercial Arbitration for Belt and Road Initiative – Some Thoughts on China, Singapore and Hong Kong SAR as Dispute Resolution Locales' (China-ASEAN Civil and Commercial Law Forum: Proceedings Paper, Guangxi University for Nationalities, Law School, 20 December 2018) https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3323302 accessed 14 April 2025

16. Nurtan A and Abilova M, 'Enforcement of Foreign Arbitral Awards in Kazakhstan: A Comparative Legal Analysis of European and Asian Mechanisms' (2025) 8(3) Access to Justice in Eastern Europe 237. doi:10.33327/AJEE-18-8.3-a000117

17. Ohler C, 'Concessions' *Max Planck Encyclopedia of Public International Law* (2013) https://opil.ouplaw.com/display/10.1093/law:epil/9780199231690/law-9780199231690-e1512 accessed 14 April 2025

18. Okoli CS, 'Production Sharing Agreements and Licences: A Distinction Without a Difference?' (2012) 282 International Energy Law Review 1. doi:10.2139/ssrn.2171506

19. Osode PC, 'State Contracts, State Interests and International Commercial Arbitration: A Third World Perspective' (1997) 30 Comparative and International Law Journal of Southern Africa 37

20. Salih RS and Yamulki A, 'Petroleum Exploration and Production Contracts as Regulatory Tools: The Kurdistan Region Production Sharing Contracts' (2020) 101 Journal of Law, Policy and Globalization 165. doi:10.7176/jlpg/101-17

21. Shaikenov Va and Idayatova A, 'The Problem of Choosing Applicable Law to Arbitration and the Arbitration Agreement in the Context of the Kazakhstan Legislation' (2017) 1(46) Bulletin of Institute of Legislation and Legal Information of the Republic of Kazakhstan 121

22. Suleimenov MK, 'Recognition and Enforcement of Foreign Arbitration and State Courts' Decisions on Investment Disputes: Kazakhstan's Experience' (*Paragraph: Yurist*, 13 May 2009) <https://online.zakon.kz/Document/?doc_id=31644606&pos=6;-106> accessed 14 April 2025

23. Tokayev KJ, 'Kazakhstan in the Era of Artificial Intelligence: Current Challenges and Solutions through Digital Transformation: Address of the President to the People of Kazakhstan' (*President of the Republic of Kazakhstan*, 8 September 2025) <https://www.akorda.kz/en/president-kassym-jomart-tokayevs-state-of-the-nation-address-to-the-people-of-kazakhstan-kazakhstan-in-the-era-of-artificial-intelligence-current-challenges-and-solutions-through-digital-transformation-1083029> accessed 14 September 2025

24. van Haersolte – Van Hof JJ and Koppe EV, *International Arbitration and the Lex Arbitri* (Grotius Centre Working Paper Series 2014/33-IEL, Grotius Centre for International Legal Studies, Universiteit Leiden 2014)

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АНОТАЦІЯ УКРАЇНСЬКОЮ МОВОЮ

Дослідницька стаття

СУБ'ЄКТИВНА АРБІТРАБЕЛЬНІСТЬ У КОНЦЕСІЙНИХ СПОРАХ МІЖ ДЕРЖАВНИМ І ПРИВАТНИМ СЕКТОРОМ: ПРАВОВІ ОСНОВИ РЕСПУБЛІКИ КАЗАХСТАН

Нурбек Жанґалієв

АНОТАЦІЯ

Вступ. *Роль концесійного договору стає дедалі важливішою в країнах Центральної Азії як договірного механізму взаємодії між державною владою та іноземним приватним сектором. Крім того, це питання стає особливо актуальним, з огляду на зростання іноземних інвестицій у цьому регіоні. Зважаючи на це, міжнародний арбітраж, що зберігає достатній нейтралітет, стає все більш актуальним для вирішення спорів за такими договорами.*

Крім того, питання арбітрабельності в арбітражних спорах між державним і приватним сектором потребує додаткової уваги через недостатню вивченість його концепції та регулювання. У зв'язку з цим, огляд арбітражної практики в Казахстані в цьому контексті має подвійну функцію: як інформаційну, для кращого розуміння цього питання іноземним інвестором, так і виявлення питань, які потребують удосконалення в чинному регулюванні. Таке узгодження є життєво важливим для підтримки правової визначеності та підвищення привабливості цього регіону для іноземних інвестицій, особливо в секторах, що залежать від довгострокових та капіталомістких партнерств.

Методи. *Це дослідження ґрунтується на всебічному емпіричному аналізі національного законодавства, що регулює концесійні угоди та комерційний арбітраж у Казахстані, з наголосом на ступінь та характер обмежень суб'єктивної арбітрабельності у спорах, що виникають з концесійних угод. Крім того, цей аналіз доповнюється порівняльно-правовим методом, що передбачає вивчення арбітражних систем в інших відповідних юрисдикціях. У цьому контексті проводиться порівняльний аналіз для визначення подібностей та відмінностей у правовому регулюванні між юрисдикціями Казахстану та Киргизстану. Крім того, дослідження застосовує логічне та правове обґрунтування для визначення найбільш релевантних правових доктрин, які перетинаються з проблемою арбітрабельності у спорах щодо концесійних угод.*

Результати та висновки. *Результати дослідження свідчать про відсутність правової визначеності в законодавстві Казахстану щодо суб'єктивної арбітрабельності за участю державних установ щодо концесійних угод. Щоб мінімізувати ризик оскарження арбітражного провадження Казахстаном на підставі суб'єктивної арбітрабельності, що може призвести до певних занепокоєнь серед іноземних інвесторів, рекомендується внести зміни до казахстанського арбітражного законодавства. Зокрема, слід встановити чітку вимогу для державних суб'єктів щодо отримання попередньої згоди належним чином уповноваженого державного органу перед укладанням арбітражних угод. Крім того, законодавство має чітко визначити процедуру та терміни отримання такої згоди для забезпечення узгодженості та юридичної передбачуваності. Враховуючи, що модель концесійної угоди поширена в Казахстані, ця законодавча зміна підвищить рівень довіри іноземних інвесторів, що може призвести до збільшення припливу інвестицій. Водночас, на сучасному етапі іноземним компаніям, які розглядають можливість інвестувати в Казахстан, доцільно звертати увагу на місце арбітражу, що мінімізує вплив законодавства Казахстану та регулює правоздатність державних суб'єктів укладати арбітражні угоди, або, як кращий варіант, вимагати від державного суб'єкта отримання попередньої згоди уповноваженого державного органу на укладання таких угод та участь в арбітражному провадженні.*

Ключові слова. *Міжнародний комерційний арбітраж, суб'єктивна арбітрабельність, арбітражна угода, концесійна угода.*