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Tax regulation

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**BRIEF OVERVIEW OF  
THE KEY ASPECTS  
OF LAW AND  
ACTIVITIES OF  
THE ASTANA  
INTERNATIONAL  
FINANCIAL CENTER**

This overview is a digest of articles and publications on certain key aspects of law and activities of the Astana International Financial Centre (hereinafter, the "**AIFC**") prepared by the lawyers of AEQUITAS Law Firm<sup>1</sup>. The overview also contains a comparative (with the general jurisdiction of the Republic of Kazakhstan (hereinafter, the "**Kazakhstan**") analysis of certain issues, which we hope will be helpful in selecting the jurisdiction while deciding on the place of registration for a respective business unit within the geographical territory of Kazakhstan.

Section A contains brief summary data about the AIFC and its key features; more detailed information on the said issues is outlined in Section B, which also contains references to original articles and publications with more detailed information on the issues under analysis.

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The review cannot be regarded as legal advice or legal basis for specific decision-making. Should you require legal assistance on antimonopoly regulation matters, we would be happy to help.

<sup>1</sup> AEQUITAS has the status of a *recognized company* in the AIFC territory.

## A. INTRODUCTION AND GENERAL INFORMATION

### 1. BASIC INFORMATION ON THE AIFC



#### 1.1. STATUS AND BENEFITS

##### IMPORTANT!

The AIFC enjoys a special legal status and was established based on the special AIFC Constitutional Law (December 2015). In light of the fact that the AIFC is essentially a separate jurisdiction in the Kazakhstan territory, its establishment required amendment of the Kazakhstan Constitution in March 2017.

The purposes and objectives of the AIFC encompass assistance with the investment attraction to the Kazakhstan economy, development of the Kazakhstan securities market and integration thereof with international capital markets, development of the financial services and technologies market, electronic commerce and innovative projects. To achieve these purposes the AIFC was furnished on a legislative level with certain preferential legal regimes and specifics, in particular, as follows:

- **Tax preferences:** AIFC bodies and participants, including their employees, are exempted from tax payments until 1 January 2066 with respect to a number of income and property taxes. The tax preferences apply to the AIFC participants providing financial services and those who provide ancillary services to the AIFC bodies and/or the AIFC participants providing financial services (the list of financial and ancillary services falling under the preferential tax regime is determined by the AIFC Constitutional Law and the AIFC acts).
- **Simplified visa and labor regime:** in addition to the general visa-free entrance for a term of up to 30 calendar days established for the citizens of 45 foreign countries arriving in Kazakhstan, a special visa regime with a term of up to 5 years is in effect for the employees of the AIFC bodies and participants and their family members. Furthermore, such persons are exempted from the requirement to obtain work permits for foreign nationals.
- **Simplified registration of foreign nationals:** introduction of a simplified registration regime based on the "one stop" principle for the issuance of visas, work permits and other procedures in the AIFC territory. A special *Expat Centre* was established for these purposes, which provides about 500 services to foreign nationals.
- **Simplified currency regime:** AIFC participants do not fall under the requirements of the currency legislation of Kazakhstan on registration of currency operations and notifications about effecting such operations, notifications about opening of accounts with foreign banks, etc.; obligations of the AIFC participants may be expressed and performed in any currency stipulated by a contract.

- **AIFC law principles:** AIFC law is based on the principles, rules and precedents of the laws of England and Wales, including the standards of the world leading financial centres.
- **All records management in English:** transactions, one of the parties to which is an AIFC participant, effected in writing must be set out in the English language. Development and adoption of the AIFC acts, documentation and legal proceedings are also in English.
- **Independent institutions for dispute resolution: there are two dispute resolution authorities effective in the AIFC territory:** AIFC Court and International Arbitration Centre. Judgments of the AIFC Court are enforced in the Kazakhstan territory without the necessity to undergo the recognition procedure in the order similar to other Kazakhstan courts' judgments. Arbitral awards of the International Arbitration Centre are subject to enforcement in Kazakhstan in accordance with the same procedure as envisaged for the Kazakhstan arbitral awards. Security measures in the framework of arbitration in the AIFC may be enforced in Kazakhstan without the necessity to apply to Kazakhstan courts (for this purpose, it is sufficient to have an order of the AIFC Court on claim security). The AIFC Court does not collect charges for filing claims, administration and conduct of hearings until 31 December 2021. Furthermore, parties to a contract signed before 31 December 2021 and containing a clause on the AIFC Court's jurisdiction over disputes will be entitled to free-of-charge administration and resolution of disputes in the AIFC Court, which arise out of such contract even after 31 December 2021. Likewise, the International Arbitration Centre does not collect charges for registration, administration and conduct of hearings until 31 December 2021. The parties may enjoy free-of-charge administration of arbitration proceedings even after 31 December 2021, for which purpose it is sufficient to include an arbitration clause on arbitration under the rules of the International Arbitration Centre in a contract entered into before the said date.

## 1.2. CURRENT AIFC LAW

The current AIFC law is based on the Kazakhstan Constitution and composed of (apart from the special AIFC Constitutional Law) the AIFC acts, which may rely upon the principles, rules and precedents of the laws of England and Wales and/or standards of the world leading financial centres, issued by the AIFC bodies (hereinafter, the "**AIFC Acts**"). The issues not governed by the AIFC Acts fall under the current laws of Kazakhstan.

In total (as of 31 August 2020), the AIFC issued more than 70 AIFC Acts. All AIFC Acts are available at <https://aifc.kz/legal-framework/>, where they are divided into the sections, as follows:

- national legislation of Kazakhstan;
- general purpose AIFC Acts;
- AIFC Acts regulating financial services;
- AIFC Court Rules;

- IAC arbitration and mediation rules;
- joint orders with the governmental authorities of Kazakhstan; and
- other (reporting standards, reporting forms).

### 1.3. ADMISSION TO ACTIVITIES. REGULATION, LICENSING AND ACCREDITATION

Activities in the AIFC territory may be carried out either in the capacity of the AIFC participant, or in the capacity of an accredited market participant.

Status of a participant is acquired by registering physical presence – by setting up and registering a new company, assigning the status of a *recognized company* for the companies registered in other jurisdictions or by way of redomiciliation.

**Recognized Company.** A company registered in another jurisdiction (including registered under the Kazakhstan legislation) may have presence in the AIFC and do its business in the form of a *recognized company*.

Physical presence of at least 1 person and a registered legal address in the AIFC territory are the mandatory requirements for registration as a *recognized company*. An existing company from another jurisdiction may actually register as a *recognized company* by registering its branch or a representative office in the AIFC. Such *recognized company* will be allowed to carry out only those types of regulated activities, for which its parent company holds a license.

**Redomiciliation.** The AFC allows for redomiciliation – transfer of the company's registration to the jurisdiction of the AIFC from another jurisdiction (which also recognizes redomiciliation) based on a certificate of continuation. The redomiciling company continues its business preserving its portfolio, credit ratings, rights and obligations towards its counterparties subject to the legal regime of the AIFC and status of an AIFC participant (tax regime, corporate rules, etc.).

**Licensing.** According to the general rule, activities of the AIFC participants are carried out under a commercial license. The license is issued for the term of 1 year, after which it is extended for another year.

The AIFC participants carrying out their activities in the sphere of financial services must obtain a special AIFC license depending on the category of activities in this sphere regulated by the *Astana Financial Services Authority* (hereinafter, the "**AFSA**").

Regulated Activities	Market Activities	Ancillary Services
<ul style="list-style-type: none"> <li>■ Investments</li> <li>■ Custody activities</li> <li>■ Trust services</li> <li>■ Fund management</li> <li>■ Islamic banking</li> <li>■ Representation</li> <li>■ Lending</li> <li>■ Insurance, including Islamic</li> <li>■ Bank accounts</li> <li>■ Payment systems, etc.</li> </ul> <p><b>(in total 27 types of activities)</b></p>	<ul style="list-style-type: none"> <li>■ Exchanges</li> <li>■ Clearing houses</li> <li>■ Electronic money trading</li> <li>■ Borrowing and crowdfunding platform management</li> <li>■ Organized trading platform management and private financing platform management, etc.</li> </ul>	<ul style="list-style-type: none"> <li>■ Legal services</li> <li>■ Audit services</li> <li>■ Accounting services</li> <li>■ Consulting services</li> <li>■ Credit ratings</li> </ul>

With respect to other services provided by other AIFC participants, one should rely upon the following principle: issues not governed by the AIFC Acts will be regulated by the Kazakhstan legislation. For example, if the Kazakhstan legislation requires a license for certain types of activities and the AIFC Acts contain no requirements on the necessity to obtain a license for such activities, it will be necessary to obtain a respective license in accordance with the Kazakhstan legislation.

**Accreditation.** In addition to the AIFC participants, a person located in the jurisdiction other than the AIFC (including a Kazakhstan legal entity) may apply to AFSA with a request to grant the status of a recognized person that is not an AIFC participant. Accreditation (recognition) grants an opportunity for the financial market infrastructures (trading platforms and settlement-and-clearing agencies) and qualified potential market participants (brokers) to be officially recognized for carrying out their activities in the AIFC without the necessity to ensure physical presence in the AIFC and obtain a relevant AIFC license.

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## B. OVERVIEW OF CERTAIN ASPECTS OF LAW AND ACTIVITIES OF THE AIFC

### 1. SPECIFICS OF SETTING UP AND REGISTERING COMPANIES



#### 1.1. ORGANIZATIONAL LEGAL FORMS OF LEGAL ENTITIES BEING SET UP

[• Please click [here](#) to see the original article in Russian by Tair Kultelev]

##### IMPORTANT!

The AIFC participants are **registered** (including **recognized companies** and **redomiciliated companies**) legal entities. As of 31 August 2020, the AIFC has 545 registered participants.

A legal entity (hereinafter, the "LE") may be organized and registered in the AIFC territory in one of the following organizational legal forms (hereinafter, the "OLF").

Private Company	Public Company
<p><b>Investment Company</b> – investment activities, provision of depository and trust services; such activities fall within the prudential requirements</p>	<p><b>Restricted Scope Company</b> – used by professional investors, state structures, family offices and a limited number of institutions. Characterized by a lesser scope of regulation and greater confidentiality</p>
<p><b>Special Purpose Company</b> – for the implementation of a specific project on structured financing (including Islamic financing), specifically, securitization transactions</p>	<p><b>Limited Partnership</b> – this is a LE composed of at least 1 participant liable for the debts of such partnership and 1 participant whose liability is limited to a contribution</p>
<p><b>General Partnership</b> – for joint business by two or more persons who enter into a Partnership Agreement on the principles of joint and several liability</p>	<p><b>Limited Liability Partnership</b> – must have at least 2 participants whose liability for the partnership's debts is limited by their contributions to the capital. The partnership participants may act on behalf of the partnership as its agents, and liability of the participants and the partnership for such activities is joint and several</p>
<p><b>Foundation</b> – does not carry out commercial activities and is normally set up for charitable purposes</p>	<p><b>Non-Profit Incorporated Organisation</b> – organization whose primary purpose of activities is not to derive income and which does not distribute the received net income among its participants</p>

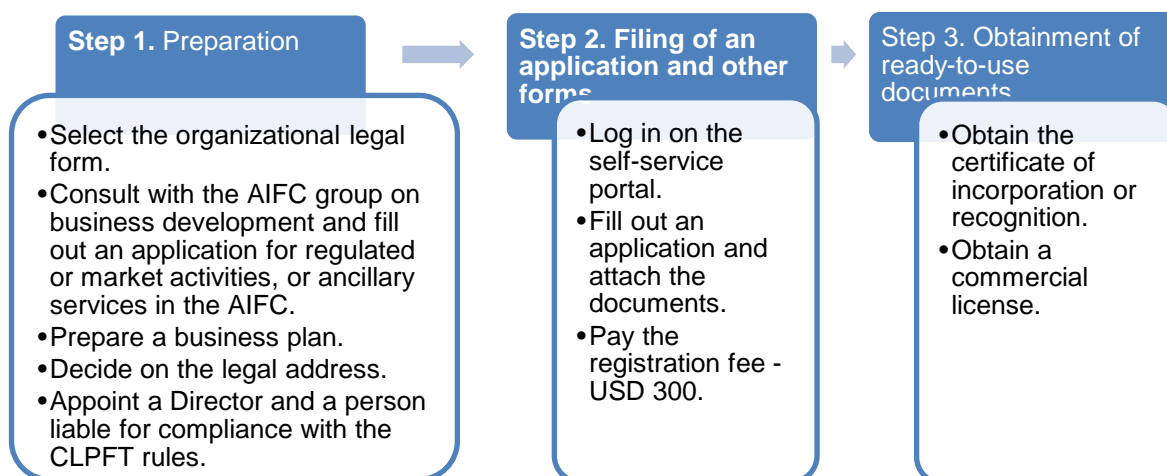
Key distinction between private and public companies is that public companies may publicly offer their securities for purchase, in which connection public companies fall within a number of additional requirements (significant charter capital, reporting, presence of a certain number of directors, presence of a corporate secretary, etc.).

To date, the most popular OLF is the form of a **private company** (385 of 545 registered organizations as of 31 August 2020), which can be explained by a relatively simple setting up procedure and low costs (possibility to register a company with 1 shareholder, possibility for new shareholders to join the company is determined by the current shareholders, minimum regulatory burden, absence of requirements on the minimum charter capital), including flexibility and optionality of corporate rules (possibility to itself keep the register of shareholders, issue shares of different classes, flexible approach to powers of management bodies, etc.). Furthermore, if setting up a *special purpose company*, it is not necessary to have an office in the AIFC, there is no requirement on mandatory annual meetings of shareholders, etc.

## 1.2. PROCESS OF REGISTRATION AS AN AIFC PARTICIPANT

There is no standard service on company registration in the AIFC territory.

Based on our own experience in registration of private and recognized companies, please see below the following algorithm of actions. For more information about the registration procedure, please visit the AIFC website<sup>2</sup>.



A company must have its legal address within the boundaries of the AIFC. Furthermore, the AIFC participants support office may provide a temporary legal address.

If a foreign national is appointed as a company Director, he/she must obtain an individual identification number (IIN), for which purpose he/she must apply to the special Expat Centre.

<sup>2</sup> Points to consider before registration: <https://afsa.aifc.kz/consider-before-opening-business/>.



The form of application for the company registration can be found on the AIFC self-service portal. In addition to application, it is also necessary to submit some other documents (depending on the contemplated types of activities). Documents issued by a foreign country do not require apostil and translation into the Russian/Kazakh language and must be submitted to the AIFC in English.

After submitting the set of documents, it is necessary to pay a fee for the registration/incorporation and issuance of a commercial license in the amount of USD 300.

To date, the term of registration is not determined by the AIFC Acts; however, in practice, this process takes about 2 weeks.

Registration is deemed to have been accomplished after issuing:

- *certificate of incorporation* of a private/public company or certificate of recognition for a recognized company containing the name, BIN and date of registration (for redomiciliated companies – certificate of continuation), *and*
- commercial license.

The only constitution document for companies is the **Articles of Association**. It is also allowed to use the model Articles of Association, which may be amended or supplemented subject to requirements of the AIFC Acts.

We previously mentioned that no minimum charter capital (share capital) is established for private companies. The minimum charter capital for public companies is USD 100,000. Each company share must be of fixed nominal value. Please note that the registrar demands from a founder in case of a public company incorporation to confirm the presence of the said amount on the founder's personal account.

In the event of transactions with shares, a company must submit to AFSA a notice of transfer of shares, register of shareholders, resolution on the sale and acquisition of shares, document confirming the transfer of shares, including information on the beneficial owner. The registrar considers the submitted documents and information, performs registration and notifies the justice authority to update the data at the National Register of Business Identification Numbers.

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## 2. REGULATION OF ACTIVITIES IN THE SPHERE OF FINANCIAL SERVICES



The AIFC participants providing financial services licensable pursuant to the AIFC Acts must file a respective application to AFSA.

Services in the financial sphere, for which AFSA issues a license, are divided into 3 groups:

- **Regulated Activities;**
- **Market Activities;**
- **Ancillary Services.**

Please note that the AIFC rules provide for different requirements to issuing of licenses for each of the above groups.

### IMPORTANT!

A license issued by the AIFC is effective only in the AIFC territory. If according to applicable legislation (including legislation of Kazakhstan) financial activities are licensable or require obtainment of a special permit from an authorized agency outside the AIFC, the AIFC participant must comply with such requirement when carrying out such types of activities outside the AIFC.

In future AFSA contemplates to introduce the so-called "passport" agreements with other jurisdictions with respect to provision of financial services.

### 2.1. REGULATED ACTIVITIES

An AIFC participant engaged in regulated activities (as defined below) is called an **Authorized Firm**.

The regulated activities include, among other, as follows: (1) purchase, sale, subscription or guarantee placement of any investments as a principal or agent; (2) management of investments that belong to another person; (3) provision of custody services; (4) provision of trust services; (4) advice on investment-related matters; (5) Islamic banking; (6) provision of insurance services, insurance management, insurance broking; (7) provision of lending services, from extension of credits to advice on the issues of selecting the type of lending; (8) provision of payment services; (9) opening and maintenance of bank accounts; and (10) payment system management.

To obtain a license an applicant (AIFC participant) must submit not only all required information specified in the AIFC rules and confirming that it meets the established criteria, but also pay a fee. An average fee for 1 type of Regulated Activities is approximately seven thousand US dollars (USD 7,000). If an AIFC participant intends to obtain a license for several Regulated Activities, it is only necessary to pay a fee for the most expensive type of Regulated Activities.

There is a difference in the licensing spheres between the AIFC rules and the general legislation of Kazakhstan. For example, the representation activities of persons who are not the AIFC participants are not typical for the Kazakhstan legislation, while it is licensable by the AIFC. Likewise, advice on investment matters, organization of custody services, provision of services on the issues of selecting the type of lending are the types of activities that do not require licensing under the Kazakhstan legislation, whereas such services are licensable if provided in the AIFC.

## 2.2. MARKET ACTIVITIES

An AIFC participant carrying out these types of activities is called an **Authorized Market Institution**.

This group of services in the financial sphere includes: (1) stock exchange's activities; (2) clearing house's activities; (3) management of a platform trading in digital assets; (4) management of a borrowing, investment crowdfunding platform or a multi-purpose platform; (5) management of an organized trading platform; (6) management of a private financing platform.

AFSA provides for separate rules for the regulation of activities of the Authorized Market Institutions by securing special requirements to Authorized Market Institutions relating to finances, internal documents, conflict of interests, technical resources and other.

To obtain a license for carrying out the Market Activities an applicant must pay a certain fee. The fee for activities of a stock exchange or a clearing house is one hundred twenty-five thousand US dollars (USD 125,000), while the other types of activities require a fee in the amount of five thousand US dollars (USD 5,000) each. When filing an application for a license with respect to several types of Market Activities, the payment is made in accordance with the procedure stipulated for applications for licenses for the Regulated Activities.

The market institutions authorized by the AIFC (exchanges, clearing houses, etc.) issue binding rules regulating the relations between them and their participants. The principle of operation of these rules is identical to the principle of operation of an agreement between the above entities.

According to the rules regulating the activities of Authorized Market Institutions, professional participants (brokers, etc.) of an exchange and other authorized market institutions of the AIFC may only be the Authorized Firms holding respective licenses or accredited market participants, specifically, non-AIFC participants whose accreditation will be described in detail below.

## 2.3. ANCILLARY SERVICES

An AIFC participant providing ancillary services to other AIFC participants engaged in the provision of financial services is called an **Ancillary Service Provider**.

General rules of the AIFC secure the exhaustive list of Ancillary Services: (1) provision of legal services; (2) provision of audit services; (3) provision of accounting services; (3) provision of expert knowledge or advice on a specific topic; and (4) credit scoring services.

AFSA issues a license for Ancillary Services and secures special requirements to an applicant. Please note that no requirements to the applicant's financial resources are stipulated. The average fee for obtaining a license for Ancillary Services is two thousand US dollars (USD 2,000). In the event of filing an application for several types of Ancillary Services, the fee is paid for each type of Ancillary Services.

## 2.4. ACCREDITATION

According to the general provisions of the AIFC, a market entity holding a permit or a license for activities of an exchange or services of a clearing house located outside the AIFC jurisdiction may file an application for recognition as a **Non-AIFC Market Institution** and carry out its activities in the AIFC territory without a necessity to obtain a relevant AIFC license.

A person holding a permit or a license for carrying out of activities outside the AIFC jurisdiction may file an application as a professional exchange participant (broker, dealer, etc.) for recognition as a non-AIFC member (hereinafter, the "**Accredited Participant**") and carry out its activities in the AIFC without obtaining the AIFC license.

It is important to distinguish the authorized participants of the AIFC and accredited market participants (accredited market institutions and accredited exchange participants). Accredited market participants are not the AIFC participants and they cannot enjoy any tax preferences.

## 2.5. ASTANA INTERNATIONAL EXCHANGE (HEREINAFTER, THE "AIX") AND KEY REQUIREMENTS TO EXCHANGE LISTING

The AIFC serves as a basis for the Astana International Exchange or AIX. The AIX rules provide for certain requirements to market entities wishing to participate in listing on the exchange. In addition to market capitalization of at least USD 1 mln for the issuers of shares and USD 500,000 for the issuers of debt securities as of the moment of listing, the minimum number of shares in free circulation and compliance with the established requirements to the issue prospectus, market entities must also submit the audited financial statements for 3 years prepared in accordance with the International Accounting Standards and other standards acceptable for AIX.

In light of the fact that the AIFC has been recently established, there are companies, which have been recently registered with the AIFC. It is difficult for such company to comply with the requirement on audited financial statements for 3 years. According to the information posted on the official website of the AIFC, each applicant for securities listing on AIX and securities listing on AIX will be considered on a case-by-case basis. In the event of a newly

established legal entity, AIX may consider other significant factors (e.g. history and efficiency of the main business, business nature, etc.). So, the recently established subsidiary companies or holding companies of the existing business (e.g. recently established company, which was set up in the AIFC as a parent company for a group of operating companies in Kazakhstan) may have the right to participate in the AIX listing subject to other circumstances.

In order for securities to be listed on AIX an issuer does not need to be an AIFC participant or an accredited market participant.

## 2.6. COMPARISON OF ORGANIZATIONAL STRUCTURES AND PRINCIPLES OF ACTIVITIES OF KASE AND AIX

Unlike AIX, the official list structure of the Kazakhstan stock exchange KASE, according to the Kazakhstan legislation, is divided into 3 platforms:

- main platform;
- alternative market;
- mixed market.

The platforms include sectors composed of shares, debt securities, bank depository securities, etc. Sectors are additionally subdivided into categories. For example, a share sector is subdivided into premium and standard categories.

KASE establishes separate listing requirements to each platform, sector and category. Accordingly, by way of segmentation KASE offers greater choice and more opportunities for potential issuers.

It is worth mentioning that AIX is developing in a similar direction. Thus, AIX has recently formed the Regional Equity Market Segment (REMS) intended to ensure a better access to equity financing for medium business entities of Kazakhstan and Central Asia.

AIX and AFSA simplified regulation for the REMS companies whose free float market capitalization does not exceed USD 200 mln. The adopted changes allow the REMS issuers preparing a simplified prospectus based on financial statements for one year and without the necessity to demonstrate the historical net profit. The new segment issuers were given two additional months to publish the first annual report. The minimum share ratio in free circulation for REMS companies was reduced up to 15%.

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### 3. TAX REGULATION

The tax regime is generally compliant with the tax legislation of Kazakhstan with certain exceptions envisaged by the AIFC Constitutional Law.

#### 3.1. CORPORATE INCOME TAX (CIT) AND VALUE ADDED TAX (VAT) EXEMPTION

##### ПРИМИТЕ ВО ВНИМАНИЕ!

The AIFC participants are exempted from the necessity to pay CIT until 1 January 2066 for the income derived from the provision of the following financial services in the AIFC territory:

- Islamic bank services;
- re-insurance services and insurance broker services;
- services on investment asset management of investment funds, accounting and storage, including services allowing to ensure the issue, placement, circulation, repurchase and redemption of securities of investment funds;
- broker and/or dealer and underwriting services;
- other financial services determined by the joint act of the AIFC, central executive authority for state planning and governmental authority performing management in the sphere of ensuring tax revenues and other mandatory payments to the budget (*to date, there is the approved list embracing 33 categories of financial services provided by the AIFC participants eligible for the CIT exemption*).

Understood as the "AIFC territory" is the territory within Nur-Sultan with precise boundaries determined by the President of Kazakhstan, where a special legal regime in the financial sphere is in effect.

The above services provided by the AIFC participants are also VAT exempt.

These tax preferences do not apply to the income of non-resident counterparties of the AIFC participants, which are taxable at the source of payment.

#### 3.2. CIT EXEMPTION IN CONNECTION WITH THE PROVISION OF A SET OF SERVICES TO THE AIFC BODIES AND/OR AIFC PARTICIPANTS

The AIFC participants are exempted from the necessity to pay CIT until 1 January 2066 for the income derived from legal, audit, accounting and consulting services provided to the AIFC bodies and the AIFC participants providing financial services under the AIFC rules, both licensable and non-licensable.

To apply the above preferences the AIFC participants must maintain separate accounting of earnings subject to CIT exemption (direct earnings) and those subject to taxation (other earnings).

### 3.3. EXEMPTION FROM THE PROPERTY TAX AND LAND TAX

The AIFC participants providing the above financial and ancillary services are exempted from the necessity to pay the property and land taxes for the facilities located in the AIFC territory.

### 3.4. EXEMPTION FROM IIT CIT ON DIVIDENDS AND INCREMENT VALUE

Individuals and legal entities (either the AIFC participants or not) are exempted from the necessity to pay the individual income tax (IIT) and CIT if they are holding rights to securities, participatory interests, shares (as defined below) until 1 January 2066 for the income derived:

- from increment value in case of selling securities officially listed by AIX as of the date of such sale;
- from increment value in case of selling shares or participatory interests in the charter capitals of participant legal entities registered under the current laws of the AIFC or those that obtained relevant accreditation;
- in the form of dividends and commission for securities officially listed by AIX as of the date of accrual of such dividends or commission;
- in the form of dividends on shares or participatory interests in the charter capitals of the AIFC participants.

The AIFC also provides for income tax exemption with respect to the income of the AIFC investment residents derived from the sources outside Kazakhstan; however, this rule will enter into force after introducing relevant amendments into the Tax Code of Kazakhstan.

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## 4. AIFC COURT

The AIFC Court is established in the form of a legal entity in the AIFC territory. The AIFC Court is independent in its activities and is separate from the judicial system of the Republic of Kazakhstan. The court's activities are governed by the AIFC Constitutional Law and the AIFC Court Regulations<sup>3</sup>. When considering disputes, the AIFC Court follows its own procedural AIFC Court Rules<sup>4</sup>.

The Chairman and justices of the AIFC Court are appointed and dismissed by the President of the Republic of Kazakhstan as advised by the AIFC Governor. Neither the Chairman, nor the justices of the AIFC Court need to be the citizens of or to reside in Kazakhstan and may carry out other activities, including to hold positions in another court of any country or jurisdiction other than the AIFC.

### 4.1. AIFC COURT JURISDICTION AND GOVERNING LAW

The AIFC Court has exclusive jurisdiction over:

- disputes arising among the AIFC participants, AIFC bodies and/or their foreign employees;
- disputes affecting any operation performed in the AIFC and governed by the AIFC laws;
- disputes referred to the AIFC Court upon mutual agreement of the parties (even if they are not the AIFC participants); and
- interpretation of the rules of the AIFC acts.

The AIFC Court does not have jurisdiction over any disputes of criminal or administrative nature.

When resolving disputes, the AIFC Court bases itself on:

- laws agreed upon by the parties that do not contradict the public order of Kazakhstan;
- laws which, in the AIFC Court's opinion, apply the most based on the facts and circumstances of the dispute; and
- current AIFC laws (AIFC Acts).

When resolving disputes, the Regulations also provide for the AIFC Court's right to consider precedents: judgments of the AIFC Court, which have already entered into legal force, and court judgments issued in other common law jurisdictions (e.g. UK, USA, etc.).

All proceedings are conducted in the AIFC Court in the English language. All documents to

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<sup>3</sup> **AIFC Court Regulations** – AIFC Court Regulations approved by the resolution of the AIFC Management Council of 5 December 2017.

<sup>4</sup> **AIFC Court Rules** – 2018 AIFC Court Rules approved by the Chairman of the AIFC Court in accordance with Article 30 of the AIFC Court Regulations, which entered into force on 1 January 2018.



be used in the AIFC Court must be in English or be translated into English.

## 4.2. AIFC COURT STRUCTURE

The AIFC Court is composed of two instances:

- first instance court, which includes a special purpose division to consider small claims (hereinafter, the "**Court of Small Claims**");
- appellate court.

The *Court of Small Claims* considers the following claims referred to the jurisdiction of the AIFC Court:

- if the claim amount or the value of the claim subject does not exceed USD 150,000;
- if the claim amount or the value of the claim subject does not exceed USD 300,000, provided that all parties agree in writing to the case consideration by the Court of Small Claims;
- claims relating to employment or former employment of a party, provided that all parties agree in writing to the case consideration by the Court of Small Claims; and
- other claims, which may be referred to the Court of Small Claims by the Chairman of the AIFC Court.

## 4.3. AIFC COURT FEES

The AIFC Court does not charge fees for filing claims, administration and hearings until 31 December 2021. Furthermore, parties to a contract signed before 31 December 2021 and containing a clause on the AIFC Court's jurisdiction over disputes will be entitled to free-of-charge administration and resolution of disputes in the AIFC Court, which arise out of such contract, before and after 31 December 2021.

## 4.4. STATUTE OF LIMITATIONS

According to the AIFC Court Regulations, a judicial dispute cannot be considered if more than 6 years has already passed from the date of events resulting in the dispute, unless otherwise provided for by other AIFC acts. For reference, the general statute of limitations under the Kazakhstan legislation is 3 years.

In practice, there may be certain disputable issues concerning the statute of limitations. For example, if a contract is governed by the Kazakhstan or a foreign law providing for the statute of limitations of less than 6 years, and a claimant files a claim after the expiration of such period, we believe that a defendant may reasonably ask the AIFC Court to apply the statute of limitations established by the law governing the contract and, accordingly, ask the AIFC Court to dismiss such claim.

## 4.5. SECURITY MEASURES

The AIFC Court Rules stipulate that the AIFC Court may adopt different claim security measures, including, as follows:

- interim injunction;
- interim decision;
- orders on: (a) attachment, inspection or preservation of respective property; (b) taking respective specimen property; (c) performance of experiment with respective property; (d) sale of respective property, which needs to be sold immediately; and (e) payment of proceeds from respective property before resolving a claim;
- order allowing a person to enter any territory or building possessed by a party to the proceedings in order to implement the order issued under the previous item;
- order on delivery of any goods to a claimant or a person appointed by the AIFC Court for such purpose on the terms and conditions specified in the order;
- order to freeze assets, which limits a party in its opportunities to transfer assets out of Kazakhstan or use them wherever located;
- order, pursuant to which a party submits information on location of respective property or assets, or submits information on respective property or assets, which are or may be the subject of an asset freezing order;
- order prescribing a party to allow another party to the territories of facilities in order to preserve the evidences;
- order on submission of documents or examination of property before a claim is filed;
- order on submission of documents or examination of property with respect to a person that is not a process participant; and
- order prohibiting a person to leave Kazakhstan without the AIFC Court's consent.

This list of security measures is not exhaustive. The AIFC Court may apply any other remedy in the interests of justice.

Claim security orders of the AIFC Court are enforced by the Kazakhstan court enforcement officers in accordance with the same procedure as provided for similar rulings of Kazakhstan courts.

Many of the above security measures are unknown to the Kazakhstan legislation, or they are not applied by Kazakhstan courts in practice, for example, order on sale of property or payment of proceeds therefrom before resolving a claim, order on submission of documents or examination of property before a claim is filed.

In the event of adopting security measures, the AIFC Court Rules also protect the defendant's interests. Thus, the AIFC Court's injunction must contain the claimant's

obligation to pay any losses to be suffered by the defendant. If the claimant fails to demonstrate enough assets in Kazakhstan, the AIFC Court may claim for provision of a security.

The Kazakhstan Civil Procedure Code also contains a rule on security of potential defendant's losses by depositing an amount specified in a court ruling on the authorized agency's account. However, no mechanism for implementing this rule is stipulated in legislation, in which connection it is not applied in Kazakhstan.

#### 4.6. TERMS FOR CONSIDERING CASES IN THE AIFC COURT

One of objectives of the AIFC Court is to consider cases applying the methods proportionate to the amounts of attracted funds, essence of case, complexity of issues, facts and arguments, and financial standing of each party. The purpose of the AIFC Court Rules is to ensure time-sensitive and efficient proceedings, using no more resources than required. In light of this, the AIFC Court is not bound by any strict terms for considering cases. The AIFC Court Rules only provide for the terms for taking certain procedural actions (e.g. serving of a claim to a defendant, submission of objections to a claim, filing of an appellate petition, etc.). It is worth mentioning that both a claimant and a defendant may agree to increase certain terms.

Unlike the AIFC Court Rules, the Civil Procedure Code of Kazakhstan provides for deadlines for considering civil cases, which, as a rule, do not exceed three months of the date of accepting a case for proceedings in court. For reference, the AIFC Court Rules establish that a statement of claim must be served to a defendant within four months of the date of filing the statement of claim to the AIFC Court. In the event a statement of claim is served outside Kazakhstan, this term is six months.

This is to say that proceedings in the AIFC Court may take more time than in a Kazakhstan court. This can be an advantage when considering extremely complicated cases, because limited timeframes for case consideration in Kazakhstan courts and tight workload of judges often prevent from high quality consideration of such cases.

At the same time, claims for small amounts within the jurisdiction of the Court of Small Claims may be considered without a hearing. When resolving such cases, the AIFC Court may not apply strict standards of evidence and limit cross-examination.

#### 4.7. REPRESENTATION OF PARTIES IN THE AIFC COURT

The AIFC Court affords more powerful capabilities for lawyers and advocates for the representation of parties than Kazakhstan courts.

Lawyers or advocates of any country qualified as professional lawyers or advocates holding respective licenses or certificates may register with the AIFC Court administration to represent parties in litigations. In order to register it is necessary to submit the documents

confirming the presence of a professional qualification as a lawyer or an advocate, current license or certificate, and a letter from a respective authority confirming proper status of an applicant.

Lawyers who are not qualified as professional lawyers or advocates and have no license to engage in legal practice or advocacy, and whose activities are not regulated by a respective bar may also register with the AIFC Court administration to represent the parties. In order to register it is necessary to submit LL.B. diploma and two court judgments where an applicant is specified as a party representative. Instead of court judgments, it is possible to submit a letter or recommendations from a judge or a client confirming that the applicant represented the parties' interests in courts.

Unless the party's representative is a legal representative of an individual or an employee of a legal entity that is a party to a dispute, the party's representative in a Kazakhstan court must be a member of a legal advisor chamber or a bar association of Kazakhstan.

#### 4.8. APPEALS

Appellate petitions against the first instance court's judgments are considered by the appellate court. Appellate petitions against the judgments of the Court of Small Claims are considered by the first instance court.

The ACIFC Court Rules establish the necessity to obtain a permission for appeal, except for the cases where an appellate petition is filed against an order on violation.

A permission to appeal may be given in case the court decides that:

- appellate petition has real chances to succeed; and
- there is another valid reason, pursuant to which an appellate petition must be considered.

According to the Kazakhstan legal proceedings system, to file an appellate petition no court permission is required. A party may file such petition against any judgment of the first instance court. Certain judgments of Kazakhstan courts may be re-considered in the cassation instance court.

#### 4.9. ENFORCEMENT OF JUDICIAL ACTS OF THE AIFC COURT IN KAZAKHSTAN

According to the AIFC Constitutional Law, judgments of the AIFC Court are enforced in accordance with the same procedure and on the same conditions as the judicial acts of Kazakhstan courts. The AIFC Constitutional Law is silent as to enforcement of any AIFC Court's acts other than judgments (specifically, orders and directions), while certain laws and the AIFC acts provide for such possibility, coming into conflict with the constitutional law. In particular, the Law on Enforcement Proceedings stipulates that it is possible to enforce in the Kazakhstan territory (1) writs of execution issued on the basis of judgments

of the AIFC Court, and (2) orders of the AIFC Court on claim security or cancellation of claim security.

The AIFC Acts go beyond the AIFC Constitutional Law and specify that orders and even directions of the AIFC Court may be enforced in the Kazakhstan territory.

Thus, the AIFC Court Rules provide for the issuance of an execution order to enforce a judgment or an order of the AIFC Court in the Kazakhstan territory (paragraph 30.1 of the AIFC Court Rules). The AIFC Court Regulations come even further and state in paragraph 40(2) that not only judgments and orders of the AIFC Court may be enforced in the Kazakhstan territory, but also the directions of the AIFC Court, however, with a reservation that these acts must be enforced in accordance with the AIFC Constitutional Law.

However, first, as we considered above, the AIFC Constitutional Law stipulates that only judgments of the AIFC Court may be enforced in Kazakhstan and it is silent about orders and directions. This definitely casts some doubt on the possibility to generally enforce orders and directions of the AIFC Court in Kazakhstan.

Second, the Law on Enforcement Proceedings stipulates that only judgments of the AIFC Court (specifically, writs of execution issued on the basis thereof) and orders of the AIFC Court on claim security or cancellation of security may be enforced in Kazakhstan. This is to say that not all orders of the AIFC Court may be enforced in Kazakhstan (only those relating to security measures). The possibility to enforce directions of the AIFC Court is not generally stipulated in Kazakhstan.

#### 4.10. ENFORCEMENT OF JUDICIAL ACTS OF THE AIFC COURT OUTSIDE KAZAKHSTAN

A party wishing to enforce a judgment or an order of the AIFC Court outside Kazakhstan must file an application to the AIFC Court for a certified copy of the judgment or order.

Judicial acts of the AIFC Court are enforced in accordance with conditions of bilateral and multilateral treaties between Kazakhstan and other countries. Kazakhstan has treaties on legal assistance in civil matters mainly with the countries located in the post-Soviet territory and with Turkey, China, Vietnam, India, Pakistan, Mongolia, United Arab Emirates, and Democratic People's Republic of Korea. However, the issue of enforceability of the AIFC Court's judgment in these countries should be evaluated subject to conditions of each such treaty. Certain bilateral legal assistance treaties understand that a "judgment" means any judgment issued by competent courts of the contracting parties<sup>5</sup>. At the same time, the Minsk Convention and the Chisinau Convention, which major part of the post-Soviet countries are the parties to, provide for recognition and enforcement of judgments of justice institutions. In light of the fact that the AIFC Court is not a justice institution of Kazakhstan,

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<sup>5</sup> Treaty between the Republic of Kazakhstan and the Republic of India on Legal Assistance in Civil Matters (Astana, 16 April 2011).

the issue of enforcement of the AIFC Court's judgments in the territories of the member states to the above international conventions may be disputable.

#### 4.11. ADVANTAGES OF THE AIFC COURT

Based on provisions of the AIFC Court Regulations and the AIFC Court Rules, it is possible to distinguish the following advantages of the AIFC Court.

The key advantage of the AIFC Court is its independence from the judicial system of Kazakhstan. Judgments and orders of the AIFC Court may be reconsidered only by the appellate instance of the AIFC Court.

The fact that judicial proceedings are conducted in the English language according to the AIFC Court Rules based on the rules and principles of the laws of England and Wales, and the possibility for foreign lawyers and advocates to participate in proceedings makes the AIFC Court an attractive platform for resolving disputes involving foreign companies.

Possibility to enforce judgments and certain orders of the AIFC Court in Kazakhstan without the necessity to undergo the recognition procedure<sup>6</sup> is another great advantage for the parties to a dispute interested in institution of recovery proceedings against the debtor's assets in Kazakhstan. This is especially topical since Kazakhstan has very limited number of international treaties providing for mutual recognition and enforcement of foreign court judgments.

High qualification of judges of the AIFC Court and the possibility to consider cases within longer periods than the periods stipulated by the Kazakhstan procedural legislation serve as the prerequisites for high quality consideration of complicated cases. At the same time, the AIFC Court Rules provide for a special accelerated procedure for considering small claims by the Court of Small Claims.

Another advantage of the AIFC Court is the fact that the AIFC Court may apply claim security measures, and the orders on application of such measures are enforced in the Kazakhstan territory under the same procedure as provided for the Kazakhstan judicial acts.

The fact that the AIFC Court Rules provide for a possibility to ensure counter security by a claimant to protect the defendant's interests against damages caused by the application of security measures can also be considered as the advantage of legal proceedings in the AIFC Court.

Finally, absence of court fees until 31 December 2021 makes the proceedings in the AIFC Court attractive for both foreign and Kazakhstan companies. The parties may use free services of the AIFC Court even after 31 December 2021, for which purpose it is sufficient to include a clause in a contract entered into before the said date on consideration of disputes arising out of such contract by the AIFC court. Please visit the official website of

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<sup>6</sup> Please see our comment in Section 4.9 hereof.

the AIFC Court (<https://court.aifc.kz/>) to see the model clause of the AIFC Court and review in more detail the AIFC Court Regulations and the AIFC Court Rules.

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## 5. AIFC ARBITRATION

### 5.1. GENERAL

Following the experience of other international financial centres, in addition to the AIFC Court, a respective arbitration institution was established in the AIFC territory – International Arbitration Centre ("IAC") aimed at ensuring the parties' right to alternative dispute resolution in the AIFC territory. Arbitration under the AIFC is available not only to the AIFC participants, but also to any other market participants upon their choice<sup>7</sup>.

According to the AIFC Constitutional Law, IAC is referred to the AIFC bodies and was established in the form of a legal entity in the AIFC territory.

Unlike the AIFC Court, IAC does not itself consider the disputes, it only administers arbitration proceedings, i.e. assists the parties and arbitrators to organize and conduct arbitration proceedings where an award on the dispute merits is issued directly by an arbitrator(s)<sup>8</sup>.

Depending on the parties' choice and content of an arbitration agreement, IAC may administer arbitration proceedings based on its own rules (in complying with the IAC Arbitration and Mediation Rules<sup>9</sup>) or the UNCITRAL rules (in complying with the UNCITRAL Arbitration Rules), or the rules established directly by the parties (*ad hoc* arbitration). Function of IAC with respect to *ad hoc* arbitrations may be much more limited and reduced only to assistance with the appointment of arbitrators (*appointing authority*).

### 5.2. LEGAL FRAMEWORK

The Arbitration Law does not apply to arbitration under the AIFC. There are two acts in effect with respect to arbitration in the AIFC territory – AIFC Arbitration Regulations<sup>10</sup> and IAC Arbitration and Mediation Rules.

The AIFC Arbitration Regulations are aimed at substituting the Arbitration Law in the AIFC territory, i.e. to establish general requirements to arbitrations in the AIFC. For example, *ad hoc* arbitration or arbitration under the UNCITRAL Rules seated in the AIFC must follow the requirements established by the AIFC Arbitration Regulations. The AIFC Arbitration Regulations correspond to international standards and are generally based on the UNCITRAL Model Law on International Commercial Arbitration.

In turn, the IAC Arbitration and Mediation Rules establish the procedure for conducting arbitration proceedings under the IAC rules.

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<sup>7</sup> Provided that arbitration with respect to such dispute is allowed.

<sup>8</sup> In light of this, the wording of Article 14.1 of the AIFC Law concerning the fact that "*The International Arbitration Centre hears disputes on the basis of an arbitration agreement between the parties*" seems to be slightly incorrect.

<sup>9</sup> Arbitration and Mediation Rules approved by the Chairman of the International Arbitration Centre on 1 January 2018.

<sup>10</sup> AIFC Arbitration Regulations approved by the resolution of the AIFC Management Council on 5 December 2017.



It is interesting to point out the issue associated with the fact that the AIFC Arbitration Regulations cover the parties to arbitration proceedings that are not the AIFC participants.

### 5.3. ARBITRATION AGREEMENT

In general, requirements to an arbitration agreement correspond to international standards.

Thus, the AIFC Arbitration Regulations secure the principle of autonomy of an arbitration agreement, pursuant to which:

- arbitration clause is considered as an agreement independent from other contract conditions;
- contract invalidity does not affect the validity of the arbitration clause; and
- arbitration agreement is governed by the laws different from the substantive law governing a contract.

According to the New York Convention principles, the AIFC Arbitration Regulations provide for mandatory written form of an arbitration agreement, which is deemed to have been reached in the event the arbitration agreement is entered into by means of electronic communications.

In case of comparing with the Kazakhstan legislation, it is worth mentioning that the AIFC legislation does not require to obtain the authorized agency's permit with respect to disputes between the Kazakhstan residents and quasi-public sector entities. At the same time, there is a risk that this requirement on obtainment of a permit to arbitration may be recognized as applicable to arbitration in the AIFC despite the fact that the Arbitration Law does not cover arbitration in the AIFC. The point is that the requirement on obtainment of the authorized agency's permit to arbitration may be qualified as a limitation of legal capacity of certain persons. In case of such interpretation, this requirement must apply to all persons registered in Kazakhstan based on the principles of law of a legal entity and must be complied with, regardless of the seat of arbitration selected by the parties.

Unlike the Kazakhstan Arbitration Law, the AIFC Arbitration Regulations do not list the categories of disputes not within the jurisdiction of arbitration (according to the Arbitration Law, such disputes include disputes on rehabilitation and bankruptcy, between the natural monopoly entities and their consumers, etc.). To determine the possibility to resolve a certain dispute in arbitration it will be necessary to address the AIFC acts directly.

### 5.4. COMPETENT COURT

A court that has jurisdiction over the issues of ensuring arbitration in the AIFC is the AIFC Court.

Such issues encompass as follows:

- appointment of an arbitrator(s) in the event of absence of mutual agreement of the parties and resolution of other disputes associated with the formation of arbitration

tribunal, challenge, change of arbitrators and termination of functions of the arbitration tribunal;

- consideration of the issue of whether an arbitration tribunal has jurisdiction to consider a dispute;
- enforcement of security measures, which were adopted by an arbitration tribunal, in the AIFC territory;
- judicial assistance with taking of evidences;
- consideration of an application for revocation of an arbitral award; and
- recognition and enforcement of an arbitral award in the AIFC territory, etc.

## 5.5. ARBITRATORS

Based on the UNCITRAL Model Law on International Commercial Arbitration, the AIFC Arbitration Regulations do not establish any specific requirements to arbitrators other than the requirement on impartiality and independence. In other words, the parties are free to select arbitrators or they may agree upon certain requirements to arbitrators in advance.

The Kazakhstan Arbitration Law is stricter with respect to this issue. Arbitrators in the Kazakhstan arbitration may be the persons who have reached the age of 30 years, have higher education and at least 5-year work experience in the specialty. Current judges, incapable persons or partially incapable persons, public officials or persons with outstanding convictions cannot act as arbitrators.

## 5.6. SECURITY MEASURES

Security measures may be adopted in the framework of arbitration proceedings in the AIFC according to the scenarios, as follows:

- Arbitration tribunal adopts security measures at one party's request, and such order of arbitrators may be subsequently enforced in the AIFC territory if the AIFC Court issues a relevant order on execution of security measures (paragraphs 27.2 - 27.4 of the AIFC Arbitration Regulations).
- The AIFC Court may itself adopt security measures upon a request from one of the parties to arbitration proceedings (paragraphs 17 and 27.5 of the AIFC Arbitration Regulations).

As regards the enforcement of the said acts on security measures in the Kazakhstan territory, we believe that this is possible only under the second scenario, where the security measures are adopted directly by the AIFC Court.

The point is that the Law on Enforcement Proceedings (Article 9.1) names two types of judicial acts of the AIFC Court, which can be enforced in Kazakhstan. These are writs of execution issued on the basis of judgements of the AIFC Court and claim security orders of the AIFC Court.

In light of provisions of paragraph 27 of the AIFC Arbitration Regulations, an order of the AIFC Court on enforcement of the arbitration tribunal's order on adoption of security measures is executed by an order of the AIFC Court on enforcement of a security measure. However, this type of an order is not named in the Law on Enforcement Proceedings, it is formally neither a *judgement*, nor a claim security *order*, because in the situation in question the AIFC Court does not itself issue a judgment on security measures; it only considers the issue of whether to enforce an award of the arbitration tribunal on security measures or not. In light of this, we believe that, based on the current regulations, an order of the AIFC Court on enforcement of the arbitration tribunal's award on security measures cannot be enforced in Kazakhstan under the first scenario.

It is also worth pointing out that there is a potential possibility for the parties to arbitration proceedings conducted in the AIFC to apply directly to a Kazakhstan court for the adoption of security measures. Specifically, Article 155 of the Kazakhstan Civil Procedure Code<sup>11</sup> provides for the right of the parties to arbitration proceedings to apply to a Kazakhstan court for claim security. This Article provides for no specifics of whether this right is granted only to the parties to arbitration proceedings conducted in Kazakhstan or also covers the arbitration proceedings outside Kazakhstan (including in the AIFC). Since there are very few examples of judicial practice where a Kazakhstan court adopted security measures in the framework of arbitration proceedings conducted outside Kazakhstan, we believe that such possibility theoretically exists also with respect to arbitration proceedings in the AIFC. This is to say that the parties to arbitration proceedings conducted in the AIFC may directly apply to a Kazakhstan court for security measures without applying to the AIFC Court.

## 5.7. ARBITRATION COSTS

According to the IAC Arbitration and Mediation Rules, arbitration costs comprise as follows:

- registration fee for filing an application for arbitration (claim);
- arbitrators' fees;
- IAC duty for administration of arbitration proceedings; and
- disbursements of the arbitration tribunal and IAC.

IAC cancelled the registration fee, duty for administration and hearings until 31 December 2021. It is not clear, according to paragraph 29.1 of the IAC Arbitration and Mediation Rules, where the duty for conducting hearings should be referred to – duty for administration or disbursements of IAC.

In light of the above exemption, the parties' arbitration costs will actually comprise until 31 December 2021 the arbitrators' fees and disbursements of arbitrators and IAC. The website of IAC contains no information on the arbitrators' fees and, apparently, they should be separately agreed upon at the beginning of arbitration proceedings.

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<sup>11</sup> Code No. 377-V of the Republic of Kazakhstan "Civil Procedure Code of the Republic of Kazakhstan" dated 31 October 2015.

An exemption only from the payment of an administration duty is also granted to the contracts signed before 31 December 2021, which contain the arbitration clause of IAC. With respect to such contracts, no administration duty will be charged both before and after 31 December 2021.

## 5.8. REVOCATION OF AN ARBITRAL AWARD

The issues of revocation of the arbitral awards issued in the AIFC are considered by the AIFC Court. The grounds under which an arbitral award may be revoked generally correspond to the grounds stipulated by the UNCITRAL Model Law on International Commercial Arbitration.

In case of comparing with the grounds under the Arbitration Law, according to the Kazakhstan legislation, the list of grounds for the revocation of arbitral awards is broader and includes an additional ground, specifically, presence of a court judgment or an arbitral award, which has entered into legal force, has been issued in a dispute between the same parties, with respect to the same subject and under the same grounds, or a court or arbitration ruling on termination of proceedings in a case in connection with the claimant's abandonment of claim.

## 5.9. ENFORCEMENT OF ARBITRAL AWARDS

### ■ Enforcement of arbitral awards in the AIFC

An arbitral award issued in the AIFC is enforced in the AIFC on the basis of a respective order of the AIFC Court. This is to say that in order to enforce an arbitral award in the AIFC territory it is necessary to apply to the AIFC Court. The grounds under which the AIFC Court may reject recognition and enforcement of an arbitral award generally correspond to the grounds under the New York Convention and the UNCITRAL Model Law on International Commercial Arbitration. In case of comparing such regulation with the Kazakhstan legislation, the list of grounds for rejection of recognition and enforcement of an arbitral award under the Kazakhstan Civil Procedure Code is broader than the grounds envisaged by the IAC Arbitration Regulations. Specifically, the Civil Procedure Code of Kazakhstan provides for an additional ground for rejection – presence of a court judgment or an arbitral award, which has entered into legal force, has been issued in a dispute between the same parties, with respect to the same subject and under the same grounds, or a court or arbitration ruling on termination of proceedings in a case in connection with the claimant's abandonment of claim.

### ■ Enforcement of arbitral awards in Kazakhstan

As regards the enforcement of an arbitral award issued in the AIFC in the Kazakhstan territory, the AIFC Constitutional Law establishes that they must be enforced under the same procedure as the Kazakhstan arbitral awards. This, in turn, means that in order to achieve recognition and enforcement of an arbitral award in the Kazakhstan territory, which has been issued in the AIFC, it is necessary to apply to a Kazakhstan court in accordance with Chapter 20 of the Civil Procedure Code of Kazakhstan. According to such application,

a Kazakhstan court conducts judicial proceedings and issues a ruling on enforcement of an arbitral award followed by subsequent issuance of a writ of execution.

At the same time, the AIFC Acts relating to this issue are somewhat contradicting the above rule under the AIFC Constitutional Law, in which connection we believe that they need to be amended.

Specifically, paragraph 40(2) of the AIFC Court Regulations specifies that "*awards issued in arbitrations seated in the AIFC which have been ratified by the Court, may be enforced in the AIFC and the Republic of Kazakhstan in accordance with the AIFC Constitutional Statute*". However, the AIFC Constitutional Law does not provide for prior ratification of arbitral awards by the AIFC Court. We mentioned above that with respect to this issue the AIFC Constitutional Law refers to the procedure effective for the Kazakhstan arbitral awards. In turn, this procedure implies applications only to a Kazakhstan court for enforcement of an arbitral award, and no prior application for ratification of an arbitral award by the AIFC Court is required.

## 5.10. ADVANTAGES OF THE AIFC ARBITRATION

We can generally distinguish the following advantages of the AIFC arbitration.

The AIFC Law does not apply to arbitration proceedings in the AIFC. In this regard, the AIFC arbitration follows the AIFC regulation, namely, the AIFC Arbitration Regulations, which is friendlier towards arbitration as compared with the Kazakhstan legislation.

The issue of revocation of an arbitral award (in case of appeal filed by one of the parties) will be considered by the AIFC Court, not a Kazakhstan court, which allows to count on impartial and fair consideration of this issue.

At the same time, it will be possible to enforce an arbitral award in Kazakhstan, provided only that such award is recognized and enforced by a Kazakhstan court. Since no enforcement of arbitral awards (both Kazakhstan and foreign) is principally possible without undergoing the recognition procedure at a Kazakhstan court, the necessity to apply to a Kazakhstan court should not be a surprise for the parties to arbitration proceedings.

Another advantage of the AIFC arbitration is the fact that security measures may be enforced in Kazakhstan without the necessity to apply to a Kazakhstan court. For this purpose, it is sufficient to have an order of the AIFC Court on claim security.

Finally, absence of registration fee, duty for administration of arbitration proceedings and conduct of hearings until 31 December 2021 make the AIFC arbitration look attractive for both foreign and Kazakhstan companies. The parties may enjoy free-of-charge administration even after 31 December 2021. For this purpose, it is sufficient to include the IAC arbitration clause in a contract entered into before the said date.

Please visit the official website of IAC (<https://iac.aifc.kz/ru/>) to find the IAC model arbitration clause and review in more detail the AIFC Arbitration Regulations and the IAC Arbitration and Mediation Rules.

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## 6. REGULATION OF LABOR RELATIONS



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Labor relations are regulated in the AIFC by the Regulations<sup>12</sup> and the Qualification Requirements Act<sup>13</sup>.

### 6.1. SPHERE OF APPLICATION

The Regulations apply to the employees of the AIFC Bodies<sup>14</sup>, organizations of the AIFC Bodies and the AIFC participants. The Regulations provide for the minimum hiring and labor relations regulation standards, as well as the possibility to include more favorable conditions for employees in employment contracts. The AIFC participants must comply with requirements of the Labor Code<sup>15</sup> and other current laws of Kazakhstan with respect to the issues not governed by the AIFC Constitutional Law and the AIFC Acts, including the Regulations.

### 6.2. CONTENT OF AN EMPLOYMENT CONTRACT

Requirements to the content of an employment contract are slightly more specific than the list of information, which must be included in an employment contract under the Labor Code of Kazakhstan.

According to the Regulations, an employee may be employed only under an employment contract, which is made in English and signed by the employee and employer. According to paragraph 11 (2) of the Regulations, an employer must provide a copy of an employment contract to an employee within 2 months after commencement of labor relations. For comparison, the Labor Code stipulates that 1 counterparty of an employment contract must be handed over to an employee immediately after signing by both parties.

If an employee does not know English well, an employer must explain to such employee all conditions of an employment contract before signing by the employee.

### 6.3. QUALIFICATION REQUIREMENTS AND VISA REGIME

The Qualification Requirements Act establishes special qualification requirements to foreigners and stateless persons applying for employment in the AIFC. Candidates must meet either the education criteria, or the work experience criteria. They must have a bachelor degree (or any equal degree) in a specialty relating to the contemplated work in

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<sup>12</sup> AIFC Regulations No. 4 on Labor Relations were adopted on 20 December 2017 (hereinafter, the "Regulations").

<sup>13</sup> AIFC Act No. GR0009 on Qualification Required for Employment in the AIFC was adopted on 10 December 2017 (hereinafter, the "Qualification Requirements Act").

<sup>14</sup> The AIFC Bodies include the AIFC Management Council, AIFC Authority, Astana Financial Services Authority, AIFC Court and International Arbitration Centre.

<sup>15</sup> Labor Code No. 414-V of the Republic of Kazakhstan was adopted on 23 November 2015 (hereinafter, the "Labor Code").

the AIFC, or the 3-year experience of work in a managing position or other 5-year work experience in relation to the contemplated work in the AIFC.

The AIFC Constitutional Law provides for a simplified visa regime for foreigners and stateless persons, specifically, a possibility to obtain an entry visa for 5 years for the employees who are the AIFC participants and their family members in the airports or foreign institutions of Kazakhstan. Citizens of the OECD member states<sup>16</sup>, UAE, Malaysia, Singapore, Monaco, and other countries determined by the Kazakhstan Government have the right to a visa-free entry for a term of up to 30 days. Furthermore, the AIFC Bodies and organizations of the AIFC participants may engage foreign labor without obtaining work permits. This is a great advantage of employment in the AIFC, because in practice obtainment of a work permit for a foreigner working in Kazakhstan is usually a time-consuming and cost intensive process.

#### 6.4. LABOR DOCUMENTS

An employer must store the copies of all employment contracts and records containing personal information pertaining to each employee.

The above information must be in English and must be stored electronically at the place of performance of principal activities of an employer in the AIFC within at least 2 years after terminating the employee's labor activities. For comparison, according to the Kazakhstan legislation, employment contracts must be made in writing in the Russian and Kazakh languages and be stored 75 years.

#### 6.5. REMUNERATION

An employer must pay to an employee the basic monthly salary subject to the total number of business days in a year. The days of labor leave must be paid to the employee not later than 5 business days before the first day of the labor leave. In the event of terminating labor relations, the employer must pay all salary and other amounts due to the employee within 14 days after they become due.

An employee and an employer may select the Kazakhstan currency (tenge) or any other currency to express and perform their obligations under an employment contract. For employees, this circumstance serves as a significant advantage of employment in the AIFC, because, according to the general procedure in effect in Kazakhstan, salary is established and paid in the Kazakhstan currency.

#### 6.6. TIME OF WORK AND REST

The time of work of an employee must not exceed 40 hours/week (8 hours/day), unless there is a prior written consent of the employee to otherwise. The employee is entitled to an

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<sup>16</sup> Organization for Economic Cooperation and Development.



uninterrupted period of rest of at least 48 hours within each 7-day work period.

An employee in the AIFC is entitled to a paid labor leave, the minimum period of which is 20 business days in a year. The employee may transfer up to 5 business days of the accrued but unused labor leave to another year, with the maximum term of 12 months. Upon expiration of such 12-month period the unused days of labor leave "expire". The labor leave may be used by periods of 3 business days or more.

For comparison, the main paid annual labor leave under the Labor Code is 24 calendar days, unless a greater number of days is stipulated by legislation, employment contract or collective agreement, and an employer's act.

### 6.7. SICK LEAVE

An employee is entitled to a sick leave, the maximum duration of which must not exceed 60 days in the aggregate within any 12-month period. If so requested by an employer, the employee must submit a medical opinion confirming that the employee cannot perform labor duties once every 7 days during the period of absence by reason of illness.

### 6.8. MATERNITY/PATERNITY RIGHTS

An employee is entitled to a maternity leave of at least 12 months subject to compliance with certain conditions (preceding term of employment, notification about pregnancy and leave, etc.).

During the minimum term of maternity leave, an employer must pay to an employee: (a) normal daily salary of the employee for the first 33 business days of the leave; (b) 50% of the normal daily salary of the employee for the following 32 business days of the leave.

An employee who became a father of a newborn child is entitled to a paternity leave of at least 5 business days. The paternity leave must be used within 2 months of the date of childbirth.

During such leave an employer may not terminate labor relations or change their conditions without obtaining the employee's prior written consent.

According to the Labor Code, an employee may be granted a maternity leave, leave in connection with adoption of a newborn child, including an unpaid childcare leave until the child reaches the age of 3 years.

### 6.9. EMPLOYER'S OBLIGATIONS

An employer must ensure safe labor conditions for employees. The Regulations also provide for the employer's obligations concerning the protection of personal data of employees, occupational safety and labor protection, ventilation, temperature inside the working space, lighting, cleanness, dimensions and area of premises, etc.

Employees may not be subject to any discrimination on the basis of gender, family status, race, nationality, religion, age or disability. An employer is also imposed with other obligations envisaged by the Regulations.

## 6.10. WITHHOLDINGS FROM THE EMPLOYEE'S SALARY

Foreigners who are the AIFC employees are exempted (until 1 January 2066) from the necessity to pay the individual income tax (IIT) on the income gained from activities in the AIFC under an employment contract entered into with the AIFC participant providing certain financial services<sup>17</sup>. Accordingly, Kazakhstan citizens and foreigners working in the AIFC who do not fall within the above exemption must pay IIT.

The AIFC Acts are silent as to provisions relating to the procedure for paying pension contributions, social tax, social deductions, contributions and deductions for mandatory social medical insurance. Accordingly, the procedure for paying the above taxes and other mandatory deductions and contributions is regulated by relevant regulatory legal acts of Kazakhstan.

## 6.11. TERMINATION OF LABOR RELATIONS

The procedure for termination of labor relations envisaged by the Regulations significantly differs from the procedure stipulated by the Labor Code.

According to the Regulations, the period to notify concerning termination of labor relations on the employer's initiative depends on the duration of employment, and may be 7-90 days. An employment contract may stipulate a longer notice period.

According to the Regulations, the parties may terminate labor relations between each other upon a prior notice *without specifying any reasons*. Labor relations may also be terminated in connection with violations by an employee, which *significantly and adversely affect* an employer; however, there is no normative definition of a material violation or material effect.

An employee who has been continuously employed for at least 1 year may claim that an employer provides a notice in writing concerning the reasons of dismissal and has the right to a monetary payment in connection with termination of labor relations, regardless of whose initiative served as the basis for the termination of labor relations.

For comparison, the Labor Code provides for a detailed and highly regulated procedure for the termination of labor relations on the employer's initiative, specifically, 25 exhaustive grounds (reasons) for dismissal of employees on the employer's initiative.

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<sup>17</sup> Islamic bank services; re-insurance services and insurance broker services; services on investment management of assets of investment funds, recording and storage thereof, as well as the services involving the issue, placement, circulation, repurchase and redemption of securities of investment funds; broker and/or dealer and underwriting services; other financial services determined by the AIFC Acts.

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When preparing the overview, we focused on the issues most often resulting in disputes in practice. However, the range of such issues is much broader, and each issue has its own details and specifics.

For our part, we are always ready to assist you.

**AEQUITAS Team**