

## Arbitration clause between state bodies and government-sponsored enterprise and its features

The question of whether government-sponsored enterprises can enter into arbitration clauses arises frequently. Despite the fact that this issue is regulated by the legislation, there are some key features which we shall highlight below.

In accordance with Article 8 (8) of the Law of the Republic of Kazakhstan "On Arbitration" (hereinafter – the Law), the Arbitration is not subject to disputes that affect the interests of minors, persons recognized in the manner prescribed by law, incapacitated or partially incapacitated, on rehabilitation and bankruptcy, between subjects of natural monopolies and their consumers, between government bodies, subjects of the quasi-public sector.

With regard to disputes with State bodies the law stipulates as follows: in accordance with Article 8 (10) of the Law, the Arbitration is not entitled to consider disputes between individuals and (or) legal entities of the Republic of Kazakhstan, and state bodies, state enterprises, as well as legal entities, fifty or more percent of voting shares (stakes in the authorized capital) of which directly or indirectly belong to the state, - without the consent of the authorized body of the relevant industry (in relation to republican property) or a local executive body (in relation to communal property).

State bodies, state enterprises, as well as legal entities, fifty or more percent of voting shares (stakes in the authorized capital) of which directly or indirectly belong to the State, intending to conclude an arbitration agreement, must send a request for consent to the conclusion of such an agreement to the authorized body of the relevant industry (in relation to republican property) or local executive body (in relation to communal property), indicating the projected amounts of arbitration costs. The authorized body of the relevant industry or the local executive body shall consider the request and send a written message on either an irrevocable consent or a reasoned refusal to give consent within fifteen calendar days. When considering a request, the authorized body of the relevant industry or local executive body must take into account the economic security and interests of the state.

It is obvious from the abovementioned, that it is possible to conclude arbitration clauses for government-sponsored enterprises, but with the consent of the authorized body (for republican enterprises, these are currently structural divisions of the Ministry of Finance of the Republic of Kazakhstan).

It is worth mentioning that consent shall be obtained prior to the conclusion of an agreement containing an arbitration clause, otherwise, such clause will be invalid.

Moreover, in accordance with the current legislation, the International Arbitration Center, acting in accordance with the Constitutional Law of the Republic of Kazakhstan "On the International Financial Center Astana" (hereinafter - "AIFC Arbitration") may consider disputes, one of the parties to which are government-sponsored enterprises, without the consent of the relevant authorized body. In order to consider a dispute in the AIFC Arbitration, the only requirement is the consent of the parties to consider such a dispute in the arbitration (arbitration clause).

This exception is applicable due to the hierarchy of the legal acts of the Republic of Kazakhstan. According to Article 10 of the Law of the Republic of Kazakhstan on "Normative Legal Acts", constitutional laws have priority over the laws of the Republic of Kazakhstan, and therefore, the Constitutional Law of the Republic of Kazakhstan "On the International Financial Center Astana" has greater legal effect than the Law "On Arbitration". In this regard, in order to refer a dispute to the AIFC arbitration, the prior consent of the authorized body is not required. Thus, this fact increases the attractiveness of the AIFC arbitration in the Parties' choice of jurisdiction.

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