

11 May 2016

To our clients and friends

INFORMATION MEMORANDUM Concerning New RK Arbitration Law

Starting 20 April 2016, Kazakhstan puts into effect a new *RK Law "On Arbitration"* (hereinafter referred to as the "Law").

The Law unites provisions of the International Arbitration Law¹ and Arbitration Tribunal Law² previously in effect. In connection with this, the concepts of "arbitration tribunal," which resolved disputes between the RK residents, and "international arbitration," which resolved disputes involving participation of a non-resident or several non-residents, are now united into a single term "arbitration," and a number of limitations established by the Arbitration Tribunal Law now cover the disputes involving participation of the RK non-residents. The Law also introduced some other novelties, brief overview of the most important of which we have presented in this Memorandum.

1. Arbitration Agreement

1.1. Autonomy of arbitration agreement

For the first time ever, the Kazakhstan legislation secured the principle of the so-called "autonomy" or "severability" of an arbitration agreement, which entails that any revocation, amendment or invalidation of the main agreement will not result in revocation, amendment or invalidation of the arbitration clause and *vice versa*.

1.2. Content of arbitration agreement

Preserving the provisions of the laws previously in effect concerning written form of an arbitration agreement, the Law also establishes requirements to the content thereof. An arbitration agreement is to contain, as follows:

- parties' intention to refer a dispute to arbitration;
- indication to the subject to be considered by arbitration;
- indication to a specific arbitration;
- consent of an authorized agency of respective industry or local executive authority in cases specified below in item 2.1 hereof.

1.3. Methods to enter into arbitration agreement

The Law provides for a possibility to enter into an arbitration agreement via accession to a contract, if such agreement is entered into after origination of the grounds to file a claim.

¹ RK Law No. 23-III "On International Arbitration" dated 28 December 2004 (hereinafter referred to as the "International Arbitration Law").

² RK Law No. 22-III "On Arbitration Tribunals" dated 28 December 2004 (hereinafter referred to as the "Arbitration Tribunal Law").



The Law also stipulates a possibility to enter into an arbitration agreement via exchange of statement of claim and response to such claim, whereby one of the parties states about the presence of an agreement and the other party does not object. Similar provisions were previously provided for only in regulations of certain arbitration institutions.

1.4. Unilateral withdrawal from arbitration agreement

The Law provides for a possibility to unilaterally withdraw from an arbitration agreement before any dispute arises subject to notification of the other party concerning such withdrawal within reasonable timeframes.

2. Limitations Related to Consideration of a Dispute, a Party to which is a Legal Entity with State Participation

2.1. Necessity to obtain authorized agency's consent

Arbitration may not consider disputes with the participation of governmental authorities, state enterprises or legal entities where 50% of voting shares (participation interest in the charter capital) or more is directly or indirectly owned by the state, without consent of an authorized agency of respective industry (with respect to national property) or local executive authority (with respect to public property) (hereinafter collectively referred to as the "Authorized Agency").

The above legal entities contemplating to enter into an arbitration agreement are to file a request to the Authorized Agency specifying the amounts of forecasted expenses associated with arbitration proceedings. The Authorized Agency considers the request within 15 calendar days and notifies in writing concerning its consent or refusal to give consent to enter into an arbitration agreement. Such request is to be considered subject to economic safety and interests of the state.

2.2. Impossibility to select applicable law

Unless otherwise established by international agreements ratified by the RK, the RK legislation is to apply in case of considering a dispute, a party to which is a governmental authority, state enterprise or a legal entity where 50% of voting shares (participation interest in the charter capital) and more is directly or indirectly owned by the state.

3. Arbitral Awards

3.1. New grounds for the award revocation

In addition to previously existing grounds for the award revocation, the Law allows for its revocation in case of submitting evidences that:

- there is a court judgment or arbitral award, or a ruling of a court or arbitration on termination of proceedings in case in connection with the claimant's abandonment of claim, which entered into legal force and was issued under a dispute between the same parties, with respect to the same subject and on the same grounds;
- arbitral award fails to meet requirements of the Law related to written form and signature.

At the same time, it is worth mentioning that the actively criticized provision of the Arbitration Tribunal Law allowing to revoke an award, if the latter contradicts the principle of legality, was not included in the new Law.

3.2. Revision of award in connection with newly discovered circumstances

The Law establishes a possibility to revise an award in connection with newly discovered circumstances, which include as follows:

- patently false testimony of a witness, patently false opinion of an expert or patently inappropriate translation, falsification of documents or physical evidences established by an effective court judgment, which resulted in the issuance of illegal or unjustified award;
- criminal actions of the parties or other persons involved in a case, or their representatives, or criminal acts of an arbitrator performed when considering the case, established by an effective court judgment;
- recognition by the RK Constitutional Council of a normative legal act applied by arbitration when rendering an award as unconstitutional.

4. Other Amendments

4.1. Arbitration Chamber

The Law provides for establishment of the Arbitration Chamber of Kazakhstan – non-profit organization representing a union of constantly functioning arbitrations and arbitrators.

The authorities of the Arbitration Chamber will include, in particular, as follows:

- monitoring of the status of arbitration activities and keeping of documents at constantly functioning arbitrations;
- keeping records of the register of arbitrators of the constantly functioning arbitrations, as well as the register of arbitrators who are the members of the Arbitration Chamber;
- appointment of an arbitrator from the persons specified in the registers of the Arbitration Chamber or constantly functioning arbitration, as well as termination of authorities of an arbitrator appointed to resolve a specific dispute in cases established by the Law.

4.2. Requirements to arbitrators

The Law increased the age from 25 to 30 years, reaching which one may be elected (appointed) as an arbitrator. The Law also establishes that an arbitrator is to possess higher education and at least 5 years' work experience in a specialty. An arbitrator solely resolving a dispute is to possess higher legal education. In case of collective dispute resolution, the chairman of the arbitration panel is to possess higher legal education.

The International Arbitration Law and Arbitration Tribunal Law previously in effect contained similar requirements to education, but they specified requirements to work experience (at least 2 years) only with respect to cases where an arbitrator solely considered a dispute.

4.3. Grounds for challenging an arbitrator

The Law regulates in details the grounds for challenging an arbitrator encompassing the below circumstances, which give rise to doubts in arbitrator's impartiality and/or competence:

- person closely related to an arbitrator is a party to a dispute or in case an arbitrator may otherwise expect any significant benefit or damages depending on the dispute consideration results;
- arbitrator or a person closely related to such arbitrator is an executive officer of a legal entity, its branch or a representative office, that is a party to a dispute, or otherwise represents a party or any other person that may expect significant benefit or damages depending on the dispute consideration results;
- arbitrator acted as an expert or otherwise defined his/her position in a dispute in advance or rendered any support to a party to the dispute in preparing or setting out its position;
- arbitrator received or claimed for remuneration not stipulated by the Law in connection with the dispute consideration;
- arbitrator unreasonably fails to observe arbitration proceedings timeframes.

According to the Law, understood as a person closely related to an arbitrator is a person who is the arbitrator's spouse, close relative, relative in-law or an employee working for the constantly functioning arbitration, or a person who is in labor or any other contractual relations with the arbitrator, or has other connections evidencing about his/her dependence upon the arbitrator.

4.4. Determination of timeframes

Unless otherwise determined by regulations of the constantly functioning arbitrations or parties' agreement, the Law provides for the following timeframes:

- timeframe for institution of arbitration proceedings – 10 calendar days of the date arbitration accepts a statement of claim;
- timeframe for preparing a case for arbitration proceedings – 15 calendar days of the date of accepting a statement of claim. This period may be extended up to 1 month in exceptional cases with respect to cases of extraordinary complexity;
- timeframe for arbitration to consider a dispute – up to 2 months of the date preparation to arbitration proceedings is completed. The said period may also be extended by arbitration based on complexity of the case under consideration.

Should you have any additional questions in connection with this Information Memorandum, we would be happy to provide more detailed information.

Best regards,
AEQUITAS Law Firm