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Kazakhstan

Joel Benjamin and Adlet Yerkinbayev

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1 Collateral

What types of collateral are available?

Kazakh civil law recognises the following methods of security:

- penalty;
- pledge;
- taking possession of the debtor's property;
- suretyship;
- guarantee; and
- deposit payment.

In addition to the above, the parties can agree to use other methods of securing liabilities (eg, assignment).

The typical forms of security in the project finance context are the pledge and the guarantee.

Pledges

Under the law, collateral under the pledge agreement may either remain in the possession of the pledgor or be transferred into the pledgeholder's possession.

The law recognises a pledge over goods in circulation.

Kazakh law permits any property to be used as collateral except for:

- property that is withdrawn from commercial circulation (eg, certain types of land);
- claims that are intrinsic to an individual (eg, alimony payments, claims for harm to one's health or life); and
- rights that may not be assigned to third parties by law (eg, recourse claims).

The law permits to use as collateral:

- property that will be acquired in the future; and
- a 'property complex' (the entire enterprise).

The most commonly used types of collateral in the project finance context are:

- land, buildings and other immovable property;
- shares and participating interests in the charter capital of an entity;
- funds (including on bank accounts and in the form of bank deposits);
- receivables; and
- contractual rights.

2 Perfection and priority

How is a security interest in each type of collateral perfected and how is its priority established? Are any fees, taxes or other charges payable to perfect a security interest and, if so, are there lawful techniques to minimise them? May a corporate entity, in the capacity of agent or trustee, hold collateral on behalf of the project lenders as the secured party?

Perfection of pledges

Depending on the type of asset, perfection of a pledge may require registration, the government's consent or notification of the relevant person.

Registration

Registration required for pledges of all property to establish priority over subsequent registered pledgeholders and all unregistered pledgeholders (namely, perfection).

Registration of a pledge is required in order to ensure the validity of the pledge where the collateral is either immovable property or moveable property that is subject to mandatory state registration. Mandatory registration is required for a pledge over, inter alia:

- land, buildings and other immovable property;
- shares;
- participating interests in the charter capital of an LLP if the company's registry of participants is maintained by an independent registrar;
- vehicles; and
- subsurface use rights.

A pledge agreement must also be registered if it prohibits re-pledge of the collateral or specifically requires registration in order to be valid even if the collateral is not subject to mandatory state registration.

Registration of a pledge over moveable property granted by a foreign entity requires prior registration of such an entity with the Kazakh tax authorities as a taxpayer. The tax registration is required in order to enable registration of the pledge granted by such foreign entity with the Kazakh registration authorities.

Subsequent amendment of a pledge agreement does not require registration thereof with the relevant Kazakh registration authorities unless:

- such amendment changes the collateral; or
- the parties to the pledge agreement wish to register such amendment.

Consents

Prior consent from the authorised state body is required for a pledge over, inter alia:

- subsurface use rights; and
- ‘strategic objects’, being assets that are deemed to be strategic objects (such as oil and gas pipelines, national electricity grid, oil refineries, international air and sea ports, etc) and equity interests in entities holding such assets or in the entities that directly or indirectly define or influence decisions of the entity holding such assets.

Notifications

A notification is required, inter alia, for:

- a pledge over rights (eg, receivables) – the debtor must be notified; and
- a pledge over monies on a bank account or in the form of a bank deposit – the bank must be notified.

Perfection of guarantees

There are no specific registration requirements in respect of guarantees.

Fees and taxes

The fee for registration of a pledge over shares is a percentage of the value of the shares being pledged. Fees for registration of pledges over other types of assets are nominal.

There are no other fees or taxes payable for registration of a pledge.

Security agents or trustees

There is no concept of a security agent or security trustee in the local law. Further, a non-creditor is not permitted to be a pledgeholder or a beneficiary under a guarantee.

In view of these restrictions, a security agent or trustee may act on behalf of the creditors as pledgeholder or beneficiary of a guarantee only if the security agent is also a creditor or the financing agreement contains a ‘parallel debt’ provision making the security agent or trustee a ‘creditor’. Although the ‘parallel debt’ concept is not explicitly recognised in the law, it is often used in practice. However, there is a risk that the validity of such a provision may not be upheld by a court.

3 Existing liens

How can a creditor assure itself as to the absence of liens with priority to the creditor’s lien?

The registry maintained by the relevant registration authority must contain all security interests that have been registered with that authority.

An extract from the registry will be sufficient to confirm the absence of any registered third-party security interests in respect of the collateral. In practice, a third party (eg, a creditor) may not be able to obtain the extract itself and may have to ask the pledgor to obtain an extract.

4 Enforcement of collateral

Outside the context of a bankruptcy proceeding, what steps should a project lender take to enforce its rights as a secured party over the collateral?

Types of enforcement procedure

A pledge is enforced by way of either:

- a court-administered sale – in the absence of the parties’ agreement to use an out-of-court sale or in situations where the collateral is such that it requires a court-administered sale (eg, subsurface use rights); or

- an out-of-court sale – in situations where the parties explicitly agree in the pledge agreement to an out-of-court sale.

In both cases, there is a public sale (auction) of the collateral. A sale is not required in the case of enforcement of a pledge over monies and receivables. A pledge over this type of collateral is enforced by way of a transfer of the monies to the pledgeholder.

Steps required to enforce the pledge

An out-of-court sale is organised by an attorney appointed by the pledgeholder or, if there is an agreement between the parties, both the pledgeholder and the pledgor.

The following notices are required to be given for an out-of-court sale of collateral:

- a notice of default – this notice must be provided to the pledgor and registered with the authority that registered the pledge; and
- a notice on carrying out the sale of the collateral – this notice can be issued no earlier than 30 days after the notice of default, and must be provided to the pledgor and the pledgeholder and registered with the authority that registered the pledge. The notice must also be published in the newspapers at least 10 days before the auction date.

Auction

Any person – including the project lenders, the pledgeholder (if different from the project lenders) and the pledgor – can participate as buyers in the sale of the collateral.

The collateral can be transferred into the pledgeholder’s ownership at its appraisal value if the collateral is not sold at the auction.

Sales in foreign currency are not permitted unless the currency control law allows transactions in foreign currency in respect of this type of collateral (eg, securities having a nominal value in foreign currency) or the buyer is a non-resident.

Self-help remedies

Self-help remedies are available in theory.

Consents

Government consents may need to be obtained in connection with the sale and purchase of the collateral. Depending on the type of the collateral, a government consent may be required to be obtained by:

- a pledgeholder for the sale of the collateral (eg, in the case of auction in respect of ‘strategic objects’) or for the transfer of the collateral into the pledgeholder’s ownership (eg, where such collateral is in the form of subsurface use rights);
- any person in order for him or her to be able to participate in the auction (eg, in the case of auction in respect of subsurface use rights); or
- an acquirer (eg, in a case where antimonopoly consent is required to be obtained by the acquirer, such as, for instance, for the purchase of more than 25 per cent of the shares or participating interests in a company if certain thresholds are met).

5 Bankruptcy proceeding

How does a bankruptcy proceeding in respect of the project company affect the ability of a project lender to enforce its rights as a secured party over the collateral? Are there any preference periods, clawback rights or other preferential creditors’ rights (eg, tax debts, employees’ claims) with respect to the collateral? What entities are excluded from bankruptcy proceedings and what legislation applies to them? What processes other than court proceedings are available to seize the assets of the project company in an enforcement?

Creditors’ rights in the context of bankruptcy proceedings

Bankruptcy is the main insolvency procedure under Kazakh law.

Following the initiation of bankruptcy proceedings, all creditors including a secured lender may enforce its rights only in the course

of the bankruptcy proceedings. There is no right to foreclose on the collateral after bankruptcy proceedings have been initiated.

In bankruptcy, creditors' claims are satisfied either in cash or in kind (namely, by way of transfer of property to the creditor), provided the creditor agrees to in-kind satisfaction of its claims.

As a rule, foreign creditors are treated the same as local creditors in all types of insolvency proceedings.

Priority of secured creditors' claims

In the bankruptcy context, claims secured by a pledge over the debtor's assets are treated differently from claims secured by other types of security.

Claims secured by pledge

Claims secured by pledge are satisfied after:

- claims for alimony payments and compensation for wrongful damage to one's health or life; and
- claims for payment under employment contracts, related social security and mandatory pension payments, and under copyright agreements.

Tax claims and claims for other mandatory payments into the budget and all other creditors' claims are satisfied after claims secured by pledge.

Secured claims are satisfied up to the value of the collateral. Any claims that exceed the value of the collateral are treated as unsecured claims.

If the debtor's assets are not sufficient to pay creditors with a ranking ahead of creditors secured by pledge, the claims of such creditors will be satisfied at the expense of the creditors secured by pledge.

Claims secured by other types of security

Claims secured by other types of security (eg, by way of a guarantee) will rank *pari passu* with all other creditors' claims.

Clawback periods

The following transactions may be challenged in the case of the debtor's bankruptcy:

- A transaction made within three years prior to initiation of bankruptcy involving the transfer of property free of charge, below market price or without sufficient grounds to the detriment of the creditors' interests.
- A transaction made within three years prior to initiation of bankruptcy involving the transfer of property to a creditor if the obligations to such creditor were fulfilled prior to maturity to the detriment of the creditors' interests.
- A transaction that was made after the initiation of the bankruptcy proceedings if such transaction leads to preferential satisfaction of one of the creditor's claims.

These clawback provisions apply in the case of rehabilitation of a debtor (discussed below). In the rehabilitation context, the clawback periods apply to transactions entered into by the debtor within three years prior to initiation of rehabilitation.

Entities excluded from bankruptcy proceedings

Bankruptcy proceedings do not apply to state enterprises and state institutions.

There is no insolvency procedure in the local law for these types of entities.

Rehabilitation procedure

In addition to the bankruptcy procedure, Kazakh law provides for a rehabilitation procedure. The recent amendments to the Law on Bankruptcy make the rehabilitation procedure an attractive tool for rehabilitating insolvent debtors. The rehabilitation regime affords to

the debtor protections analogous to the ones available in the bankruptcy context (including, for instance, the ability to clawback certain transactions entered into prior to initiation of rehabilitation) except that at the end of the rehabilitation the entity resumes its operations as a going concern.

6 Foreign exchange

What are the restrictions, controls, fees, taxes or other charges on foreign currency exchange?

Generally, foreign currency exchange transactions are carried out without restrictions. Certain types of transactions are subject to either a registration regime or a notification regime. If such a regime applies, it is the sole obligation of the resident to comply with the regime's requirements. A non-resident may not be held liable for the resident's failure to comply with the regime's requirements. In theory, if a resident fails to comply with the requirements, a non-resident may suffer negative consequences from such a failure because a bank may refuse to transact payments. However, in practice, all payments that are subject to the regimes must be carried out through banks, which are currency control agents and are required to ensure compliance with the regime.

The transactions that are subject to these regimes include, *inter alia*, the following transactions between residents and non-residents:

- a commercial credit for a period exceeding 180 days;
- a direct investment whereby a non-resident acquires 10 or more per cent of the voting shares or interests in a Kazakhstan entity or a transaction involving the purchase of equity capital (shares or interests) or derivative financial instruments;
- a loan for a period exceeding 180 days;
- a purchase of immoveable property; and
- a purchase of intellectual property rights.

In respect of a purchase or sale of foreign currency, the law requires that any purchase or sale of foreign currency within Kazakhstan must be carried out through a Kazakhstan bank. There is no notification or registration requirement for this type of transaction.

Registration regime

The registration regime involves the initial registration of the transaction by the resident with the National Bank of Kazakhstan (NBK) and the subsequent filing of certain quarterly reports to the NBK. The registration regime applies to certain transactions such as commercial credits, direct investments, loans and purchase of intellectual property rights if they create an obligation by the resident to pay to the non-resident an amount exceeding US\$500,000 or the equivalent.

Notification regime

The notification regime involves the initial notification of the NBK by the resident regarding the transaction and the subsequent filing of quarterly reports with the NBK. The notification regime applies to certain transactions such as transaction involving the purchase of equity capital (shares or interests) or derivative financial instruments (other than the direct investments) and purchase of immoveable property, if they create an obligation by the resident to pay to the non-resident an amount exceeding US\$500,000 or the equivalent.

Fees

There are no fees or taxes that apply to foreign exchange transactions.

Special currency regime

The law allows the state to introduce a 'special currency regime' on a temporary basis in the case of a threat to the economic security of Kazakhstan and the stability of its financial system. If this regime is introduced, then the state may restrict certain types of transactions between residents and non-residents. For instance, the regime may

provide a requirement (i) to place a percentage of the transaction amount on a non-interest-bearing deposit; (ii) to obtain a special permission for carrying out a transaction; or (iii) to sell foreign earnings in Kazakhstan. This regime may be introduced for a maximum period of one year.

7 Remittances

What are the restrictions, controls, fees and taxes on remittances of investment returns or payments of principal, interest or premiums on loans or bonds to parties in other jurisdictions?

There are no restrictions on remittances of investment returns or payments of principal, interest or premiums on loans or bonds to parties in other jurisdictions.

The resident who makes such remittances may be required to comply with the notification or registration regimes.

The remittances may be subject to the applicable withholding tax, which may be reduced by application of double tax treaties. There are no other fees on such remittances.

8 Repatriation

Must project companies repatriate foreign earnings? If so, must they be converted to local currency and what further restrictions exist over their use?

A Kazakh company must repatriate to its Kazakh bank account:

- earnings in foreign and national currency from the export of goods, works or services; and
- foreign and national currency transferred by it to a non-resident under a contract for the import of goods, works or services if the non-resident fails to perform its obligations under the contract.

The repatriation requirement is deemed to have been satisfied in certain circumstances without actual repatriation (eg, in the case of set-off of a non-resident's obligation against a claim against the Kazakh company).

A Kazakh company is not required to convert into local currency its foreign earnings on Kazakh bank accounts.

A Kazakh company may use foreign earnings on Kazakh bank accounts for any legitimate purpose.

A Kazakh company may not withdraw from its Kazakh bank accounts foreign earnings in the form of cash except to make certain payments in cash to individuals (eg, for payment of salaries to its non-resident employees).

9 Offshore and foreign currency accounts

May project companies establish and maintain foreign currency accounts in other jurisdictions and locally?

A Kazakh company may establish and maintain foreign currency accounts in other jurisdictions and in Kazakhstan.

In practice, the Kazakh company is limited in its ability to accumulate funds on its offshore bank accounts by the repatriation requirement (see question 8). The exception from the repatriation requirement includes, inter alia, the company's right to secure the company's obligations under a loan from a non-resident or to finance its overseas branches and representative offices.

In respect of its offshore bank accounts, a Kazakh company must:

- notify the NBK of opening an offshore bank account within 30 days from the date of signing of the bank account agreement;
- provide the NBK with quarterly reports in respect of the offshore bank account; and

- provide the NBK with monthly reports if the company makes or receives payments through its offshore bank account in an amount exceeding the equivalent of US\$50,000 or an equivalent and such payment relates to an agreement for the export or import of goods, works or services.

10 Foreign investment and ownership restrictions

What restrictions, fees and taxes exist on foreign investment in or ownership of a project and related companies? Do the restrictions also apply to foreign investors or creditors in the event of foreclosure on the project and related companies? Are there any bilateral investment treaties with key nation states or other international treaties that may afford relief from such restrictions? Would such activities require registration with any government authority?

Restrictions

Kazakh law restricts foreign ownership in the following sectors:

- telecommunications – foreign entities and individuals may not own or hold (directly or indirectly) more than 49 per cent of the shares or interests of an operator of intercity or international communications or both, which owns main communications lines;
- mass media – foreign entities and individuals may not own or hold or manage (directly or indirectly) more than 20 per cent of the shares or interests of a mass media company; and
- certain other sectors (eg, private guard (security) service).

Investment by a foreign or local investor into certain types of entities or assets requires governmental approval. Such approval must be obtained prior to making the investment. Depending on the type of the entity or asset involved, the approval may need to be obtained by either the acquirer or the seller. In certain cases, the state has a statutory pre-emptive right to acquire the entity or asset involved.

Generally, the approval may not be refused solely on the basis that the investor is a foreign entity. However, in certain cases (such as in the case where the approval for the sale of a 'strategic object' is sought) the law grants to the relevant government authority the right to reject an application for approval without specifying the reasons for such rejection.

The above restrictions also apply in the event of foreclosure on the relevant company.

Bilateral investment treaties do not afford relief from such restrictions.

Taxes

There are no taxes or fees payable on foreign investment or ownership of a local project company.

Registrations

Foreign investment may require registration as a 'direct investment' with the NBK or notification to the NBK, depending on the size of the investment.

11 Documentation formalities

Must any of the financing or project documents be registered or filed with any government authority or otherwise comply with legal formalities to be valid or enforceable?

Written form

As a rule, all agreements must be reduced to written form.

Languages

All agreements by local entities must be formulated in the Kazakh language. However, at present, there is no penalty for a failure to comply with this requirement.

Typically, most agreements with foreign parties are formulated in English and, where the parties wish to do so, also in Russian.

Filings

For most types of filings with the state authorities it is sufficient to provide either a Russian or Kazakh translation of the agreement.

However, certain documents must be drafted in both Kazakh and Russian in order for their registration or filing with the state authorities (eg, a charter of a legal entity).

Notarisation

Generally, notarisation is not required except for certain types of documents (such as charters of legal entities, agreements for the sale and purchase of immovable property, etc).

Apostille

Apostille or legalisation may be required where foreign documents need to be provided to state authorities.

12 Government approvals

What government approvals are required for typical project finance transactions? What fees and other charges apply?

Investments

Investments may require the following government approvals:

- antimonopoly consent is usually required for acquisition of more than 25 per cent in the charter capital of an entity; and
- other consents may be required if the target company operates in a sector that requires government consent for acquisition of shares in such company (such as, for example, oil and gas and mining, financial sector).

Investment may also be subject to registration with the NBK.

Loans

Government approvals are not required for loans. Loans between residents and non-residents exceeding certain thresholds must be registered with or notified to the NBK.

Generally, granting of security for a loan does not require governmental approval. However, government approvals may be required for granting security over certain types of assets, such as, inter alia, assets that are deemed to be strategic objects and subsurface assets.

Operations

There are various government approvals required for companies operating in certain sectors of the Kazakh economy. For instance, a company may be required to obtain a licence from the relevant state authority in order to be able to carry out a particular type of activity. Other approvals may be required, including, inter alia, approvals for construction, etc.

Transactions and remittances by foreign parties or by local companies owned or controlled by foreign parties

There are no special government approvals required for transactions and remittances by foreign parties or by local companies owned or controlled by foreign parties.

Fees

In all of the above cases, there are either no fees payable or the amount of such fees is nominal.

13 Foreign insurance

What restrictions, fees and taxes exist on insurance policies over project assets provided or guaranteed by foreign insurance companies? May such policies be payable to foreign secured creditors?

Kazakh law prohibits foreign insurance over most types of assets located on the territory of Kazakhstan. These assets must be insured by local insurance companies. Local insurance companies most often will reinsure their risks with foreign insurance companies.

Mandatory insurance with local insurance companies is required for certain types of assets and risks, such as ecological risks, insurance of employer's liability in the case of accidents involving an employee that occurs when the employee performs his or her employment duties, liability of a vehicle's owner, liability relating to the drilling of wells of an owner of hazardous objects, etc.

In respect of the mandatory types of insurance, the loss payee is determined by law (usually, a third party to whom liability is owed as a result of an insurance event). The loss payee may be a foreign secured creditor in respect of voluntary types of insurance.

14 Foreign employee restrictions

What restrictions exist on bringing in foreign workers, technicians or executives to work on a project?

Work permits

A work permit from state authorities is required in order to employ a foreign worker. There are certain exceptions from the work permit requirement for certain categories of foreign workers, such as, for instance, the head of a branch or representative office of a foreign entity.

Work permits are issued on the basis of an annual quota for the number of foreigners employed in each region of Kazakhstan and the cities of Almaty and Astana.

Before submitting an application for a work permit, an employer must notify the competent body about any available vacancies. Such notification shall be made at least 15 days prior to submitting an application for a work permit.

Applications for work permits are evaluated on a points-based system that takes into account the candidate's experience, education and the likelihood that the vacancy can be filled by a local worker. Obtaining a work permit takes about three months, although it may take longer in certain cases.

The applications are subject to a cash deposit requirement to secure the foreign worker's departure from Kazakhstan upon termination of his or her employment.

Work permits may be issued subject to certain conditions, such as a requirement to train local staff or to create additional jobs for local staff. Work permits are also usually granted for a limited period only (eg, an initial period of one year and two renewals) sometimes with the requirement that the foreign employee be replaced at the end of the term by a local employee.

Individuals who come to Kazakhstan to carry out entrepreneurial activities are not required to obtain a work permit on the basis of an exception available for 'business-immigrants'.

Foreign employees with certain qualifications may obtain work permits for themselves. Authorities may grant a work permit for self-employed persons for up to three years, as long as the total number of foreign employees does not exceed the approved state quota. The work permit for self-employed persons is valid within only one region of Kazakhstan.

Visas

A foreign worker must have a valid passport and, if required, a work visa in order to be able to enter Kazakhstan. A work visa is issued on the basis of a work permit and is valid only for the term of such work permit. Major foreign investors may apply for investors' visas for CEOs and top management. A multiple entry investor's visa can be issued for a period of up to three years.

Citizens of most CIS countries do not need a visa to enter Kazakhstan but will need a work permit to work in Kazakhstan. However, citizens of countries that are part of the Customs Union (namely, Russia and Belarus) do not require a work permit in order to work in Kazakhstan.

Registration requirements

A foreign worker must register with the state authorities within five calendar days of arrival.

15 Equipment import restrictions

What restrictions exist on the importation of project equipment?

The importation of project equipment is subject to the requirements of the customs legislation (eg, payment of applicable customs duties, etc). As of 1 July 2010, Kazakhstan is a member of the Customs Union between Belarus, Kazakhstan and the Russian Federation.

Importation of project equipment or goods may require obtaining of a licence. The licensing regime applies to certain types of goods (eg, explosive substances). Importation may also require obtaining of a certificate of compliance or a declaration of compliance in respect of equipment. This requirement applies to, inter alia, vehicles, agriculture equipment, electronic machines and equipment, construction materials, etc.

Importation may also be subject to restrictions applied by the government, inter alia, as anti-dumping measures or temporary protective measures in the form of special protective duties or quotas for importation of goods.

16 Nationalisation and expropriation

What laws exist regarding the nationalisation or expropriation of project companies and assets? Are any forms of investment specially protected?

The law on state property regulates nationalisation or requisitioning of private property.

Nationalisation

Nationalisation may only be carried out in the interests of the society in order to ensure national security. The law provides that the state must nationalise without discrimination, in a transparent manner, and only after all other possible legal means of alienation of property provided for by the Civil Code (eg, sale and purchase) are exhausted.

Nationalisation of particular property may only be carried out on the basis of a law that specifically allows that property to be nationalised.

Where property has been nationalised, the owner of that property has the following rights (protections):

- the owner has the right to receive market-value compensation for the nationalised property and other damages;
- compensation cannot be paid in instalments;
- property shall be handed over to the state only after the owner receives 'equivalent compensation'; and
- the owner has the right to judicial review of the owner's rights (eg, compensation), but not to judicial review of the nationalisation itself.

Requisition

Private property may be requisitioned either:

- in the case of an emergency situation caused by a natural or man-made disaster; or
- in the case that it is required for defence purposes during a period of martial law.

In the first instance, requisition is limited to the territory of the emergency and can be carried out only in exceptional circumstances when the state's reserves are not sufficient to protect people, the environment and certain other objects from that emergency. The law guarantees market value compensation to the owners of the requisitioned property in the case of an emergency situation. The law explicitly provides that the valuation of the property and the decision to requisition property may be appealed in court by the owner.

In the second instance, the law does not provide for similar guarantees to the owners of property that is subject to requisition. As such, the law only states that the compensation for the property requisitioned for the purposes of defence is paid from the budget and the procedure for compensation must be set forth in the government's regulation.

Protections

There are no protections for specific forms of investments. Certain protections may be available pursuant to bilateral treaties on protection of investments between Kazakhstan and the relevant foreign country and multilateral treaties and conventions to which Kazakhstan is a party.

17 Fiscal treatment of foreign investment

What tax incentives or other incentives are provided preferentially to foreign investors or creditors? What taxes apply to foreign investments, loans, mortgages or other security documents, either for the purposes of effectiveness or registration?

The current tax regime applies equally to local and foreign investors. There are no tax incentives that are specifically provided to foreign investors. Investors into priority sectors of the economy may obtain incentives on the basis of an investment contract with the state in the form of waivers of applicable customs duties and applicable land and property taxes, grants of state property and industrial incentives for legal entities that conduct strategic projects in locations with a low level of socio-economic life.

There are no taxes payable for the purposes of effectiveness of foreign investments, loans or security documents. Nominal fees are payable for the purposes of registration of security documents.

18 Government authorities

What are the relevant government agencies or departments with authority over projects in the typical project sectors? What is the nature and extent of their authority? What is the history of state ownership in these sectors?

The Ministry of Oil and Gas (MOG) has comprehensive regulatory and supervisory authority over the petroleum sector (including oil and gas and chemical refining). MOG prepares tenders for granting rights for exploration, development and production of hydrocarbons; represents the state in negotiations and signs all subsurface use contracts in the sector; approves work programmes; and has the right to amend, suspend and terminate contracts.

The Ministry of Industry of New Technologies (MINT) has comprehensive regulatory and supervisory authority over the mining sector. MINT has the same authorities as MOG but in relation to mining rather than oil and gas.

Local authorities (*Akimats*) are responsible for granting land use rights, for control and supervision over the use and protection of land, water and the environment, and for monitoring compliance with local content obligations.

Usage and protection of the water fund, water supply and water disposal regulation is carried out by the Committee on Water Resources of the Ministry of Agriculture, the Agency on Construction, Housing and Utilities and the *Akimats*.

MINT is the primary regulator of the power sector. MINT issues licences for the production, transmission, distribution and sale of electricity.

The Ministry of Transportation and Communications (MTC) regulates transportation (including air, railroad, sea and automobile transportation) and communication services (eg, telephones, television, radio and postal services). MTC issues licences for the provision of transportation and communications services.

The competent authority responsible for the management of state ownership is the Ministry of Finance. The majority of state assets (including stakes in the national companies) are owned by the National Welfare Fund ‘Samruk-Kazyna’.

19 International arbitration

How are international arbitration contractual provisions and awards recognised by local courts? Is the jurisdiction a member of the ICSID Convention or other prominent dispute resolution conventions? Are any types of disputes not arbitrable? Are any types of disputes subject to automatic domestic arbitration?

Kazakhstan is a party to the 1958 New York Convention on Recognition and Enforcement of Foreign Arbitral Awards (the Convention). Like the Convention, the Kazakh Law ‘On International Commercial Arbitration’ provides for the enforcement of foreign arbitral awards. A foreign arbitral award obtained in a state that is a party to the Convention will be enforceable by a Kazakh court, subject to the qualifications in the Convention and compliance with Kazakh civil procedure and the procedures established by the Kazakh legislation on commercial arbitration for the enforcement of arbitral awards.

Kazakhstan is also a party to the ICSID Convention.

There are no disputes that are subject to automatic domestic arbitration. The parties may agree to subject disputes to domestic arbitration.

Disputes relating to immovable property located in Kazakhstan and certain other disputes may not be subject to international or local arbitration but are reserved for Kazakh courts.

20 Applicable law

Which jurisdiction’s law typically governs project agreements? Which jurisdiction’s law typically governs financing agreements? Which matters are governed by domestic law?

Most project agreements are typically governed by foreign law except for matters that are subject to Kazakh law (eg, pledge agreements as to collateral in Kazakhstan). Financing agreements are typically governed by foreign law.

Kazakh law provides for freedom of choice in respect of a contract’s governing law. However, Kazakh law prevails in situations where:

- foreign law conflicts with the public policy of Kazakhstan;
- the imperative norms of Kazakh law apply; or
- the contract includes matters that must be governed by Kazakh law (eg, matters relating to immovable property located in Kazakhstan and other property included in the Kazakhstan state registry or regulation of relationships between the participants of a Kazakh company).

21 Jurisdiction and waiver of immunity

Is a submission to a foreign jurisdiction and a waiver of immunity effective and enforceable?

A submission to foreign jurisdiction will be recognised by local courts as a valid submission. However, judgments of courts of most western jurisdictions (including the United States, the United Kingdom and most western European countries) will not be enforceable in Kazakhstan because Kazakhstan does not have relevant international agreements with such jurisdictions.

Judgments of courts of most CIS countries will be enforceable in Kazakhstan since Kazakhstan is a party to relevant international agreements with these countries.

A waiver of immunity by state institutions is possible, will be recognised as effective and will be enforceable. Private companies and companies with state participation do not have state immunity.

22 Title to natural resources

Who has title to natural resources? What rights may private parties acquire to these resources and what obligations does the holder have? May foreign parties acquire such rights?

The subsurface and natural resources contained therein, including minerals, water, land, plants and animals are owned by the state.

Individuals and legal entities can obtain subsurface use rights in accordance with the Law ‘On Subsurface and Subsurface Use’. Natural resources extracted under a subsurface use contract become the property of the subsurface user. The holder of a subsurface use right must comply with the terms of the subsurface use contract. Subsurface use contracts must provide for the financing of local development projects (eg, construction of schools, kindergartens and hospitals), training of local personnel, environmental obligations and the reclamation of lands upon the completion of operations.

In general, land is owned by the state and may be granted into private ownership to individuals and legal entities (including foreign citizens and foreign legal entities) subject to certain exceptions specified in the Land Code. Private ownership is permitted over land designated for construction (or undergoing construction) and industrial and non-industrial buildings, including land designated for the use of such buildings. Agricultural and forestry lands cannot be owned by, but may be leased by, foreign citizens and foreign legal entities. Note that foreign individuals may not own residences in Kazakhstan.

23 Royalties on the extraction of natural resources

What royalties and taxes are payable on the extraction of natural resources, and are they revenue- or profit-based?

The following main taxes apply to subsurface use operations:

- Signature bonus – this bonus is a fixed payment for the right to conduct subsurface use operations in the contract area. The minimum amount of the bonus is determined based on a calculation taking into account the estimated amount of reserves and the deposit’s economic value. The actual amount of the bonus is determined based on the results of the winning bid.
- Commercial discovery bonus – this bonus is payable for each commercial discovery and is based on the actual volume of discovered mineral deposits approved by the authorised state agency.
- Mineral production tax – this tax replaced the previous royalty tax and is payable at fixed rates on a sliding scale based on actual production levels.
- Export rent tax – this tax applies to exported crude oil and gas condensate. Export rent tax is determined on the basis of a sliding scale provided by the Tax Code and depending on the ‘market price’ of oil and gas condensate.

- Customs duties – duties are payable in respect of exports of crude oil, light and heavy oil products.
- Excess profit tax – this tax is based on the contractor's net disposable income.
- Historical costs reimbursement – this is a fee payable to compensate the state for exploration expenditures incurred by the state before the conclusion of a subsurface use contract. Part of the amount of the historical costs must be paid for the acquisition of geological information. The balance of the historical costs must be paid at the production stage after a commercial discovery is established.

There is no tax stabilisation for subsurface contracts according to the current Tax Code. However, production-sharing agreements concluded prior to 1 January 2009 and that have gone through mandatory tax expertise, and subsurface use contracts that have been approved by the president, are still stabilised.

24 Export of natural resources

What restrictions, fees or taxes exist on the export of natural resources?

The export of natural resources may be subject to both tariff regulation (eg, payment of custom duties) and non-tariff restrictions (eg, export licensing and export limitation).

The government has a pre-emptive right to acquire minerals to ensure internal supplies of certain 'strategic' natural resources and in the case of certain emergency circumstances. The price of acquisition of natural resources pursuant to the pre-emptive right must be equal to a third-party contact price or, in the absence of such contract, to international market prices.

25 Environmental, health and safety laws

What laws or regulations apply to typical project sectors? What regulatory bodies administer those laws?

Environmental matters are primarily regulated by the Environmental Code and the Law on Specially Protected Nature Reserves. These laws are administered by the Ministry of Environment Protection.

Health-related matters are primarily regulated by the Code on Health of the People and the System of Health and the Sanitary Regulations adopted by the Ministry of Health. These laws and regulations are administered by the Ministry of Health.

Safety-related matters are primarily regulated by the Law on Fire Safety; the Law on Industrial Safety at Dangerous Industrial Facilities; and the Fire Safety Regulations adopted by the Ministry of Emergency Situations. These laws and regulations are administered by the Ministry of Emergency Situations.

26 Project companies

What are the principal business structures of project companies?
What are the principal sources of financing available to project companies?

Business structures

Kazakh project companies are usually established in the form of either a limited liability partnership or a joint-stock company.

Limited liability partnership

The main features of a limited liability partnership are as follows:

- low minimal charter capital requirement;
- a participant's liability is limited to the value of its contribution to the charter capital;
- each participant has a right of first refusal in the case of a sale by another participant to third parties of its interests in the charter capital;

- the foundation agreement governs the relationship between the participants;
- simple management structure (supervisory board – namely, equivalent to a board of directors – is optional);
- no annual audit requirement; and
- minimal reporting obligations.

Joint-stock company

The main features of a joint-stock company are as follows:

- high minimal charter capital requirement;
- a shareholder's liability is limited to the value of the shares held by it;
- shares can be issued in the form of common shares that have voting rights and preference shares with a guaranteed annual dividend and no voting rights, except for certain limited circumstances (such as non-payment of the guaranteed dividend);
- shares are freely transferable with no pre-emptive right by other shareholders;
- mandatory tender offer requirement in the case of acquisition of 30 per cent or more of the issued common share capital;
- management structure includes the shareholders' meeting, board of directors and an executive board or chief executive;
- independent director requirement for board of directors;
- interested party and certain other transactions must be approved and other minority shareholder protections exist;
- annual audit requirement; and
- reporting obligations.

Financing sources

The principal sources of financing are:

- local and foreign bank debt – local commercial banks often provide financing; foreign debt in the form of bilateral and syndicated loans is also very common;
- debt from state-owned institutions – Kazakhstan provides financing through various institutions, including a number of state development institutions for the promotion of entrepreneurship;
- debt from multilateral development institutions – a number of international development institutions operate in Kazakhstan and provide financing in the project finance area, including the Eurasian Development Bank and the European Bank for Reconstruction and Development;
- bond finance – local entities can issue bonds both under local law and foreign law; listing on the Kazakh stock exchange is attractive due to an exemption from withholding tax for listed bonds; and
- equity – equity financing is sometimes available from local and foreign sources; listing on the Kazakhstan stock exchange is possible for joint-stock companies.

27 Public-private partnership legislation

Has PPP enabling legislation been enacted and, if so, at what level of government and is the legislation industry-specific?

There is PPP-enabling legislation at the national level in the form of the Law on Concessions. This law is not industry-specific. In addition, there are certain industry-specific laws that contain provisions relating to concessions (eg, the Law on Railroads).

The recently revised Law on Project Finance and Securitisation creates a legal basis for implementation of concession projects using the framework of the securitisation legislation.

The legislation on concessions is still developing and, from our experience, as of the date of this publication, the bankability of concession projects under the current legislation is problematic.

28 PPP – limitations

What, if any, are the practical and legal limitations on PPP transactions?

The following are some of the practical and legal limitations on concession projects in Kazakhstan:

- a project in respect of which a concession is proposed must be listed in the government's list of approved concession projects;
- tariffs for most types of concession projects (eg, for railroad, airport, electricity lines) are subject to state regulation and cannot be guaranteed;
- the period of concession is limited to 30 years;
- project assets remain in state ownership;
- security over project assets cannot be granted without the state's approval; and
- the state has the right to unilateral amendment or termination of a concession agreement.

29 PPP – transactions

What have been the most significant PPP transactions completed to date in your jurisdiction?

Presently, there are six concession projects under implementation in Kazakhstan with a total investment up to US\$500 million.

Following are some notable PPP transactions in Kazakhstan:

- construction and operation of the new Shar – Ust-Kamenogorsk railway line;
- construction and operation of inter-regional North Kazakhstan – Aktobe oblast power transmission line;
- construction and operation of the passenger terminal of the international airport in Aktau;
- construction and operation of a turbo-gas power station in Kandygash, Aktobe oblast;
- construction and operation of the railway line Yerallyevo – Kuryk; and
- electrification of the Makat-Kandygash railway section.

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