In keeping with GRATA International’s practice of informing clients regarding important legal developments that might influence their business, we draw your attention to the following recent changes in Kazakhstani legislation that occurred during the period of January – December 2015

**IN THIS ISSUE:**

Plan of the Nation – 100 Particular Steps for Realisation of 5 Institutional Reforms (the “Plan”) issued by the President Nazarbayev in May 2015 and main relevant laws adopted within the frameworks of the Plan.

**PLAN OF THE NATION – 100 STEPS:**

In May 2015 the President has adopted the Plan that is, in essence, the strategy of the country’s development and a tool to overcome the crisis caused by the sharp decrease of oil price.

The Plan is aimed at further attraction of foreign investment, development of industrialisation, economic growth, integration of the nation and to address major faults such as corruption, ineffectiveness of courts and judges, lack of professional state officials etc.

Major legal acts such as the new Commercial Code, the new Civil Procedure Code, the new Labour Code, the new Public-Private Partnership (“PPP”) Law have been adopted and substantial amendments have been made to a number of other key Kazakhstani laws.

In order to attract foreign investors, PPP mechanism has been legally introduced, Astana International Financial Center has been established and certain other amendments to facilitate resolution of investment disputes have been enacted. Foreign banks and insurance companies have been provided with the opportunity to open and operate their branches that was prohibited before. Further, Kazakh Government has decided to conduct privatisation of about 260 major state owned and national holdings owned companies (e.g. JSC “National Company “KazMunaiGaz”, JSC “National Company “Kazakhstan Temir Zholy”, JSC “National Company “Kazatomprom”, JSC “Air Astana”, JSC “Housing Construction Savings Bank of Kazakhstan”, JSC “KazAgroFinance” etc) either by direct sale on through the stock exchange.

The Plan includes the below 5 institutional reforms. Relevant laws described in this legal alert are indicated under respective reform:

- **REFORM I. MODERN GOVERNMENT MACHINE**
  1. Law on Corruption Countermeasures
 REFORM II. SUPREMACY OF THE LAW
2. New Civil Procedure Code
3. Law on Astana International Financial Center
4. Law on Judicial System
5. Law on Supreme Judicial Council
6. Resolution on Application of Bankruptcy and Rehabilitation Legislation by the Courts

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

 REFORM IV. THE NATION OF COMMON FUTURE

 REFORM V. TRANSPARENT RESPONSIBLE STATE
17. New Procurement Law
1. LAW ON CORRUPTION COUNTERMEASURES

The new Law on Corruption Countermeasures¹ has been enacted from 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 aimed on improvement and strengthening of anti-corruption measures and further development of measures preventing the 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 the 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) and other subjects of corruption countermeasures – state bodies, quasi-state sector subjects, non-governmental organisations and legal entities and individuals (the “Subjects”). Anticorruption monitoring is conducted by the Subjects for the purposes of assessment of the practice of law application, conducting anticorruption analysis and improvement of measures aimed on development of anticorruption culture. Analysis of corruption risks can be external and internal. External analysis of corruption risks is executed by the authorised body by 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 is now also aimed on the formation of anticorruption culture that is a countermeasure to corruption in addition to the measures mentioned above. Formation of anticorruption culture is performed by the authorised body and other Subjects and includes mainly educational, information, organisational and other measures.

Anticorruption Standards

Anticorruption Standards 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 corruption limitation.

Measures of Financial Control

Under the current legislation, candidates to the 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 etc.) State officials and their spouses shall provide the Income and Property Declaration annually and state officials dismissed for negative reasons and their spouses shall provide the Income and Property Declaration within 3 years from the moment of their dismissal. Non-provision of the mentioned information may incur administrative and criminal liability.

From 1 January 2017, state officials (and not candidates) and their spouses shall provide the Income and Property Declaration.

In addition, the following persons shall provide assets and liabilities declaration (the “Assets and Liabilities Declaration”): candidates to the President, members to the Parliament and local representative bodies (maslikhats), heads of the 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 placed 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 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 the 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 the state officials. Certain state officials are now expressly prohibited to perform their functions if they reveal the conflict between their personal interests and their job functions that may lead to undue performance by the state officials of their relevant functions. In this case, relevant state officials shall inform his management on the conflict of interests and the management shall take appropriate measures to address the conflict of interests issue, such as suspending the relevant person from performance of the functions that constitute the conflict of interests, amending his 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 on 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 to 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 from 1 January 2016.

Please see below main amendments enacted 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 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 not less than three judges of the Supreme Court. Cassation claim can be submitted subject to prior consideration of the appeal claim on the same case.

Certain cases cannot be considered in cassation instance (e.g. cases resolved by amicable agreement/mediation; cases related to individuals’ proprietary rights with the amount of claim not exceeding 2,000 monthly calculation indexes and cases related to legal entities’ proprietary rights with the amount of claim not exceeding 30,000 monthly calculation indexes; 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.

Decisions of the Supreme Court taken in cassation instance can be also reconsidered in exceptional circumstances by the broader tribunal of the Supreme Court of not less than seven judges.

Introduction of Investment Court

Investment disputes shall be now considered and resolved in the first instance by the special investment tribunal of Astana court. Investment disputes that involve major investor shall be considered by the Supreme Court. Major investor is an individual or a legal entity that invested in the Republic of Kazakhstan the amount of not less than 2,000,000 monthly calculation indexes or approximately USD 11,622,000.

Mandatory Prejudicial Settlement for Certain Cases

The CPC broadened the list of cases that can be resolved only upon 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.)

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4 Monthly calculation index for 2016 is KZT 2,121.
5 Exchange rate USD/KZT as of 31 January 2016.
The CPC has introduced the provision that aims to encourage case parties to indeed use prejudicial settlement. The court is now entitled, irrespective on outcome of the case, to confer court expenses to the party that failed to answer the letter of the counterparty 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**

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 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.

**Amendment of Appeal/Cassation Deadlines**

The deadline for making an appeal of court decision is now one month and the deadline for making an appeal of court order is now 10 days from the moment of final decision/order. Under the old CPC, the deadline for making an appeal of court decision/court order was 15 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**

The appealing party does not now have to pay a court duty for the appeal claim.

Court duty payable in relation to the case on invalidation of the certain proprietary transactions (sale and purchase, pledge etc.) and claims for moral damage shall be now determined based on the market value of the relevant property or the amount claimed as moral damage\(^6\), respectively. Under the old CPC, the question as to whether invalidation case is a proprietary one was not clear, and often the party challenging the transaction paid low court duty applicable for non-proprietary claims (that was not fair and allowed dishonest parties to challenge even decent transactions without incurring substantial expenses).

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

**Fast-track Interim Remedies**

Court ruling on interim remedies can now be sent directly to the person/entity that shall enforce it (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.

\(^6\) 1% for an individual and 3% for a legal entity.
PoA for Legal Representative

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

Introduction of Participation Procedure

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

3. LAW ON ASTANA INTERNATIONAL FINANCIAL CENTER

The Law on AIFC\(^7\) 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 a local capital market, integration into international capital markets, development of banking, insurance and Islamic finance services and the 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 the 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 has been established based on the experience of the Dubai International Financial Center.

4. LAW ON JUDICIAL SYSTEM

The Law on Judicial System\(^8\) is aimed on comprehensive reform of the system of judges appointment, strengthening requirements to the judges as well as 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 the candidates to the judges. Now, a candidate to the judge shall, \textit{inter alia}, have high moral qualities and working experience of at least five 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 be a judge. Moreover, a candidate shall pass polygraph test.

The Law on Judicial System has introduced mandatory suretyship requirement for the candidates for the judges of regional (\textit{oblastnoi}) courts. Suretyship for such candidate shall be issued by each of two judges of the higher courts and one retired judge. In the suretyship, these judges assure that they know the


candidate, have experience in working with him/her, opinion on his/her professional experience and other skills etc.

The qualification requirements to candidates to the 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 of working as a judge, 5 years out of which as a judge of regional (oblastnoi) court. The candidate to the judge of the Supreme Court of Kazakhstan shall also provide suretyship of three judges as described above. The candidate to the Chairman of the Supreme Court of Kazakhstan is exempt of the mentioned qualification requirements.

*Introduction of Retired Judge Life Benefits.* The retired judges with experience of not less than 15 years are now subject to the monthly life benefits provided that such judge has reached pension age. Such benefit is tax free and is payable for the amount of 50% - 65% of the judge’s salary at his last 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 the 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\(^9\) will come into effect from 1 January 2016 and replaces the previous law on the same subject. The Law on Supreme Judicial Council is aimed on improvement of the activities of the Supreme Judicial Council, improvement and reforming of the court system in the framework of realisation of the President’s Plan of the Nation – 100 Particular Steps for 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 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.* The Law on Supreme Judicial Council prohibited interference in the activities of the Council when it exercises its power to strengthen its status, as well as prohibited interference of the chairman and members of the Council in the activities of courts and judges on 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. Other persons, including legal scholars, lawyers and foreign experts, 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 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 chairmen of the courts and court panels.

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Strengthening Requirements to Candidates for Judges. The Law on Supreme Judicial Council introduces stricter provisions for the candidate’s selection for judicial positions that include, *inter alia*, the qualification examination.

Qualification commission of the Council carries the admission of qualification examination of the candidates for judges to determine the level of their knowledge and ability to apply them in practice.

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

- computer test on knowledge of the law and the ability to apply it on practice;
- examination of the candidate’s knowledge and the ability to apply it on practice by examination tickets that modulate particular situations from the court practice;
- psychological test.

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

- candidates who have successfully passed the qualification examination shall pass a polygraph test to obtain more information about a candidate and to check the reliability of the reported information;
- polygraph test conclusions are considered as recommendations.

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

The Law on Supreme Judicial Council established a work experience that can be counted as a legal experience, which is directly related to participation in the judicial proceedings (required for appointment of a candidate as a 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 for more than two times in a row.

### 6. 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 absent debtor may be submitted by any creditor or prosecutor irrespective of the amount and overdue period of the debt.

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10 Court Jury is a special commission consisting of experienced judges for the purposes of judges professional activity assessment, considering judges resignation and disciplinary liability issues.

11 Regulatory Resolution of the Supreme Court of the Republic of Kazakhstan no. 5 dated 2 October 2015 “On Practice of Application of Bankruptcy and Rehabilitation Legislation”.

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Claim for the 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 6,000). In addition to this overdue amount threshold, the law also establishes general overdue tenor requirement to file for the bankruptcy (3 months). The Resolution, however, is silent on 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 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 issue 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 of 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 with activities 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 on 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. 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.

Temporary manager\(^{14}\) shall prepare analytical report on financial position of the debtor and its solvency. The Resolution clarified that such analytical report shall be considered as evidence in consideration by the court of the bankruptcy case, but such 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

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\(^{12}\) Absent debtor is the debtor, the place of residence or registration or location of corporate bodies of which etc. cannot be established within 6 months.

\(^{13}\) As compared to other debtors, bankruptcy proceedings against which can be generally initiated if (i) the amount of overdue debt is approximately USD 6,000 and (ii) such debt is overdue for 3 months.

\(^{14}\) The person appointed by the court for the purposes of collection of information on financial position of the debtor before appointment of bankruptcy manager.
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 which is 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 schedule established in rehabilitation, the court shall put aside the management of the insolvent debtor and replace it with rehabilitation manager to be 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**).

- Further, 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, 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 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 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 the 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 it will satisfy the claims of all preceding creditors and 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, bankruptcy manager is obliged, and **the creditors are entitled to claim** from the person who committed relevant actions satisfaction of 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 was entered into force (except for certain provisions) on 1 January 2016. The Code was adopted to facilitate the implementation of the President’s Plan of the Nation – 100 Particular Steps for Realisation of 5 Institutional Reforms. 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.

Due to entering into force of the Commercial Code on 1 January 2016 the following laws have been terminated:

1. Law On Peasant 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;

Please note the following major novelties of the Commercial Code:

Presumption of Good Faith

In state regulation of entrepreneurship good faith of entrepreneurs is assumed. 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 category of the subject will be provided in the form of electronic certificate to interested parties (including state bodies) to use in work.

One Stop Principle

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

Access to Information

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

Entrepreneurs Rights Commissioner

Entrepreneurs rights commissioner will be appointed by the President of Kazakhstan to represent, ensure and protect rights and legal interests of subjects of entrepreneurship in state bodies and protect interests of business community. It shall examine applications of subjects of entrepreneurship and submit to state bodies proposals in order to protect interests of subjects of entrepreneurship and recommendations to suspend legislative acts, file application to courts, etc.

State Registration of Prices and Tariffs of Subjects of Entrepreneurship

Prices on 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;
As a temporary measure antimonopoly body may introduce price regulation on any goods market or goods, works, services of certain subject of market for the 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 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.

**Investment Dispute**

The new term of an “investment dispute” was introduced. An investment dispute means a dispute arising from contract obligations between investors including major investors and state bodies in connection with investment activities of an investor. Investment disputes may be settled with 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 importation of raw materials and/or materials within investment project. In case of pre-term termination of the investment contract upon an initiative of a Kazakh legal entity being a party of 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**

Parties will be able to apply to antimonopoly body asking to review the draft agreement to check its compliance with antimonopoly requirements and it shall revert with its conclusion within 30 calendar days.

**Removal of Limitations of Activities of Subjects of Natural Monopolies**

Certain limitations of 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

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

8. PPP LAW

The PPP Law\textsuperscript{15} entered into force on 22 November 2015. In addition, on 29 October 2015, the new Commercial Code was signed, which has become effective in most part from 1 January 2016, and where the whole chapter is devoted to the PPP regulation.

Since the legal framework for the implementation of PPP projects in Kazakhstan has been pretty much established (under the framework of legislation on concession and general civil legislation), the next year or two shall show the changes in the ratio of concessional and non-concessional public-private partnership projects in Kazakhstan, the attractiveness and effectiveness of the institution of the public-private partnership contract as compared with a concession agreement both for business and state.

Positive novelties of the PPP Law

Prior to the enactment of the new PPP Law, the legislation of the Republic of Kazakhstan did not provide a legal concept of the contract on public-private partnership. At the same time, before the entry into legal force of the PPP Law, the previous version of the Concession Law\textsuperscript{16} defined the concept of public-private partnership as a form of cooperation between the state and business entities aimed at the financing, creation, reconstruction and/or operation of social and vital infrastructure facilities. Moreover, the previous version of the Concession Law clearly outlined that PPP in Kazakhstan was divided into institutional and contractual. It is noteworthy that according to the literal interpretation of the previous version of the Concession Law, contractual public-private partnership could be implemented only within the framework of concession agreements, as well as agreements of tenancy and trust management of state property as provided by the State Property Law\textsuperscript{17}.

Among positive novelties of the new PPP Law, it is worth mentioning that:

(i) the new PPP Law introduced in Kazakhstan legislation the long-awaited concept of a private initiative;
(ii) simplified procedure for tendering and entering into a PPP contract with shorter terms as compared to the concession;
(iii) In addition, the PPP Law gave a broader definition of public-private partnership: “public-private partnership is a form of cooperation between a public partner and a private partner that complies with features defined in this Law”, and also introduced a new legal definition of a public-private partnership contract as “a written agreement defining rights, obligations and liabilities of parties of a public-private partnership contract, and other terms and conditions of public-private partnership contract within the framework of realization of a public-private partnership project.”
(iv) Article 7 of the PPP Law enlists possible types of public-private partnership contracts, but the list remains open so it would be possible to enter into “other agreements, which comply with the features of public-private partnership”. Thus, the PPP Law solved the problem existed under the previous legislation of a narrow range of possible types of PPP contracts and now allows entering into other contractual forms of PPP, even that are not provided by the PPP Law, but just meet the public-private partnership’s features specified in Article 4 of the PPP Law.

At the same time, we would like to note that the PPP Law, apparently, with aim to extend the possibility of PPP application in all economic sectors, unconsciously created a new problem, since it offers unnecessarily broad understanding of the term “public-private partnership”. Prior to the new PPP Law enactment, a public-private partnership was limited to the forms of cooperation between the state and business aimed at “financing, construction, reconstruction and (or) operation of social and vital

\textsuperscript{16} Law of the Republic of Kazakhstan “On Concessions” dated 7 July 2006 No. 167-III.
\textsuperscript{17} Law of the Republic of Kazakhstan “On State Property” dated 1 March 2011 No. 413-IV.
infrastructure”. It is clear, therefore, that the scope of PPP application shall be extended, but with a clear understanding that “public-private partnership is a type of investment activity”\textsuperscript{18}, and a public-private partnership contract is, in fact, a business (investment) agreement. In the current wording of the PPP Law, however, the public-private partnership forms formally include, for instance, charity, grants, student loans, scholarships, joint activities with the business community on improving educational programs and plans, etc., since it is fairly easy to satisfy the above PPP features for many possible forms of cooperation between the state and business.

The PPP Law enlist the legal rights and obligations of PPP entities in Chapter 2 of the PPP Law. A special attention should be given to the new legal right of a private investor in the case of pre-term cancellation of a PPP contract to demand payments and compensation in cases and in the procedure established by the PPP contract (i.e. termination payment). Additional rights and obligations of the parties may be agreed on a contractual basis in accordance with the freedom of contract principle.

\textit{One of the material shortcomings of the PPP Law is ill-considered definitions of the public and private partners.}

In particular, Article 14.1 of the PPP Law introduced a new definition – “PPP entities”, which mean “the public partner and private partner, and other persons involved in the implementation of a public-private partnership project and specified by this Law”. The concept of a PPP entity is evidently wider than a concept of party to a PPP contract (i.e., not every entity is a party to a PPP contract, but each party to the PPP contract is a PPP entities). Pursuant to Article 1.5 of the PPP Law, “a public partner is the Republic of Kazakhstan, on which behalf the Government of the Republic of Kazakhstan or local executive body, as well as other government agencies, and entities of quasi-public sector, where fifty or more percent of voting shares (interests in the charter capital) are directly or indirectly owned by the state, entered into a public-private partnership contract”.

As we understand, this definition excludes the possibility of so-called public legal entities (i.e. state-owned enterprises and government agencies) to act as a public partner, since state legal entities are understood as legal entities (companies and institutions), the property of which is not divided into shares or interests, but as a whole belongs to the state under right of ownership (Article 102 of the Civil Code). Meanwhile, we believe there may be situations where, for instance, the object of a PPP contract is the property owned by the state enterprise under the so-called “right of economic management”, therefore, such an enterprise must have the right to participate on the side of the public partner and exercise certain powers to transfer the PPP object, sign relevant transfer-delivery acts.

Thus, we believe that the concept of a public partner should be extended in the PPP Law by including state legal entities into the list.

The PPP Law also introduced the concept of a “private partner”, which can be an “individual businessman, simple partnership, consortium or legal entity, except for entities acting as public partners under this Law, entered into a contract of public-private partnership” (Article 1.1 of the PPP Law). Since in Kazakhstan commercial organisations can only be established in the form of a joint stock company, business partnership, production cooperative, or state enterprise, it is obvious that the private partner can be the private businessman of any of the above legal forms. Moreover, the definition is so broad that within the current PPP Law the private partner can be non-profit organisations and foreign legal entities.

Meantime, a PPP contract does not have any particular distinctive features that allow it to be classified as an independent contractual obligation and distinguished from all other civil contracts. In addition, a PPP contract is, in fact, a business (investment) agreement.

In the legal literature,\textsuperscript{19} business contract is also defined not as an independent type of a contract, but as a kind of civil contract with a set of the following specific features: 1) parties thereto can only be business structures; 2) they are only used in the business and other economic area.

Therefore, the activities performed by a private partner within the PPP contract can only be a business activity, which raises the question of the need to clarify the PPP Law that non-profit organisations cannot act as the private partner.


Besides, for the purpose of removing the risk of accountability of the private partner to the public partner, by analogy with the PPP Law of the Russian Federation, it makes sense to clarify in the PPP Law that only a Kazakhstani legal entity can be the private partner.

Another considerable weakness of the PPP Law is a potential conflict between provisions of the PPP Law and the same of the Concession Law.

According to the preamble to the PPP Law, the law will determine the “legal conditions of the public-private partnerships, ways of its implementation, and regulate social relations arising in the process of preparing and implementing public-private partnership projects, conclusion, performance and termination of public-private partnership contracts”. Pursuant to Article 7.3 of the PPP Law, one of the types of contractual public-private partnership will be a concession and “in the implementation of certain types of contractual public-private partnerships, to the extent not regulated by this Law, the provisions of the relevant laws of the Republic of Kazakhstan, including the features provided by the Concession Law will apply”.

Our interpretation of the above provisions states that:

1) Provisions of the PPP Law will have priority over the Concession Law, including in the implementation of concession projects.

2) With the current wording of the PPP Law, there obviously will be the conflict between the Concession Law and the PPP Law. For instance, the PPP Law provides that the parties to a PPP contract (i.e. to a concession agreement as well) can be not only a public partner and a private partner, but also financial and other organisations that provide financing, and industry operators (Article 5 of the PPP Law). At the same time, the Concession Law clearly states that the parties to a concession agreement can be only the concessionaire and the concessor (Article 1.18 of the Concession Law). Since the PPP Law regulates relations related to the parties to a PPP contract, then it turns out that the provisions of the Concession Law, in particular on limiting the number of parties to a concession agreement, would no longer be applicable.

We recommend, therefore, to improve the PPP Law in terms of legal technique and to consider the following points:

1) In the PPP Law it is necessary to clarify the term of a public-private partnership (the current wording of the PPP Law provides an unjustifiably broad interpretation of the term ‘public-private partnership’).

2) It is necessary to adjust the relationship and priority of the PPP Law and the Concession Law, since the current wording of the PPP Law will inevitably lead to legal conflicts.

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”) in anticipation to official accession of Kazakhstan to WTO.

Amendments Related to Foreign Labor Force Attraction. The Law on WTO Accession introduces the definition of “internal corporate transfer” of foreign employees from legal entity established in the territory of one of WTO countries to subsidiaries, branches, representative offices of such legal entity 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 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 employees is not included in the annual foreign labour force quote).
“transferred” employees to Kazakhstan is unlimited subject to compliance with Kazakh to foreign employees ratio established by Kazakhstan Government).

**Amendments Related to Subsoil Users Obligations re Local Content.** The Law on WTO Accession abolished mandatory requirement of local goods for the 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 Kazakhstan 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 specialists shall not exceed 25% and 50% from 1 January 2022 out of total number of managers and specialists by each respective category.

The obligation of subsoil user to use Kazakh employees in conduction of subsoil operations has also been amended by the Law on WTO Accession. Now 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 the 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 Measures21 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 frameworks of Eurasian Economic Union (the “EAEU”) and international treaties of the World Trade Organisation (the “WTO”) in anticipation to official accession of Kazakhstan to 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.

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The Law on Special Defensive, Antidumping and Compensational Measures provides for the following types of special defensive measures: (i) import quote\(^{22}\); (ii) special quote\(^{23}\) and (iii) special duty\(^{24}\) (including preliminary special duty\(^{25}\)). Special defensive measures can be introduced for not more than 4 years with 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 to the customs territory of EAEU of the goods export price of which is lower than normal price of such goods (the “dumping import”).

Antidumping measures apply only in case the dumping 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 relevant economy sector of member-states. The fact 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.

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

Antidumping measure can be introduced by the way of (i) introduction of antidumping duty\(^{26}\) (including preliminary antidumping duty\(^{27}\)); or (ii) approval of pricing obligations accepted by the relevant exporter\(^{28}\).

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

**Compensation Measures**

Compensation measures are aimed at neutralisation of negative effect on EAEU economy of specific subsidy provided to the foreign exporters by the exporting third country\(^{29}\). Compensation measures apply in case of import to the customs territory of EAEU of the goods produced, exporter or delivered with the use of the specific subsidy provided by the third exporting country (the “subsidised import”).

Compensation measures apply only in case 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 relevant economy sector of member-states. The fact 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.

\(^{22}\) Limitation of import of certain goods in terms of their quantity and(or) price.

\(^{23}\) Establishment of certain level of import below which the goods are delivered free of special duty and above which the goods are delivered subject to special duty.

\(^{24}\) Duty payable in addition to import customs duty.

\(^{25}\) Duty introduced in urgent circumstances when it is not clear whether or not the import of certain goods cause/may cause damage to economic sector of the member states and the Investigation Body has issued preliminary conclusion that the import of such goods caused/may cause damage.

\(^{26}\) Duty payable in addition to import customs duty.

\(^{27}\) Duty introduced in case of preliminary conclusion of the Investigation Body according to which the dumping import of certain goods caused or may cause material damage to economy sector of member-states or substantially delays the establishment of the relevant economy sector of member-states.

\(^{28}\) The investigation by the Investigation Body is put on hold or terminated, and no preliminary antidumping duty or antidumping duty is introduced if the relevant exporter accepts the obligations on reconsideration of price for the relevant goods or termination of dumping import into the territory of EAEU and if the Investigation Body holds that acceptance of such obligations will rectify the damage caused by the dumping import.

\(^{29}\) A country that is not a member-state of EAEU.
Compensation measures can be introduced only upon decision of the Eurasian Economic Commission after investigation mentioned above.

Compensation measure can be introduced by the way of (i) introduction of compensation duty\(^{30}\) (including preliminary compensation duty\(^{31}\); or (ii) approval of voluntary obligations accepted by the subsidising body of the exporting third country or the relevant exporter\(^{32}\).

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

11. LAW ON OWNERSHIP RIGHT FURTHER PROTECTION

The Law on Ownership Right Further Protection\(^{33}\) 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 protection of ownership rights and guarantee of protection of contractual obligations.

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

\textit{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 of 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, 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 the period of not 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”. 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.

\[^{30}\text{Duty payable in addition to import customs duty.}\]
\[^{31}\text{Duty introduced in case of preliminary conclusion of the Investigation Body according to which the fact of subsidised import is confirmed and such subsidised import caused or may cause material damage to economy sector of member-states or substantially delays the establishment of the relevant economy sector of member-states.}\]
\[^{32}\text{The investigation by the Investigation Body is put on hold or terminated, and no preliminary compensation duty or compensation duty is introduced if (i) the exporting third country agrees to cancel or decrease the subsidy or take the measure in order to rectify the consequences of subsidy; or (ii) the relevant exporter agrees to reconsider the prices for the relevant goods if the Investigation Body holds that acceptance of such obligations will rectify the damage caused by the subsidised import.}\]
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 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 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 introduction of capacity market to avoid increase of tariffs and additional burden on industrial consumers. Accordingly, “ceiling” tariffs system that was planned to expire on 1 January 2016 due to introduction of capacity market has been also extended until 1 January 2019. The Order of the Minister of Energy of the Republic of Kazakhstan No 676 has established the rates of ceiling tariffs 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 from 1 January 2016, except certain provisions as described below.

The purposes of the Law are to improve the mechanisms of protecting 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.

37 Order of the Minister of Energy of the Republic of Kazakhstan dated 30 November 2015 No 676 “On Introduction of Amendments and Additions to Certain Orders of the Minister of Energy”.

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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) as indicated below.

(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, currently, as a general rule, in case if the amount received from the borrower as a repayment under non-bank/microcredit loan agreement is not sufficient, such 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 interests; (iii) due principal; (iv) due interest; (v) penalties; (vi) enforcement expenses of the creditor.

Change of loan repayment order is aimed at decrease of number of non-performing loans in the financial system and improvement of quality of banks and microfinance organisations credit 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 fund, mortgage organisations and subjects of the securities market (the “regulated organisations”) for breaches of prudential requirements and Kazakh legislation.

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

Secondly, in case of written prescription issued for breach of legislation by a regulated organisation, the Law gave opportunity to the regulated organisations to develop their own plan of measures to address committed breaches 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 possibility of sanctions to be applied to it by the National Bank in case of repeated breach of legislation within one year from the moment of written notification (previously, notification was issued in relation to the sanctions that could be applied for the first breach without waiting for the repeated breach 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 enforcement of pledge over such land plots.
**Strengthening Criminal Liability of Financial Organisations’ Management.** Management of the financial organisations, banking and insurance holdings, major shareholders-individuals and management of major shareholders – legal entities can be now, *inter alia*, deprived of the right to hold management positions for the 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 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 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 breach of prudential requirements applicable to the bank/insurance (reinsurance) company provided that such 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 definition of “subordinated debt” of banks and insurance organisations. Subordinated debt is an unsecured debt of the bank/insurance organisation under bonds issuance or loan that simultaneously satisfies the following criteria: (a) the debt is issued for not 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 voluntary repaid by the bank/insurance organisation provided that such repayment shall 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 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, 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 branch in Kazakhstan, non-resident bank shall, *inter alia*, have not 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 country of its residence on exchange of information etc.

In order to be able to open branch in Kazakhstan, 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 financial regulator of the country of its residence that such non-resident insurance (reinsurance) company holds a valid insurance license, confirmation that there is an agreement between Kazakhstan and country of its residence on exchange of information etc.

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

Management of the branches of non-resident banks, 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 major participant – individual and (b) of the insurance (reinsurance) company that conducts mandatory insurance if such insurance (reinsurance) company does not have major participant – individual or insurance holding.

(B) Amendments Aimed on Further Financial Services’ Consumers Protection

Limitation of Penalties. Under the Law, the penalty for undue repayment of principal or 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 is more than 90 days (previously, it was 0.5% per day irrespective of overdue period). In any case, the total amount of penalty shall still not exceed 10% of the bank loan amount per one year.

Notification on Overdue Amounts. Under the Law, the banks are now obliged to notify the 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 overdue obligation that leads to accrual of huge amount of penalties.

Limitation of Bank Account Debit. Under the Law, the amount that the banks can debit from any bank accounts of individual borrower without his/her consent in case of overdue payments under the loan agreement concluded with such bank is now limited to 50% of the funds placed on debited borrower’s 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. The banks are now prohibited to claim from individual borrowers payment of interest and penalties accrued under residential mortgage after 180 days of payment delay. In case of restructuring or refinancing of residential mortgage by an individual borrower, capitalisation of overdue interests and penalties to the amount of principal is prohibited. These amendments presumably try to protect individual borrowers from the risk to be deprived of their housings.

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 agreement, 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 shall be determined.

39 Legal entity holding 25% or more of the shares.
40 Person holding 10% or more of the shares.
The Law clarifies which 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 from improved conditions within 14 calendar days.

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 decrease 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. 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, including all commission 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, 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 microcredit agreement. Certain mandatory provisions of 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 microfinance organisation).

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 overdue interest and penalties to the principal amount is prohibited.

Microcredit organisation is not entitled to claim payment of interest and penalties under the loan with 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.

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 microfinance organisation (previously, such consent could have been signed by the borrower in any place other than premises of microfinance organisation). Disclosure of microcredit secrecy to the representatives of individual borrowers can be done 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 pledge agreement execution.

The Law has extended this provision to in court realisation procedure in relation to residential mortgage of individual borrower provided that such individual borrower does not have any other property to be enforced.

(C) 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 bank 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 relevant resolution of the Kazakhstan Government. Under the Law pledge, levy of execution and freeze of such designated assets is prohibited and such designated assets are excluded from liquidation estate upon insolvency.

(D) 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, “Kazakh resident” in the context of the Kazakh Securities Market Law covers non-resident company if not less than 2/3 of its assets is located in Kazakhstan or issued under Kazakh law or if effective management of such 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 the 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 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 Participant 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 information system of OTC securities market (“OTC IS”). OTC IS will be maintained by JSC “Integrated Securities Registrar” and will provide to investors “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 to improve 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 “open trade” method. Mentioned financial securities are also excluded by the Law from liquidation estate upon insolvency.

The Law clarified that arrest on 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 arrest of such securities.

In addition, under the Law the transactions executed through the stock exchange by “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 of competition for the purposes of development of agricultural sector in Kazakhstan.

Please note the following provisions of the Law:

Making Agricultural Cooperatives Commercial

Currently, most of 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 production cooperative that is a commercial legal entity that allows to distribute dividends to its members. Agricultural cooperatives established as non-commercial

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42 Open trade method means the trades method where unlimited number of participants can participate and satisfaction of the bid does not depend on identity of the trades participant.

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, 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 for the amount of their contribution, bear liability to the cooperative’s creditors only for the amount of their contribution, 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 business activity of agricultural cooperative. The total number of associated members shall not exceed one fifth of the total number of participants of 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 non-agricultural producer can become an associated member of agricultural cooperative.

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**15. PRIVATISATION DECREES**

On 6 January the Ministry of National Economy presented a list of about 260 state owned companies and subsidiaries of national holdings, which are going to be privatised/ transferred to the competitive environment. The Government Decree No. 1141 dated 30 December 2015 “On Several Issues Related to Privatisation” (the “Privatisation Decree”) has entered into force on 1 January 2016. 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 auctions and tenders, stock exchange trades, two-stage competitive tendering and sale of derivative securities. It is also expected that the targeted sale of the companies to the strategic investors will be used. The assets with the 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 project office which will include international consultants and 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 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.;
- **Chemical Industry:** “Astana Solar” LLP, “Kazakhstan Solar Silicon” LLP, JSC “Irtysh 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.;
- **Communication**: JSC “Kazakhtelecom” (IPO), JSC “Kazpost” (IPO), JSC “Trancetelecom” etc.

We note that it not the full list of the companies. For more details, please go to [http://adilet.zan.kz/rus/docs/P1500001141](http://adilet.zan.kz/rus/docs/P1500001141).

### 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 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 participant or by exchange of electronic messages. The participants use electronic money to settle trade transactions.

### 17. NEW PROCUREMENT LAW

The new Procurement Law has been enacted from 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 the entrepreneurs in the course of state procurement procedure and 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 mechanism of challenging purchasers’ decisions, absence of effective mechanism to exclude bad faith suppliers from participation in state procurement process.

In addition, the new Procurement Law has been developed to make Kazakh legislation compliant with international treaty on 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 the way of tender, only the suppliers who suggested the so called “best technical specification” were admitted to submit price proposals to the purchasers – subjects of state procurement. The “best technical specification” meant the specification of goods, services, works to be

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purchased the characteristics of which were better than standard specification required from all suppliers in the tender documentation. This provision restricted competition since only limited number of suppliers could suggest “the best technical specification”. In addition, it gave grounds for corruption since the procedure of recognising the suggested specification as the “best” was not transparent and purchasers-subjects of state procurement could easily have recognised any supplier as suggesting “the best technical specification” basically 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 of all suppliers who suggest equal technical specification required by purchasers shall be considered.

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

New Competitive Tender with Preliminary Selection

The new Procurement Law introduces the new way of conducting of public procurement – so called “competitive tender with preliminary selection” (konkurs s predvaritel’nym otborom). Competitive tender with preliminary selection consists of two steps: (i) establishment of register of qualified suppliers by types of goods, works and services that will be regularly updated. Commission for establishment of such register will mandatorily include representatives of the National Chamber of Entrepreneurs and other non-governmental organisations for protection of potential suppliers’ interests; and (ii) competitive tender among qualified suppliers included to 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 once). 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 specification and 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 specification and of action participants on compliance with qualification requirements and (ii) auction.

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

Abolishment of Exclusions to State Procurement Process

Previously, there was a list of goods, services, works that have been excluded from state procurement requirements and could be purchased by the purchasers – subjects of state procurement directly, by signing of relevant agreement with relevant supplier (e.g., if the total annual value of the purchased goods/services/works does not exceed 2,000 monthly calculation indexes or approximately USD 12,000\(^{45}\), mass media goods/services/works, employees education etc.) Under the new Procurement Law, such exclusions have been abolished and most of earlier excluded goods/services/works shall be now purchased through so called “purchase from one source” procedure. In order to make such procedure more transparent, the new Procurement Law requires the purchasers – subjects of state procurement to place on the state procurement website the report on purchases of goods/services/works made “from one

\(^{45}\) USD/KZT exchange rate as of 31 January 2015.
source”. Such report shall contain the detailed justification of 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 mandatory condition of tender documentation approval: the preliminary public discussion of the draft tender documentation by potential suppliers. Any comments on the draft of 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, the unified organiser of state procurement not later than five working days from the date of publication of the public procurement announcement. The mentioned entities shall consider comments and questions of the potential suppliers and either amend tender documentation accordingly or decline comments and provide the reasons for declining. Any such decision may be challenged by the potential suppliers. This amendment will allow potential suppliers to preview draft of tender documentation before it is approved and in case of identification of any issues may request amendments of tender documentation by the purchaser – subject of state procurement. This amendment is also aimed to address the frequent situation when the 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 potential supplier may submit a complaint to the authorised body 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 not later than within 5 business days from the date of publication of the minutes on results of state procurement by the way of tender/auction. The state procurement contract can be concluded inly upon expiry of 5 business days period within which a complaint can be filed. In case the complaint is indeed filed by the potential supplier, the conclusion of 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 shall be made within 30 calendar days from execution of the suppliers’ obligations under the contract.

Further, now the state procurement contract shall be generally concluded in electronic form, i.e. sent through 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 conclusion of 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 from the advanced payment under state procurement contract (and accordingly, released them from obligation to provide the security in the amount of such advanced payment).

Introduction of State Procurement Monitoring

The new Procurement Law introduced monitoring over state procurement as one of the stages of state procurement process. Monitoring shall be performed by the authorised body based on analysis of state procurement announcement. The mentioned entities shall consider comments and questions of the potential suppliers and either amend tender documentation accordingly or decline comments and provide the reasons for declining. Any such decision may be challenged by the potential suppliers. This amendment will allow potential suppliers to preview draft of tender documentation before it is approved and in case of identification of any issues may request amendments of tender documentation by the purchaser – subject of state procurement. This amendment is also aimed to address the frequent situation when the purchasers tailored tender documentation for particular suppliers.

Legal entity authorised to organize and conduct state procurement procedures.
procurement website. Annual report with results of monitoring shall be submitted by the authorised body to Administration of the President and the Government of the Republic of Kazakhstan.

*Establishment of Territorial Unified Organisers of State Procurement*

Unified organiser of state procurement previously was 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 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 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 the way of tender. It is now allowed for the potential suppliers to suggest dumping prices provided that the potential supplier, in addition to security for execution of the state procurement contract, will provide additional security in the amount of 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.

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