

Global Arbitration Review

# The Guide to Challenging and Enforcing Arbitration Awards

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General Editor  
J William Rowley QC

Editors  
Emmanuel Gaillard and Gordon E Kaiser

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## Publisher's Note

Global Arbitration Review is delighted to publish this new volume, *The Guide to Challenging and Enforcing Arbitration Awards*.

For those unfamiliar with Global Arbitration Review, we are the online home for international arbitration specialists, telling them everything they need to know about all the developments that matter. We provide daily news and analysis, and a series of more in-depth books and reviews, and also organise conferences and build work-flow tools. Visit us at [www.globalarbitrationreview.com](http://www.globalarbitrationreview.com).

As the unofficial journal of international arbitration, sometimes we spot gaps in the literature earlier than other publishers. Recently, as J William Rowley QC observes in his excellent preface, it became obvious that the time spent on post-award matters has increased vastly compared with, say, 10 years ago, and it was high time someone published a reference work focused on this phase.

*The Guide to Challenging and Enforcing Arbitration Awards* is that book. It is a practical know-how text covering both sides of the coin – challenging and enforcing – first at thematic level, and then country by country. We are delighted to have worked with so many leading firms and individuals to produce it.

If you find it useful, you may also like the other books in the GAR Guides series. They cover energy, construction, M&A and mining disputes in the same unique, practical way. We also have books on advocacy in international arbitration and the assessment of damages.

My thanks to the editors for their vision and energy in pursuing this project and to my colleagues in production for achieving such a polished work.

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# Editor's Preface

During the past two decades, the explosive and continuous growth in cross-border trade and investments that began after World War II has jet-propelled the growth of international arbitration. Today, arbitration (whether *ad hoc* or institutional) is the universal first choice over transnational litigation for the resolution of cross-border business disputes.

## Why parties choose arbitration for international disputes

During the same period, forests have been destroyed to print the thousands of papers, pamphlets, scholarly treatises and texts that have analysed every aspect of arbitration as a dispute resolution tool. The eight or 10 reasons usually given for why arbitration is the best way to resolve cross-border disputes have remained pretty constant, but their comparative rankings have changed somewhat. At present, two reasons probably outweigh all others.

The first must be the widespread disinclination of those doing business internationally to entrust the resolution of prospective disputes to the national court systems of their foreign counterparties. This unwillingness to trust foreign courts (whether based on knowledge or simply uncertainty as to whether the counterparty's court system is worthy – i.e., efficient, experienced and impartial) leaves international arbitration as the only realistic alternative, assuming the parties have equal bargaining power.

The second is that, unlike court judgments, arbitral awards benefit from a series of international treaties that provide robust and effective means of enforcement. Unquestionably, the most important of these is the 1958 New York Convention, which enables the straightforward enforcement of arbitral awards in approximately 160 countries. When enforcement against a sovereign state is at issue, the ICSID Convention of 1966 requires that ICSID awards are to be treated as final judgments of the courts of the relevant contracting state, of which there are currently 161.

## Awards used to be honoured

A decade ago, international corporate counsel who responded to the 2008 Queen Mary/PricewaterhouseCoopers Survey on Corporate Attitudes and Practices in Relation to Investment Arbitration (the 2008 Queen Mary Survey) reported positive outcomes on the use of international arbitration to resolve disputes. A very high percentage (84 per cent) indicated that, in more than 76 per cent of arbitration proceedings, the non-prevailing party voluntarily complied with the arbitral award. Where enforcement was required, 57 per cent said that it took less than a year for awards to be recognised and enforced, 44 per cent received the full value of the award and 84 per cent received more than three-quarters of the award. Of those who experienced problems in enforcement, most described them as complications rather than insurmountable difficulties. The survey results amounted to a stunning endorsement of international arbitration for the resolution of cross-border disputes.

## Is the situation changing?

As an arbitrator, my job is done with the delivery of a timely and enforceable award. When the award is issued, my attention invariably turns to other cases, rather than to whether the award produces results. The question of enforcing the award (or challenging it) is for others. This has meant that, until relatively recently, I have not given much thought to whether the recipient of an award would be as sanguine today about its enforceability and payment as those who responded to the 2008 Queen Mary Survey.

My interest in the question of whether international business disputes are still being resolved effectively by the delivery of an award perked up a few years ago. This was a result of the frequency of media reports – pretty well daily – of awards being challenged (either on appeal or by applications to vacate) and of prevailing parties being required to bring enforcement proceedings (often in multiple jurisdictions).

## Increasing press reports of awards under attack

During 2018, *Global Arbitration Review's* daily news reports contained literally hundreds of headlines that suggest that a repeat of the 2008 Queen Mary Survey today could well lead to a significantly different view as to the state of voluntary compliance with awards or the need to seek enforcement.

A sprinkling of last year's headlines on the subject are illustrative:

- 'Well known' arbitrator sees award set aside in London
- Gazprom challenges gas pricing award in Sweden
- ICC award set aside in Paris in Russia–Ukrainian dispute
- Yukos bankruptcy denied recognition in the Netherlands
- Award against Zimbabwe upheld after eight years
- Malaysia to challenge multibillion-dollar 1MBD settlement
- Uzbekistan escapes Swiss enforcement bid
- India wins leave to challenge award on home turf

Regrettably, no source of reliable data is available as yet to test the question of whether challenges to awards are on the increase or the ease of enforcement has changed materially

since 2008. However, given the importance of the subject (without effective enforcement, there really is no effective resolution) and my anecdote-based perception of increasing concerns, last summer I raised the possibility of doing a book on the subject with David Samuels (*Global Arbitration Review's* publisher). Ultimately, we became convinced that a practical, 'know-how' text that covered both sides of the coin – challenges and enforcement – would be a useful addition to the bookshelves of those who more frequently than in the past may have to deal with challenges to, and enforcement of, international arbitration awards. Being well equipped (and up to date) on how to deal with a client's post-award options is essential for counsel in today's increasingly disputatious environment.

David and I were obviously delighted when Emmanuel Gaillard and Gordon Kaiser agreed to become partners in the project.

### Editorial approach

As editors, we have not approached our work with a particular view on whether parties are currently making inappropriate use of mechanisms to challenge or resist the enforcement of awards. Any consideration of that question should be made against an understanding that not every tribunal delivers a flawless award. As Pierre Lalive said in a report 35 years ago:

*an arbitral award is not always worthy of being respected and enforced; in consequence, appeals against awards [where permitted] or the refusal of enforcement can, in certain cases, be justified both in the general interest and in that of a better quality of arbitration.*

Nevertheless, the 2008 Queen Mary Survey, and the statistics kept by a number of the leading arbitral institutions, suggest that the great majority of awards come to conclusions that should normally be upheld and enforced.

### Structure of the guide

This guide is structured to include, in Part I, coverage of general matters that will always need to be considered by parties, wherever situated, when faced with the need to enforce or to challenge an award. In this first edition, the 13 chapters in Part I deal with subjects that include (1) initial strategic considerations in relation to prospective proceedings, (2) how best to achieve an enforceable award, (3) challenges generally, (4) a variety of specific types of challenges, (5) enforcement generally, (6) the enforcement of interim measures, (7) how to prevent asset stripping, (8) grounds to refuse enforcement, and (9) the special case of ICSID awards.

Part II of the book is designed to provide answers to more specific questions that practitioners will need to consider when reaching decisions concerning the use (or avoidance) of a particular national jurisdiction – whether this concerns the choice of that jurisdiction as a seat of an arbitration, as a physical venue for the hearing, as a place for enforcement, or as a place in which to challenge an award. This first edition includes reports on 29 national jurisdictions. The author, or authors, of each chapter have been asked to address the same 35 questions. All relate to essential, practical information on the local approach and requirements relating to challenging or seeking to enforce awards in each jurisdiction. Obviously, the answers to a common set of questions will provide readers

with a straightforward way in which to assess the comparative advantages and disadvantages of competing jurisdictions.

Through this approach, we have tried to produce a coherent and comprehensive coverage of many of the most obvious, recurring or new issues that are now faced by parties who find that they will need to take steps to enforce these awards or, conversely, find themselves with an award that ought not to have been made and should not be enforced.

### **Quality control and future editions**

Having taken on the task, my aim as general editor has been to achieve a substantive quality consistent with *The Guide to Challenging and Enforcing Arbitration Awards* being seen as an essential desktop reference work in our field. To ensure content of high quality, I agreed to go forward only if we could attract as contributors, colleagues who were some of the internationally recognised leaders in the field. Emmanuel, Gordon and I feel blessed to have been able to enlist the support of such an extraordinarily capable list of contributors.

In future editions, we hope to fill in important omissions. In Part I, these could include chapters on successful cross-border asset tracing, the new role played by funders at the enforcement stage, and the special skill sets required by successful enforcement counsel. In Part II, we plan to expand the geographical reach with chapters on China, Saudi Arabia, Turkey and Venezuela.

Without the tireless efforts of the Global Arbitration Review team at Law Business Research, this work never would have been completed within the very tight schedule we allowed ourselves; David Samuels and I are greatly indebted to them. Finally, I am enormously grateful to Doris Hutton Smith (my long-suffering PA), who has managed endless correspondence with our contributors with skill, grace and patience.

I hope that all my friends and colleagues who have helped with this project have saved us from error – but it is I alone who should be charged with the responsibility for such errors as may appear.

Although it should go without saying, this first edition of this publication will obviously benefit from the thoughts and suggestions of our readers on how we might be able to improve the next edition, for which we will be extremely grateful.

J William Rowley QC

April 2019

London

# Part II

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Challenging and Enforcing Arbitration  
Awards: Jurisdictional Know-How

# 28

Kazakhstan

Lyailya Tleulina and Ardak Idayatova<sup>1</sup>

## Applicable requirements as to the form of arbitral awards

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### Applicable legislation as to the form of awards

- 1 Must an award take any particular form (e.g., in writing, signed, dated, place, the need for reasons, delivery)?

Requirements for the form of arbitral awards are set forth in Articles 45 and 47 of the Kazakhstan Law No. 488-V on Arbitration dated 8 April 2016 (the Law on Arbitration).

An arbitral award shall be issued in written form and signed by all arbitrators (sole arbitrator). If a signature of one of the arbitrators is absent, the reason for this shall be indicated in the arbitral award. An arbitrator adhering to a dissenting opinion is not required to sign, but the dissenting opinion shall be attached in writing to the arbitral award. The award enters into force from the date of its signing by the arbitrators (sole arbitrator).

An arbitral award shall contain the following information:

- date of rendering the award;
- seat of arbitration;
- composition of arbitral tribunal;
- substantiation of the arbitral tribunal's jurisdiction to resolve the matter;
- names of the parties to a dispute, titles of the parties' representatives and a description of their authorities;
- description of the claimant's claims and the defendant's objections;
- merit of a dispute;
- facts and circumstances as established by an arbitral tribunal; evidence in support of the established facts and circumstances; the laws based on which the arbitral tribunal renders its award;

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<sup>1</sup> Lyailya Tleulina and Ardak Idayatova are associates at Aequitas Law Firm.



- arbitral tribunal's conclusions on satisfying or rejecting each of the stated claims;
- amount of arbitration costs and allocation of costs between the parties; and
- time and procedure for execution of an arbitral award, if required.

## **Applicable procedural law for recourse against an award**

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### **Applicable legislation governing recourse against an award**

#### **2 Are there provisions governing modification, clarification or correction of an award?**

Under Article 50 of the Law on Arbitration, either party has the right to apply to an arbitral tribunal with a request to correct typographical and other errors in an arbitral award within 60 calendar days of the date of receiving the award, unless another term is agreed by the parties or provided for by the rules of a respective arbitration institute.

If the arbitral tribunal finds the request substantiated, it shall modify the arbitral award within 30 calendar days, unless another term is agreed by the parties or provided for by the rules of a respective arbitration institute.

The arbitral tribunal has the right to modify an arbitral award on its own initiative within 60 calendar days of the date of rendering the award, unless another term is agreed by the parties or provided for by the rules of a respective arbitration institute.

Also, within 60 calendar days of the date of receiving an award, the parties may file a request for rendering an additional arbitral award with regard to claims that are not reflected in the award. If the arbitral tribunal finds the request to be substantiated, it shall modify the arbitral award within 60 calendar days.

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### **Appeals from an award**

#### **3 May an award be appealed to or set aside by the courts? If so, on what grounds and what procedures? What are the differences between appeals and applications for set-aside?**

Kazakhstan legislation does not provide for appealing against an arbitral award.

An arbitral award may be set aside by a Kazakhstan court. An applicant for set-aside must submit the evidence to the court that:

- the arbitral award contains a decision on the matter not contemplated by or not falling within the terms of the arbitration agreement, or it contains a decision on the matters beyond the scope of the arbitration agreement, or a dispute is not within the jurisdiction of the arbitral tribunal. If an arbitral award on the matters falling within the terms of an arbitration agreement may be separated from an arbitral award on matters beyond that agreement, a court cannot refuse rendering an enforcement order (writ of execution) for enforcement of that very part of the arbitral award falling within the terms of the arbitration agreement;
- the court has considered one of the parties to the arbitration agreement as legally incapable, or an arbitration agreement is invalid under the law that the parties selected as the governing law of the arbitration agreement, and, in the absence of such choice, under the law of the Republic of Kazakhstan;

- a party was not given proper notice of the appointment of an arbitrator or of the arbitration proceedings, or was otherwise unable to provide its explanations under the circumstances admitted by the court as reasonable;
- the composition of the arbitral tribunal or the arbitral procedure is not in accordance with the agreement of the parties or, in the absence of such an agreement, is not in accordance with the Law on Arbitration; or
- a court decision, or an arbitral award that has entered into legal force, had been rendered in a dispute between the same parties, on the same subject matter and for the same reasons, or a court or an arbitral tribunal terminated the proceedings in connection with the abandonment or relinquishment of the claim by the plaintiff.

An arbitral award may also be set aside if the court finds that enforcement of the award contravenes the public policy of Kazakhstan, or the dispute, in respect of which the arbitral award was made, is not arbitrable in accordance with Kazakhstan legislation.

An application to set aside an arbitral award could be submitted to a Kazakhstan court within one month of the date of its receipt. The court duty shall be paid when submitting the application. With respect to proprietary claims, the amount of the state duty is 1.5 per cent for legal entities and 0.75 per cent for individuals. In relation to non-pecuniary claims, the amount of the state duty is about 631 tenge.

An application for setting aside an arbitral award shall be considered by the court within 10 business days (this term to be extended in some exceptional cases). Upon consideration of the application, the court renders a ruling on setting aside the arbitral award or rejecting the application submitted. The court ruling could be appealed to a higher instance court within 10 days and enters into force on the date of expiry of the period for appeal or on the date of rendering a decision by a higher instance court.

The rulings rendered by the first instance court and the appellate court could be further appealed to the Supreme Court of Kazakhstan, provided that the amount of claim under the arbitral award exceeds the threshold of approximately 5.05 million tenge for individuals or approximately 75.75 million tenge for legal entities.

## **Applicable procedural law for recognition and enforcement of arbitral awards**

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### **Applicable legislation for recognition and enforcement**

- 4 What is the applicable procedural law for recognition and enforcement of an arbitral award in your jurisdiction? Is your jurisdiction party to treaties facilitating recognition and enforcement of arbitral awards?

Foreign arbitral awards are recognised and enforced in accordance with the international treaties to which Kazakhstan is a party, the Civil Procedure Code No. 377-V dated 31 October 2015 (CPC) and the Law on Enforcement Proceedings and Status of Court Enforcement Officers.

Kazakhstan is a party to the New York Convention, European Convention on International Commercial Arbitration (Geneva, 1961) and the Convention on the Settlement of Disputes (the ICSID Convention).

Domestic arbitral awards are recognised and enforced in accordance with the CPC, the Law on Arbitration and the Law on Enforcement Proceedings and Status of Court Enforcement Officers.

The Arbitration Law may also apply to the procedure for recognition and enforcement of foreign arbitral awards, if the seat of the arbitration is the Republic of Kazakhstan and the parties agreed that an arbitration agreement will be governed by the laws of the Republic of Kazakhstan.

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## **The New York Convention**

- 5     **Is the state a party to the 1958 New York Convention? If yes, what is the date of entry into force of the Convention? Was there any reservation made under Article I(3) of the Convention?**

Kazakhstan is a party to the 1958 New York Convention, which entered into force on 18 February 1996 (according to the Convention status published online by UNCITRAL at [www.uncitral.org/uncitral/en/uncitral\\_texts/arbitration/NYConvention\\_status.html](http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_status.html)). Under Article I(3), Kazakhstan applies the Convention only to recognise and enforce awards made in the territories of other contracting states.

## **Recognition proceedings**

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### **Competent court**

- 6     **Which court has jurisdiction over an application for recognition and enforcement of arbitral awards?**

Pursuant to the CPC, disputes the parties to which are legal entities or individuals engaging in entrepreneurial activities without forming a legal entity (individual entrepreneurs) fall within the jurisdiction of specialised inter-district economic courts. Disputes in which at least one party is an individual not engaging in entrepreneurial activities are to be reviewed by district courts of general jurisdiction.

The territorial jurisdiction of arbitral award enforcement application is dependent on the place of residence (individual debtor) or the location of the main organisation (legal entity debtor). If the debtor's place of residence or location is unknown, the application is to be filed with a court according to the location of the property. The CPC also sets forth that applications may be filed at the place of the dispute review by arbitration (which may be the case if the place of dispute review was Kazakhstan).

The jurisdiction rules apply to both local and foreign arbitral awards.

## Jurisdictional issues

- 7 What are the requirements for the court to have jurisdiction over an application for recognition and enforcement of arbitral awards? Must the applicant identify assets within the jurisdiction of the court that will be the subject of enforcement for the purpose of recognition proceedings?

Pursuant to the CPC, an applicant may apply to court at the location of the debtor's assets if the debtor's location is unknown. In this case, the applicant should provide documents to support the fact that the debtor's assets are located in the territory of the Republic of Kazakhstan (e.g., extracts from the register of shareholders or a certificate of registered rights to immovable property).

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## Form of the recognition proceedings

- 8 Are the recognition proceedings in your jurisdiction adversarial or *ex parte*?

Recognition proceedings are adversarial. The parties are informed of the place and time of the court hearing. However, their failure to attend court does not prevent the review, unless the debtor motions for postponement and provides valid reasons for why it was not possible to attend.

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## Form of application and required documentation

- 9 What documentation is required to obtain the recognition of an arbitral award?

The party applying for recognition and enforcement of an arbitral award must submit to the competent court the authenticated original award, or a duly certified copy thereof, and the original arbitration agreement (agreement including an arbitral clause), or a duly certified copy thereof. It is necessary to submit one copy of each of these documents.

The New York Convention does not define 'duly certified copy', but we believe it to be a copy certified by the arbitration having rendered the award, or a notarised copy.

Pursuant to Article 475 of the CPC, documents issued, compiled or certified by the competent authorities of foreign states, which are executed outside Kazakhstan according to the laws of foreign states, are accepted by courts if they are consular legalised, unless otherwise provided for by an international treaty. Kazakhstan is a party to the Hague Convention Abolishing the Requirement of Legalization for Foreign Public Documents of 5 October 1961, under which documents compiled and certified by the competent authorities of a contracting states do not require consular legalisation, an apostil being sufficient. Hence, if a copy of a foreign arbitral award is notarised, for submission to a Kazakh court, it would suffice to apostil the notarised copy of the award.

As regards domestic arbitral awards, according to the CPC, it is necessary to submit to court a notarised copy of an award by an *ad hoc* arbitral tribunal. If an award was issued by a constantly functioning arbitral tribunal, the award copy may be certified by the head of that arbitral tribunal.

## **Translation of required documentation**

- 10 If the required documentation is drafted in a language other than the official language of your jurisdiction, is it necessary to submit a translation with an application to obtain recognition of an arbitral award? If yes, in what form must the translation be?

If the required documents are drawn up in a foreign language, the party must provide a duly certified translation of the documents into the Kazakh or Russian (which is used, if necessary, alongside Kazakh). The language of judicial proceedings is established by the court ruling, depending on the language of the application filed in court. Thus, if the application for arbitral award enforcement is made in Russian, the applicant must provide a Russian translation of the foreign language documents attached to the application.

There are no sworn translators in Kazakhstan. A translation may be prepared by any translator possessing a relevant qualification. The submitted translation normally contains the translator's signature, the authenticity of which is notarised, although there is no such requirement in the Kazakhstan legislation. As a rule, documents submitted to court must be translated in full.

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## **Other practical requirements**

- 11 What are the other practical requirements relating to recognition and enforcement of arbitral awards?

An application for recognition and enforcement of an arbitral award must include a document confirming payment of the state duty; in 2019, the duty is 12,625 tenge.

The application for arbitral award enforcement may be filed within three years of the date of expiry of the term for its voluntary performance. This gives rise to a question of how to determine the voluntary performance term, if it is not specified in the arbitral award. If the award or the rules of arbitration lack provisions setting the term for voluntary or immediate performance of the award, it would be expedient if the party, once it receives the full text of the award rendered in its favour, submits to the other party a written proposal to perform the award voluntarily, specifying a reasonable term for the same.

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## **Recognition of interim or partial awards**

- 12 Do courts recognise and enforce partial or interim awards?

Article V of the New York Convention implies in its essence that only arbitral awards rendered on the dispute merits and upon completion of arbitration proceedings are subject to enforcement. According to Article 501 of the CPC, Kazakhstan also recognises and enforces arbitral awards (resolutions, rulings) approving an amicable agreement.

The Kazakhstan legislation does not regulate the procedure for recognition of partial or interim awards. At the same time, the identified single cases in judicial practice do not allow for completely excluding the practical likelihood of the recognition and enforcement of partial or interim awards.

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## **Grounds for refusing recognition of an award**

- 13 What are the grounds on which an award may be refused recognition? Are the grounds applied by the courts different from the ones provided under Article V of the Convention?

The CPC provides for a greater number of grounds for refusing recognition of the award than stipulated by the New York Convention. In addition to the grounds provided for by Article V of the Convention, a court may refuse recognition and enforcement of an arbitral award if a party, against which the arbitral award was rendered, submits evidences that:

- there is an effective court decision or arbitral award rendered under a dispute between the same parties, with respect to the same subject and on the same grounds, or a court or arbitration ruling on termination of proceedings in the case in connection with the claimant's abandonment of the claim; or
- rendering of an arbitral award became possible following the commitment of a criminal offence established by a court sentence, which took legal effect.

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## **Effect of a decision recognising an award**

- 14 What is the effect of a decision recognising an award in your jurisdiction? Is it immediately enforceable? What challenges are available against a decision recognising an arbitral award in your jurisdiction?

The court ruling on recognition and enforcement of an arbitral award is subject to immediate enforcement. The court issues an enforcement order, which is the basis for instituting the enforcement proceedings. Further, the arbitral award is enforced by the enforcement agencies.

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## **Decisions refusing to recognise an award**

- 15 What challenges are available against a decision refusing to recognise an arbitral award in your jurisdiction?

A decision refusing to recognise an arbitral award may be appealed in the appellate instance court. If the appellate court dismisses the appeal, the judicial act issued by the appellate court may be appealed under the cassation procedure.

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## **Stay of recognition or enforcement proceedings pending annulment proceedings**

- 16 Will the courts adjourn the recognition or enforcement proceedings pending the outcome of annulment proceedings at the seat of the arbitration? What trends, if any, are suggested by recent decisions? What are the factors considered by courts to adjourn recognition or enforcement?

The procedure for recognition and enforcement of arbitral awards is not the action proceedings; therefore, the Kazakhstan legislation provides for an extremely short timeline for this procedure, equal to 15 business days from the date the court accepts an application.

The judicial acts issued under this procedure are not always published and we cannot investigate the trends suggested by recent decisions. Based on the firm's experience, the court did not suspend the recognition or enforcement proceedings, although a party filed an application for suspension, referring to the annulment proceedings at the seat of the arbitration. Subsequently, the arbitral award under this case was annulled, after which the Kazakh court annulled its ruling on enforcement of the arbitral award upon the concerned party's application.

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## Security

- 17 If the courts adjourn the recognition or enforcement proceedings pending the annulment proceedings, will the defendant to the recognition or enforcement proceedings be ordered to post security? What are the factors considered by courts to order security? Based on recent case law, what are the form and amount of the security to be posted by the party resisting enforcement?

The Kazakhstan legislation does not provide for any security measures when considering applications for recognition or enforcement of arbitral awards.

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## Recognition or enforcement of an award set aside at the seat

- 18 Is it possible to obtain the recognition and enforcement of an award that has been fully or partly set aside at the seat of the arbitration? If an award is set aside after the decision recognising the award has been issued, what challenges are available against this decision?

If a party submits evidence that an arbitral award was fully set aside, the court will refuse to recognise and enforce it. Should the award be partially set aside, the court will recognise and enforce the part that remains in force.

The CPC provides for the grounds for reconsideration of judicial acts under newly discovered circumstances. These include a decision being set aside, which serves as a basis for issuing a judicial act. If an award is set aside after the decision recognising the award has been issued, the party concerned may file an application to court for reconsideration under newly discovered circumstances of the ruling on recognition and enforcement of the award. An application must be filed within three months of the date the award was set aside.

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## Service

### Service in your jurisdiction

- 19 What is the applicable procedure for service of extrajudicial and judicial documents to a defendant in your jurisdiction?

Extrajudicial and judicial documents are generally served in Kazakhstan via a courier service with confirmation of delivery.

According to the CPC, a defendant is notified about a court hearing by way of a notification letter sent by recorded delivery, or a telegram or telephone message or other

means of communication whereby the time of delivery can be fixed. Kazakhstan courts have started to notify parties about the date of a court hearing by sending emails or messages to mobile phones.

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## **Service out of your jurisdiction**

### **20 What is the applicable procedure for service of extrajudicial and judicial documents to a defendant out of your jurisdiction?**

Kazakhstan legislation does not provide for a particular procedure for service of extrajudicial and judicial documents to a defendant outside Kazakhstan.

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## **Identification of assets**

### **Asset databases**

#### **21 Are there any databases or publicly available registers allowing the identification of an award debtor's assets within your jurisdiction?**

The only publicly available database is the electronic register of Kazakhstan's legal entities. This database allows public access to information about participation of a company or an individual in legal entities registered in Kazakhstan (except for joint-stock companies with a large number of shareholders).

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## **Information available through judicial proceedings**

#### **22 Are there any proceedings allowing for the disclosure of information about an award debtor within your jurisdiction?**

It is not possible to obtain information about a debtor's assets at the recognition and enforcement stage of an arbitral award. Disclosure of such information through judicial proceedings is possible during the arbitration proceedings by applying to the court for the adoption of interim or provisional measures (in most cases, provisional measures are adopted in the form of seizure or attachment of the debtor's property). Information about a debtor's assets may also be disclosed during the enforcement proceedings by court enforcement officers (once the award is recognised by court).

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## **Enforcement proceedings**

### **Availability of interim measures**

#### **23 Are interim measures against assets available in your jurisdiction? May award creditors apply such interim measures against assets owned by a sovereign state?**

Interim measures against the assets of a debtor are available either during the arbitration proceedings by applying to the court, or at the enforcement stage of an arbitral award, by court enforcement officers, after the award has been recognised by the court and the relevant court ruling on enforcement has been rendered.



Under Article 492 of the CPC, award creditors may apply interim measures against assets owned by a sovereign state if:

- the state has expressly consented to the taking of such measures as indicated;
  - by international agreement;
  - by an arbitration agreement or in a written contract; or
  - by a declaration before the court or a written communication after a dispute between the parties has arisen; or
- the state has allocated or earmarked property for the satisfaction of the claim that is the object of that proceeding; or
- the state either uses the property in Kazakhstan, or the property is designated, for purposes other than for the performance of sovereign power.

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### **Procedure for interim measures**

#### **24 What is the procedure to apply interim measures against assets in your jurisdiction? Is it a requirement to obtain prior court authorisation before applying interim measures? If yes, are such proceedings *ex parte*?**

According to the CPC, the Kazakhstan court may apply provisional measures upon the claimant's application, if failure to take such measures may hinder the enforcement of a judgment or even make it impossible.

The CPC provides for the following provisional measures:

- freezing money or other property of the defendant;
- prohibiting certain actions by the defendant;
- prohibiting other persons from carrying out obligations to the defendant as stipulated by legislation or contract (e.g., transferring disputed property to the defendant or registering rights thereto);
- suspending the sale of property, if a claim for the release of that property is filed; and
- suspending debt recovery on the basis of a writ of execution that is disputed by the applicant.

This list is not exhaustive. The court may also apply other measures, depending on the merits of the dispute, including applying several measures at one time.

The court considers an application for security of a claim without notifying the defendant. The parties may appeal to a superior court against a court ruling on application of provisional measures or on refusal to apply such measures. The term for bringing an appeal is 10 business days from the date the court issues a ruling in its final form or from the date when a party becomes aware of the ruling. Filing an appeal to a superior court does not suspend the court ruling on the application of provisional measures.

Arrests (freezing) of money or other property owned by the defendant are most often applied in Kazakhstan when considering commercial disputes.

A court ruling on the adoption of interim or provisional measures is subject to enforcement by court enforcement officers, whose function is to identify a defendant's property and to send the court ruling on attachment to the relevant authorities for execution.

### **Interim measures against immovable property**

- 25 What is the procedure for interim measures against immovable property within your jurisdiction?

The procedure for interim measures against immovable property is same as discussed in question 24. A court ruling on the attachment of a defendant's immovable property is to be sent by the court enforcement officer to the Ministry of Justice; the latter records the relevant encumbrances on the immovable property register.

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### **Interim measures against movable property**

- 26 What is the procedure for interim measures against movable property within your jurisdiction?

The procedure for interim measures against movable property is same as discussed in question 24. A court ruling on the attachment of a defendant's movable property is to be sent by the court enforcement officer to the relevant registration authorities for recording the relevant encumbrances on the appropriate register (concerning shares, participatory interest, motor vehicles, etc.).

Further, arrested movable property may be withdrawn by the court enforcement officer or a defendant may have restricted use of the arrested property.

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### **Interim measures against intangible property**

- 27 What is the procedure for interim measures against intangible property within your jurisdiction?

The procedure for interim measures against intangible property is same as discussed in question 24. If intangible property is subject to registration (e.g., IT rights), the relevant encumbrances are recorded on the appropriate register, based on the relevant court ruling.

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### **Attachment proceedings**

- 28 What is the procedure to attach assets in your jurisdiction? Is it a requirement to obtain prior court authorisation before attaching assets? If yes, are such proceedings *ex parte*?

Kazakhstan law does not distinguish between interim measures and attachment proceedings. The law provides for provisional measures – see question 24. The procedure for adopting provisional measures is the same for all types of measures.

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### **Attachment against immovable property**

- 29 What is the procedure for enforcement measures against immovable property within your jurisdiction?

See question 25.

### **Attachment against movable property**

- 30 What is the procedure for enforcement measures against movable property within your jurisdiction?

See question 26.

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### **Attachment against intangible property**

- 31 What is the procedure for enforcement measures against intangible property within your jurisdiction?

See question 27.

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### **Enforcement against foreign states**

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#### **Applicable law**

- 32 Are there any rules in your jurisdiction that specifically govern recognition and enforcement of arbitral awards against foreign states?

There are no rules in Kazakhstan that specifically govern recognition and enforcement of arbitral awards against foreign states.

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### **Service of documents to a foreign state**

- 33 What is the applicable procedure for service of extrajudicial and judicial documents to a foreign state?

Since Kazakhstan has ratified the UN Convention, the procedure provided for by Article 22 of the Convention applies to service of judicial documents to a foreign state.

Article 499 of the CPC provides that service of notices and other judicial documents to a foreign state is performed through diplomatic channels. The documents are deemed to be served on the date of their receipt by the relevant foreign affairs authority of the state.

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### **Immunity from enforcement**

- 34 Are assets belonging to a foreign state immune from enforcement in your jurisdiction? If yes, are there exceptions to such immunity?

It is not sufficiently clear whether a foreign state enjoys immunity from enforcement of arbitral awards.

Article 482 of the CPC provides that by concluding the arbitration agreement, the foreign state voluntarily waives judicial immunity regarding issues associated with implementation of the functions relating to arbitration by Kazakhstan courts. Enforcement of an arbitral award requires adoption of a relevant court ruling on recognition and enforcement by a Kazakhstan court. This could lead to a conclusion that when recognising and enforcing an arbitral award against a foreign state, the Kazakhstan court implements its functions relating to arbitration, whereby the foreign state is not immune from enforcement.

Kazakhstan legal practitioners support this position, under which conclusion of an arbitration agreement means that the foreign state waives immunity from enforcement of the arbitral award (see Suleimenov MK and Osipov E, *Immunity of International Organizations*, [https://online.zakon.kz/Document/?doc\\_id=31115410#pos=50;19](https://online.zakon.kz/Document/?doc_id=31115410#pos=50;19) (in Russian)).

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### **Waiver of immunity from enforcement**

35 Is it possible for a foreign state to waive immunity from enforcement in your jurisdiction? If yes, what are the requirements of such waiver?

As discussed in question 31, it is not sufficiently clear whether a foreign state enjoys immunity from enforcement of arbitral awards. To secure creditors' interests, we would recommend that an arbitration agreement should explicitly provide that a foreign state waives its immunity from enforcement of a future arbitral award.

# Appendix 1

## About the Authors

### **Lyailya Tleulina**

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Lyailya Tleulina has more than 15 years of experience as a litigator and commercial arbitration lawyer, focusing on complex multi-jurisdictional commercial disputes and domestic litigation. She exclusively focuses on dispute resolution. She has represented clients, predominantly foreign investors, in commercial arbitrations over disputes involving debt recovery and in courts over cases for enforcement of foreign judgments and awards. She has successfully applied pre-judicial and extrajudicial methods of dispute resolution. Clients praise her as a supremely intelligent litigator, with a thorough knowledge of the law and the ability to find creative solutions.

Lyailya Tleulina has published profound articles on complex legal issues of civil procedure, civil law and enforcement in leading professional journals in Kazakhstan and abroad.

### **Ardak Idayatova**

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Ardak Idayatova is a leading dispute resolution lawyer with a primary focus on construction arbitration and litigation. In 2018, she was promoted to the position of deputy head of dispute resolution. Ardak is a mature and senior lawyer running dispute projects quite independently with limited involvement of partners. She represents clients before the Kazakhstan courts at all levels and acts as counsel in commercial arbitrations, seated both in Kazakhstan and abroad.

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Enforcement used to be an irrelevance in international arbitration. Most losing parties simply paid. Not so any more. The time spent on post-award matters has increased vastly.

*The Guide to Challenging and Enforcing Arbitration Awards* is a comprehensive volume that addresses this new reality. It offers practical know-how on both sides of the coin: challenging, and enforcing, awards. Part I provides a full thematic overview, while Part II delves into the specifics seat by seat. It covers 29 seats.

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