Global Restructuring and Insolvency Guide - Kazakhstan

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# Initial Considerations

## Can you take security over all types of assets, including accounts receivable?

Security can be taken over most types of assets, including receivables and property (both immovable and movable), with the exception of property that is inseparably connected with the identity of the creditor (i.e., claims for alimony and damage caused to health and safety, etc.). The most common forms of security are mortgages, floating charges, pledges of securities and pledges of rights. Assignments by way of security are not specifically recognized by Kazakhstani law and are rarely used.

## What is the nature of the insolvency process?

**Bankruptcy**

A court process leading to insolvency liquidation of the debtor.

After the court declares the debtor bankrupt, the debtor loses its capacity to manage and dispose of the bankruptcy estate, and all court enforcement procedures relating to security or otherwise are postponed. The power to undertake any legal action in respect of the bankruptcy estate passes to the receiver. With limited exceptions, the bankruptcy estate consists of all of the bankrupt debtor's assets.

The receiver sells the bankruptcy estate and distributes the proceeds among the creditors in the established order of priorities.

**Rehabilitation**

A court process leading to the reorganization of the debtor's assets and liabilities in order to restore its solvency

**Restructuring**

A court process whereby the company and its creditors agree to restructure the company's debts.

Once the restoring agreement is sanctioned by court, it is binding upon all creditors.

## What is the solvency requirement for a company to file a case in this jurisdiction?

**Bankruptcy**

A creditor can initiate bankruptcy proceedings against a company if the company fails to pay its debt to the creditor, which has either (a) been confirmed by a court judgment or (b) admitted by the company.

A debtor can apply to the court for commencement of bankruptcy proceedings if the company's obligations exceed the value of its property as of the date of (a) filing a bankruptcy petition and (b) the beginning of the year in which the bankruptcy petition was filed (the so-called "persistent insolvency").

**Rehabilitation**

A creditor or the debtor can commence rehabilitation proceedings if the debtor fails to pay its debts within four months after they become due (or three months for certain types of claims).

**Restructuring**

A debtor can apply to a court for commencement of restructuring proceedings if it fails to pay its debts within four months after they become due (or three months for certain types of claims).

## Is there a requirement to demonstrate COMI ("centre of main interests") for a company to file a case in this country?

No. Only companies registered in Kazakhstan may be subject to bankruptcy proceedings under Kazakhstan's bankruptcy laws.

## Is restructuring of both secured and unsecured claims possible?

**Bankruptcy**

There is no restructuring. The procedure aims to liquidate the debtor's assets and distribute the proceeds to the creditors in accordance with their respective priority rights.

**Rehabilitation**

Yes.

**Restructuring**

Yes.

## Are the claims of creditors and shareholders put into separate classes for purposes of voting and treatment under the plan or scheme?

**Bankruptcy**

Generally, no. However, shareholders and other affiliates of the debtor are not allowed to vote at the creditors' meetings.

**Rehabilitation**

Generally, no. However, shareholders and other affiliates of the debtor are not allowed to vote at the creditors' meetings.

**Restructuring**

No.

## Is shareholder approval needed to commence a case? Are shareholders entitled to vote on a plan?

**Bankruptcy**

In most cases, shareholder approval is required to commence a case. However, the debtor's CEO must commence a case (even without shareholder approval) where the shareholders took a decision to liquidate the debtor, but the debtor's assets are insufficient to repay the debts of all of its creditors.

Shareholders and other affiliates of the debtor are not allowed to vote at the creditors' meetings.

**Rehabilitation**

In most cases, shareholder approval is required to commence a case. However, the debtor's CEO must commence a case (even without shareholder approval) where the shareholders took a decision to liquidate the debtor, but the debtor's assets are insufficient to repay the debts of all of its creditors.

Shareholders and other affiliates of the debtor are not allowed to vote at the creditors' meetings.

**Restructuring**

N/A

## Is there an ability to bind minority dissenting creditors (i.e., cramdown)?

**Bankruptcy**

N/A

**Rehabilitation**

Yes. The reorganization plan will be approved in the case of a positive vote by a majority of votes of creditors of the second (secured creditors) and fourth (general unsecured creditors) orders of priority. If such approval is obtained and subject to court ratification, the minority dissenting creditors are nevertheless bound by the reorganization plan.

**Restructuring**

No. All creditors of the insolvent company must sign the restructuring agreement.

# Commencing the Process

## Who can commence?

**Bankruptcy**

The debtor, one or more creditors or the public prosecutor

**Rehabilitation**

The debtor or one or more creditors

**Restructuring**

The debtor

## Is shareholder's consent required to commence proceeding?

**Bankruptcy**

No.

**Rehabilitation**

No.

**Restructuring**

No.

## Is there an ability to consolidate group estates?

**Bankruptcy**

No.

**Rehabilitation**

No.

**Restructuring**

No.

## Is there any court involvement?

**Bankruptcy**

Yes. The court opens and supervises the process.

**Rehabilitation**

Yes. The court opens and supervises the process. Any reorganization plan approved by the creditors is to be ratified by the court.

**Restructuring**

Yes. The court opens and supervises the process. Any restructuring agreement signed by the debtor and creditors is to be ratified by the court.

## Who manages the debtor?

**Bankruptcy**

A court-appointed independent bankruptcy trustee

**Rehabilitation**

Manager appointed by the meeting of creditors (the creditors may appoint the CEO of the debtor as such a manager)

**Restructuring**

The management of the debtor is not affected by the commencement of the restructuring proceedings.

## What is level of disclosure of process to voting creditors?

**Bankruptcy**

Creditors will be notified of any creditor meeting no earlier than ten days prior to the meeting.

**Rehabilitation**

Creditors will be notified of any creditor meeting no earlier than ten days prior to the meeting.

**Restructuring**

N/A

## What entities are excluded from customary insolvency or reorganisation proceedings, and what legislation applies to them?

The general insolvency and rehabilitation proceedings do not apply to state establishments, accumulative pension funds, banks, insurance and reinsurance companies.

State establishments generally cannot be placed into bankruptcy proceedings. Pension funds, banks and insurance/reinsurance companies are liquidated pursuant to specific laws and regulations applicable to those entities.

## How long does it generally take for a creditor to commence the procedure?

**Bankruptcy**

The court must commence the procedure within five business days after receiving the bankruptcy petition together with all the required supporting documents.

However, a creditor may commence bankruptcy proceedings only if the debtor fails to pay any amount due to the creditor pursuant to a court judgment or where the debtor admits its inability to repay the debt.

Thus, unless the debtor admits its inability to repay the debt, the creditor will first need to obtain a court judgment confirming its claim against the debtor.

**Rehabilitation**

The court must commence the procedure within five business days after receiving the bankruptcy petition together with all the required supporting documents.

**Restructuring**

N/A. The debtor commences the procedure.

# Effect of Process

## Does debtor remain in possession with continuation of incumbent management control?

**Bankruptcy**

No. A court-appointed bankruptcy trustee assumes control.

**Rehabilitation**

No. A manager appointed by the creditor's meeting assumes control.

**Restructuring**

N/A. The management of the debtor is not affected by the commencement of the restructuring proceedings.

## What is the stay/moratorium regime (if any)? Is the stay or moratorium worldwide?

**Bankruptcy**

N/A

**Rehabilitation**

The debtor benefits from a moratorium from the opening of the procedure by the court. Subject to limited exceptions, creditors may not take any enforcement action.

The law does not expressly state that the moratorium is worldwide, but this can be inferred from the law.

**Restructuring**

Creditors are not allowed to file bankruptcy petitions against the debtor during the restructuring proceedings.

## Is there a provision for debtor in possession or rescuer financing or superpriority or priming financing?

**Bankruptcy**

No.

**Rehabilitation**

No.

**Restructuring**

N/A

## Can procedure be used to implement a debt-to-equity swap?

**Bankruptcy**

No.

**Rehabilitation**

No.

**Restructuring**

N/A

## Are third party releases available?

**Bankruptcy**

No.

**Rehabilitation**

No.

**Restructuring**

N/A

## Are the proceedings recognised abroad?

There is no firmly established approach. Kazakhstan is a party to a number of international treaties on the recognition and enforcement of court judgments, although none of these directly deals with matters of bankruptcy. These include the CIS Convention "On Legal Aid in Civil and Family Law Disputes and Criminal Prosecution" adopted in Minsk on 22 January 1993, and the CIS Agreement "On the Procedure for Settlement of Disputes related to Economic Activity" adopted in Kiev on 20 March 1992. Additionally, the proceedings may also be recognized and enforced based on reciprocity.

## Has the UNCITRAL Model Law been adopted?

No.

## Can a debtor continue to carry on business during insolvency proceedings?

**Bankruptcy**

The court may authorize the bankruptcy trustee to continue the business.

**Rehabilitation**

Yes.

**Restructuring**

Yes.

# Other Factors

## Are there any wrongful or insolvent trading restrictions and what is the directors' liability?

A shareholder and/or official of the insolvent entity can be subject to secondary liability if their actions resulted in the so-called "intentional bankruptcy" or if they failed to commence bankruptcy proceedings where required.

## What is the order of priority of claims?

**Bankruptcy**

Kazakhstani law envisages the following ranking of claims (creditors):

Administrative and court expenses relating to the proceedings are outside of the order of priorities and are repaid first.

First order of priority: claims connected with bodily injuries and other injuries to health, claims of employees regarding their salaries and severance payments, pension fund contributions, and royalties to authors of items of intellectual property

Second-order of priority: claims secured by pledges (only pledges granted under Kazakhstani law are eligible for this order of priority) and claims resulting from the bankruptcy official's borrowing loans during the course of bankruptcy proceedings

Third-order of priority: tax and customs debts

Fourth order of priority: claims of general unsecured creditors

Fifth order of priority: claims for damages, default interest, penalties, etc.

The sixth order of priority: claims that were filed after the deadline for filing claims

**Rehabilitation**

N/A. There is no statutory priority of claims for rehabilitation.

**Restructuring**

N/A

## Do pension liabilities have any priority over other unsecured claims?

**Bankruptcy**

No. In Kazakhstan, companies do not have any pension liabilities to their employees. Each company makes monthly contributions to the state pension fund, which will be responsible for paying pensions to the retired employees.

**Rehabilitation**

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**Restructuring**

N/A

## Is it possible to challenge prior transactions?

**Bankruptcy**

The bankruptcy law obliges the insolvency official to seek a court order on the invalidation of transactions of the insolvent entity, concluded within three years prior to commencement of insolvency proceedings against a Kazakhstani entity, in any of the following cases:

The price and/or other terms of the transactions are substantially worse for the insolvent entity in comparison to similar transactions entered into in similar circumstances, provided that the transaction caused financial loss to the insolvent entity.

The transaction was entered in violation of the insolvent entity's capacity if its constituent documents or Kazakhstani law restricts such capacity, or the transaction was an ultra-wires transaction.

Property was transferred for free or at a price that was substantially lower than the price for identical or homogeneous property in comparable circumstances or without grounds to the detriment of creditors.

The transaction that was concluded within six months prior to the commencement of insolvency liquidation or rehabilitation proceedings caused preferential treatment of some creditors compared with the other creditors.

The transaction was a gift.

**Rehabilitation**

The rehabilitation manager has the right to unilaterally rescind agreements of the company undergoing rehabilitation, which has not yet been fully or partially performed, in any of the following cases:

The subject agreement is between the insolvent entity and its affiliate.

The agreement contains terms that are burdensome for the insolvent entity as compared with earlier concluded similar agreements.

The agreement is entered for a term exceeding one year or is intended to bring benefits to the insolvent entity only in the distant future.

There are grounds to believe that the performance of the agreement by the insolvent entity will result in adverse consequences to the other creditors of the insolvent entity.

**Restructuring**

N/A

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