

# Insight

August 2009

## The New Bank Restructuring Law in Kazakhstan

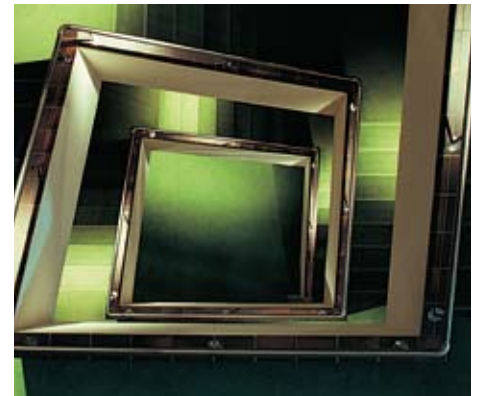
### Background

The banking system in Kazakhstan has been severely hit by the global financial crisis and over the past 18 months the authorities there have taken a number of steps to support it, culminating in the decision announced in November 2008 that Samruk-Kazyna, Kazakhstan's sovereign wealth fund, would invest US\$3.5 billion in the four "systemic" banks - JSC Halyk Bank, JSC Kazkommertsbank, JSC BTA Bank and JSC Alliance Bank. Like many other countries, including the United Kingdom, Kazakhstan also enacted legislation enabling the authorities to take emergency measures in relation to its banks.

By January 2009 it had, however, become clear that fast deteriorating loan portfolios at BTA Bank and Alliance Bank required further capital support for them. Using powers under the new legislation the authorities took steps that resulted in Samruk-Kazyna injecting substantial new capital into BTA Bank, so becoming its largest shareholder. Samruk-Kazyna was also granted by Alliance Bank's largest shareholders an option to acquire control of that bank in exchange for providing substantial liquidity. Even these measures proved to be insufficient and both banks defaulted on their debt in April this year. BTA Bank and Alliance Bank are not the only victims of the crisis locally; JSC Astana Finance, a diversified financial services company, defaulted in May, and other banks face increasing pressure due to the growing number of non-performing loans.

We were engaged by both BTA Bank and Alliance Bank to help them in the restructuring of their financial indebtedness and it soon became clear to us that while there were powers available to Kazakhstan's financial regulator, the Agency for Regulation and Supervision of Financial Markets and Financial Organisations (the "FMSA"), enabling it to force a distressed bank into bankruptcy or to place it into conservation or another special regulatory regime, there was no law that would allow the bank itself to effect a complete financial restructuring without the consent of all of its creditors. Thus, any one creditor potentially had the power to block a financial restructuring agreed by the vast majority of other creditors and for there to be any prospect of successfully restructuring the troubled banks in Kazakhstan, new legislation was clearly needed.

We worked closely with the FMSA and other relevant government bodies in drafting a new law as part of a major legislative package debated by Kazakhstan's parliament in May and June and proposed by the FMSA with the twin aims of enabling consensual financial restructurings approved by a majority of creditors and of revising the existing framework for good bank/bad bank reorganisations.<sup>1</sup>



For more information please contact:

**Francis Fitzherbert-Brockholes**  
Partner, London

Tel: + 44 20 7532 1400

E-mail: [ffitzherbert-brockholes@whitecase.com](mailto:ffitzherbert-brockholes@whitecase.com)

**Stuart Matty**  
Partner, London

Tel: + 44 20 7532 1430

E-mail: [smatty@whitecase.com](mailto:smatty@whitecase.com)

**Yuriy V. Maltsev**  
Partner, Almaty

Tel: + 7 727 2507491

E-mail: [ymaltsev@whitecase.com](mailto:ymaltsev@whitecase.com)

<sup>1</sup> The package is contained in the Law of the Republic of Kazakhstan No. 18S-IV ZRK dated 11 July 2009 on Amendments and Additions to Certain Legislative Acts on Money Payments and Transfers, Accounting and Financial Reporting, Banking Activities, the National Bank of Kazakhstan and Other Legislation (the "New Restructuring Law"), published in *Kazakhstanskaya Pravda* on 30 July 2009 and taking effect on 30 August 2009.

### Financial Restructurings

The process introduced by the New Restructuring Law is similar to corporate rescue statutes existing in many jurisdictions, such as the United Kingdom or the United States, and is intended to ensure international recognition of the relevant bank's restructuring. The central proposition of the law is that creditors holding at least two thirds of the bank's obligations by value subject to the restructuring may, through a fair and transparent process, approve the plan and that this approval will ultimately bind dissenting minority creditors.

The New Restructuring Law introduces a procedure for restructuring the financial indebtedness of a bank that will be familiar to practitioners in this field. It has the following general format:

- The bank decides to restructure its debt and enters into an agreement with the FMSA with respect to such restructuring.
- The bank submits a restructuring plan (the "**Restructuring Plan**") to the FMSA for its consideration. The Restructuring Plan should:
  - describe the process for and period of the restructuring;
  - list the bank's assets and liabilities to be restructured;
  - contain a pro forma balance sheet showing the bank's financial condition following the restructuring; and
  - describe the bank's future activities and any limitations on them.
- The Bank applies to the specialised financial court of the Regional Almaty Financial Centre (the "**Court**") to initiate the process described in the Restructuring Plan.
- If the Court approves the restructuring process then, with immediate effect:
  - all relevant claims of the bank's creditors are stayed;
  - the bank's property is protected from execution and attachment; and

- the bank's obligations under agreements for the sale of assets and any financial commitments as either a lender (if the commitment carries any credit risk) or as a borrower, including contingent obligations such as guarantees, may be suspended in whole or in part.
- The bank convenes a meeting of its relevant creditors to approve the Restructuring Plan. If creditors holding at least two thirds in value of the bank's obligations subject to restructuring vote in favour of the Restructuring Plan, the bank then submits the approved Restructuring Plan to the FMSA to establish its conformity with the Restructuring Plan originally submitted to the FMSA.
- The Restructuring Plan is then submitted to the Court for final approval. We anticipate that all relevant creditors will receive notice of this hearing and will have the opportunity to make representations to the court.
- If the Restructuring Plan is approved by the Court, it is then binding on all creditors with claims subject to the restructuring.

Completion of the bank's restructuring will be achieved when the Restructuring Plan has been carried out to the satisfaction of the Court and the FMSA. Upon completion of the restructuring, the relevant liabilities of the bank are cancelled and any claims in relation to them are discharged and replaced by appropriate restructured claims. Completion of the restructuring is confirmed by a decision of the Court upon the FMSA's application.

The restructuring process set out in the New Restructuring Law is designed to be fair to the relevant creditors and should ensure that a restructuring effected under it will be capable of international recognition in countries (such as the United Kingdom and the United States) which have adopted legislation based on the 1997 UNCITRAL Model Law on Cross-Border Insolvency.

### Good Bank/Bad Bank Reorganisations

The second principal feature of the New Restructuring Law is the amendment of the existing legislative framework allowing the segregation of the "good" assets and liabilities of a distressed bank and the transfer of them to another bank (or several banks) or to a specialised stabilisation bank. The good bank/bad bank structure could be used in a number of different circumstances. For example:

- the process could be initiated by the bank itself if other efforts to restructure itself have failed or if it does not wish or can't, for whatever reason, achieve a financial restructuring following the process described above;
- where a bank has already been placed in conservation, the reorganisation may be initiated by a temporary manager appointed by the FMSA; or
- where a bank's licence has been revoked, the reorganisation may be initiated by a temporary manager appointed by the FMSA to manage the bank's assets pending court ordered compulsory liquidation taking effect.

Any reorganisation under these new procedures requires the FMSA's consent and the consent of depositors and/or creditors. Depositors and creditors are notified of the proposed reorganisation by an announcement published in Kazakhstan's mass media and any depositor and/or creditor may object to it by timely filing of a written objection.

### Stabilisation Banks

The New Restructuring Law also makes provision for the establishment of stabilisation banks. These could be used as the "good" bank in the reorganisation into a good bank and bad bank of a bank which is in conservation. Each would be a special purpose company established by the FMSA on an *ad hoc* basis as and when required and would have a special status under the Kazakhstan banking law and a limited scope of business compared to ordinary commercial banks. Due to its special status and purpose, a stabilisation bank would

White & Case LLP  
5 Old Broad Street  
London EC2N 1DW  
Tel: + 44 0 20 7532 1000  
Fax: + 44 0 20 7532 1001

not be subject to normal capital adequacy and other prudential requirements. Its main role would be to hold "good" assets while the segregation of the "good" and "bad" assets of the distressed bank was in progress. Once the segregation had been completed, the stabilisation bank would transfer the "good" assets to another bank designated by the FMSA, subject to the consent of the depositors and/or other creditors of the stabilisation bank. The procedures for obtaining this consent would be similar to the procedures for obtaining the depositors' and creditors' consent to the initial transfer of "good" assets from the distressed bank.

The New Restructuring Law provides that once the stabilisation bank passes on the assets to an acquiring bank, it may either be liquidated or be sold to an investor, provided the investor can procure a recapitalisation of the stabilisation bank and bring it into compliance with the requirements applicable to ordinary commercial banks because following a sale, the stabilisation bank would lose its special status and become subject to the general banking legislation applicable to an ordinary bank.

It is unclear at present whether one stabilisation bank can be utilised as a holding vehicle for "good" assets of several distressed banks.

We believe that the New Restructuring Law is a positive development for the Kazakhstan legal system and provides an adequate, internationally recognisable, legislative framework for the current bank restructurings. We will be monitoring closely further developments relating to bank restructurings in Kazakhstan and will provide further client alerts on them in due course.

*This publication is prepared for the general information of our clients and other interested persons. It is not, and does not attempt to be, comprehensive in nature. Due to the general nature of its content, it should not be regarded as legal advice.*

[www.whitecase.com](http://www.whitecase.com)

In this publication, White & Case means the international legal practice comprising White & Case LLP, a New York State registered limited liability partnership, White & Case LLP, a limited liability partnership incorporated under English law and all other affiliated partnerships, corporations and undertakings.