Baker McKenzie.

Global Restructuring & Insolvency Guide

Kazakhstan

Overview and Introduction

This Guide discusses various types of bankruptcy proceedings operating in respect of companies and provides a general overview of local corporate insolvency laws.

In addition, this Guide provides a basic overview of the Bank Restructuring Law[1] promulgated amid the international financial crisis of 2007. The Bank Restructuring Law establishes a legal framework for the restructuring of obligations of Kazakhstani banks.

In Kazakhstan, only companies and not individuals may be subject to bankruptcy proceedings. While this may change in the future, the concept of "bankruptcy of individuals" is not known in Kazakhstani law.

Applicable Legislation

The main components of the Kazakhstani insolvency and restructuring legislation include the Law "On Rehabilitation and Bankruptcy" dated 7 March 2014 (as amended, the "**Bankruptcy Law**") and the Bank Restructuring Law.

Additional laws and regulations may interact with the Bankruptcy Law and the Bank Restructuring Law.

Corporate Non-Banking Insolvency

Insolvency Test

Under the Bankruptcy Law, a company may be placed under bankruptcy proceedings if a company is insolvent. Broadly, a company will be deemed to be insolvent if it is unable to pay debts within three months from the date when they fell due.

Solvency is a question of fact and thus, in assessing solvency, regard should be given both to debts that are currently due and payable and to future debts and their timeframe for payment.

Main Types of Insolvency Proceedings

The Bankruptcy Law provides for the following types of insolvency proceedings which may be applied against a Kazakhstani company: insolvency arrangement, rehabilitation, accelerated rehabilitation, bankruptcy liquidation and voluntary arrangement.

Insolvency arrangement, rehabilitation and accelerated rehabilitation are court-supervised pre-bankruptcy proceedings whereby the debtor tries to improve its financial structure.

Bankruptcy liquidation is the most common form of bankruptcy. In bankruptcy liquidation, the assets of the bankrupt entity are sold and the proceeds are distributed among the creditors according to the established priorities.

Voluntary arrangement can be entered into at any time during a bankruptcy proceeding. A voluntary (settlement) agreement is entered into between the debtor and creditors in order to terminate the bankruptcy proceeding.

---

[1] Law "*On Making Changes and Amendments to Certain Legislative Acts of the Republic of Kazakhstan Concerning Improvement of Legislation of the Republic of Kazakhstan on Payments and Money Transfers, Accounting and Financial Reporting of Financial Organizations, Banking Activities and the Activities of the National Bank of the Republic of Kazakhstan*" dated 11 July 2009 (the "**Bank Restructuring Law**").

Commencement of Bankruptcy Proceedings

A creditor is entitled to seek commencement of court-based bankruptcy proceedings if the amount owed by the debtor to tax authorities in connection with payment of taxes and other obligatory payments is more than 150 times the monthly calculation index[2] or if the amount owed by the debtor to other creditors is more than 1,000 times the monthly calculation index.[3] In addition, court-based bankruptcy proceedings may be initiated in respect to voluntary liquidation [4] if the assets of the debtor being voluntarily liquidated are insufficient to satisfy all claims of the creditors. In voluntary liquidation, the liquidation commission of the company has a duty to promptly apply to court to initiate the bankruptcy proceedings.

The Bankruptcy Law does not require that an announcement be made immediately when a creditor files for bankruptcy of a debtor. Under the Bankruptcy Law, such an announcement should be made when the court commences bankruptcy proceedings against the debtor. Accordingly, it may not be possible for other creditors of a debtor to immediately know about the filing for bankruptcy.

After the bankruptcy proceedings are commenced (as applicable to both the involuntary liquidation and voluntary liquidation mentioned above), the court must hear the case on its merits and adopt one of the following decisions:

- To declare the debtor bankrupt and commence bankruptcy liquidation (a creditors' committee will be formed at this stage to oversee the bankruptcy);
- To refuse to declare the debtor bankrupt and terminate the proceedings;
- To commence rehabilitation procedures;
- To terminate the proceedings against the debtor if the creditor has withdrawn its claim or if the debtor was rehabilitated in the course of rehabilitation proceedings; or
- To approve the voluntary (settlement) agreement and terminate bankruptcy proceedings.

The debtor will be declared bankrupt and liquidated if the debtor fails to prove its solvency, or if the debtor acknowledges its insolvency.

Implications of the Commencement of Bankruptcy Proceedings

Once the bankruptcy proceedings have commenced, a number of restrictions are placed on the company and its shareholders:

- The owner of the company's property, its shareholders and its management bodies will not be allowed to dispose of, or otherwise transfer, the company's assets without the approval of the temporary manager, other than in the course of ordinary business operations; and
- The company's shareholders and the owners of the company's property will not be allowed to sell or otherwise transfer their shares and ownership interests, respectively.

In addition, the commencement of bankruptcy proceedings will generally suspend the enforcement of unsatisfied earlier court judgments and arbitral awards, and will trigger the need for the creditors to file their claims against the company only within the bankruptcy proceedings.

Bankruptcy Liquidation

Bankruptcy liquidation is the most common form of bankruptcy, and it commences immediately following the court's declaration of the debtor's bankruptcy.

---

[2] Approximately USD 964.

[3] Approximately USD 6,427.

[4] I.e. liquidation initiated on a voluntary basis by the competent body of a debtor.

In bankruptcy liquidation, the court or competent authority[5] (depending on circumstances) appoints an insolvency official who, among other powers, has the power to review and approve (or reject) the claims of creditors, as well as to develop (together with the creditors' committee) a plan on the sale of the debtor's property. The insolvency official must be an individual who passed a special qualification exam and notified the competent authority about the commencement of its activity and should be independent from the creditors and the debtor. The insolvency official is responsible for adjudicating the creditors' claims and, in doing so, must prepare the list of creditors who may receive satisfaction from the debtor's bankruptcy estate. The list of creditors is then sent to the competent authority for publication on its website.

In bankruptcy liquidation, the secured creditors, subject to certain statutory exemptions, are paid in priority to unsecured debts (to the extent of the value of their security). The statutory exemptions having statutory priority over secured claims include employee claims, injury compensation claims, social and pension payment claims and claims under IP contracts. The administrative and court expenses are recovered outside the established priority and thus may be reimbursed at the very first instance, even before the listed employee and other statutorily preferred claims.

In Kazakhstan, a secured creditor generally may not simply take possession of the collateral. Therefore, as a general rule, in bankruptcy liquidation secured creditors will receive only the amount of their secured claims (subject to the above-mentioned limitations); they will not receive the actual assets pledged as security. In certain cases, i.e. upon consent of creditors' meeting, the secured creditor may receive the actual pledged asset. In these cases, the secured creditor must pay statutorily preferred claims, such as employee claims, etc. and administrative expenses incurred in connection with the maintenance of the secured asset. All unsecured debts rank *pari passu*, and if the property of the debtor is insufficient to meet them in full, they must be paid proportionately.

The Bankruptcy Law requires that, generally, the bankruptcy liquidation be completed within nine months. In certain cases, this period may be extended, but for not more than three additional months.

Clawback and Recovery Mechanisms

Under the Bankruptcy Law, the insolvency official has authority to investigate the affairs of the company, to identify persons liable for the bankruptcy of the company and to take actions against directors (management) or third parties to recover certain assets or to invalidate certain transactions. All these are established with the purpose of increasing the bankruptcy estate available for the distribution to the creditors.

In particular, under the Bankruptcy Law, the insolvency official may request court invalidation of a transaction it if was executed:

- Within six months prior to commencement of the bankruptcy proceedings and if it prioritises the demands of certain creditors before the others;

- Within three years prior to commencement of the bankruptcy proceedings if under the transaction a counterparty received property without consideration or for consideration below market value, or if the transaction was made without sufficient grounds, and in each case the transaction adversely affected the interests of the creditors;

- Within three years prior to commencement of the bankruptcy proceedings if the value or other terms of the transaction are materially detrimental to the debtor as compared to the value and other terms of similar transactions made in comparable circumstances and if such transaction resulted in financial losses; or

- Within three years prior to commencement of bankruptcy proceedings if the transaction is an ultra vires transaction.

[5] State Revenue Committee of the Ministry of Finance of the Republic of Kazakhstan.

Insolvency Arrangement

If the debtor is insolvent, the debtor may initiate an insolvency arrangement procedure, which is a court-supervised pre-bankruptcy procedure aimed at the restructuring of a debtor's obligations. To initiate the procedure, the debtor must file a petition with the court and simultaneously notify its creditors.

Within two months after initiation of an insolvency arrangement, the debtor must enter into a restructuring agreement with all creditors. The agreement may provide for deferral of debt repayment, full or partial debt write-off, assignment of claims and other terms that do not contravene Kazakhstani legislation. The agreement may be entered into for a term not exceeding three years. The agreement must be approved by all creditors, and if any creditor refuses to approve the agreement, then the agreement may not be concluded.

After the agreement is approved by creditors, it must be submitted to the court for approval. From the date the court resolution approving the agreement enters into legal force, the agreement will be binding on the debtor, creditors and third parties that participate in the agreement. In addition, from the date of such court resolution (i) penalties and interest on debtor's debts will stop accruing, (ii) any liens on the debtor's bank accounts will be lifted, (iii) court decisions and arbitral awards may not be enforced against the debtor (with limited exceptions), and (iv) no arrests or liens may be imposed on the debtor's assets (with limited exceptions).

Rehabilitation

Rehabilitation may be established on the basis of a court decision at the petition of the debtor or creditor.

Rehabilitation is not a mandatory procedure, and the debtor (or creditor) can apply for rehabilitation if it is unable to pay its existing debts or its debts falling due within the next 12 months. The law appears not to establish any substantive test with respect to the amount of the unpaid debt, thus the debtor can apply for rehabilitation even if it is unable to pay a relatively insignificant debt.

During rehabilitation, the debtor must prepare a rehabilitation plan and deliver it to the creditors and thereafter to the court for approval. The rehabilitation plan must contain measures intended to restore the solvency of the debtor. Furthermore, the plan must contain a debt repayment schedule according to which the creditor claims included into the rehabilitation plan will be satisfied.

The primary purpose of rehabilitation is to give the debtor an opportunity to rehabilitate its financial structure and to restore its solvency. Thus, if the rehabilitation is successful, the debtor will emerge from bankruptcy proceedings; if not, the debtor will be subject to the bankruptcy liquidation procedure discussed above.

The rehabilitation plan must be implemented (and the relevant creditor claims included into the plan should be satisfied) within a period not exceeding five years. The competent authority will appoint a rehabilitation manager to supervise implementation of the plan. The rehabilitation manager will also take control of the company and enter into ordinary business transactions on behalf of the company. The rehabilitation manager may enter into transactions outside of the ordinary course of business only if such transactions are contemplated by the rehabilitation plan, or if the transactions are specifically approved by the creditors.

Rehabilitation must be completed within the term established by the court, which has the right (at the request of the rehabilitation manager and upon the creditors' consent) to prolong the originally established term for an additional term not exceeding six months. After expiration of the rehabilitation term, the court may: (i) if the solvency of the subject entity was restored, issue a resolution terminating the rehabilitation proceedings; or (ii) if the solvency was not restored, issue a resolution terminating the rehabilitation proceedings and commencing bankruptcy liquidation proceedings.

The rehabilitation manager has the same clawback and recovery rights as the rights of the insolvency official discussed under "Clawback and Recovery Mechanisms" above. In addition, the rehabilitation manager may reject the performance of contracts that were made prior to the commencement of rehabilitation proceedings and that have not been fully performed by both parties in any of the

following circumstances: (i) where the contract is made with the debtor's affiliated party; (ii) where the contract contains unusually burdensome provisions or is long-term (i.e. more than one year); or (iii) where performance might adversely affect the interests of other creditors.

During the rehabilitation procedure, the same restrictions will apply with respect to the company and its shareholders as the restrictions discussed under "Implications of the Commencement of Bankruptcy Proceedings" above.

Accelerated Rehabilitation

Accelerated rehabilitation is a procedure applied with respect to a debtor that is unable to pay its existing debts or that will be unable to pay its future debts falling due within the next 12 months. Generally, accelerated rehabilitation is similar in many respects to the rehabilitation procedure discussed above,[6] except that the accelerated rehabilitation is applied prior to bankruptcy liquidation or rehabilitation with a view to imposing a moratorium on the commencement of bankruptcy proceedings against the company.

Thus, upon instigation of the accelerated rehabilitation procedure, the creditors included in the rehabilitation plan will not be able to commence bankruptcy proceedings against the company.

The accelerated rehabilitation procedure must be completed within two years; however, at the request of the company and upon the creditors' consent, the court has the right to extend this two-year period for an additional period not exceeding six months. Unlike the rehabilitation procedure, during accelerated rehabilitation the company's management will remain in place and the competent authority will not appoint a rehabilitation manager.

Voluntary Arrangement

Voluntary arrangement may be entered into at any time during a bankruptcy proceeding. A voluntary (settlement) agreement is entered into between the debtor and creditors in order to terminate the bankruptcy proceeding.

The voluntary (settlement) agreement covers all registered creditors, except certain statutorily preferred creditors (e.g., employees). It provides the terms and procedure for repayment of creditors' claims.

An agreement must be approved by a simple majority of creditors and the court. After an agreement is approved, bankruptcy proceedings with respect to the debtor will terminate and the debtor must repay creditors' claims in accordance with the agreement. An approved agreement is binding on all creditors, including the creditors who voted against it or did not vote.

An agreement may be terminated upon the request of a creditor (creditors) holding at least 25% of registered claims by value if the debtor (or third parties participating in the agreement) fail to perform their obligations with respect to such creditors. In that case, the agreement will be terminated and bankruptcy proceedings will be re-initiated against the debtor.

Bank-specific Insolvency Proceedings

There are certain special insolvency-related proceedings that apply to Kazakhstani banks that operate outside of the formal insolvency provisions of Kazakhstani legislation. These special proceedings are discussed below.

In Kazakhstan, the competent authority for banks is the National Bank of Kazakhstan (the "**National Bank**"), the country's central bank. Generally, the National Bank oversees all second-tier banks, including matters related to their solvency and liquidation (as discussed below), and establishes certain prudential, liquidity and other requirements mandatory for all such banks.

---

[6] I.e. there is a rehabilitation plan approved by the creditors and court, and claims of creditors included in the plan are satisfied in accordance with the debt repayment schedule contained in the plan.

Conservation

The National Bank, Kazakhstan's bank regulatory body, is authorised to implement bankruptcy prevention measures in respect of a bank ("**conservation**", or *konservatsia*) with or without the establishment of a stabilisation bank (discussed below). The National Bank may also order temporary administration of a bank (*vremennaya administratsiya*).

If a Kazakhstani bank has financial difficulties or does not comply with certain capital adequacy requirements, the National Bank may put the bank into conservation for up to one year with the goal of improving the bank's financial position and the quality of its operations, and also with the goal of preventing the bankruptcy of the bank. Conservation is supervised by the National Bank. The National Bank appoints a temporary administration, which takes control of the bank. The temporary administration has the right to suspend any of the bank's payment obligations under deposit agreements and to terminate or unilaterally amend the bank's contracts which provide for investing (depositing, putting in, etc.) of the bank's money.

Conservation does not involve an automatic stay. The bank's creditors have the right to bring court actions against the bank and seek enforcement of court judgments during conservation. But again, the administrator can suspend the payments (under deposit agreements) by the bank, until the end of the conservation. If conservation is successful, the National Bank will terminate it (or, at the end of the period of conservation, the conservation will automatically terminate) and the bank will resume its business as usual. If conservation is unsuccessful, the National Bank is likely to force the bank into liquidation. The authors are not aware of any successful conservation in Kazakhstan; all banks, insurance companies and pension funds which thus far have undergone conservation were eventually liquidated.

Debt Restructuring

A bank can apply for restructuring if it is unable to repay its debt to one or more creditors within seven days after the debt became due, where such inability is caused by a lack of funds. The law does not establish any monetary threshold for this right. The bank's decision to seek restructuring effectively should be approved by the National Bank.

Further, the bank should prepare a restructuring plan, have it approved by the National Bank and then apply to a court seeking an order on restructuring. Generally, the order on restructuring suspends enforcement of court judgments or arbitral awards in relation to obligations which are to be restructured and lifts any liens over the bank's assets.

The bank must then seek approval of the restructuring plan from creditors holding not less than two-thirds of the total amount of the debt to be restructured. After two-thirds of the creditors approve the restructuring plan, it must be submitted to the National Bank and, if the National Bank does not have any comments, to the court for approval.

The restructuring plan approved by the creditors and by the court will be binding on all the creditors whose debts are included in the restructuring plan, whether or not a particular creditor approved the plan. Upon implementation of measures provided in the restructuring plan, the court will terminate restructuring proceedings, at the request of the National Bank. Obligations of the bank included in the restructuring plan will be deemed to have been performed, and enforcement of any court judgments and arbitral awards in respect of such obligations will be terminated.

Bank debt restructuring may be recognised as main insolvency proceedings in countries which have adopted the UNCITRAL Cross-Border Insolvency Law, thus giving protection against dissenting creditors' claims in such countries. This happened in the 2009 and 2012 BTA Bank restructurings, where the Kazakhstani debt restructuring procedure was recognised in the US and UK.

Stabilisation Bank

After the National Bank puts a bank into conservation (or revokes a bank's licence), it may require that all or part of the bank's assets and liabilities be transferred to a stabilisation bank established specifically for such purposes. A stabilisation bank is a special-purpose vehicle, wholly owned by the National Bank, for acquiring assets and liabilities of a financially troubled bank. The stabilisation bank

is not required to comply with capital adequacy, reserve capital, management, or most other requirements generally applicable to banks. It is also not subject to corporate law provisions on corporate governance, voting, authority of the bank's bodies, related-party transactions and major transactions.

The law does not require consent of any of the bank's creditors to transfer the bank's assets to the stabilisation bank. The National Bank can effectively cherry-pick valuable assets and transfer them to the stabilisation bank, while non-performing assets will be left with the bank. The stabilisation bank will enjoy a 12-month standstill in respect of the most of its debts (except debts to government, secured debts to other banks, term deposits and certain other obligations).

The regulator exits the stabilisation bank through a share or asset sale once a qualified investor is found.

Kazakhstan

Baker & McKenzie − CIS, Limited
Samal Towers, 8th Floor
97, Zholdasbekov Street
Almaty Samal-2, 050051
Kazakhstan

T +7 727 250 99 45 / 330 05 00
F +7 727 258 40 00