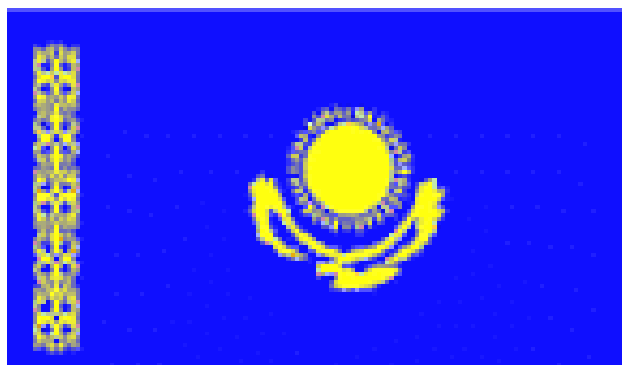


# DOING BUSINESS IN KAZAKHSTAN



**JSC “Almaty Technology Park”**  
E-mail: [almatytechnopark@mail.ru](mailto:almatytechnopark@mail.ru)  
Website: [www.almatytechnopark.kz](http://www.almatytechnopark.kz)

**Kazakhstan**

**Almaty**

**Makatayeva street № 117**

**Tel.: +7 (3272) 792864**

**Fax: +7 (3272)792877**

**Contact Manager – Aigerim Sharapiyeva**

## **PREFACE**

Kazakhstan is a young country, which gained independence in 1991, as a result of the collapse of the Soviet Union, and has, over the last 10 years, experienced a rapid transition from the old “Soviet” economy to a new “market” economy. During this transition, a large number of laws were adopted seeking to satisfy, and, indeed, struggling to keep pace with the complex needs of a market driven economy. The rapid adoption of laws, though arguably necessary for the times and circumstances Kazakhstan found itself in, has not always adequately addressed the purpose for which several of such laws were adopted, and has resulted in frequent changes being made to the laws. Having said that, Kazakhstan remains an attractive market for foreign investors, and the government is increasingly considering additional infrastructure projects for hospitals, schools, airports, power generation, water treatment projects and so on. Major investment opportunities exist in oil and gas, power and energy, natural resources, namely, mining of coal, iron ore, uranium, copper, titanium and magnesium mines, precious metals, cement, transportation and manufacturing.

In view of the above, it becomes pertinent for a foreign person interested in investment opportunities in Kazakhstan, or elsewhere in the neighboring CIS region, to first assess the local conditions, legal and otherwise, and evaluate the risks and benefits attached to any investment.

In this document, we outline some of the key legal issues of primary concern, which a foreign investor is most likely to face in relation to investments in Kazakhstan.

The information contained herein is general in nature, and is intended to provide an outline only of Kazakhstani law, practice and other current issues, as at the date hereof. It must not be relied on in relation to any transaction without seeking specific legal advice. Law and practice in Kazakhstan are in a constant state of flux, and readers should be aware that any information soon becomes outdated.

We will be happy to provide you with updates on the material contained herein, and to provide you with further information regarding a specific industry, or area of Kazakhstani law in which you may have a particular interest.

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## **1. KAZAKHSTAN - AN OVERVIEW**

The Republic of Kazakhstan (“Kazakhstan”) is a unitary State with a Presidential form of government. The Head of State since 1991 has been President Nursultan Nazarbayev.

The area of the territory of Kazakhstan is 2724,9 thousand square km (i.e. 1,049,150 sq miles). Kazakhstan shares its borders with the following States: China- 1.460 km; Kyrgyzstan - 980 km; Turkmenistan - 380 km; Uzbekistan - 2.300 km; and the Russian Federation - 6.467 km.

There are 14 oblasts (provinces), 160 rayons (counties), 86 cities, including 2 cities of republican importance, 186 poselok 1 (villages), and 7,719 auls 2 . According to the Agency on Statistics, the population of Kazakhstan as of 1 October 2004 was 15,046.3 thousand people.

The capital of Kazakhstan is Astana, which, literally translated from Kazakh into Russian, means “capital”. Astana was, until 1998, called Akmola (population 502 thousand people).

The capital was moved from Almaty in 1997. Almaty remains, however, the financial and cultural centre of Kazakhstan (population 1,147.5 thousand people).

The local currency is “Tenge”, and the current rate is about 130 Tenge per one US dollar 3.

## **2. LEGAL FRAMEWORK**

The legal system of Kazakhstan owes its origin to the Continental (Roman-German) legal family. The Constitution, respective normative legal acts, international treaties, as well as the normative resolutions of the Constitutional Council, and Supreme Court of Kazakhstan constitute the actual law in Kazakhstan.

The international treaties ratified by Kazakhstan generally have priority over its laws and, such treaties can either apply directly/automatically, or, after the adoption of a law where the treaty itself provides that, for its application, a law must be adopted 4.

### **2.1 Hierarchy of the normative legal acts of Kazakhstan:**

- The Constitution of Kazakhstan
- Laws which introduce amendments and additions to the Constitution
- Constitutional laws of Kazakhstan and edicts of the President of Kazakhstan having the force of constitutional laws
- Codes of Kazakhstan
- Laws of Kazakhstan as well as edicts of the President of Kazakhstan having the force of laws
- Regulatory decrees of the Parliament of Kazakhstan and its chambers
- Regulatory edicts of the President of Kazakhstan
- Regulatory decrees of the Government of Kazakhstan

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1 Poselok is a settlement attached to industrial enterprises, building sites, railway stations and other economically important

objects with the population of not less than 3 thousand people.

2 Aul (selo) is a settlement with a population of not less than 50 people.

3 As of December 2004.

4 Article 4 of the Constitution of Kazakhstan of 30 August 1995.

- Regulatory legal orders of the ministers of Kazakhstan and other heads of central State bodies, regulatory legal resolutions of central State bodies and regulatory resolutions of the Central Electoral Commission of Kazakhstan
- Regulatory legal orders of the heads of departments of central State bodies
- Regulatory legal decisions of maslikhats (local representative bodies), regulatory legal resolutions of akimats (local executive bodies), regulatory legal decisions of akims (the Heads of local executive bodies).

Regulatory decrees of the Constitutional Council of Kazakhstan, and of the Supreme Court of Kazakhstan are not within the scope of the said hierarchy (para.4, Article 4 of the Law of Kazakhstan <sup>1</sup> 213-1 “On Normative Legal Acts”).

Each of the regulatory legal acts of a subordinated level must not contradict regulatory legal acts of the higher levels.

All regulatory legal acts shall have direct/automatic effect, unless it is otherwise stipulated in the regulatory legal acts themselves, or in acts regulating their entering into force.

## **2.2 Legislative, Executive and Judicial Functions**

The Parliament of Kazakhstan is the highest representative body of Kazakhstan which performs legislative functions. The Parliament consists of two Chambers: the Senate, the upper house, and the Majilis, the lower house, which act on a permanent basis.

The Senate consists of deputies who are elected in the following manner: at a joint meeting of all representative bodies of the provinces, the cities of republican significance, and the capital of Kazakhstan, two people from each of such province, cities of republican significance, and the capital of Kazakhstan are elected. Further, seven persons are appointed by the President of Kazakhstan to the Senate. The Senate term of each deputy is six years.

The Majilis consists of seventy-seven deputies who are elected in the following manner: sixty-seven deputies are elected in one-mandate, from territorial election precincts, which are formed in accordance with the administrative and territorial division of the Republic. Ten deputies are elected on the basis of party lists based on the proportionate representation system and for the territory of the single national election precinct. The term of office of the Majilis deputies is five years. Draft laws adopted by the Majilis become laws after approval by the Senate.

The Government exercises the executive power of Kazakhstan, heads the system of the executive bodies, and guides their activities. The Government in its entire activities is responsible to the President of Kazakhstan, and in some cases is subordinated to the Parliament.

Judicial functions are exercised only by courts of law. Judicial functions are exercised by application of civil, criminal and other forms of judicial proceedings as established by law. The courts of the Republic are as follows: the Supreme Court, and local courts of law of the Republic.

## **3. LEGAL REGIME FOR FOREIGN INVESTMENTS**

### **3.1 Introduction**

Since its independence Kazakhstan has made considerable progress towards the establishment of a market economy and an attractive climate for foreign investments. The President and the Government of Kazakhstan have adopted several programme documents important to the State's relations with foreign investors, including the Presidential Decree "On Strategy of Industry and Innovation Development of the Republic of Kazakhstan for the Years 2003-2015", "The State Program for Development of Kazakhstani Sector of the Caspian Sea". The Government has recently announced a strategy for liberalization of foreign currency regulation in Kazakhstan.

In 2000, the European Union recognized Kazakhstan's economic reforms, and in 2002 the US Department of Commerce granted Kazakhstan a market economy status. In May 2004, Standard & Poor's announced an upgrading of the long-term sovereign credit rating of Kazakhstan in foreign currency from "BB+" up to "BBB-" and the short-term credit rating in foreign currency from "B" to "A-".

On the other hand, in the past four (4) years an increased tendency, on the part of the Government, has been observed to challenge investor contracts, provide legislative protections and preferences to local companies and operators, and increasing the regulation of procurement activities and infrastructure privatization. In this period, the Parliament has adopted a new law which is less favourable for foreign investors, namely, the Law on Investments <sup>5</sup> (the "Investment Law"), which replaced two old laws On Foreign Investments and On State Support of Direct Investments <sup>7</sup>, and has also made amendments to the existing legislation, granting to the State a pre-emptive right to purchase participations in oil and gas and mineral projects from selling participants <sup>8</sup>. This may project Kazakhstan as being not as open to foreign investors as it was in the 1990's.

### **3.2 Investment Law**

As mentioned above, the Investment Law replaced the 1994 Foreign Investment Law and the 1997 Law on State Support of Direct Investments, and has significantly changed the investment regime in Kazakhstan.

The Investment Law establishes a single investment regime for both domestic and foreign investors.

Most guarantees granted by two earlier investment laws have been reserved, although some of them have been changed considerably.

The Investment Law guarantees stability of contracts where investors enter into contracts with Kazakhstani State agencies or have entered into investment contracts for investment projects prior to the effective date of the Investment Law, except when a change of law is

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<sup>5</sup> Law of the Republic of Kazakhstan On Investments dated 8 January 2003

<sup>6</sup> Law of the Republic of Kazakhstan On Foreign Investments dated 27 December 1994

<sup>7</sup> Law of the Republic of Kazakhstan On State Support of Direct Investments dated 28 February 1997

<sup>8</sup> Please refer to Section 15 below

intended for national or ecological security, public health or morality, or if it affects the procedure or conditions of import, production and/or sales of excisable goods.

The guarantees provided against nationalization or requisitioning in the Investment Law do not conform to international standards that were reflected in the previous Foreign Investments Law. The “public interest” pre-requisite has been replaced by “State needs”. The principle of “non-discrimination” has been omitted. The Investment Law differentiates between nationalization and requisition, in that it provides for full indemnification in case of nationalization, but only for payment of market value of the requisitioned property, in case of requisition.

The Investment Law has narrowed the definition of investment disputes, as compared to the previous Foreign Investment Law of 1994, to cover only disputes arising out of contractual obligations between investors and government agencies in connection with investment activity of the investor. Investment disputes are to be resolved by negotiation, failing which investment disputes can be resolved in accordance with international treaties, and domestic laws in the courts of Kazakhstan. Investment disputes may be resolved by international arbitration, if the parties have so agreed. Other disputes not related to investment disputes are to be resolved in accordance with the legislation of Kazakhstan.

The Investment Law includes investment incentives that allow for preferences based on Government-determined priority activities and provides for investment tax preferences, customs duties exemptions, and “in-kind” grants. Under the law, the preferences may be given through conclusion of an investment contract with the Government and the Government may rescind such incentives, and collect back payments on duties, etc. including fines, if the investor fails to fulfil its contractual obligations.

## **4. ESTABLISHING A LEGAL PRESENCE**

A legal presence in Kazakhstan may be established by way of establishing a representative office or a branch, and by way of establishing a Kazakhstani legal entity whether (i) a wholly (foreign) owned legal entity or (ii) a joint venture with a Kazakhstani partner(s).

### **4.1 Representative Office and Branch**

#### **4.1.1 Legal Form, Management and Liability**

Neither a representative office nor a branch are legal entities, but are merely subdivisions of a parent legal entity located outside the location of the parent entity.

Both a representative office and a branch represent the interests of the parent legal entity. While a representative office’s functions are limited to such representation and protection of the parent legal entity’s interests, a branch may, on behalf of its parent legal entity, perform all or a part of the parent entity’s activities, thereby creating rights and obligations for the parent entity. A branch is entitled, subject always to its regulations as approved by the parent legal entity, to execute transactions, including those generating profit. However, should a branch fail to perform its obligations under the transactions carried out thereby, the parent legal entity will be liable for performance of the said obligations.

Both a representative office and a branch act based on the regulations approved by the parent legal entity and are managed by the general manager, appointed by the parent entity, who acts on the basis of a general power of attorney executed by the parent entity setting out the extent of the powers and authority of the general manager.

Should an action, arising from the actions of a representative office/branch, be brought before the courts of Kazakhstan, such action should name a parent entity as the proper defendant. Such an action may be brought in the place of location of a representative office/branch.

#### **4.1.2 Registration**

A representative office or a branch must be registered with the local (oblast, city) department of the Ministry of Justice of Kazakhstan. Following the registration of a representative office or a branch, such justice department, based on the documents submitted, would then have the representative office or a branch registered with the statistics and tax authorities and would eventually issue the certificates of registration of a representative office or a branch with all above-mentioned authorities. Such “one-step” registration procedure should take ten (10) working days from the date of submission of all required documents in due form.

Producing the seal of a representative office or a branch and opening bank accounts is likely to take one (1) working day. The seals are produced by the stamp-graver enterprises (workshop) of all forms of ownership, which have a relevant permission issued by internal affairs bodies.

The following documents are required for the registration of a representative office or a branch:

- a standard letter of application in either Kazakh or Russian languages;
- copy of the parent legal entity’s charter (or memorandum and articles of association);
- an extract from a foreign State/commercial register confirming the parent entity’s registration in the country of origin;
- parent legal entity’s resolution to establish a representative office or a branch;
- regulations of a representative office or a branch, each signed and bound separately;
- a power of attorney setting out powers of a general manager of a representative office or a branch;
- copies of national passport and certificate of tax registration of a general manager of a representative office or a branch;
- a letter in Kazakh or Russian language of guarantee from the future landlord stating his consent to provide premises to a representative office or a branch at a certain address in Kazakhstan; and
- the receipt for the registration fee payment. Currently <sup>9</sup> the registration fee is KZT18,380, which is approximately US\$141 or EUR112.

All documents originating outside Kazakhstan, save certain CIS countries, should be either legalized or apostilled. As Kazakhstan is a party to the 1961 Hague Convention providing for apostillation, the documents that originate within States who are parties to the said Convention, require apostillation, but do not require legalization. The documents produced

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<sup>9</sup>

As of the date of this publication

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in a foreign language must be accompanied with notarized translations into both the Kazakh and Russian languages.

## **4.2 Legal Entity**

A legal entity is an enterprise which is vested with civil rights and bears corresponding obligations arising out of or in connection with its activities. A legal entity may carry out any type of activity not prohibited by the legislation of Kazakhstan, and where licenses are required, it may be engaged in any activity as set out in the law pursuant to a license duly and properly obtained, in accordance with the established procedure.

A legal entity may be established by one or more persons and/or entities, depending on its organizational form chosen from the alternatives as described below. The charter capital (namely equity, paid-up equity capital) of a commercial legal entity is divided into contributions/shares of its founders/participants/shareholders. The title and ownership over any property contributed to the commercial legal entity's charter capital as well as that produced or acquired by the business partnership in the course of its activities is vested in such legal entity.

### **4.2.1 Forms of Legal Entities**

The following organizational forms of commercial legal entities are recognized by the legislation of Kazakhstan:

- general partnership - includes only individuals as its participants. A general partnership consists of participants that are jointly liable for the commitments/obligations of the general partnership with all their property;
- special ("commandite") partnership - comprises one or more general participants (same as participants in the general partnership, again only individuals) and one or more commandite participants. Commandite participants are participants that are liable for the commitments/obligations of the partnership only to the extent of their contributions to its charter capital, but are not entitled to manage or participate in the management of the partnership;
- additional liability partnership - a partnership in which its participants are liable for its obligations to the extent of their contributions made to the charter capital of the partnership, and if those are insufficient, additionally with their own assets in the amount which is a multiple of their contributions. The maximum amount of the participants' liability may be established in the Charter. In the case of bankruptcy of one of the participants of an additional liability partnership, his liability is distributed between the rest of the participants in proportion to their contributions, unless the Charter provides otherwise.
- limited liability partnership (please see sub-section 4.2.2 for details); and
- joint-stock company (please see sub-section 4.2.3 for details).

### **4.2.2 Limited Liability Partnership**

A limited liability partnership ("LLP") is a partnership in which the participants are not liable for its obligations, but bear the risk of losses arising out of such LLP's activity, only to the extent of the value of their contributions. An LLP is liable for its obligations to the extent of

all its assets and is not liable for the obligations of its participants. An LLP may be established for an unlimited period of time, unless otherwise agreed by its participants. The number of participants in an LLP may be as few as one (1) and their maximum amount is not limited. However, the legislation provides that: (i) an LLP may not be established by a legal entity as its sole participant, which sole participant is itself owned by one person; and (ii) an LLP with over 100 participants must maintain a register of its participants.

Interests: The minimum charter capital of an LLP is approximately the equivalent of six hundred and eighty-five US dollars (US\$685). At least 25% of the charter capital amount must be paid by the date of registration. The balance of the charter capital must be paid up within one (1) year after the State registration of an LLP.

The charter capital consists of contributions of LLP's founding participants. The amount of participatory interests in the charter capital held by each of an LLP's participants is ordinarily defined by the amount of their initial contributions thereto, unless the foundation agreement provides otherwise.

An LLP is not required to issue or register shares, nor does a national identical code need to be assigned to the participatory interests of an LLP.

Pre-emptive rights: All participants of an LLP hold pre-emptive rights to buy the participatory interests held by the other participants in an LLP. Thus, the participatory interests in a LLP may not be transferred freely without the vendor's (selling participant's) prior offer to other participants to buy out his participatory interests.

Management: Ordinarily, the management and voting powers of each participant of an LLP directly correspond to the amount of participatory interests held by each participant.

An LLP is managed by the general meeting of its participants, the supreme body of the LLP which decides the key issues of its activities, competence of its bodies, etc. The Executive Director, in his capacity as the executive body of the LLP, is appointed by the general meeting of its participants, carries out and provides for the day-to-day activities of the LLP, hires and dismisses personnel, concludes contracts and agreements on behalf of the LLP and may represent the LLP in relations with third parties without the requirement of a Power of Attorney in accordance with the law on LLPs, and its Charter.

Registration: An LLP must be registered with the local (oblast, city) department of the Ministry of Justice of Kazakhstan. Following the State registration of an LLP, such justice department, based on the documents submitted thereto, would then have the LLP registered with the statistics and tax authorities and would issue the certificates of registration of the LLP with all above-mentioned authorities.

Such "one-stop" registration procedure is supposed to take ten (10) working days from the date of submission of all required documents in due form. Producing the seal of an LLP and opening its bank accounts is likely to take two (2) more working days. The seals are produced by the stamp-graver enterprises (workshop) of all forms of ownership, which have a permission issued by internal affairs bodies.

The list of documents required for the registration of an LLP varies depending on the number of founders and whether such founder(s) are Kazakhstani residents or not.

Below is the list of documents required for the registration of an LLP, indicating which documents are to be submitted in which case:

- a standard letter of application;
- extract from the Trade/Commercial Register regarding a foreign legal entity (if a foreign legal entity is one of the LLP's founders, or the LLP's sole founder);
- copy of Charter/Articles of Association/By-Laws of a foreign legal entity (if a foreign legal entity is one of the LLP's founders, or the LLP's sole founder);
- certificate of Absence of Debts Due to State Budget of Republic of Kazakhstan (if a foreign legal entity is one of the LLP's founders, or the LLP's sole founder);
- copy of Certificate of State Registration of a Kazakhstani legal entity (if a Kazakhstani legal entity is one of the LLP's founders, or the LLP's sole founder);
- copy of Charter of a Kazakhstani legal entity (if a Kazakhstani legal entity is one of the LLP's founders, or the LLP's sole founder);
- copy of passport and tax registration certificate of an individual (if an individual is one of the LLP's founders, or the LLP's sole founder);
- resolution of the LLP's founder(s) regarding establishing the LLP;
- foundation Agreement (required if there are more than one (1) founders in the LLP);
- Charter of the LLP;
- letter from a future landlord agreeing to provide office premises to the LLP following its State Registration;
- copy of passport and tax registration certificate of the LLP's Director; and
- original receipt for payment of official company registration fee.

All documents originating outside Kazakhstan, save certain CIS countries, should be either legalized or apostilled. As Kazakhstan is a party to the 1961 Hague Convention providing for apostillation, the documents that originate within States who are parties to the said Convention, require apostillation, but do not require legalization. The documents produced in a foreign language must be accompanied with notarized translations into both the Kazakh and Russian languages.

#### **4.2.3 Joint-Stock Company**

A joint-stock company ("JSC") is a legal entity which issues securities for the purpose of raising funds for the performance of its activity. The JSC has a capital separate from the capital of its shareholders, and it is not liable for their obligations. The JSC is liable for its obligations within the amount of its capital.

*Charter Capital of a JSC and Securities:* The minimum required charter capital of a JSC is approximately the equivalent of three hundred fifty four thousand four hundred sixty US dollars (US\$354,460). Where a JSC's charter capital is over approximately seven million seventy thousand US dollars (US\$7,070,000) and the number of its shareholders exceeds five hundred (500), such a JSC is deemed to be a *public* JSC. Kazakhstani legislation sets out additional requirements for public JSCs.

The issue of securities by a JSC must be approved by and registered with the Agency for Supervision of Financial Markets and Financial Organisations, which also assigns a code for each issue of securities. JSCs are required to regularly file reports regarding the results of placement of their securities with the above-mentioned authority.

Pre-emptive rights: The securities in a JSC may be freely transferred and pre-emptive rights extend only to the issue of securities on the primary market, i.e. when the JSC issues and places its securities, the shareholders are entitled to purchase certain amount of securities proportionate to their securities in a JSC, whereas, on the secondary market (when the shareholders sell their own securities to each other or any third parties), there are no such pre-emptive rights or requirements pertaining to other shareholders of the JSC.

Management: The management structure of a JSC is provided for in great detail in the relevant law. The JSC's supreme managing body is the general meeting of shareholders, which has the exclusive competence of deciding on change of the amount of charter capital, amendments to the charter of the JSC, its participation in other enterprises, distribution of dividends, etc. Moreover, only the general meeting of shareholders may approve a JSC entering into certain transactions qualifying as "major transactions" (a transaction resulting in the JSC's sale or purchase of assets amounting to at least twenty-five per cent (25%) of the total value of the JSC's assets) or "interested transactions" (JSC's transaction with its own affiliate, or an affiliate of the latter). Other bodies of a JSC are: the supervisory body – the board (of directors) and the executive body – the (General) Director.

In order to convene a general meeting of shareholders, the chairman of the board of directors has to convene and hold a board meeting, which in turn decides to convene a general meeting and issues relevant announcements and notices (including in the mass media) at least thirty (30) days prior to such meeting. The board of directors approves the agenda of the general meeting, such agenda may be changed by the general meeting only by a vote of ninety-five per cent (95%) of the JSC's securities. A shareholder holding at least ten per cent (10%) of the JSC's securities, is entitled to simply propose to the board of directors to add certain issues to the agenda at least ten (10) days before the general meeting.

Transparency and Supervision: JSCs are required to publish their yearly financial reports, as well as all and any decisions made by the general meeting of shareholders following each shareholders meeting unless, in the latter case, the Charter provides otherwise. Such transparency is required by the relevant State agencies in order to supervise the activities of JSCs.

Registration: A JSC must be registered with the local (oblast, city) department of the Ministry of Justice of Kazakhstan. As in the case with LLPs, a JSC is also registered using a "one-stop" registration procedure which is supposed to take ten (10) working days from the date of submission of all required documents in due form. Producing the corporate seal of a JSC and opening its bank accounts takes about two (2) more working days. The seals are produced by the stamp-graver enterprises (workshop) of all forms of ownership, which have a permission issued by internal affairs bodies.

The list of documents required for the registration of a JSC varies depending on the number of founders and whether such founder(s) are Kazakhstani residents or not. Below is the list of documents required for the registration of a JSC and indicating which documents are to be submitted in which case:

- a standard letter of application;
- extract from the Trade/Commercial Register regarding a foreign legal entity (if a foreign legal entity is one of the JSC's founders, or the JSC's sole founder);
- copy of Charter/Articles of Association/By-Laws of a foreign legal entity (if a foreign legal entity is one of the JSC's founders, or the JSC's sole founder);

- certificate of Absence of Debts Due to State Budget of Republic of Kazakhstan (if a foreign legal entity is one of the JSC's founders, or the JSC's sole founder);
- copy of Certificate of State Registration of a Kazakhstani legal entity (if a Kazakhstani legal entity is one of the JSC's founders, or the JSC's sole founder);
- copy of Charter of a Kazakhstani legal entity (if a Kazakhstani legal entity is one of the JSC's founders, or the JSC's sole founder);
- copy of passport and tax registration certificate of an individual (if an individual is one of the JSC's founders, or the JSC's sole founder);
- resolution of the JSC's founder(s) regarding establishing the JSC;
- Charter of the JSC;
- letter from a future landlord agreeing to provide office premises to the JSC following its State Registration;
- copy of passport and tax registration certificate of the JSC's Executive Director; and
- original receipt for payment of official company registration fee.

All documents originating outside Kazakhstan, save certain CIS countries, should be either legalized or apostilled. As Kazakhstan is a party to the 1961 Hague Convention providing for apostillation, the documents that originate within States who are parties to the said Convention, require apostillation, but do not require legalization. The documents produced in a foreign language must be accompanied with notarized translations into both the Kazakh and Russian languages.

## **5. ENTRY AND STAY OF FOREIGN INDIVIDUALS IN KAZAKHSTAN**

### **5.1 Categories of visas and procedure for issuance**

The entry into Kazakhstan and the exit from Kazakhstan of foreign citizens is carried out through the clearance points at the State frontier, which are open for international and bilateral communication, on the basis of valid passports or documents substituting passports, having the visa of Kazakhstan, unless another procedure is established by international agreements ratified by Kazakhstan.

Visas are classified into the following categories:

- 1) diplomatic visas;
- 2) service visas;
- 3) investor visas;
- 4) business visas;
- 5) private visas;
- 6) tourist visas;
- 7) for education;
- 8) for work;
- 9) for medical treatment;
- 10) for permanent residence; and
- 11) transit visas.

Foreign institutions of the Ministry of Foreign Affairs of the Republic of Kazakhstan (MFA RK) may issue visas of all categories. In certain cases decisions for issuing of visas may be taken by the Head of a foreign institution of the MFA RK on the basis of a petition of a legal

entity or a physical person with subsequent notification to the MFA RK, which shall timely notify the National Security Committee of the RK. Single diplomatic, service, business, private and tourist visas of Kazakhstan to citizens of the Australian Commonwealth, Austrian Republic, Kingdom of Belgium, United Kingdom of Great Britain and Northern Ireland, Greek Republic, Kingdom of Denmark, Irish Republic, Republic of Island, Kingdom of Spain, Italian Republic, Canada, Principalities of Liechtenstein, Great Duke of Luxemburg, Malaysia, Monaco, Kingdom of Netherlands, New Zealand, Kingdom of Norway, Republic of Portugal, Republic of Singapore, United States of America, Republic of Finland, French Republic, Federal Republic of Germany, Swiss Confederation, Kingdom of Sweden, Japan may be issued pursuant to their written petitions without invitations and visa support. In the territory of Kazakhstan visas shall be issued as follows:

1) by the MFA RK to foreign citizens pursuant to petitions of state authorities and governmental organizations of Kazakhstan as well as representations of foreign states accredited in Kazakhstan. Consular offices of the MFA RK shall issue visas of the “diplomatic”, “service”, “business”, “tourist”, “for education”, “for medical treatment”, “for work”, “transit” categories as a rule where there is no foreign institution of the MFA RK authorized to issue visas, provided there is the visa support from the MFA RK (for issuing transit visas no visa support shall be required);

2) Ministry of Internal Affairs of Kazakhstan, Departments of Internal Affairs (MIA RK) of the provinces, cities of Astana and Almaty pursuant to petitions of legal entities and physical persons (except for the “diplomatic” and “investor” visa categories).

Where there is the visa support from the MIA RK, no invitation shall be required.

Among the eleven (11) types of visas, the following three (3) types are the most relevant for the purposes of this outline and will be described below in more details:

- investors visa;
- business visa; and
- working visa.

### **5.1.1 Investors Visa**

Investors’ visas are issued to the general managers of foreign companies carrying out investment projects of interest to Kazakhstan.

A single-entry visa is issued:

(i) upon the application of foreign companies, or the Investments Committee of the Ministry of Industry and Trade of Kazakhstan; or

(ii) upon the direction of the MFA RK.

A multiple-entry visa is always subject to approval by the MFA RK and can be issued for up to one (1) year and may be further extended for up to one (1) year.

### **5.1.2 Business Visa**

Business visas shall be issued to foreign citizens who are heading to and who are present in the Republic of Kazakhstan for business purposes (business trip, participation in business negotiations having strictly business nature or commercial character, at seminars, symposia, conferences, tenders, conclusion of contracts, formation of joint ventures, research of the Kazakhstan markets, participation in auctions, exhibitions and fairs, performance of commercial transactions and international carriage, rendering of consultancy and audit services) on the basis of the following:

- permits from the bodies of internal affairs when foreign citizens are invited by non-governmental legal entities;
- invitations of international organisations, representations of foreign states and governmental organisations of Kazakhstan;
- invitations of legal entities for citizens of the countries of which the list is determined by the MFA RK, MIA RK and National Securities Commission of Kazakhstan;
- written petitions to the consular institutions of the Republic of Kazakhstan of citizens of the Australian Commonwealth, Austrian Republic, Kingdom of Belgium, United Kingdom of Great Britain and Northern Ireland, Greek Republic, Kingdom of Denmark, Irish Republic, Republic of Island, Kingdom of Spain, Italian Republic, Canada, Principality of Liechtenstein, Great Duke of Luxemburg, Malaysia, Monaco, Kingdom of Netherlands, New Zealand, Kingdom of Norway, Republic of Portugal, Republic of Singapore, United States of America, Republic of Finland, French Republic, Federal Republic of Germany, Swiss Confederation, Kingdom of Sweden, Japan on issuing of a single-entry business visa of the Republic of Kazakhstan.

### **5.1.3 Working Visa**

Working visa shall be subject to a valid work permit for attraction of foreign manpower into Kazakhstan (as obtained by the employer of the foreign national), the invitation in due form. Working visa can also be issued pursuant to international treaties or laws of Kazakhstan in cases where work permits are not required.

## **6. EMPLOYMENT**

### **6.1 Employment**

Employment of Kazakhstani nationals and foreign citizens in Kazakhstan must be in compliance with the labour legislation of Kazakhstan. This means that employment contracts concluded by either a locally registered company or a branch of a foreign company with both Kazakhstani and foreign citizens in relation to their work in Kazakhstan should not contradict any mandatory requirements set by the labour legislation of Kazakhstan. The mandatory requirements comprise a minimum wage which may be paid to an employee in Kazakhstan (currently 6,600 Kazakhstani Tenge (approx. US\$50 per month), maximum overtime work and compensation for such work, minimum paid annual leave (eighteen (18) calendar days), minimum sick leave compensation etc.

## 6.2 Foreign Employee Work Permits

Kazakhstan has adopted a general policy which promotes the employment of Kazakhstan citizens. This policy may create difficulty in obtaining work permits for foreign labor due to the limited number of permits granted each year.

Quotas. Work permits are issued under a quota, which is established by the Government on an annual basis. The ratio of expatriate to local workers is a key factor that is considered in the granting of work permits.

Types of Work Permits. Employers must obtain work permits for most foreign employees. Several categories are exempt from this requirement. For example, the head of a legal entity whether a Kazakh entity or a branch (or representative) office need not obtain a work permit.

The Ministry of Labor and Social Protection of the Population (“Ministry of Labor”) may impose additional conditions for issuing work permits, such as requiring employers to train local staff to replace foreign employees when their permits expire or creating additional jobs for Kazakhstan citizens.

Obtaining a Work Permit. An employer must take steps to hire the staff needed locally. Employers must advertise a job vacancy in Kazakh and Russian language newspapers (or other media) specified by the Ministry of Labor. If the employer cannot obtain the labor needed locally, it may apply for a work permit to hire foreign labor.

Work permits should be issued or rejected within fifteen (15) days of application, though in practice the process often takes longer. Work permits are issued by the local government (Akimat) and authorize employment for an allotted number of employees without the need to identify the specific workers. After receiving the work permit(s), the employer must submit a list of specific, individual foreign employees. The employer must also submit notarized copies of education documents, confirmation of work experience as well as an HIV medical certificate for such individuals.

The Akim must approve or reject the list within five (5) days of receipt. The proposed list may be rejected on the basis of incomplete documentation or inadequate qualification for one or more of the candidates. If rejected, the decision may be appealed.

Without a work permit, a locally registered company or a branch of a foreign company may only hire the following main categories of employees:

- chief managers of branch and representative offices of foreign companies;
- employees seconded for no more than forty five (45) days in aggregate within one calendar year;
- chief managers of organisations which concluded investment contracts with the Government of Kazakhstan in an amount of more than US\$50 million;
- chief managers of locally registered companies carrying out investment activities in the priority sectors of Kazakhstani economy and which concluded investment contracts (please refer to the Investment Preferences Section above);
- chief managers of banking and insurance organisations;

- members of crews of vessels, aircrafts, railway and motor transport owned by foreign companies; and
- employees which have a residential permit in Kazakhstan.

The work permit is issued within the foreign labour quota established by the Government of Kazakhstan annually and subject to the current situation on the labour market.

## **7. LICENSES**

### **7.1 Introduction**

Licensing legislation <sup>10</sup> in Kazakhstan establishes a list of investment activities requiring licenses and permits. Licenses may be granted to citizens and legal entities of Kazakhstan as well as to foreign legal entities, foreign citizens, Stateless persons and international organizations. A license is granted, without discrimination, to any entity that satisfies the requirements for that specific license. Foreign investors may obtain licenses on the same conditions and in accordance with the same procedures as Kazakhstani nationals, unless otherwise stipulated by law. Some licenses are restricted to specific territories, other licenses apply throughout the territory of Kazakhstan and some others apply outside the territory of Kazakhstan. A licensee may not transfer the license to another legal entity or individual, unless otherwise stipulated by law.

### **7.2 Licensing Agencies**

An investor must submit applications directly to the various concerned Ministries who are authorised by legislative acts to issue certain types of licenses. For example, the following Ministries have the following general areas of responsibilities:

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<sup>10</sup> The primary law regulating licensing is Edict No. 2200 of 17 April 1995 of the President of Kazakhstan having the force of law “Concerning Licensing”, as amended.

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Ministry of Energy and Mineral Resources	Production, transmission, and distribution of electricity and thermal energy Operation of industrial facilities associated with the risks of explosion, fire and mining facilities, electric power stations, electricity grids and transformers, hydrotechnical facilities, main pipelines for oil and gas, lifting devices, and also boilers, vessels and pipelines which operate under pressure and drilling operations associated with petroleum and gas Design, manufacture, assembling and repairing of chemical, drilling equipment, oil and gas rigs, geological exploration, mining metallurgical, power engineering equipment, explosion-proof electromechanical equipment, equipment and control systems, fire prevention alarm and protection, lifting devices, and also boilers, vessels and pipelines which operate under pressure Manufacture and repair work associated with supplying gas to residential and utility premises
Committee for Issues of Construction of Ministry of Industry and Trade	Planning and construction of industrial facilities associated with the risks of explosion, fire and mining facilities, electric power stations, electricity grids and transformers, hydrotechnical facilities, main pipelines for oil and gas, lifting devices, and also boilers, vessels and pipelines which operate under pressure and drilling operations associated with petroleum and gas Construction work associated with supplying gas to residential and utility premises Design, construction of national main, international communication lines
Agency for Informatization and Telecommunications	Rendering and provision of services in the sphere of communications with regard to organization of television and (or) radio broadcast, technical maintenance of networks and communication lines
Ministry of Labor and Social Protection of Citizens 11	Foreign labor licenses
Committee of Registering Service of Ministry of Justice	Rendering of legal services
Agency for Regulation and Supervision of Financial Markets and Financial Organizations	Insurance activity Professional activity on the securities market and activity of stock exchanges Banking activity, activity of clearing and settlement organizations Carrying out foreign currency transactions which are considered currency transactions under the law
Ministry of Finance	Auditing activity

### 7.3 Applying for a License

An applicant must submit all required documents specified by the relevant agency. The applicant will also be required to submit an application fee. If the application meets all of the

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11 In Almaty such licenses are issued by the Akimat and are valid only in Almaty.

requirements, the license is supposed to be issued within one month of the date when the application was submitted.

#### **7.4 Consequences of Operating Without an Appropriate License**

Penalties for operating without a license can be severe and subject an individual or entity to administrative and criminal liability. All income received from unlicensed activity is subject to confiscation by the relevant State bodies.

### **8. TAXATION**

Taxes in Kazakhstan are governed by the international tax treaties, the Tax Code, instructions and letters of the Tax Committee of the Ministry of Finance. While tax levels in Kazakhstan are fairly reasonable, failure to pay taxes can subject the taxpayer to certain penalties.

#### **8.1 Registration with Tax Authorities**

All Kazakhstani legal entities, representative offices, branches, foreign legal entities that carry out activities in Kazakhstan through a “permanent establishment” (as defined in the Tax Code), or without a permanent establishment, but for a period of more than 30 working days within any 12 months, must register with the tax authorities, whether or not their activities are or will be taxable in Kazakhstan. The definition of a permanent establishment includes any place of business from which business activity is conducted including, among others, any manufacturing or production facility, construction site, mining or extraction facility or premises used for the purpose of providing services. Since the definition of a permanent establishment is quite complicated in Kazakhstani tax legislation, and tax treatment of a foreign entity’s activities differs depending on such activities being treated as carried out through a permanent establishment or without a permanent establishment, a foreign entity should, before entering the Kazakhstani market, carefully analyze the permanent establishment issue.

#### **8.2 Taxes and Fees**

Kazakhstani taxes include corporate and individual income tax, value added tax (VAT), excise tax, subsoil users’ taxes and special fees, land tax, tax on vehicles and property tax. Additionally, the tax legislation provides for a number of mandatory fees (e.g. business registration fee, license fee for the right to conduct certain businesses, environment pollution fee and some others). Additionally, companies employing persons permanently residing in Kazakhstan have to deduct 10% of employees’ monthly income and pay the amount deducted to accumulative pension funds.

#### **8.3 Income Tax**

The corporate income tax for most legal entities and permanent establishments is 30% on their taxable income allowing certain deductions. A rate of 10% applies to income of legal entities having land as their main fixed production asset. In addition to corporate income tax, foreign entities carrying out business in Kazakhstan through a permanent establishment are subject to 15% net profit tax.

The tax base for Kazakhstani legal entities and permanent establishments is gross annual income minus allowable deductions. Deductions are allowed within certain limits and include expenses connected with deriving income including wages, social payments, travel and accommodation costs, doubtful claims, depreciation of fixed assets and some others. The aggregate annual income of a resident taxpayer includes all income irrespective of source. Taxed income of a non-resident taxpayer carrying business through a permanent establishment consists only of income relating to the permanent establishment's activities. Kazakhstani source income of a non-resident that is not related to a permanent establishment will be taxed at source of payment based on aggregate income without deductions at the following rates, unless reduced by relevant double-tax treaty (please refer to Section 8.4 below):

Dividends and remuneration (interest)	15%
Insurance premiums payable under risk insurance agreements	10%
Insurance premiums payable under risk re-insurance agreements	5%
Income derived from rendering international transportation services	5%
Other types of income	20%

Under Kazakh law, the applicability of reduced tax rates is not automatic and should either be confirmed by the tax agent (which is an entity responsible for withholding the tax) or approved by the tax authorities in a special procedure established by legislation. Kazakhstan has personal income tax rates from 5% up to 20% calculated on a progressive scale. Income tax must be paid by Kazakhstani residents, the definition of which given in the Tax Code is quite complicated and includes Kazakhstani citizens and persons who have applied for citizenship or for residential permit, as well as any individuals that have been in the country for one hundred and eighty three (183) days or more (in any consecutive twelve (12) calendar month period ending in the current tax period). Employers are required to withhold income tax on salary payments to employees and transfer them to the budget. Failure to do so may result in fines and penalties.

#### 8.4 Double-Tax Treaties

Kazakhstan has entered into double-tax treaties with thirty five (35) countries, as set out below:

Country	Date of signature	Kazakhstan Ratification
Poland	21 September 1994	21 April 1995
Italy	22 September 1994	21 April 1995
Hungary	7 December 1994	21 April 1995
Pakistan	23 August 1995	25 December 1995
Turkey	15 August 1995	3 January 1996
USA	24 October 1993	26 June 1996

Country	Date of signature	Kazakhstan Ratification
Turkmenistan	27 February 1997	9 July 1998
Sweden	19 March 1997	9 July 1998
Republic of Korea	18 October 1997	9 July 1998
Georgia	11 November 1997	9 July 1998
Bulgaria	13 November 1997	9 July 1998
Germany	26 November 1997	9 November 1998

Country	Date of signature	Kazakhstan Ratification	Country	Date of signature	Kazakhstan Ratification
Great Britain	21 March 1994	26 June 1996	France	3 February 1998	9 November 1998
Netherlands	24 April 1996	24 February 1997	Mongolia	12 March 1998	9 November 1998
Uzbekistan	12 June 1996	24 February 1997	Czech Republic	9 April 1998	9 November 1998
Ukraine	9 July 1996	24 February 1997	Belgium	16 April 1998	9 November 1998
Azerbaijan	16 September 1996	24 February 1997	Romania	21 September 1998	24 June 1999
Canada	25 September 1996	24 February 1997	Estonia	1 March 1999	30 December 1999
Iran	1 January 1996	3 July 1997	Switzerland	21 October 1999	5 July 2000
Russia	18 October 1996	3 July 1997	Tajikistan	16 December 1999	21 October 2000
India	9 December 1996	3 July 1997	Moldova	15 July 1999	15 January 2002
Kyrgyzstan	8 April 1997	11 July 1997	Latvia	6 September 2001	14 November 2002
Lithuania	7 March 1997	31 October 1997	China	12 September 2001	2 June 2003
Belarus	11 April 1997	31 October 1997			

As a rule, double-tax treaties do not reduce income tax rates applicable to a permanent establishment, but provide that if a foreign company carries out its business through a permanent establishment, the part of the company's profit attributable to such permanent establishment will be taxed in the State where such permanent establishment is located/registered. This part of the profit is defined as a profit, which the permanent establishment could gain if it was a separate and independent company involved in the same business. Normally, in determining the permanent establishment's profit double tax treaties allow deduction of expenses incurred for the permanent establishment, including management and general administrative costs.

### 8.5 Value Added Tax

The Tax Code imposes VAT on the sale of most goods and services in Kazakhstan and on the importation of most goods. The general VAT rate is 15 percent. VAT payers have to register with tax authorities in addition to general taxpayers' registration. VAT on the export of goods is zero except for export of nonferrous scrap. Sale of certain goods, works and services, including lease and sale of land and buildings (with some exceptions including first sale of residential buildings after their construction), financial services, geological exploration and prospecting operations, works and service relating to international transportation, contributions into charter capital, sale of assets in the process of privatization and some others is exempted from VAT.

### 8.6 Excise Tax

Certain types of goods, both produced in Kazakhstan and imported, and some types of activities are subject to excise tax. The excised goods include alcohol, tobacco, gasoline and diesel fuel, motorcars, firearms, crude oil and gas condensate and some others. The excised types of activities include gambling and lottery businesses. The rates of excise tax are established by the Government for particular types of goods/businesses as a percentage of the goods' value or in absolute figures.

## **8.7 Social Tax**

Kazakhstani legal entities and foreign entities carrying out business through a permanent establishment are required to make payments of social tax at rates from 20% on their local employees' annual taxed income and from 11% on their foreign employees' annual taxed income, calculated at a progressive scale.

## **8.8 Subsoil Users Taxation**

Companies engaged in the extraction of natural resources are subject to special taxes and payments, comprising of the following:

- excess profits tax (rates depend on net profit exceeding 20% of deductions under corporate income tax in a particular tax period);
- rent tax on crude oil for export (rates depend on market price for exported oil);
- special subsoil users' payments;
- signing bonus (determined by the Government's commission based on a certain field's characteristics)
- commercial discovery bonus (0.1% of value of approved volumes of mineral resources);
- royalty (in respect of oil: based on quantity of oil extracted within a calendar year; in respect of ore mineral resources: at rates established by the Government);
- State share under Product Sharing Agreements (PSA).  
Subsoil users transferring their share under PSA to the State are exempted from (i) rent tax on crude oil for export; (ii) excise on crude oil; (iii) excess profit tax; (iv) land tax and (v) property tax.

## **8.9 Property Tax**

Property tax is payable at a rate of 1% of annual average book value of fixed (excluding land and vehicles which are subject to land tax and tax on vehicles, respectively) and intangible assets owned by Kazakhstani resident legal entities. Assets owned by non-resident legal entities in Kazakhstan are also subject to 1% property tax.

## **8.10 Land Tax**

The rates of land tax in respect of a certain land plot depend on the land plot's characteristics and vary for different types of land.

## **8.11 Vehicle Tax**

Vehicle tax rates are established depending upon a vehicle's engine capacity, age and country of origin.

## **9. CURRENCY REGULATIONS**

### **9.1 Introduction**

Since 1993, when Kazakhstan introduced its own currency, the Tenge, the National Bank of Kazakhstan (the “NBK”) has pursued a tight monetary and fiscal policy. As a result, Kazakhstan has one of most stable financial systems in former Soviet Union. In general, the foreign currency regulations of Kazakhstan are not overly restrictive. Kazakhstani Government has recently announced a policy for further liberalization of currency regulation in the country, which will be implemented in the coming years.

### **9.2 Regulation of Currency Operations**

The NBK is the governmental agency that performs currency regulation and conducts overall supervision over currency transactions. The main legal act governing currency operations in Kazakhstan is the Law on Currency Regulation. Additionally, there are a number of rules and regulations issued by the NBK governing different aspects of State supervision over currency operations, including licensing, registration, reporting and other requirements. Various aspects of the currency regulations cover, among other matters, transactions involving gold and equity and debt securities, which are treated as if they were currency for the purposes of the legislation. Licensed banks (including subsidiaries of foreign banks) act as currency control agents and are responsible for compliance of currency transactions carried out through their clients’ accounts with mandatory requirements established by legislation. The legal treatment of an entity or a person in terms of currency regulation is very much dependent on such entity/person being treated as a Kazakhstani resident or a non-resident. It is important to note that the definitions of a resident and non-resident for currency regulation purposes are different from those used for taxation purposes. Generally, the requirements applicable to a resident are much more stringent compared to those applicable to a non-resident.

#### **9.2.1 Residents**

Residents for currency regulation purposes are defined to include, among others, private individuals permanently residing in Kazakhstan and legal entities incorporated in Kazakhstan and their branches and representative offices. Branches and representative offices of foreign entities established in Kazakhstan do not fall within the definition of residents. In general, residents are subject to the following principal restrictions:

1. Opening by residents of a bank account in a jurisdiction outside Kazakhstan is subject to licensing by the NBK although residents are entitled to open a Tenge and a foreign currency account with a licensed Kazakhstani bank. In order to be permitted to open a foreign currency account outside of Kazakhstan, the applicant must justify to the NBK the economic justification for maintaining such an account. The holders of foreign currency accounts held abroad must submit monthly reports to the NBK detailing movements in their foreign currency accounts with foreign banks.

2. All payments between residents must be conducted in local currency except as provided by regulatory acts of the NBK, customs and tax legislation.
3. The purchase, sale and exchange of foreign currency in Kazakhstan may be carried out only through authorized banks or authorized non-banking financial institutions.
4. Resident legal entities may purchase foreign currency in domestic currency market only for certain purposes, including, among other matters, payments to non-residents, repayment of loans received from authorized banks in foreign currency; business trip and representation expenses outside Kazakhstan. If a resident purchases foreign currency but does not use that money for the permitted purpose within thirty (30) days, such currency must be re-sold on the domestic foreign currency market.
5. Cash funds from foreign exchange accounts may only be withdrawn for payment of wages to non-residents or for expenditures involved in overseas business trips against relevant documents confirming the purpose of the withdrawal.
6. Legal regime of currency operations depends on whether a certain transaction is treated as a “routine currency operation” or an “operation involving the movement of capital.” Routine currency operations do not require NBK’s license or registration <sup>12</sup> and may be effected through authorized banks without restriction.

Routine currency operations include:

- Settlements relating to import/export transactions providing deferred or advance payment for a term of up to one hundred and eighty (180) days;
- Granting and receiving loans with a term of up to hundred and eighty (180) days;
- Transfer and receipt of dividends, interest and other income from deposits, investments, loans and other operations;
- Non-commercial transfers, including grants, transfers of legacies, wages, pensions, alimony and others;
- All other operations not treated by law as operations involving the movement of capital.

If a routine currency operation exceeds the above hundred and eighty (180)-days period, such operation will be treated as an operation involving movement of capital and will be subject to licensing or registration.

Currency operations involving the movement of capital include:

- investments;
- payments in transactions providing full transfer of exclusive rights to intellectual property;
- payments for property rights to real estate;

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<sup>12</sup> As a general rule, a license is required for transactions whereby funds are transferred from residents to non-residents

and transactions involving transfer of funds from non-residents to residents require registration with the NBK. Any licenses to conduct operations involving the movement of capital are considered on the case-by-case basis and are valid within the period indicated in the license.

- settlements relating to import/export transactions providing deferred or advance payment for a term exceeding hundred and eighty (180) days;
- granting and receiving loans with a term of more than hundred and eighty (180) days;
- international transfers under transactions relating to accumulation of pension assets;
- international transfers under accumulative insurance and re-insurance agreements;
- transfer of currency or currency equivalent into trust management (which is an arrangement whereby an owner transfers the right to manage an asset to another party (the trustee manager)).

Residents must deposit any receipts from foreign currency transactions in their accounts maintained at authorized banks.

The NBK is entitled to establish for resident legal entities a mandatory sale of foreign currency raised from export.

### **9.2.2 Non-residents**

As pointed out above, non-residents for foreign currency purposes include Kazakhstani branches and representative offices of foreign entities. The foreign currency regulations are substantially less restrictive for these entities and these non-residents may open off-shore bank accounts without restriction, deposit their funds off-shore and are not liable to sell foreign currency raised from export sales to the banking system. Non-resident legal entities may purchase foreign currency in the domestic foreign currency market for any purpose. However, a non-resident may withdraw foreign currency in cash from their bank accounts only for payment of wages and business trip expenses.

### **9.2.3 Individuals**

The position for individuals is slightly more relaxed than for legal entities. However, individuals cannot use their accounts for business-related transactions. Payments and money transfers of resident and non-resident individuals in an amount exceeding US\$10,000 may be effected by authorized banks only subject to submission to the banks of documents confirming grounds of the payment/money transfer (contracts, invoices, etc.). Resident and non-resident individuals may perform cross-border routine currency transactions without opening a bank account through a one-time bank transfer, but only if such transactions are not business-related and do not exceed US\$10,000.

## **10. ACQUIRING RIGHTS TO OWN AND USE LAND**

### **10.1 General**

Land reform is still at a nascent stage in Kazakhstan. Only in 1995, the new Constitution of Kazakhstan allowed private ownership of land on the terms and conditions and subject to the limitations set forth in the law. The Presidential Decree “On Land” of 1995 and the later Law “On Land” of 2001 allowed private ownership of land for development of personal husbandry, gardening and summer houses construction. However, only the new Land Code, adopted on 20<sup>th</sup> June 2003, permitted Kazakhstani citizens to own agricultural lands for farming, agricultural production and forest-growing.

The Land Code provides for the following types of rights to land in Kazakhstan: (i) ownership; (ii) permanent land use; (iii) temporary land use; (iv) lease; and (v) servitudes (easements).

Rights to a land plot generally extend to surface soil, landlocked water basins and plantation located within the boundaries of the plot. Ownership or lease of a land plot does not enable a person to develop mineral resources found beneath that plot. Those rights may be granted by the State based on the laws governing subsoil use operations, for example the Law “On Subsoil and Use of Subsoil” and the Law “On Petroleum”.

Title to land is certified by a relevant act such as an act of ownership of land, or an act of permanent land use, or an act of temporary land use issued by the Land Management Committees on the basis of an underlying legal act such as a resolution of the relevant State agency, or a contract or a court judgment. No transaction with land can be implemented in absence of any of such acts to land.

Unless a land title document expressly provide for indivisibility of a land plot, it is deemed to be divisible.

All land rights, including ownership rights, permanent and temporary land use rights, pledges, easements, and any transactions involving transfer of land for a period exceeding one year must be registered, as defined in the Decree on State Registration of Rights to Immovable Property<sup>13</sup>, with the registering authorities of the Ministry of Justice. A purchaser of land is advised to register its rights as soon as possible since the title and rights are deemed transferred at the moment registration is completed.

Payments for land granted by the State are made in the form of a land tax (in the case of ownership or permanent land use right) or lease payments (for temporary land use right), which are set by taking into account the quality, location and water supply of the land plots.

Allocation of land plots by the State into private ownership is subject to payment pursuant to the resolution of the local executive agency. Payments are to be calculated on the basis of a cadastre value, which is to be determined by the local Land Management Committee by multiplying the land plot base payment rate (BPR) by an adjustment coefficient. BPR are to be established by the Government. Adjustment coefficient is to be determined by a Maslikhat (local representative) and cannot exceed double the amount of the applicable BPR.

Disputes arising in respect of land are submitted to the exclusive jurisdiction of the Kazakhstani courts.

## **10.2 Ownership of Land**

Kazakhstan recognizes and equally protects State and private ownership of land. Essentially, only Kazakhstani citizens may own land plots for farming, personal husbandry, gardening, individual house and summer cottage construction. They may also own lands designated for industrial or residential building construction. Non-government entities of Kazakhstan may own land for farm-market agriculture, forest-growing, land plots, whether

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<sup>13</sup> Decree No. 2727 On the State Registration of Rights to Immovable Property and Transactions Therewith dated 25 December 1995.

under development or already developed, which house industrial facilities and residential buildings, including land plots designated for maintenance of such buildings and facilities.

No private ownership is allowed with respect to the following lands:

- land designated for the needs of defence and national security, protection of the State border and customs needs;
- protected natural reserves;
- forestry land, except for plots of land owned by private persons covered with artificial woods planted by such a person;
- water fund land, except for plots of land occupied by privatized irrigation and drainage systems;
- land occupied by main railroads and motor roads of public use; and
- land in populated areas designated as areas of public use.

Under the Land Code, the right of ownership to buildings and constructions is not separable from the underlying real property on which they are located. The transfer of a building or construction automatically entails transfer of the land.

### **10.3 Use of Land**

The right to use land may be permanent or temporary, alienable or non-alienable, provided for a consideration or free of charge. The right to use land arises as a result of provision of a land plot by the State, transfer or passing of a title on the basis of universal succession.

Land use right is provided on the basis of a resolution of the relevant State executive authorities and subject to the conclusion of an appropriate lease agreement with a land user. A land plot designated for certain operations that require a license cannot be allocated unless an appropriate license has been obtained or a subsoil use contract concluded. Once a subsoil use contract is concluded, this serves a basis for immediate execution of a land plot.

Land use right can be sold, leased, granted as a gift, exchanged or alienated otherwise. Land users may not change the designation of a land plot when disposing and transferring the land use right.

The right of permanent land use may be granted to Kazakhstani State-owned legal entities, which possess buildings or premises in a condominium, or are engaged in agricultural and forestry production; or in land use within the protected natural areas. Citizens and nongovernmental legal entities that had bought the right of permanent land use from the State prior to the adoption of the Land Code have become the owners of such land plots.

The right of temporary free land use of land is generally granted for a period up to five (5) years. A temporary right to use a land plot free of charge can be granted to a Kazakhstan citizen or a legal entity for pasture, gardening, as a service allotment, for construction of public use roads and other State-owned facilities, for restoration of disturbed lands, and in other cases. A land user having a temporary free land use right cannot alienate or sublease such land plot.

Temporary paid land use is granted for a period ranging from five (5) to forty nine (49) years. Both Kazakhstani and foreign persons and legal entities are permitted to lease a land plot.

However, Kazakhstani citizens and legal entities may lease land for farming and agricultural production for up to forty nine (49) years, while foreign citizens and stateless persons may lease land for a maximum term of ten (10) years.

A lessee that has properly performed its obligation under the original lease has a preferential right to renew the lease. Persons and legal entities having a temporary land use right in respect of agricultural land plots for agricultural production cannot sublease such land plots. Those citizens and non-governmental legal entities which had subleased their land plots for farming and market agricultural production prior to the adoption of the Land Code must terminate their lease agreements by 1 January 2005.

#### **10.4 Rights of Foreign Persons to Land**

Unless the Land Code provides otherwise, foreigners, Stateless persons and foreign legal entities enjoy the same rights as Kazakhstani citizens and legal entities.

Under the Land Code, foreigners cannot own plots of agricultural and forestry land, or have the right of permanent use of land, or lease plots of agricultural land within the threekilometre protection zone adjacent to the State border of Kazakhstan. Foreign citizens, Stateless persons and foreign legal entities may own plots of land designated for construction and operation of residential buildings and industrial and non-industrial facilities. Foreign citizens and Stateless persons may lease agricultural lands for a maximum term of ten (10) years.

Legal entities organized and existing under the laws of Kazakhstan, including those that are fully or partially owned by foreign persons or entities, are deemed to be national land users, and may own agricultural and forestry land.

#### **10.5 Third Party Rights**

A security interest can be created in a land plot that is privately owned or leased for at least five (5) years. Unless, otherwise stipulated in the law, pledge of a land plot and land use rights are subject to the general rules applicable to mortgage of immovable property. A land mortgage agreement cannot provide for transfer of a land plot or land use right to the creditor or a third party designated by the creditor, restrict the debtor's rights to use the land plot and derive benefits from such land plot. A land plot can only be pledged together with all buildings and constructions located thereon, and vice versa.

A mortgage of land is not valid unless registered with the relevant registering authorities of the Ministry of Justice.

In certain cases as set forth in the Land Code and other statutory acts, a landowner or land user must allow physical persons and legal entities the right of restricted use of land for a special purpose (servitude or easement) such as to access a road, water source, to lay pipes or install transmission lines etc. Easements can be private and public.

Private easements are created on the basis of a contract with a landowner or land user. A landowner or land user of a land plot encumbered with an easement may require payment from an easement holder. Also, an easement holder may be required to indemnify the and owner or land user against all damages incurred by the owner in connection with the

easement. Private easements, their change or termination must be registered in a legal cadastre maintained by the registering authorities of the Ministry of Justice.

Public easements are established on the basis of an act of the local executive authorities in order to protect the interests of the State and local population. No registration is required for easements arising from statutory acts.

## **11. LANGUAGE POLICY**

### **11.1 History**

Under the Constitution of Kazakhstan the State language is Kazakh, which belongs to the Kipchak (or Western Turkic) branch of the Turkic languages. The Kazakh language developed originally in the Arabic script, but in 1928 the Soviet government mandated a switch to the Latin (or Roman) alphabet. Then in 1940 the Soviet government imposed the Cyrillic alphabet (the script of the Russian language), with some modifications for the Kazakh language. This writing system continues to be used today.

Despite the fact that at least 98 percent of ethnic Kazakhs regarded Kazakh as their native language (census of 1989), the level of mastery of the Kazakh language remains extremely low. Most Russians do not know the Kazakh language, while many Kazakhs have a working knowledge of Russian. During the Soviet period, Russian was the primary language of instruction in most schools, and knowledge of Russian was necessary to acquire skilled jobs. Beginning in the late 1980s a campaign for developing and promoting the Kazakh language was launched. In 1989, the Supreme Soviet (legislature) of Kazakhstan adopted the first legislation making Kazakh the official language of the Republic, which was ratified by the Constitution of 1993, while Russian served as the language of “interethnic communication”.

### **11.2 Current Status**

On 11 July 1997, a new Law No. 151-1 “On Languages in Kazakhstan” (the “Language Law of 1997”) was adopted. The Language Law of 1997 declared that “The State language of Kazakhstan is Kazakh. The State language is the language of State administration, legislation, court proceedings and record-keeping that is effective in all spheres of social relations throughout the territory of the country” (Article 4). Article 5 of the same Law states that Russian should be used in State agencies and local self-governments on an equal basis with Kazakh.

In many respects, the status of the Kazakh language remains merely of a declarative character and is not supported sufficiently with a mechanism that would provide for its extended use and acquisition, notwithstanding the fact that the President and the Government adopted a number of acts, including Regulation as to Procedure for Control over the Compliance with the Legislation on Languages approved by Government Resolution No. 16, dated 8 January 1999, State Program of the Development of Languages for 2001-2010, approved by Presidential Decree No. 550, dated 7 February 2001. The use of Kazakh is most widespread in conversational usage and among the Kazakh rural and marginal population. There has been made a considerable, albeit slow, progress in activation of Kazakh in institutional spheres such as the government, education systems, publishing companies, science, and mass media. Outside the State structures, however, there is little evidence of the Kazakh language.

Most independent media, whether print or electronic, use Russian as the means of communication. Similarly, the medium of instruction at the majority of private institutions of higher education is Russian. The greatest part of actual communication and printed matter sold is in Russian. This is true of literature concerning arts, sciences, semi-scholarly fields, journalism, and instruction.

Seals and stamps of legal entities must be in Russian and Kazakh. Letterheads, signs, announcements, advertisements, price-lists, price-tags and other visual information must be in Kazakh and Russian, and, where necessary, may be in other languages. All transactions executed in writing must be in Kazakh and Russian. Transactions with foreign legal entities and foreign individuals must be in Kazakh and in a language chosen by the parties to the transaction (Article 15 of the 1997 Languages Law). In practice, however, Russian is the language of choice used for most contracts and Kazakh is rarely used. The current legislation contains no provision dealing with the consequences, in terms of validity or enforceability, of non-compliance with Article 15 of the Languages Law.

## **12. BANKING AND FINANCE**

### **12.1 Description of the Banking System**

The banking industry in Kazakhstan is regulated by, among other laws, the Law on Banks and Banking<sup>14</sup>, Law on the National Bank<sup>15</sup> and the Law on the State Regulation and Supervision of Financial Markets and Financial Organizations<sup>16</sup>.

Kazakhstan has a two-tiered banking system, with the NBK comprising the first tier and the remaining banks comprising the second tier. The NBK is a State-owned bank and an independent legal entity, presently capitalized at 168 billion KZT. The main objective of the NBK is to ensure domestic stability of prices.

In 2004 the NBK was reorganized and the Agency for Regulation and Supervision of Financial Markets and Financial Organizations was formed to operate as the central authority with supervisory control over the banking sector<sup>17</sup>. The NBK, however, retained some regulating power over banking activity in Kazakhstan and issues instructions which are binding on all second-tier banks.

The Agency issues licenses for banking operations, establishes the relevant minimum charter capital, and net worth requirements, and other prudential requirements for second-tier banks. The Agency approves the appointment of the senior management of second-tier banks, including foreign bank branches.

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<sup>14</sup> Decree of the President of Kazakhstan having the force of a law “On Banks and Banking” dated 31 August 1995, as amended.

<sup>15</sup> Edict No. 2155 of the President of Kazakhstan, having the force of law “Concerning the National Bank” of Kazakhstan dated 30 March 1995.

<sup>16</sup> Law No. 474-II “On the State Regulation and Supervision of Financial Markets and Financial Organizations” dated 4 July 2003.

<sup>17</sup> Edict No. 1270 of the President of Kazakhstan “On Further Improvement of the State Administration System” dated 31 December 2003.

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The Agency reports to the President of Kazakhstan. The President appoints the Chairman and two (2) Deputy Chairmen, approves annual reports, has the right to demand any information relating to the Agency's activity.

As of 1 September 2004, there were thirty five (35) second-tier banks registered in Kazakhstan, including fifteen (15) banks with foreign participation (of which Citibank, ABN AMRO Bank, and HSBC are the largest); one (1) bank 100% State controlled (Eximbank of Kazakhstan); and one (1) bank with special status and 100% State controlled (Development Bank of Kazakhstan). The number of originally registered second-tier banks decreased as a result of the introduction by the NBK of more stringent capitalization and prudential requirements.

## **12.2 Licensing**

All banking activities (which includes the acceptance of deposits, maintenance of correspondent accounts, cash operations, money transfers, discounting operations, lending, etc.) are subject to licensing. Only the Agency has the right to grant licenses for banking activity.

## **12.3 Transition to International Banking Standards**

The banking system is currently in a state of transition with the NBK and Agency's aim being to bring all depository banks in Kazakhstan up to international standards of capitalization, quality of assets, management expertise, accounting, and information. The second-tier banks were divided into two groups required to reach international standards by certain time: group one banks by the end of 1998; group two banks by the end of the year 2000. Several banks complied with the requirements set by the NBK and others failed to meet the deadlines and are still in the process of transition.

Currently, only group one banks are authorized, within the bounds of their licenses, to:

- participate in the capital of investment banks;
- accept deposits from individual customers which exceed the bank's own capital;
- conduct international transactions;
- support foreign loans guaranteed by the State;
- be custodians of corporate securities;
- conduct transactions in precious metals; and
- open and keep correspondent accounts of banks and non-banking financial institutions.

## **12.4 Standards for Domestic Banks**

The Agency establishes standard requirements (including a minimum capital requirement) and reserve fund requirements.

The senior management of banks (the chairman, members of the supervisory board, the chairman of the management board and his/her deputies, the chief accountant and his/her deputies, and the head and chief accountant of branches) are subject to certain compulsory standards.

## **12.5 Banks with Foreign Participation**

Foreign banks may operate representative offices, subsidiaries and joint ventures in Kazakhstan. Banks with foreign participation are defined as banks in which one third or more of the shares are owned or managed by a non-resident entity.

Banks with foreign participation are subject to certain restrictions. The total charter capital of banks with foreign participation must not exceed 50 % of the aggregate capital of all domestic banks in Kazakhstan. At least one (1) member of the supervisory board of a bank with foreign participation must be a Kazakhstani citizen with at least three (3) years of experience in banking and not less than 70% of all bank's employees must be citizens of Kazakhstan.

## **12.6 Liquidation and Reorganization of Banks**

Banks may be liquidated or reorganized upon the revocation of their license by the Agency, by court order, or by a voluntary decision of the bank.

## **12.7 Non-banking Activity of Banks**

Banks may carry out the following non-banking activities subject to obtaining a license from the Agency:

- broker/dealer (of government securities only);
- custodianship;
- investment portfolio management; and
- clearing

# **13. INTELLECTUAL PROPERTY**

## **13.1 Introduction**

The basic provisions regulating Intellectual Property rights are stated in the Civil Code of Kazakhstan (Special Part) dated 1 July 1999. Besides this, there is a set of legislative acts comprising all the aspects of IP rights in Kazakhstan.

The following laws regulate the issues on Intellectual Property rights protection:

- The Patent Law of the Republic of Kazakhstan dated 16 July 1999 (inventions, utility models, industrial designs);
- The Law on Trademarks, Service Marks and Appellations of Origin of Goods dated 26 July 1999;
- The Law of the Republic of Kazakhstan “On Protection of Selection Achievements” dated 13 July 1999 ;
- The Law of the Republic of Kazakhstan “On Protection of Integral Circuits Topologies” dated 29 June 2001;
- The Copyrights Law dated 10 June 1996.

Provisions on protection of IP rights are also included in some other legislative acts, namely, the Customs Code dated 5 April 2003; the Code of Administrative Violations dated 30 January 2001; the Criminal Code dated 16 July 1997; the law on Unfair Competition dated 9 June 1998.

Thus, Section 10 of the new Customs Code grants to the customs authorities the right to stop export of goods infringing IP rights. The Criminal Code of Kazakhstan prescribes liability for violation of IP rights of the proprietor. Under Article 199 of the Criminal Code, trademark piracy may cause liability up to five (5)-year imprisonment.

In order to integrate into the world economic community and to become a member of the World Trade Organization (WTO) Kazakhstan has strengthened its judicial system in the field of IP rights. New provisions of its IP laws comply with the requirements of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement).

At the same time, the enforcement of IP rights still remains a serious problem in the Republic, as well as in other CIS countries. Piracy of copyrights and trademarks is widespread. Counterfeiters exploit the customers' desire to have goods with well-known brands at cheap price, and the State enforcement mechanism is not effective enough to put an end to the production and sale of counterfeit goods. However, government bodies, producers' associations and IP rights proprietors are carrying out an aggressive policy against counterfeiters, using the judicial system and mass media.

### **13.2 International Conventions**

Kazakhstan is a party to the Convention Establishing the World Intellectual Property Organization (WIPO); the Paris Convention for the Protection of Industrial Property; Patent Cooperation Treaty (PCT), the Eurasian Patent Convention, the Madrid Agreement Concerning the International Registration of Marks, the Berne Convention on Protection of Literary and Art Works.

### **13.3 Authorized authority**

The IP Committee of the Ministry of Justice of Kazakhstan is the State authorized body for protection of intellectual property rights. It implements the State policy in this sphere and issue patents and trademark certificates.

Examination of applications for inventions, utility models, industrial designs and trademarks is carried out by the National Institute of Intellectual Property (NIIP), which also maintains State IP Registers and arranges official publications.

To date, NIIP has received more than 65,000 trademark applications (including international) and 521 design applications. More than 16,200 registered trademarks and about 15,000 inventions are recorded in the State Registers of Kazakhstan.

## **13.4 Patent Protection for Inventions, Utility Models and Industrial Designs**

### **13.4.1 Patents for Inventions**

The duration of protection is five (5) years for a provisional patent (which term may be extended for three (3) years) and twenty (20) years for a patent.

Conventional priority is twelve (12) months from the date of first filing in a member country to the Paris Convention.

The following documents must be submitted to the IP Committee:

- Completed application, in Kazakh or Russian, in the prescribed format;
- patent description (in Kazakh or Russian), including claims and drawings (if applicable) and a summary;
- valid Power of Attorney; and
- document confirming payment of fee.

### **13.4.2 Patents for Utility Models**

The duration of protection is five (5) years from the date of filing the application. The term may be extended for three (3) years.

Conventional priority is six (6) months from the date of first filing in a member country to the Paris Convention.

Basic filing requirements are as follows:

- Completed application, in Kazakh or Russian, in the prescribed format;
- description (in Kazakh or Russian), including claims, drawings and a summary;
- valid Power of Attorney; and
- document confirming payment of fee.

### **13.4.3 Patents for Industrial Designs**

The duration of protection is five (5) years for provisional patent and ten (10) years (from the filing date) for a patent. The term may be extended for five (5) years. Conventional priority is six (6) months from the date of first filing in a member country to the Paris Convention.

Filing requirements are as follows:

- Completed application, in Kazakh or Russian, in the prescribed format;
- description (in Kazakh or Russian), including claim, photocopies of the design and drawings;
- valid Power of Attorney; and
- document confirming payment of fee.

To obtain industrial property rights protection in Kazakhstan these objects shall be registered in IP Committee.

## **13.5 Trademarks, Service Marks and Appellations of Origin**

### **13.5.1 Trademarks**

The right to a trademark is based upon its due registration with the IP Committee. Duration of the protection is ten (10) years from the filing date. Renewals may be done every ten (10) years.

Conventional priority is six (6) months from the date of first filing in a member country to the Paris Convention.

Basic filing requirements are as follows:

- application in Kazakh or Russian, in the prescribed format, including a list of goods and services classified in accordance with the International Classification of Goods and Services;
- valid Power of Attorney;
- document evidencing payment of the prescribed fee.

### **13.5.2 Appellations of Origin of Goods**

Protection is based upon the due registration with the IP Committee. The term of protection is ten (10) years. Renewals may be done every ten (10) years to the extent the quality characteristics of the goods specified in the State Register for the appellation of origin still are preserved. A proprietor of the right to use an appellation of origin shall not grant licenses to anybody for use of the appellation of the origin of goods.

## **13.6 Copyrights, Computer Programs and Databases**

The Copyrights Law provides protection for works of science, literature and arts being results of creative activity, as well as for staging, performance, phonograms and broadcasts.

Computer programs and databases are also protected under the Copyrights Law. According to Article 48 of the above law, unauthorized use of computer programs and databases causes civil, criminal and administrative liability.

The copyright protection is valid until the death of the author plus fifty (50) years after his death. To enjoy copyrights protection it is not necessary to register an object of rights.

## **13.7 Protection from Unfair Competition**

According to Article 5 of the Law on Unfair Competition the following activities constitute unfair competition:

- illegal use of a commercial name, trade mark, service mark and (or) any other commercial designation of an entrepreneur which misleads or may mislead consumers with regard to the manufacturer or trader or goods (work, services);
- emulating a competitor by way of direct reproduction of external appearance of competitor's goods, his business name, labelling of goods, trade mark, other commercial symbols, as well as advertising materials, firm's package, form, or other

external design of goods, which may mislead a consumer with regard to the manufacturer or trader of given goods (work, services);

- deliberate distribution of false information and statements with regard of goods (work, services) of a competitor, in particular with regard of origin, manufacturer, trader, as well as quality, consumer values, purposes, method and place of manufacture of goods (work, services), as well as other deliberately false information discrediting goods (work, services), good name and reputation of a competitor;
- imposition by the seller, who has no competition, on the buyers of additional conditions with regard to selling, which due to their nature or commercial designation do not pertain to the subject matter of the agreement;
- distribution of advertisements and other information containing improper comparison with goods (work, services) or business of another competitor;
- deliberate distortion or concealment in promotional materials of information concerning true properties quality and prices of goods (work, services);
- entering into and performance of any agreements between competitors with regard to prices, division of markets, elimination of other entrepreneurs and other conditions of activities aimed at elimination or substantial restriction of competition;
- horizontal merger of entities in market relations, which lead to substantial restriction or elimination of competition;
- obtaining, use or disclosure of scientific and technical information, business information or any other information which constitutes commercial or service secret, without its owner's authorisation;
- gaining of advantages in competition by way of using dumping prices;
- other acts which lead to elimination or restriction of competition, granting and (or) gaining of unreasonable advantages.

## **14. OIL AND GAS**

### **14.1 General**

Oil production is the backbone of the economy of Kazakhstan and its most rapidly developing sector, generating a substantial portion of the gross national product and providing a large part of budget revenues and hard currency earnings for the country.

Kazakhstan ranks as the 12th nation in the world in terms of proven reserves of oil and gas condensate, and it is rated 23rd in the listing of the worlds leading oil producing countries.

The key role in the oil production in the Republic is played by 7 companies producing almost 86% of Kazakh oil. Tengizchevroil JV is by far the undisputed leader, whose production is comparable with the aggregated production of its three nearest rivals – Mangistaumunaigaz JV JSC, Uzenmunaygaz PC and Karachaganak Petroleum Operating B.V.

The leading 7 include PetroKazakhstan JSC, CNPC-Aktobemunaygaz OJSC and Kazakhoil-Emba OJSC.

Kazakhstan has a developed infrastructure, enabling delivery of oil from the producing regions of the Republic to the pipeline system of Russia, through which the products from Kazakhstan fields can be exported to foreign markets. In addition, the construction of an oil pipeline from west Kazakhstan (Atyrau), to west China (Alashenkou), with a projected capacity of 20 million tonnes per annum, stretching about 3,000 kilometers is being pursued by a Kazakh-Chinese joint venture, called CJSC Munaitas. The first leg of the pipeline (from Atyrau to Kenkiyak, Kazakhstan – 448 kilometers), with a capacity of up to 12 million tones per annum, has already been built. The second leg of the pipeline (from Atasu, Kazakhstan to Alashenkou) is projected to be completed by December 2005. The third leg will be built from the oil ramp at Atasu railway station in Karaganda region to the Kazakh-Chinese border near the Druzhba-Alashankou railway terminal.

Apart from the Caspian shelf reserves, the explored Kazakhstan resources of natural gas make 1.8 tn m<sup>3</sup>. Over 95% of gas reserves are concentrated in 142 fields (in free and dissolved form), located in the territories of Atyrau, Aktyubinsk, Western-Kazakhstan and Mangistau regions.

The main feature of the resource base of the country's gas industry is that the gas reserves are mainly associated with oil, oil and gas and oil and gas condensate fields: there are 66 fields in the Republic, having industrial gas reserves - and only 7 small fields of them are stand-alone gas fields. The initial sources of stand-alone gas fields make only 4.2 bln m<sup>3</sup>, which is not more than 1.5% of the total initial gas reserves of the country.

## **14.2 Legislation**

The primary legal acts regulating the oil and gas industry are the Constitution of Kazakhstan, bilateral agreements on cooperation in this sphere, the Law of Kazakhstan “Concerning Subsurface and Its Use” № 2828 dated 27 January 1996, as amended by the Law of Kazakhstan dated 1 December 2004 № 2-III, the Decree of the President of Kazakhstan having the force of a Law “On Petroleum” № 2350 dated 28 June 1995, Decree № 108 dated 21 January 2000 of the Government of Kazakhstan “Concerning the Approval of the Rules for Granting the Rights to Use Subsurface in the Republic of Kazakhstan”, as well as many other Government Resolutions and Orders of different Ministries.

In accordance with the Law № 2828, both Kazakhstani and foreign physical persons and legal entities, have the right to use the subsurface. The right to Subsurface Use shall emerge by the following ways:

- 1) granting of the Subsurface Use Right to an entity directly by the State;
- 2) assignment of the Subsurface Use Right;
- 3) assignment of the Subsurface Use Right by legal succession.

The right to Subsurface Use may be granted by the Competent Authorities, by two (2) methods:

- 1) by way of conducting of a tender; and
- 2) by way of conducting direct negotiations.

In case of a tender, the winner shall be determined on the basis of a combination of the following principal parameters:

- the time of beginning and intensity of conducting exploration;

- the date of beginning production and of reaching its economical and technical potential, as well as maximum coefficient of extraction of useful minerals;
- intended amounts of initial and subsequent payments to the budget;
- amounts of investments, deadlines and terms of financing the project and capital investments into the development of the production and social infrastructure of the contractual territories;
- compliance with the requirements associated with the protection of the subsurface and the environment, safe performance of operations in accordance with the Kazakhstani legislation;<sup>18</sup>
- obligations undertaken with regard to hiring of Kazakhstan personnel as a percentage of the total number of employed personnel and proposals concerning the organisation of financing training and retraining of Kazakhstan personnel<sup>19</sup>;
- obligations undertaken with regard to purchase of goods, work and services of Kazakhstan origin as percentage of the total value of goods, work and services which are required for the performance of work under the contract and which are in compliance with national and (or) international standards<sup>20</sup>;
- proposals concerning the development and use of high technologies, new and processing production facilities, main pipelines and other pipelines, construction and joint use of infrastructure items and other facilities<sup>21</sup>.

The amendments to the Law “Concerning Subsurface and Its Use” contain provisions aimed at protection of the Kazakhstani market. There are some other new provisions in the Law, which oblige contractors, when conducting subsurface use operations, to purchase goods, work and services from Kazakhstani producers, provided they comply with the national and (or) international standards, and prohibit to invite exclusively foreign organizations where there are Kazakhstani producers of the goods, work and services to be purchased. These provisions are aimed at support of Kazakhstani manufactures<sup>22</sup>.

The winner of a tender shall conclude a contract for the performance of subsurface use contract with the competent authority (see below) in order to carry out work on a subsurface block. Subsurface use right shall be deemed to be granted and acquired only from the time when a contract is registered. In the event that the winner of a tender fails to submit a draft contract for the performance of subsurface use operations within a period longer than one year, the competitive bid commission shall abolish the decision adopted previously on recognition of the applicant for obtaining subsurface use rights, as the winner of a given tender<sup>23</sup>.

In case of direct negotiations, the following contracts shall be concluded without a tender:

- 1) for the performance of production operations with a person having the exclusive right to obtain subsurface use rights for production in connection with a commercial discovery on the basis of an exploration contract;

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18 The Law “Concerning the subsurface and its use” as amended on 1 December 2004

19 The Law “Concerning the subsurface and its use” as amended on 1 December 2004

20 The Law “Concerning the subsurface and its use” as amended on 1 December 2004

21 The Law “Concerning the subsurface and its use” as amended on 1 December 2004

22 Article 63-2 of the Law “Concerning the subsurface and its use” as amended on 1 December 2004

23 Article 41-7 of the Law “Concerning the subsurface and its use” as amended on 1 December 2004

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- 2) for the performance of operations associated with the construction and (or) operation of underground facilities not connected with exploration and (or) production;
- 3) for the performance of exploration and (or) production operations with the National company.

The Ministry of Energy and Mineral Resources of Kazakhstan is the Competent Body with regard to:

- preparation and organisation of tenders for the granting of the Right to Use Subsurface for conducting Exploration, Production, and combined Exploration and Production;
- conducting of negotiations with Subsurface Users concerning terms of Contracts, preparation of draft Contracts together with Subsurface Users;
- conclusion and registration of the contract, except for contracts on exploration, production or combined exploration and production of commonly occurring useful minerals;
- monitoring and supervision of compliance with the implementation of contracts;
- issuing of permits for the transfer of subsurface use rights as well as registration of a transaction associated with pledging subsurface use rights in accordance with Article 14 of the Law;
- ensuring compliance with and termination of Contracts in accordance with the procedure and on the bases as provided for by legislation.

Local executive bodies shall be the Competent Authority with regard to the conclusion of a Contract for Exploration and/or Production of commonly occurring useful minerals for commercial purposes.

### **14.3 The Competent Authorities**

The Ministry of Energy and Mineral Resources of Kazakhstan is the Competent Body with regard to the conclusion of Contracts for Exploration, Production, combined Exploration and Production of Useful minerals and also Useful Minerals of Technogenic Mineral Formations.

The Committee for Geology and Protection of the Subsurface of the Ministry of Energy and Mineral Resources of Kazakhstan is the Competent Authority with regard to the conclusion of a Construction Contract and/or a Contract for operation of underground facilities not connected with Exploration and/or Production, and state-directed geological exploration of the subsurface.

Local executive bodies shall be the Competent Authority with regard to the conclusion of a Contract for Exploration and/or Production of commonly occurring useful minerals for commercial purposes.

## **15. PRE-EMPTIVE RIGHT TO BUY AN ALIENATED SUBSOIL USE RIGHT**

On 1 December 2004 the President of the Republic of Kazakhstan signed Law No. 2-III on Introduction of Amendments and Additions into Certain Legal Acts on Subsoil Use and Subsoil Operations. This Law was previously adopted by the Parliament on 5 November 2004. One of the most important features of this Law is that it has introduced an amendment

(the “Amendment”) to the Presidential Decree having the force of a law № 2828 “On Subsoil and Subsoil Use” dated 27 January 1996 (the “Subsoil Law”). This new Law amends Article 71 “Guarantees of Subsoil Users’ Rights” of the Subsoil Law as follows:

*With the aim to preserve and strengthen the reserves and power resources of the economy in new and existing contracts for subsoil use the State shall have a pre-emptive right over any other party to the contract or participants in a legal entity having a subsoil use right, or other persons to buy an alienated subsoil use right (or part thereof), or part of a share (stockholding) in a legal entity having a subsoil use right, on the conditions not worse than those offered by other buyers.*

This Amendment is designed to provide the State with the pre-emptive right to buy out a share in not only oil and gas projects, but also mineral (as well as any subsoil use activity) projects.

The impact of the Amendment in the context of oil and gas projects may become clear if it is read in the context of recent developments relating to the sale of British Gas’s (“BG”) interest in the North Caspian Product Sharing Agreement (the “PSA”), for the development of Kashagan oil field, which developments will be directly affected by the Amendment. The parties to the PSA are: BG - 16.67% interest, ENI - 16.67% interest, ExxonMobil - 16.67% interest, Royal Dutch/Shell - 16.67% interest, TotalFinaElf - 16.67% interest, ConocoPhillips - 8.33% interest, and INPEX - 8.33% interest.

On 7 and 11 March 2003, BG announced that it had agreed to sell its interest in the PSA, to two Chinese companies for USD 1.23 billion, namely, CNOOC North Caspian Sea Ltd. And Sinopec International Petroleum Exploration and Production Corp. (a wholly owned subsidiary of China Petrochemical Corporation (“Sinopec Group”).

The proposed transaction had, as one of its conditions precedent, the requirement of the approval of the transaction by the Kazakhstani authorities. After the announcement all PSA parties, except for INPEX, exercised their pre-emptive rights. The five (5) PSA parties agreed to divide the interest of BG evenly and prepared documentation for completion of the transaction, waiting only the approval of the Kazakhstani authorities. At this stage the Government of Kazakhstan expressed its desire to purchase BG’s interest and declared that it had a pre-emptive right to the interest of BG.

The Amendment was introduced to create legislative justification for the Government’s actions which were being challenged by the PSA investors. The PSA investors have reserved their right to contest the constitutionality of the Amendment. There are several apparent methods of structuring transactions so as to circumvent the apparent intention of the Amendment. Any such methods may, of course, provoke further legislative amendment.

## **16. TELECOMMUNICATIONS**

### **16.1 Introduction**

The telecommunications sector is governed primarily by the Law on Telecommunications of 5 July 2004 № 567-II.

The Ministry of Industry and Trade of Kazakhstan places great importance to the development of the market for telecommunication services and information technologies, and

to attracting potential investors, which they hope and believe will stimulate the manufacture of high-tech and export-oriented products.

The Ministry's main aim is the creation of favourable conditions for the breakthrough and development of information technologies in Kazakhstan by way of attracting foreign companies, IT industry leaders, as well as the interest and involvement of local companies operating within the sector.

## **16.2 The Competent Authority**

The Agency of Kazakhstan on Informatization and Communication is the central executive authority authorized to implement the State policy in the sphere of informatization and communication.

Due to the reorganization of the administrative system of Kazakhstan, which is being currently implemented, changes are possible.

## **16.3 Licensing of Telecommunication Services**

Telecommunication services are subject to licensing. Licenses may be issued based on the results of a tender, if the authorized body decides to hold such a tender. The decision to hold a tender shall be based on published reasons. The authorized body may refuse to issue a license if there is considered to be a threat to the national security of the Republic. The period of validity of a license is determined by the licensor depending on the type of activity, and may be as long as fifteen (15) years for projects requiring large capital investment and long payoff periods.

## **16.4 Foreign Participation**

Till 2008 Kazakhstan plans to retain its right to limit the commercial presence of foreigners in the charter capital of telecommunications operators at the level below 50%; and to complete the National Information Super Highway by using the capabilities of the owners of transportation networks (railway, power supply, oil and gas transportation etc). For this period, preference will be given to foreign investment in the form of loans and credits.

# **17. CONSTRUCTION**

## **17.1 Introduction**

In 2001, Kazakhstan adopted a Law on Architecture, Town Planning and Construction Activity (the "Law") which replaced the old Law N 2473-XII of 22 October 1993 "On Architecture and Town Planning in Kazakhstan". The new Law limits foreign participation in "construction joint ventures," prescribes guidelines on the use of subcontractors, sets out the scope of State and public control over construction activities, introduces requirements for floating tenders and imposes certain minimum standards. The Law has a broad ambit and governs the conduct of numerous construction activities including engineering design services, project management, quality control services, architectural design works, surveying (including quantity surveying), and a variety of installation works.

## **17.2 Foreign Participation**

The Law states that foreign participation in the charter capital of joint construction ventures must not exceed 49%. On the other hand, it appears that a local entity, which is 100% owned by a foreign company, may still be able to participate in joint ventures, and have, in such joint ventures, more than 49% of the charter capital.

Keeping in view the current political mindset, it may be that applications for future tenders may require, as a condition precedent, the applicant (if foreign) to enter into a joint venture with a local entity, which, in turn, will raise issues including allocation of responsibility, risks and liability.

## **17.3 Contracts**

The Law requires that construction contracts must be executed in accordance with Kazakhstani legislation, primarily the Civil Code. This may not necessarily mean that Kazakh law needs to be the governing law of the relevant contract, as the Civil Code permits the contracting parties to choose the governing law of the contract.

The Law prescribes that the guarantees, for the work performed under construction contracts, must be specified in the construction contract, and must be for a minimum period of two years, from the date of job completion. It is not clear though, as to the extent of the guarantee, whether different limits can apply to latent and patent defects and whether a limit on the amount of damages that could be payable is consistent with this provision. Clearly, care will need to be taken to ensure that the remedy for the defect is clearly specified in relevant construction contracts so that the Law does not reallocate risk to a particular contractor who had not contractually assumed such risk.

Works and services, which the contractor, pursuant to a construction contract, intends to turn over to subcontractors, must be specified in subcontracting contracts, and such subcontracted work must not exceed two-thirds of the total contracted works in volume and value. It is not clear how the authorities will calculate volume of work. It is worth mentioning here that, where there is a large construction element with involvement of relatively less sophisticated engineering design elements, such as in the case of road projects, for example, a restriction on subcontracting may not necessarily be either in the overall interests of the State, or lead to more work for Kazakh entities.

## **17.4 Licensing of Construction Activity**

Under the Law, construction activity continues to be subject to licensing and general construction licenses still require regular confirmation as follows: annually, for construction and installation licenses; annually, for licenses for the manufacture of construction materials, articles and modules; every three years, for licenses for design, survey and expert activities; and every five years, for construction licenses issued to individuals.

## **17.5 Tenders**

The Law provides that in certain cases the client must choose the contractor by holding an open or closed tender, with or without preliminary qualification of candidates (the procedure for holding tenders for the construction of facilities for the State is governed by special

legislation). The client or his nominee determines the terms and procedure of the tender and forms a tender commission. Tenders must comply with the conditions set out in the Law, including, at the time when the decision is made to hold a tender, the client must have appropriate rights to the land plot or a decision from an executive body granting such rights. In addition, the tender participants must not be prohibited from doing business in Kazakhstan, bankrupt, organizers of the tender or members of the tender commission or organizations not duly registered. Breaches of these and other conditions listed in the legislation can be grounds for declaring the results of the tender void and entail the cancellation of any agreement executed on the basis thereof.

## **17.6 Approvals and permits**

The Law contains a list of fee-based permits, approvals and registrations required in order to carry out construction activity. The fees are determined by the Government and pertain to the cost of permits relating to:

- the akim's resolution to provide a land plot or use permit for construction;
- a design order containing the parameters of the facility or other reference data;
- technical specifications for connecting the facility to public utilities;
- an approval by the local architectural authorities;
- drafting design documentation and gaining approval for the same;
- expert review of the project;
- receiving a construction permit;
- formal commissioning of the facility; and
- registration of the facility with the State agency for registering rights to immovable property.