

April 23, 2014

Law No. 176-V "On Rehabilitation and Bankruptcy" came into effect on 25 March 2014.

The Law "On Rehabilitation and Bankruptcy" (Law) has replaced the Law "On Bankruptcy" dated 21 January 1997. The law applies to legal entities and individual entrepreneurs. As with its predecessor, the Law does not apply to state owned entities, pension funds, banks, and insurance companies (for which special provision is made in the relevant legislation).

As compared with the previous law, the Law focuses more on rehabilitation procedure.

The Law contains several elements that were not previously addressed in Kazakhstan insolvency legislation.

Petition for Bankruptcy

The classes of creditors who may petition for bankruptcy are no longer limited to tax creditors and commercial creditors. Creditors under personal injury damages, unpaid alimony, employee compensation, contributions to the National Social Insurance Fund, pension contributions and mandatory professional pension contributions, and compensation due under copyright agreements may also petition for the bankruptcy of a debtor, if such claims have not been paid within three (3) months from their due date and their amount is 100 Monthly Calculated Indexes (~US\$1000).

Invalidation of Transactions

The Law provides for a three (3) year hardening period, as in the previous Bankruptcy Law. The Law sets out several grounds for invalidation of transactions, in addition to the grounds envisaged in Kazakhstan's Civil Code. Those additional grounds are: (i) that the price and/or other terms are substantially worse than those on which similar transactions are undertaken and the transaction led to a financial loss; (ii) that the transaction is outside any limits on the debtor's business activities, are imposed by law or by the debtor's constitutive documents, or were not properly authorized; (iii) that property was transferred free of charge (including for temporary use), or at a price significantly below market value and to the detriment of the creditors; (iv) that a transaction made within the previous six (6) months advantaged one creditor (or group of creditors) over others; (v) that the transaction constituted a gift by the debtor outside of its ordinary business activities.

In addition, an administrator (temporary administrator, rehabilitation, temporary, and bankruptcy trustee as defined under the Law) may challenge in court a reorganization made by way of accession, demerger, and segregation which led to the dissolution of assets.

No Termination upon Bankruptcy Proceedings

Provisions of a contract which provide for termination/refusal to perform the contract in the event of the bankruptcy of a counterparty are now recognized under the Law as invalid. In some instances rehabilitation trustee may refuse to perform an agreement which is not performed by both parties.

Set-off

The Law provides for the possibility of set-off of money claims within rehabilitation and bankruptcy when such set-off is direct, mutual, and does not affect the priority of claims of other creditors.

Affiliated Parties

In the general creditors meeting creditors which are affiliates of the debtor do not have voting rights until full satisfaction of claims of unaffiliated creditors. Kazakhstan laws provide an explicit definition of an affiliate party. In particular the definition covers ultimate beneficial owners, ten (10) percent holders of the capital of Kazakhstan counterparty and any other entity which has control (e.g., ability to influence the decisions of an entity) over a Kazakhstan entity.

Priority of Claims

The Law provides for a new order of priority of claims, as follows: (i) Claims resulting from personal injury damages, unpaid alimony, employee compensation, contributions to the National Social Insurance Fund, pension contributions and mandatory professional pension contributions, and compensation due under copyright agreements; (ii) secured creditors; (iii).tax claims and claims of governmental charges; (iv) claims of other unsecured creditors under commercial agreements; (v) claims for losses and penalties.

Secured Creditors

Under secured creditors the Law recognizes creditors secured by way of pledge (zalog) documented pursuant to the Kazakhstan law. It is far not certain what was meant under this wording; however, most probably it means pledges governed by Kazakhstan law. The Law envisages that secured obligations may be discharged by transfer of the pledged property to the secured creditors, with the consent of the general creditors' meeting. In the event the general creditors' meeting decides that that the pledged property is not to be transferred to the pledgee, such property will form a part of the liquidation estate, and secured creditors will be satisfied within the second line of priority.

Timely Presentation of Claims

Time for presentation of creditors' claims in both scenarios (bankruptcy and rehabilitation) was cut to one month instead of two months, as previously. In the event claims are not submitted in time, the late creditor will lose his right to vote in the general creditors' meeting until satisfaction of rights of the creditors who have submitted their claims within the one month period.

Rehabilitation in lieu of Bankruptcy

In the event bankruptcy proceedings are commenced against a debtor, the debtor may request for application of a rehabilitation procedure in lieu of bankruptcy. The court will consider such an application and may sanction a rehabilitation plan with the consent of creditors.

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We note that the Law is more detailed and provides for great number of formalities that need to be addressed within fast rehabilitation, rehabilitation and bankruptcy proceedings. We assume, that all efforts made by the legislators in order to ensure preservation of the debtor's assets will lead to rehabilitation procedures becoming more common. However, the Law is yet to pass the test of time, and it remains to be seen how often this procedure will be used.

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