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## Kazakhstan

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### A. Legislation and rules

#### A.1 Legislation

In April 2016, as a result of the reform of the judicial system, the Law On Arbitration (the “New Arbitration Law”) was adopted. This law is based on the UNCITRAL Model Law. It governs both international and domestic arbitration proceedings.

In addition to unifying procedural rules for international and domestic arbitration proceedings, the New Arbitration Law implemented the following changes to the previous rules:

- (a) State-owned companies may only execute arbitration agreements with Kazakhstani companies after obtaining consent from the superior state authority.
- (b) An arbitration agreement must set out the name of the arbitration institution to be used. Due to this provision, it is not entirely clear whether arbitration agreements that refer to ad hoc arbitration rules will be valid or not.
- (c) A party has the right to terminate an arbitration agreement unilaterally before the origin of the dispute.
- (d) A new association of arbitration institutions and arbitrators — the Arbitration Chamber — should be established. This Chamber is responsible for maintaining a Register of Arbitrators and represents local arbitration institutions to local state authorities and foreign organizations.
- (e) When reviewing disputes with state-owned companies, arbitrators are required to apply Kazakhstani law only, unless

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otherwise provided for in the international treaties of the Republic of Kazakhstan.

- (f) Parties have the right to seek the reconsideration of arbitral awards based on so-called “newly opened circumstances” (ie, facts that are material to the case, but were not previously known to an applicant). This provision has been copied from the Civil Procedure Code, and it is not entirely clear how it will be applied by arbitrators.
- (g) In addition to the currently existing grounds for challenging an arbitral award, the New Arbitration Law will allow parties to challenge the award if there is a judgment or an award that has a *res judicata* effect on the subject matter of the challenged award.

Generally, while the unification of procedural rules for international and domestic arbitration proceedings is a positive change, other provisions of the proposed New Arbitration Law will make the regulation of arbitration proceedings in Kazakhstan more restrictive. Additionally, it is not entirely clear how these new provisions will interrelate with the provisions of international treaties ratified by Kazakhstan.

As a result of the pressure of local scholars and practitioners, in February 2017, the relevant provision of the New Arbitration Law allowing the unilateral termination of the arbitration clause was canceled.

At the same time, there are a number of cases where parties made attempts to terminate arbitration agreements based on the above provision and Kazakhstani court practice on its application is very controversial.

In addition, under the new version of the Civil Procedural Code of the Republic of Kazakhstan, adopted in October 2015 and in force since 1 January 2016, the procedure for enforcing domestic arbitration awards has become more complicated.



In particular, in addition to the grounds for refusing to enforce an arbitral award listed in Article V of the New York Convention, the enforcement of an award may now be rejected if: (i) there is a judgment or an arbitral award issued on the same dispute between the same parties and based on the same grounds (ie, a judgment or award that has a *res judicata* effect); or (ii) an award is issued as a result of a crime confirmed by a criminal court sentence.

While it is not entirely clear, due to the fact that Kazakhstan is a member of the New York Convention and the Geneva Convention, it is our understanding that these new grounds will be applied only to domestic arbitral awards.<sup>2</sup> However, this issue will need to be clarified by local court practice.

Kazakhstan is a party to a number of bilateral and multilateral agreements that grant investors the right to arbitrate disputes over their investments in Kazakhstan. These treaties include the ICSID Convention, the Treaty On Partnership and Co-operation Agreement Between the European Union and the Republic of Kazakhstan dated 23 January 1995, and the ECT dated 17 December 1994.

## A.2 Institutions, rules and infrastructure

At present, there are around 20 arbitration institutions in Kazakhstan. The most famous of these are the Kazakhstani International Arbitrage (KIA), the International Arbitration Court IUS (IUS) and the Center of Arbitration of the National Chamber of Entrepreneurs of the Republic of Kazakhstan (CA of NCE).

### A.2.1 The CA of NCE

The CA of NCE was established in 2014 as a result of the reorganization of the International and Domestic Arbitration Courts at

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<sup>2</sup> Some local scholars and practitioners argue that Kazakhstan did not properly ratify the international treaties above (ie, by the law adopted by the Kazakhstani parliament) and, therefore, these treaties cannot prevail over national laws. However, there are a number of court decisions that confirm that provisions of the New York Convention and Geneva Convention will overrule national laws in a case of conflict.

the Chamber of Commerce and Industry of the Republic of Kazakhstan. This reorganization took place as a result of amendments to Kazakhstani law relating to the liquidation of the Chamber of Commerce and Industry and the establishment of the National Chamber of Entrepreneurs (NCE). While the CA of NCE signed assignment agreements with the International and Domestic Arbitration Courts at the Chamber of Commerce and Industry of the Republic of Kazakhstan, technically, it is not a successor of these arbitration institutions. However, due to the fact that for most local companies, membership of the NCE is mandatory, and given that the CA of NCE has opened branches in all Kazakhstani regions, this institution will be the biggest in Kazakhstan.

The CA of NCE handles all types of commercial disputes between local and foreign companies, except disputes that are non-arbitrable under Kazakh law (such as disputes relating to the registration of rights over immovable property and challenges to decisions of state authorities).

The CA of NCE has been designated by the Kazakhstani government to exercise the functions referred to in Article IV of the Geneva Convention.

#### A.2.2 The IUS

The IUS was the first arbitration institution in Kazakhstan, established in 1993 shortly after the declaration of independence of the Republic of Kazakhstan. This institution was established by the famous local scholar Professor Petr Greshnikov. In 2002, the IUS opened a branch in St. Petersburg. This branch was established, among other reasons, for the purpose of avoiding the application of Kazakhstani law, which was unfavorable toward arbitration proceedings.

The IUS also handles all types of commercial disputes between local and foreign companies, except disputes that are non-arbitrable under Kazakh law.



Under the Rules of Arbitration of the IUS, in exceptional cases, the Council of the IUS may dismiss an award issued under the Rules of Arbitration of the IUS.

### A.2.3 The KIA

The KIA was the first arbitration institution established after the adoption of the International Arbitration Law. This institution was established by the famous local scholar Professor Maidan Suleimenov.

Similar to the other two institutions, the KIA handles all types of commercial disputes between local and foreign companies.

### A.2.4 Astana Financial Center

In addition to the above arbitration institutions, a new international arbitration institution was launched on 1 January 2017.

In an effort to attract further investment to Kazakhstan, on 19 May 2015, President Nursultan Nazarbayev issued the Financial Center Decree, which significantly affects the Republic's financial and judicial systems. Pursuant to the Financial Center Decree, the Astana Financial Center, a new international financial center, will be created in Astana with the goal of becoming one of the top 10 financial centers in Asia, as well as one of the top 30 financial centers in the world, by 2020.

In line with the Financial Center Decree, in December 2015, the Constitutional Law on the Astana Financial Center (“Astana Financial Center Law”) was adopted to ensure the establishment and operation of the Astana Financial Center.

A key part of the Astana Financial Center will be the creation of a financial court, the Astana Financial Center Court. It will engage foreign judges to resolve investment and other disputes between members of the Astana Financial Center, or other parties if they agree to settle their disputes in this financial court. It appears that the new court may hear disputes under agreements governed by English law

and that English will be the language used for proceedings of the new court.

Similar to the Dubai Financial Center, under the Astana Financial Center Law, the Council of the Astana Financial Center will establish the International Arbitration Center, which will be a new arbitration institution. While it is not entirely clear, it seems that the Astana Financial Center Court will be responsible for the enforcement of awards issued by the International Arbitration Center.

## B. Cases

### B.1 Recognition of ICC interim measures award

In March 2017, upon the application of the claimant, an ICC arbitral tribunal issued a decision on interim measures that ordered the respondent not to dispose its assets until a final decision was made on the merits of the arbitration dispute.

In accordance with Article 28.1 of the ICC Arbitration Rules, this decision was deliberately made in the form of an arbitral award at the request of the claimant in order to allow him to later apply to the Kazakh courts for recognition and enforcement.<sup>3</sup>

In 2017, the Almaty City Economic Court and the Almaty City Court of Appeal considered the application of the claimant seeking the enforcement of the ICC interim measures award.

Dismissing objections raised by the respondent, local courts confirmed that this award should be enforced in line with provisions of the Kazakhstani Civil Procedure Code despite the fact that it was not an award on the merits of the dispute.

To the best of our knowledge, this was the first time the Kazakhstani courts considered the enforcement of an interim measures arbitral

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<sup>3</sup> Under the conservative interpretation of the Kazakhstani Civil Procedure Code, local courts may only enforce foreign arbitral awards. Therefore, other arbitral decisions (like orders or resolutions) may not be enforceable in Kazakhstan.



award. The above approach of the Kazakhstani courts evidences their pro-arbitration position, which is in line with recent international trends.

## B.2 A public policy argument cannot lead to reconsideration of the case on merits

In May 2017, the Kazakh Supreme Court reviewed a case seeking to set aside an arbitral award issued by the KIA in a dispute between two non-residents of Kazakhstan.

In this case, the respondent in the arbitration proceedings asked the court to set aside the arbitral award claiming that the arbitrators incorrectly applied relevant provisions of the applicable law, which led to a breach of Kazakhstani public policy.

The application was granted by lower courts, but the claimant appealed the lower court decisions to the Supreme Court. The Supreme Court overruled the lower court decisions.

In particular, the Supreme Court stated that the court review of the public policy argument cannot lead to the reconsideration of arbitrators' findings on merits, including the correctness of the application of law.

We believe that the above Supreme Court decision will be used by local courts as an example of proper interpretation of the public policy provisions.

## C. Funding in international arbitration

Kazakhstani law does not regulate the use of the third-party funding in arbitration.

We are also not aware of any cases where parties have used such funding in local arbitration or court proceedings.

To our knowledge, there is at least one case where local courts analyzed the issues relating to a funding arrangement executed in the

framework of foreign court proceedings and it seems that the concept of this arrangement is not entirely clear to local courts.

At the same time, we expect funding arrangements will become increasingly popular in Kazakhstan, especially in court and/or arbitration proceedings commenced in the Astana International Financial Centre.