

Russia

Update on the Changes to the ICAC Rules

The International Commercial Arbitration Court (ICAC) Rules are currently undergoing a substantial review procedure, which is likely to have a considerable impact on the procedural conduct of international commercial arbitration under the ICAC Rules within the Russian Federation. The proposed new ICAC Rules were adopted by the general meeting of the listed Arbitrators of ICAC on 19 October 2005.

The key changes introduced by the new Rules include the following:

1. Compared with the current ICAC Rules, the proposed new Rules would increase the overall reach of the ICAC in relation to the regulation of arbitral proceedings. For example, the Rules propose to extend (i) the arbitrator's liability to include omissions as well as actions by the arbitrator in connection with arbitral proceedings and to extend (ii) the duty of confidentiality to experts, employees of the ICAC and employees of the Chamber of Commerce. The new Rules also propose to bring arbitration proceedings into the 21st Century, by extending the modes of communication recognised for the purpose of arbitral proceedings to include emails as well as various means of registered delivery. As further evidence of the increase in the ICAC's reach, and in stark contrast to the previous Rules, the new Rules propose a measure enabling the Presidium (being the Chairman, his deputies and also three representatives of persons on the ICAC list of arbitrators) to remove any arbitrator without the requirement to specify reasons for such a removal.

2. With a view to increasing the transparency and accountability standards applicable to arbitral proceedings, the new Rules seek to increase the requirements imposed on ICAC arbitrators, requiring them to sign a specific form indicating their consent to comply with the ICAC Rules in their capacity as arbitrator. In addition, the new Rules require that each arbitrator provide short biographical details including reference to their education and previous professional experience. A failure to comply with these requirements within 15 days from receipt of the notification of appointment from ICAC results in the Arbitrator being deemed to have declined the appointment.

3. The proposed Rules further suggest measures designed to increase the flexibility of arbitral proceedings with a view to obtaining a suitable result, by allowing the parties to an arbitration the freedom to agree not to resort to interim measures against one another during arbitral proceedings and providing the option for the giving of 'partial awards' to be adopted on discrete issues arising during the arbitral proceedings or with regard to part of the original claim.

The new Rules reflect the current trend in Russia to move closer towards meeting the present requirements of international trade and the country's commitment to the adherence both to the Council of Europe and the Organization for Security and Cooperation in Europe (OSCE) founding documents. These Rules will be in force from 1 March 2006 and all arbitrations commenced after this date will be subject to the new rules.

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Russian Speaker Sees Subsoil Law Delays until Spring

Russia's new subsoil law, a keenly awaited reform of rules for oil and metals producers, may not be passed until at least spring next year, the speaker of Russia's upper house of parliament said on Friday.

"I think that it will only happen in spring. Right now the government is amending it. I think that they won't be ready in time for the autumn session," said Sergei Mironov, speaker of the upper house, which also has to approve the law.

The lower house had been scheduled to hold a first reading on Nov. 2, but it was postponed because of a lack of clarity on how to restrict foreign involvement in mineral resources that Russia considers strategic. The government said it was postponing the debate until the second half of November. But Mironov's comments imply that companies that are closely watching the law to see how it will affect their plans will have to wait several months longer.

The idea of establishing a list of strategic fields emerged after President Vladimir Putin called on the government earlier this year to tighten the state's grip on natural resources.

Investors have said they were concerned about the move as it could limit the growth potential in Russia of foreign players such as U.S. Exxon-Mobil or BP's 50/50 Russian venture, TNK-BP.

The Resources Ministry last month came up with its first concrete proposals saying it wanted limits on foreign participation in auctions for natural resources that are scarce in Russia – diamonds, uranium, quartz and others.

Foreign firms would also be banned from fields with more than 1 billion barrels of oil or 1 trillion cubic metres of gas, but large remote offshore fields could still be developed by foreign ventures.

Foreigners would also be barred from fields situated on, or close to, Russian military sites. Resources Minister Yuri Trutnev has said strategic status would only be granted to untapped fields and would not apply to deposits already in production.

The ministry has said the Titov and Trebs oilfields in the Timan Pechora oil region and the Chayadinskoye gas field in East Siberia will be considered strategic, as will Sukhoi Log, Eurasia's biggest gold deposit, and the Udokan copper field.

Some analysts also said the key issue was how the state would classify firms with majority foreign control as most Russian oil companies are actively traded abroad.

It remains unclear what limits could be put on 50/50 joint ventures.

Reuters, November 11, 2005

Kazakhstan

New Law On Production Sharing Agreements (Contracts) for Offshore Oil Operations*

The President signed a new Law of the Republic of Kazakhstan *On Production Sharing Agreements (Contracts) for Offshore Oil Operations* (the "Law") on 8 July 2005. The Law came into force on the date of its official publication, i.e. on 15 July 2005.

The Law establishes the legal and economic principles for interaction between the Republic of Kazakhstan and contractors under production sharing agreement (the "PSA") conditions and governs public relations associated with the provision of the right to conduct oil operations, to conclude, fulfill, change and terminate PSAs in the Kazakhstan section of the Caspian and Aral seas, determines the basic legal conditions of these agreements, and the subsequent allocation of production between the Republic of Kazakhstan and contractors.

The Law provides 50% participation rights in all offshore projects to the National Company (i.e. "KazMunaiGaz") and the right to determine (with the consent of the Ministry of Energy and Mineral Resources) the type of contract to be concluded.

The Law requires establishing obligations of subsurface users

to purchase Kazakhstan goods/services in the PSA, the provision of a certain quantity of oil for processing in Kazakhstan and additional obligations for the contractor (e.g. the commissioning of advanced technologies and development of infrastructure and other facilities).

The Law establishes the maximum period of a PSA as 35 years for exploration and production projects; 25 years for production projects and 45 years for the exploration and production of unique reserves. When a PSA expires, the contractor shall have the exclusive right (provided all conditions of the previous PSA have been met in full) without participating in a tender to enter into negotiations with the competent body for the conclusion of a new PSA for a period sufficient to conclude the project.

With respect to the state authorities regulating the activity related to the PSAs, the Law provides a complete list of the authority of the Government and the relevant competent body (i.e. the Ministry of Energy and Mineral Resources), regional executive bodies, other state bodies and authorised body (designated by the Government) with respect to PSAs.

Also, the Law envisages specific legislative and economic conditions and procedures for conducting tenders and according to which PSAs should be concluded and executed. An entire chapter of the Law is dedicated to defining the terms and con-

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ditions for conducting tenders, special procedures to receive the right to conduct oil operations, and the conditions for declaring the winner of a tender.

The Law also regulates the terms and conditions for concluding and executing a PSA, such as operator management, taxation and accounting requirements, contractual stability, the resolution of disputes, etc. For instance, taxes under a PSA should be calculated and paid in accordance with the Tax Code; foreign investors are permitted to keep their accounts in foreign currency, but should submit reports in tenge.

Special provisions in the Law guarantee contractor rights and the stability of the PSA regime. In particular, the Law specifies that PSAs will be grandfathered, while any PSAs concluded prior to the entry into force of the Law will remain valid. If legislation changes, the economic balance of the parties of a PSA prior to the changes should be retained. The Law also designates special cases not covered by stability guarantees, such as (1) amendments to legislation and international agreements of the Republic of Kazakhstan regarding the import, production and sale of excisable goods; and (2) amendments and additions to legislative acts of the Republic of Kazakhstan introduced to ensure national and environmental safety, public health and morals.

The Law states that relations under the PSA on the combined exploration and production or production of oil should be governed exclusively by the laws of the Republic of Kazakhstan.

In conclusion, we would like to mention that the enactment of the Law will promote the establishment of a concise legal basis, which will govern the offshore oil operations under PSAs, and the Law will facilitate the development of the regulatory and legal framework that is, undoubtedly, an essential and vital aspect for both investors and Kazakhstan.

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The Government of the Republic of Kazakhstan is going to introduce a new Transfer Pricing Law*

The Government of the Republic of Kazakhstan has initiated changes to Transfer Pricing legislation by introducing a draft of a new Transfer Pricing Law.

The draft Law is currently under the consideration of a Working Group consisting of representatives from

the Tax Committee of the Ministry of Finance, the Ministry of Economy and Budget Planning, the Financial Police, the Customs Committee and taxpayers.

The currently effective Transfer Pricing Law of 5 January 2001 was criticized by investors operating in Kazakhstan on a numerous occasions due to uncertainty in its application and as a result excessive control over prices by the state authorities, particularly with respect to the export of mineral resources. Therefore, it was hoped that the new Law would have positive effect in bringing clarity to transfer pricing regulation. However, it appears that by introducing the new Transfer Pricing Law the state aims to further strengthen its control over prices used by taxpayers in transactions within and outside of the Republic of Kazakhstan.

Over the last few months the state authorities have presented considerably different versions of the draft Law for discussion within the Working Group. The latest version of the draft Law (as of 31 August 2005) includes the following significant amendments:

- (i) introduction of new and amended definitions;
- (ii) amended scope of transactions that are subject to the application of transfer pricing regulations, including:
 - ! international business transactions;
 - ! transactions, conducted in the Republic of Kazakhstan if interrelated with international business transactions, where participants (i) carry out their activity in the sphere of subsurface use, (ii) are subject to tax incentives, (iii) have losses in accordance with their tax declarations for 2 tax years immediately preceding the transaction;
- (iii) additional introduction of 5% price deviation for certain items within the amended scope of transactions subject to Transfer Pricing Law control;
- (iv) more precise definition of rights and obligations of the authorized bodies and parties to a transaction.

The latest version of the draft Law does not reflect the numerous comments and amendments proposed by taxpayers, such as (i) state control should cover only those transactions between related parties, (ii) a reduction of transactions that are subject to transfer pricing regulations, (iii) an improvement in state control and transactions monitoring procedures and (iv) a more efficient method for determining market price.

Overall, the draft Law does not contain significant positive changes, though in certain aspects it is moving to-

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wards the principles established in OECD Transfer Pricing Guidelines. Besides, the current version of the draft Law is quite a raw document, which requires a number of further changes.

It is expected that the new Transfer Pricing Law should replace the existing Law starting from 1 January 2006, but before this can happen a significant amount of work will be required, particularly if taxpayers want to push for significant positive changes.

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Liberalization of the Currency Regime in Kazakhstan*

Liberalization of the currency regime is a conceptual feature of the newly adopted Law on Currency Regulation and Currency Control (hereinafter, the "Law") which was signed by the President of the Republic of Kazakhstan on June 13, 2005. The Law has been developed in accordance with the "Program for the liberalization of the currency regime in Kazakhstan for 2005–2007" approved by the Government Resolution No 705 dated June 24, 2004.

The Law enters into force six months after the day of publication, i.e. on December 18, 2005. The current Law on Currency Regulation dated December 24, 1996 loses its force with the entry into force of the Law.

The Law introduces important innovations and changes into the field of currency control and regulation.

The Law provides for three methods of currency regulation: licensing, registration and the notification of currency transactions. The latter is an innovation for currency registration in Kazakhstan. The notification regime involves resident¹ participants of currency transactions and (or) authorized

banks providing information on a currency contract to the National Bank of Kazakhstan.

Starting from January 1, 2007 the licensing regime related to currency transactions will be abolished and will remain solely with respect to the following

types of activities associated with the use of currency valuables: retail trade and the provision of services in return for foreign currency cash; the organization of exchange transactions with foreign currency by authorised organizations. A license to perform retail trade activities and to provide services in return for foreign currency cash is issued to entities that perform their activities under the duty free shop regime, and also on marine and domestic water vessels, aircraft, railway and automobiles performing international conveyances. Current legislation establishes a licensing regime for the following types of transactions: for residents to open accounts (including accounts in the Kazakhstan national currency) in foreign banks and other financial institutions; transfers by residents in favour of non-residents² to pay for transactions stipulating the transfer of property rights to real estate, with the exception of property equivalent to immovable items; the overseas investments of residents, the provision of credit by residents (apart from banks) to non-residents for a period of more than 180 days; the transfer of currency valuables to a non-resident by a resident for trustee management, etc.

One of the innovations established by the Law is that the National Bank of the Republic of Kazakhstan will perform currency monitoring activities to assess the stability of the balance of payments by means of creating an information database for currency transactions performed by objects of currency regulation and improving the statistics, analysis, and forecasting of the balance of payments, foreign debt and the international investment position of the Republic of Kazakhstan. Branches and representative offices of non-resident legal entities operating in Kazakhstan for no less than one year will be monitored.

The Law further liberalizes the procedure for the repatriation of foreign and national currency. Pursuant to the Law Kazakhstan residents are obliged to ensure the following has been credited to bank accounts in authorised banks within the deadline stipulated by the conditions of a transaction: foreign and national currency received by residents as payment for the export of goods (work, services) and currency transferred by residents in favor of a non-resident to make settlements for the import of goods (work, services) in the event a non-resident fails to fulfill obligations and (or) does not do so in full. Previously the repatriation period was limited to 180 days. This provision is effective starting from January 1, 2007.

In order to ensure residents fulfill repatriation requirements, the National Bank of the Republic of Kazakhstan will establish uniform rules and conditions for residents to register export and import transaction certification. A transaction certification

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¹ According to the Law the concept of resident of the Republic of Kazakhstan includes: (1) citizens of the Republic of Kazakhstan (2) foreigners who have a document providing the right to permanent residence in Kazakhstan (3) all legal entities created in accordance with legislation of the Republic of Kazakhstan (including their branches and representative offices located in the Republic of Kazakhstan and abroad).

² Non-residents of the Republic of Kazakhstan: individuals, legal entities, their branches and representative offices not indicated in the category of residents.

will not be drawn up for those contracts that have been concluded for an amount not exceeding the equivalent of USD 10,000 as at the date the exporter (importer) concluded the contract.

The Law proposes an expanded list of foreign currency transactions that are permitted between residents, most of which are currently prohibited. Examples of permitted transactions include:

- ! a transfer of money free-of-charge or a transfer of currency valuables free-of-charge by individuals to individuals, and also to legal entities that have charity activities registered as their charter activities;
- ! the payment of employee business trip expenses when the business trip is outside of the Republic of Kazakhstan;
- ! bank deposits made by individuals in favor of other individuals;
- ! transactions associated with the payment of taxes and other obligatory payments to the budget in those cases stipulated by legislative acts of the Republic of Kazakhstan;
- ! payments and money transfers under commission agreements associated with an export (import), using transferable letters of credit as the form of payment.

The Law provides one limitation for the performance of foreign currency transactions between non-residents, which is the introduction of the special authorization regime. This regime is ap-

plied in the event of a threat to the economic security of the Republic of Kazakhstan and the stability of its financial system.

Restrictions on non-resident individuals exporting foreign currency cash from the Republic of Kazakhstan have been reduced. Resident and non-resident individuals have the right to export foreign currency cash from the Republic of Kazakhstan in an amount not exceeding the equivalent of USD 10,000, without having to provide documents confirming the origin of the foreign currency cash to be exported. Any amount in excess of the above must be supported by documents supporting the legality of the source of any money exceeding the equivalent of USD 10,000. Currently the restriction on non-resident individuals for exporting foreign currency without having to provide documents confirming the origin of the foreign currency is USD 3,000.

Normative legal documents that will implement the provisions of the Law are currently being developed by the National Bank of the Republic of Kazakhstan.

In general the Law establishes a firm framework for the further liberalization of the currency regime in the Republic of Kazakhstan.

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Turkmenistan

Turkmenistan Offers Oil Search Rights

Turkmenistan will offer foreign investors rights to explore the deep shelf of its sector of the Caspian Sea, as the country struggles to pump more oil.

The exploration and development of the Caspian shelf is "the urgent goal", Turkmenistan President Saparmurat Niyazov, said in a statement posted on the state-owned news service's website.

Petroleum Nasional Bhd (Petronas), Dublin-registered Dragon Oil plc, London-based Burren Energy plc and Maersk Oil Turkmenistan BV, an oil unit of A.P. Moeller-Maersk A/S, the world's largest shipping company, are already exploring Turkmenistan's fields in the Caspian Sea and inland.

Dragon Oil on October 12 said its new well in the Cheleken offshore field had pumped more oil.

Burren increased oil output in Turkmenistan 50 per cent to 15,150 barrels a day in the first half of the year, up from the same period a year earlier, after drilling 12 new wells, the company said on September 19.

Petronas will begin producing oil in Turkmenistan by the end of the year and gas by end-2007, its chief executive Tan Sri Mohd Hassan Marican said.

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