



GRATA
INTERNATIONAL

MAJOR KAZAKHSTAN LEGISLATION CHANGES FOR 2015

GRATA Finance & Securities Group Legal Alert - February 2016



In keeping with GRATA's practice of informing clients regarding important legal developments that might influence their business, allow us to draw your attention to the following changes in Kazakhstani legislation that occurred during 2015

KAZAKHSTAN IN 2015 AT A GLANCE:

In 2015 Kazakhstan's economy was badly hurt by the impact of falling oil prices and economic troubles in neighbouring Russia and China. The local currency (Tenge) has shed more than a half of its value since August 2015, when previous governor of the National Bank, Mr Kelimbetov, announced a move to a free float.

As a response to the worsening social and economic situation, the "100 Concrete Steps" program, called the Plan of the Nation, was unveiled in 2015, soon after President Nursultan Nazarbayev's re-election. It is designed to provide the strong national platform needed to overcome short-term challenges and achieve the country's ambition of joining the top 30 developed countries by 2050.

The concrete steps, which are shorter and more precise measures, are grouped under the five institutional reforms: formation of a professional state apparatus; the rule of law; industrialisation and economic growth; identity and unity; and formation of accountable government.

Below we provide a brief overview of the respective legal acts adopted in 2015 for the implementation of each of these five institutional reforms:

➤ REFORM I. FORMATION OF A PROFESSIONAL STATE APPARATUS

1. The Law on Corruption Countermeasures

➤ REFORM II. SUPREMACY OF THE RULE OF LAW

2. The New Civil Procedure Code

3. The Law on Astana International Financial Center
4. The Law on Judicial System
5. The Law on Supreme Judicial Council
6. The Resolution on Application of Bankruptcy and Rehabilitation Legislation by the Courts

➤ REFORM III. INDUSTRIALISATION AND ECONOMICAL GROWTH

7. The New Commercial Code
8. The PPP Law and relevant bylaws
9. The Law on WTO Accession
10. The Law on Special Defensive, Antidumping and Compensational Measures
11. The Law on Ownership Right Further Protection
12. The Law on Amendments to Electric Power Industry
13. The Law on Amendments Related to Non-performing Loans, Financial Services and Financial Organisations
14. The Law on Agricultural Cooperatives
15. The Privatisation Decree
16. The Rules of Electronic Trades

➤ REFORM IV. THE IDENTITY AND UNITY OF THE NATION

n/a

➤ REFORM V. FORMATION OF ACCOUNTABLE GOVERNMENT

17. The New Procurement Law.

Finance & Securities Group

What we do:

- ❖ Bank and Corporate Lending
- ❖ IPOs and Eurobonds
- ❖ Project Finance & PPP
- ❖ Restructuring & Insolvency
- ❖ Asset Finance & Leasing
- ❖ Financial Services Regulation & Derivatives
- ❖ Foreign Direct Investments in Kazakhstan
- ❖ Financial Institutions M&A
- ❖ Banking Litigation
- ❖ Islamic Finance
- ❖ Insurance & Reinsurance

For further information, please contact:



Shaimerden Chikanayev

Partner, Finance & Securities Group

M.: +7 701 787 80 20

E.: schikanayev@gratanet.com

Finance & Securities Group's achievements:

- ❖ Chambers Global: "The team is noted for its strength in banking and finance matters".
- ❖ Legal 500: "The team has particular expertise in banking and finance."

1. LAW ON CORRUPTION COUNTERMEASURES

The new Law on Corruption Countermeasures was enacted on 1 January 2016 and replaced the previous law of the Republic of Kazakhstan “On Combating Corruption” no. 267-I dated 2 July 1998.

The new Law on Corruption Countermeasures is focused on the improvement and strengthening of anti-corruption measures and the further development of measures preventing corruption.

The main amendments contained in the new Law on Corruption Countermeasures are listed below.

Anticorruption Monitoring and Analysis of Corruption Risks

The new Law on Corruption Countermeasures introduced new corruption countermeasures, such as “anticorruption monitoring” and “analysis of corruption risks”. Anticorruption monitoring shall be conducted by the authorised body - the National Bureau for Counteractions to Corruption of the Ministry for Public Service Issues of the Republic of Kazakhstan (the “**Authorised Body**”) and other subjects of corruption countermeasures – i.e. state bodies, so-called quasi-state sector subjects, non-governmental organisations and legal entities and individuals (the “**Subjects**”). Anticorruption monitoring is conducted by the Subjects to assess how the law is applied, conducting anticorruption analysis and improvement of measures aimed to develop anticorruption culture. Analysis of corruption risks can be external and internal. External analysis of corruption risks is executed by the Authorised Body through analysis of legislation and checking the activity of state bodies and organisations, subjects of quasi-state sector. Internal anticorruption analysis is conducted by the Subjects (except individuals) themselves.

Anticorruption Culture

The new Law on Corruption Countermeasures introduced the new corruption countermeasure in addition to the measures mentioned above, namely, formation of anticorruption culture in society. Formation of anticorruption culture is performed by the Authorised Body and other Subjects and shall be performed through educational, information, organisational and other measures.

Anticorruption Standards

Anticorruption standards introduced by the Law on Corruption Countermeasures are recommendations established by the Authorised Body in order to prevent corruption.

In our view, the measures listed above are of declarative and recommendation nature, and there is no clear mechanism how the state will ensure all of these measures are indeed taken in practice. Unlike the above, the below amendments seem to be more efficient in terms of the prevention of corruption.

Measures of Financial Control

Under the current legislation, candidates to state officials and their spouses shall provide to the tax body declaration on taxable income and property (including income and property located abroad) (the “**Income and Property Declaration**”) and certain other information (on bank deposits, securities, shareholdings in companies owned by such candidates and their spouses etc.) After appointment to their position, state officials and their spouses shall provide such Income and

Property Declaration annually. State officials dismissed for negative reasons and their spouses shall provide the Income and Property Declaration during the 3 year period from the moment of their dismissal. Non-provision of the mentioned information may result in disqualification of the relevant candidate and administrative or criminal liability.

From 1 January 2017 the obligation to provide the Income and Property Declaration is imposed on state officials and their spouses only and no longer on the candidates to the state officials.

In addition, from 1 January 2017, the following persons shall provide assets and liabilities declaration (the “**Assets and Liabilities Declaration**”): candidates to the President, members of Parliament and local representative bodies (*maslikhats*), heads of local executive bodies (*akims*) and their spouses.

Information on provision/non-provision by the relevant persons of the Income and Property Declaration and the Assets and Liabilities Declaration shall be published on the website of the tax body. Non-provision of the mentioned information may incur administrative and criminal liability.

From 1 January 2020, certain information contained in the Declarations mentioned above shall be mandatorily published on the websites of the relevant state bodies if such Declarations have been provided by the following state officials and their spouses:

- Political state officials;
- Administrative state officials of “A” corpus;
- Members of Parliament;
- Judges;
- Managing officials of quasi-state sector companies.

Conflict of Interests

The new Law on Corruption Countermeasures introduced the definition of the “conflict of interests” for state officials. Certain state officials are now expressly prohibited to perform their functions if they reveal a conflict between their personal interests and their job functions that may lead to undue performance by such state officials of their duties. In this case, the relevant state official shall inform his/her management of the conflict of interests and the management shall take appropriate measures to address the conflict of interests issue, such as suspending the relevant state official from performance of the functions that constitute the conflict of interests, amending his/her functions accordingly etc.

National Report on Corruption Countermeasures

The new Law on Corruption Countermeasures introduced the obligation of the Authorised Body to provide the President with the annual national report on corruption countermeasures. Such report shall be based on results of work of the Authorised Body and activity of state bodies, individuals and legal entities related to the corruption issues.

2. NEW CIVIL PROCEDURE CODE

The new Civil Procedure Code (the “CPC”) is effective from 1 January 2016 and introduces substantial amendments to the civil process in the Republic of Kazakhstan. In support of the CPC and in order to implement the CPC provisions, the CPC Law that amends relevant provisions of various legal acts of the Republic of Kazakhstan (e.g. Tax Code, Customs Code, Land Code, Ecology Code etc.) has been enacted on 1 January 2016.

Please see below main amendments promulgated by the CPC and the CPC Law.

Abolishment of “Supervision Instance” of the Civil Process

Previously, Kazakh civil procedure included four stages: first instance, appeal instance, cassation and supervision (executed by the Supreme Court of the Republic of Kazakhstan (the “**Supreme Court**”).

The CPC has abolished supervision instance and transferred cassation instance (that became the final instance of the Kazakh civil process) to the competence of the Supreme Court. Cassation tribunals of the Kazakh courts have been abolished.

Appeal claims will be now generally considered by three judges, subject to certain exceptions. Cassation claims will be generally considered by no less than three judges of the Supreme Court. Cassation claims can be submitted to the Supreme Court subject to prior consideration of the appeal claim on the same case by the court of appeal instance.

Certain cases cannot be considered in cassation instance (e.g. cases resolved by amicable agreement/mediation; cases related to individuals' proprietary rights with the size of claim not exceeding 2,000 monthly calculation indexes (approximately USD 11,622) and cases related to legal entities' proprietary rights with the size of the claim not exceeding 30,000 monthly calculation indexes (approximately USD 174,329); rehabilitation and bankruptcy cases etc). Such cases can be reconsidered only in exceptional circumstances, e.g. if relevant decisions do breach the rights of unlimited number of persons etc.

In exceptional circumstances, decisions of the Supreme Court taken in the cassation instance can be reconsidered by the broader tribunal of the Supreme Court of no less than seven judges.

Introduction of the Investment Court

Investment disputes, namely, the disputes arising from the contract executed between an investor (including so-called “major investor”) and Kazakh state bodies in relation to investment activity of the investor, shall be now considered and resolved in the first instance by the special investment tribunal of the Astana court, irrespective of the connection of the parties or subject matter of the dispute with Astana city (i.e. even if the dispute relates to investment project not in Astana but, for instance, in Almaty city). Investment disputes that involve a so called “major investor” shall be considered by the Supreme Court. “Major investor” is an individual or a legal entity that made an investment to the economy of the Republic of Kazakhstan for an amount of no less than 2,000,000

monthly calculation indexes or approximately USD 11,621,918.

Mandatory Prejudicial Settlement for Certain Cases

The CPC broadened the list of cases that can be resolved by the courts only after the attempt of prejudicial settlement.

Currently, the following cases are subject to mandatory prejudicial settlement: cases involving subjects of entrepreneurship, intellectual property rights protection, consumers' rights protection, cases challenging actions/inactions of certain state bodies etc.)

In order to encourage the parties to use prejudicial settlement, the CPC has introduced the following provision: the court is now entitled (irrespective on outcome of the case) to confer court expenses to the party that failed to answer the counterparty's letter sent before the court action as an attempt of prejudicial settlement or committed delay in answering such a letter.

Strengthening of Evidence Provision and Counter-Claim Filing Rules

All the evidence shall now be provided by both parties during the period of “preliminary preparation to the case” that lasts for 15 business days from the moment of acceptance of the case to consideration by the court (with the extension option of up to 1 month). The counter-claim shall be filed by the counterparty within the same period. Upon expiry of the mentioned period, the additional evidence may be provided only if the relevant party will prove that it was not possible to provide such evidence earlier. The counter-claim may be filed upon expiry of the mentioned period only if defendant has not been notified on the time of “preliminary preparation to the case” and, accordingly, was not able to file its counter-claim at that stage.

The court is now entitled to confer court expenses to the party that failed to provide all the evidence in time if such delay led to delay of the whole court process.

The CPC has also clarified that the burden of proof, in cases challenging actions/inactions of the state bodies, shall be vested on the state bodies whose actions/inactions are being challenged. This provision has been expected by lawyers for quite a while and shall facilitate litigation against state bodies for other parties.

Amendment of Appeal/Cassation Deadlines

The deadline for filing the appeal of court decision has been extended from 15 days to one month and the deadline for filing the appeal of court order has been decreased from 15 days to 10 days from the moment of final decision/order.

The deadline for filing a cassation claim to the Supreme Court is now 6 months upon entering of appeal decision into legal force. Under the old CPC, the party could file a claim to the Supreme Court within one year from the moment of entering of the relevant court act into legal force.

Amendments Related to the Court Duty

Under the new CPC, the appealing party does not now have to pay a court duty for the appeal claim.

Court duty payable in relation to cases for the invalidation of certain proprietary transactions (sale and purchase, pledge etc.) and claims for moral damage shall now be determined based on the market value of the relevant property or the amount claimed as moral damage, respectively. Court duty payable in relation to proprietary claims can be much higher than court duty for non-proprietary claims. Since under the old CPC it was not clear whether the claim for invalidation of transaction is indeed a proprietary claim, it was easy for dishonest parties to challenge decent transactions in the interest of time by paying low court duty applicable for non-proprietary claims. The described provision seems to address this practical issue.

In case of reconciliation of the parties in appeal instance, the court duty shall be now returned in full. If reconciliation happened in cassation instance, 50% of the court fee is refundable.

Fast-tracking of Interim Remedies

Court ruling on interim remedies can now be sent directly to the person/entity that shall enforce them (e.g. a bank where accounts of plaintiff are open, property registration body etc) and not the bailiff as previously was provided by the old CPC. This amendment will allow to fast-track interim remedies and, accordingly, make them more efficient.

PoA for Legal Representative

The new CPC has broadened the list of authorities that a legal representative (a person who is authorised to represent the interests of his/her client before the court) is entitled to perform only if such authorities are expressly provided in the Power of Attorney issued by the client to the legal representative.

Introduction of Participation Procedure

The new CPC has introduced a so-called “participation” procedure as one of amicable dispute resolution options where the parties reach the agreement with mandatory involvement of their advocates without involvement of the court.



3. LAW ON ASTANA INTERNATIONAL FINANCIAL CENTER

The Law on AIFC was signed by the President on 7 December 2015.

In May 2015 the President of Kazakhstan issued the decree providing for the establishment of the so-called Astana International Financial Centre (the “AIFC”), for the purposes of the creation of an attractive investment climate, development of local capital market, integration into international capital markets, development of banking, insurance and Islamic finance services and improvement of financial and professional services based on international practice. The decree was followed by the Law on AIFC.

AIFC is a free financial zone located in the capital of Kazakhstan (Astana) providing to its participants substantial tax advantages, free visa and foreign employees attraction regime and, most importantly, the unprecedented mechanism of dispute resolution. Civil, financial and administrative disputes between the participants of AIFC will be resolved by either AIFC financial court or AIFC international commercial arbitration (if the relevant agreement contains an arbitration clause). Such disputes may be resolved under English law in English language by foreign judges. The transactions concluded between the participants of AIFC will be executed and court proceedings will be held in English. The AIFC will be established based on the experience of the Dubai International Financial Center.

According to the public sources, the AIFC is still in the process of establishment and most likely will start its activity not earlier than 1 January 2018, notwithstanding the 1 January 2016 deadline for commencement of its activity, established by the President's decree.



4. LAW ON JUDICIAL SYSTEM

The Law on Judicial System is focused on comprehensive reform of judges' appointment process, strengthening the requirements of the judges as well as the improvement of their social and material support in the framework of realisation of the President's Plan of the Nation – 100 Particular Steps for Realisation of 5 Institutional Reforms.

Regular Professional Activity Assessment

The professional activity of each judge (except judges with more than 20 years of judicial experience) shall now be assessed by the Court Jury every five years.

Qualification Requirements

The Law on Judicial System has amended the qualification requirements for candidates to become judges. Now such candidates shall, *inter alia*, have high moral qualities and working experience of at least 5 years in the judicial system (as a court secretary, court assistant, prosecutor, advocate) OR at least 10 years as a lawyer. Previously, at least 2 years of working experience as a lawyer was enough to become a candidate for a judge. Moreover, candidates must pass a mandatory polygraph test.

The Law on Judicial System has introduced a mandatory suretyship requirement for candidates to become judges of regional (*oblastnoi*) courts. Suretyship for such candidates shall be issued by two judges of the higher courts and one retired judge. In the suretyship, these judges shall assure that they know the candidate, have experience in working with him/her, give an opinion on his/her professional experience and other skills etc.

The qualification requirements for candidates to become judges of the Supreme Court of Kazakhstan have also been amended. Though the Law on Judicial System did not change the requirement of overall 20 years of experience as a lawyer for such candidates, now such overall legal experience shall include not less than 10 years of experience as a judge, 5 years of which as a judge of a regional (*oblastnoi*) court. The candidates to become a judge of the Supreme Court of Kazakhstan shall also provide suretyship of three judges as described above. The candidate to become Chairman of the Supreme Court of Kazakhstan is exempt from the mentioned qualification requirements.

Introduction of Retired Judges Life Benefits

Retired judges with experience of no less than 15 years are now subject to the monthly life benefits, provided that such judges have reached pension age. Judge life benefit is tax free and is payable for the amount of 50% - 65% of the judge's salary at his/her latest place of occupation and shall not exceed the amount approximately equal to USD 600.

Establishment of the Academy of Justice

The Law on Judicial System provides for the establishment of the Academy of Justice for the purposes of professional advancement and academic activities of judges. The Academy is a state institution governed by the Supreme Court of Kazakhstan.



5. LAW ON SUPREME JUDICIAL COUNCIL

The Law on Supreme Judicial Council came into effect on 1 January 2016 and replaced the previous law on the same subject. The Law on Supreme Judicial Council aims to improve the activities of the Supreme Judicial Council, and to improve and reform the court system in the framework of the realisation of the President's Plan of the Nation – 100 Particular Steps for the Realisation of 5 Institutional Reforms.

The Supreme Judicial Council of the Republic of Kazakhstan (the “**Council**”) is a state body created to ensure the constitutional powers of the President of the Republic of Kazakhstan on the formation of courts, guarantees of judicial independence and integrity. The Supreme Judicial Council plays an important role in the appointment of Kazakh state judges to their positions (by the President).

Confirmation of the Supreme Judicial Council Legal Status

Under the Law on Supreme Judicial Council, the Council is now established as a separate legal entity (previously, the Council was established as an institution that was not a legal entity).

Non-interference in the Supreme Judicial Council's Activities

In order to strengthen the status of the Supreme Judicial Council, the Law on Supreme Judicial Council prohibited interference in the activities of the Council when it exercises its power and prohibited interference of the chairman and members of the Council in the activities of courts and judges on the execution of justice.

Expansion of the Supreme Judicial Council's Composition

The following persons are now included to the composition of the Supreme Judicial Council by default: the Chairman of the Supreme Court, the General Public Prosecutor, the Minister of Justice, the head of the authorised body on civil service and fight against corruption, the chairmen of the relevant specialised committees of the Senate and the Majilis (i.e. upper and lower chambers of the Parliament of Kazakhstan). Other persons, including legal scholars, lawyers and foreign experts, and representatives of associations may be assigned to become members of the Council by the President. Judges and retired judges shall now constitute half of the Supreme Judicial Council's members.

Extension of the Supreme Judicial Council's Powers

The Law on Supreme Judicial Council extended the powers of the Council. Now the Council, *inter alia*, is entitled to organise the electronic personal records of judges and (together with the Supreme Court) the records of candidates to become chairmen of the courts and court panels.

Strengthening Requirements for Candidates to become Judges

The Law on Supreme Judicial Council introduces stricter provisions for the candidate's selection for judicial positions that shall include, *inter alia*, the qualification examination.

The qualification commission of the Council carries the admission of the qualification examination of the candidates to become judges to determine the level of their knowledge and ability to apply it in practice.

Under the Law on Supreme Judicial Council, the qualification examination now includes three stages:

- computer test on knowledge of the law and the ability to apply it in practice;

- examination of the candidate's knowledge and the ability to apply it in practice by examination tickets that modulate particular situations from real court practice;

- psychological test.

The Law on Supreme Judicial Council also introduces the requirement of a polygraph test:

- candidates who have successfully passed the qualification examination also shall sit a polygraph test to obtain more information about the candidate and to check the reliability of the reported information;

- polygraph test conclusions are considered recommendations.

The professional activity of the newly appointed judges is now subject to mandatory assessment by the qualification commission of the Court Jury.

The Law on Supreme Judicial Council provided that certain work experience which is directly related to participation in the judicial proceedings can be counted as legal experience required for appointment of a candidate to judge:

- 1) court secretary;
- 2) consultant (assistant) of the judge;
- 3) prosecutor, who participates in the judicial proceedings;
- 4) lawyers involved in litigation;
- 5) arbitrator.

The Law on Supreme Judicial Council establishes the limitation for chairmen (chairmen of district courts, chairmen and chairmen of the judicial boards of the regional courts, the chairmen of the Supreme Court): they cannot be appointed to the same positions in the relevant court more than two times in a row.

5. RESOLUTION ON APPLICATION OF BANKRUPTCY AND REHABILITATION LEGISLATION BY THE COURTS

The Resolution has been issued by the Supreme Court of Kazakhstan and is effective from 24 October 2015. It is aimed on consistent and correct application of rehabilitation and bankruptcy legislation by the Kazakh courts and is mandatory for all the Kazakh judges and other persons in Kazakhstan.

The Resolution reminded and clarified to the courts the following main points:

- Claim for the bankruptcy of an absent debtor may be submitted by any creditor or prosecutor **irrespective of the amount and overdue period of the debt**;
- Claim for bankruptcy **shall be dismissed** by the court if the amount of overdue indebtedness is **less** than the threshold established by law (1,000 monthly calculation indexes or approximately USD 5,810). In addition to this overdue amount threshold, the law also establishes a 3 month overdue period requirement to file for bankruptcy. The Resolution is, however, silent on the overdue requirement and expressly prescribes the courts to dismiss the claim only in case the amount threshold is not met.
- At the moment of acceptance of the claim of debtor/creditor for initiation of bankruptcy/rehabilitation proceedings, **the court shall check if the claim has been duly executed** by the relevant signatory in accordance with constitutional documents of the claimant. If the court decides that the claim has not been duly executed or the claimant failed to attach the documents confirming authority of the signatory to the claim, **the claim shall be dismissed by the court**.
- If the claim for the bankruptcy is submitted by a creditor while it has been already initiated by another creditor, **the court shall merge both claims** to consider them simultaneously (provided that the court has not issued the resolution on initiation of bankruptcy proceeding against the debtor).
- The Resolution clarified that the court cannot apply injunctive relief measures at its own discretion and shall do so only if requested by the creditor in its claim. In application for injunctive relief measures, the court shall consider whether such measures are reasonable, provide for safety of the debtor's property, do not interfere business activity of debtors related to national security, environmental protection, life and health of people etc.
- Initiation of bankruptcy/rehabilitation proceeding **does not automatically terminate other proceedings against the debtor**. The question on enforcement of court resolutions issued in such proceedings shall be resolved in the course of bankruptcy/rehabilitation proceeding.
- **Previous court proceedings against the debtor are terminated** in case of issuance of the court resolution on recognition of the debtor as bankrupt. Claims considered in such proceedings shall be filed by the creditors in the course of the debtor's bankruptcy. The bankruptcy manager shall notify all the relevant courts that previous court proceedings considered by them shall be terminated due to issuance of the court resolution on recognition of the debtor as bankrupt.
- The ground for recognition of the debtor as bankrupt is debtor's insolvency (inability to pay its debts). The Resolution clarified that there are **different insolvency criteria for different types of debtors**. For example, the insolvency of a bank can be established only based on relevant conclusion of the financial regulator – the National Bank of Kazakhstan (the “National Bank”).
- The applications for initiation of bankruptcy/rehabilitation proceeding against the debtor **may be generally withdrawn** by the applicant creditors/prosecutor **before** issuance of the court resolution on recognition of the debtor as bankrupt/introduction of rehabilitation in relation to the debtor.
- The temporary manager shall prepare an analytical report on the financial position of the debtor and its solvency. The Resolution clarified that this analytical report shall be considered as evidence in consideration by the court of the bankruptcy case, however, this analytical report shall not prevail over other evidence presented in the proceedings.
- The Resolution clarified that rehabilitation can be introduced by the court only if two conditions are simultaneously met: (i) insolvency (inability to pay its debts) or threat of insolvency of the debtor and (ii) real possibility of recovery of solvency of the debtor. The court is not entitled to introduce rehabilitation in relation to the debtor which did not prove its insolvency or threat of insolvency to avoid use of rehabilitation

by debtors as a way to delay due payments to the creditors.

- In rehabilitation, **the management over the debtor may be kept by its management bodies** upon application of its shareholders subject to consent of the creditors' committee (otherwise, the management over the debtor in rehabilitation is executed by the rehabilitation manager appointed by the special state body for work with insolvent creditors from the candidates registered with such authorised body and suggested by the creditors). In case of default of debtor on payments according to the schedule established in rehabilitation, the court shall put aside the management of the insolvent debtor and replace it with the rehabilitation manager that shall appointed as described above.
- The temporary administrator (in rehabilitation) or temporary manager (in bankruptcy) are the persons appointed by the court prior to appointment of rehabilitation manager/bankruptcy manager, respectively for the purpose of, *inter alia*, preparation of the register of creditors claims. The creditors **must file their claims** to temporary administrator/temporary manager for the purpose of preparation of the register of creditors' claims **within one month from the moment of relevant publication**. If the claim is filed after this deadline, it still shall be included to the register of creditors' claims. However, **the delayed creditor is deprived of the voting right at the creditors' meeting** until satisfaction of the claims of the creditors who submitted their claims in time. In bankruptcy, the claims of delayed creditors (if filed prior to approval of liquidation balance) shall be satisfied **only after** satisfaction of the creditors who submitted their claims in time (**including secured creditors**).
- Furthermore, the decision of the temporary administrator/temporary manager on inclusion/refusal of a creditor's claim to the register of creditors' claims **can be challenged** by the relevant creditor, debtor, or its shareholder to the court **within 10 business days** from the moment of its issuance. If this deadline is missed, the decision of the temporary administrator/temporary manager cannot be challenged. If the challenge is accepted, the court shall determine the priority in which the relevant claim shall be included to the register of the creditors' claims.
- The Resolution clarified that the temporary administrator/temporary manager **is not entitled to prepare the register of the creditors' claims based on balance sheet** of the debtor – instead, he/she shall check the documents that do confirm the claim.
- The priority of the satisfaction of creditors' claims is as follows: (i) claims for compensation of life and health damage, alimony payments, employment and social payments, pension payments, payments under copyright agreements; (ii) secured creditors' claims; (iii) tax claims; (iv) unsecured creditors claims; (v) claims for fines and damages.
- Claims of secured creditors based on **improperly drafted/executed pledge agreement** and in part not covered by the pledge agreement, shall be included to the fourth priority.
- **The creditors' meeting can decide to transfer the pledge property directly to the secured creditor**, provided that such secured creditor will satisfy the claims of all preceding creditors and cover expenses for maintaining of the pledged property. If the secured creditor does not show up at the relevant creditors' meeting, it shall be considered that such creditor refused from acceptance of the pledged property (provided that it was duly notified).
- Tax claims (third priority) shall include the amounts of tax deficiencies, default interest and fines.
- The courts shall take into consideration that the main obligations of unsecured creditors shall be included in the fourth priority separately from claims for fines and damages under such unsecured claims that shall be included in the fifth priority.
- In case of identification of **deliberate** bankruptcy facts in the course of bankruptcy proceeding, the bankruptcy manager is obliged, and **the creditors are entitled to claim** from the person who committed relevant actions, to satisfy the claims of the creditors outstanding due to insufficiency of the property of the bankrupt entity.

7.COMMERCIAL CODE

The Commercial Code was signed by the President on 29 October 2015 and entered into force (except for certain provisions) on 1 January 2016. The main purpose of the Commercial Code is to improve and develop legislation regulating cooperation between subjects of entrepreneurship and state including state regulation and support of entrepreneurship, filling gaps and collisions in regulation of entrepreneurship and to systematise legal, economic, social conditions and guarantees ensuring freedom of entrepreneurship in Kazakhstan.

Because of the Commercial Code the following laws have been terminated:

1. Law On Farmhand or Farm Enterprise;
2. Law On Investments;
3. Law On Private Entrepreneurship;
4. Law On Competition;
5. Law On State Control and Supervision in the Republic of Kazakhstan;
6. Law On State Support of Industrial and Innovative Activities.

The above six laws have just been mechanically incorporated into one legal act (i.e. the Commercial Code) so the Commercial Code does not really add much to the legislation of Kazakhstan. It is worth mentioning, however, the following few novelties of the Commercial Code:

Presumption of Good Faith

In state regulation of entrepreneurship, the good faith of entrepreneurs is assumed. The subject of entrepreneurship shall be assumed to be in good faith if, in exercising of rights and/or performance of obligations, it followed official clarification from a state body issued within its competence.

Register of Subjects of Entrepreneurship

This register will be maintained by the authorised body and will contain information on categories of subjects of entrepreneurship. Information on the category of the subject will be provided in the form of an electronic certificate to the interested parties (including state bodies) to be used in their activities.

One Stop Principle

State services will be rendered by state corporation “Government to Citizens” on the basis of “one stop” principle.

Access to Information

Information held by state authorities and required by subjects of entrepreneurship shall be made available on free of charge basis unless otherwise provided by Kazakh law.

Entrepreneurs Rights Commissioner

An entrepreneurs rights commissioner will be appointed by the President of Kazakhstan to represent, ensure and protect the rights and legal interests of subjects of entrepreneurship in state

bodies and protect the interests of the business community. It shall examine applications of subjects of entrepreneurship and submit proposals to state bodies in order to protect the interests of subjects of entrepreneurship and recommendations to suspend legislative acts, file application to courts, etc.

State Regulation of Certain Prices and Tariffs

Prices for the following goods, works and services will be subject to state regulation:

1. socially important food products;
2. goods, works and services in the area of natural monopoly and state monopoly;
3. goods, works and services of regulated market;
4. goods, works and services in international business operations and transactions arising from transfer pricing;
5. retail trade of relevant kinds of oil products;
6. establishing minimal prices of ethyl alcohol produced from edible and non-edible raw material and alcoholic products (except for beer);
7. establishing minimal retail prices of filter-tipped cigarettes;
8. on goods market which is not a natural monopoly in certain cases (emergency situations, disasters, national security protection).

As a temporary measure, an antimonopoly body may introduce price regulation on any goods market or goods, works, services of certain subject of market for a maximum period of 180 calendar days.

Social Liability of Subjects of Entrepreneurship

Subjects of entrepreneurship shall not be forced to carry out activities related to social liability. Subjects of entrepreneurship carrying out such activities will have the right to get tax relief and some other benefits.

Major Investor

The new term of a “major investor” was introduced. A major investor is a private individual or a legal entity investing in Kazakhstan in the amount not less than 2,000,000 monthly calculation indexes or approximately USD 11,621,918. The investment disputes involving major investors shall now be considered by the Supreme Court of the Republic of Kazakhstan that presumably will ensure proper consideration of the dispute by highly qualified judges of the Supreme Court.

Investment Dispute

The new term of an “investment dispute” was introduced. An investment dispute means a dispute arising from contractual obligations between investors including major investors and state bodies in connection with investment activities of an investor. Investment disputes involving foreign investors may still be settled by international arbitral courts determined by agreement of parties.

Investment Incentives

Investment projects (except for priority and strategic projects) will be subject to exemption from VAT on import of raw materials and/or materials within investment project. By “investment project” Kazakh law means measures for investments in establishment of the new manufactures, development and renewal of existing manufactures including the manufactures established/developed/renewed in the frameworks of public–private partnership including concession.

In case of early termination of the investment contract upon an initiative of a Kazakh legal entity being a party to the investment contract unilaterally or by agreement of the parties the legal entity shall pay taxes and tax duties not paid due to the provided investment incentives and return state in-kind grant or its initial value as of the date of transfer.

Register of Subjects of Market Occupying a Dominant or Monopoly Position

This register comparing with the current version will be limited to subjects of market occupying a dominant or monopoly position on regulated markets only and will be kept until 1 January 2017.

Examination of Draft of Agreement to Check its Compliance with Antimonopoly Legislation

To be on the safe side, the parties of the proposed commercial contract that presumably may not be in full compliance with the Kazakh antimonopoly legislation, will be able to apply to an antimonopoly body asking to review the draft agreement to check its compliance with antimonopoly requirements, before actually executing a commercial contract. The antimonopoly body shall revert with its conclusion within 30 calendar days from the date of application.

Removal of Limitations on Activities of Subjects of Natural Monopolies

Certain limitations on activities of subjects of natural monopolies will be removed from 1 January 2017. These limitations include, *inter alia*: rendering services and carrying out activities not related to natural monopolies, owning property not related to regulated services.

Notifications of the Antimonopoly Body

The Antimonopoly body will be able to send “notifications” without examination in relation to subjects of the market if their actions bear features of abuse of their dominant or monopoly position.



8. PPP LAW

The PPP Law entered into force on 22 November 2015. In addition, on 29 October 2015, the new Commercial Code was signed, which has become effective in the most part from 1 January 2016, and where the whole chapter is devoted to the PPP regulation.

In addition, various special bylaws and regulations with regard to PPPs have been adopted:

1. Order of the Minister of National Economy No.743 dated 30 November 2015 'On approval of the Rules of formation and ratification of the tariffs (prices) for regulated services of the subjects of natural monopoly that carry on their activities on the basis of public-private partnership agreement, in particular concession agreement" (the "**Order 743**");
2. Order of the acting Minister of National Economy No. 725 dated 25 November 2015 "On some questions of planning and implementation of PPP projects" (the "**Order 725**");
3. Order of the Minister of National Economy No. 731 dated 26 November 2015 "On approval of the methodology of determining of limits of state obligations for the PPP projects, including state concession obligations, obligations of the Government of Kazakhstan and local executive bodies";
4. Order of the acting Minister of National Economy No. 713 dated 25 November 2015 "On approval of the Rules on acceptance of PPP objects in state ownership";
5. Order of the Minister of National Economy No.724 dated 25 November 2015 "On approval of the Template tender documentation of a PPP project and template PPP agreement for PPP projects in different sectors of economy";
6. Decree of the Government of Kazakhstan No. 1056 dated 25 December 2015 "On some questions of the Public-Private Partnership Center";
7. Decree of the Government of Kazakhstan No. 1057 dated 25 December 2015 "On determination of the legal entity to be responsible for the support of PPP projects of the Republican (national) level"; and
8. Edict of the President of Kazakhstan No. 172 dated 14 January 2016 "On List of objects that cannot be transferred for implementation on the basis of PPP" (the '**Edict 172**').

The PPP Law, unlike the Concession Law, has enabled implementation of a PPP project in one of the following two ways: either on an institutional basis (with the creation of a special purpose vehicle as a joint venture) or a contractual one (without the creation of the SPV). Article 7 of the PPP Law enlists the possible types of public private partnership contracts, including concession agreements, trust management of state-owned property, rental / lease of state-owned property, finance lease, contracts for the development of technologies and pre-production prototypes, for conducting pilot tests, and for short-run production, life cycle contracts and after-sales service contracts. However, the list remains open, so it is possible to enter into “other agreements, which comply with the features of public private partnership.” Thus, the PPP Law allows entering into other contractual forms of PPP, even not provided by the PPP Law, but mainly meeting the public private partnership features specified in article 4 of the PPP Law.

What is the difference between the PPP Law and the Concession Law?

In accordance with article 7 of the PPP Law, the concession agreements remain governed by the general provisions of the PPP Law, save for peculiarities clearly provided by the Concession Law. In our view, however, the legislator failed to make clear how these two laws (i.e. the PPP Law and the Concession Law) shall correlate and what are the distinctive features of the Concession Law that shall make it preferable option in certain cases in comparison with the implementation of a PPP project on the basis of the PPP Law. Based on our comparative analysis of the Concession Law and the PPP Law herein, we came to the conclusion that any potential PPP project with a tenor of more than three years is preferably to implement under the PPP Law framework and that in future the Concession Law would be redundant in practice, as it does not provide any advantages.

Issue	Concession Law	PPP Law
Parties to agreement	In contrast to the PPP Law, the Concession Law provides only two parties to the concession agreement (i.e. a concessor and a concessionary).	<p>Unlike a concession agreement, in a public private partnership agreement the parties can be both one or several public and private partners. Moreover, the parties to a public private partnership agreement can also be financial and other organisations that provide funding for public private partnership, as well as the so-called "industry operators" (see article 5 of the PPP Law).</p> <p>Section 14 of article 1 of the PPP Law provides a concept of 'subjects of a public private partnership' (hereinafter – the 'PPP Entities'), which are defined as 'a public partner and a private partner, and other persons involved in the implementation of a public private partnership project and specified by this Law'. The concept of PPP Entities is, evidently, wider than a concept of 'parties to a PPP contract' (i.e., not every PPP Entity is a party to a PPP contract, but each party to a PPP contract is a PPP Entity).</p>
Public Partner	Under the Concession Law, only the Republic of Kazakhstan itself can be the grantor. Either the Government of Kazakhstan or local executive bodies (Akimats) or authorised state bodies can act on behalf of the Republic of Kazakhstan and execute the concession agreements.	PPP Law also provides that only the Republic of Kazakhstan can act as a public partner. Unlike the Concession Law, however, the PPP Law provides that in addition to the Government of Kazakhstan, local executive bodies (Akimats) and authorised state bodies, also so-called 'subjects of quasi-public sector', fifty or more percent of voting shares (participatory interests in the charter capital) of which are directly or indirectly owned by the State, can act on behalf of the Republic of Kazakhstan as a public partner and execute PPP agreements.
Private Partner	<p>Pursuant to the Concession Law any individual, even a foreigner, conducting entrepreneurial activity and (or) legal entity (except for state institutions and 'subjects of quasi-public sector' fifty or more percent of voting shares (participatory interests in the charter capital) of which are directly or indirectly owned by the State), including foreign legal entities and legal entities conducting their activity based on the agreement on joint activity (simple partnership), can participate in the concession tender.</p> <p>One of the types of the simple partnership is a consortium, which can comprise only legal entities. Herein, the consortium is not a legal body but a temporary association of legal entities on the basis of an agreement on joint business activity (consortium</p>	<p>The PPP Law provides the concept of a private partner identical to the concept of the concessionary, save that unlike the Concession Law, PPP Law requires an individual to procure individual entrepreneur official status to be able to act as a private partner (i.e. under the Concession Law an individual does not necessarily have to have individual entrepreneur status).</p> <p>Since in Kazakhstan commercial organisations can only be established in the form of a joint stock company, economic partnership, production cooperative, or state enterprise, it is obvious that a private partner can be a subject of private entrepreneurship of any of the above organisational legal forms.</p> <p>In addition, the definition is so broad that a private partner can be, apparently, a non-profit organisation and a foreign legal entity.</p>
The Object of Agreement	A concession object can be any property that can be recognised as the so-called “social and vital infrastructure facility included into the list, which shall be constructed (or reconstructed) and operated under a concession agreement.” In accordance with section 2 of article 1 of the Concession Law, “social and vital infrastructure facilities are facilities [or] complexes of facilities used for the satisfaction of public needs, the securing of which is imposed on state authorities in accordance with the legislation of the Republic of Kazakhstan'. The Concession Law, therefore, cannot be used for construction of, for instance, a fertilizer plant, as it is unlikely to be considered as a facility used for the satisfaction of public needs, the securing of which is imposed on	<p>Unlike the Concession Law, under the PPP Law practically any property can be considered as the PPP object.</p> <p>In accordance with section 13 of article 1 of the PPP Law, in particular, any property, including property complexes, in which design, construction, development, reconstruction, modernization and operation are carried out under the framework of the PPP project, as well as the works (services) and innovation, subject to introduction during implementation of the PPP project, can be considered as the PPP object.</p>

Issue	Concession Law	PPP Law
Governing Law and Possibility for International Arbitration	<p>Even though the Concession Law does not specifically prohibit having a foreign law as the government law of the concession agreement, our interpretation of the law suggests that only Kazakh law can be the governing law of the concession agreements.</p> <p>Only so-called "concession projects of special importance" can benefit from international arbitration clause in the concession agreement even if all parties to it are residents of Kazakhstan, but at least one shareholder of the concessionary is a non-resident (see article 27.2 of the Concession Law).</p>	<p>The PPP Law explicitly confirms that if a private sector partner under a PPP agreement is a non-resident, the parties shall have discretion to choose the applicable law of the PPP agreement (see article 46.3 of the PPP Law).</p> <p>Only so-called "PPP projects of special importance" can benefit from the international arbitration clause in the PPP agreement, provided the private partner is a non-resident (see article 57.2 of the PPP Law).</p>
Direct agreement	<p>The Concession Law stipulates the concept of "direct agreement", but it is available only for the so-called "concession projects of special importance" (see article 26-2 of the Concession Law).</p> <p>In case of replacement of the concessionaire at the request of the creditors, an assignment of claim and (or) debt of the concessionaire under the concession agreement can be performed without a new tender in the manner determined by the direct agreement (i.e. it is allowed to be transferred to a replacement company without going through the whole re-tendering process) (see article 21.6 of the Concession Law).</p>	<p>The PPP Law stipulates the concept of "direct agreement", but, same as in the Concession Law, it is available only for the so-called PPP projects of special importance (see section 21 of article 1 of the PPP Law).</p>
Tariff Setting	<p>In accordance with the Law of Kazakhstan 'On Natural Monopolies', individual entrepreneurs and legal entities operating within certain enumerated industries which are recognised as 'natural monopolies' shall render so-called 'regulated services (goods, works)'. Natural monopolies in Kazakhstan cannot charge for the regulated services (goods, work) in excess of the general tariffs established for all natural monopolies in Kazakhstan.</p> <p>A subject of natural monopolies in Kazakhstan that executed a PPP or concession agreement can have, however, its own special tariff (as a cap) to be stipulated in the PPP/concession agreement.</p> <p>Such a tariff shall be no less than the estimated costs to be incurred while rendering the regulated services, plus it shall secure recovery of the so-called "invested amount" (see section 3 of the Order 743).</p> <p>The tariff shall be calculated based on the formula provided in Schedule 1 of the Order 743 and the term of validity of such a tariff shall not be less than the term of the PPP/concession agreement (see section 34 of the Order 743).</p>	<p>Same as for concessions.</p>

Issue	Concession Law	PPP Law
The Subject of Agreement	<p>The Concession Law is not industry-specific and, generally, state assets from any sector of the economy can be transferred under concession, save for an exhaustive list of exceptions like a backbone railway network or strategic dams (see article 4 of the Concession Law and Edict 294). In particular, pursuant to section 6 of article 1 of the Concession Law, “a concession is an activity aimed at the construction (or reconstruction) and operation of concession facilities, that shall be performed at the expense of concessionary funds or on conditions of co-funding by a concessor.” A concession facility in Kazakhstan can only be for the so-called “social and vital infrastructure facilities included into the list, which shall be constructed (or reconstructed) and operated under a concession agreement.” In accordance with section 2 of article 1 of the Concession Law, “social and vital infrastructure facilities are facilities [or] complexes of facilities used for the satisfaction of public needs, the securing of which is imposed on state authorities in accordance with the legislation of the Republic of Kazakhstan’.</p> <p>The Concession Law, therefore, cannot be used for construction of, for instance, a fertilizer plant, as it is unlikely to be considered as a facility used for the satisfaction of public needs, the securing of which is imposed on state authorities.</p> <p>Importantly, the Concession Law is not applicable to subsoil use matters that are regulated by the Law 'On Subsoil and Subsoil Use' (see article 2.1 of the Concession Law).</p> <p>The subject of concession agreements, therefore, is the construction and (or) development of the social and vital infrastructure facilities by a private partner, at the expense of full or partial funding attracted by him, as well as the implementation by the private partner of operations and (or) maintenance of the object of the agreement.)</p>	<p>The PPP Law enables implementation of PPP projects in all sectors of economy and, therefore, PPP facilities under the PPP Law, unlike the Concession Law, do not necessarily have to be used for the satisfaction of public needs, the securing of which is imposed on state authorities (e.g. a fertilizer plant project can be implemented under the PPP Law). Section 6 of article 1 of the PPP Law provides for an extremely broad concept of a public private partnership as a "form of cooperation between the public partner and a private partner that corresponds to the features defined by the Law". Such features include: (i) building of relations between the state partner and private partner through entering into PPP contract, (ii) medium-term or long-term PPP project implementation (from 3 to 30 years depending on peculiar features of PPP project), (iii) joint participation of the state partner and private partner in PPP project implementation, (iv) combining resources of the state partner and private partner for PPP project implementation (see article 4 of the PPP Law).</p> <p>The subject of the PPP agreements is not clearly defined by the PPP Law, however, it can be determined through the essential elements of the PPP agreement, stipulated in article 46 of the PPP Law. The subject of the PPP agreements is, therefore, a form of cooperation between the public partner and a private partner that corresponds to the PPP features defined by the PPP Law and that can be related to any types of activities, including construction and (or) development of infrastructure or rendering services or even, arguably, charity.</p>
The Term of the Agreement	<p>A concession agreement can be executed for up to 30 years and it has no lower limit (see article 23.1 of the Concession Law).</p>	<p>Unlike the Concession Law, the PPP Law provides that to be classified as a PPP agreement, an agreement must be for a minimum of three years and maximum of thirty years (see article 4 of the PPP Law).</p>

Issue	Concession Law	PPP Law
<p>The Right of Private Ownership of the Object of the Agreement</p>	<p>Upon completion of the construction phase, ownership of the relevant concession facilities, generally, shall be transferred to the relevant state authority (see article 5.3 of the Concession Law). The concession agreement, however, may provide for a concessionary option to reserve the right to the concession facility upon completion of the concession project, and, therefore, under a concession agreement all available PPP schemes (i.e. BOT, BOOT, ROT, BTO, BOMT, BOO, etc) may be structured.</p> <p>If in accordance with the concession agreement the State provides co-financing of the concession project and (or) covers the compensation of investment expenses of the concessionary, however, the concession facility must be transferred into the state ownership (see article 5.8 of the Concession Law).</p> <p>The Concession Law also provides that a concession facility cannot be disposed/alienated for the whole term of the concession agreement (see article 5.6 of the Concession Law).</p> <p>Finally, a concession agreement may not include terms, directed on alienation in a private property of a concession facility, being in the property of the state (see article 21-1.3 of the Concession Law).</p>	<p>The requirement to transfer the object of an agreement to the ownership of a public partner is, generally, not an obligatory element in the PPP agreement.</p> <p>If, in accordance with the PPP agreement, the State covers the investment expenses compensation, however, the object of public-private partnership must be transferred into the state ownership (see article 12.4 of the PPP Law).</p> <p>The PPP Law also provides that if the public partner gives to the private partner balance the PPP facility itself and (or) any other property for implementation of the PPP project, such transferred property shall be separated from the private partner's own property and shall be reflected in a separate accounting (see article 12.3 of the PPP Law).</p> <p>Unlike the Concession Law, the PPP Law generally allows the transfer of the PPP object to a third party. Article 12.2 of the PPP Law, in particular, provides that, upon prior consent of its counterparty, the party to the PPP agreement has the right to transfer the PPP object and (or) any other property necessary for implementation of the PPP project to a third party, subject to requirement that such a third party shall comply with the obligations of the transferring party under the PPP agreement. The law also makes clear that the transmitting party still bears statutory responsibility for the actions of such a third party.</p>
<p>Pledge of the Object of Agreement and (or) Rights of the Private Partner</p>	<p>In accordance with article 5.5 of the Concession Law it is prohibited to take a pledge over the concession facility itself, however, the concessionary may pledge its rights under the concession agreement, subject to the concessor's prior written consent (see article 21.6 of the Concession Law).</p>	<p>Unlike the Concession Law, the PPP Law generally allows the pledge over the PPP facility.</p> <p>If, in accordance with the PPP agreement, the State covers the investment expenses compensation, however, the respective object of the public-private partnership cannot be pledged (see article 12.4 of the PPP Law).</p> <p>A private partner may, generally, pledge its rights under the PPP agreement, subject to the public partner's prior written consent (see article 51 of the PPP Law).</p> <p>As a distinctive feature of the PPP Law, that provides for possibility to implement a PPP project either on an institutional basis (with the creation of the PPP company as a joint venture) or a contractual one (without the creation of the PPP company), a disposal of or pledge or other collateral over the private partner's voting shares (participatory interests) of the PPP company to third parties, requires prior consent of the public partner and <i>vice versa</i> (see article 54.2 of the PPP Law).</p>

9. LAW ON WTO ACCESSION

The Law on WTO Accession came into effect on 9 November 2015.

The main purpose of the Law on WTO Accession is to make national legislation compliant with international treaties executed by Kazakhstan in the frameworks of the World Trade Organisation (the “WTO”). Kazakhstan officially acceded to the WTO on 30 November 2015.

Amendments Related to Foreign Labor Force Attraction

The Law on WTO Accession introduces the definition of “**internal corporate transfer**” of foreign employees from a legal entity established in the territory of a WTO country to its subsidiaries, branches, representative offices established in Kazakhstan. Such transfer can be performed for the period of up to 3 years (with 1 year prolongation option) and foreign employees shall receive work permits from the relevant Kazakh authorised body. The foreign employees transferred under the internal corporate transfer are, however, exempt from the annual foreign labour force quote requirement established by Kazakh law (i.e. the number of such “transferred” employees to Kazakhstan is unlimited subject to compliance with the Kazakh to foreign employees ratio established by the Kazakhstani Government).

Amendments Related to Subsoil Users Obligations re Local Content

The Law on WTO Accession abolished the mandatory requirement to use local goods of subsoil users who executed their subsoil use contracts after 1 January 2015. These subsoil users will not be obliged to use local goods and materials and will not be obliged to buy goods from local

producers. The obligation to use local services and works (the minimal threshold is 50%), however, did not change and subsoil users still have to keep such obligation.

Under the Law on WTO Accession, the definition of a Kazakhstani provider of works and services has been amended and now includes individual entrepreneurs and/or legal entities established under Kazakh law, located in Kazakhstan and using not less than 95% of Kazakh **employees excluding managers and specialists transferred to Kazakhstan as a part of “internal corporate transfer”** described above. The total number of such “transferred” managers and specialist shall not exceed 25% and 50% from 1 January 2022 out of the total number of managers and specialists by each respective category.

The obligation of subsoil users to use Kazakh employees in conduction of subsoil operations has also been amended by the Law on WTO Accession. Now a subsoil user **is entitled to use managers and specialists transferred to Kazakhstan as a part of “internal corporate transfer”** provided that the ratio of Kazakh employees will be kept at 50% of the total employees by each respective category.

Strengthening the Liability for Breaches of Trademark Rights

Currently a person who illegally used a trademark or mark similar to the trademark to the extent of confusion, shall **destroy the goods or package of goods where such trademark/ mark similar to trademark is placed.** Previously, the obligation to destroy the relevant goods arose only if it was impossible to delete the trademark/ mark similar to trademark from the goods/package.



10. LAW ON SPECIAL DEFENSIVE, ANTIDUMPING AND COMPENSATIONAL MEASURES

The Law on Special Defensive, Antidumping and Compensation Measures came into effect on 10 July 2015.

The main purpose of the Law on Special Defensive, Antidumping and Compensation Measures is to make national legislation compliant with international treaties executed by Kazakhstan in the framework of Eurasian Economic Union (the “EAEU”) and international treaties of the WTO.

Please note the following major provisions of the Law on Special Defensive, Antidumping and Compensation Measures:

Special Defensive Measures

Special defensive measures are aimed at limitation of import of the certain goods to the customs territory of EAEU in case if increased import of such goods has caused or may cause serious damage to economic sector of the member states. The damage or threat of damage shall be investigated and confirmed by a special investigation body appointed by the Eurasian Economic Commission (the “**Investigation Body**”).

Special defensive measures can be introduced only upon decision of the Eurasian Economic Commission after investigation mentioned above.

The Law on Special Defensive, Antidumping and Compensational Measures provides for the following types of special defensive measures: (i) import quote; (ii) special quote and (iii) special duty (including preliminary special duty).

Special defensive measures can be introduced for not more than 4 years with a prolongation option for another 4 years (8 years in total), except preliminary special duty that can be introduced for up to 200 calendar days.

Antidumping Measures

Antidumping measures apply in case of import into the customs territory of EAEU of goods of an export price which is lower than the normal price of such goods (the “**dumping import**”).

Antidumping measures apply only when the dumping import to the customs territory of EAEU causes or may cause material damage to the economy sector of member-states or substantially delays the establishment of the relevant economy sector of member-states. The presence of material damage, threat of material damage or delay in the establishment of the relevant economy sector of the member-states shall be investigated and confirmed by the Investigation Body.

Antidumping measures can be introduced only upon decision of the Eurasian Economic Commission after investigation mentioned above.

Antidumping measures can be introduced by way of (i) introduction of antidumping duty (including

preliminary antidumping duty); or (ii) approval of pricing obligations accepted by the relevant exporter.

Antidumping measures can generally be introduced for not more than 5 years, except preliminary antidumping duty that, depending on the circumstances, can be introduced for up to 9 months.

Compensation Measures

Compensation measures are aimed at the neutralisation of the negative effect on the EAEU economy of the specific subsidy provided to the foreign exporters by the exporting third country. Compensation measures apply in case of import to the customs territory of EAEU of goods produced, exported or delivered with the use of the specific subsidy provided by the third exporting country (the “**subsidised import**”).

Compensation measures apply only when the subsidised import to the customs territory of EAEU causes or may cause material damage to economy sector of member-states or substantially delays the establishment of the relevant economy sector of member-states. The presence of material damage, threat of material damage or delay in the establishment of relevant economy sector of member-states shall be investigated and confirmed by the Investigation Body.

Compensation measures can be introduced only upon a decision of the Eurasian Economic Commission after the investigation mentioned above.

Compensation measures can be introduced by way of (i) introduction of compensation duty (including preliminary compensation duty); or (ii) approval of voluntary obligations accepted by the subsidising body of the exporting third country or the relevant exporter.

Compensation measures generally can be introduced for not more than 5 years, except the preliminary antidumping duty that can be introduced for up to 4 months.

11. LAW ON OWNERSHIP RIGHT FURTHER PROTECTION

The Law on Ownership Right Further Protection came into effect on 1 August 2015.

The main purpose of the Law on Ownership Right Further Protection is to strengthen relevant provisions of legislation related to the protection of ownership rights and the guarantee of the protection of contractual obligations.

Please note the following major provisions of the Law on Ownership Right Further Protection:

Clarification of “Expressly Insignificant” Criteria in Pledge Enforcement

Kazakh legislation provides that the court may refuse to levy execution on the pledged property in case of the breach of the secured obligation committed by the debtor is “extremely insignificant and the amount of the creditor's claims is, accordingly, expressly inadequate to the amount to the value of the pledged property”. The law, however, did not previously provide any guidance as to what shall be considered as **“extremely insignificant”** and **“expressly inadequate”**. The court was able, accordingly, to determine these criteria itself and refuse to levy execution on the pledged property at its sole discretion.

To address this issue, the Law on Ownership Right Further Protection clarified that the breach shall be considered “extremely insignificant” and the creditor's claims shall be considered as “expressly inadequate” to the value of the pledged property if the following criteria are simultaneously met: (i) the amount of non-performed obligation (excluding fines) is less than 10% of the value of the pledged property determined by the parties in the pledge agreement; and (ii) the secured obligation is non-performed for a period of no less than 3 months.

This amendment, however, does not help in situations where non-financial obligations of the borrower are breached. Literal interpretation of the amendment suggests that, only non-payment for less than 10% of the value of the pledged property for the period of 3 months can be considered as “extremely inadequate”. A breach of any other non-financial obligations (e.g. non-provision of financial statements or absence of notification on change of address of the borrower) cannot now be considered by the court as “expressly insignificant”, and the court will not be able to refuse levy execution on the pledged property in case of such breaches to the detriment of the borrowers and pledgers.

Introduction of Summary of Terms Requirement for Individual Borrowers

The Kazakh banking legislation contains a number of mandatory provisions of the bank loan agreement, without inclusion of which such a bank loan agreement will be held invalid.

The Law on Ownership Right Further Protection introduced the summary of terms requirement in relation to the bank loan agreements concluded with individual borrowers (except the loans issued for the period of less than 1 month, loans issued in the framework of credit line through the payment card and overdraft loans). The bank and individual borrower now will have to sign, in addition to bank loan agreement, the summary of terms document that shall contain the main terms of the bank loan, including the amount, currency and tenor of the loan, number of payments under the loan, type of interest rate (fixed or floating), final amount of interests, fines under the loan etc.



12. LAW ON AMENDMENTS TO ELECTRIC POWER INDUSTRY

On 12 November 2015, Kazakhstan enacted the Law on Amendments to Electric Power Industry. Amendments were made to the Law On Electric Power Industry, the Law On Natural Monopolies and Regulated Markets and some other laws.

The most important amendment introduced by the Law on Amendments to Electric Power Industry is that the introduction of the capacity market in Kazakhstan has been postponed by 3 years until 2019. Initially, capacity market was planned to be introduced in Kazakhstan from 1 January 2016, however, given the recent crisis and respective decrease of industrial production, it was decided by the Government to postpone the introduction of the capacity market to avoid an increase of tariffs and an additional burden on industrial consumers. Accordingly, “ceiling” electricity tariffs system that were planned to expire on 1 January 2016 due to introduction of capacity market have also been extended until 1 January 2019. The Order of the Minister of Energy of the Republic of Kazakhstan No 676 established the rates of ceiling tariffs for electricity for the next three years (2016-2019).



13. LAW ON AMENDMENTS RELATED TO NON-PERFORMING LOANS, FINANCIAL SERVICES AND FINANCIAL ORGANISATIONS

The Law on Amendments Related to Non-Performing Loans, Financial Services and Financial Organisations (the “**Law**”) came into effect on 1 January 2016, except certain provisions.

The purposes of the Law are to improve the mechanisms to protect the rights of financial services' consumers and work of the second-tier banks with insolvent borrowers, creation of additional mechanisms for dealing with non-performing assets of banks, ensuring the stability of the financial system and further development of Islamic finance in Kazakhstan.

The Law amends 7 codes and 35 laws of the Republic of Kazakhstan. Some of the provisions of the Law have retrospective effect (i.e. cover the relations and agreements that arose BEFORE the enactment of the Law).

(A) Amendments Aimed on Dealing with Non-Performing Assets and Ensuring Stability of Financial System

Change of Loan Repayment Order

The Law has changed the general repayment order for non-bank loans and established mandatory repayment order for the bank loans and microcredits. Thus, under the Law, as a general rule, in case the amount received from the borrower as a repayment under non-bank/microcredit loan agreement is not sufficient, such an amount shall first be applied to discharge the principal and interests amounts, and only after that penalties and expenses shall be discharged (previously, the repayment amount received from the borrower shall have been applied *vice versa*).

In case of the bank loans and microcredits provided to **individuals**, the following mandatory repayment order is established: (i) overdue principal; (ii) overdue interest; (iii) penalties; (iv) due principal; (v) due interest; (vi) enforcement expenses of the creditor. If the payment has not been made by the borrower within 180 consecutive calendar days, the following mandatory repayment order shall apply: (i) overdue principal; (ii) overdue interest; (iii) due principal; (iv) due interest; (v) penalties; (vi) enforcement expenses of the creditor.

The above provisions will come into force on 1 July 2016 and will cover relations that arose from this date under the agreements executed earlier.

The change to the loan repayment order is aimed at decreasing the number of non-performing loans in the financial system and improving the quality of banks' and microfinance organisations' loan portfolios.

Amendments to Measures of Influence of the National Bank

The Law has introduced certain amendments to the so called “measures of influence” that can be applied by the National Bank to banks, insurance (reinsurance) companies, microfinance organisations, pension funds, mortgage organisations and subjects of the securities market (the “**regulated organisations**”) for breaches of prudential requirements and other provisions of Kazakh legislation.

First of all, such measures as “letter-obligation” have been abolished, so the National Bank now can generally apply three remaining measures: written prescription, written notification and written agreement.

Secondly, in case of a written prescription issued for breach of legislation by a regulated organisation, the Law gave the opportunity to the regulated organisations to develop their **own plan of measures to address**

breaches committed as well as reasons and conditions resulted in committed breaches (previously, the mentioned organisations had to perform the measures prescribed by the National Bank and could not suggest their own plan of measures).

Thirdly, written notification will now be issued to notify the regulated organisation about the possibility of sanctions to be applied to it by the National Bank **in case of repeated breaches of legislation within one year from the moment of written notification** (previously, sanctions could be applied for the first breach without waiting for the repeated breaches or if the breach was not cured within the period established by the National Bank).

Further, the Law clarified that “**written agreement**” shall be **mandatorily signed** by the regulated organisation.

Protection of Banks against Requisition of the Land Plots

Under Kazakh law, if a land plot is not used in accordance with its purposes (e.g. agriculture, construction etc), it shall be subject to requisition by the state.

The Law clarified that requisition of such land plots from the Kazakh banks can take place only after 6 months from the moment of acquisition of such land plots by the bank in the course of the enforcement of a pledge over such land plots.

Strengthening Criminal Liability of Financial Organisations' Management

Management of the financial organisations, banking and insurance holdings, major shareholder-individuals and management of major shareholders – legal entities can now be, *inter alia*, deprived of the right to hold management positions for a period from 5 years and up to the life term for deliberate bankruptcy, bringing to insolvency, abuse of authority if these actions caused heavy damage to financial organisation (previously, they could be deprived of the right to hold management positions for the period of up to 5 years).

Introduction of Administrative Liability for Manipulation with Currency Exchange Rate

Participants of the financial market are now subject to administrative liability for transactions concluded for the purposes of manipulation with prices for financial instruments and market currency exchange rate. The administrative liability constitutes the fine of 10% of the amount of the transactions concluded for the purposes of manipulation.

Organisations for Acquisition of Doubtful and Bad Assets

Previously, in order to get rid of doubtful and bad assets, the banks were entitled to sell such assets either to special organisation established by the National Bank (JSC “Fund of Bad Assets”) or to special subsidiaries of the bank established particularly for the purpose of dealing with bad assets. Now the banks, in addition to options mentioned above, are entitled to establish special organisations for the acquisition of doubtful and bad assets together with the National Bank and sell their bad assets to such organisations. In this case, relevant risks are shared between the bank and the National Bank as regulator.

Right Not to Pay Dividends

A bank, an insurance (reinsurance) company is now entitled not to pay dividends on its privileged shares in case such payment will cause a breach of the prudential requirements applicable to the bank/insurance (reinsurance) company, provided that this right is contemplated in the prospectus of shares issuance.

The Law clarified that the shareholders of a Kazakh joint stock company are not entitled to claim dividends payment if the dividends have not been accrued due to the following reasons: (i) negative own capital of a joint stock company or possibility of negative own capital as a result of dividends payment; or (ii) there would be risk of insolvency of a joint stock company as a result of dividends payment.

Subordinated Debt of Banks and Insurance Organisations

The Law introduced the concept of “subordinated debt” of banks and insurance organisations. Subordinated debt is an unsecured debt of the bank/insurance organisation under a bonds issuance or a loan that simultaneously satisfies the following criteria: (a) the debt is issued for no less than 5 years; (b) creditors cannot claim repayment earlier than upon 5 years from the moment of issuance of debt; (c) debt can be voluntarily repaid by the bank/insurance organisation provided that such repayment does not cause breach of prudential requirements by the bank/insurance organisation; and (d) upon liquidation of the bank/insurance organisation, such debt shall be satisfied in the next to the last turn, prior to satisfaction of common shareholders' claims.

Subsidiaries of the bank/insurance organisation and organisations in which the bank/insurance organisation holds 20% of shares or more are prohibited to issue the subordinated debt to the bank/insurance organisation (by the way of acquiring the bonds of the bank/insurance organisation and/or issuing the loans to the bank/insurance organisation).

Insurance (reinsurance) companies that previously were able to issue shares only (and not other types of securities) and attract loans from banks for the period of not more than 3 months and for the amount of not more than amount of their own capital, are now also able to attract subordinated debt in the form of bonds or loans without limitations.

Branches of Non-Resident Banks, Insurance (Reinsurance) Companies, Insurance Brokers

Pursuant to the Law, from 16 December 2020 non-resident banks, non-resident insurance (reinsurance) companies and insurance brokers will be able to open their branches and perform banking/insurance activities in Kazakhstan, subject to permission issued by the National Bank and subject to certain requirements (opening of branches of such non-residents was previously prohibited in Kazakhstan).

In order to be able to open a branch in Kazakhstan, a non-resident bank shall, *inter alia*, have no less than USD 20 billion total assets, provide confirmation from financial regulator of the country of its residence that such non-resident bank holds a valid banking license, confirmation that there is an agreement between Kazakhstan and the country of its residence on exchange of information etc.

In order to be able to open a branch in Kazakhstan, an insurance (reinsurance) company shall, *inter alia*, have not less than USD 5 billion total assets, not less than 10 years of insurance experience in all sectors and classes of insurance, provide confirmation from the financial regulator of the country of its residence that this non-resident insurance (reinsurance) company holds a valid insurance license and confirmation that there is an agreement between Kazakhstan and country of its residence on exchange of information etc.

Branches of non-resident banks and non-resident insurance (reinsurance) companies will be regulated by the National Bank, including by way of the establishment of mandatory prudential requirements and requirements to the management of such branches.

Management of the branches of non-resident banks and non-resident insurance (reinsurance) companies will be subject to criminal and administrative liability for breaches of banking and insurance legislation.

“Reliable” Shareholder Requirement

The National Bank is now generally entitled to freeze/withdraw the license: (i) of the bank that is entitled to take deposits and keep accounts of individuals if such bank does not have parent bank or bank holding with minimal rating established by the National Bank, or does not have a major participant –and (b) of the insurance (reinsurance) company that provides mandatory types of insurance (e.g. insurance of automobile owners liability etc.) if such insurance (reinsurance) company does not have a major participant (an individual or insurance holding).

(A) Amendments Focused on the Further Protection of Financial Services' Consumers

Limitation of Penalties

Under the Law, the penalty for undue repayment of principal interest of a bank loan cannot exceed 0.5% per day in case the overdue period is less than 90 days, and 0.03% per day in case the overdue period exceeds 90 days (previously, 0.5% limitation per day applied irrespective of the duration of the overdue period). In any case, the total amount of the penalty shall still not exceed 10% of the bank loan amount per one year.

This provision enters into force on 1 July 2016 and will take retrospective effect. The penalties under bank loan agreements concluded with individuals, which **were paid** before the implementation of the Law, or penalties that have to be paid in accordance with the court decision entered into force before the implementation of the Law, **cannot be recalculated**.

Notification on Overdue Amounts

Under the Law, banks are now obliged to notify borrowers on overdue amounts under the bank loans not later than 30 business days from the moment the obligation has become overdue. This measure presumably aims to address the situation where the borrower for some reason is not aware of an overdue obligation that leads to the accrual of a huge amount of penalties.

Limitation of Bank Account Debit

From 1 January 2017 the amount that the banks can debit from any bank accounts of an individual borrower without his/her consent, in case of overdue payments under the loan agreement concluded with such bank, will be limited to 50% of the funds placed on this borrower's current bank accounts (except the deposit account from which the bank is still entitled to debit the full amount).

Prohibition to Claim Payments under Residential Mortgage after 180 Days Payment Delay

Banks are now prohibited to claim payment of interest and penalties accrued under residential mortgage after 180 days of payment delay from individual borrowers. In case of restructuring or refinancing of residential mortgage by an individual borrower, capitalisation of overdue interests and penalties to the principal amount is prohibited. These amendments presumably try to protect individual borrowers from the risk of being deprived of their housing.

The above provisions have retrospective effect. Interest and penalties under the agreements concluded with individuals, accrued and unpaid before implementation of the Law, **cannot be recalculated**. At the same time, the period after which the bank/microfinance organisation is not entitled to claim payment of interest and penalties shall be calculated from 1 January 2016.

Prohibition to Unilaterally Amend the Terms of Bank Loan and Microcredit Agreement

Under Kazakh law, banks are prohibited to unilaterally amend the provisions of loan agreements, except cases where such amendments improve the borrower's position. Prior to the Law, it was not clear which conditions do "improve the borrower's position" and how these conditions are determined.

The Law clarifies that from 1 July 2016 the following amendments can be considered as "improving the borrower's position", namely: decrease and cancelation of commissions, penalties and other payments under the loan, decrease of interest rate, introduction of delayed payments. Other conditions "improving the borrower's position" may be determined in the loan agreement itself. The borrower shall be notified on unilateral change of loan agreement provisions and has a right to refuse the improved conditions within 14 calendar days. These provisions have retrospective effect and shall cover relations between the bank and its customers that arose prior to 1 July 2016.

The Law introduced similar general prohibition for microfinance organisations to unilaterally amend ANY provision of microcredit agreement, though for some reason the Law did not allow microfinance organisations to unilaterally introduce the amendments that improve the borrower's position (like in case of the banks). The only provisions that a microfinance organisation can amend unilaterally are decreases of the interest rate and commissions' amount.

Limitation on Microcredit Acceleration

The Law provides that a microfinance organisation may now accelerate the microcredit only after 40 days of either principal or interest overdue (previously, such limitation applied to the banks only, and microfinance organisations were able to accelerate microcredit from the first day of overdue).

Obligation to Offer to the Borrower Two Types of Loan/Microcredit Conditions

From 1 July 2016 the Law obliges a bank/microfinance organisation to offer an individual non-businessman borrower two types of loan/microcredit conditions: (i) "no commissions" type whereby the bank/microfinance organisation is entitled to charge only interests and no commissions and (ii) "interest and commissions" regular type. It is not clear whether such measure is indeed helpful since the banks/microfinance organisations are not prohibited to apply the higher interest rate to the first type and include all commissions in the interest rate.

Mandatory Provisions of Microcredit Agreement

The Law updated the list of mandatory provisions that shall be contained in each microcredit agreement as a condition to its validity. A microcredit agreement shall now mandatorily contain, *inter alia*, a full list and amounts of all commissions and other payments related to issuance and service of microcredit by a microfinance organisation, microcredit repayment order, penalties accrual order and penalties' amounts, rights and obligations of the parties to the microcredit agreement. Certain mandatory provisions of the microcredit agreement shall be listed in a certain order, starting from the first page of the microcredit agreement and cannot be contained in general terms and conditions of a microfinance organisation (i.e. shall be contained in the microcredit agreement actually signed by the borrower and not in general terms and conditions placed on the website of the microfinance organisation).

From 1 July 2016 the Law allows the microfinance organisation to offer to its clients, in addition to annuity and differentiated repayment schedules (that shall be mandatorily offered to the borrower by microfinance organisation), any other repayment schedules prepared in accordance with microcredit rules.

Protection of the Borrowers under Microcredits Secured by Residence Mortgage

Under the new Law, if microcredit is secured by a land plot or immovable property that constitutes the housing of an individual borrower, capitalisation of the overdue interest and penalties to the principal amount is prohibited. This provision has retrospective effect.

The microfinance organisation is not entitled to claim payment of interest and penalties under the loan with an individual borrower secured by the housing/land plot with housing located on it if such interest and penalties have been accrued after the payments under the loan became overdue for 180 days.

This provision has retrospective affect. Interest and penalties under the agreements concluded with individuals, accrued and unpaid before implementation of the Law **cannot be recalculated**. At the same time the period after which a bank/microfinance organisation cannot claim payment of interest and penalties, shall be calculated from 1 January 2016.

Microcredit Secrecy

The consent for the disclosure of microcredit secrecy shall now be given by the borrower at the moment of his/her personal presence in the premises of the microfinance organisation (previously, such consent could have been signed by the borrower in any place other than the premises of microfinance organisation). Disclosure of microcredit secrecy to the representatives of individual borrowers can be made only based on notarised Power of Attorney (previously, plain Power of Attorney was sufficient).

Termination of Principal Obligation upon Realisation of the Pledged Property

Kazakh law provides that, in out-of-court procedure for realisation of the pledged property, the principal obligation shall terminate upon realisation of the pledged property (even if sold for the amount less than principal obligation), provided that the pledge fully secured the principal obligation at the moment of execution of the pledge agreement. The Law has extended this provision to in court realisation procedure in relation to residential mortgage of the individual borrower, provided that such an individual borrower does not have any other property to be enforced. This provision applies only to the pledge agreements concluded from 1 January 2016.

(A) Amendments Aimed on Development of Islamic Finance

Conversion to Islamic Bank

The Law introduced the possibility for conventional banks to perform voluntary reorganisation and convert to Islamic banks upon decision of the general meeting of its shareholders and subject to permission from the National Bank. The term of conversion is 5 years and can be extended by the National Bank by not more than 1 year.

State Special Islamic Financial Company

The Law introduced the concept of so called “state special Islamic financial company” (the “**SSIFC**”) that can be established upon resolution of the Government of Kazakhstan by the Committee for State Property and Privatisation of the Ministry of Finance in the form of limited liability partnership. Under the Law, SSIFC has been provided with certain tax exemptions.

SSIFC is established for the purposes of issuing state Islamic securities (Islamic lease certificates). Islamic lease certificates provide to investors the right to receive lease payments under the lease entered into by SSIFC as owner of the leased designated assets (acquired with the funds raised through Islamic lease certificates) and the lessee.

The Law introduced amendments that will allow SSIFC to acquire automobile roads (as designated assets) from the state (with the right of repurchase). SSIFC will then lease the automobile roads to the relevant state body and use the proceeds from the lease to make payments to the investors under Islamic lease certificates. Any state property (other than automobile roads) may be used as designated assets by SSIFC subject to the relevant resolution of the Kazakhstan Government. Under the Law pledge, levy of the execution and freeze of such designated assets is prohibited and such designated assets are excluded from the liquidation estate upon insolvency.

(B) Amendments Related to Securities Market Regulation

Additional Requirement for Issuance of Securities in the Territory of a Foreign State

Under the Kazakh Securities Market Law, issuance and placement of securities by a Kazakh resident in the territory of a foreign state is subject to permission of the National Bank and certain other mandatory conditions (the “**Article 22-1 Requirements**”). Notably, a “Kazakh resident” in the context of the Kazakh Securities Market Law covers a **non-resident company** if not less than 2/3 of its assets is located in Kazakhstan or issued under Kazakh law or if the effective management of the company is executed abroad. Previously, one of the mentioned mandatory conditions of issuance and placement of securities in the territory of a foreign state by a “Kazakh resident” was KASE listing of the existing securities of such “Kazakh resident”.

The Law introduced an additional requirement. In addition to KASE listing, the existing securities of the “Kazakh resident” shall be “in circulation”. By “circulation”, Kazakh Securities Market Law means that the security shall be traded in the secondary market. It seems that if previously the “Kazakh resident” could issue a nominal number of securities and list these on KASE to formally satisfy Article 22-1 Requirements,

now the “Kazakh resident” shall have to prove that such securities are not only listed on KASE but also are “in circulation”, i.e. are traded on the secondary market. The Law has not clarified what evidence shall be presented to prove the securities are “in circulation”.

Exclusion of State Securities from Article 22-1 Requirements

The Law also excluded state emission securities from Article 22-1 Requirements.

Reports and Mandatory Audit Requirements for Major Participants of Investment Portfolio Managers

The Law introduced reporting obligations (financial statements, information on affiliated parties etc) to resident and non-resident individuals and non-residents who are considered as major participants (holding 10% or more of shares) in investment portfolio managing companies.

Establishment of Information System of OTC Securities Market

The Law provides for the establishment of an information system of OTC securities market (“**OTC IS**”). OTC IS will be maintained by JSC “Integrated Securities Registrar” and will provide investors with “real time” access to information on the bids of other investors for certain securities OTC and information on executed transactions with securities OTC. Establishment of OTC IS will provide transparency of OTC transactions with securities and will allow improvement of the supervision over such transactions by financial regulator.

Exemption for Financial Securities from Freeze of Assets in Enforcement Proceedings and Liquidation Estate

The Law provided that the following property cannot be arrested in the course of enforcement proceedings: securities and financial instruments contributed to the guarantee and reserve funds of clearing organisations, securities that constitute margin contributions or securing obligations under transactions executed through the stock exchange by “open trade” method; property that is subject of repo transactions executed through the stock exchange by the “open trade” method. These mentioned financial securities are also excluded by the Law from liquidation estate upon insolvency.

The Law clarified that the arrest of securities does not prevent execution of the transactions with such securities through the stock exchange until the moment the stock exchange has received the relevant court order on the arrest of such securities.

In addition, under the Law, transactions executed through the stock exchange by the “open trade” method have been exempted from insolvency claw back.

14. LAW ON AGRICULTURAL COOPERATIVES

The Law on Agricultural Cooperatives was signed by the President on 29 October 2015 and came into effect from 1 January 2016.

The Law on Agricultural Cooperatives is aimed to increase the attractiveness of membership in agricultural cooperatives, encouraging competition for the purposes of development of the agricultural sector in Kazakhstan.

Please note the following provisions of the Law:

Making Agricultural Cooperatives Commercial

Currently, most agricultural cooperatives are established as non-commercial organisations (except agricultural cooperatives established in the form of so called production cooperatives). Non-commercial organisations cannot distribute dividends to its members. Accordingly, agricultural cooperatives were not really attractive for the members to join.

The Law provides that from 1 January 2016 all agricultural cooperatives shall be established and perform their activity in the form of a production cooperative that is a commercial legal entity that allows distribution of dividends to its members. Agricultural cooperatives established as non-commercial organisations shall

be reorganised and become commercial organisations (in the form of production cooperative) within 1 year from the effective date of the Law on Agricultural Cooperatives.

Introduction of Associated Members

The Law on Agricultural Cooperatives provides that, apart from other members, an agricultural cooperative can have so called “associated” members.

The contribution of associated members can be made only with money (and not other property). Associated members receive dividends on the amounts of their contributions, bear liability to the cooperative's creditors limited to the amounts of their contributions, are not entitled to participate in the management of agricultural cooperative (have a right of advisory vote only) and are not obliged to take part in the business activity of agricultural cooperative. The total number of associated members shall not exceed one fifth of the total number of participants in an agricultural cooperative.

The Law on Agricultural Cooperatives provides that associated participants can be individuals and legal entities that are agricultural producers who make contributions to the agricultural cooperative as a prepayment of agricultural raw materials in order to guarantee the delivery of such materials. It is not clear whether a non-agricultural producer can become an associated member of an agricultural cooperative.



15. PRIVATISATION DECREE

Kazakhstan is set to embark upon its most ambitious privatisation plan since independence from the Soviet Union in 1991, offering stakes in its largest state-owned enterprises to international investors in preparation for eventual stock market flotations.

The Government Decree No. 1141 dated 30 December 2015 “On Several Issues Related to Privatisation” (the “**Privatisation Decree**”) entered into force on 1 January 2016 and provides the list of 783 (the “**Privatisation List**”) state owned companies and subsidiaries of so-called “national holdings” that are going to be privatised. Such privatisation is one of the main crisis response measures of the Kazakh Government intended to reduce the presence of the state in business and cut down expenses on business support as well as make up for the budget loss from the lower oil price.

The privatisation shall be conducted until 2020 and will be held through either auctions and tenders, or stock exchange trades, or two-stage competitive tendering and sale of derivative securities. It is also expected that a targeted sale of the companies to the strategic investors will be enacted. The assets with balance value of more than KZT 5 billion will be sold directly or through IPO or SPO.

The Decree approved a systematic plan of privatisation for 2016 – 2020 and its target indicators. The systematic plan provides for the establishment of a project office which will include international consultants who will advise the Kazakh Government on the privatisation process. The main function of the project office is to give recommendations on the privatisation policy, pre-sale preparation, transaction terms and potential clients. The target indicators are: (i) reduction of quasi-state companies owned by the central government by 15% by 2021 and (ii) transfer of 5% of companies owned by the local governments to the competitive environment.

The Privatisation List of the companies to be privatised/transferred to the competitive environment includes, *inter alia*:

- **Oil and gas:** JSC “National Company “KazMunayGas” (IPO), “PetroKazakhstan Oil Products” LLP, “Atyrau Oil Refinery” LLP, JSC “KazTransGaz Almaty”, “BeineuMunayGas” LLP, Rompetrol Petrochemical SRL etc.;
- **Railway:** JSC “National Company “Kazakhstan Temir Zholy” (IPO), JSC “KazTemirTrans”, “Tulpar Talgo” LLP etc.;
- **Energy:** JSC “National Company “Kazatomprom” (IPO), JSC “Samruk-Energy” (IPO), JSC “Almaty Electric Power Plants”, JSC “Alatau Jaryk Kompaniyasy”, “AlmatyEnergoSbyt” LLP etc.;
- **Chemical Industry:** “Astana Solar” LLP, “Kazakhstan Solar Silicon” LLP, JSC “Irtys Chemical-metallurgical Plant” etc.;
- **Aviation:** JSC “Air Astana” (IPO), JSC “Qazaq Air”, JSC “Astana International Airport”, airports of Kyzylorda, Pavlodar, Shymkent etc.;
- **Banking and finance:** JSC “Housing Construction Savings Bank of Kazakhstan”, JSC “Investment Fund of Kazakhstan”, JSC “KazExportGarant” etc.;
- **Agriculture:** JSC “National Company “Food Contract Corporation”, KazAgro, JSC “KazAgroProduct”, JSC “KazAgroFinance” etc.;
- **Communication:** JSC “Kazakhtelecom” (IPO), JSC “Kazpost” (IPO), JSC “Trancetelecom” etc.



16. RULES OF ELECTRONIC TRADES

On 25 November 2015, the Ministry of National Economy of the Republic of Kazakhstan adopted the Rules of Electronic Trades (the “**Electronic Trade Rules**”) that will enter into force on 2 February 2016. The Electronic Trade Rules were enacted in order to implement the provisions of the Law of the Republic of Kazakhstan “On Regulation of Trading Activity” dated 12 April 2004 no. 544-II, to facilitate the procedure of conclusion sale and purchase transactions provided that such transactions are not subject to notarisation and/or state registration.

The Electronic Trade Rules do not apply to state procurement and procurement by the National Bank and its group.

Under the Electronic Trade Rules, the participants of the electronic trades – sellers, purchaser and trades

intermediaries (i.e. the persons or legal entities that place electronic messages offering the goods on behalf of the sellers and searching for potential purchasers for the benefit of the sellers under a special agreement concluded between such intermediary and the seller). Both individuals and legal entities, either entrepreneurs (i.e. persons regularly involved in business activity) or not (i.e. persons who wish to conclude a single sale and purchase transaction on non-regular basis) can participate in the electronic trades. The sellers, entrepreneurs and intermediaries shall report to the relevant state bodies, including tax bodies. The electronic trades are conducted by the exchange of electronic documents certified by digital electronic signature registered in the name of each of the relevant participants, or by exchange of electronic messages. The participants use electronic money to settle trade transactions.



17. NEW PROCUREMENT LAW

The new Procurement Law was enacted on 1 January 2016 and replaced the previous law of the Republic of Kazakhstan “On Public Procurement” no. 303-III dated 21 July 2007.

The new Procurement Law is aimed to resolve issues arising for entrepreneurs in the course of the state procurement procedure and to address corruptions risks, such as extra regulation of state procurement process, abuse by purchasers, subjects of state procurement (generally, state bodies and state companies) and absence of effective mechanisms for challenging purchasers' decisions and absence of effective mechanisms to exclude bad faith suppliers from participating in state procurement process.

In addition, the new Procurement Law has been developed to make Kazakh legislation compliant with the international treaty on the Eurasian Economical Union executed between the Republic of Kazakhstan, Russian Federation and the Republic of Belarus.

Simplification of Tender Procedure

Previously, in case of procurement by way of tender, only the suppliers who suggested the so called “best technical specification” were admitted to submit price proposals to the purchasers, the subjects of state procurement. The “best technical specification” meant the specification of goods, services and works to be purchased of which the characteristics were better than the standard specification required from all suppliers in the tender documentation. This provision restricted competition, since only a limited number of suppliers could suggest “the best technical specification”. In addition, it created grounds for corruption, since the procedure of recognising the suggested specification as the “best” was not transparent and purchaser-subjects of state procurement could easily have recognised any supplier as suggesting “the best technical specification” at their discretion, thus unfairly awarding them the tender. In the new Procurement Law, the concept of “the best technical specification” is excluded. Now tender applications from all suppliers who suggest equal technical specification required by purchasers shall be considered.

Further, tender procedure has been simplified by the inclusion of a price proposal to the tender application (previously, price proposal could be submitted only after tender applications had been considered and suppliers suggesting the “best technical specification” had been identified). This amendment will allow for expedition of the tender procedure.

New Competitive Tender with Preliminary Selection

The new Procurement Law introduces the new way of conducting public procurements – the so called “competitive tender with preliminary selection” (*konkurs s predvaritel'nyim otdorom*). The competitive tender with preliminary selection consists of two steps: (i) establishment of a register of qualified suppliers by types of goods, works and services that will be regularly updated. The commission for the establishment of this register will mandatorily include representatives of the National Chamber of Entrepreneurs and other non-governmental organisations for protection of potential suppliers' interests; and (ii) a competitive tender among qualified suppliers included in the register.

Currently, it is necessary to select qualified suppliers before conducting every tender and, accordingly, the suppliers have to provide the same documents from tender to tender. The described approach will expedite the procurement process by avoiding such necessity (since the register of qualified suppliers will already be in place based on the document provided by the suppliers). The new competitive tender with preliminary selection will be introduced from 1 April 2016.

Simplification of Auction Procedure

Previously, auction consisted of three main stages: (i) verification of auction applications for compliance with technical specifications and the existence of application security (cash deposit or bank guarantee); (ii) auction by best price offered; (iii) verification of compliance of auction participants with qualification requirements. The new Procurement Law simplifies the auction procedure, so that now it consists of two stages: (i) verification of auction applications for compliance with technical specifications and of action participants on compliance with qualification requirements and (ii) auction.

The described simplifications aim to decrease the time taken to conduct the auction and, more importantly, to exclude the possibility of the refusal of an application that won the auction by the best price at a later stage on grounds of non-compliance with qualification requirements.

Abolishment of Exclusions to the State Procurement Process

Previously, there was a list of goods, services and works that were excluded from state procurement requirements and could be purchased by the purchaser-subjects of state procurement directly, by signing of the relevant agreement with the relevant supplier (e.g., if the total annual value of the purchased goods/services/works did not exceed 2,000 monthly calculation indexes or approximately USD 11,621, mass media goods/services/works, employees education etc.) Under the new Procurement Law, such exclusions have been abolished and most of the earlier excluded goods/services/works shall be now purchased through the so called “purchase from one source” procedure. In order to make such procedure more transparent, the new Procurement Law requires the purchaser-subjects of state procurement to place on the state procurement website the report on purchases of goods/services/works made “from one source”. This report shall contain the detailed justification of the choice of the particular supplier and contain information on the price and other major terms of the agreement concluded with the relevant supplier.

Public Discussion of Draft Tender Documentation by Potential Suppliers

Importantly, the new Procurement Law introduces a mandatory condition of the tender documentation approval: the preliminary public discussion of the draft tender documentation by potential suppliers. Any comments on the draft of the tender documentation, as well as requests for clarification of the tender documentation, can be addressed by the potential suppliers to the purchaser-subject of state procurement, organiser of state procurement or the unified organiser of state procurement no later than 5 business days from the date of publication of the public procurement announcement. The mentioned entities shall consider the comments and questions of the potential suppliers and either amend the tender documentation accordingly or decline comments and provide reasons for declining. Any such decision may be challenged by the potential suppliers. This amendment will allow potential suppliers to preview drafts of the tender documentation before it is approved and, in case of identification of any issues, may request amendments to the tender documentation by the purchaser-subject of state procurement. This amendment is also aimed to address the frequent situation when purchasers tailored tender documentation for particular suppliers.

Clarification of Complaint Procedure

The new Procurement Law clarifies the procedure for challenging of state procurement procedures by the suppliers. In particular, the new Procurement Law clarified that a potential supplier may submit a complaint to the authorised body on the actions (failures to act) and decisions of purchaser, organiser of state procurement, the unified organiser of state procurement, relevant commissions, experts, and the unified state procurement operator no later than within 5 business days from the date of publication of the minutes on results of the state procurement by the way of tender/auction. The state procurement contract can be concluded only upon expiry of the 5 business day period within which a complaint can be filed. In case the complaint is indeed filed by the potential supplier, the conclusion of the state procurement contract shall be further postponed until the complaint has been considered by the authorised body. The complaint shall be considered within 10 business days.

Amendments Related to State Procurement Contract

The new Procurement Law introduced mandatory provision to the state procurement contract, pursuant to which the full payment to the supplier must be made within 30 calendar days from the execution of the suppliers' obligations under the contract.

Furthermore, now the state procurement contract shall be generally concluded in electronic form, i.e. sent through the state procurement website and signed by the parties using electronic digital signatures. This amendment will improve the position of the purchasers against bad faith suppliers, who in practice frequently did not conclude state procurement agreements and avoided liability since the purchasers could not prove due delivery/signing of the state procurement contract. Electronic format of the conclusion of the state procurement contracts is aimed to address this issue.

In order to improve the position of the suppliers, the new Procurement Law provided them the right to refuse the advanced payment under state procurement contract (and accordingly, released them from the obligation to provide the security in the amount of this advanced payment).

Introduction of State Procurement Monitoring

The new Procurement Law introduced monitoring over state procurement as one of the stages of the state procurement process. Monitoring shall be performed by the authorised body based on analysis of the state procurement website. An annual report with results of monitoring shall be submitted by the authorised body to the Administration of the President and the Government of the Republic of Kazakhstan.

Establishment of Territorial Unified Organisers of State Procurement

The unified organiser of state procurement was previously a state institution authorised to organise and conduct state procurement under budget programs. It previously existed at republican level only (i.e. did not participate in local state procurements conducted in territorial subdivisions of Kazakhstan). The purpose of the unified organiser is to ensure transparency and fairness of the procurement process, since representatives of the unified organiser participate in state procurement together with representatives of the purchaser-subject of state procurement. Under the new Procurement Law, it was decided to apply successful experience of using the unified organiser of state procurement not only on a republican level, but also to establish local unified organisers in territorial subdivisions of the Republic Kazakhstan and improve state procurement procedure at all levels.

Introduction of Antidumping Measures

The new Procurement Law introduces antidumping measures on public procurement by way of tender. It is now allowed for potential suppliers to suggest dumping prices, provided that the potential supplier, in addition to providing security for the execution of the state procurement contract, will provide additional security of the amount of the difference between the suggested dumping price and the price that according to the law shall not be considered as dumping price. This measure will save budget funds and procure competition among the potential suppliers.



* * * * *

We hope this Legal Alert of the GRATA Finance & Securities Group is useful to you in your present work. Please let us know if you have any questions. We would be glad to be of assistance.

As we are constantly trying to improve the quality of our services, we would highly appreciate your recommendations or comments as to how we can serve you better. Furthermore, if there is anything we omitted to mention when working on a project of yours, please do let us know.

Comments and recommendations can be sent to schikanayev@gratanet.com. We will make sure we fix any problems and continue to offer you the best service we can.

Sincerely yours,

Shaimerden Chikanayev
Partner



Email: schikanayev@gratanet.com
Mob: 7701 7878020

Marina Kahiani
Partner



Email: mkahiani@gratanet.com
Mob: 7701 7251269

This Legal Alert is provided for your convenience and does not constitute legal advice. It is prepared for the general information of our clients and other interested persons. This Legal Alert should not be acted upon in any specific situation without appropriate legal advice and it may include links to websites other than the GRATA website. If you no longer wish to receive legal alerts from the GRATA Finance & Securities Group, please send an email to schikanayev@gratanet.com