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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 and 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.

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- (e) When reviewing disputes with state-owned companies, arbitrators are required to apply Kazakhstani law only, unless 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” (i.e., 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 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.

Due to pressure from 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

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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 (i.e., 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>3</sup> This interpretation is supported by local court practice as well.

At present, the parliament is considering further amendments to the New Arbitration Law that will clarify issues relating to the application of the New York Convention and Geneva Convention and cancel several restrictions relating to the settlement of disputes with state-owned companies.

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 EU and the Republic of Kazakhstan dated 23 January 1995 and the ECT dated 17 December 1994.

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<sup>3</sup> Some local scholars and practitioners argue that Kazakhstan did not properly ratify the international treaties above (i.e., by the law adopted by the Kazakhstani Parliament) and, therefore, these treaties cannot prevail over national laws. However, a number of court decisions confirm that the provisions of the New York Convention and Geneva Convention will overrule national laws in case of conflict.

## 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), the Center of Arbitration of the National Chamber of Entrepreneurs of the Republic of Kazakhstan (CA of NCE), and the International Arbitration Center of Astana International Financial Center (IAC of AIFC).

### 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 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 in 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 appointed 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 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 IAC of AIFC

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

The IAC is acting in line with the AIFC Constitutional Statute No. 438-V ZRK of 7 December 2015, the AIFC Arbitration Regulations approved on 5 December 2017, and the IAC Arbitration and Mediation Rules approved in 2018.

The above rules provide that the New Arbitration Law does not apply to the arbitration proceedings in AIFC. The 2017 AIFC Arbitration

Regulations is based on the UNCITRAL Model Law and is more liberal than the Kazakhstani domestic rules.

The IAC of AIFC handles all types of commercial disputes between local and foreign companies. It also provides services related to the administration of ad hoc arbitration proceedings.

Arbitral awards issued under the 2018 IAC Arbitration and Mediation Rules may be enforced via the AIFC Court.

## **B. Cases**

### **B.1 A public policy argument cannot lead to reconsideration of the case on merits**

In December 2018, the Cassation Panel of the Supreme Court preliminarily reviewed a case seeking to set aside a domestic arbitral award issued by the KIA.

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

The application was granted by lower courts, which stated that the above grounds may be viewed as a breach of Kazakhstani public policy.

However, the claimant appealed the lower court decisions to the Supreme Court.

As a result of the preliminary review of the case by the Cassation Panel of the Supreme Court, it came to the conclusion that lower court decisions should be overruled.

In particular, the Supreme Court confirmed its position, argued in other cases, 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 the law.

We believe that the above position of the Supreme Court decision will be included in the Supreme Court guideline for local courts as a precedent.

## **B.2 Arbitrability of disputes arising from mortgage arrangements may be disputable**

In January 2018, the Almaty City Court of Appeal decided to set aside the domestic arbitral award issued on the dispute regarding the enforcement of a mortgage agreement.

The position of the appellate court was based on the assumption that under Kazakhstani law, such disputes are non-arbitrable. The court position was grounded by reference to the Kazakhstani mortgage rules, which provide that disputes arising out of mortgage arrangements may be settled “in court proceedings.”

As far as we know, the case has not been reviewed by the Cassation Panel of the Supreme Court on merits, but the findings of the court of appeal are criticized by both local scholars and practitioners and the Supreme Court in its guideline on consideration of cases relating to arbitration.

In particular, the Supreme Court took the position that the above general wording (which is widely used in local laws) cannot be viewed as a restriction for arbitrability of disputes. In turn, any private disputes may be settled through arbitration unless clearly prohibited by law.