

CONSULTATION PAPER NO. 15
On proposed amendments to AIFC Security Regulations and AIFC Personal Property Regulations

INTRODUCTION

1. Why are we issuing this paper?

The Astana International Financial Centre Authority (the “**AIFC Authority**”) has issued this Consultation Paper to invite public feedback and comments on the proposed amendments to AIFC Security Regulations and AIFC Personal Property Regulations (the “**Amendments**”).

The proposed Amendments aim to enhance enforcement of the national law and to avoid regulatory arbitrage in regards of pledge a real property as a security (collateral) in the AIFC.

2. Who should read this paper?

This Consultation Paper may be of interest to the current and prospective AIFC Participants, as well as all the AIFC Bodies and their organisations, individuals employed by AIFC Participants or AIFC Bodies or individuals seeking to be employed by AIFC Participants or AIFC Bodies, as well as legal advisors and human resources departments of the abovementioned entities, and generally, to all interested in providing their feedback to the Proposed Framework.

3. How to provide comments?

The AIFC Authority encourages interested parties to provide their views and comments in writing on the issues outlined in the Consultation Paper.

All comments should be provided to:

E-mail: legaldevelopmentdepartment@aifc.kz

You may as well identify your organisation in the provided comments.

By submitting your comments to the AIFC Authority you expressly consent to the processing by the AIFC Authority of the personal data pertaining to you, including, but not limited to the collection, recording, organisation, storage, adaptation or alteration, retrieval, use, disclosure by transmission, dissemination or otherwise making available, alignment or combination, blocking, erasure or destruction of thereof, as per the AIFC Data Protection Regulations 2017.

The AIFC Authority reserves the right to publish, including on its website, any comments you provide, unless you expressly request otherwise at the time of making comments. Comments supported by reasoning and evidence will be given more weight by the AIFC Authority.

4. What happens next?

The deadline for providing comments on the proposals in this Consultation Paper is 30 April 2024.

Once we receive your comments, we will consider if any further refinements are required to the Proposed Amendments annexed to this Consultation Paper. Once the task is complete, the draft of the Proposed Amendments will be further processed in accordance with the requirements, stipulated in the AIFC Regulations on AIFC Acts 2017.

The Proposed Amendments are in draft form only and are, therefore, subject to change following consultation as mentioned above. Consequently, you should not act on it until the Proposed Framework is formally enacted.

LEGISLATIVE PROPOSAL

Annex 1 – Policy paper on amendments

Annex 2 – Proposed amendments

Policy Paper
On amendments to AIFC Security Regulations and Personal Property Regulations

Astana

Date 14/03/24

1. Author*Name:**Division: Legal Development Department**Tel:**E-mail: legaldevelopmentdepartment@aifc.kz***2. Proposal type**

- | | | | | | |
|-----------------|---|--------------------------------|---------------------------------|------------------------------------|---------------------------------------|
| a) New | <input type="checkbox"/> Regulations | <input type="checkbox"/> Rules | <input type="checkbox"/> Policy | <input type="checkbox"/> Procedure | <input type="checkbox"/> Other: _____ |
| b) Amendment of | <input checked="" type="checkbox"/> Regulations | <input type="checkbox"/> Rules | <input type="checkbox"/> Policy | <input type="checkbox"/> Procedure | <input type="checkbox"/> Other: _____ |

3. Introduction

[Please, list the current framework documents that already exist in this field. What are the key issues with the current framework?]

This Policy Paper aims to provide a summary of the proposed amendments to the AIFC Security Regulations and AIFC Personal Property Regulations to enhance enforcement of the national law and to avoid regulatory arbitrage in regards to pledging of real property as a security (collateral) in the AIFC.

The creation of securities, registration and enforcement of securities in the AIFC is governed by the AIFC Security Regulations 2017 (hereinafter, the “**Security Regulations**”) which is modelled on the DIFC Law of Security No. 8 of 2005 (hereinafter, the “**DIFC Law**”).

The AIFC Security Regulations do not impose restrictions as to who can hold or obtain the benefit of a security in the AIFC, or who can grant a security interest governed by the Security Regulations. The application of the Security Regulations to a security interest does not depend on the law that governs the secured obligation. Accordingly, parties to a security agreement may opt to have the Security Regulations as the governing law while the financing agreement is governed by another law¹.

Under the Security Regulations, a security is enforceable (attachment of security interest²) when:

- a) value is given, which is normally when the loan is made;
- b) the security provider has the rights to deal with the collaterals, including to transfer them to the secured party; and
- c) a security agreement that binds the debtor and specifies the details of the Collateral is in place.

The AIFC Security Regulations determines the term “Collateral³” as “Property subject to the Security Interest”, whereby the used term “Property” is not given by the Security Regulations.

Whereas section 12(2)(c)(ii) of the Security Regulations provides the following -

¹ Section 8 of the AIFC Security Regulations 2017.

² Section 12 of the AIFC Security Regulations 2017.

³ Paragraph 7 of Schedule 1 of the AIFC Security Regulations 2017.

“[the Collateral is a negotiable Document of Title⁴, a Negotiable Instrument⁵, money, a Deposit Account⁶ or Financial Property⁷ and the Secured Party has control under the Debtor’s Security Agreement.]”

It must be noted that the type and nature collaterals are critical in relation to perfection of security interest. For instance, security interests in the form of assignment of receivables, sale of a receivable or promissory note are perfected when they attach, namely when they are enforceable against the debtor or third party.

Security interests over negotiable document of title, a negotiable instrument, money, financial property or a deposit account are perfected by the filing of a prescribed form of financing statement with the AIFC Registrar of Security.

For the moment, the definition of “Security Interest⁸” under the Security Regulations means an interest in real or personal property that secures payment or performance of an obligation [*emphasis is added*].

The above-mentioned definition of Security Interest causes practical ambiguity in a case when an AIFC Participant will be pledging real property as a security.

The process of registration of security interest over real property is determined by the Law of the Republic of Kazakhstan *On State Registration of Rights to Immoveable Property* (Real Property) no. 310 dated 26 July 2007 (hereinafter, the “**National Law**”).

Article 3 of the National Law imposes a mandatory requirement on the state registration of accrual, change and termination of the rights (encumbrance of the rights) to immovable property (real property), as well as any legal claim.

By virtue of article 4 of the Constitutional Statute *On the Astana International Financial Centre* dated 7 December 2015 (hereinafter, the “**Constitutional Statute**”), the National Law must displace the provisions of the Security Regulations in relation to the matters of registration of security interest over real property in the AIFC.

Considering the specific legal nature of the National Law and the lack of a separate register of real property in the AIFC, the requirements on mandatory state registration of security interest in real property prevail over the procedure determined by the Security Regulations.

It must be mentioned that the possibility of registration security interest over real property in the Security Regulations was modelled on the DIFC Law.

However, the Acting Law of the AIFC does not have a specific law which is equivalent to DIFC Real Property Law no. 8 of 2018 which allows the establishment of a separate register of real property in the DIFC.

Therefore, it is not possible to implement the Security Regulations in a case when real property is subject to a security interest in the AIFC.

⁴ **Document of Title**, in relation to Goods, means a document of title relating to the Goods that evidences the entitlement of the holder to receive, possess and dispose of the document and Goods.

⁵ **Negotiable Instrument** means any instrument (whether or not in tangible form) or any other Writing that:

- (a) evidences a right to the payment of a monetary obligation: and
- (b) is of a type that in the ordinary course of business is transferred by delivery with any necessary endorsement or assignment;

but does not include money or an Investment.

⁶ **Deposit Account** means a money account held with a Bank other than an account evidenced by a Negotiable Instrument.

⁷ **Financial Property** means an Investment, Investment Entitlement or Commodity Contract.

⁸ Paragraph 7 of Schedule 1 of the AIFC Security Regulations 2017.

In this regard, it is proposed to revise the Security Regulations by omitting any reference to real property.

Furthermore, it is proposed to revise the definition of “Real Property” provided in the AIFC Personal Property Regulations 2017 to align it with the definition provided by the National Law.

It is expected that the proposed amendments will establish a clear procedure for the registration of security interest in real property in the AIFC in compliance with the National Law.

4. Purpose and scope of the proposed AIFC Act

[What is the intended purpose of your proposal? What is the scope of your proposal? How the proposal is expected to solve the identified issues outlined above?]

The primary objective of this proposal is to enhance the existing security framework, bringing better clarity on registration procedures and distribution of competence on registration of personal and real property between the AIFC Registrar of Securities and the relevant Government bodies of the Republic of Kazakhstan.

The establishment of a clear boundary between the AIFC and the Government will eliminate the existing legislative ambiguity and make obligations and responsibilities clear to the AIFC Participants and their stakeholders.

5. Operation of the proposed AIFC Act

[Please specify the key features of the proposed AIFC Act. What new rights and obligations does the proposed AIFC Act intend to create? How the proposed AIFC Act will affect existing rights and obligations?]

The proposed amendments aim to establish a clear procedure for registration of security interest in the AIFC which will be limited to personal property.

The proposed amendments will require to amend the following provisions of the AIFC Security Regulations 2017 –

- a) omit reference to “real property” in section 12(6);*
- b) omit section 43(5);*
- c) omit section 49(2);*
- d) omit reference to “real property” in paragraph 7 of Schedule 1;*
- e) supplement paragraph 7 of section 1 –*

*“**Property** means anything (other than real property) that may be owned and transferred under the Acting Law of the AIFC, and, as the context requires, may refer to either the thing itself or title to it.”.*

Furthermore, the proposed amendments consider subsequential amendments to paragraph 1 of Schedule 1 of the AIFC Personal Property Regulations 2017 –

*“**Real Property** means any right or interest in land, buildings, and items placed in, on or under the land comprising a lot with the intention that such buildings and fixtures should remain in position permanently or indefinitely.”.*

6. Best practice

[Are there any examples of best practice to support your arguments?]

Introduced proposals based on comparison of the similar framework legislation in the Dubai International Financial Centre (hereinafter, the “**DIFC**”), Abu Dhabi Global Market (hereinafter, the “**ADGM**”) and Qatari Financial Centre (hereinafter, the “**QFC**”).

As previously noted, the **AIFC Security Regulations 2017** closely mirrors the **DIFC Security Law** and incorporating numerous provisions directly from the DIFC Law.

Please see below comparison table on jurisdictions:

| | AIFC | DIFC | QFC | ADGM |
|--|--|--------------------------------------|---|-------------------------------------|
| Registration of real property as collateral? | Yes | Yes | No | Yes |
| Who registers security interest in real property? | AIFC Security Regulations provides the power to the AIFC Security Registrar to register security interest in real property. <u>[This provided power contradicts the national law].</u> | DIFC Security Registrar | N/a | ADGM Registration Authority |
| Who is maintaining the register of real property? | Ministry of Justice of the Republic of Kazakhstan | DIFC Registrar of Real Property | Ministry of Justice of the State of Qatar | ADGM Registration Authority |
| Legislative authority to maintain the register of real property | Law of Republic of Kazakhstan <i>On State Registration of Rights to Immoveable Property</i> no. 310 dated 26 July 2007 | DIFC Real Property Law no.10 of 2008 | Real Estate Development Law no. 6 of 2014 | ADGM Real Property Regulations 2015 |

7. Outcomes

*[What goals would be achieved by implementing your proposal?
What potential negative outcomes could arise?]*

As a result of the proposed amendments, we will fill certain gaps and clarify related to the registration of real property in the AIFC. Additionally, the proposed amendments will bring in line the AIFC Security Regulations and AIFC Data Protection Regulations with the national legislation.

8. Financial implications

*[Does your submission need a budget? If so, please provide an estimate on the cost.
If the budget is already adopted, will there be a need to make corrections?
Will the adoption of the Act/amendments of the Act allow a profit to be generated?]*

Proposed amendments do not need any budget.

9. Legislative amendments

[What legislative amendments are required to enforce the proposal?]

The implementation of the proposed amendments will be accomplished by introducing amendments to the AIFC Security Regulations 2017 and the AIFC Personal Property Regulations 2017.

In this document, the underlining indicates new text and the strikethrough indicates deleted text, unless otherwise indicated.

PROPOSED AMENDMENTS TO THE AIFC SECURITY REGULATIONS 2017

12. Attachment and enforceability of Security Interests in Collateral, Proceeds and Supporting Obligations

- (1) A Security Interest attaches to Collateral when it becomes enforceable against the Debtor, unless an agreement expressly postpones the time of attachment.
- (2) A Security Interest is enforceable against the Debtor and third parties if:
 - (a) value has been given; and
 - (b) the Debtor has rights in the Collateral or the power to transfer rights in the Collateral to a Secured Party; and
 - (c) either or both of the following conditions are met:
 - (i) the Debtor is bound by a Security Agreement that provides a description of the Collateral;
 - (ii) the Collateral is a negotiable Document of Title, a Negotiable Instrument, money, a Deposit Account or Financial Property and the Secured Party has control under the Debtor's Security Agreement.
- (3) A Person (the first Person) becomes bound as Debtor by a Security Agreement previously entered into by another Person, as Debtor, if:
 - (a) the Security Agreement becomes effective to create a Security Interest in the first Person's Property; or
 - (b) the first Person becomes generally liable for the obligations of the other Person, including the obligations secured under the Security Agreement.
- (4) If, under subsection (3), a Person becomes bound as Debtor by a Security Agreement entered into by another Person:
 - (a) another agreement is not necessary to make a Security Interest in the property enforceable under subsection (2)(c)(i); and
 - (b) the Security Agreement satisfies subsection (2)(c)(i) in relation to existing or after-acquired property of the Person to the extent the property is described in the agreement.
- (5) The attachment of a Security Interest in Collateral gives the Secured Party the rights to Proceeds provided by section 24 (Secured Party's rights on disposal of Collateral and in Proceeds) and is also attachment of a Security Interest in a Supporting Obligation for the Collateral.
- (6) The attachment of a Security Interest in a right to payment or performance secured by a Security Interest or other interest in personal ~~or real~~ property is also attachment of a Security Interest in the Security Interest or other interest.

43. Duration and effectiveness of Financing Statement etc.

- (1) Subject to subsections (4) and (5), a duly Filed Financing Statement is effective for 5 years after the day the initial financing statement is Filed.

- (2) The Financing Statement ceases to be effective at the end of the 5-year period unless a Continuation Statement is Filed in accordance with subsection (3) for the Financing Statement before the end of that period. If the Security Interest becomes unperfected when the Financing Statement ceases to be effective, it is taken never to have been perfected as against a Purchaser of the Collateral for value whose purchase takes place after the loss of perfection in good faith.
- (3) A Continuation Statement for the Financing Statement may be Filed only within 6 months before the end of the 5-year period mentioned in subsection (1) or (4).
- (4) On the Filing of a Continuation Statement in accordance with subsection (3), the effectiveness of the initial financing statement continues for 5 years (or a further period or further periods of 5 years) commencing on the day the Financing Statement would have become ineffective in the absence of the Filing.
- ~~(5) If the Financing Statement relates to real property or fixtures, the Financing Statement remains effective as a Financing Statement until the Security Interest is released or satisfied or its effectiveness otherwise terminates.~~

49. Collection and enforcement by Secured Party

- (1) Subject to subsection (4), after default, a Secured Party:
 - (a) may notify a Person obligated on the Collateral to make payment or otherwise render performance to or for the benefit of the Secured Party; and
 - (b) may take any Proceeds to which the Secured Party is entitled under these Regulations; and
 - (c) may enforce the obligations of a Person (the **obligated Person**) who is an Account Debtor or a Person obligated on the Collateral, and exercise the rights of the Debtor in relation to:
 - (i) the obligations of the obligated Person to make payment or otherwise render performance to or for the benefit of the Debtor; and
 - (ii) any Property that secures the obligations of the obligated Person; and
 - (d) if the Secured Party holds a Security Interest in a Deposit Account perfected by control under section 2(1)(a) (Control of Deposit Account) of Schedule 1—may apply or cause the Bank to apply the balance of the Deposit Account to the obligation secured by the Deposit Account.
- ~~(2) If necessary to enable a Secured Party to exercise the right to enforce a Security Interest in real property, the Secured Party may File in the Security Registry:
 - ~~(a) a copy of the Security Agreement that creates or provides for the relevant Security Interest; and~~
 - ~~(b) the Secured Party's Written statement that:
 - ~~(i) a default has occurred; and~~
 - ~~(ii) the Secured Party is entitled to enforce the Security Interest.~~~~~~
- (3) A Secured Party may deduct from the collections made under this section reasonable expenses of collection and enforcement, including reasonable legal expenses incurred by the Secured Party.

- (4) If, when the Secured Party proposes to take action under subsection (1), there is a Filed Financing Statement (the **other Financing Statement**) relating to the Debtor that may disclose the priority of another Security Interest in the Collateral, the Secured Party:
- (a) must notify the Secured Party named in the other Financing Statement (the **other Secured Party**) of its proposal in Writing; and
 - (b) must not take action under that subsection until the earlier of the following:
 - (i) receipt of a Written consent from the other Secured Party;
 - (ii) the elapse of 14 days after the day the other Secured Party was notified under paragraph (a).
- (5) If, within the 14-day period mentioned in subsection (4)(b)(ii), the other Secured Party notifies the Secured Party that the other Secured Party has priority in the Collateral and objects to the Secured Party's proposal, the Secured Party must not take action under subsection (1) in relation to the Collateral unless the Court sets the objection aside or authorises the Secured Party to take the action despite the objection.
- (6) For subsection (4), a Financing Statement may disclose the priority of another Security Interest if:
- (a) the initial financing statement to which it relates is earlier than that Filed by the Secured Party; or
 - (b) the Financing Statement is made by a Bank, an Investment Intermediary or a Commodity Broker.

SCHEDULE 1: INTERPRETATION

7. Definitions for these Regulations

In these Regulations:

Security Interest means an interest in ~~real or~~ personal property that secures payment or performance of an obligation.

PROPOSED AMENDMENTS TO THE AIFC PERSONAL PROPERTY REGULATIONS 2017

SCHEDULE 1: INTERPRETATION

1. Definitions for these Regulations

In these Regulations:

Real Property means ~~any right or interest in land~~ any right or interest in land, buildings, and items placed in, on or under the land comprising a lot with the intention that such buildings and fixtures should remain in position permanently or indefinitely.