

**GOVERNMENT'S CONSENT TO
INVOLVEMENT OF A STATE-OWNED COMPANY
IN AIFC INTERNATIONAL ARBITRATION CENTRE
PROCEEDINGS:
TO SEEK OR NOT TO SEEK**

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Task

- contract with a state-owned company;
- both parties are Kazakhstan legal entities.

Our first recommendation: go to **arbitration.**

Problem

Article 8.10 of the Arbitration Law:

“An arbitration institution may not deal with a dispute between a Kazakhstan natural person and/or legal entity, on the one side, and a government authority or a government enterprise or an entity in which at least 50% of voting shares/interests are either directly or indirectly held by the government, on the other side, without consent of the relevant industry authority (if the dispute concerns public property) or the relevant local executive authority (if the dispute concerns municipal property)”.

Seeking Government's Consent

- 1) a state-owned company should file a request for consent to the execution of an arbitration agreement specifying the *estimated costs of arbitration proceedings*;
- 2) the relevant industry authority should, within 15 days, notify the applicant of either their irrevocable consent or their well-grounded denial of consent.

NB: when processing the request, the competent authority should consider economic security concerns and **national interests.**

Preamble to the Arbitration Law

The Law “*regulates any public relations arising in the course of arbitration proceedings in the Republic of Kazakhstan, and sets out the procedures and conditions for recognition and enforcement of arbitration awards in Kazakhstan*”.

Question: Can we assert that the Arbitration Law provisions **are not applicable to foreign arbitration proceedings?**

Exceptions under the Constitutional Statute (1)

Article 4.1 of the Constitutional Statute provides that “the current AIFC law is based on the Constitution of the Republic of Kazakhstan and comprises the following:

- 1) this Constitutional Statute;*
- 2) the AIFC acts complying with this Constitutional Statute that may be based on the principles, rules and cases of the law of England and Wales and/or standards of leading international financial centres and adopted by the AIFC bodies within their authority as determined by this Constitutional Statute; and*
- 3) the current laws of the Republic of Kazakhstan that may be applied to the extent not covered by this Constitutional Statute and AIFC acts”.*

Exceptions under the Constitutional Statute (2)

However, subject to Article 7 of the AIFC Arbitration Regulations, “the requirements of the Arbitration Law of the Republic of Kazakhstan do not apply to arbitrations conducted under these Regulations”.

Conclusion: the aforementioned restrictions under the Arbitration Law **do not apply to the AIFC arbitration.**

Authorities' Approach and Our Recommendations to the Client

- 1) Ministry of Energy's opinion is that government's consent **must be sought**;
- 2) our recommendation was to choose the **AIFC Court** because:
 - the aforementioned restrictions under the Arbitration Law are not applicable to the AIFC Court;
 - investors are more inclined to trust the AIFC Court rather than other Kazakhstan courts .



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