

USAID Commerical Law Project: Development and Implementation of an Effective Bankruptcy System and Law in the Republics of Kazakhstan and the Kyrgyz Republic



ENI/PER Task Order Reference No. 03-0064-BOOZ-05
USA/ENI/EPE Task Order #1
Contract No. EPE-0014-I-00-5071-00
Walter Coles, PER/NISP Division Chief, COTR

**USAID COMMERCIAL LAW PROJECT : DEVELOPMENT
AND IMPLEMENTATION OF AN EFFECTIVE BANKRUPTCY
SYSTEM AND LAW IN THE REPUBLICS OF KAZAKSTAN
AND THE KYRGYZ REPUBLIC**

COMPLETION REPORT
JANUARY 31, 1997

BOOZ·ALLEN & HAMILTON, INC.
8283 GREENSBORO DRIVE
MCLEAN, VA 22102

B

Table of Contents

1. INTRODUCTION.....	3
2. EXECUTIVE SUMMARY.....	3
3. ACCOMPLISHMENTS OF THE PAST YEAR AND FINAL STATUS OF WORK AGAINST BENCHMARKS AND REQUIRED TANGIBLE RESULTS --- IN KAZAKSTAN.....	5
3.1 SUMMARY OF ECONOMIC AND POLITICAL ENVIRONMENTS.....	5
3.2 TASK ORDER ACCOMPLISHMENTS AGAINST BENCHMARKS AND REQUIRED TANGIBLE RESULTS.....	6
3.2.1 Achieve Reforms to Laws Impacting Bankruptcy that Facilitate Privatization and Encourage Growth of a Market Economy.	6
3.2.2 Create Demonstration Projects, Develop Strategies to Enforce and Implement Bankruptcy, Restructuring, and Debt Resolution Procedures.....	10
3.2.3 Coordinate With USAID Mass Privatization Team, World Bank and other USAID and Donor Organizations.....	12
3.2.4 Coordinate With Commercial Law Project, Training & Education.....	13
3.2.5 Train Project Participants on Bankruptcy Matters and Provide Public Education.	15
4. ACCOMPLISHMENTS OF THE PAST YEAR AND FINAL STATUS OF WORK AGAINST BENCHMARKS AND TANGIBLE RESULTS --- IN KYRGYZSTAN.	16
4.1 SUMMARY OF ECONOMIC AND POLITICAL ENVIRONMENTS.....	16
4.2 TASK ORDER ACCOMPLISHMENTS AGAINST BENCHMARKS AND REQUIRED TANGIBLE RESULTS.....	19
4.2.1 Achieve Reforms to Laws Impacting Bankruptcy that Facilitate Privatization and Encourage Growth of a Market Economy.	19
4.2.2 Create Demonstration Projects, Develop Strategies to Enforce and Implement Bankruptcy, Restructuring, and Debt Resolution Procedures.....	19
4.2.3 Coordinate With USAID Mass Privatization Team, World Bank and other USAID and Donor Organizations.....	23
4.2.4 Coordinate With Commercial Law Project, Training & Education.....	23
4.2.5 Train Project Participants to Understand the Bankruptcy Laws, the Tasks to be Performed by the Project, and Provide Public Education.	25
5. LESSONS LEARNED AND RECOMMENDED RESPONSES.....	26

1

List of Appendices

1. Comments to the Draft Law on Bankruptcy Submitted to the Senate Chamber of the Parliament of Kazakstan.
2. Portion of the OSC Commercial Law Bulletin on "Questions and Answers on Bankruptcy".
3. Table of Contents for the Draft version of Kazakstani Liquidation Manual.
4. Draft version of "Wechsels: A Manual for their Implementation" (available in Russian only).
5. Draft Kyrgyz Law on Bankruptcy delivered by the Bankruptcy Law Reform Committee.
6. Table of contents from the Draft version of the Kyrgyz Liquidation Manual.

1. INTRODUCTION

On November 30, 1996 the USAID Bankruptcy and Restructuring Project in Kazakstan and Kyrgyzstan ("Project") came to a close. This completion report summarizes the accomplishments of the past year, provides the final status of work against benchmarks and tangible results, addresses lessons learned during implementation, and suggests ways to resolve identified constraints, through further work in Kazakstan and Kyrgyzstan regarding bankruptcy-related matters. For purposes of illustrating points in the completion report and for providing USAID and other donors with materials that might be of use in bankruptcy-related projects, the completion report contains various documents attached as an appendix.

2. EXECUTIVE SUMMARY

The Task Order called on the Booz-Allen Team ("the Team") to support the introduction and development of legislative reform that would increase the efficiency of the bankruptcy laws and to demonstrate, through technical assistance and pilot projects, effective approaches to bankruptcy implementation. Despite numerous political obstacles, reluctant counterparts, and false starts with pilot projects, the Team succeeded in meeting these goals by the end of the Project.

The situation of the Team encountered upon its arrival in Central Asia was sobering. As the result of various economic factors and government policies during the market transformation period, companies in Kazakstan and Kyrgyzstan had taken on or inherited billions of dollars of debts. Such debts, which left most companies technically insolvent, prevented companies from using normal channels of commerce, and discouraged investment.

To tackle these problems, both Kazakstan and Kyrgyzstan had passed bankruptcy laws. The laws themselves, however, and, more importantly, the infrastructure for implementing them, were vastly underdeveloped. In both countries, the executive branch and the judiciary were unfamiliar with the connection between an effective bankruptcy/debt resolution regime and the development of a market economy. The judges in both countries either ignored or rejected bankruptcy petitions. The executive branch agencies tasked with implementing state objectives in connection with the law lacked both the necessary skills and direction.

Adding to these problems was the widespread attitude, both within the government and among the general population, that bankruptcy and liquidation meant destruction of assets and increased unemployment. Such attitudes significantly impacted legal reform efforts and the implementation of pilot projects throughout the Project.

It is not surprising that, given these obstacles, the Team had numerous false starts on making progress towards the Task Order goals. In short, the Team's counterparts were at best ambivalent about the implementation of the bankruptcy

laws. Many government officials recognized the need for progress in this area, but few were willing to take the political risk in moving forward. With regard to private party counterparts, the Team found that creditors tended to express apathy towards their uncollected claims. They often viewed filing bankruptcy cases or even filing simple debt collection actions as simply not worth the effort. Such actions were expensive and unlikely to be successful.

Despite these challenges and set backs, the Team moved forward in four areas: legal reform, demonstration projects, training, and public education. The Team worked in each of these areas, to a greater or lesser extent throughout the year.

In both countries the Team participated in the shaping of new bankruptcy laws. In Kyrgyzstan, the Team began rewriting bankruptcy regulations. Mid-way through the Project, the government called on the Team and other donors to come up with a new draft law on bankruptcy. The draft that the Team shaped, became the official draft for review by the Kyrgyz government.

In Kazakstan, the Team, for various political and territorial reasons, was shut out from significant participation in shaping the government's draft law on bankruptcy. Instead, the Team's opportunity to work on the bankruptcy draft came after it was submitted to Parliament. Despite numerous time constraints and reluctant Parliamentarians, the Team was able to add several changes to the draft law as it emerged from the Senate chamber of the Kazak Parliament, most notably, the moving up of the rights to repayment of claims of secured creditors from behind those of workers to before those of workers in both a liquidation and a rehabilitation. This was a significant victory in that (a) it overcame considerable ideological and political obstacles and (b) it removed a significant risk faced by secured lenders of enterprises with large work forces.

With regard to demonstration projects, the Team had hoped to begin actively working on bankruptcy cases early in the term in order to take them all the way to completion. It was hoped that the Team could then use the practical experience from these projects to increase its credibility in connection with legal reform. Further, it sought to disseminate the techniques and practices in the form of various how-to publications. The biggest obstacle the Team found here was the lack of counterparts, either public or private, willing to implement, or cooperate on, a bankruptcy case. It was not until late spring of 1996 that demonstration projects in Kyrgyzstan began, and it was not until late summer that they began in Kazakstan.

Despite these late starts, the demonstration projects were extremely valuable. They gave the Team knowledge (important for subsequent dissemination) and credibility (important for advocating various legal reforms). Although in neither country did time allow for the completion of the liquidations in full, they nevertheless served their purpose. By the end of the Project, the Team had compiled draft liquidation manuals based on the Team's experiences in each country.

With regard to areas where counterpart cooperation was less crucial, i.e., publication and training, the Team excelled. Throughout the Project, the Team pushed its message regarding the value and underlying processes of bankruptcy

laws, either on radio, television, or through the print media. With regard to training, the Team organized and delivered numerous seminars and lectures on bankruptcy issues. The highlight in Kyrgyzstan was a two week seminar for liquidators in July and a similar seminar for a similar audience in Kazakstan in late September - early October. A significant portion of all of the liquidations in both countries are now being run by alumni from these seminars.

In short, the Team, despite a slow start, ended the Project on a positive note. In both countries, there will soon be new bankruptcy laws, each shaped by the Team's input. Skills and methodologies in implementing the law have been developed, and both private and public institutions are providing these services in either liquidating or restructuring companies. While certainly both Kazakstan and Kyrgyzstan have a long way to go, both have come very far in implementing a rational bankruptcy/debt resolution regime. It is very safe to say that the Team contributed significantly to this progress over the course of the Project.

3. ACCOMPLISHMENTS OF THE PAST YEAR AND FINAL STATUS OF WORK AGAINST BENCHMARKS AND REQUIRED TANGIBLE RESULTS --- IN KAZAKSTAN

3.1 Summary of Economic and Political Environments --- Beginning of Task Order

In Kazakstan, the Team on its arrival faced a challenging environment. Companies in Kazakstan, like most in Eastern Europe and the CIS, had taken on or inherited massive amounts of debts, estimated in the billions of dollars. Such indebtedness often prevented companies from using normal channels of commerce, such as the bank transfer system and deterred both domestic and foreign investment. Unable to obtain capital through normal sources, companies often looked to workers, essentially extorting loans from them, by running up huge salary arrears.

To deal with this problem, Kazakstan had at its disposal its law on bankruptcy: an eight page document riddled with gaps and inconsistencies, and the Kazak Agency for the Reorganization of Enterprises: an individual sitting in an office in an annex of the Ministry of Economy.

Legal procedures regarding bankruptcy were also underdeveloped. When a creditor filed a petition under Kazakstan's bankruptcy law, the judges almost always dismissed the case or simply chose to ignore it.¹ This result was partially due to the courts' fashioning their own rule that, unless the petitioner held more than 50 percent of the total claims against the debtor, the petition should be dismissed.

In such an environment it is not hard to imagine abuses occurring. They did. In one controversial privatization in late 1995, Kazakstan directed its largest state-owned joint stock company (Karmet Kombinat one of the largest steel mills in the

¹ In 1994 and 1995, 257 applications for bankruptcy were filed. The project has not yet heard of a single one resulting in the liquidation of an enterprise according to the procedures required under the bankruptcy law.

world) to transfer most of its assets to a foreign buyer, leaving the joint stock company afterwards with insufficient assets from which to pay millions of dollars owed to creditors. Authors of an article describing this transaction characterized it as perhaps "the largest fraudulent conveyance in history."² The bankruptcy laws of most countries specifically prohibit such transactions and allow them to be voided. Kazakhstan's does not.

Compounding these problems was widespread fear among the population that implementation of the bankruptcy law resulted in the destruction of companies and creation of massive unemployment. The government, partially in response to this perception, had all but refused to implement voluntary bankruptcy/liquidation proceedings over insolvent companies it owned.

If there was one comfort amongst these problems, it was that, at least in the non-state sector, company indebtedness was not getting much worse. By late 1995, most creditors, both state and private parties, were offering credit only in cases where repayment was all but certain.³ This credit restriction, however, served as a drag on economic development.

In this environment the Team struggled to assist private and state entities to begin heading in the right direction. The key to this struggle was (a) progress in legal reform and enforcement, (b) training of the judges, lawyers and other professionals involved in bankruptcy proceedings, and (c) changing public perception of the bankruptcy process. These efforts and their results are discussed more fully in the next section.

3.2 Task Order Accomplishments Against Benchmarks and Required Tangible Results

3.2.1 Achieve Reforms to Laws Impacting Bankruptcy that Facilitate Privatization and Encourage Growth of a Market Economy.

The Task Order called on the Team to achieve needed reforms to the bankruptcy laws and to seek their adoption. Throughout the term of the Project, the Team, despite numerous obstacles, moved forward in improving the regulatory framework for in-court rehabilitation or liquidation proceedings under the bankruptcy law, and for out-of-court negotiations between debtors and creditors. These efforts are described in several subsections below.

Draft Law on Bankruptcy -- Executive Branch Preparation Stage

As mentioned above, Kazakhstan's law on bankruptcy suffers from numerous gaps and inconsistencies, even when judged by CIS standards.⁴ The Government of

² *Bankruptcy Kazak Style: The Karmet Case*, 6 BNA Eastern Europe Reporter 339, 344 (May 20, 1996).

³ For instance, staff members at the US-funded Central Asian American Enterprise Fund would often lament that they lacked partners on debt financing of projects. No one else in the country was "doing deals". Apparently, the only entities in the lending business were utilities that continued to provide heat and electricity to individuals and companies without payment.

⁴ If size is any indicator of comprehensiveness, the Kazak bankruptcy law consists of 27 articles while

Kazakstan having recognized this, had formed a working group organized by the Almaty office of a US law firm to write a draft replacement law. For various reasons, having to do with politics, personality, and territoriality, the Team's opportunities to participate in the drafting group were limited. The only opportunity for input was a brief window (approximately one week) to submit comments through the Kazak Agency for the Reorganization of Enterprises.

With the arrival of Christopher Osakwe (the Advisor to the Government of Kazakstan on Legal Reform) the Team thought it had gained a channel for providing input to the bankruptcy law. At that point, however, which was approximately late May, the draft had reached a stage where, according to Mr. Osakwe, "major surgery" was not possible. Keeping this in mind, the Team submitted comments on the draft in the format of a multi-page, multi-column table that offered amendments and additions to approximately 35 of the 104 articles. The Team, however, was not given the chance, despite repeated requests, to meet with Mr. Osakwe's counterparts and advocate the changes. In the end, the changes provided by the Team were not adopted into the draft that the Government sent to Parliament.

Draft Law on Bankruptcy -- Parliamentary Stage

In September, the Team began advocating amendments to the draft law during its review by Parliament. Upon obtaining approval from the USAID mission and the embassy, the Team began a multi-front effort of education, interest group organizing, and persuasion to effect needed changes in the draft. For instance:

- Mr. Fitzpatrick, the Project's Chief of Party, spoke in front of Parliamentary deputies on bankruptcy policy and world bankruptcy norms.
- The Team met several times with the drafters in order to ascertain the public policy basis for many of the draft's provisions for purposes of developing counter arguments.
- Through handouts, presentations, and one-on-one meetings, the Team educated the foreign and local banking community as to provisions in the law that compromised their rights as secured creditors. These handouts helped develop support for secured creditors' rights that were eventually incorporated into the draft law passed by the Kazakstani Senate.
- The Team submitted to the Senate chamber of Parliament a detailed multi-page, multi column set of proposed amendments. The Team organized the comments by theme, to facilitate discussion and comprehension (see Appendix 1).
- The Team submitted to Overseas Strategic Consulting for distribution to members of Parliament a series of questions and answers on bankruptcy policy (see Appendix 2).

the ones of the Russian Federation and Kyrgyzstan (both passed before Kazakstan's) have nearly three times that many.

- The Team, through assistance of the AID mission, informed representatives of the World Bank and the Asian Development Bank on various deficiencies in the law in order to put pressure on the executive branch and Parliament to accept needed amendments.

At the completion of the Project, various deputies in Parliament were considering the changes suggested by the Team. Despite numerous time constraints and reluctant Parliamentarians, the Team was able to add several changes to the draft law as approved by the Senate chamber of the Kazak Parliament, most notably, the moving up of the rights to repayment of claims of secured creditors from behind those of workers to before those of workers in both a liquidation and a rehabilitation. This was considered by many to be a significant victory in that (a) it overcame considerable ideological and political obstacles and (b) it removed a significant risk faced by secured lenders of enterprises with large work forces. The key to passage of this change was a provision (suggested by the Team in a session with Parliament) to make it prospective only. This served a dual purpose: it protected the current claims of workers against the current claims of secured creditors and it encouraged lenders in the future to make loans secured by pledges of property.

Reforms of Other Laws

The Team suggested amendments to the Tax Code (through the USAID Fiscal Reform Project), the Civil Code (General Part) (through Mr. Osakwe) and the Banking Law (through the USAID/Barents project working on bank supervision). In both cases, the amendments focused on increasing incentives for, and certainty in, out-of-court negotiation and settlement of debts. The first two recipients of these comments have pledged to push for the proffered changes when appropriate. The third took them into account with regard to the draft amendments to the Law on Banking recently submitted to the National Bank of Kazakhstan.

Regulatory Reform at the Agency for Reorganization of Enterprises

By the early summer the Team had established an office at the Agency for the Reorganization of Enterprises (ARE).⁵ As part of its relationship with the ARE, the Team supported efforts of ARE staff to draft and submit regulations for government approval. They focused on the following areas:

- *Government efforts to initiate liquidation and out-of-court restructuring of indebted enterprises.* Over the summer, the Agency struggled with creating regulations on how to deal with insolvent enterprises that were both implementable and in compliance with the current law on bankruptcy. The result was a set of regulations on “out-of-court bankruptcies” that interpreted the bankruptcy law to allow the ARE unilaterally to limit the rights of private parties, and other agencies in their attempts to deal with debtor enterprises. In

⁵ The ARE is under the State Committee for Property Management, known more commonly as the GKI. It was transformed from the Ministry of Economy to the GKI in February 1996.

response, the Team helped clarify to ARE staff that the government could not, through a unilateral regulation, prescribe the behavior of private parties or even other government agencies. The result was a more realistic set of draft regulations that were distributed for comment at a GKI seminar/meeting held in late June.

In September, the Agency was given the right to represent the government in its role as a creditor with respect to insolvent enterprises with debts to the state. This role had been actively supported by the Team.

At the close of the project, the Agency was actively reviewing the Team's draft regulations on restructuring state-owned enterprises.

- *Allowing winners of auctions of state-owned packets to pay for these shares by showing they have paid the tax and pension fund arrears of the companies whose shares they intended to purchase.* This would remove an obstacle to privatization, result in more financially healthy privatized companies, and would increase tax revenues. This proposal is awaiting approval of AID before it will be released.
- *Licensing:* The Team prepared regulations on licensing of liquidators and rehabilitation managers. The responsibility to license such individuals will fall upon the ARE after passage of the new law on bankruptcy. The ARE has recently begun a training program with the Soros-funded Arman Center to train potential licensees.
- *Sale of Assets in Liquidation:* The regulations define the rights and duties of the various players, and detail, step-by-step, the method of disposition and transfer of the assets to winning bidders. One of the most important goals of these regulations is the protection of the rights of creditors by involving them in many of the decisions affecting the sale of the assets.

Decisions on these regulations were still pending at the completion of the project.

Standing Committee: The Task Order called on the Team to form a "Standing Committee" for purposes of amending the laws affecting bankruptcy, liquidation, and reorganization. The Team invested a Herculean, and perhaps even disproportionate, amount of effort attempting to establish such a committee. It met only twice. The reasons:

- *A standing committee already existed:* This was the group that had been charged with drafting a new bankruptcy law, the group from which the Team was excluded (see discussion on bankruptcy law above).
- *The lack of a clear mandate/official role:* Having the bankruptcy law outside its responsibility, the standing committee had little else to focus on. As described above, reform of many agency regulations regarding liquidation and reorganization was hampered by inadequate and conflicting provisions in the current law on bankruptcy. Efforts in this area before passage of the new law were premature.

- *The absence of Berig Imashev (the head of the ARE) and the Chairman of the Committee, for most of June and July and his subsequent transfer to the Tax Police:* It was Mr. Imashev's influence that helped initiate the standing committee meeting. His absence significantly restricted efforts to give the committee momentum.
- *The size and makeup of the committee:* At the meetings, the number of attendees exceeded a dozen individuals from various agencies with competing agendas. This lent to discord and needless debate rather than progress on proposed legal reforms.

3.2.2 Create Demonstration Projects, Develop Strategies to Enforce and Implement Bankruptcy, Restructuring, and Debt Resolution Procedures.

Liquidation Demonstration Projects

The Task Order called on the Team to involve itself with, and support efforts in, two bankruptcy cases in Kazakhstan. Sometime after the arrival of the Team, this number was increased to eight out-of-court and two in-court cases in each country. In attempting to meet this goal, the Team initially put the lion's share of its resources into visiting and evaluating enterprises with whom the GKI had a significant share position. The goal here was to provide sufficient data to convince the government to initiate liquidation or reorganization proceedings. The Team also explored the use of Russian-made financial analysis programs that would be able to sift through enterprise data and arrive at a close-to-inarguable mandate to restructure or liquidate the enterprises.

Despite exhaustive analyses, however, the Team continued to face widespread reluctance on the part of the government to initiate voluntary (i.e., shareholder induced) bankruptcy proceedings. No voluntary liquidations or restructurings resulted from the analyses provided by the Team.

The reason for such reluctance was that the government process established for initiating voluntary liquidations was, and remains for the most part, too prone to political influence to make such decisions. The bodies established to decide whether to voluntarily liquidate a company, known commonly as the inter-sectoral commissions, represent a broad array of government groups, many of which oppose liquidation on grounds of self interest, ideological principles, or simple ignorance. Other than in two cases, the inter-sectoral commissions voted to allow liquidation only when the proportion of state shares was very small. In such cases, the private shareholders (often the investment privatization funds) opposed efforts to initiate liquidation proceedings.

As a result of these obstacles, the Team, throughout the first half of the Project experienced a number of false starts with regard to initiation of bankruptcy cases. But, by the midway into the third quarter, the Team had identified several cases where judges had officially declared companies bankrupt and had ordered their liquidation. The Team contacted the persons involved in these matters and offered consulting services to each in exchange for their cooperation through use of

the company's liquidation as demonstration projects. Eventually, two liquidations, one in Almaty, and one in Taldykorgan, emerged as appropriate matters for the Team to support. The Team began active work on these cases at the end of July.

Results became apparent shortly after work began. The Team helped organize the initial efforts of the liquidation commissions and helped them tackle various problems that arose during implementation. The Team benefited as well, as the liquidation efforts highlighted numerous problems with current laws and regulations. This experience helped shape the comments the Team made to Parliament regarding the draft bankruptcy law and provided the bulk of the material for the liquidation seminars and the draft liquidation manual the Team prepared. This draft manual will serve as the basis for an updated version produced under the IRIS Commercial Law Development Project aegis after the passage of the new bankruptcy law (see Appendix 3).

Out-of-Court Debt Negotiations with Creditors

While the Team struggled to identify and to initiate bankruptcy demonstration projects, it pressed forward in assisting the efforts of two companies to reduce their debt. The goal of this effort was to highlight to creditors and debtors the benefits of negotiations and mutual compromise.

Ust-Kamenogorsk Chicken Factory: Efforts to assist this company were initiated under the Mass Privatization Project and was subsequently picked up by the Bankruptcy and Restructuring Project when a member of the Mass Privatization Team signed on. The Team provided assistance to the factory for nearly six months. The end result was a combined reduction (through a debt-asset swap) and deferral of debt (for three years at no interest charge) that removed indebtedness as an obstacle to foreign investment. The participants have pledged to credit negotiations with creditors as a major contribution to the investment.

Joint Stock Company Plastik: Efforts to assist this company with its indebtedness to Turanbank (one of Kazakstan's largest financial institutions) culminated in a memorandum discussing various options to restructure, settle or otherwise dispose of the debt to Turanbank. As yet, the parties have not acted on the recommendations in the memorandum. Factors contributing to this inaction are hopes by Turanbank to sell the claim, continued discussions about restructuring Turanbank, and, possibly, connections of Plastik's management with various government officials that can influence Turanbank's behavior.

Wechselization of Debt

A *wechsel* is a form of promissory note used in countries with a civil law tradition. It is essentially a one-page document that reflects an obligation of the issuer to pay a specified sum. Its format is intentionally simplified and standardized for purposes of allowing the holder of the *wechsel* to sell it to another in order to obtain a payment on the debt before it becomes due. A company *wechselizes* its debt when it convinces its creditors to take *wechsels* in exchange for forgiveness of existing debt. The Team had hoped that if a sufficient number of debtors *wechselized* their debt, these *wechsels* would circulate and eventually end up in the

hands of those who valued them most: entities and individuals who owed money to the wechsell issuer. The holder of such a note could then set off his debt to the wechsell issuer to the extent of the face value of the note.⁶

Throughout the project, the Team assisted companies and municipalities in their efforts to wechsellize debt. To further facilitate such efforts the Team assisted the various entities that created, or planned to create, debt trading floors. Further, Team Member Igor Klioutchnikov wrote a wechsell implementation manual. (See Appendix 4). The Team distributed this manual to various participants in the wechsell market for review and comment.

Non-sellable, "Indebted" Objects

In the spring, the Team, upon an invitation by the State Committee for Privatization, began looking into the problem of unsold objects. It was initially reported to the Team that the main reason behind the failure of these objects to sell was the requirement that buyers take on obligations to pay the debts attributed to these objects.

A closer look, however, eventually revealed that debt was not the cause of non-sale of many of the companies. Only a handful of these unsold objects had debts attributed to them. Instead, as consultants for Carana Corporation surmised, the non-sale was caused primarily by the poor location or condition of these objects.

3.2.3 Coordinate With USAID Mass Privatization Team, World Bank and other USAID and Donor Organizations.

During the year the Team coordinated extensively. Below is a representative, but not necessarily exhaustive, list of coordinated activities:

Activity	Coordination Partner(s)
Identified candidates for liquidation from a pool of companies slated for privatization.	USAID Mass Privatization Program
Evaluated problem involving indebted objects that could not be sold through small scale auctions.	Carana Corporation
Provided legal and political background to a new team of advisors. Provided copy of the English version of the draft law on bankruptcy. Provided seminar on American liquidation practices to Rehabilitation Bank staff.	World Bank-funded Rehabilitation Bank Project
Provided legal and political background to a new team of advisors.	World Bank-funded Case-by-Case Privatization Assistance
Brokered negotiations between a bank regarding the possibilities of a debt-equity swap with a non-performing loan to AO Plastik, a local company.	British Know How Fund EBRD Post-Privatization Fund Intrados

⁶ A similar approach to settling inter-enterprise arrears was advocated in Rostowski, *Inter-enterprise Arrears in Post-Communist Economies* (IMF Working Paper, April, 1994).

Activity	Coordination Partner(s)
Audited debt of Ust-Kamenogorsk Chicken Factory and suggested various approaches to negotiating with company creditors in order to remove large company indebtedness as an obstacle to foreign investment.	EBRD Post-Privatization Fund Central Asian American Enterprise Fund
Lectured at seminar in Kustanai.	Intrados
Provided lecture to consultants on out-of-court debt negotiations.	KIMEP (Arman)
Provided lecture on contract enforcement at international investor forum.	Central Asian American Enterprise Fund
Development of pre-privatization tax forgiveness regulations	USAID Mass Privatization Program
Proposed debt-related legal reform.	IRIS Barents Group Chris Osakwe
Lobbying Parliament on the draft law on bankruptcy	World Bank funded Rehabilitation Bank Project British Know How Fund Central Asian American Enterprise Fund Asian Development Bank EBRD Post-Privatization Fund

3.2.4 Coordinate With Commercial Law Project, Training & Education.

The Task Order called for broad scale training of judges, attorneys and other parties interested in bankruptcy proceedings. The Team was charged with delivering this training in conjunction with the ARD/Checchi program.

The challenges the Team faced in this area included (a) the daunting nature and complexity of bankruptcy proceedings, (b) the perceived link between bankruptcy proceedings and economic dislocation, and (c) the inconsistencies and gaps in the current law on bankruptcy. In the first half of the project, the Team tackled the first two issues, while in the latter half, it tackled the third. The strategy primarily involved the presentation of seminars and the distribution of practice materials.

An early success in this area was the two-day seminar on bankruptcy delivered to a broad selection of government officials. A US bankruptcy judge, a Russian Federation appellate level judge, and the Chairman of the Russian Federal Bankruptcy Agency lectured on American and Russian bankruptcy experiences to audiences crowded into seminar rooms at the Dostyk Hotel in Almaty. Afterwards the seminar presenters met with various officials in a series of smaller, informal sessions. The seminar served as a first step in a series of dialogues on the positive role bankruptcy can play in an emerging market economy.

The Team continued during the course of the Project to present seminars on an increasingly frequent basis. Often, the Team participated in seminars organized by other groups, thereby allowing the Project to leverage its resources in delivering its message as broadly as possible. One particularly effective effort was a series of lectures throughout the country given by Igor Klioutchnikov, a senior consultant

on the Team and an expert on debt trading, bankruptcy, and debt resolution mechanisms. These seminars were organized by NAMI (the local investment fund association) which distributed the USAID Debt Restructuring Manual in conjunction with these presentations.

The Team's training efforts peaked in frequency and effectiveness in late September and October. The first in this series was a nine day, fifty hour seminar on bankruptcy issues, focusing on liquidation. The audience consisted of various government officials from the Agency and the Rehabilitation Bank, and, more importantly, entrepreneurs that the Team had identified as having the background skills necessary to become effective liquidators.

The first half of the seminar was presented by a group of speakers from the Russian Bankruptcy Agency who provided significant amount of background on the bankruptcy process as it had developed in the Russian Federation.

The second half of the seminar focused on the practical aspects of running a liquidation in Kazakstan. The Team sought to combine the practical Kazakstani experiences (which the Team had amassed) with Western bankruptcy methods and theory, in order to provide a comprehensive approach to running a liquidation in Kazakstan. The Team used lectures, interactive slides, and discussion groups to deliver a significant amount of material to the audience. It distributed legal analyses and model practice forms for use by the parties. The Team also formally introduced a business game that simulated a liquidation whereby the Team acted as the liquidation commission and the seminar participants acted as creditors, workers, potential buyers, and the tax authorities. The seminar closed with a 40 question test. Those who took the test received certificates reflecting their score.

The seminar was extremely successful. The Kazakstani portion of the seminar outscored the Russian Federation portion in the post-seminar, AED/NET survey. In all, close to 40 participants successfully completed the course. Several participants have taken the lead in establishing a liquidators' association, and plan to cooperate with NAMI on these efforts. One of the participants was selected as the chairman of the liquidation commission for the Almaty Tea Weighing Factory and another has been selected by the Agency to run a liquidation in Petrapovlarsk. Two other alumni were principals in the consulting firm that was selected by the ARE as the local consulting firm for several World Bank-funded liquidations to be done in 1997.

The next week, the Team presented a three hour seminar to commercial judges as part of the ARD/Checchi judicial training program. This was a particularly challenging audience. Judges in Kazakstan have been often described as a group where significant improvement in human capital is necessary. Further, as described earlier, judges had shown reluctance, if not hostility, to implementing the bankruptcy law. To soften the judges up, the Team started the seminar with an interactive business game entitled "The Creditors' Dilemma." The game illustrated how a creditor faces various obstacles in bargaining with an insolvent enterprise and with its other creditors. The point of the exercise was that a bankruptcy law, by providing a framework for negotiation, could lead to better results for creditors.

Afterwards, the Team sought to suggest to judges how they could bridge the numerous gaps in the current law through active but prudent involvement in a bankruptcy case for purposes of furthering the interests of creditors. The Team again distributed several legal analyses of the current bankruptcy law, and provided each judge with the name, address, and phone number of the participants of the liquidator seminar given earlier in the month. Particularly well received was a draft judicial order that clarified the rights, responsibilities, and compensation of the liquidation commission, something the current law sorely fails to address.

As a direct result of the Team's efforts, a substantial portion of liquidations in Kazakhstan are now being conducted by Bankruptcy Task-trained individuals. Furthermore, in December, the ARE began conducting its own seminars for liquidators, using many of the materials developed by the Team.

3.2.5 Train Project Participants on Bankruptcy Matters and Provide Public Education.

Throughout the year, the local members of the Team grew professionally as they worked with the recently-published USAID Debt Restructuring Manual, actively supported liquidations, developed practice materials, and gave seminar presentations. By the end of the Project, the local members had either taken or had been offered the following positions:

- Deputy Head of the Liquidation Department of the Agency;
- bankruptcy specialist for a World Bank agricultural project;
- attorney at the largest foreign law firm in Almaty;
- debt restructuring specialist on an ACDI agricultural project;
- financial analyst for the EBRD post-privatization fund.

With regard to public education, the Team submitted several pieces to the Commercial Law Bulletin for publication (a representative submission is attached as Appendix 2). Members of the Team also appeared several times on television and were heard on the radio as well.

Throughout these submissions, appearances and interviews, the Team repeated several themes: (1) that liquidation did not result in the destruction of assets but rather their transfer in order to pay back creditors, (2) that creditors and debtors can find common ground if they look hard enough, and (3) that predictable laws and regulations will benefit all in their efforts to arrange their business affairs.

A summary of other seminars, as well as media appearances, which were delivered throughout the country is as follows:

Type of Audience	Presentation
Government officials	Comparative topics in US and Russian bankruptcy presented during the March 1996 seminar series featuring US Bankruptcy Judge Sidney Brooks, Russian Judge Vassily Vitriyanski; and Chairman of the Russian Bankruptcy Agency Peter Mostovoy
Public	Various media appearances by Team members on Almaty and Oblast-Level radio and television to discuss the following subjects: liquidation and fraudulent bankruptcy; wechsell-related issues; the Project's tasks; presentation of the debt restructuring manual; and securitization of debt
Private consultants affiliated with the Soros-funded Arman Center, and Ministry of Finance Officials	Debt restructuring and a business game
ARE and Kazakstani Rehabilitation Bank officials	Bankruptcy proceedings in the United States, and the Kyrgyz experiences in liquidation and restructuring
Privatization Investment Funds, bankers, and specialists of local department of GKI in the Atyrau, Kustanai, Petropavlosk, and Shymkent Oblasts	An introduction to bankruptcy and the transformation of debt into wechsels; the Project's tasks; a presentation of the debt restructuring concepts and the debt restructuring manual
Various local consultants and government officials (in conjunction with liquidation training seminars)	The Russian experience with bankruptcy, and issues involved in liquidating companies in Kazakstan
Judges, Deputies of Parliament, lawyers, and law students (at various venues)	An introduction to bankruptcy
Participants of ARE seminar for rehabilitation managers	Business game entitled "A Kinder, Gentler Liquidation"

4. ACCOMPLISHMENTS OF THE PAST YEAR AND FINAL STATUS OF WORK AGAINST BENCHMARKS AND TANGIBLE RESULTS --- IN KYRGYZSTAN

4.1 Summary of Economic and Political Environments

Like most CIS countries, the Kyrgyz Republic faced serious economic problems after five years of transitioning to a market economy. Despite a decrease in the rate of decline of industrial production in 1995, the over 50% slump in production that occurred in Kyrgyzstan between 1991 and 1994 was a major reason for the very high levels of debt and insolvency among countless enterprises.

During that period of time, enterprises with rapidly disappearing markets, falling production rates, and rising production costs for raw materials and transport continued to employ large numbers of workers and to incur new debt both to the government in the form of taxes and pension fund charges on wages and to

workers, banks, energy producers and suppliers. CIS countries are not only dealing with a transition to another economic system, but they are also dealing with the collapse of a greater integrated economic system of which they had been but a part, and in the case of Kyrgyzstan, only a very small part. The relationship between the collapse of the FSU and the bankruptcy of enterprises is direct. Almost all of the 21 enterprises that the team visited and analyzed over the course of the year had had close working relations with Russian or other CIS suppliers and purchasers prior to 1991. For example:

- Russian suppliers had provided 100% of the metals needed by a large, insolvent concrete factory in Osh;
- a tobacco fermentation factory had sold 70% of its product to 15 Russian cigarette factories and 20% to Ukraine and Belarus - now among other factors the cost of transport has become too high - the tobacco has to go through Uzbekistan and Kazakstan with long and costly delays at each border;
- a factory that had produced computer components and now produces hardware for local farmers from scrap material remaining from pre-1991 used to receive 100% of its supplies from Russia and had sold 100% of its products to Russia;
- an insolvent sewing factory had been supplied with 50% of its raw materials out of Russia; etc.

The breakdown of the former, integrated system and the consequent steep drops in production without a parallel drop in employment and other costs contributed significantly to widespread insolvency. When the World Bank's PESAC program restructured 24 of the LLME's (large loss making enterprises), the staff was invariably cut to one half or one quarter of its original number. In one case, a meat packing plant, the staff was cut from 465 to 60.

The situation was aggravated by hyper-inflation (consumer prices increased by a coefficient of close to 500 between 1991 and 1994) which resulted in huge interest rates and penalties being charged to the outstanding debts. These interests and penalties did not abate as quickly as the inflation rate. A single example is telling: in the tobacco fermentation plant that the Team visited a five million *som* loan became a thirty-nine million *som* debt over 20 months in 1994-95.

In addition, the privatization process that segmented government monopolies contributed to insolvency. The government divided and passed on to the newly-segmented and privatized companies debts that were not incurred by those companies. The accounts receivable that were also passed on during privatization, often were against enterprises that were also newly-privatized and refused to admit responsibility for debts occurred pursuant to government mandates. For instance, one local gasoline distributor that the team visited had been used during the Soviet regime as a conduit for the disbursement of gasoline on credit to local sovhozes by the Ministry of Agriculture. The cost of the gasoline was charged to its books and it was to collect the money from the sovhozes and pass it on to the Ministry through the oblast level distributor. After the collapse of the Soviet

Union, the distributor as well as the sovhozes were privatized. The distributor was left with this huge 1991 debt on its books to the oblast level distributor for gasoline that it never saw or processed and which it was to collect from private farmers who owed it on behalf of the defunct sovhozes whose assets and liabilities they inherited.

Little was done over the past several years to remedy these problems. Instead, debts continued to sit on the books of hundreds of enterprises that made little or no effort to pay them. According to some statistics, over 50% of the enterprises in the Republic today (as much as 75% of the SOE's or companies with significant government ownership) are technically insolvent. Such a volume of insolvent enterprises has stifled the economy. Potential investors have no incentive to buy enterprises with huge debt burdens. The enterprises, feeling hopeless about their balance sheet structure, begin to conduct business "off the books" which means taxes were not paid. A seemingly unbreakable chain of debt was created.

In sum, upon the team's arrival, there was an untapped wealth of work to be done. The Law of the Kyrgyz Republic on Bankruptcy had only been passed in 1994. A federal bankruptcy agency, called the Department of Reorganization and Liquidation of Enterprises (DRLE) within the State Property Fund had barely begun to function. The bankruptcy law had basically not been implemented except for a few incomplete, in-court bank liquidations and the work begun by the World Bank PESAC program which had not yet completed a single liquidation or restructuring. The Arbitrazh Court judges were unfamiliar with the law and its purpose and were very hesitant to apply it. Court decisions on declarations of insolvency stretched out for months as debtors who had large, long-overdue debts tried to prove that they were, nevertheless, solvent or would become solvent shortly. Public perception of the law on bankruptcy was that of an instrument to bankrupt enterprises. A typical reaction was that of one Deputy of the Jogorku Kenesh (Kyrgyz Parliament) who said in response to a proposed plan for training 50 bankruptcy trustees "what do you want to do, bankrupt the whole country?"

On the positive side, today the Kyrgyz Republic seems ready to implement the law. The government has approved a list of 119 enterprises scheduled for liquidation or restructuring for the year 1996-97 and an additional list of 50 scheduled for reorganization under the Law on Bankruptcy; a Bankruptcy Trustee Association has been founded and registered; thirty-four liquidators (bankruptcy trustees) have been officially licensed; a bankruptcy standing committee that includes members from the private sector as well as from the various relevant government bodies has been created; a newly drafted bankruptcy law is complete and ready for consideration by Parliament; and attitudes toward the bankruptcy process have been substantially improved among such important groups as judges, lawyers, parliamentary deputies and business persons. All these accomplishments were actively fostered and nurtured by the USAID Bankruptcy Project Team.

4.2 Task Order Accomplishments Against Benchmarks and Required Tangible Results

4.2.1 Achieve Reforms to Laws Impacting Bankruptcy that Facilitate Privatization and Encourage Growth of a Market Economy.

The Task Order called on the Team to achieve needed reforms to the bankruptcy laws and to seek their adoption. In Kyrgyzstan, efforts of the Team regarding legal reform focused on work through the Bankruptcy Law Reform Committee (BLRC). The government granted the BLRC official status in May 1996. It became the one group entrusted with redrafting the Bankruptcy Law and Instructions as mandated by Presidential decree and dictated by World Bank conditionality for additional aid to Kyrgyzstan. A small Working Group was created within the BLRC that was responsible for actually writing the amendments for consideration by the BLRC. Ms. Haugh and one other member of the Team were invited to be members of this Work Group

Initially, the Work Group of the BLRC focused on amendments to the Instructions and made significant progress. In mid-July, however, the government officially requested the BLRC to adjust its priorities and complete a revised draft of the bankruptcy law by the end of August. This task was accomplished. The draft law was both fuller and clearer than the original law and incorporated experience gained from one year of applying the original bankruptcy law including the experience gained from the Team's two model liquidations. The draft law's significant improvements include the following:

- The draft law added divisions or articles dealing with issues that had proven to be trouble spots in the application of the original law, such as taxation, worker compensation, bankruptcy fraud, and abandoned property.
- The draft law eliminated sections dealing with liquidation of solvent enterprises that rightfully should not be part of a bankruptcy law and had proven to be confusing to inexperienced judges.
- The draft law set out in great detail criteria for insolvency and made it exceedingly clear that a creditor need not prove that an enterprise's liabilities outweigh its assets in order to have the enterprise declared bankrupt but need merely show that the enterprise was not paying its debts as they came due whether from inability, refusal or simple negligence.⁷

⁷ This point is extremely important because judges were showing tremendous reluctance in initiating bankruptcy proceedings against enterprises that were not paying their debts but claimed they were solvent. Judges would spend months pouring over financial records trying to determine whether the enterprise was really insolvent in the sense of having liabilities that outweighed assets. These exercises proved very futile first because judges are not experienced business people or accountants and second because the system for asset evaluation in Kyrgyzstan is at best highly undeveloped and at worse totally artificial where unrealistic, government mandated coefficients are applied to "balance sheet" values in an effort to reevaluate assets to take into account the conversion from the ruble to the

- The draft law set strict time limits for judges to reach decisions regarding such basic issues as solvency, appointment of interim trustees and other issues that require speedy resolution under any bankruptcy law. Under the original law, inexperienced judges would take up to six months to reach such decisions often severely impacting the position of creditors who were forced to wait while the debtor dissipated any remaining assets.
- The draft law reworked the division dealing with insolvency of individual entrepreneurs, eliminating such difficult requirements as making the liquidator provide substitute housing for the insolvent debtor and instead providing for exclusions; making it clear that an individual entrepreneur may be put into bankruptcy only for commercial debts; etc.
- The draft law expanded the definition section from 11 terms to 37 terms which clarified the law and made it far more precise in its application.
- The draft law reworked the sections of the law dealing with the bankruptcy procedures available under the law.⁸

The Bankruptcy Law Committee (BLRC) hosted a one-day seminar in September and a half-day seminar in October to introduce the draft law and to solicit comments, suggestions or changes to the new draft law on bankruptcy. The seminars were chaired by the Head of the Department of Reorganization and Liquidation of Enterprises (DRLE), Mr. Mederov, and included the Deputy Chairman of the Jogorku Kenesh Constitutional Legislation Committee (Mr. Sabirov) and representatives from most of the relevant government and non-government bodies (Arbitrazh Court, State Property Fund, Government Legal Department, Ministries of Justice, Finance and Economy, and the National Bank).

som in 1993 and past hyper inflation. Given these factors enterprises often come up with highly inflated "balance sheet" values for their assets which were totally unrelated to true market values. Furthermore, many bankrupt enterprises actually have assets that outweigh liabilities but have no liquidity or prospects for a positive cash flow - in other words, there is no possibility of paying creditors without liquidation of assets or major restructuring under the law on bankruptcy despite "balance sheet solvency."

⁸ The original law provided for liquidation, sanation (a highly impractical procedure that required a guarantee of all the debt by a third party, typically the government, or a guarantee by the volunteer "sanator" for any additional debt incurred during the sanation and was virtually never used successfully) and "peaceful settlement." The draft law provided for 2 basic procedures: 1) special administration which included simple (piecemeal) liquidation and restructuring by creating a new enterprise on the basis of the old and selling shares for the benefit of creditors - the new enterprise could either be successor in title to the old or not; and 2) reorganization - a greatly expanded and reworked section that provided a realistic approach to working out a compromise with creditors and keeping the original enterprise intact - akin to a US Chapter 11. Having a workable reorganization section is important in that it is government policy to attempt to reorganize as many enterprises as possible and this provides a framework for dealing with debt that also provides some creditor protection (creditors may initiate the process, must approve plan with 60% of the debt voting in favor and may force the insolvent debtor to accept an outside administrator appointed by them) and yet also allows the owner to restructure its debt burden (discharging some of it) to make it manageable.

As a result of this iterative review process, the BLRC's draft bankruptcy law has a far better chance of being passed by Parliament as the BLRC received considerable feedback that it will incorporate prior to officially submitting the law for consideration. One very helpful suggestion which the BRLC has acted upon was to hire a top notch local legal expert to put the final Russian version of the law into locally accepted format and legal language that will be the most easily accessible and understandable to judges, lawyers and others using the law (see Appendix 5).

Work on the revision of the Bankruptcy Instructions resumed in mid August with the arrival of an EBRD-funded Belgian bankruptcy lawyer who began the actual drafting of the Instructions conforming them to the revised law. Jeroen Smets of Claes and Partners worked in the Project's office under the guidance of Ms. Haugh and completed the final edition of his work in October. As of November 31, this document is under World Bank review.

Outside the BLRC forum, the Team successfully sought approval for a government regulation on wechselization of the debt of state-owned enterprises (see section 3.2.2 above for background on this process in general).

4.2.2 Create Demonstration Projects, Develop Strategies to Enforce and Implement Bankruptcy, Restructuring, and Debt Resolution Procedures.

The Task Order called on the Team to involve itself with, and support efforts in, two bankruptcy cases in Kyrgyzstan. As in Kazakstan, a great deal of effort was expended in the first half of the project to select appropriate candidates, with the assistance and concurrence of the State Property Fund. After conducting a financial analysis of close to twenty enterprises in the Djalal-Abad and Osh Regions in the spring and selecting an initial demonstration site, permission to proceed further with the selection of additional demonstration cases was suspended in April as the Kyrgyz State Property Fund (SPF) underwent a significant reorganization. A beneficial result of these intitial analyses, however, was the development of questionnaire that was subsequently adapted (with some modifications) by the Methodology Division of the DRLE in the conduct of their own enterprise analysis. Visiting these enterprises also proved to be a very important learning experience for the whole Team. The experience helped them prepare for both the redrafting of the Bankruptcy Law and for the actual model liquidations that commenced in the summer. Permission to officially proceed with demonstration cases was once again secured in May, and from that point onward, the Team's work focused on liquidating two companies in the Chui Oblast, where Team members were officially appointed as liquidators on July 4, 1996.

The Team persuaded the DLRE to push for the voluntary liquidation of The Kaindi Construction Company and the Kaindi Transport Company. In the liquidation process of these two enterprises, the Team performed the following functions:

- The Team-organized shareholder meetings at which the shareholders of these two companies agreed to liquidation.

- The Team convened creditors meetings at which members of the team were appointed liquidators.
- The Team conducted meetings for the worker collectives of both enterprises to educate the workers about the bankruptcy process. One of these meetings was taped for the television show "Business Today."
- The Team completed a re-evaluation of the assets of both enterprises, inventoried and secured enterprise property, filed semi-annual tax accounting documents, opened liquidation accounts in a bank and compiled liquidation balances.
- The Team conducted four auctions which were held at both enterprises in October and November. Few sales resulted, however, due to political pressure not to offer government property at a price below the formal "balance sheet" price at initial auctions. The Team made a written recommendation to the DLRE to reduce the pricing coefficients so as to generate realistic starting prices at initial auctions. Mr. Mederov passed this recommendation on to the Chairman of the State Property Fund with a request to reconsider the regulation currently requiring such steps. A decision is still pending. This reduction would save both time and money, since the law requires ads to be placed for each auction a minimum of 10-days prior to the sale.
- The Team assisted the State Social Fund on worker compensation claim issues. The Legal Head of the Fund joined the Bankruptcy Standing Committee as a result and has taken an active role in working out problems in dealing with workers of insolvent enterprises that had suffered work related injuries. A special account was created in the Fund for money received in a liquidation to cover worker claims. A new government decree required such claims against the insolvent debtor to be capitalized and paid to the Fund. A host of related issues were likewise dealt with, such as who is responsible for the monthly invalid pension during the period of the bankruptcy procedure and prior to the payment of the capitalized amount etc.

The Team also advised the liquidators of Adil Bank and Elbank, two former state savings banks which were ultimately forced into bankruptcy by the National Bank of Kyrgyzstan (NBK). The Team drafted contracts with creditors substituting rights to accounts receivable for claims against the bank. The Team also confronted other novel issues that arose during the liquidation, such as government shareholders who annulled their purchase of shares and took back property that had been used as payment for those shares subsequent to the filing of the bankruptcy petition. In general, there was a substantial educational process that went on during the liquidation of these banks in relation to the shareholders, the liquidators, and the depositors and other creditors. For example, Adil Bank depositors picketed the White House to have the government back the bank's debt to them. The eventual outcome was the creation of a depositor insurance system under the auspices of the National Bank of Kyrgyzstan (NBK). The Team assisted the NBK, which held 80% of the debt, to resolve depositor-related issues, and the NBK eventually agreed to

voluntarily cede its rightful priority for the benefit of depositors.

As was the case in Kazakstan, the Team assembled a draft liquidation manual, which discusses step by step, how to supervise and run a liquidation, which will also be revised by IRIS to take into account any future changes to the bankruptcy law (see Appendix 6).

4.2.3 Coordinate With USAID Mass Privatization Team, World Bank and other USAID and Donor Organizations.

As in Kazakstan, the Bishkek-based Team coordinated extensively with other donor-supported projects and organizations. Below is a representative, but not necessarily exhaustive, list of coordinated activities:

Activity	Coordination Partner(s)
Shared information regarding simplified share registration procedures for newly formed companies and revisions concerning the Bankruptcy Law.	World Bank PESAC Program
Met with the Coordinator of the Auction Center Network (ACN) to create a system of information and resource sharing between the ACN and the DRLE.	USAID Mass Privatization Project
Provided space, office support and supervision for an EBRD-funded Belgian lawyer to work on Bankruptcy Instructions.	EBRD
Cooperated on the wechsel program for possible pass-off at end of the Project.	USAID Corporate Finance Project
Provided the ADB representative with a written evaluation of the most effective expenditure of funds for a successful implementation of the law on bankruptcy in Kyrgyzstan.	Asian Development Bank (ADB)
Negotiated agreement for funding of the 2-week liquidator training and BLRC-sponsored seminars.	USAID Commercial Law Development Project
Provided a short list of qualified liquidators (three of the 34 trained in July by the Bankruptcy Project) and liquidator association contacts for possible future ADB-supported bankruptcy activities	ADB

4.2.4 Coordinate With Commercial Law Project, Training & Education.

The Task Order called for broad scale training of judges, attorneys and other parties interested in bankruptcy proceedings. The Team was charged with delivering this training in conjunction with the ARD/Checchi program. Team efforts mirrored those performed in Kazakstan. For details of the Spring 1996

training activities conducted with the ARD/Checchi program, see section 3.2.4 above.

The Team conducted a two week training course for liquidators in July. Over thirty participants successfully passed an exam and received a certificate from the State Property Fund, and the course produced 18 video tapes and 182 pages of supplementary materials for future use. The program had three principle components: 1) legal; 2) financial; and 3) management. Expertise in these three areas is essential to a competent and effective implementation of the bankruptcy law by the liquidator (bankruptcy trustee). The *draft* Kyrgyz Bankruptcy Law provides for essentially three procedures: straight liquidation; restructuring by creating a new solvent enterprise on the basis of the viable asset of the insolvent debtor enterprise and selling its shares for the benefit of creditors; and a reorganization procedure which involves a detailed analysis of the enterprise and putting together a business plan akin to a Chapter 11 reorganization plan under the U.S. Bankruptcy Code. The first task of any liquidator/bankruptcy trustee is to make a detailed financial and business analysis of the enterprise to enable him to make the determination as to which of the three procedures is best suited to the specific conditions of the enterprise. In order to make an intelligent decision the liquidator must have a clear understanding of the legal framework within which he must work; he must be familiar with basic accounting and audit principles; and he must have at least a rudimentary knowledge of the workings of a market economy to determine the future viability of the company in terms of marketing, pricing, competition etc. This 10-day program was designed to provide this knowledge. Alumni of this program formed an officially registered "Liquidator/Trustee Association"(discussed more fully below).

Two simultaneous one-week bankruptcy seminars were held September 16-21, co-sponsored by the Bankruptcy Project and AED/NET. Although the seminars were planned for fifty participants, sixty-four persons ultimately received certificates. The participants consisted of thirty-three government officials and thirty-three private business persons.

The seminar was taught by three officials from the Russian Federal Bankruptcy Agency including its Deputy Director who was primarily instrumental in creating the 28 Russian training centers for liquidators in Russia and also participated in drafting the new Russian bankruptcy law. Topics covered included a comparison and analysis of bankruptcy laws from different countries, methodology of creating a legal basis for the process of bankruptcy, financial management of insolvent enterprises, role of the government in dealing with issues of debt and insolvency, role of the Arbitrazh court, creation and organization of bankruptcy professionals, experience of the Russian Federal Bankruptcy Agency in dealing with insolvent enterprises using concrete case histories, Russian practice in evaluation of real estate and other assets, and reorganization of bankrupt enterprises including a section on writing a good business plan.

Other training activities performed in Kyrgyzstan, including those involving other donor agency projects or organizations, are as follows:

Type of Audience	Presentation
Judges in Osh Oblast	In an ARD/Checchi-sponsored program, lectured on the role of bankruptcy in a transition economy and discussed the major changes to be introduced in the newly-drafted bankruptcy law, highlighting areas that will especially affect the role of judges.
Bankruptcy Professionals of Bishkek	Lectured on use of the "Special Purpose Vehicle" as means of privatizing government property.
Anti-Monopoly Department of the Ministry of the Economy	Presented analysis of the official 1996-97 Government Anti-Monopoly Program.
Economists	Lectured on the status of the implementation of the bankruptcy law in Kyrgyzstan and its effect on the social and economic environment of the country for the monthly AED/NET/Ministry of Economy lecture series
Lawyers in Bishkek	In an ARD/Checchi sponsored program, lectured on the role of bankruptcy law in a transition economy and discussed the five major components of bankruptcy law and how they differ in the current and draft law.

4.2.5 Train Project Participants to Understand the Bankruptcy Laws, the Tasks to be Performed by the Project, and Provide Public Education.

Throughout the Bankruptcy reform process, Team members provided interviews on the television program "Business Today" regarding the Law on Bankruptcy and its implementation in Kyrgyzstan. Team members also gave interviews to the Press Club regarding their experience in liquidating the two enterprises in Kaindi, this information provided was subsequently used for newspaper articles in the *Evening Bishkek* and *Word of Kyrgyzstan*.

The most impressive public education success of the Team in Kyrgyzstan has been the overwhelming interest in founding associations of liquidators that would, among other roles, provide a forum for exchanging ideas, maintain a professional database, publish a monthly newsletter and continue to organize seminars targeted at developing the skills of the newly-formed and growing group of bankruptcy professionals in the Kyrgyz Republic. At least three distinct groups of skilled individuals approached the Team for such assistance. The first of these groups consists of alumni from the first group of liquidators who received certificates in July. A second group is being founded by 11 persons, one of whom is the current liquidator of the Adil Bank. The third group is being founded by four local entrepreneurs who are hoping to serve as a counterweight to the currently overwhelming role of the government in the bankruptcy process.

As a result of this interest, the Team helped organize, and participated in, the founding meeting of a liquidator's association which took place at the State Property Fund on October 19th. Over 30 persons attended who agreed to accept a proposed charter for the new association. Five persons were named to the Board of Directors,

one of whom was also elected to be the Chairman of the Association. Subsequently, 16 persons filled out applications for membership and agreed to pay annual dues of 1,000 soms (a relatively high sum in today's economy). The members further agreed to donate 10% of their commissions on any jobs obtained via the Association to the Association. In support of this newly-founded association, Mr. Mederov of the DRLE has officially submitted for approval a list of 130 enterprises slated for liquidation and 40 for reorganization by June 30, 1997. Members of the association will be eligible to serve as liquidators for some of these enterprises. The association intends to provide continuing education to its members in the areas of asset valuation, auditing and changes to the law and its instructions.

5. LESSONS LEARNED AND RECOMMENDED RESPONSES

A year after the inception of the Project, both Kazakstan and Kyrgyzstan are moving forward in resolving the problem of wide spread indebtedness. Both countries now have well-established agencies charged with the task of liquidating or reorganizing state-owned enterprises. Further, both countries now have a growing cadre of entrepreneurs who are active, and to a greater extent, interested in providing bankruptcy-related services in exchange for a fee. Finally, both countries are likely to soon have bankruptcy laws significantly better than the current regulations.

Nevertheless, the most sober lesson learned over the course of the Project is that, short of entering another round of hyper-inflation or decreeing that debt be canceled, there are few broad scale solutions to the broad scale problem of old debt. For the most part, this problem will have to be tackled and solved by each creditor with his debtor, either through negotiation, individual enforcement through the courts, or joint action through the bankruptcy process. Until this occurs, widespread indebtedness will, at the very least, continue to force companies to trade outside the regulated market, and tarnish their attractiveness to domestic and foreign investors.

The key to progress in this area is to remove as many artificial obstacles as possible, educate interested parties as to their options and rights, and realistically account for the social disruption caused by a liquidation/rehabilitation. All of these efforts began under the Project and should, in one form or another, be continued:

- **Removing obstacles in debtor-creditor negotiations:** Numerous obstacles still remain with regard to resolution of indebtedness, namely the existence of various legal rules and government practices that keep creditors and debtors from resolving their differences through negotiation. Commercial law reform efforts should include, and maintain, as a goal, the removal of these obstacles.
- **Removing obstacles to basic debt collection:** One of the largest obstacles to resolution of indebtedness is the inadequacy of court-based, debt collection procedures. An adequate debt collection mechanism would not only help resolve indebtedness through enforcement, it would spur and frame debt negotiations between debtors and creditors, resulting in more debt resolution out of court. Improvement in this area would reduce indebtedness far more quickly than even the most effective of bankruptcy laws.

- **Educating Participants:** But even if the mechanisms for debt collection, bankruptcy, and out-of-court negotiations are in place, they will have little effect unless parties use them. This involves education through use of seminars and the distribution of materials that point both professionals and lay persons in the right direction. There is clearly a demand for this input. Further, the Team has seen through its demonstration projects that involved individuals will act responsibly and rationally if given realistic and easily understandable game plans. Efforts to provide such game plans to participants should be part of any commercial law reform agenda.
- **Accounting for Social Disruption caused by Implementation of the Bankruptcy Laws:** It is clear that, in most cases, with insolvent enterprises, the social disruption, i.e., the loss of jobs, the loss of markets, has already occurred. Nevertheless, the fear of social disruption will nevertheless continue to plague and distort decisions to rationally deal with insolvent enterprises. The best way to deal with these issues is first, to accommodate the workers to the extent possible in the bankruptcy process, i.e., by allowing interim payments during the bankruptcy process, or by arranging to have workers swap all or part of their wage claims against their employer for equity in a newly-reorganized company. Second, and more generally, local and national authorities need to be educated that social disruption is the result of economics, not the result of a piece of legislation. The only way to deal with such disruption is to tackle it directly, through worker retraining programs or targeted tax incentives to stimulate job creation in economically distressed areas.

APPENDIX 1

Comments on the Draft Law on Bankruptcy Submitted to the Senate Chamber of the Parliament of the Republic of Kazakhstan

Submitted by the USAID Bankruptcy and Restructuring Project
November 20, 1996

In this document, please find commentary on the draft law on bankruptcy that was recently submitted to the Senate Chamber of Parliament. The comments stem from (a) the experience of the USAID Bankruptcy and Restructuring Project in supporting liquidation efforts under the current law, (b) a review of the most recent versions of the draft laws of the Russian Federation and the Kyrgyz Republic, and (c) experience with analogous matters in the United States and other countries.

The comments divide into four parts:

- Part 1 Out-of-Court Liquidations Under the Creditors' Control
- Part 2 Liquidation Methods
- Part 3 The Rights of Secured Creditors and Voting Procedures
- Part 4 Various Additional Changes

Please note that at various points the comments in each part rely on changes in other parts. The rejection of suggestions may require the revision of others in this document.

29

1

Part 1 -- Suggested Changes to Increase Opportunities for Out-of-Court Liquidation Under the Creditors' Control

Article 99 of draft law has the potential to swiftly and efficiently deal with insolvent enterprise by allowing for out-of-court liquidations. Such liquidations are allowed because the creditors control it and, hence, have the opportunity to make sure it is run for their benefit.

In order to ensure that these liquidations do not harm the interests of creditors, the Article 99 states that it be done with the agreement of all creditors. This is simply too demanding a requirement. It will be almost impossible to get the consent of *all* the creditors of a company.

As an alternative, the proposed amendments make the requirement merely the consent of 1/2 of the bankruptcy creditors (measured by size of claim), or the consent of 1/2 of state agencies holding claims on mandatory obligations to budget and non-budget funds (again, measured by size of claim). The proposed amendments offer various provisions that ensure that the liquidation progresses in an orderly and fair manner. For instance, the amendments set forth minimum requirements of a voluntary liquidation agreement. It also allows a creditor who feels that his interests are not getting sufficient protection to apply to the court to initiate bankruptcy proceedings.

Of course, any creditor that does not sign the voluntary liquidation agreement is free to try to enforce his claim against the company as the liquidation proceedings continue. Creditors can be restricted from acting so only if the company is undergoing an in-court bankruptcy.

Further, the amendments add a provision whereby, upon an agreement as to an out-of-court liquidation, state bodies must stop collection efforts against the debtor outside the liquidation proceedings. Unless this provision is included, many creditors will not enter into a voluntary liquidation, fearing that the assets of the debtor company might be taken by an aggressive creditor before they are sold for the benefit of all the creditors.

Finally, the amendments clarify the procedures used to initiate in-court bankruptcy proceedings once out-of-court proceedings have begun. The goal for this proposed amendment is to give disgruntled creditors a means of seeking protection from the court, while at the same time, minimizing the likelihood that such attempts will slow down the bankruptcy proceeding.

30

Text in Draft Law or Reference to Text in Draft Law	Suggestions	Comments
<p>Article 1 Bankruptcy - is the insolvency of the debtor officially ordered by the decision of the court or stemming from the <i>official</i> out-of-court agreement with creditors. Such insolvency is a ground for liquidation of the debtor.</p>	<p>Change to: Bankruptcy - is the insolvency of the debtor officially ordered by the decision of the court.</p>	<p>Bankruptcy should simply be the declaration of insolvency by the court. Provisions that mix this concept up with out-of-court agreements to liquidate between the debtor and its creditors will only cause confusion.</p>
<p>Article 17. Point 2 2. The debtor shall file a bankruptcy petition with the court when the owner of the property, an agency authorized by it, founders or a competent body of the legal person have decided to liquidate the debtor, with the value of its property being insufficient to pay off the creditors' claims in the full volume, or when the agreement with the creditors on the official declaration of the out-of-court bankruptcy has not been reached.</p>	<p>Change to: 2. The debtor shall file a bankruptcy petition with the court when the owner of the property, an agency authorized by it, founders or a competent body of the legal person have decided to liquidate the debtor, with the value of its property being insufficient to pay off the creditors' claims in the full volume, or when the agreement with the creditors on the liquidation of the insolvent debtor under the creditors' control has not been reached.</p>	<p>See comments to article 1, definition of bankruptcy.</p>
<p>Article 99. Liquidation of the Insolvent Debtor Under the Creditors' Control</p> <p>1. The owner of the debtor's property (an agency commissioned by it) or the agency authorized by the charter documents, together with all the creditors, shall reach a decision on voluntary liquidation of the debtor. The decision shall be made on the basis of the analysis of the debtor's financial condition that ascertains that the enterprise is not able to meet its liabilities and there is no way to restore it back to solvency.</p> <p>2. The official announcement about voluntary liquidation of the debtor shall be published in the official press <i>of the central body of justice</i>.</p>	<p>Rewrite the first three points as follows:</p> <p>1. The owner of the debtor's property (an agency commissioned by it) or the founders (participants) or the body of the debtor authorized by its charter documents, may decide to initiate a voluntary liquidation of the debtor under the control of creditors. The decision shall be made on the basis of the analysis of the debtor's financial condition that ascertains that the enterprise is not able to meet its liabilities and there is no way to restore it back to solvency.</p> <p>1-A The implementation of the liquidation proceedings may begin upon the finalization of a voluntary liquidation agreement between the debtor</p>	<p>These changes seek to increase the opportunities to initiate efficient, out-of-court liquidations. The key change is the deletion of the requirement that all creditors agree to the liquidation. If this burdensome requirement remains, few out-of-court liquidations will occur.</p> <p>Instead of all creditors, these changes call for the consent of either the bankruptcy creditors holding one half of the claims <i>or</i> the representatives of state agencies holding more than one half of the claims arising from obligatory payments to the budget and non-budget funds.</p> <p>Despite this change, creditors remain adequately protected by (1) procedures that clarify how the decision to liquidate was made, (2) the creditors'</p>

Text in Draft Law or Reference to Text in Draft Law	Suggestions	Comments
<p>3. The creditors' meeting shall appoint the bankruptcy manager.</p> <p>4. From the moment of his appointment the bankruptcy manager shall control and manage the debtor's property and the debtor's branches shall be relieved of any management duties. One of the responsibilities of the bankruptcy manager is to submit, on a regular basis, a progress report on the debtor's liquidation to the creditors' meeting. The bankruptcy manager fulfills other functions stipulated by Article 99 of this Law.</p> <p>5. <i>The debtor is prohibited from paying any creditors' claims at the expense of its property after the appointment of the liquidation manager, except for the claims of the creditors of the first and second priorities (Article 75 of this Law).</i></p> <p>6. Within seven days from the date of the appointment of the bankruptcy manager the debtor shall submit to him <i>the financial statements</i>.</p> <p>7. The procedure for selling the debtor's property and paying off the creditors' claims is set forth by Articles 72, 83, and 84 of this Law.</p> <p>8. After the sale of the debtor's property and apportionment of the money among the creditors, the bankruptcy manager shall convene the final meeting of the creditors, invite the owner of the debtor and report about his performance. The meeting shall vote on the approval of the liquidation balance, the report on utilization of the</p>	<p>and the bankruptcy creditors holding more than one half of the claims of this class.</p> <p>1-B Such implementation may also begin upon the finalization of a voluntary liquidation agreement between the debtor and the representatives of state agencies holding more than one half of the claims arising from obligatory payments to the budget and non-budget funds. The voluntary liquidation agreement may also take the form of a government decree, protocol, regulation etc., if the debtor is a state-owned enterprise and the relevant document contains the information in point 1-C.</p> <p>1-C. The voluntary liquidation agreement must include at least:</p> <ol style="list-style-type: none"> 1) a description of how the decision to liquidate the debtor was reached (shareholder's meeting, etc.); 2) a statement as to the total amount of indebtedness of the debtor to bankruptcy creditors (in cases where the bankruptcy creditors are those described in point 1-A), or the total amount of indebtedness of the debtor to the budget or to non-budgetary funds (in cases where the creditors are those described in point 1-B); 3) the date, time, and place of the first scheduled meeting of the creditors; 4) the name of the individual who shall preside at the first meeting of the creditors; 5) a provision that waives the rights of creditors signing the document to seek to enforce the rights against the creditor in a manner other than through (1) the voluntary liquidation proceedings or (2) a filing of a bankruptcy petition; 6) the names, and amounts of claims of each 	<p>meeting provisions under this law, (3) the right of the bankruptcy creditors to appoint the bankruptcy manager, and (4) the right of any creditor to initiate a bankruptcy case.</p> <p>The provisions also require that the debtor and the bankruptcy creditor sign a liquidation agreement that calls for, among other things, an agreement by the creditors to only obtain satisfaction from the debtor through the liquidation proceedings. By signing this waiver, these creditors obtain voting rights at the creditors' meeting.</p>

Text in Draft Law or Reference to Text in Draft Law	Suggestions	Comments
<p>funds remaining after the creditors' claims were paid off, and on liquidation of the enterprise. The enterprise is deemed to be liquidated as of the moment it is excluded from the state registration list.</p> <p>*****</p> <p>9. Even if the decision on the debtor's voluntary liquidation was reached, after such decision is made, the creditor(s) may file a petition with the court to have bankruptcy proceedings instituted.</p>	<p>creditor that is consenting to the voluntary liquidation, and the names of their duly authorized representatives;</p> <p>7) a provision that states that for each consenting creditor, the date on which the penalties and interest on the arrears of the debtor shall be the date of the first meeting of creditors;</p> <p>8) a provision that nullifies the obligations and waivers contained in the document upon the initiation of bankruptcy proceedings against the debtor.</p> <p>2. The debtor shall publish an official announcement about voluntary liquidation of the debtor in the official press <i>of the central body of justice</i>.</p> <p>3. The creditors' meeting and/or committee shall control the implementation of the liquidation in accordance with the relevant articles of this law and the restrictions in this article. It is not necessary for the selection of the bankruptcy manager, made pursuant to these procedures to be approved by any court.</p> <p>3-A. The creditors with voting rights in the meeting will be those with voting rights described in Article 14 of this law that have waived their rights in accordance with subpoint 5 of point 1-C of this article. Those creditors not waiving their rights may participate in the meeting as non-voting members.</p> <p>*****</p> <p>9. Even if the decision on the debtor's voluntary liquidation was reached, after such decision is made, the creditor(s) or the bankruptcy manager may file a petition with the court to have</p>	<p>Point 9 adds the bankruptcy manager to the group that may initiate bankruptcy proceedings.</p> <p>Point 10 is crucial for encouraging private creditors to agree to a voluntary liquidation. They will be</p>

Text in Draft Law or Reference to Text in Draft Law	Suggestions	Comments
	<p>bankruptcy proceedings instituted. Further, non-state creditors that have not entered into the voluntary liquidation agreement may enforce their claims against the debtor under the laws of Kazakstan.</p> <p>10. Upon the publication of the decision to liquidate the company under the creditors' control, any actions to enforce obligations of the debtor to the budget and to non-budgetary funds shall be executed only through the out-of-court liquidation proceedings.</p>	<p>very reluctant to enter into a voluntary liquidation agreement if they know there is a possibility that the tax authorities might continue to act aggressively in seizing and selling the debtor's property.</p> <p>Essentially, through point 10, the state is waiving its rights to act unilaterally in order to encourage a voluntary liquidation.</p>
<p>After Article 99</p>	<p>Add an additional article</p> <p>99-A Consideration by the Court of the Bankruptcy of a Company undergoing Voluntary Liquidation under the creditors' control</p> <p>1. The initiation of court proceedings shall operate as an automatic stay prohibiting the bankruptcy manager from transferring the debtor's property (assets) to other persons or disposing of it in any other way.</p> <p>2. The court which instituted proceedings in bankruptcy against the legal entity which is to be liquidated, within one month shall determine whether to allow the voluntary liquidation proceedings to continue.</p> <p>3. If, during the examination of the case, it is established that the value of the debtor's property is insufficient to pay off the creditors' claims in full volume and that initiating bankruptcy proceedings would provide greater protection to creditors, the court shall initiate bankruptcy proceedings. Otherwise, the court shall dismiss the case and the voluntary liquidation shall continue.</p>	<p>This provision, like articles 89 and 90, regulate instances where a creditor files a petition to initiate bankruptcy proceedings when a liquidation is already underway. In order to minimize the disruption that might be caused by the filing of such a petition, this provision requires the court to focus primarily on whether initiating the bankruptcy proceedings would provide greater protections to creditors. Otherwise, the case is dismissed, and the out-of-court proceedings continue.</p>

34

Part 2 -- Suggested Changes to Improve the Results in Liquidations

It is likely that for many companies in bankruptcy, rehabilitation will not be an effective solution. This is not surprising. Rehabilitations are very complicated arrangements with uncertain outcomes. For instance, in the United States, some studies have indicated that efforts at rehabilitation fail 40% of the time. Often times the only winners in a rehabilitation are the rehabilitation manager, the lawyers, and the accountants.

But a liquidation can occur in a way that would allow the company's assets to remain intact and, possibly, allow preferred groups of creditors (such as workers) to take shares of the company in full or partial exchange for their claims for repayment.

Several countries, including Kyrgyzstan, have allowed various versions of a "fresh start" liquidation. This is described below:

1. The bankruptcy manager creates a new company using the assets of the bankrupt company. The new company has no debt. The debt remains with the bankrupt company.
2. The bankrupt company's assets are now simply its shares of the new company.
3. The shares of the new company are sold by the bankruptcy manager. The proceeds from the sale are then distributed to the creditors.
4. According to a specified formula, certain senior creditors of the bankrupt company are allowed to take shares in the new company in exchange for their claims for repayment in cash.
5. The new company has the same assets as the old company, but is now debt free.

This form of liquidation is superior to a regular liquidation when it is likely that a sale of shares will generate more money than a sale of assets. Further, it is far less complicated than a rehabilitation. However, it offers one of the main advantages of a rehabilitation in that it gives creditors the opportunity to take shares in the company instead of receiving payment in cash.

A very detailed, fun, and informative business game that illustrates this method is available from the USAID Bankruptcy and Restructuring Project.

A bankruptcy law should allow for this type of liquidation if the creditors decide it will benefit them most. The changes in this Part allow this to occur.

Text in the Draft Law or Reference to the Text in the Draft	Suggestions	Commentary
Article 70. Point 10	<p>Add an additional sub-point Establish for review and ratification by creditors a plan for the sale of the debtor's assets.</p>	See comments to proposed article 70-A
After Article 70.	<p>Add an additional article: Article 70-A. Planning and Preparation for Sale of Debtor's Assets</p> <p>1) Within 30 days of his appointment, the bankruptcy manager shall convene a meeting with the creditors' committee or the creditors and discuss the possible plans for selling the property of the debtor. Such discussions should include, among other things, issues such as:</p> <ol style="list-style-type: none"> 1) the extent that the debtor's property should be sold in separate parts; 2) the timing of the sale and the benefits and costs thereof; 3) the amount of time and expense that should be incurred in selling the property (for instance, the hiring of specialized auctioneers or assessors); 4) the type of sale (e.g., open auction, closed tender); 5) the extent that claims of the debtor should be sold or enforced in court; 6) the benefits and costs of a liquidation arrangement whereby the liquidator creates a new company with the debtor as a founder, places some or all of the assets of the debtor in the new company, and sells the shares of the new company to pay the creditors. <p>2. After discussing the matter with the creditors or their committee, the bankruptcy manager shall prepare a plan which will be presented to the creditors or their committee for approval. Such plan shall become the plan of liquidation is approved by the creditors or the creditors</p>	The success or failure of a liquidation will often times depend on the right choice of liquidation plan. The added provision encourages the bankruptcy manager to consider various options that are crucial to a successful liquidation and consult with creditors on his decision.

Text in the Draft Law or Reference to the Text in the Draft	Suggestions	Commentary
	committee in accordance with the procedures of the creditors' meeting.	
Article 76, before point 1	Add an additional point Any creditor entitled to cash payment under these rules may agree to accept payment in a substitute form so long as the offering of such substitute payment is allowed by the liquidation plan approved by the creditors.	This provision allows for a more flexible liquidation procedure and is necessary to support the liquidation approach proposed as Article 84-A.
Article 84. Point 1. 1. The sale of the debtor's property (assets) shall be effectuated by the bankruptcy manager according to the order established by civil procedure law.	Replace with: 1. The sale of the debtor's property (assets) shall be effectuated by the bankruptcy manager in a competitive manner according to the plan approved by the vote of the secured and bankruptcy creditors at a meeting of creditors or in the creditors' committee.	This amendment requires that sales be competitive and that they comply with a liquidation plan approved by the creditors. Such flexibility is important given that procedures for sales under civil procedural rules are not fully developed.
After Article 84.	Add an additional article 84-A. Article 84-A. Liquidation by Sale of Shares 1. Subject to the approval of creditors according to article 70-A, the liquidator may create a new company with the debtor as the founder, place some or all of the assets of the debtor in the new company, and sell the shares of the new company to pay the creditors. The bankruptcy manager has the option of seeking approval of this plan with the court. 2. If court approval for such a sales method is obtained, various taxes and fees to the state budget for creating the company and registering its shares may be deferred and paid out as part of the administrative costs of liquidation pursuant to point 1 of article 75 of this law. 3. The company that is created according to this article is a subsidiary economic partnership of the debtor under the Civil Code and, hence, may not be held liable for the debts of the debtor. The bankruptcy manager, however, may with a	This provision clarifies the right of the bankruptcy manager to utilize what might be a rather practical and efficient way of selling the assets of an indebted enterprise as a property complex. Often times, the property is more valuable if sold in this manner. However, because few single buyers have the capital to pay a sufficient price for all the assets, bankruptcy manager would have to sell the assets piecemeal. This method allows the assets of the debtor to be sold as a property complex while allowing numerous bidders (if the shares are sold in packets) to bid on the company. Point 2 is similar to the provisions in article 20. It allows the bankruptcy manager to obtain deferrals of the state fees involved in forming a company and registering its shares. This removes a potential obstacle to this liquidation method. Point 4 gives the creditors of the debtor, who are

57

Text in the Draft Law or Reference to the Text in the Draft	Suggestions	Commentary
	<p>pledgeholder's consent transfer pledged property of the debtor to the subsidiary economic partnership.</p> <p>4. Under such a sales technique, non-state creditors entitled to a payment under the liquidation at the price sold, may instead arrange to take shares in the new company proportional to the value of their entitlement to payment in cash.</p>	<p>often the parties most interested in buying the debtor's assets, but are often times illiquid, the opportunity to trade their claims in for shares in the new company.</p>

38

Part 3 -- Suggested Changes Regarding the Rights of Secured Creditors and Voting Procedures

The USAID Bankruptcy and Restructuring Project ("Project") is aware of the desire to protect workers and health claimants of bankrupt companies under the draft law. Such a desire has resulted in a decision to limit the rights of secured creditors after bankruptcy proceedings against the debtor begin. For instance, the draft law prohibits secured creditors from repossessing and selling pledged property to repay loans. And it places their rights to payment in the third tier.

It is very likely, however, that these efforts to protect workers and injured parties will reduce the opportunities of many companies in Kazakhstan to obtain secured loans at affordable interest rates. Cutting off such access to capital will harm workers far more than they will benefit from their place above secured lenders in the payment line.

Other problems: the current priority rules in the draft law will (1) force secured lenders to foreclose on overdue debtors more quickly in order to protect themselves from a bankruptcy filing, and (2) increase the number of bankruptcy cases filed as debtors use the bankruptcy law as a tool against their secured creditors.

If Parliament decides to give rights of secured creditors adequate protection under the bankruptcy laws, there are two ways of doing so. The first is to simply allow secured creditors their rights under the laws on pledge and mortgage, regardless of the filing of a bankruptcy case. In such cases, the secured creditors are essentially excluded from the bankruptcy proceedings and have voting rights as creditors only to the extent that their claims are not secured by a pledge of property.

The other method is to limit secured creditors' rights to obtain and sell property pledged by a bankrupt company, but to give them a first preference in payout in a liquidation. This approach, however, leads to numerous complications regarding voting. Do secured creditors vote separately or in conjunction with unsecured creditors? If together, how can their rights, which are vastly divergent from unsecured creditors, be protected? If they vote separately, how are their claims valued if the property has not yet been sold?

These complications lead the Project to recommend the first approach. The comments in Part 1 offer amendments and additions to the draft law to put this approach into effect.

The comments also provide for a provision to prevent instances where unsecured creditors attempt to renegotiate their loan arrangements in order to take advantage of the rights offered to secured creditors after the passage of the new law. The comments suggest a provision that would render invalid certain pledge agreements made four months prior to the initiation of bankruptcy proceedings with existing unsecured creditors.

Finally, the comments suggest changing voting procedures to make all votes of creditors counted by size of claim. This is in line with the latest version of the Russian draft law on bankruptcy.

39

Text in the Draft Law or Reference to the Text in the Draft	Suggestions	Commentary
<p>Article 5-A</p>	<p>Add as a new article:</p> <p>Article 5-A. Rights of a Creditor Secured with a Pledge Agreement with the Debtor</p> <ol style="list-style-type: none"> 1. The rights of a creditor with a claim secured by pledge or mortgage are regulated by the Law on Mortgage and the applicable provisions on pledge of the Civil Code. 2. A creditor with the right described in point 1 of this article may exercise his rights against the secured property whether or not bankruptcy proceedings have been initiated. 3. Amounts from the sale of pledged property, if any, that remain after pledgeholders have been paid shall be included into the debtor's estate. 4. If the amount received when realizing the pledged property is insufficient to cover the demand of the pledge holder, the amount not satisfied will be treated as a payment to a fifth priority creditor. 5. The administrator, rehabilitation manager or bankruptcy manager may renegotiate with the secured creditor to reduce the portion of the claim that is potentially secured. 6. With the consent of the pledgeholder(s), the pledged property may be transferred from the debtor to a purchaser still subject to the pledge, according to the limits provided for in applicable provisions on pledge of the Civil Code and the Law on Mortgages. 7. With the consent of the creditors with voting rights, the rehabilitation manager or bankruptcy manager may exercise his rights under the provisions on pledge under the Civil Code and the Law on Mortgage to pay the obligation secured by pledge in order to maintain possession of the property for the benefit of the remaining creditors. 8. With the consent of the creditors with voting rights, the administrator, rehabilitation manager, or bankruptcy manager may exercise his rights under the applicable provisions on pledge of the Civil Code and the Law on Mortgage to 	<p>In general, this addition establishes the right of a secured creditor to exercise his rights under the Civil Code and the Law on Mortgage regardless of whether the debtor is in bankruptcy. It also allows the administrator, rehabilitation manager, or bankruptcy manager to exercise rights of the debtor as a pledgor for purposes of protecting the rights of other creditors of the debtor.</p> <p>As the result of this change, the rights of secured creditors to vote in creditors meetings is significantly curtailed (see Article 14).</p> <p>Point 5 allows secondary lien holders (who may benefit very little from having a secured claim) to essentially reduce or waive their rights as secured creditors. Such a reduction or waiver will allow them greater voting rights in the proceedings (see Article 14).</p> <p>Point 6 allows the transfer of the pledged property from the debtor (along with the claims against it). Of course, such a transaction requires consent of the pledgeholder(s).</p> <p>Point 7 provides for the possibility that a pledge holder will have only a small claim against a piece of property that would be better off remaining in the estate. In such cases, the administrator, rehabilitation manager, or bankruptcy manager can be repay the debt and settle the secured claim.</p> <p>Point 8 allows the bankruptcy or rehabilitation manager the right to attempt to buy back the property that is being foreclosed upon. This may lead to opportunities where the debtor's estate can regain a piece of property crucial to a rehabilitation or a liquidation sale of the company as an ongoing business.</p>

017

Text in the Draft Law or Reference to the Text in the Draft	Suggestions	Commentary
	<p>participate in the auction of pledged items of the debtor in order to repurchase the pledged property for the benefit of creditors.</p> <p>9. The administrator, rehabilitation manager, or bankruptcy manager may serve as a trustee for the sale of the pledged property if so appointed by the pledgeholder. In such cases, the administrator, rehabilitation manager, or bankruptcy manager may not exercise the rights described in point 7.</p>	<p>In order to perform the transactions described in points 7 and 8, the rehabilitation or bankruptcy manager may need financing. The bankruptcy law should allow the rehabilitation or bankruptcy manager to seek such financing so long as the voting creditors consent. In order to get such financing, the businesses that lend to bankrupt enterprises should have the right to priority repayment as part of the administrative costs of bankruptcy.</p>
<p>Article 6, point 1, subpoint 2</p>	<p>Add an additional subpoint: 2-A) The petition of creditors, the administrator, the rehabilitation and bankruptcy managers, if the deal concluded with the creditor elevated the creditor to a higher category of repayment in a liquidation (see article 75) up to four months before the initiation of the bankruptcy case.</p>	<p>This prohibits the debtor from favoring some creditors at the expense of others by elevating their payment status.</p>
<p>Article 6. Point 2.</p>	<p>Add an additional sentence: This provision shall not apply to deals made pursuant to a foreclosure sale that complies with the Law on Mortgage, or the applicable provisions on pledge of the Civil Code.</p>	<p>Sales prices in a foreclosure are often significantly below market prices. If there exists a fear that these deals could be held invalid because of a low price, buyers will be reluctant to bid. This would result in even lower prices.</p>
<p>Article 11. Point 2</p>	<p>Add an additional point: 2-A. The creditors' meeting, and the meeting of the creditors' committee (if it is created) shall be the only forums for obtaining the consent of creditors to proposals and issues requiring collective creditor consent under this law.</p> <p>And an additional point at the end of the Article 5. Decisions of the creditors' meeting or creditors' committee shall be invalid if they call for actions in violation of this law or otherwise give preferential treatment to a particular creditor or creditors over other creditors of the same class.</p>	<p>These two additions clarify that the creditors' meeting or the creditors' committee are the only forums for creditors to make collective decisions. They also clarify that such decisions may not favor certain creditors over others within a particular class.</p>
<p>Article 14.</p>	<p>This article should be rewritten as follows 1. The secured and bankruptcy creditors as participants of the creditors' meeting (committee) shall have the right to vote.</p>	<p>The changes in this article result primarily from the need to simplify and clarify voting procedures, and the need to restrict the voting rights of secured creditors if the suggested changes</p>

41

Text in the Draft Law or Reference to the Text in the Draft	Suggestions	Commentary
	<p>Other creditors have the right to participate in the creditors' meeting (committee) as non-voting members.</p> <p>2. Voting creditors may designate individuals to vote on their behalf through powers of attorney valid under the Civil Code and other applicable legislation.</p> <p>3. The creditors' meeting shall be deemed to be legitimate irrespective of the number of attending workers, bankruptcy and secured creditors, provided that the creditors were notified in time about the date and place of the creditors' meeting, except for the cases specified by this Law.</p> <p>4. Voting at creditor meetings shall be carried out on the principle of one tenge of debt equals one vote, subject to the limits on secured creditors' voting rights described in point 5 of this article.</p> <p>5. The votes of a secured creditor are valued by the extent that his claim exceeds the value of the secured portion of his claim. Where such a difference has not yet been settled by the actual sale of the property and the distribution of proceeds, the value of the secured creditors vote will be zero, <i>unless</i> he agrees to modify his agreement with the debtor to clarify that a particular portion of his claim can be satisfied only through his rights as a fifth priority (i.e., unsecured) creditor. Afterwards, his vote in creditors' meetings will be based on the amount of his claim that has been limited to the category of fifth priority creditors.</p> <p>6. Unless otherwise specified by this law, decisions on any proposal raised at the creditors' meeting shall be approved if the more than 50 percent of the votes cast favor the proposal.</p> <p>7. It is necessary to obtain the majority of votes of secured and bankruptcy creditors who own more than 50 % of the total claims of these creditors, when the following decisions are taken:</p> <ol style="list-style-type: none"> 1) whether to create a creditors' committee, and if so, the particular powers that the creditors delegate to it; 2) application of the rehabilitation procedure to the 	<p>regarding these creditors are accepted.</p> <p>Point 2 recognizes that voting creditors may wish to have someone vote in their place</p> <p>Point 4 calls for all votes to be measured by size of claim. This is the way votes are counted in shareholders meetings (where larger stake holders have greater voting rights). They should be counted in the same manner in bankruptcy cases. This is also the method found in the Russian Federation draft law on bankruptcy.</p> <p>Finally, regarding Point 4, to have some decisions voted in one manner and other decisions voted on by another method would only cause confusion and discord in the meetings.</p> <p>If proposed Article 5-A (regarding secured creditors' rights to obtain and sell pledged property) is approved, the votes of secured creditors should be valued only to the extent that their claims are undersecured.</p> <p>If the provisions in proposed article 5-A are not accepted, then secured creditors should have the right to vote. Decisions by the creditors meeting should be made only with the approval of both the secured and unsecured creditors voting separately.</p> <p>Point 8's method for choosing representatives to the creditors' committee allows the five largest unsecured creditors a voice on this body.</p>

412

Text in the Draft Law or Reference to the Text in the Draft	Suggestions	Commentary
	debtor; 3) nomination of the rehabilitation and bankruptcy managers for out-of-court procedures and the terms of their compensation; 4) petition to court for the replacement of the administrator, rehabilitation or bankruptcy managers. 5) approval of a liquidation plan; 6) approval of a proposal by the rehabilitation or bankruptcy manager to obtain additional financing. 8. A creditor's committee shall consist of five members. Each of the five largest creditors with the right to vote shall have the right to select a member of the committee. 9. The creditors' committee shall decide issues on a one member, one vote basis.	
Article 32. Point 3. From the moment of introduction of external management, the creditors forfeit the right to demand individual payment of their claims. All the actions with regard to the debtor shall be effectuated pursuant to the provisions of this Law.	Make the following change From the moment of introduction of external management, the creditors, forfeit the right to demand individual payment of their claims. All the actions with regard to the debtor by creditors other than those with claims secured by pledge shall be effectuated pursuant to the provisions of this Law. Actions by creditors with claims secured by pledge are regulated by Article 5-A of this law.	These changes follow from the provisions that essentially exclude secured creditors from the bankruptcy proceedings
Article 43. Point 6. 6. If there is a motion for the rehabilitation procedure that conforms to the requirements listed in Paragraph 3 of this Article, the court, <i>with the consent of the secured creditors who hold more than 50% of the total claims secured by collateral and the bankruptcy creditors who</i>	Make the following change 6. If there is a motion for the rehabilitation procedure that conforms to the requirements listed in Paragraph 3 of this Article, the court, if the creditors with voting rights of the creditors' committee have approved , shall allot to the candidate for the position of the rehabilitation manager 30 - 60 days to develop a schedule for restoring the debtor back to solvency, except for the cases when the rehabilitation schedule is filed together with the motion.	This reflects the fact that, if the suggestions regarding Article 5-A and 14 are accepted, secured creditors, to the extent they have votes, vote concurrently with unsecured creditors.

53

Text in the Draft Law or Reference to the Text in the Draft	Suggestions	Commentary
<i>hold more than 50% of the total claims of this class, shall allot to the candidate for the position of the rehabilitation manager 30 - 60 days to develop a schedule for restoring the debtor back to solvency, except for the cases when the rehabilitation schedule is filed together with the motion.</i>		
Article 69. (second paragraph) The bankruptcy manager shall be elected by the creditors' meeting (with the consent of the creditors holding 2/3 or more of the total amount of claims). The administrator may serve as the bankruptcy manager with the consent of the creditors' meeting.	Change to: The bankruptcy manager shall be nominated by approval of 2/3 of the creditors in accordance with the procedures of the creditors' meeting. The administrator may serve as the bankruptcy manager. A failure of the court to disapprove the bankruptcy manager within 10 days from the date the court received notice of the creditor's choice, shall be deemed an approval of the creditors' decision.	This provision clarifies the voting procedures by referring back to those established in Article 14. Further, the provision will help avoid situations where failure of the court to act slows down the bankruptcy process.
Article 75, point 4	Delete	This provision follows from the provisions that essentially exclude secured creditors from the bankruptcy proceedings.
Article 77, point 3, Article 78, point 3, and all of Article 79	Delete	These changes follow from the provisions that essentially exclude secured creditors from the bankruptcy proceedings.
Titles to Articles 80 and 81	Change titles to third and fourth priority creditors respectively.	These changes follow from the provisions that essentially exclude secured creditors from the bankruptcy proceedings
Article 81 In order to determine the amount of the claims added to the claims of the fifth priority creditors, the claims	Change to: In order to determine the amount of the claims added to the claims of the fourth priority creditors, the claims of the creditors on Civil Law obligations, including the portions of the claims of secured creditors that have not been satisfied	This change accounts for the interests of a secured creditors where the pledged property was not sufficiently valuable to fully repay the claim.

hkh

Text in the Draft Law or Reference to the Text in the Draft	Suggestions	Commentary
of the creditors on Civil Law obligations, including the interest payable to the creditors, except for the claims secured by pledge and claims of the founders (participants) of the legal entity, shall be counted in.	from the proceeds from the sale of the pledged property, and the interest payable to the creditors, except for claims of the founders (participants) of the legal entity, shall be counted in.	
After point 2, subpoint 2 of Article 83	Add the following subpoint 3) property that the debtor had pledged, against which the claims of the secured creditors have not been satisfied or otherwise settled.	This provision follows from the provisions that essentially exclude secured creditors from the bankruptcy proceedings.

9/6

Part 4 -- Various Additional Changes

This final section contains a collection of amendments designed to clarify bankruptcy proceedings and make them more efficient. For instance:

- **The amendments make it easier for companies in bankruptcy to borrow money if the creditors agree to this activity:** At times, rehabilitation and bankruptcy managers will need money to perform certain acts to either make a rehabilitation plan work, or preserve assets that will be sold in a liquidation. It will often be the case that such money will not be available within the company. Of course, the rehabilitation or bankruptcy manager can sell assets to generate cash to pay immediate bankruptcy expenses, but this may not always be the most efficient approach. The amendments allow a rehabilitation or bankruptcy manager to direct the debtor to borrow this money. The amendments encourage lenders to do so by giving them a preference in a pay-out if the company is liquidated. To protect the creditors from over-borrowing by the debtor, this activity must be approved at a creditors meeting and by the workers' elected representative.
- **The amendments encourage settlements of bankruptcy cases by allowing amicable agreements on debt forgiveness to apply to bankruptcy creditors that do not consent to the agreement.** The power to bind minority creditors on debt discounts is one of the most important tools in bankruptcy. Without assurances that all similar creditors will be bound by a debt discount, the creditors are not likely to agree to such a discount. The bankruptcy laws of numerous countries, including the United States, and Russia, allow for debt discounts to be applied to minority creditors who are opposed to the agreement. In the United States, bankruptcy is often used to finalize out-of-court negotiating agreements where a few minority creditors refuse to enter into a debt forgiveness agreement. The creditors wanting the agreement file a bankruptcy claim and then immediately settle the case, using an amicable agreement that binds all creditors.

Some objections have been raised to debt discounting because it compromises contract rights. Yes, contractual rights are canceled, but it is done so in a way that is fair (everyone takes a similar discount in proportion to its claims) and is approved by a judge. Further, if concerns regarding contract rights are so important, why does the draft law allow the application of payment delays to non-consenting creditors? This also compromises the contractual rights of creditors, sometimes even more so than a debt discount. For instance, in which situation would a non-consenting creditor be worse off? When an amicable agreement forces him to accept a 20 percent discount in his claim, or when the amicable agreement forces him to accept a delay in payment for ten years without interest compensation?

- **The amendments clarify that the sale of property in a liquidation does not create additional tax liabilities for the debtor:** This clarifies the apparent intent reflected in the law. A decision to tax such transactions would only add complications to the liquidation process, thereby increasing administrative costs and depriving workers and other creditors of moneys due to them. The draft law being considered by the Kyrgyz Republic takes a similar approach.

Text in the Draft Law or Reference to the Text in the Draft	Suggestions	Commentary
Article 1.	<p>Add the following as a definition: Owner of the debtor's property or a body authorized by it -- the State or a body authorized by it in the case of a state-owned enterprise that obtained from the State the right of economic jurisdiction.</p>	<p>The provisions regarding the rights of the owner of the debtor's property have caused significant confusion among numerous readers of the draft. This definition clarifies that this provision applies only to the rights of the state when the debtor is a state-owned enterprise.</p>
<p>Article 6. Point 4. The property that was assigned a year prior to the initiation of a bankruptcy case by an employee (worker), a participant of an economic partnership, or a director of the insolvent debtor, may be demanded and obtained on the grounds provided for by Paragraphs 2 and 3 of this Article.</p>	<p>Rewrite to clarify that it is to an insider not by an insider.</p>	<p>The language, before this change, was somewhat unclear as to meaning.</p>
Article 9.	<p>Add an additional point: 6. For the period he performed services on behalf of the debtor, until he, or another person enters into an agreement with the creditors, the administrator has right to receive a salary equal to the highest salary of the debtor's workers.</p>	<p>The salary of the administrator should be established for the the period in which he works prior to reaching an agreement with creditors.</p>
Article 18. Point 3.	Delete.	<p>This requirement is expensive for the debtor and is unnecessary. How does this provide a benefit to creditors when, within a very short period of time, after the court initiates proceedings, the creditors receive notice from the court under Article 28.1 and several more after that throughout the proceedings?</p> <p>There is little to gain for other creditors from this notice requirement. That is probably why creditors who file claims are not required to send copies to other creditors under Article 22.</p> <p>If this provision remains in the law that is passed, it will be possible that some debtors will be too poor</p>

Text in the Draft Law or Reference to the Text in the Draft	Suggestions	Commentary
		to file for bankruptcy.
Article 19. Point 1. Subpoint 2.	Delete.	See comments to Article 18. Point 3.
Article 29. Point 1, subpoint 1.	Delete.	This provision runs the risk of having no person with legal authority to run the company prior to the appointment of the administrator. Instead, the right to manage should cease upon the appointment of an external manager (see Article 32).
Article 33. Point 1.	Add the following subpoint: 7) with the agreement of creditors having the right to vote, may borrow money for financing activities that wil increase the payment to creditors.	The right to borrow money will help avoid situations when the bankruptcy manager has to sell assets prematurely to fund activities aimed at protecting the debtor's property and increasing the amount of funds available to satisfy creditors' claims.
Article 36. Point 2, subpoint 3.	Replace with: 3) notice to the creditors to file their claims against the debtor within two months from the date of the publication and the the consequences for failing to file on time. 4) the place and procedure for filing.	This adition adds a bit more guidance for creditors.
Article 37. Point 1. 1. In the event of acceptance of the debtor's objections against the creditors' claims, the court shall refuse to deem the debtor to the bankrupt.	Replace with: 1) In the event of acceptance of the debtor's objections against the creditors' claims, or acceptance of objections of other interested parties, the court shall refuse to deem the debtor to the bankrupt.	It is quite possible that parties other than the debtor will argue that the debtor is solvent, for instance, a creditor in the process of collecting on his claim through routine debt collection.
Article 43. Point 1. The insolvent debtor, owner of the debtor's property (a body authorized by him), creditor may petition to the court for the rehabilitation procedure to apply to the debtor before the court renders the appropriate judgement (Article 35 of the Law).	Replace with: The insolvent debtor, owner of the debtor's property (a body authorized by him), creditor may petition to the court for the rehabilitation procedure to apply to the debtor before the court convenes the hearing (Article 34 of the Law).	Petitions for rehabilitation proccdure should be filed before the hearing to give all concerned parties the opportunity to comment on them.
Article 51. Point 2.	Add the following as subpoint 4:	The right to enter agreements to borrow money on behalf of the debtor would assist a rehabilitation

Text in the Draft Law or Reference to the Text in the Draft	Suggestions	Commentary
	4) to direct the debtor to borrow money in order to fund activities necessary to implement a successful rehabilitation, provided that the representative of the employee's representative approves in writing this action.	<p>manager planning and implementing a successful rehabilitation. In order to convince lenders to enter into such an agreement, these lenders need to have a preferred claim if a liquidation occurs (see changes to Article 75).</p> <p>The requirement that the employees' representative approve such borrowing will serve to protect the workers and other preferred creditors from arrangement that would compromise the amount of money that could be paid to these creditors in a liquidation.</p>
Article 52.	<p>Add an additional sentence: Further, the rehabilitation manager shall be held personally responsible for any unpaid claims of the employees of the debtor in liquidation if he directs the debtor to borrow money without the written permission of the employees's representative.</p>	This provision will significantly diminish any likelihood that the rehabilitation manager might direct the debtor to borrow money without the approval of the representative of the employees.
<p>Article 61. Point 1. 1. The amicable agreement shall be considered to be entered into if more than 1/2 of the <i>secured</i> and bankruptcy creditors whose claims constitute more than 2/3 of the total claims agree thereto, and if the debtor paid off the creditors' claims of other priorities in the full amount, except for the cases, when the creditors voluntarily grant a deferral, an installment plan or a debt discount.</p> <p>2. The terms of the amicable agreement whereby the debtor is granted a deferral and/or an installment plan shall apply to the creditors, who do not agree to enter into the amicable agreement. However, they shall not adversely affect such creditors if compared to those who belong to the same class and entered into the agreement.</p>	<p>Make the following change: 1. The amicable agreement shall be considered to be entered into if creditors with the right to vote holding more than 2/3 of the debt (by value) of such creditors agree thereto, and if the debtor paid off the creditors' claims of other priorities in the full amount, except for the cases, when these creditors voluntarily grant a deferral, an installment plan or a debt discount.</p> <p>2. The terms of the amicable agreement whereby the debtor is granted a debt discount, deferral, and/or an installment plan shall apply to the creditors with the right to vote, who do not agree to enter into the amicable agreement. However, they shall not adversely affect such creditors if compared to those who belong to the same class and entered into the agreement.</p>	<p>Point 1 allows for agreements to become valid if the voting creditors holding more than 2/3 of the claims of the creditors with the right to vote agree thereto.</p> <p>Point 2 allows for terms regarding debt discounts to bind minority voting creditors. The power to bind minority creditors on debt discounts is one of the most important tools in bankruptcy. Without assurances that all similar creditors will be bound by a debt discount, the creditors are more likely to agree to such a discount.</p> <p>The bankruptcy laws of numerous countries, including the United States, and Russia, allow for debt discounts to be applied to minority creditors who are opposed to the agreement. In the United</p>

Text in the Draft Law or Reference to the Text in the Draft	Suggestions	Commentary
	<p>3. The terms of the amicable agreement may not restrict the rights of a secured creditor to execute a pledge agreement he has with the debtor. A secured creditor is free to waive this right.</p>	<p>States, bankruptcy is often used to finalize-out-of-court negotiating agreements where a few minority creditors refuse to enter into a debt forgiveness agreement. The creditors wanting the agreement file a bankruptcy claim and then immediately settle the case, using an amicable agreement that binds all creditors.</p>
<p>Article 68. Point 1. 1. When the court decides to deem the debtor to be bankrupt and to start liquidation, the following consequences shall occur:</p>	<p>Replace with: 1. In addition to the continuation of the effects of the initiation of bankruptcy proceedings (point 1 of article 29 of the present law) when the court decides to deem the debtor to be bankrupt and to start liquidation, the following consequences shall occur:</p>	<p>The changes in this provision clarify the effects of initiation of bankruptcy/liquidation proceedings (konkursni proceduri) as opposed to proceedings under the bankruptcy law.</p>
<p>Article 70. Point 1.</p>	<p>Change the title to "Rights and Responsibilities of the bankruptcy manager -- liquidator". And then add the following subpoint: 11) upon the approval of the creditors given at the creditors meeting, and upon the written approval of the employees' representative, direct the debtor to borrow money for a successful implementation of the liquidation.</p> <p>Then add the following as points 2 & 3: 2. Other rights and responsibilities of the bankruptcy manager are set forth by this Law, and by the Civil Code of the RK (General Provisions) and the agreement entered into between the bankruptcy manager and the creditors (Paragraph 2 of Article 9 of this Law).</p> <p>3. The bankruptcy manager shall bear responsibility for ill-performance of the liquidation procedure as stipulated in the agreement. Further, the rehabilitation manager shall be held personally responsible for any unpaid claims of the employees</p>	<p>The right to enter agreements to borrow money on behalf of the debtor increases the opportunities for a bankruptcy manager to plan and implement a successful rehabilitation. In order to convince lenders to enter into such an agreement, these lenders need to have a preferred claim if a liquidation occurs (see changes to Article 75).</p> <p>Point 1 requires the employees' representative to approve borrowing by the bankruptcy manager. This will help protect workers and other preferred creditors from borrowing that may result in a reduction of repayments to these creditors.</p> <p>The provisions in points 2 and 3 are similar to those that protect the creditors from abuses by the rehabilitation manager.</p> <p>The second sentence in point 3 will significantly diminish any likelihood that the bankruptcy manager might direct the debtor to borrow money</p>

50

Text in the Draft Law or Reference to the Text in the Draft	Suggestions	Commentary
	of the debtor in liquidation if he directs the debtor to borrow money without the written permission of the employees's representative.	without the approval of the representative of the employees.
<p>Article 72. Point 4. 4. The debtors' creditors may review the list of claims. At the request of more than 50 creditors, the list of claims shall be published in the same publication where the announcement on debtor's bankruptcy and liquidation was placed.</p>	<p>Change to: 4. The debtors' creditors may review the list of claims. At the request of more than 50 creditors, the list of claims shall be published in the same publication where the announcement on debtor's bankruptcy and liquidation was placed. Any creditor shall have the right to review the documentation on which another creditor's claim is based.</p>	<p>A creditor can make a meaningful decision to challenge another creditor's claim only if it knows the basis for it.</p>
<p>Article 75. Point 1. 1. Expenses associated with the bankruptcy proceeding, remuneration of the external administrator, bankruptcy manager and rehabilitation manager shall be covered as a priority.</p>	<p>Change to: 1. Expenses associated with the bankruptcy proceeding, remuneration of the external administrator, bankruptcy manager and rehabilitation manager and repayment of loans that had been entered into by the debtor shall be covered as a priority.</p>	<p>This reflects the need to give priority rights in liquidation to those who offer financing to the debtor after the initiation of proceedings under the bankruptcy law. This right must be made explicit in order to attract financial assistance after bankruptcy proceedings have commenced.</p>
<p>Nòàdüy 76. At the end.</p>	<p>Add the following as Point 7: Creditors that have been assigned claims against the debtor fall in the same payment category under Article 75 as the original claimant against the debtor.</p>	<p>This provision will confirm the right of an assignee of a claim of the debtor to enjoy the same rights as the original creditor. This could make claims sold by certain groups more valuable.</p> <p>For instance, the government is planning to sell claims against companies that owe obligations to the pension fund. The government would likely receive more for these claims if it were made clear that these claims would be paid off in the same ranking as an obligation to a budget or non-budget fund.</p>
<p>Article 80, Point 1.</p>	<p>Add the following to the end of this point: The sale of the property of the debtor pursuant to the liquidation shall not be considered to be a</p>	<p>This clarifies the apparent intent reflected in the previous sentence to exclude sales of property during a liquidation from taxation of any sort.</p>

Text in the Draft Law or Reference to the Text in the Draft	Suggestions	Commentary
	disposal of goods for purposes of calculating any value added tax. The income from the sale of the property of the debtor pursuant to the liquidation shall not be considered income of any sort for purposes of computing additional liabilities to the government under the Law on Taxes.	<p>A decision to tax such transactions would only add complications to the liquidation process, thereby adding administrative costs and depriving workers and other creditors of moneys due to them.</p> <p>The draft law being considered by the Kyrgyz Republic takes a similar approach.</p>
After Article 88.	<p>Add an additional article: Article 88-A. Continued Validity of the Claims of the Debtor After its Liquidation Notwithstanding its liquidation, the claims of the debtor that are assigned before the completion of the liquidation shall remain valid as if the debtor had not been liquidated.</p>	Clarifying the right of transferees of claims of the indebted company to pursue those claims after the debtor is liquidated (doubt exists under current law), will increase the value of these claims and increase the potential payout to creditors.
After Article 88.	<p>Add an additional article: Article 88-B. Continued Liability of Persons who are Jointly Liable with the Debtor or Guaranteed his Obligations Notwithstanding the liquidation of the debtor, persons who agreed to subsidiary or joint liability with the debtor (e.g., guarantors) shall remain liable for their obligations to the extent provided for under the law.</p>	Third party guarantees are extremely important to a company's efforts to obtain financing. They are designed to give lenders assurance of repayment even if the company goes bankrupt. This amendment assures that such will be the case.

62

APPENDIX 2

NEWS BULLETIN

ON MARKET REFORM IN KAZAKSTAN

USAID



November '96

Issue #10

INTRODUCTION

The Monthly Bulletin is a publication funded by the United States Agency for International Development. It is produced by Overseas Strategic Consulting, Ltd. and is designed to inform policy makers and members of the development community about recent accomplishments of the USAID Consortium.

Your input is important, so please free to contact Asele Karaulova, Director, Kazakstan Press Club, (7-3272) 62-88-67, William Herkelrath or Jose-Manuel Bassat, Overseas Strategic Consulting, Ltd., 62-97-85, by e-mail: osc@jose.almaty.kz.

ACCOUNTING REFORM

International Accounting Standards

On November 29, 1996 the Head of the National Accounting Commission, Rymkesh Rakhimbekova, announced Kazakstan's adoption of 20 International Accounting Standards (IAS), the largest package of its kind in the CIS. This was both monumental and a crucial step in promoting a more successful and efficient economy.

Why are IAS so important?

New accounting standards are necessary because private owners now have a financial stake in the success of their business. The previous accounting system was designed to work well in a centrally-planned economy. However, accountants and business managers in a market economy have completely different incentives in their bookkeeping than those who kept records for centrally-planned institutions.

In a market economy, managers and accountants are interested in profits, accountability, and a better un-

derstanding of their costs. Profits are facilitated by efficient day-to-day operations. Accountability allows each accountant and manager the ability to understand how each and every tenge is being spent and by whom. Because accountants and managers are often faced with the responsibility of reporting to those who own their institution (workers, shareholders, or entrepreneurs) they need to clearly and carefully explain with the documents they produce the complete financial picture of their enterprise. International Accounting Standards get down to the heart of financial information when it comes to analyzing the different costs of one's business. Instead of focusing simply on total production costs as in centrally planned institutions, it forces businesses to understand which departments are spending which sums of money and for what reasons. The two primary advantages of this are:

- Business managers will have the information necessary to better understand their cost structure. This helps them, in turn, to determine what price they must charge for their good or services to recover their expenditures and earn profits.
- Businesses faced with difficult decisions regarding cutting costs in other ways can make better-informed decisions as to what aspects of production are currently the most inefficient.

Promoting Investment

Kazakstan's business environment is changing, and with that change come many new concepts and terminology. Because a common accounting language facilitates uniformity in financial record keeping, accountants will be asked to understand financial terms that are common throughout the world. Therefore, when an foreign investor or potential stockholder analyzes a Kazakstani firm's financial statements they will be able to confidently assess them. Potential investors will only feel reassured if they believe the firm's accountant understands international business practices and methodologies.

If an enterprise operates its financial accounting to world standards it will not only be easier to attract potential investors, but easier to prepare business plans adequate to attract bank credits, as well as sell their goods and services abroad.

BANKRUPTCY LAW

The Bankruptcy and Restructuring Project has been working on issues involving bankruptcy. The Parliament has begun to review legislation concerning this question. Following are a few commentaries which explain the relevance of the law as well as why it best meets the concerns of workers, creditors, and potential investors.

The General Goal of a Bankruptcy Law

Bankruptcy laws can be quite complex. Their primary goal, however, is very simple. A bankruptcy law, in essence, is a tool for forcing creditors of an insolvent company to cooperate in their efforts to get repaid. The person who facilitates such cooperation is the administrator, external manager, or bankruptcy manager, and is normally chosen by the creditors. Without this forced collaboration, creditors, rather than cooperating voluntarily, will begin a race to obtain a repayment before other creditors snatch up all the assets. The result is a feeding frenzy. A bankruptcy law should regulate this process and allow for fair and orderly repayment of creditors. All participants surely benefit from this more civilized solution to a difficult problem.

The Purpose of Liquidating a Company

A liquidation is nothing more than a sale of a company's assets to repay creditors. After the sale and the repayment of creditors, the company's name is removed from the list of legal entities at the Ministry of Justice. The claims of the company are then extinguished. A liquidation does not necessarily mean turning factories into rubble or putting all the former workers of the bankrupt company out of work.

The debt cleansing aspect of a liquidation often can remove a significant obstacle to the revitalization of a factory or plant. Before bankruptcy, distressed companies have trouble obtaining financing and operating bank accounts because of large outstanding debt and the insistent collection efforts of creditors. In addition, outside investors fear putting money in a distressed company because they fear that the creditors will snatch it up. After a liquidation the purchaser of the assets has no such concerns. All the claims against the former company are extinguished. This makes development of the assets and use of the former workers more likely.

A New Bankruptcy Law Can Improve the Economic Situation of Workers

Regardless of whether the draft law is passed, insolvent companies will remain insolvent and creditors will continue to press their claims. Debt collection cases and bankruptcy cases will still be filed, and latent unemployment will continue to surface. A new bankruptcy law cannot change this economic fact. It will however, if it contains the right provisions, help smooth out the bankruptcy process and clarify the rights of creditors (many of which are workers).

A bankruptcy law should be designed to help creditors receive a certain amount of compensation from the bankrupt company. How much a creditor receives depends in part on his place in a line established by the bankruptcy law for repayment. Workers are creditors, and they will likely be paid prior to unsecured creditors. With these provisions, workers are almost always assured full payment of their claims for back wages. Moreover, liquidation provisions in a bankruptcy law can be designed to give workers the opportunity to take a portion of shares in a newly-created company, in exchange for their agreement to give up some or all of their back wages.

A New Bankruptcy Law Encourages Credits at Affordable Interest Rates

Many Kazakstani companies and those that work for them desperately need banks and other sources of funding to begin lending more money. But so long as risk of non-payment remains, these institutions will not lend, or will only do so at very high interest rates. Lenders often reduce risk by requiring that the borrower pledge property as collateral. Borrowers agree to enter into pledge agreements because they know that it may be the only way to get the loan at a reasonable interest rate. The relationship between pledged property and lower interest rates is seen, for instance, in the United States, where banks will lend money at 8 percent per year if the borrower has pledged property, and at 18-20 percent if the borrower has not pledged property.

"Fresh Start" Liquidations

There are several ways to perform a liquidation that would allow the company's assets to remain intact and, possibly, allow preferred groups of creditors to take shares of the company in full or partial exchange for their claims for repayment in cash. Several countries, including the Kyrgyz Republic, have allowed various versions of a "fresh start" liquidation:

- The liquidator creates a new company using the assets of the bankrupt company. The new company is sold in the form of shares to willing investors.

55

- According to a specified formula, certain creditors of the original company are allowed to take shares in the new company as an acceptable form of repayment.
- The proceeds from the sale of shares are used to pay off any remaining debt the old company had.
- Thus, the new company has the same assets as the old company, but is now debt free.

This form of liquidation is superior to a regular liquidation because it is often easier to generate more money from the sale of the share packets to various investors than it is from the sale of assets to one buyer. A comprehensive bankruptcy law should allow for this type of liquidation if creditors decide it will be beneficial in their respective situation.

Other Legislation That Should be Changed in Order to Help Prevent Bankruptcies

The key to avoiding bankruptcy is to encourage debtors and creditors to negotiate settlements beforehand. Studies in other countries have shown that pre-bankruptcy negotiations are often less costly and time consuming than those after a bankruptcy claim is filed. Provisions in several pieces of legislation, if changed, would likely encourage more parties to settle their claims without the filing of a bankruptcy petition. These are detailed briefly below:

- **the Law on Taxes** should be amended to allow companies that forgive the debt of their debtors to be able to take a deduction. Currently, the law requires a creditor to wait two years before it can take a deduction for forgiving overdue debt
- **the Law on Economic Partnerships and the Civil Code** should be amended to allow companies to issue shares for purposes of giving them to creditors in exchange for debt forgiveness.
- **the Law on State Fees** should be amended to allow creditors to file routine debt collection law suits at a fee significantly less than that currently charged (10 percent of the total claim). A decrease in the fee will make the threat of a lawsuit by a creditor against his debtor more credible. This will stimulate more negotiations between debtors and creditors and should reduce the number of bankruptcy cases actually filed.

POST-PRIVATIZATION SUPPORT

A draft business plan for the Kazakstan Food Marketing Association (KFMA) outlining the association's strategy for the next several years, was developed. Information packets on food wholesaling and retailing and food processing were completed in both English and Russian .

The Team will assist the association to market and sell these information packets in order to generate additional revenues and give KFMA more visibility in the marketplace.

Most of CARANA's efforts to effect positive changes in the trucking sector will be channeled through KazATO, the Kazakstan Association of International Road Carriers. An important part of KazATO's work is the protection of drivers' rights and lobbying government officials on the need to address the numerous problems encountered with current Kazakstani transportation laws, as they do not conform to the conventions signed with other countries.

In an effort to raise awareness about the tax and regulatory problems faced by private trucking firms operating within Kazakstan, the team organized a roundtable discussion on November 27th. Representatives from the Government, private trucking enterprises, research institutes, KazATO and other interested parties gathered to discuss relevant issues.

FRANCHISE DEVELOPMENT

The USAID project in support of franchising development undertaken by Sibley International began in September 1996. Franchising is the world's fastest-growing source of independent business units. The main focus of the work has been to provide support, through customized manuals and training seminars, to four thriving firms in order to replicate their success through franchises.

The Project's strategy has been to work on an individual basis with each of the selected companies in order to devise a franchise development plan which is going to best suit each particular case. The Team has provided each company with a set of 14 manuals which explain all the steps necessary to improve business performance and become a successful franchisor. The manuals provide know-how on topics such as retail planning and development, marketing, selling and advertising, human resources as well as information on laws and regulations concerning franchising in each particular sector. In addition to the manuals, the Project has also provided support in the form of "in-house" customized seminars for company managers and other employees involved in the development of the business.

So far, the Project has been involved in the furniture, freight forwarding, pharmaceutical and gas retailing and sectors. The freight forwarding company supported by Sibley has already found its first franchisee. The furniture company has quickly adopted many of the recommendations suggested by the consultants, and is negotiating with a potential franchisee.

APPENDIX 3

**USAID BANKRUPTCY AND RESTRUCTURING PROJECT IN
KAZAKSTAN AND THE KYRGYZ REPUBLIC**

LIQUIDATION MANUAL

**ALMATY, KAZAKSTAN
NOVEMBER 1996**

D R A F T

BOOZ-ALLEN & HAMILTON, INC.
ENI/PER Task Order Reference No. 03-0064-BOOZ-05
Contract No. EPE-0014-I-00-5071-00

TABLE OF CONTENTS

A. LEGAL FRAMEWORK FOR BANKRUPTCY AND LIQUIDATION	1
I. DECREE "ON BANKRUPTCY"	1
1. Introduction.....	1
2. Definitions.....	1
3. Initiation of a bankruptcy case.....	1
4. In-court bankruptcy proceedings.....	2
5. Liquidation proceedings.....	3
II. THE CIVIL CODE (GENERAL PROVISIONS)	4
1. Voluntary liquidation under the CC.....	4
B. LEGAL STATUS AND COMPENSATION OF THE LIQUIDATION COMMISSION	5
I. LEGAL STATUS.....	5
II. COMPENSATION OF LIQUIDATION COMMISSION	6
III. SELECTION OF LIQUIDATION COMMISSION.....	7
IV. INTERNAL STRUCTURE OF THE LC	8
1. Gaining control over the company.....	9
2. Gaining control over property (company).....	10
3. Control Assumed over Property Transferred to Other Entities.....	11
V. EFFORTS TO MAINTAIN THE PROPERTY VALUE.....	14
1. Introduction.....	15
VI. INITIAL EXPENSES OF THE LIQUIDATION COMMISSION	16
C. RELATIONSHIPS WITH THE CREDITORS.....	19
I. ESTABLISHMENT OF RELATIONSHIP.....	19
1. Introduction.....	19
2. Steps to establishment of relations with the creditors.....	19
II. PROCEDURES FOR RECEIPT AND CONSIDERATION OF THE CLAIM.....	21
III. CLAIM CONSIDERATION RESULTS	21
IV. CLASSIFICATION OF THE CLAIMS	22
1. Priority list. Concept of absolute priority.....	22
D. SPECIFIC PROBLEMS CONNECTED WITH OBLIGATION FULFILLMENT	22

I. CLAIMS OF ENTERPRISE STAFF FOR INJURIES COMPENSATION.....	23
1. Introduction.....	23
II. TRANSFER OF CLAIMS.....	25
1. Introduction.....	25
2. Grounds and Procedure for Claims Transfer:.....	25
3. Debt Transfer.....	26
III. CLAIMS IN THE FORM OF PROMISSORY NOTE.....	26
IV. PAYABLES COLLECTION IS AN OPPORTUNITY FOR BANKRUPT PROPERTY REPLENISHMENT.....	28
E. SALE OF THE ASSETS OF THE BANKRUPT.....	30
I. LEGAL PROVISIONS.....	30
II. THE AGENT.....	30
III. SELLING THE ASSETS AS A SINGLE UNIT OR IN PARTS.....	31
IV. TAXES.....	31
F. RELATIONS WITH COURT.....	31
I. POSSIBLE RESPONDENT SITUATIONS.....	32
II. POSSIBLE APPLICANT SITUATIONS.....	34
III. REPORTING REQUIREMENTS.....	35
G. COMPARISON OF LIQUIDATION PROCEDURES, CONDUCTED UNDER THE CIVIL CODE AND THE LAW ON BANKRUPTCY.....	36
I. THE PROCESS OF INITIATION OF A CASE.....	36
II. GROUNDS FOR INITIATION OF LIQUIDATION PROCEEDINGS WITH RESPECT TO A BUSINESS ENTITY.....	36
III. BODIES ENTITLED TO BRING A CLAIM FOR LIQUIDATION.....	37
IV. BODIES THAT EXECUTE THE DECISION ON LIQUIDATION.....	37
V. ADMINISTRATIVE COSTS PAYMENT.....	38
VI. DETERMINATION OF THE SCHEDULE FOR THE STAGES OF THE LIQUIDATION PROCESS.....	38
VII. REPORTING REQUIREMENTS.....	40
H. ANNEXES.....	41

APPENDIX 4

**Проект по банкротству и
реструктурированию USAID**

Буз-Аллен и Гамильтон

ВЕКСЕЛЬ

**СПРАВОЧНИК
ПО
ИСПОЛЬЗОВАНИЮ**
(проектный вариант)

**Автор: Игорь Ключников,
доктор экономических наук**

**Алматы
1996**

Предупреждение

Целью данного справочника является предоставление информации по вопросам, касающимся векселей и их использования. Тем не менее, авторы, редакторы и издатели справочника предупреждают, что он не может являться заменителем бухгалтерских, юридических или других профессиональных услуг. При необходимости юридической консультации или решении других вопросов обращайтесь к профессионалам.

13

Содержание

1.	Введение.....	3
2.	Что такое вексель?.....	5
2.1.	Природа векселей.....	5
2.2.	Типы векселей.....	6
2.2.1.	<i>Promissory note / Простой вексель</i>	6
2.2.2.	<i>Bills of Exchange / Переводной вексель</i>	6
2.3.	Основные участники вексельного обращения.....	7
2.4.	Формальные требования.....	7
2.5.	Выпуск векселя.....	8
2.6.	Выпуск векселя и определяющая его сделка.....	8
2.7.	Цена векселя.....	8
2.7.1.	Дисконт.....	9
2.7.2.	Номинальная цена.....	10
2.7.3.	Цена продажи.....	10
2.7.4.	Метод расчета процентной ставки (дисконта).....	10
2.8.	Как выписывать сумму обязательств.....	10
2.9.	Дата погашения.....	10
2.10.	Предъявление векселя.....	11
2.11.	Форма выписывания векселей.....	11
2.12.	Национальное и международное вексельное законодательство.....	11
3.	Как используются и работают векселя?.....	13
3.1.	Различия между векселем, появившемся на базе контракта, и векселем, основанном на просроченной задолженности.....	13
3.2.	Концепция долгового-вексельного свопа.....	14
3.3.	Вексельный рынок.....	15
3.3.1.	Первичный и вторичный вексельный рынок.....	15
3.3.2.	Вторичный вексельный рынок.....	16
3.3.3.	Организованный и неорганизованный вексельный рынок.....	16
3.3.4.	Объем вексельного рынка.....	16
3.3.5.	Главные участники рынка.....	17
3.3.6.	Переговорный климат на вексельном рынке.....	17
3.3.7.	Поиск покупателя.....	17
3.3.8.	Брокерское вознаграждение.....	17
3.3.9.	Выбор векселей трейдерами.....	18
3.3.10.	Структура вексельной сделки.....	18
3.3.11.	Передача и приобретение векселя посредством передаточной надписи.....	18
3.4.	Риск неплатежа.....	19
3.4.1.	Задержка выполнения условий по векселю.....	19
3.4.2.	Оценка перспектив вексельной программы.....	19
3.4.3.	Отношения между долгом, собственностью и векселем.....	19
3.4.4.	Риск неплатежа при проведении взаимопогашений. Долгов посредством обращения векселей.....	20
3.4.5.	Процедурные вопросы по усилению прав и возможностей владельца векселя.....	20
3.4.6.	Опись имущества неплатежеспособного эмитента векселя.....	21
3.4.7.	Приоритеты.....	22
3.4.8.	Качественные выпуски.....	22

3.5.	Гарантии/ Аваль.....	23
3.6.	Достоверность данных.....	24
3.7.	Временная структура векселя.....	24
3.8.	Оплата векселя.....	24
3.9.	Удостоверение собственности на вексель.....	24
3.10.	Ответственность по векселю.....	24
3.11.	Инфраструктура вексельного рынка.....	25
	3.11.1. Информация.....	25
	3.11.2. Регистрация.....	26
3.12.	Прозрачность рынка.....	27
4.	Как запустить и провести вексельную программу?.....	28
4.1.	Долги.....	28
4.2.	Создание векселя.....	28
	4.2.1. Как подобрать кандидатов для долгового-вексельного свопа.....	29
	4.2.2. Тактика переговоров при проведении трансформации долгов в векселя.....	29
	4.2.3. Документы по выпуску векселей.....	30
	4.2.4. Альтернативы выпуску векселей.....	30
	4.2.5. Создание возобновляемого вексельного соглашения.....	31
4.3.	Закрытие векселя.....	31
	4.3.1. Механизм закрытия.....	31
	4.3.2. Генеральные условия закрытия.....	32
	4.3.3. Многоразовое закрытие.....	32
	4.3.4. Условия погашения векселя.....	32
4.4.	Выпуск векселей.....	33
	4.4.1. Бизнес план выпуска векселей.....	33
	4.4.2. Структура выпуска векселей.....	33
4.5.	Алгоритм выпуска векселей.....	34
5.	Фондовый своп.....	36
	5.1. Концепция фондового свопа.....	36
	5.2. Преимущества вексельно-акционного свопа.....	36
	5.3. Своп долгов в акционерный капитал.....	36
	5.4. Регулирование свопа векселей в акционерный капитал.....	37
	5.5. Практика свопа векселей в акции.....	38
	5.6. Процедура голосования при свопе векселей в акции.....	38
	5.7. Процедура свопа векселей в акции.....	38

1. Введение

Недостаток денег и высокая цена кредита в Казахстане и в Киргизстане побуждают менеджеров компаний прибегать к двум методам выживания: бартеру и взаимному кредитованию. Однако бартер чрезмерно громоздок; взаимное же кредитование чаще всего является принудительным методом (покупатель принуждает своих поставщиков предоставить ему кредит только потому, что он не в состоянии заплатить за продукцию). Данные методы во многом уже утрачивают свою практическую ценность: они исчерпали пределы своего развития. Тем не менее, у компаний сохраняется недостаток денег, а кредит остается дорогим удовольствием. Что должен предпринять управляющий в таких условиях?

В Справочнике делается попытка найти ответ на данный вопрос через описание механизма использования такого известного финансового инструмента как векселя. Вексель фиксирует право (обязательство) одного (юридического или физического) лица заплатить другому определенную сумму денег на определенную дату. Данный инструмент и само право оплаты продаются и покупаются.

При определенных условиях векселя практически заменяют деньги, а также наделяют предприятия более эффективными и надежными средствами для расширения границ кредитования друг друга. Более того, предприятия-должники могут использовать векселя в качестве средств, побуждающих кредиторов пролонгировать кредит или производить взаимозачет определенной части долга. В свою очередь кредиторы посредством перевода долговых обязательств несостоятельного должника в вексельную форму фиксируют и подтверждают свои притязания (требования), а также переводят их в подвижную форму, способную обращаться на рынке.

За последние пять лет в России использование векселей существенно возросло. В настоящее время они стали играть чрезвычайно важную роль в общем экономическом развитии. Тем не менее, в Казахстане можно отметить лишь несколько попыток использования векселя; в Киргизстане намечаются только намерения создания вексельного обращения.

Какие важные функции векселя выполняют в обществе, которые придают их существованию такую значимость, особенно в переходных экономиках? Могут ли они помочь процессу стабилизации неплатежеспособных предприятий? И если могут, то как они это делают? В брошюре даются ответы на данные вопросы и описываются механизмы введения вексельного рынка в Казахстане и в Киргизстане с целью реструктуризации долгов, проведения взаимозачета просроченной задолженности и осуществления финансовой стабилизации предприятий.

Особенности Справочника

В справочнике сделана попытка сосредоточить в одном месте вопросы трансформации долгов в вексельную форму, а также процедуры выпуска, размещения и торговли векселями. В нем рассматриваются правила, ставятся проблемы и механизмы их решения в связи с раскрытием данных процедур. Справочник не ставит целью описать историю развития векселей в переходной экономике, критически оценить действующее вексельное законодательство или дать предложения по его реформированию и развитию торговли долгами. Справочник представляет собой сжатое изложение механизмов трансформации долгов в вексельную форму и практики торговли векселями. Каждый участник вексельного рынка может обращаться к справочнику как к полезному путеводителю в данной сфере.

С целью экономии места и концентрации внимания на процедурных вопросах в справочнике упомянуто только весьма ограниченное число конкретных случаев вексельного обращения и замены долгов векселями. Фактически все примеры взяты из практической жизни. Существенным является то, что Справочник содержит данные о ведущих участниках рынка. Эти данные были собраны в ходе оказания им технической помощи в налаживании вексельного обращения. В справочнике содержится также краткий и неполный обзор российской практики и анализ перспектив ее применения в Казахстане и Киргизстане.

Используя основную информацию по вексельным делам в сочетании с конкретным поэтапным подходом должники, вексельные эмитенты, брокеры, кредиторы и инвесторы получают как базу для понимания и оценки механизмов выпуска и организации торговли векселей, так и путеводитель для запуска программ трансформации долгов в вексельную форму.

*Организация
Справочника*

Организация справочника отражает неразвитость вексельного рынка в Казахстане и в Киргизстане, а также способы его развития в наиболее важной части - в сфере трансформации долгов в вексельную форму и взаимопогашения долгов посредством организации обращения векселей. Справочник написан так, что вторая часть может быть опущена опытным читателем без отрицательного воздействия на проведение вексельной программы. В ходе подготовки выпуска векселей главы 3, 4 и 5 можно использовать только как справочный материал.

2. Что такое вексель?

Основная идея

В той или иной форме компании всегда используют обещания заплатить деньги. Практически в каждом контракте существует по меньшей мере одна статья, в которой рассматриваются вопросы, связанные с обещанием заплатить. Эта статья может быть обособлена от основного контракта и приступить к самостоятельному существованию (также в форме контракта). Если контракт-обязательство заплатить деньги составлен так, что его можно передавать из рук в руки (обращать его), то он сможет обслуживать различных участников рынка.

Обращаемый на рынке контракт-обязательство обладает особо привлекательными для различных сторон свойствами, которые превращают его в весьма полезный инструмент финансовой и торговой сфер. Целью данного контракта является гарантирование платежа, что и превращает его в важный инструмент создания, перемещения и удовлетворения различных финансовых обязательств.

Вексель

- это наиболее известная и широко используемая форма обращаемого контракта. Он часто используется в качестве эквивалента платежа. Однако в отличие от денег, вексель не является "законным платежным средством", хотя он и обслуживает многие сделки в форме денег. Вексель используется на добровольной основе при наличии согласий (договоренности) между продавцом и покупателем, должником и кредитором.

2.1. Природа векселей

Векселя выступают
в качестве
ссуд

- по ним выплачивается процент и они представляют собой обещание выплатить занятую сумму в конце срока. Однако они обладают дополнительной особенностью, которая и делает их такими привлекательными для кредиторов - векселя могут продаваться и покупаться до срока погашения ссуды, то есть они обращаются. Кредиторы посредством векселя получают обращаемую расписку с указанием суммы, выплачиваемой в конце срока ссуды. Если кредиторам необходимо получить деньги раньше срока погашения ссуды, они могут продать векселя на рынке другим кредиторам, которые готовы их купить.

Векселя выступают
в качестве
ценных бумаг

- они служат как облигации. В силу того, что облигации обращаются, до срока своего погашения они продаются любое число раз на вторичном рынке. Корпоративные облигации - это долговой контракт (контракт-обязательство), в котором должник обязуется производить периодические платежи по выплате процентов и вернуть занятую сумму денег при завершении срока контракта. По своей природе вексель более близок к специальным долговым обязательствам корпораций - закладным. Однако в отличие от ценных бумаг векселя не регистрируются Национальными комиссиями по ценным бумагам. Выпуск и обращение их происходит свободно, но регулируется Национальными банками. Вексель - это краткосрочный инструмент, по которому выплачивается занятая сумма и процент одновременно в конце срока ссуды.

Векселя выступают
в качестве
контрактов

- они представляют собой обязательство. Каждый вексель имеет безоговорочное (безусловное) обещание заплатить деньги в соответствии с условиями, отраженными на векселе. В отличие от контракта вексель чрезвычайно стандартизирован, четко определен по форме и обращаем.

В целом векселя представляют собой, с одной стороны, фондовые ценности, а с другой стороны, коммерческие обязательства (бумагами).

В Гражданском законодательстве России, Казахстана, Киргизстана, Украины, Молдовы вексель определяется как ценная бумага. Однако вексель в этих странах регулируется Национальными банками как денежный инструмент (и рассматривается как коммерческий документ).

Прежде всего вексель - это контракт. Он обладает силой обязательства заплатить деньги.
Во-вторых, вексель - это собственность. Право владения может передаваться.

Узловое требование Центральное требование для обращения векселя - безусловное обещание или безусловный приказ заплатить фиксированную сумму денег с или без процента (номинал, указанный на векселе).

2.2. Типы векселей

В обычной сделке производитель продает товары и получает платеж от покупателей чаще всего через 30-90 дней по расписке. Вексель может выполнять функции такой расписки. В таком случае он выступает как свидетельство о долге. Нередко у должника отсутствуют средства для погашения своего долгового обязательства. В таком случае он посредством выдачи кредитору векселя получает временное облегчение. Вексель бывает простым (в англоязычных странах - письменное обещание / promissory note) и переводным (переводной счет / bill of exchange).

2.2.1. Promissory note / Простой вексель

Promissory note (письменное обещание) - это инструмент, представляющий собой письменное обещание заплатить деньги лицом, выписавшим данную расписку. Письменное обещание может быть в самых разнообразных формах (в отличие от векселя у письменного обещания отсутствует строго регулируемая форма документа), которые определяются его целями, договоренностями сторон и другими факторами. Обещание может быть выданным с оплатой или на конкретную дату, или по предъявлению.

Простой вексель выполняет те же функции, что и письменное обещание в англоязычных странах и, в основном, выглядит таким же образом, как и последний инструмент. Однако вексель отличается от письменного обещания тем, что первый представляет собой чрезвычайно определенный формализованный документ, сама форма которого регулируется законом.

2.2.2. Bills of Exchange / Переводной вексель

Bill of Exchange (известен также под названием Draft) / переводной счет - это инструмент, который скорее предписывает заплатить деньги, чем обещание сделать это в будущем. Переводной счет принципиально отличен от письменного обещания следующим: (а) счет не включает в себе выражение обещания заплатить; (б) выписавший счет дает указание третьему лицу заплатить деньги по счету; (в) получивший предписание заплатить деньги не обязан оплачивать до момента акцепта им счета (или принятия счета к погашению).

Переводной вексель выглядит во многом как переводной счет - выпустивший переводной вексель дает указание третьему лицу заплатить определенную сумму денег векселедержателю или по предъявлению векселя или на определенную дату. Векселя покупаются и продаются, то есть их можно передавать от одного держателя другому. Переводной же счет имеет только трех участников и в ходе своей жизни не меняет первоначального владельца.

2.3. Основные участники вексельного обращения

У простого векселя (promissory note) два основных участника:

- Эмитент - лицо, которое выписало вексель;
- Владелец - лицо, которому эмитент должен заплатить.

У переводного векселя три основных участника:

- Эмитент - лицо, выписавшее вексель;
- Платательщик - лицо, которому эмитент дает указание уплатить;
- Владелец - лицо, получающее причитающуюся по векселю сумму.

Наряду с основными участниками в ходе вексельного обращения могут быть и другие стороны:

- Акцептант;
- Промежуточный владелец;
- Гарант;
- Индоссант;
- Брокер.

2.4. Формальные требования

Предполагаемый должник или покупатель выписывает вексель и предлагает его другому лицу. Однако, никто никого не принуждает принять вексель. Решения выпустить и принять вексель определяются свободным волеизъявлением двух сторон и являются результатом их переговоров и соглашения. Однако, как только вексель появляется, специфические правила определяют процедуру его выпуска, обращения и погашения.

Прежде чем рассмотреть эти правила, следует обратить внимание на то, как они появились. В 1995 году Казахстан по Указу Президента № 2418 присоединился к международному договору, который устанавливает общие правила для векселей. В соответствии с Конституцией правила международных договоров применяются непосредственно, если только международный договор сам по себе не требует принятия отдельного закона. Таким образом, для Казахстана правила, установленные международным договором, служат основой для использования участниками вексельного обращения. Киргизстан еще не присоединился к международному договору, однако предполагает сделать это в ближайшее время.

Международный договор об универсальном законе о векселях устанавливает процедуры выписывания векселя (включая его бланковую форму), передаточных надписей и требования к векселедержателю по необходимым шагам для предъявления векселя к погашению. Эти процедуры чрезвычайно точны и, если лицо, выписавшее вексель, не погашает его, то векселедержатель при предъявлении претензии через суд должен проследить их четкое выполнение. Только в таком случае вексель может быть признан действительным.

Вексель содержит следующие формальные требования:

1. Текст векселя должен включать сам термин "вексель";
2. Вексель должен заключать безусловное указание заплатить определенную сумму (сумма денег проставляется в цифрах и указывается словами);
3. На векселе делаются две подписи эмитента: директора компании и главного бухгалтера. Факсимильные подписи считаются недействительными; на векселе ставится официальная печать выписавшего вексель;
4. На векселе указывается дата его выпуска и дата или период времени до даты погашения;
5. На векселе указывается место погашения векселя, если его нет, то наименование компании, выпустившей вексель, и ее адрес.
6. На векселе указывается наименование компании, выпустившей вексель.

Данные требования по выпуску векселя являются существенными. Если одно из них не выполнено, то вексель признается недействительным. Кроме обязательных реквизитов вексель может иметь и дополнительные надписи (например, место платежа, указание плательщика, акцепт плательщика, гарантию, передаточную надпись и т.п.).

2.5. Выпуск векселя

Следует различать следующее:

- акт подписания векселя (должны быть две подписи);
- размещение любых других письменных распоряжений на векселе;
- передача держателю подписанного векселя.

Передача подписанного векселя представляет собой выпуск векселя.

Вексель передается с целью выпуска, если выписавший его передает право на его владение по совместному согласию первому держателю.

2.6. Выпуск векселя и определяющая его сделка

Следует различать выпуск векселя и определяющую этот выпуск бизнес-операцию (если, конечно, не выпускается вексель с целью привлечения краткосрочного капитала). Последняя может существовать в следующих трех основных формах:

- контракт на покупку (практически любой торговый, транспортный, страховой или финансовый контракт), в котором определяется оплата посредством векселя;
- старые (в основном, просроченные) обязательства, которые трансформируются в вексельную форму;
- кредитное соглашение (по своей сути является одной из форм финансового контракта), по которому указывается, что заем предоставляется и/или погашается векселем.

Две операции - (1) основная сделка и (2) выпуск векселя - должны быть полностью разьединены. Выпуск векселя - полностью самостоятельная операция.

2.7. Цена векселя

Цена векселя (процент или дисконт) и другие расходы, взимаемые лицом, выписавшим вексель или/и передающим его в другие руки, зависит от ряда факторов. Среди них, прежде всего, существующая банковская процентная ставка, текущая и прогнозируемая экономическая среда, а также проблемы и механизмы погашения векселя. В основном цена векселей зависит в значительной мере от оценки риска и вознаграждения, которые ожидают брокеры.

Когда речь идет о цене важно отметить, что это цена тех преимуществ, которые предоставляются векселедержателем лицу, выпустившему вексель, то есть возможность отсрочить платеж. Существуют два способа, посредством которых эмитент оплачивает такие преимущества. Наиболее

известный метод - оплата через *процент*. Другой, менее известный, но превращающийся в типичный, - оплата через *дисконт*. Посредством последнего метода эмитент наделяет вексель номиналом, например, в 1000 единиц, но выпускает его в обмен на долговые обязательства за 900 единиц. Расходы, которые несет и оплачивает эмитент за возможность отложить платеж, составляют 100 единиц (разница между тем, что он получил и тем, что он, в конечном счете, оплачивает), которые эквивалентны выплате процента на вексель с процентной ставкой в 10%.

На ранней стадии развития векселя, как правило, выпускались с процентной ставкой. Сегодня типичный вексель имеет дисконт. В России банки иногда продолжают выпускать процентные векселя, которые по своей природе являются банковскими сертификатными депозитами. Та же самая тенденция заметна и в Казахстане (например, Народный Сберегательный Банк, Алем Банк выпустили процентные векселя). Однако, многие банки используют векселя с дисконтом. Например, Темир Банк предлагает иногда своим клиентам подписывать дисконтные векселя в качестве условия предоставления кредита. Пытаются выпускать дисконтные векселя предприятия, местные и центральные органы власти. В России отличия в процентном и дисконтном векселе существенны с точки зрения различия налогообложения. Держатель процентного векселя платит налог на доход, полученный от векселя, из прибыли; держатель дисконтного векселя не платит налог на доход от векселя, так как номинал, предоставленный на векселе, обеспечивает возмещение старых вложений и, соответственно, убытков кредитора.

2.7.1. Дисконт

Цена векселя определяется следующими обстоятельствами:

1. Банковской процентной ставкой.
2. Типом векселя. Цена правительственного векселя, как правило, выше, чем векселя, выпущенного частной компанией.
3. Уровнем ликвидности векселя. Чем больше спрос и предложение на вексель, тем при общих равных обстоятельствах цена на него выше.
4. Уровень развития торговли векселями. Чем больше сделок совершают трейдеры, тем меньше дисконт (или процентная ставка) и ниже брокерские комиссионные.
5. Вероятностью платежа по векселю и уровень доверия к (а) эмитенту; (б) гаранту.
6. Развитостью информационной системы. Важно иметь развитую информационную систему, которая обеспечивает брокеров и инвесторов, а также потребителей услуг и покупателей товаров (во многих случаях покупатели векселей хотят иметь дисконт на цены некоторых услуг и товаров) необходимыми ценовыми характеристиками и финансовыми данными об эмитенте.

Цена (дисконт или процентная ставка) векселя имеет региональный и отраслевой аспект; отличается она также по эмитентам и по различным выпускам одних и тех же эмитентов; есть различия исходя из методов (местной валютой, конвертируемой валютой или товарными поставками и оказанными услугами) и места погашения векселя. В среднем дисконт и процентная ставка (в дальнейшем используется только понятие дисконт) ниже в крупных вексельных центрах; она также ниже для векселей, выписанных в валюте и выпущенных хорошо известными эмитентами.

Нередко векселя продаются значительно ниже номинальной цены. При прочих равных обстоятельствах это определяется недостаточно развитым вексельным рынком. В таких случаях кредиторы при реализации векселя компенсируются значительно ниже оптимально возможного уровня. Поэтому создание и развитие вексельного рынка помогает оптимизировать ценовые параметры движения векселей.

В переходных странах реальный дисконт чрезвычайно неустойчив и подвержен сильным колебаниям. Однако, постепенно его движение стабилизируется и он становится меньше. Это позволяет шире использовать вексель при финансовом планировании и привлечении оборотного капитала, а в отдельных случаях и инвестиций.

2.7.2. Номинальная цена

Номинальная цена векселя определяется по обоюдному согласию должника и кредиторов; ее базой является обязательства должника, включая погашения первоначальной основной суммы, процентов и (если включаются) штрафов, экстраполированных до времени погашения векселя. На практике штрафы и частично проценты (особенно с момента выдачи векселя) не включаются в номинальную стоимость векселя. Однако, первоначальные затраты кредитора всегда являются основой номинальной цены векселя.

2.7.3. Цена продажи

Цена продажи состоит из цены выпуска и рыночной цены:

- Цена выпуска - стартовая (начальная) цена - это цена размещения векселя. Данная цена является договорной. Общая сумма цен выпуска (цен размещения векселя) равна общей сумме долга, а также процентной ставки (по крайней мере ее части) на время обращения векселей. На практике цены выпуска ниже обязательств должника;
- Рыночные цены основаны на действующей банковской процентной ставке и уровне риска неплатежа.

2.7.4. Метод расчета процентной ставки (дисконта)

Невозможно приравнять дневную процентную ставку и месячную. Необходимо указывать ту или другую. Наиболее общей практикой является выписывание векселей в днях и, соответственно, подсчет сумм причитающихся процентов в днях. Текущая цена векселя рассчитывается путем деления причитающихся процентов за весь срок жизни векселя на число дней и затем полученную сумму, представляющую из себя дневную ставку относят к величине общей основной задолженности и умножают на количество дней, прошедших с момента начала жизни векселя, и все это присоединяется к основной задолженности.

Например, вексель с номиналом в 1000 единиц выпущен на 90 дней с доходом 18% продается на 40-й день своей жизни. Его текущая цена определяется следующим образом:

$$18\% \div 90 = 0,2\%; \quad 0,2\% \times 1000 \times 40 \div 100\% = 80; \quad 80 + 1000 = 1080$$

2.8. Как выписывать сумму обязательств

В зависимости от соглашения между должником и кредиторами сумма обязательств может проставляться для каждого кредитора в общей сумме задолженности и погашаться всем кредиторам в один и тот же день или же выпускается серия векселей (на стандартную сумму), каждый погашается в одно и то же или различное время (например, через три, четыре, пять, шесть месяцев). Выбор более одного периода времени погашения зависит от прогнозирования времени поступления необходимых средств должнику (на основе бизнес-плана). Единый день погашения всех векселей лучше подходит трансформации векселей в акции.

2.9. Дата погашения

День погашения векселя указывается на векселе или рассчитывается от даты его выпуска, с учетом срока, на который он был выпущен. Если день погашения приходится на субботу, воскресенье или праздники, то погашение происходит на следующий рабочий день.

2.10. Предъявление векселя

К погашению вексель предъявляют в месте платежа. Если на векселе не указано место погашения, то местом платежа считается место нахождения эмитента.

Вексель предъявляет к платежу последний его держатель или его агент/брокер/банк.

Если вексель не предъявлен к погашению на указанный день или на следующий рабочий день (во многих странах закон устанавливает три рабочих дня), то становится сложно предъявить обоснованный протест к невыполняющему обязательству эмитенту векселя. Задержка в оформлении отказа плательщика произвести погашение векселя (или не должное оформление) может значительно осложнить или даже лишить держателя векселя права предъявлять претензии к плательщику.

2.11. Форма выписывания векселей

Векселя обычно выписываются на специальных бланках. Однако появляется тенденция к бездокументарной форме векселей. Причем сторонники бездокументарных векселей считают, что они облегчают процесс перемещения к новым владельцам и, следовательно, являются более ликвидными. В России на учредительном собрании Национальной ассоциации участников вексельного рынка (октябрь 1996 г.) решили, что необходимо разобраться с сущностью бездокументарного векселя и оценить его соответствие Женевским вексельным конвенциям.

2.12. Национальное и международное вексельное законодательство

Казахстанское вексельное законодательство в основном базируется на трех Женевских вексельных конвенциях 1930 года.

- Конвенция, обеспечивающая Универсальный закон для переводных векселей (*Bills of Exchange*) и простых векселей (*Promissory Notes*).
- Конвенция по урегулированию определенных законодательных конфликтов, связанных с функционированием переводных и простых векселей.
- Конвенция о Законах о марках (гербовых сборах), связанных с переводными и простыми векселями.

Казахстан ратифицировал Конвенции в 1995 году. Киргизстан готовится к такой ратификации (вероятно, ратификация произойдет в 1997 году). В Казахстане подготовлен проект Закона о векселях, который в целом соответствует Универсальному закону 1930 года.

Однако форма любого контракта, права и обязательства, возникающего из векселя, регулируется национальным законодательством каждой страны обращения векселей.

Резюме

Роль векселя сводится, с одной стороны, к фиксации в определенной и универсальной форме обещания заплатить, а с другой стороны, к возможности обращения данного обязательства (обращения претензии кредитора к должнику). Чем эффективнее происходит обращение векселей на рынке, тем проще он может выполнять свои функции. Полезность векселя определяется его использованием в качестве средства, обеспечивающего должника рабочим капиталом, способствующего

предприятию решать проблемы своей неплатежеспособности и устранять просроченные долги.

Выпуск векселей является одним из наиболее важных предусловий для развития оптовой торговли и краткосрочного финансового управления предприятием. Трансформация долга в вексельную форму оказывает существенное воздействие на развитие неплатежеспособных предприятий, в том числе во многих случаях способствует и даже непосредственно решает проблемы погашения задолженности (в том числе, посредством клиринга их взаимных претензий). Вексель обеспечивает систему отношений должник-кредиторы мощным универсальным инструментом, который как подтверждает, так и укрепляет их отношения и обязательства. Кроме того, один вексель может встретить другой вексель с противоположными по отношению к эмитенту первого векселя обязательствами. В результате происходит зачет обязательств. Более того, вексель предоставляет предприятию определенное время (время своей жизни) для оздоровления и, в отдельных случаях, трансформирует долговые обязательства в форму акционерного капитала (в инвестиции).

3. Как используются и работают векселя?

Вексель содержит безусловное письменное распоряжение осуществить платеж одной стороны другой. Распоряжение заплатить определенную сумму денег или по предъявлению или через определенный промежуток времени. Вексель можно использовать при переговорах о замене существующих просроченных обязательств должника новыми. Эти новые обязательства представляют собой (а) четкое свидетельство о долге, (б) продаются и покупаются, (в) более легко и надежно, чем обычный контракт, предъявляются ко взысканию.

3.1. Различия между векселем, появившемся на базе контракта, и векселем, основанном на просроченной задолженности

Как правило, векселя можно использовать практически при каждом виде коммерческой деятельности. Например, Национальная энергетическая система Казахстана выпустила два типа векселей для урегулирования взаимных долговых претензий: документарные (оператор - инвестиционная компания "Тенир") и бездокументарные (оператор - инвестиционная компания "Интерсток"; депозитарий - Крамдс Банк). Большинство векселей выпускается для удовлетворения специфических потребностей:

- если вексель выпущен на основе обычного контракта (например, на поставку товаров или оказания услуг), то он обслуживает данную сделку;
- если вексель выпущен в результате переговоров о трансформации обычной просроченной задолженности в вексельную форму, то он может оздоровить отношения между должником и кредитором, способствовать восстановлению платежеспособности должника и в ряде случаев взаимопогашения части задолженности или трансформации ее в акционерную форму.

Несмотря на то, что два вида векселей неразрывно связаны друг с другом, они различаются как вполне независимые составные части прав системы "кредитор-должник". В данном справочнике мы имеем дело со вторым видом векселей - выпущенных в результате замены обычных просроченных долгов векселями. Однако, в тех случаях, когда для лучшего понимания или описания механизмов выпуска и обращения векселей требуется представить общую картину и процедуру движения векселей, мы обращаемся и к первому типу векселей (выпущенных на основе обычного товарного, страхового, транспортного или финансового контракта).

Кредитору удобнее обменять старый долг на вексель, чем обращаться в суд с претензией на должника. Во-первых, при обмене должник подтверждает свою добрую волю вернуть долг (проявляет своеобразную лояльность к долгу и кредитору), что чрезвычайно важно в случае, если должник является постоянным клиентом кредитора; во-вторых, кредитор получает возможность использовать вексель для погашения своих обязательств; в-третьих, кредитор может продать вексель и получить деньги до истечения срока платежа; в-четвертых, кредитор может под залог векселя получить кредит в своем банке.

3.2. Концепция долгового- вексельного свопа

Целью долгового-вексельного свопа является привлечение вполне осязаемого и мощного средства для разрешения задолженности - используя основные функции векселя, договорности и подвижности, можно погасить достаточно многие просроченные обязательства.

В тех пределах, в которых вексельная система способна обеспечивать краткосрочные финансовые потребности пользователей, цели и концепции трансформации долгов в векселя, непосредственно выпуск векселей, их обращение и организация торговли ими находятся под общим воздействием массовой неплатежеспособности предприятий, недостатком оборотного капитала, негибкостью банковской системы и непопулярностью вопросов, связанных с ликвидацией предприятий.

Для организации долгового-вексельного свопа необходимо иметь, с одной стороны, векселя и их рынок, а с другой стороны, процедуры трансформации долгов в вексельную форму и взаимопогашения долгов посредством обращения векселей.

В процессе взаимопогашения долгов вексель выступает преимущественно как обычный долг в любой другой сфере - сумма денег, определенная на бумаге, должна быть возвращена на определенную дату и с определенным процентом. Главным преимуществом векселя выступает то, что он может более легко продаваться и покупаться, к тому же его не надо держать в одних руках весь период кредитования. Эта особенность векселя придает ему дополнительную силу, превращает его в важный инструмент взаимопогашения долгов и привлечения дополнительных кредиторов.

Если определять более широко, то долгово-вексельный своп выступает как трансформация долгов компании в стандартную и договорную форму. Это означает, что закон предоставляет любому лицу, получившему в результате такого свопа вексель, приобретать неотъемлемые, свободные от претензий безусловные права требовать от должника указанные в векселе суммы денег в строго определенные сроки. Развитие векселя идет в ногу как с бурными технологическими изменениями в торговом пространстве, так и с развертыванием платежного кризиса. В настоящее время вексель превратился в важный инструмент урегулирования просроченных долговых обязательств. Фондовые биржи и информационные системы также как и брокеры обеспечивают поступление данных о номинальных и текущих ценах, спросе и предложении и реальной ликвидности векселей. В конечном счете, векселя смогли бы сформировать особый огромный сегмент денежного рынка в Казахстане и Киргизстане.

! — Чисто механическое применение процедур трансформации долгов в вексельную форму не всегда достаточно результативно. Без устойчивой и крепкой платежной системы многие по существу жизнеспособные предприятия могут и впредь становиться неплатежеспособными в силу цепной реакции. Можно составить отдельные цепочки неплатежей и произвести взаимозачет по ним. Посредством выпуска векселей данная процедура значительно упрощается и ускоряется. В целом ряде случаев векселя могут разорвать порочный круг несостоятельности и способствовать трансформации предприятий в платежеспособные. Однако далеко не все долги в составленных цепочках можно погасить только посредством одного выпуска векселей. Многие цепочки взаимных претензий могут погаситься посредством организации специальных кредитных линий.

— Массовые эмиссия и размещение векселей в условиях неустойчивой платежной системы может навлечь дополнительные расходы для поддержания системы обращения векселей. Недостаток в экспертизе и дисциплины как выпуска векселей, так и взыскания причитающихся по ним денежных средств, а также отсутствие четких правил по субординации долгов, могут навлечь дополнительные социальные расходы для поддержания обращения векселей.

3.3. Вексельный рынок

3.3.1. Первичный и вторичный вексельный рынок

Как первичный, так и вторичный вексельный рынки не являются рынками с жестким регулированием.

В последнее время заметны попытки наладить выпуск векселей строго для внутренних целей: для обращения и взаимопогашения долгов внутри холдинговой компаний, отдельных отраслей или регионов. Однако есть примеры, когда так называемые внутренние векселя функционируют недостаточно гладко. Например, объединенный железнодорожный вексель в России, который был выпущен в надежде, что он заменит векселя отдельных железных дорог и будет обращаться только внутри системы для взаимопогашения внутреннего долга. Однако векселя отдельных железных дорог остались на рынке в силу их большей гибкости (брокеры и различные внешние по отношению к железной дороге компании проявляют повышенный интерес к данным векселям). Постепенно и объединенный вексель стал более гибок (наметились пути участия в его движении клиентов железных дорог).

В настоящее время вексель все еще не используется достаточно широко как средство коммерческого кредитования. В Казахстане можно отметить по меньшей мере две попытки выпуска векселей с целью предоставления ссуд векселедержателям: Продовольственный (зерновой) вексель, который был выпущен для кредитования фермеров, и вексель Темир Банка, выпущенный для кредитования клиентов банка при общем недостатке у банка кредитных ресурсов. Однако, вексель все еще практически не используется для кредитования торговли и, таким образом, пополнения рабочего капитала эмитента. Совсем недавно множество новых компаний выпускали векселя для аккумуляции капитала и сбора средств населения. В дальнейшем многие компании стали смотреть на вексель как на удобное средство взаимопогашения долговых обязательств. Однако, вексель не используется до тех пор, пока долги не становятся просроченными. До момента наступления просрочки кредиторы и должник совсем не уделяют внимания долгу и его возможности трансформации в вексельную форму. Однако, вексель (а) обладает свойством более четко предъявлять денежные претензии к должнику, (б) является договорным инструментом, покупается и продается на особом рынке, (в) может быть использован как средство платежа, (г) может произвести взаимный зачет претензий, (д) в развитой банковской системе учитывается в банках. Очевидно, что данная роль векселя не может быть полностью учтена при всем многообразии вексельного обращения в каждом конкретном случае. В настоящее время центральным моментом развития векселей является их способность смягчить платежный кризис и в целом ряде случаев оздоравливать несостоятельные предприятия. По своей природе вексель не является всеобщим целительным средством; он только способствует разрешению многих тупиковых ситуаций, связанных с неплатежеспособностью предприятий. В этом своем качестве он вполне полезен, особенно с учетом углубляющегося платежного кризиса и массовой несостоятельности предприятий. Обращая внимания на данную его полезность, мы, в основном, заняты вопросами выпуска векселей для реструктуризации долгов. Эти же вопросы наиболее актуальны и для

участников вексельного обращения; во многом, именно с учетом данных направлений использования, вексель служит первичный и вторичный вексельный рынок.

В Казахстане и в Киргизстане вторичный вексельный рынок или совершенно неразвит или же находится на стадии становления. И это не удивительно, поскольку первичный рынок векселей также еще только делает свои первые шаги.

3.3.2. Вторичный вексельный рынок

Должник выпускает вексель с целью трансформации долга в новую подвижную форму. Получив вексель, его владелец может его продать. Так векселя начинают обращаться на вексельном рынке, посредством которого регулярно могут меняться держатели векселя. Сам факт наличия рынка, на котором векселя продаются и покупаются, является важным предварительным условием для согласия кредиторов трансформировать долг в вексельную форму. Торговля на вексельном рынке (на котором цены колеблются в соответствии со спросом и предложением) создает основу для спекулятивной работы с целью покупок векселей на чрезвычайно короткий срок. Спекулянты, как и брокеры способствуют развитию рынка посредством повышения уровня ликвидности векселей - чем больше покупателей и продавцов на рынке, тем легче кредитору вернуть свои вложения, а новому инвестору найти наиболее выгодные направления вложений.

3.3.3. Организованный и неорганизованный вексельный рынок

В целом вексельный рынок менее организован, чем фондовый рынок. Для этого есть свои причины:

- вексель - чрезвычайно гибкий инструмент, который может поддерживать и сопровождать практически любую торговую сделку (как небольшую и среднюю, так и крупную; в любом месте и на любой промежуток времени; в торговле, обслуживании, на транспорте, при страховании и в финансовой сфере);
- в некоторых случаях вексель представляет собой результат конфиденциального соглашения между кредитором и должником и в силу этого его переход к новому кредитору возможен лишь со значительными оговорками и с большой предосторожностью;
- способ перехода векселя из рук в руки вполне отличим от способа смены владельца акции или облигации; в основном векселя находят свой путь на основе разделения труда и каналов оптовой торговли.

3.3.4. Объем вексельного рынка

Существует недостаток информации о масштабах вексельного рынка. Однако, по некоторым оценкам, его еженедельный оборот (по той части векселей, которая находится в различных информационных сетях) в Санкт-Петербурге составляет около 5-7 млн. американских долларов, в Москве - 12-15 млн. (Санкт-Петербургский и Московский рынки охватывают порядка 80% всего регистрируемого оборота векселей в России) и в Алматы - не более 100 тыс. долларов. В Казахстане основными участниками вексельного рынка являются три банка (Казкоммерцбанк, Туранбанк и Народный Сберегательный Банк), а также три-четыре инвестиционные компании. Как правило, банки торгуют векселями с чрезвычайно узким кругом клиентов, с которыми достигнуты определенные доверительные отношения. Если в России на вексельном рынке заняты сотни брокерских компаний и банков, тысячи индивидуальных брокеров предлагают свои услуги и почти все они находят необходимое дело, то в Казахстане, а также и в Киргизстане все еще отсутствует необходимая масса участников рынка (однако достаточно

большое число брокеров и компаний проявляют значительный интерес к вексельной торговле). В России существует регулярная котировка (дневная, а по отдельным сетям на 9 часов утра, 12 и 16 часов 30 минут) по сотням векселей, а также передается информация об эмитентах, держателях и брокерах (причем, информация имеется также в региональном и отраслевом срезах). Однако в Казахстане и в Киргизстане все еще отсутствует необходимая для развития вексельного рынка информация, также чрезвычайно сложно получить любую информацию о кредиторской и дебиторской задолженности как отдельных акционерных обществ, так и отраслей и регионов. Отдельные российские участники вексельного рынка готовы поставить необходимый программный продукт и информацию для создания информационных сетей в вексельной сфере Казахстана и осуществить соединение с российскими сетями (например, Фондовый эмиссионный синдикат, Международный институт фондового рынка. Санкт-Петербург и Санкт-Петербургская фондовая биржа могут предоставить данные услуги бесплатно). Необходимая информация - это узловой момент процесса создания вексельной торговли в Казахстане и в Киргизстане.

3.3.5. Главные участники рынка

Общее утверждение о том, что держатели векселей являются кредиторами компаний, выпустивших векселя, далеко не всегда является правильным, особенно, если мы имеем дело с вексельным рынком. Права векселедержателей, их притязания и ответственность различаются в каждом конкретном случае. Спекулянтов только с очень большим допущением можно назвать кредиторами. Однако, они становятся главными участниками рынка и, по сути, наделяют вексель свойствами подвижности и ликвидности. Основными участниками рынка являются: вексельные торговцы [трейдеры] (брокеры и дилеры), кредиторы и потенциальные инвесторы. В основной своей массе трейдеры являются спекулянтами. Главная социальная ответственность спекулянтов - покупка и продажа векселей. Именно это делает вексель ликвидным инструментом.

3.3.6. Переговорный климат на вексельном рынке

Спрос и предложение на вексельных торговых площадках являются основными индикаторами состояния переговорного процесса между покупателями и продавцами. Переговоры скорее происходят при личных контактах; телефонный разговор нередко используется как на начальной стадии, так и на заключительной - для подтверждения каких-либо вопросов или обстоятельств. Во многих случаях продавец может оказать воздействие на потенциального покупателя только потому, что он гарантирует платежи по векселю (или "отоваривание" натурой векселя). В этих случаях продавец имеет особые тесные (рабочие) отношения или связи (например, является дочерней компанией эмитента) с эмитентом. В основном, брокеры специализируются на определенных видах векселей и пытаются зачастую заключать конфиденциальные договоры с эмитентами.

3.3.7. Поиск покупателя

Главный вопрос, который ставит кредитор при замене обычных своих притязаний к должнику на вексельные, сможет ли он найти на вексель покупателя. Потенциальный покупатель - центральный момент выпуска векселей. Вексельный же рынок, по сути дела, создает потенциальных покупателей.

3.3.8. Брокерское вознаграждение

Вознаграждение брокера в основном связано с размерами сделки и его участием (или гарантией) в погашении векселя. В России типичным брокерским вознаграждением является два-три процента. Когда объем сделки

чрезвычайно высок, процентная ставка может спускаться до 0,1%. В отдельных случаях вознаграждение может достигать пяти и даже десяти процентов.

3.3.9. Выбор векселей трейдерами

На выбор трейдерами векселей оказывает воздействие целый ряд обстоятельств. Они определяются наличием связей с должником, природой векселя, его сроком, наличием предполагаемого покупателя (другого брокера, кредитора или инвестора). Трейдер, прежде всего, определяет отношение эмитента к тому виду бизнеса или отрасли, к которым он имеет предпочтения. В России отдельные трейдеры являются экспертами в определенных отраслях промышленности и банковского дела. Можно различать трейдеров, занятых операциями с энергетическими векселями, векселями нефтяных и газовых компаний, металлургическими векселями, векселями железнодорожных и фрахтовых компаний, банковскими векселями, правительственными векселями.

Другим важным решением, стоящим перед трейдером, является как выступать по отношению к выбранным векселям: брокером или принять участие в финансировании и быть дилером.

3.3.10. Структура вексельной сделки

Вексельная операция на вторичном рынке включает тот же основной документ - вексель, на котором текущий владелец векселя делает передаточную надпись, по которой все права по векселю переходят к новому владельцу. Если на бланке векселя недостаточно места, то к нему прикрепляется дополнительный лист бумаги для совершения передаточной надписи.

Непереводное долговое обязательство (оно может иметь название "вексель", но не содержать неотъемлемых для векселя признаков) не позволяет законным образом передавать его новым владельцам. Для того, чтобы стать переводным обязательством - векселем - оно должно содержать безусловное обещание заплатить определенную сумму законному держателю векселя и иметь все реквизиты, необходимые для векселя.

Векселя рассматриваются как "немедленно доступные", если они доступны для использования покупателем в момент покупки или на другом этапе завершения сделки купли-продажи. Если существует Центральный депозитарный офис, Центральный регистратор и/или Клиринговый центр, поставка векселей наступает немедленно после их оплаты, если иное не предусмотрено в договоре. В отдельных случаях эмитент делает специальные оговорки о том, что реальный переход векселя в новые руки происходит только после уведомления эмитента текущим владельцем векселя (продавцом).

3.3.11. Передача и приобретение векселя посредством передаточной надписи

Вексель это документ-распоряжение. Именно поэтому он передается посредством передаточной надписи. Для передачи векселя существуют следующие формальные требования:

- Передаточная надпись должна быть сделана действующим законным владельцем векселя (и произведена собственной рукой руководителя организации и скреплена печатью); подпись должна быть проставлена на самом векселе или на прикрепленном к векселю документу. Обычно передаточная надпись ставится на обратной стороне векселя.
- Передаточная надпись должна идентифицировать нового владельца. Однако допускаются случаи, когда оставляется свободное место для дальнейшего заполнения новым владельцем векселя.

Передаточная надпись должна быть безусловной. Любое имеющееся на векселе условие рассматривается как ненаписанное. Передаточная надпись передает все права на вексель от действующего владельца к новому владельцу.

3.4. Риск неплатежа

3.4.1. Задержка выполнения условий по векселю

В начале 1990-х годов практиковалась длительная задержка платежа при погашении векселей и во многих случаях невыполнения обязательств по векселю (неплатеж). Это частично объясняло высокий уровень процентной ставки или значительный дисконт по векселям. В настоящее время в Польше, России и в Балтийских странах вексельный рынок более-менее стабилизировался и основные эмитенты выполняют свои обязательства достаточно пунктуально. Однако в Казахстане гладко совершаются только отдельные сделки. В стране существует значительное число нестабильных компаний. Некоторые из них смогли выпустить векселя и аккумулировать денежные средства. Целый ряд компаний, выпустивших векселя, не имели программ по использованию собранных денег и их возврату (как правило, такие компании не владели также необходимыми активами для реализации денежных средств и возврата причитающихся по векселям сумм). Фактически они банкроты. Однако крупные компании со значительными активами, но с отсутствием свободных денежных средств проводят выпуск векселей для финансовой реструктуризации задолженности в целях реставрации своей платежеспособности. При тщательной подготовке выпуска и размещения векселей, а в дальнейшем налаживании процесса их обращения такие компании, как правило, добиваются успехов.

3.4.2. Оценка перспектив вексельной программы

Владелец векселя ожидает вернуть вложенные деньги и получить согласованный процент (который определен как надбавка или дисконт векселя). Условия и статьи векселя следует определять так, чтобы помочь достичь предполагаемого результата.

Важно понять, что если в ходе проведения вексельной программы существует возможность банкротства должника, то маловероятно, что кредитор будет настаивать на трансформации долгов в векселя. В таком случае для кредитора может повыситься риск невозврата и ему можно рекомендовать работать над ликвидацией такого должника. Для оценки перспектив вексельной программы проводится большая подготовительная работа.

3.4.3. Отношения между долгом, собственностью и векселем

Если должник не возвращает деньги, то при наличии залога имущества кредитор может обратиться к собственности должника. Кредитор, который принял в обеспечение выданной ссуды имущество должника, может произвести следующие действия:

- (а) предъявить претензию к должнику;
- (б) предъявить претензию к собственности должника.

Вексель не означает, что кредитор имеет обеспечение или какие-либо гарантии. Если владелец векселя первым предъявляет претензии к невыполняющему свои обязательства должнику, то он может описать

собственность должника (для этого кредитору требуется нотариус и судебный исполнитель; кредитор может подготовить необходимые документы и совершить требуемые процедуры за две недели). Должник может ограничить действия кредитора по "захвату" своей собственности. Для этого ему необходимо погасить любую часть претензии кредитора.

По сути, для векселя не существует обеспечения. Однако при переходе векселя из рук в руки вексель может получить дополнительные гарантии от каждого держателя векселя. В таком случае последний владелец векселя в случае неплатежеспособности эмитента может перевести свои требования к первому векселедержателю (а затем по очереди ко всем остальным). При авале (гарантии) вексель получает дополнительное обеспечение. Более обеспеченный вексель имеет обычно банковский аваль. Однако, банки все еще редко ставят аваль на вексель, не так часто они совершают и другие операции с векселем. Банки еще не обладают необходимыми технико-организационными условиями для оказания подобных услуг клиентам.

3.4.4. Риск неплатежа при проведении взаимопогашений долгов посредством обращения векселей

Кредитор обменивает один вид обязательств должника (вытекающие из контракта или договора) на другой (вексель). Обмен происходит на добровольной основе. Кредитор предвидит возможность взаимопогашения долгов полностью или частично. В таком случае вексельный рынок становится важным инструментом погашения долгов. Должник (или кредитор, или тот и другой) составляет что-то вроде бизнес-плана выпуска векселей и взаимопогашения долгов. При дефиците данных, индикатирующих величину реального риска, очень сложно оценивать результат вексельного обращения и возможность погашения задолженности. Однако, имеются общие подходы, позволяющие определить возможность риска в связи со следующими обстоятельствами:

- банкротством компании. Должник после выпуска векселей может объявить о своем банкротстве (преднамеренное или фальсифицированное банкротство);
- задержкой при распределении векселей. Это затрудняет процесс проведения взаимозачета просто в силу дефицита времени;
- задержкой при погашении векселей;
- отсутствием на рынке взаимопогашающих векселей.

3.4.5. Процедурные вопросы по усилению прав и возможностей владельца векселя

Все действия, возникающие из обращения векселя, могут быть сведены к проведению специальной процедуры, то есть специфическим мероприятиям, позволяющим придать векселю дополнительную силу.

При предъявлении векселя к погашению должник не имеет права принимать во внимание обстоятельства, не вытекающие из самого векселя.

Первый держатель векселя должен сознавать, что эмитент может защищать свои права по формальным признакам векселя. Если эмитент не погасит вексель по причинам неплатежеспособности или не совсем правильного заполнения документа, претензия может быть предъявлена к первому держателю векселя.

Процедура использования прав по векселю чрезвычайно варьируется в зависимости от типа невыполнения обязательств по векселю, наличия и качества передаточных надписей, авали на векселе. Права по векселю используются следующим образом:

- добровольно;
- посредством нотариального уведомления при условии отказа должника выполнять обязательства при наступлении срока платежа;
- через суд.

При отказе эмитента погасить вексель в указанные сроки права, вытекающие из векселя, необходимо применять немедленно. Данные права можно использовать без (или до) соответствующего решения суда. Дело поступает в суд, если эмитент оспаривает реквизиты (существенные признаки) векселя или действия по описи (или саму опись) имущества, произведенную присяжным поверенным.

Реализация прав включает два шага:

- Первый шаг - *нотариальное уведомление* о невозможности выполнения обязательств; заявление через нотариуса об удовлетворении претензий.
- Второй шаг. Досудебная процедура возмещения задолженности дополняется соответствующими *судебными процедурами*. Владелец векселя может использовать судебную процедуру для реализации своих прав по отношению к эмитенту.

Владелец векселя может постепенно продвигаться:

1. от досудебной процедуры реализации своих прав,
2. к судебной процедуре и затем,
3. к постсудебным методам реализации своих прав.

Нельзя смешивать собственность на вексель и возможность реализации прав по нему. Часто эти понятия и отношения совпадают, однако, они могут и не совпадать. В последнем случае реализовать права по векселю в состоянии не только его владелец.

Любой держатель векселя может реализовывать права по нему. Держатель векселя может передать право реализации прав по векселю посредством простой передачи векселя новому держателю.

Ответственность эмитента, плательщика, передающего вексель и акцептующего его во многом сходны: каждый несет обязательства по отношению к держателю векселя. Однако их ответственность субординирована: наступает последовательно, одна после другой, после невыполнения обязательств предшествующей стороной.

3.4.6. *Опись имущества неплатежеспособного эмитента векселя*

Держатель векселя является необеспеченным кредитором. Должник не отвечает всем имуществом при отказе гашения векселя. Поэтому за векселем отсутствует какая-либо собственность. Для того, чтобы получить доступ к собственности и описать ее, необходимо провести определенные процедуры. Опись собственности может быть осуществлена самим держателем векселя (через нотариуса) без помощи суда. В других случаях (в основном, если эмитент сопротивляется попыткам держателя векселя описать собственность) необходимо судебное предписание. Судебная процедура обычно занимает длительное время. Однако существуют отдельные технические приемы, которые могут ускорить судебный процесс.

Как только имущество стало находиться под контролем держателя векселя, наступает процесс его реализации. Существует один типичный метод использования имущества для удовлетворения претензий держателя векселя:

продажа имущества. Процесс продажи осуществляется присяжным поверенным, который возглавляет специальную комиссию по проведению аукциона по продаже имущества несостоятельного должника (в комиссии имеются представители должника и держателя векселя, а также другие официальные лица, представляющие нотариат). Продажа осуществляется через публичный аукцион с объявлением в печати (и письмом с уведомлением заинтересованных сторон) даты его проведения.

3.4.7. Приоритеты

Закон относится ко всем держателям векселей (и ко всем их претензиям, а также к другим претензиям кредиторов) одинаково.

Нередко случается, что в один и тот же день предъявляются к погашению несколько векселей, закончивших свой жизненный цикл. Однако плательщик не производит их гашение. В таком случае, если каждый держатель векселя выполнит все формальности, заполнит все документы и предъявит претензии эмитенту в один и тот же день (на практике это маловероятно), все получают одинаковые права на реализацию своих претензий. Однако на практике формируется список, в котором определяется последовательность платежей по просроченным векселям (каждый держатель векселя занимает свое место по дате официального предъявления претензии).

3.4.8. Качественные выпуски

Лишь немногие выпуски векселей можно рассматривать как качественные. В основном такие выпуски были связаны с проведением региональных взаимозачетов долгов (например, Северо-Западная Казахстанская область), привлечением коротких денег (Госпродкорпорация в Казахстане) и погашением задолженности государства государственным компаниям, поставщикам продукции, правительственным учреждениям, а также с погашением задолженности компаний по налогам. Летом-осенью 1996 года наиболее ликвидным был вексель Госпродкорпорации; достаточно высококачественным - Государственный казначейский вексель. Однако последний был недостаточно подвижен и, по своей сути, был полуликвидным (существовал целый ряд ограничений на его обращение, а процесс его распределения в ряде случаев был полупринудительным).

В настоящее время государство и его органы регулирования (в особенности региональные органы регулирования (а) ответственные за сбор местных налогов и (б) производящие взаимозачет долгов частных, полугосударственных и государственных компаний на региональных уровнях), а также участники рынка основное внимание концентрируют на вопросах проведения взаимозачетов как местных, так и внутренних. Например, Государственная холдинговая компания "Мунайгаз", Акционерное общество "Фосфор" пытаются осуществить взаимозачет внутренних долгов. Потребуется определенное время, вероятно не менее одного года, прежде чем основное внимание переместится к другим направлениям использования векселя и концепция трансформации долгов в вексельную форму будет широко использоваться. Именно тогда развитие вексельного рынка и его инфраструктуры будут достаточно полными. Сегодня местная вексельная индустрия только появляется. Коммерческие банки все еще не в состоянии удовлетворить потребности эмитентов и держателей векселей, поскольку у них не хватает необходимого опыта (акцепт векселя, его авалирование, регистрация, учет, залог и хранение требуют определенных технических навыков), а также капитала. Последнее обстоятельство не позволяет банкам предоставлять фонды на определенное время для кредитования вексельного обращения. Поэтому банки участвуют в вексельных операциях достаточно редко. Кроме того, не обладая достаточным опытом, они опасаются крупных неплатежей в вексельной сфере и разворачивают свою деятельность на новом рынке весьма осторожно.

Предприятия, государство, правительственные агентства центральных и местных органов власти не владеют необходимым опытом и возможностями для реализации своих интересов по выпуску векселей и совершению операций на вексельном рынке. Информационная асимметрия между различными участниками рынка, недостаток профессиональных брокеров, и практически отсутствие торговых площадок ведут к тому, что указанные выше институты осторожно и нередко скептически относятся к самой идее выпуска векселя. Тем не менее вексельный рынок появляется и его будущее развитие для урегулирования долгов предопределено. Основное беспокойство участников рынка связано с разработкой качественного пилотного проекта, позволяющего продемонстрировать и обеспечить всех будущих участников рынка примером, показывающим роль и место векселя для проведения взаимопогашения долгов и восстановления рабочего капитала предприятий.

3.5. Гарантии/ Аваль

Вексель может быть обеспечен полностью или частично при помощи гарантии. Гарантия указывается на самом векселе или на отдельном документе, прикрепленном к векселю. Вексельная гарантия создает независимое обязательство, которое служит дополнением к первичному и основному обязательству. Если гарант оплачивает по своей гарантии, он приобретает права выставлять претензию к оригинальному эмитенту.

Гарантия на векселе указывается в правом верхнем углу словом "аваль", указывается также наименование и проставляется подпись, скрепленная печатью гаранта.

Гарантии по векселям выдаются банками или другими широко известными компаниями. Типичной формой гарантии по векселю является его аваль. На практике эмитент договаривается с банком до начала выпуска векселей о банковской гарантии на его векселя. Однако в ряде случаев гарантию векселя может произвести его держатель.

Гарантия в форме авалья относится к полной сумме векселя и не может быть разбита на части. Нередко гарантом, по своей сути, выступает промежуточный держатель векселя, поставивший передаточную надпись на нем.

Гарантия принимается к исполнению только после отказа основного плательщика погасить вексель в указанный на нем срок. Гарант обязан выполнять все обязательства по векселю и после их выполнения может предъявлять претензию к эмитенту.

Акцепт банком векселя выполняет следующие цели:

- позволяет продавцам продавать товар, что без наличия необходимых средств у покупателя и недоверия к нему сделать иначе трудно;
- обеспечивает (страхует) платеж в достаточно гибкой и договорной форме;
- позволяет покупателям приобрести необходимый товар там, где он неизвестен;
- служит средством движения фондов.

Функция гарантии в передаточной надписи

Сделавший передаточную надпись на векселе обязан по нему в случае отсутствия платежа по векселю, за исключением тех случаев, когда его обязательства снимаются специальным указанием, проставленным на векселе. Если действующий держатель ставит подпись и скрепляет ее печатью своей организации для передачи векселя новому держателю, то ценность векселя увеличивается и поэтому при прочих равных условиях возрастает его ликвидность.

3.6. Достоверность данных

Недостаток надежной информации вызывает особые сложности при выпуске векселей и организации работы с должниками. Даже такие вопросы, как идентифицирование всех кредиторов и сумм долга, решаются достаточно проблематично. Однако посредством выпуска векселей можно уточнить долг и наладить отношения с кредиторами. Другим неоднозначным вопросом является определение действительного состояния дел у должника.

Вероятнее всего официальные показатели переоценивают уровень падения производства, поскольку в сводки попадает только информация о "зарегистрированной деятельности" и не включается огромный "теневой сектор" предприятий. Отдельные предприятия, которые по сводкам проходят как несостоятельные, имеют значительные размеры теневого сектора. Это означает, что предприятие фактически эффективно и его общий бизнес по неофициальным оценкам вполне стабильный. Процедура выпуска векселей для такого предприятия помогает очистить экономическую сцену от должников.

3.7. Временная структура векселя

Основная масса векселей краткосрочна, то есть 3-х месячные, 6-ти месячные и 9-ти месячные векселя занимают основное место на рынке. Однако все чаще встречаются как долгосрочные (свыше девяти месяцев), так и более краткосрочные (со сроком погашения менее чем один месяц) векселя. Первые используются как источник капитала для инвестиций. Крупные и хорошо известные компании могут привлекать на вексельном рынке долгосрочные деньги; именно они и выпускают долгосрочные векселя. Такие компании имеют достаточно развитый рынок своих векселей. Они получают капитал на вексельном рынке в случае, если у них возникла неожиданная потребность в дополнительном капитале. В других же случаях такие компании имеют доступ к другим источникам капитала и заменяют капитал, полученный посредством размещения векселей другими типами капитала.

3.8. Оплата векселя

Вексель оплачивается на определенную дату:

- дата фиксирована;
- фиксировано время от даты выпуска.

3.9. Удостоверение собственности на вексель

Юридическое или физическое лицо рассматривается как законный собственник векселя при условии, если оно держит вексель и может доказать свое право посредством непрерывности передаточных надписей на векселе. Цепочка надписей считается непрерывной, если в векселе указан первый держатель (лицо, которому причитается платеж и для которого выпущен вексель), а каждый последующий владелец получил вексель в результате правильно составленной передаточной надписи.

3.10. Ответственность по векселю

Держатель векселя имеет права по отношению к следующим сторонам вексельной сделки:

- эмитенту, если не указан иной плательщик по переводному векселю и последний не акцептовал вексель;
- плательщику (лицу, акцептовавшему вексель);
- гаранту;
- предшествующим держателям векселя.

3.11. Инфраструктура вексельного рынка

3.11.1. Информация

Для преодоления неэффективности вексельного рынка необходим мониторинг информации, связанной с движением векселей. В процессе создания рынка происходит подготовка к сбору, анализу и распространению достоверной информации.

В соответствии с глубиной, четкостью и обширностью данных различаются три фазы информационного мониторинга:

1. стадия дорыночного мониторинга, в рамках которой информация о векселях (предназначенных для продажи) становится доступной потенциальным покупателям. Создается мониторинг следующих данных: название эмитента и продавцов (брокеров и/или владельцев), номинальная цена, дата погашения, место платежа и цены предложения и спроса;
2. стадия промежуточного мониторинга, на которой предоставляются финансовые данные об эмитенте. Существует определенное противоречие интересов между держателем векселя и его брокером. Последний (инсайдер) нередко владеет дополнительной информацией об эмитенте векселя и не желает ее обнародовать и делиться данной информацией с потенциальными покупателями векселей (аутсайдерами). Необходима такая система информации об эмитенте, которая не зависит от воли и желания продавца векселя (свободная и открытая информационная система). Данная система осуществит мониторинг финансовых показателей предприятия, отрасли, рынка и предоставит данные о предшествующих держателях векселя и его гарантиях;
3. стадия развитого рынка включает наличие следующей информации:
 - движение основной дорыночной информации (предшествующая договорам и сделкам по купле-продаже), которая предоставляет достоверные финансовые данные о предприятиях и конкретных выпусках векселей;
 - текущий мониторинг, раскрывающий и индицирующий в каждый момент движение рынка в основном с количественных позиций;
 - постторговая информация, призванная контролировать и обновлять информацию.

Воздействие информации на вексельный рынок проявляется следующим образом:

- придает векселю ликвидность и подвижность;
- создает сам вексельный рынок.

Потребность в совершенной информационной технологии для организации движения векселей возрастает по мере роста объемов торгов и усложнения операций на рынке. То, что соответствовало первой половине 90-х годов, во второй половине десятилетия совершенно не подходит. Очевидным примером выступает не только рост числа векселей и увеличение объемов операций, но и усложнение их функций. Когда на рынке существует незначительное число векселей, легко осуществлять их движение: векселя поступают на рынок преимущественно случайно и часто совершенно искусственно и даже принудительно. Сегодня векселя обеспечивают принципиально новый взгляд на их роль в экономике и этот взгляд связан с их возможным участием в процессе зачета взаимных задолженностей, трансформации долгов в акционерную форму.

Движение информации происходит как двухстадийный процесс:

- первая стадия (текущая информация) - мониторинг спроса и предложения, объемов торгов и другой текущей информации для непосредственного принятия решений о покупках и продажах;
- вторая стадия (стратегическая информация) - направлена на обеспечение прозрачности эмитентов векселей, а также предоставление полной

информации о вексельных операторах для определения стратегии и тактики поведения на рынке.

В относительно развитых вексельно ориентированных денежно-финансовых системах, таких как российская экономика, имеется двухстадийная информация, которая поставляется информационными и торговыми агентами. Например, мониторинг спроса и предложения обособлен от информации поставляемой торговыми площадками; данные об объемах торгов поставляются торговыми площадками и специализированными аналитическими агентствами, которые оценивают основные количественные индикаторы; финансовая информация об эмитентах поставляется теми же агентствами, которые предоставляют сходную информацию на фондовом рынке.

В Казахстане и в Киргизстане настоятельно необходимо инициировать работу таких информационных агентств. Они могут обеспечивать необходимой информацией участников как вексельного, так и фондового рынков.

Наиболее удобно и легко развивать сбор и поставку такой информации через Фондовые биржи, которые обладают всеми возможностями стать ведущими институтами в организации вторичных вексельных рынков. Заслугой Фондовых бирж может стать, с одной стороны, демонстрация работы организованного вексельного рынка для стимулирования выпуска векселей, а с другой стороны, обеспечение участников рынка достоверной информацией. Однако, возможен и другой сценарий появления и развития информации: потребность местного рынка в информации может обеспечить одно из ведущих российских информационных агентств. Возможен и третий сценарий - организация совместного предприятия в информационной сфере. Второй сценарий чуть было не претворился в жизнь в ходе развертывания деятельности в Среднеазиатских странах Тверь-универсалбанка, который владел ведущей вексельной площадкой России. Однако, финансовые проблемы этого банка стали сдерживающим моментом в реализации данного сценария развития.

3.11.2. Регистрация

По мере развертывания вексельного обращения использование регистратора для мониторинга движения векселей (изменения их собственников) становится важным условием дальнейшего развития. Эмитенты могут указывать в положении о выпуске векселей регистрационный офис и порядок их регистрации при переходе прав собственности на вексель.

Если имеется регистратор, то вексель может быть как в наличной форме, так и в безналичной форме, или в той и другой одновременно.

Наличие регистрации векселя имеет как положительные, так и отрицательные моменты для должника и кредитора.

- прежде всего, требуется дополнительное время на совершение соответствующих действий по регистрации;
- должник и кредитор несут определенные дополнительные расходы. Как правило начальные затраты по организации регистрационной службы обеспечивает должник; последующие же издержки несут кредиторы. В конечном счете, все эти расходы включаются в цену векселя;
- происходит ускорение самой сделки. Если существует регистратор, то происходит экономия времени при идентификации векселя;
- регистратор снабжает как должников, так и кредиторов специфическими возможностями, которые улучшают коммуникационные возможности рынка.

Регистрация прав перехода собственности на вексель происходит до или после установления передаточной надписи на векселе.

Если регистрация происходит до нанесения передаточной надписи (особенно, если регистрация становится обязательным условием ее нанесения), то такое условие воспринимается как ограничение вексельному обращению.

Всегда необходимо помнить, что в соответствии с Женевскими вексельными конвенциями любые указания на векселе о его регистрации считаются ненаписанными.

Регистрационный офис

Регистрация может проводиться специальным регистрационным офисом.

Регистрационный офис выбирается:

- должником или
- кредиторами.

Регистрационный офис может быть (1) учрежден как должником, так и кредиторами или (2) независимым регистратором (например, регистрационные офисы Центральноазиатской фондовой биржи и Киргизстанской фондовой биржи вполне могут выполнять функции независимых вексельных регистраторов).

3.12. Прозрачность рынка

В процессе принятия решения покупать или не покупать вексель каждый кредитор желает удостовериться в законности операции и узнать о положении дел как у эмитента, так и у предыдущего держателя векселя. Основная деятельность по выпуску векселей должна быть доступна всем участникам рынка (рынок должен быть достаточно прозрачным). Равный доступ к информации всех участников рынка - основа его развития и ликвидности. Однако бухгалтерские стандарты часто являются "иностранным языком" для трейдеров. На практике они являются "иностранным языком" вдвойне, так как не всегда содержат достоверную информацию и/или отражают реальное положение дел.

4. Как запустить и провести вексельную программу?

4.1. Долги

Существует два вида долгов. Каждый имеет свою природу, которая и определяет пути, способы и главные последствия выпуска и обращения векселей.

1. *“Контрактный долг”*. Долг, который образовался на основе контракта, когда стороны имели возможность планировать сделку. При контракте одна из сторон становится кредитором. Последний делает все, чтобы минимизировать риск невыполнения должником своих обязательств.
2. *Долг, образовавшийся на основе невыполнения (или не должного выполнения) обязательств*. Долг, который образовался на основе:
 - непредвиденных отношений. Например, компания своей неосмотрительностью нанесла убытки другой компании и вовремя их не возместила;
 - разрыва сложившихся отношений.

В первом случае вексель (специальная форма контракта) выпускается должником до основной сделки. В данном случае вексель определяется обычной сделкой и направлен на ее обслуживание. Во втором случае вексель может заменить просроченный долг. Он выпускается после неудачной сделки и выступает своеобразным лекарством, посредством которого стороны пытаются “вылечить” сделку и восстановить отношения.

4.2. Создание векселя

Вексель сам по себе не появляется; для его выпуска недостаточно простого желания должника. Вексель возникает на основе следующих объективных причин:

- Если у покупателя недостаточно рабочего капитала и он не желает или не может получить деньги в банке. В данном случае покупатель может расширять свою деятельность посредством осуществления покупок в долг или получения кредита. Посредством векселя покупатели получают наиболее удобный и гибкий метод приобретения товаров в кредит. Именно в данном случае вексель и выступает как инструмент коммерческого кредитования. Это и наиболее общее его определение для развитых рынков. Вексель предоставляет возможности коммерческого кредитования: покупатели приобретают товары в кредит при отсутствии достаточного рабочего капитала, а продавцы сбывают свою продукцию при нехватке денег у покупателей. Таким образом, вексель помогает перемещать товары и осуществлять услуги.
- В переходной экономике вексель выполняет дополнительные функции:
 - вексель используется для погашения долгов в широких масштабах и на рыночной основе;
 - вексель используется как промежуточное звено при проведении фондового свопа (трансформации обязательств в акции).

На отношения между должниками и кредиторами, а также отношения, возникающие на основе выпуска и обращения векселей в Казахстане, сложно распространить западный тип анализа и поведения. То, что является плодотворным и нужным на Западе далеко не всегда приемлемо полностью в Казахстане. И, соответственно, наоборот: новые рынки создают новые инструменты, а старые инструменты начинают использоваться с новыми функциями. В данном случае вексель можно использовать следующим образом: по назначению непосредственно отмеченному Женевскими вексельными конвенциями 1930 года, а также с новыми функциями, более соответствующими переходным к рынку странам - для погашения долгов.

Появление последней функции определяется специфическими условиями развития переходной экономики.

!

Для более полного выполнения своей новой функции вексель не должен быть ограничен отношениями только между должником и оригинальным кредитором; он должен свободно обращаться и переходить к новым владельцам. Процесс развития новой функции векселя и соответственно выпуска векселя для погашения долгов основан на развитой вексельной торговой системе. Переход векселя к третьим лицам или превращение его в инструмент торгов - главный момент организации вексельной торговли и системы погашения долгов посредством организации движения векселя.

Главным свойством векселя, образованного на базе непогашенных долгов, является его необходимость и действенность для третьих лиц (которые в момент выпуска не указываются на векселе).

4.2.1. Как подобрать кандидатов для долгового-вексельного свопа

Чрезвычайно важно подобрать подходящих кандидатов для трансформации просроченных долгов в вексельную форму. В отношении проблемы погашения долгов и организации вексельного рынка важно найти хорошего кандидата. Удачный эксперимент придаст особую движущую силу процессу векселизации долгов и разрешения посредством векселей определенной части долговых проблем, сформирует систему доверия к векселю и вексельному рынку. Если же трансформировать долги банкротящихся предприятий (и к тому же не имеющих активов), то векселя не решат проблемы и вызовут общее отрицательное отношение как бизнесменов, так и широкой общественности к самой системе вексельного обращения.

Во-вторых, случайный выпуск векселя солидным и потенциально платежеспособным предприятием далеко не всегда может принести положительный результат. Только более или менее массовый выпуск векселей компаниями, способными восстановить свою платежеспособность, может создать саморазвивающуюся вексельную систему погашения долгов.

Существует ряд правил, которые следует выполнять:

— выпуск нескольких векселей, связанных между собой разделением труда и кооперацией предприятий, обеспечивает лучший результат, чем одиночный выпуск. В данном случае количество перерастает в новое качество: взаимные обязательства встречаются на вексельном рынке и происходит погашение взаимных претензий. Таким образом, срабатывает эффект синергии;

доступность финансовой информации о должнике и цен спроса и предложения на векселя облегчает должнику процесс поиска новых кредиторов и инвесторов и, следовательно, создает условия для обращения и взаимопогашения долгов.

4.2.2. Тактика переговоров при проведении трансформации долгов в векселя

Долгово-вексельный своп чрезвычайно чувствителен к переговорам.

От процедуры переговоров во многом зависит успех или неудача трансформации долгов в вексельную форму и возможность погашения (полное или частичное) долгов предприятий.

92

Отсрочка заключения соглашения о трансформации не только на месяцы, но и на дни может существенно удорожить всю процедуру выпуска и погашения долгов.

Как должник, так и кредиторы нередко начинают переговоры с постановки нереалистичных целей. Иногда обеим сторонам переговоров требуется время и специальная консультация для достижения желаемого результата при определении целей и возможностей выпуска векселей, а также срока их погашения и цен реализации (так называемый период осознания).

Существует ряд общих ошибок, которые совершаются в данный подготовительный период времени:

- многие полагают, что вексель - это расписка, свидетельствующая о возможности денежной оплаты. Причем передача и погашение данной "расписки" происходит по номиналу. Передается эта "расписка" в новые руки чаще всего на принудительных основах по номинальной цене;
- другой общей ошибкой является подход к векселю как к способу устранения претензий кредиторов (что-то вроде добровольного прощения обязательств).

Лучше всего период осознания использовать для убеждения кредиторов реально смотреть на состояние дел должника; с целью повышения эффективности выпуска и работы векселей можно пересмотреть общие суммы претензий (сделать их более реалистичными; по крайней мере устранить штрафные санкции). Отсутствие гибкости у кредитора непродуктивно.

На начальном этапе переговоров (или еще до их наступления) следует составить бизнес-план (или технико-экономическое обоснование) выпуска векселей; это позволит определить роль векселей в погашении долгов и оценить ценовые параметры всей процедуры.

В ходе выпуска непосредственного выпуска векселей наступает следующий этап процесса понимания должником и кредиторами последствий данной процедуры. Кредитор, став держателем векселя, определяет его реальную (рыночную) цену; он узнает, что она может быть совершенно другой, чем он ожидал, и существенно отличаться от номинальной цены.

Обычно бывает два типа переговоров: открытые, состоящие из вопросов, включенных, в основном, в бизнес-план (хотя обсуждение данных вопросов может быть конфиденциальным), и закрытые, происходящие чаще всего за рамками обычного переговорного процесса. Основные кредиторы могут иметь специальные встречи с должником. Секретные встречи иногда устраивает и должник, если он желает выторговать для себя определенные привилегии и, в конечном счете, доходы от выпуска векселей.

4.2.3. Документы по выпуску векселей

Выпуск векселя основан на одном документе: *особая расписка (вексель)*.

Трансформации долга в вексельную форму включает в себя два основных документа:

- (1) договор по замене долгов на вексельную форму и нуллификации (отмене) старых долгов (*договор нуллификации долгов*);
- (2) *вексель*.

4.2.4. Альтернативы выпуску векселей

Должнику и кредиторам следует найти наиболее целесообразную форму организации работы с долгами. Этот поиск, конечно, определяется как самой возможностью погашения долгов, так и ценой реализации данной возможности.

Существуют альтернативы выпуску векселей. Прежде всего, это договор цессия (уступки прав требования), продолжение переговоров, добровольная нуллификация задолженности и работа по конкретным цепочкам неплатежей.

Должнику и кредиторам следует тщательно оценить все альтернативы. Если должник и кредиторы решаются выпустить векселя для урегулирования просроченной задолженности, они определяют вид векселя и механизм его выпуска.

4.2.5. Создание возобновляемого вексельного соглашения

Возобновляемое вексельное соглашение часто предусматривает замену векселей с истекшим сроком новыми на выгодных для держателя векселя условиях. Возобновляемый вексель легко применим к ликвидному векселю. Эмитент (или его брокер, или банк) может выкупать векселя в любой момент по текущей рыночной или определяемой им цене. В таких случаях эмитент может постоянно заменять действующие векселя новыми, с более поздним сроком погашения. Данные процедуры проходят только на добровольной основе и по обоюдному согласию между держателем и эмитентом.

Пролонгация, то есть продление сроков действия векселя. Любое письменное согласие сторон продлить срок действия векселя не законно (хотя на практике пролонгация векселя является достаточно распространенной). Лучший способ продления срока действия векселя - это замена векселей при их погашении новыми с более поздним сроком погашения. Пролонгация векселя проходит через процедуру возобновляемого вексельного соглашения (нередко называемое "косвенной пролонгацией" или "непрямой пролонгацией").

Возобновляемое вексельное соглашение особо привлекательно для должников, которые могут и стремятся повысить свою эффективность в более долгосрочной перспективе. Оно полезно для производителей сырья, энергетиков и т.п. Только предприятия с солидными активами могут быть хорошими кандидатами для возобновляемых векселей.

Если эмитент готов погасить только часть долга, то держатель векселя может согласиться получить часть денег и новый вексель на оставшуюся часть суммы долга (частичная непрямая пролонгация).

Метод непрямо́й пролонгации имеет ряд недостатков, особенно если должник просит произвести пролонгацию только на несколько дней. В случае пролонгации необходимо тщательно проверить формальные требования, предъявляемые к векселю и соответствие их старому инструменту. Случается, когда действительный документ обменивается на недействительный (сомнительный), что может стать очевидным в момент наступления погашения нового векселя.

4.3. Закрытие векселя

4.3.1. Механизм закрытия

Стороны вексельной сделки должны выбрать точный способ закрытия векселя и метод его погашения, а также рассмотреть последствия возможного непогашения векселя и возможные альтернативы выпуску векселей. Устанавливая день закрытия векселя, важно определить время, необходимое для погашения по всем векселям и возможность его соблюдения эмитентом или акцептовавшим вексель плательщиком.

Некоторые эмитенты при подготовке положения о выпуске и обращении векселя включают особую статью, в которой устанавливают определенный срок (обычно пять банковских дней) на погашение векселя после его предъявления на указанную в нем дату.

4.3.2. Генеральные условия закрытия

Условия закрытия векселя можно разграничить как на существенные, так и на процедурные.

Существенным является то, что позволяет держателям векселя вернуть свои вложения. Важность существенных функций варьируется следующим образом:

- простой вексель закрывается и погашается эмитентом и, следовательно, эмитент определяет свои возможности погасить вексель в срок или другой способ удовлетворения интересов держателей векселей;
- переводной вексель закрывается и погашается третьей стороной, если последняя согласилась (акцептовала вексель) сделать это, и, следовательно, эмитент полагается на третью сторону в случае, если векселя самостоятельно не нашли на рынке способы взаимопогашения.

Процедурные вопросы включают конкретные шаги, которые необходимо предпринять как эмитенту, так и держателю для получения кредитором причитающихся ему денег.

4.3.3. Многоразовое закрытие

Некоторые выпущенные векселя могут иметь ряд серий, каждая из которых закрывается в разные сроки. Например, предприятие может выпустить векселя трех-, шести- и девятимесячные и их погашение будет соответственно через три, шесть и девять месяцев. В других случаях предприятие выпускает векселя с погашением через шесть месяцев, однако погашение может быть растянуто на определенный период времени в силу того, что векселя выпускаются в разное время и дата погашения согласовывается с каждым кредитором отдельно.

4.3.4. Условия погашения векселя

В переходных экономиках популярными средствами платежа выступают доллары, электроэнергия, нефть, газ, железнодорожный тариф. Частично это объясняется инфляционными факторами и неустойчивостью национальных денежных систем. Многие банки принимают долларовые депозиты и выпускают долларовые векселя. Нефтяные и газовые компании выпускают так называемые нефтяные векселя. Погашаемые "натурой" векселя выглядят в основном как специфический вид форвардного контракта: (а) покупатель (получатель) векселя (кредитор) приобретает право получить определенную сумму денег или товаров с дисконтом на определенную дату; (б) продавец векселя передает стандартный контракт (вексель), посредством которого продавец гарантирует передать товар держателю векселя в конце срока по определенной цене.

Всегда необходимо помнить, что в соответствии с Женевскими вексельными конвенциями любое не денежное указание о погашении на векселе считается ненаписанным.

95

4.4. Выпуск векселей

4.4.1. Бизнес-план выпуска векселей

Бизнес-план (БП) может быть разработан до начала переговоров по долговому-вексельному свопу. Четко составленный БП позволяет облегчить процесс переговоров, улучшить взаимопонимание между кредиторами и должником и сократить время необходимое для процедурных вопросов. Однако чрезмерная детализация бизнес-плана переоценивает роль второстепенных вопросов и нередко скрывает принципиальные проблемы. Не требуется, чтобы каждый кредитор одобрил бизнес-план (однако лучше всего, если он будет одобрен ведущими кредиторами).

Бизнес-план обычно включает следующие части:

- краткая финансовая характеристика должника;
- обследование обязательств основных кредиторов должника и возможности их погашения векселями, полученными от должника;
- цепочка обязательств, которая может быть погашена посредством обращения векселей.

Если выпуск векселей имеет цели, связанные не только с погашением долгов, то в бизнес-плане могут быть следующие разделы:

- время, необходимое должнику для улучшения финансового положения в восстановлении платежеспособности;
 - план оздоровления должника;
 - план сегментации и продажи активов должника;
 - фондовый своп (см. Раздел 5 Справочника).
-
- положение о выпуске векселей;
 - образец векселя с полным описанием его особенностей;
 - условия выпуска и размещения векселей;
 - условия погашения;
 - инструкция держателям векселя (включая стандартные банковские проводки при операциях с векселями).

4.4.2. Структура выпуска векселей

Наиболее общим методом выпуска векселей является заключение между должником и кредитором вексельного договора (или подписание схемы выпуска векселей). Схема может включать следующее:

- дату трансформации долга в вексельную форму. Дата может быть одна для всех кредиторов или с каждым кредитором согласовывается отдельная дата;
- тип векселя: простой или переводной;
- номинальная цена векселя;
- плательщик, если это не должник (при переводном векселе);
- время и способ платежа;
- последовательность (может быть в виде графика, таблицы, письменного описания) всех работ по выпуску, размещению и погашению векселей.

96

4.5. Алгоритм выпуска векселей

Шаг первый

Подготовительный период

Если должник осознал важность трансформации долга в вексельную форму, то совершаются следующие действия:

1. Провести встречи и переговоры с главными кредиторами на предмет возможности выпуска векселей.

Поддержка и понимание вопроса со стороны главных кредиторов способствует процедуре выпуска векселей и трансформации долгов в вексельную форму.

!

Если основная масса кредиторов не поддерживает проект реструктуризации долга, то его можно провести для небольшой группы кредиторов. В данном случае необходимо более тщательно оценить перспективу выпуска векселей.

2. Необходимо предварительное обследование воздействия векселей на следующее:
 - на обязательства кредиторов;
 - на формирование цепочек обязательств;
 - на роль векселя в обслуживании процесса погашения обязательств в выявленных цепочках.

Если кредиторы пришли к выводу о необходимости трансформации долговых обязательств в вексельную форму, необходимо предпринять следующие шаги:

3. Воздействовать на должника с целью подтолкнуть его к выпуску векселя;
4. Более четко определить размеры долговых обязательств, трансформируемых в вексельную форму;
5. Подтвердить данные долги (сам факт их трансформации в вексель служит подтверждением).

Если брокер обслуживает должника либо кредитора, то он должен убедить как должника, так и других главных кредиторов о необходимости реструктуризации долга.

Шаг второй

Подготовительная работа

1. Уведомить кредиторов о собрании (с повесткой) кредиторов и должника. Лучше всего данное уведомление произвести следующим образом:

- через местную или республиканскую прессу;
- прямой почтовой рассылкой с уведомлением.

!

Отсутствуют какие-либо законодательные требования как к уведомлению кредиторов о собрании, так и к его проведению вообще.

2. Провести предварительное собрание кредиторов.

Шаг третий

Время решений

1. Составление бизнес-плана о трансформации долговых обязательств в вексельную форму.
2. Проведение нового собрания кредиторов, на котором принимается бизнес-план.
3. Подписание соглашения(ий) о трансформации долговых обязательств в вексельную форму. Это соглашение подписывается на добровольной основе и оно не является обязательным для последующего выпуска векселей (если иное не отмечено в соглашении, оно не несет форму договора с обязанностями сторон).

Шаг четвертый

Время действий

1. *Выпуск и размещение векселей*
 - а) Проведение обмена действующих претензий кредиторов к должнику на вексель. Данный обмен является двухстадийным:
 - должник подписывает вексель и вручает его кредитору;
 - должник и кредитор подписывают договор нуллификации старых обязательств.
 - б) Уведомление заинтересованных сторон о выпуске векселей.
2. *Период обслуживания обращения векселей*
 - а) Мониторинг информации о движении векселей.
 - б) Поддержка ликвидности и регулирование движения цен.
3. *Время закрытия*
 - а) Организация механизма закрытия.
 - б) Определение времени и места закрытия.

Упрощенный метод

Для должника упрощенный метод трансформации долговых обязательств в вексель означает подготовку векселей и в дальнейшем согласование с каждым конкретным кредитором вопросов замены просроченного долга на вексель.

Для кредитора упрощенный метод трансформации не возвращенных ему в срок вложений в новую форму обязательств - вексель - означает воздействовать на должника так, чтобы он подписал взамен старых своих обязательств кредитору новое - вексель.

Для проведения данного упрощенного метода нет необходимости в какой-либо специальной подготовительной работе и организации. Все что следует сделать заинтересованным сторонам - это подписать как вексель, так и договор о нуллификации старых долговых обязательств.

5. Фондовый своп

5.1. Концепция фондового свопа

Секьюритизация векселей не является достаточно широко используемой концепцией для трансформации долгов в акционерный капитал. Однако в развитых экономических странах существует практика долгового-акционерного свопа. В большинстве переходных экономик прямая трансформация просроченных долговых обязательств в акции или облигации запрещена. Однако существует законный механизм, который позволяет трансформировать долги в акции через векселя. Данный механизм построен на том обстоятельстве, что не просроченный вексель - это действующий инструмент, обладающий платежной силой.

5.2. Преимущества вексельно-акционного свопа

Трансформация долгов в акции может представлять взаимный интерес для должника и кредиторов потенциально жизнеспособного предприятия. Более того, такая трансформация позволяет сократить фискальные затраты: на плечи частных предприятий возлагаются все издержки по финансовой реструктуризации.

Вексельно-акционный своп представляет собой один из долгосрочных и перспективных путей погашения долгов. Он позволяет трансформировать неплатежеспособные предприятия в платежеспособные с минимальными затратами. Как только долги трансформируются в акционерный капитал, так сразу же предприятие не просто становится платежеспособным (естественно, если оно продолжает работать и производить необходимую продукцию и по балансу не является убыточным, а просроченная задолженность сформировалась достаточно давно и на ее обслуживание отнимаются все доходы предприятия), но и перестает терять свои активы. После такой трансформации у предприятия появляется большее число акционеров. Кредиторы аннулируют свои денежные претензии к предприятию и прекращают любые процедуры по взысканию долгов (включая судебные действия против должника). Более того, кредитор становится акционером и начинает отражать их интересы. В конечном счете вексельно-акционный своп воссоединяет бывшего должника и его кредиторов. Иногда имеются сильные возражения к трансформации долгов в акции. Акционеры опасаются, что распределение акций среди кредиторов может размыть контроль над предприятием и отстранить от управления существующих собственников. Будут или не будут акционеры и кредиторы менять существующий порядок и структуру собственности, вексельно-акционный своп позволяет решать некоторые чрезвычайно сложные отношения между должником и кредиторами.

5.3. Своп долгов в акционерный капитал

В России, Казахстане и Киргизстане действующее законодательство запрещает прямой переход просроченных долгов в акционерный капитал. В России усиливает действие тенденции против такого запрета, особенно возражают ведущие инвестиционные фонды и некоторые банки, которые хотят трансформировать огромные долги предприятий в акции и тем самым решить проблему их неплатежеспособности. Вероятно, данные ограничения в скором времени будут отменены.

По закону существует два основных ограничения для проведения свопа по трансформации долгов в акционерный капитал:

- во-первых, выпущенные акции по номинальной стоимости должны соответствовать балансовой стоимости основных фондов;
- во-вторых, закон не разрешает приобретать за долги акции.

Различаются два вида долгов предприятий:

- Если долги вызваны убытками предприятия, то существуют ограничения по новому выпуску акций и заполнению акционерного капитала долгами. Параграф 2 статьи 58 Закона Республики Казахстан “О партнерстве” запрещает увеличивать Уставный капитал партнерства или акционерного общества для возмещения убытков.
- Если существует просроченный долг, но отсутствуют убытки и по данным баланса предприятие является прибыльным (такая ситуация станет невозможной если в Казахстане и в Киргизстане будут приняты международные бухгалтерские стандарты), то своп долга в акционерный капитал можно рассматривать как законную операцию, так как с позиции закона “О партнерстве” отсутствуют ограничения на такую процедуру.

5.4. Регулирование свопа векселей в акционерный капитал

Введение векселей меняет процедуру свопа долга в акционерный капитал и превращает ее в двухстадийный процесс:

- Первая стадия. Трансформация долга в вексель (своп долговых обязательств в векселя).
- Вторая стадия. Трансформация векселей в акции или облигации (своп векселей в акционерный капитал).

Двухстадийный подход полностью отвечает требованиям закона. В соответствии с российским, казахским и киргизским правилами вексель представляет собой специфическую форму ценной бумаги и каждый может приобретать акции в обмен на другие ценные бумаги (включая векселя), деньги и другие активы и права собственности. Параграф 1 Статьи 130 Гражданского Кодекса Республики Казахстан отмечает следующие виды ценных бумаг: облигация, вексель, чек (банковский чек), банковский сертификат, товарно-транспортная накладная, акция и другие документы, которые являются ценными бумагами по своему статусу или определены таковыми своими положениями. В соответствии с Декретом Президента (21 апреля 1995 года № 2227) “О ценных бумагах и фондовых биржах” отсутствуют ограничения на обмен акций или облигаций на векселя. Существует свободная покупка и продажа акций или облигаций за векселя.

Когда компания становится публичным (открытым акционерным) обществом базой для расчета объемов выпускаемых акций по номиналу служит стоимость основных фондов. Если же компания уже является публичной, то она имеет право для привлечения дополнительного капитала осуществить дополнительный выпуск акций. Таким образом, публичная корпорация, во-первых, может выпускать акции на сумму большую, чем стоимость ее активов. Во-вторых, действующие акционеры для того чтобы не потерять контроль над компанией при предоставлении определенной части акций кредиторам (держателям векселей) могут осуществить разделение (сплит) и соответственно переоценку своих акций.

Своп векселей в акции может быть произведен посредством закрытой подписки на акции и соответственно закрытого их размещения. Статья 18 Декрета Президента "О ценных бумагах и фондовых биржах" позволяет проводить закрытую подписку по списку кредиторам предприятия. В эмиссионном проспекте может быть специальная статья, определяющая процедуру распределения акций кредиторам в обмен на векселя.

5.5. Практика свопа векселей в акции

В развитых рыночных странах существует своп долговых обязательств в акции. Однако практика такого свопа не является чрезвычайно большой и обширной. Основными причинами недостаточного развития данного метода погашения долгов является трудоемкость, значительная продолжительность и дороговизна процедуры свопа. Кроме того, достаточно сложно найти консенсус между кредиторами и акционерами.

В России практика свопа векселей в акции чрезвычайно ограничена. Однако можно отметить процесс заметной либерализации и правительственного признания данных процедур. В середине 1996 года были приняты отдельные правила, предоставляющие процессу трансформации векселей в акции дополнительную свободу и большую гибкость.

Экономический отдел Алматинского городского совета заинтересован в проведении свопа по отношению к одному из крупнейших должников города. Долг такого должника городу меньше его активов, поэтому процедура принудительного банкротства для него неприемлема. Посредством двухстадийного свопа город может получить часть акций должника и реализовать их на фондовом рынке, а полученную таким образом выручку направить в городской бюджет.

5.6. Процедура голосования при свопе векселей в акции

Своп векселей в акции обычно включает три группы участников:

- акционеров;
- кредиторов;
- должника.

Для проведения свопа необходимо примирить всех участников и добиться их сотрудничества. Для этого можно провести объединенное собрание акционеров, кредиторов и должника (или два отдельных собрания: собрание кредиторов и собрание акционеров). Основные требования для проведения таких собраний: на собраниях необходимо одобрить (1) трансформацию долговых обязательств в вексельную форму и (2) трансформации векселей в акции, а также (3) Новый эмиссионный проспект, в котором предусматривается процедура распределения среди кредиторов всей или части новой эмиссии акций (посредством закрытой подписки или свободной продажи акций за векселя).

5.7. Процедура свопа векселей в акции

Можно предложить четырех стадийную процедуру свопа:

1. Должник выпускает векселя в обмен на свои старые долговые обязательства.

Временные рамки векселя не могут быть короче времени, необходимого для регистрации Эмиссионного проспекта и

проведения новой эмиссии акций.

2. Должник и кредиторы составляют и заключают договора об обмене векселей на акции.
3. Должник разрабатывает и регистрирует Эмиссионный проспект. Проспект может предусматривать открытую (свободную) или закрытую продажу акций. Открытая продажа акций интересна тем, что кредитор до момента появления акций может продать свой вексель и акционером станет новый кредитор (используется переводной вексель); закрытая применяется в том случае, если стремятся сохранить акционеров и кредиторов на первом этапе в прежнем составе (применяется простой вексель).
4. Должник проводит размещение акций нового выпуска в обмен на векселя.

Таким образом, при проведении свопа векселей в акции снимается конфликт интересов между акционерами, кредиторами (новыми инвесторами) и должником. Кредиторы становятся инвесторами и совместно со старыми акционерами формируют новое акционерное единство для организации стратегического управления прежнего должника.

APPENDIX 5

**KYRGYZ REPUBLIC
LAW ON BANKRUPTCY
REVISED**

DRAFT AS OF 10/15/96

(abbreviations used below KR=Kyrgyz Republic; NBK-National Bank of Kyrgyz Republic; SPF=State Property Fund; GBA=Government Bankruptcy Agency)

PART I: GENERAL PROVISIONS

Article 1: Subject of regulation and validity of the Law of the KR "On Bankruptcy"

- I. This Law determines the basis, conditions and the procedures for a process of bankruptcy in relation to insolvent juridical and physical persons conducting commercial activities who are declared bankrupt hereinafter referred to as insolvent debtors. It sets out the *two* forms of a legal process of bankruptcy, which are Special administration or Reorganization (including Sanation)
- II. In accordance with Articles 60 and 96 of Part 1 of the Civil Code of the Kyrgyz Republic, the present Law applies to any insolvent debtor regardless of the form of ownership and includes both state and private enterprises, banks and foreign enterprises operating in the Republic of Kyrgyzstan (whether established in Kyrgyzstan as legal entities or not).
- III. Pursuant to Article 100(3) of Part 1 the Civil Code of the Kyrgyz Republic, the present Law alone regulates questions relating to the process of bankruptcy. All other existing legislation of the KR regulating questions relating to the process of bankruptcy is invalid and is hereby repealed. Any future legislation, other than by amendment to this Law, which purports to regulate the process of bankruptcy is invalid by virtue of the Civil Code.
- IV. Pursuant to the Civil Code of the Kyrgyz Republic, this Law regulates only the process of bankruptcy of insolvent debtors, and does not deal (a) with the liquidation of solvent enterprises, except to the extent of ensuring that the liquidation of an enterprise which claims to be solvent is subjected to safeguards in case it is actually insolvent (Articles 11, 12 and 61 of the Law) or (b) with the liquidation of an enterprise (including a bank) on the ground that it performs its activities without a license (or that its license has been revoked) or engages in activities banned by law. These matters are dealt with in accordance with the Civil Code, Part. 1, especially in Articles 96-99 (solvent enterprises) and 96(2) (enterprises acting illegally or without authorization) and by other legislation made in accordance with the Civil Code.
- V. This Law does not apply to public Institutions. This Law applies to State enterprises founded on any basis, including those founded on the basis of the right to conduct business pursuant to Article 158 of Part 1 of the Civil Code, and also those founded on the basis of the right of operational management pursuant to Article 159 of the Civil Code provided that the latter is granted the right to engage in revenue creating activities pursuant to Article 231(4) of the Civil Code so that it is considered to be carrying on commercial activities.
- VI. The procedural rules necessary to explain and execute the present Law are defined by Instructions issued in compliance with the present Law. Any supplementary regulations, decrees or instructions issued that contradict the present law are null and void.

Article 2: Concepts used in this Law

- I. **Civil Code** - all references in this law to the Civil Code refer to Part 1 of the Civil Code of the Kyrgyz Republic.
- II. **Assets** - the property of debtors comprised of fixed assets, other long term investments (including non-material assets), current assets, and financial assets including debtor debt (receivables).
- III. **Liabilities** - obligations of a debtor (with the exception of subventions, subsidies, own funds [capital] and other sources) consisting of borrowed and attracted funds, including the debts payable to creditors.
- IV. **Enterprise** - a property complex used for carrying out business activity (Article 33 of the Civil Code)
- V. **Owners** - means the natural or juridical persons who possess all the rights and attributes of ownership (right of possession, use, disposition) over the insolvent debtor including founders (until such time as they transfer their rights) shareholders, participants, and members and in case of state-owned enterprises, the Kyrgyz Republic through the State Property Fund.
- VI. **Managers** - persons with the power to make binding decisions regarding the daily operation of the enterprise.
- VII. **Petition** - a formal request to the court to initiate a process of bankruptcy which includes a petition by the owners of the insolvent debtor or a suit (isk) of a creditor and may also refer to any motions (hodataistva) put before the court by any party to the action.
- VIII. **Initiation of a process of bankruptcy** - means the time at which a person takes the initial steps which may result in the commencement of a process of bankruptcy. The initiation of the process does not necessarily result in its commencement.
- IX. **Commencement of a process of bankruptcy** - means the time, set out in Article 10 of this Law, at which the process of bankruptcy formally begins.
- X. **Natural Person** - any person regardless of whether or not he carries on commercial activity who is not a legal entity.
- XI. **Physical person** - any person carrying on commercial activities as an individual entrepreneur without doing so through a legal entity and capable of being deemed insolvent pursuant to Article 60(1) of the Civil Code and of being the subject of a legal process of bankruptcy in regard to his commercial activity as per Article 52 of this Law..
- XII. **Juridical person** - any legal entity, as described in Article 83 of the Civil Code, capable of being deemed insolvent pursuant to Article 100(1) of the Civil Code and of being the subject of a legal process of bankruptcy
- XIII. **Limited Liability** - a status depending on the constitutive documents of an insolvent debtor and given pursuant to the Civil Code and which protects the owners from claims for the creditors of the insolvent debtors except to the amount, if any, of the charter capital which the owner should have contributed to the insolvent debtor but has not done so. This status is given to the owners of debtors which are established as juridical persons with the exception of participants in a general partnership and also in certain other cases as specified in the Civil Code.
- XIV. **Extended Liability** - the status given by the Civil Code to the owners of debtors and which protects the owners from some claims for the debts of the insolvent debtor but not all such claims, so that an owner may become liable for some claims even beyond the amount (if any) of the charter capital which he should have contributed to the insolvent debtor but has not done so. Extended liability is a status given pursuant to the Civil Code by reason of the constitutive documents of the debtor, but an owner may become personally liable for some of the debts of the insolvent debtor by other means, for example, by giving a personal guarantee for some of the debts of the insolvent debtor (personal liability).

- XV. **Unlimited Liability** - a status given to owners of a debtors where owners are fully liable for the debts of the insolvent debtor. An owner will have unlimited liability unless given the status of limited or extended liability by the constitutive document of the debtor in accordance with the Civil Code but even an owner with limited or extended liability may have unlimited liability by other means, for example, by giving personal guarantee for all the debts of the debtor (personal liability).
- XVI. **Insolvent Debtor** - a physical or juridical person involved in commercial activity and deemed to be insolvent on the basis of Article 4 of this Law.
- XVII. **Troubled Debtor** - is a described in Article 39.A.1.a to whom Article 39 of this law applies.
- XVIII. **State Enterprise** - an enterprise in which the state's share of ownership is 51% or more and includes those enterprises founded on the basis of the right to conduct business and also those founded on the basis of the right of operational management provided that the latter is granted the right to engage in revenue creating activities so that it is considered to be carrying on commercial activities.
- XIX. **Agricultural Enterprise**: an enterprise involved in working the land and producing agricultural products and including farms, peasant (krestianskie) and collective-peasant enterprises and agricultural cooperatives etc.
- XX. **Process of Bankruptcy** - a legal process administered under this law, applicable to an insolvent debtor and which may be in the form of Special administration (Restructuring pursuant to Article 39 and 40 of this Law or Liquidation) or Reorganization (including Sanation).
- XXI. **Special administration** - one of the two forms of a legal process of bankruptcy which may be applied to an insolvent debtor and which may occur with or without the participation of the court in regard to juridical persons but must occur with the participation of the court in regard to physical person. This process may consist of either a restructuring or a liquidation of the insolvent debtor (or the commercial activity of the insolvent debtor in the case of physical persons) but which, in either case, involves the appointment of special administrator, a disposition of the assets of the insolvent debtor to third parties for the benefit of creditors and a deregistration of the insolvent debtor (or the commercial activity of the insolvent debtor in the case of physical persons)
- XXII. **Restructuring** - one of two methods of special administration which involves the restructuring of the insolvent debtor and the creation of a one or more new legal and its subsequent sale to third parties for the benefit of creditors (Articles 39 & 40 of this law.)
- XXIII. **Liquidation** - one of two methods of special administration which involves the disposition of all the assets of the insolvent debtor for the benefit of creditors without the creation of a new legal entity (simple liquidation).
- XXIV. **Liquidation Mass** - means assets available in a liquidation (Special Administration) for distribution to creditors, namely the unsecured assets less cost of Special Administration
- XXV. **Cost of Administration**: any legitimate obligations of the insolvent debtor accrued after commencement of Special Administration
- XXVI. **Reorganization** - one of the two forms of a legal process of bankruptcy which may be applied to an insolvent debtor; which may occur with or without the participation of the court in regard to juridical persons but must occur with the participation of the court in regard to physical persons. This process consists of a reorganization and rehabilitation of the insolvent debtor pursuant to Part III of this Law without change of ownership and which may involve the appointment of an external manager.
- XXVII. **Sanation** - is one method of Reorganization, which may only occur with the participation of the court. This process results in the rehabilitation of the insolvent debtor (usually as a result of an influx of additional capital) and which must result in full payment of all creditors within a 6 month period pursuant to Article 80 of this Law.
- XXVIII. **Bankruptcy Administrator** - a qualified natural or juridical person, (including a specialized organ or agency of the State authorized by government decision to act as a bankruptcy Administrator) appointed by the court, the NBK (in case of banks) or a

106

creditors meeting who administers the process of bankruptcy as a Temporary Conservator, Special Administrator or External Manager.

- XXXIX. **Temporary Conservator** - a bankruptcy administrator appointed by the court in cases when court proceedings are postponed until a final decision is reached, and responsible for preserving the assets of an insolvent debtor.
- XXX. **Special Administrator** - a bankruptcy administrator appointed by the court, the NBK (in case of banks), or by a meeting of creditors, and responsible for implementing the Special administration of the insolvent debtor.
- XXXI. **External Manager**- a bankruptcy administrator(optionally) appointed by the court or by a meeting of creditors and is responsible for implementing the Reorganization of the insolvent debtor in accordance with an accepted reorganization plan.
- XXXII. **Conservation** - a status for a bank decided upon by the NBK and which results in a requirement for Reorganization or Special administration.
- XXXIII.**Conservator** - a qualified person appointed by the NBK of the KR, who may be a natural or a juridical person including a specialized agency and who is responsible for the bank's reorganization or for recommending its liquidation where reorganization is not possible.
- XXXIV.**Deregistration** - official act of notifying the appropriate state body of the liquidation, as a result of a bankruptcy process, of a juridical person and of the termination of commercial activities, as a result of a bankruptcy process, of a physical person.
- XXXV. **Duty of Care** is the duty of a manager of a troubled debtor to familiarize himself with and to act upon all facts relevant to the business in order to safeguard creditors and the debtor from unnecessary loss.
- XXXVI.**Duty to Avoid Loss** is the duty of a manager of a troubled debtor to prevent this debtor from engaging in any activity or transaction which results in unnecessary loss to creditors or to the debtor.
- XXXVII.**Duty to Warn** is the duty of a manager of a troubled debtor to inform any person about to enter into a contractual relationship that the debtor is or may be subject a process of bankruptcy.

Article 3 The concept of a process of bankruptcy

- I. A legal process of bankruptcy under this Law may have the following two forms:
- A. Special administration (with deregistration of the insolvent debtor) may also have two forms:
1. Liquidation
 2. Restructuring (Articles 39 and 40)
- B. Reorganization includes Reorganization by Sanation (without deregistration of the insolvent debtor)
- II. The basic features of the processes in point 1 of this Article are:
- A. Liquidation: the seizure of all the assets of the insolvent debtor and their disposition for the benefit of creditors (and owners if creditor claims are first fully satisfied) and the subsequent deregistration of the insolvent debtor. This process may be applied to both juridical and physical persons but when applied to physical persons participation of the court is obligatory and the special provisions of Article 52 apply. The court may prohibit a physical person to engage further in commercial activity for a specified period of time.
- B. Restructuring : the restructuring of the insolvent debtor, pursuant to Articles 39 & 40 of this Law, involves the creation of one or more new legal. The new legal entity or entities, as well as the remaining assets of the insolvent debtor, are sold for the benefit of creditors. The insolvent debtor (or the commercial activity in the case of a physical person) is then reregistered. This process may be applied to both juridical and physical persons but when applied to physical persons

participation of the court is obligatory and the special provisions of Article 52 apply.

C. Reorganization: the reorganization of the insolvent debtor involves the submission of a reorganization plan by the insolvent debtor for acceptance by the creditors in accordance with Article 81 of this law. A reorganization plan provides for the insolvent debtor to continue in business and to meet all or part of his creditor obligations (as per the accepted plan). Change of ownership is not obligatory. A process of Reorganization may be converted to a process of Special administration as per Article 81 of this law. This process may be applied to both juridical and physical persons but when applied to physical persons participation of the court is obligatory and the special provisions of Article 52 apply

D. Reorganization by Sanation: the process of sanation of an insolvent debtor is by order of the court and in accordance with Article 80 of this Law. It provides for specific guarantees to safeguard the position of creditors and must conclude within 6 months with full payment of all debt. If the process of sanation is successful, the debtor will no longer be insolvent and may continue in business, without necessarily changing its ownership. Although change of ownership of assets is not necessary it may occur if agreed between the parties. This process may be applied to juridical persons only as per Article.101 of the Civil Code.

III. The two forms of the process of bankruptcy under this Law are implemented by bankruptcy administrators (except in cases of reorganization when an external administrator is not appointed) as follows:

- A. temporary Conservator
- B. Special Administrator
- C. External Manager

IV. A Bankruptcy Administrator may be a natural or juridical person including foreigners who meet the requirements of points 5 and 6 of this Article.

V. A Bankruptcy Administrator must have a higher education in the field of business management, commercial law, economics or accounting or equivalent practical experience. An administrator must also be a disinterested party and may not be:

- A. current owners, managers, debtors, creditor, or any close business associates (parties to mutual contracts etc.);
- B. past owners or managers in the past 12 months
- C. relatives up to second degree of persons mentioned in subpoints a & b above
- D. any other person working in an organ of government power and management or the court.

VI. A Bankruptcy Administrator which is a juridical person may not be a creditor, debtor a close business associate, owner or former owner in the past 12 months. In addition, a government organ or agency must be authorized by an appropriate government body.

VII. Such persons may be appointed by the court (in process with court participation), by the NBK in case of banks or by a meeting of creditors (in a process without court participation) and may be a natural or juridical person (including a specialized organ or agency of the State authorized by government decision to act as an Administrator) An administrator may also be a foreign citizen.

VIII. A Bankruptcy Administrator in the performance of his duties enjoys all the rights protections granted him under this law and functions within the framework of this law and any additional contracts not contradictory to this law.

Article 4 The concept of insolvency and of an insolvent debtor

I. A debtor is subject to a process of bankruptcy if it is insolvent. A debtor is considered insolvent if:

- A. it fails to meet the demands of creditors for payment of debts and for fulfillment other obligations (for goods or services); or

- B. refuses to meet such demands, or
- C. is unable to meet such demands, or
- D. its liabilities exceed the value of its assets so that the balance sheet structure of the insolvent debtor is unsatisfactory.

In cases (a) and (b) and (d) of this subpoint, it is not relevant whether an insolvent debtor is able to pay its debts.

- II. A debtor is considered insolvent once this fact has been determined
 - A. by the Arbitrazh court (where a process of bankruptcy is brought about with the involvement of the court) or
 - B. by its creditors (in cases where a process of bankruptcy is brought about without the involvement of the court).
- III. Points 1. and 2. of this Article apply equally to physical and juridical persons but the concept of insolvency of a physical person also takes into account the special features provided by Article 52 of this Law.

PART 2 : SPECIAL ADMINISTRATION

Liquidation or Restructuring of insolvent debtor with change of ownership

SECTION I: GENERAL

Article 5 Grounds to initiate Special administration

A process of Special administration may be initiated against an insolvent debtor on the grounds set out in Article 4(1) provided that the amount of the debts is as follows:

- I. In the case of an insolvent debtor which is a legal entity which is not a bank:
 - A. when it has outstanding debts amounting at least to five minimum size of wage (minimum salary), as determined in the KR, to one of its creditors (when a physical person is the creditor); or
 - B. when aggregate claims on the insolvent debtor amount to 100 minimum wages or more (when a juridical person is the creditor)
- II. In the case of a bank, the amount of the debt is one minimum wage, whether the creditor is a physical or legal person.
- III. In the case of a physical person when subpoena (a) of point 1 of this Article applies or when aggregate claims to the insolvent debtor amount to 50 minimum salaries or more.

Article 6 Invalidity of a decision

The court, the meeting of creditors, the creditors committee, the Temporary Conservator, the Special Administrator, and the External Manager as well as the insolvent debtor or its owners, have no power to take decisions - and if such decisions have been taken they are considered invalid -if they contradict this law and specifically the requirements provided for by Section 13 of this Law, or encroach on the rights of a secured creditor.

Article 7 The commencement of the Special administration process

- I. The commencement of the Special administration process is a formal step which entails certain consequences under this Law, and particularly (but not exclusively) in relation to Article 27 of this Law.
- II. The process of Special administration is considered to have commenced upon the appointment of a Special Administrator for the insolvent debtor, either by the creditors meeting or by the court following a petition, or by NBK in the case of a bank
- III. Once the process of Special administration has commenced, whether it with court participation or without court participation, it must continue until completion of the

process of Special administration unless earlier stopped by order of the court, or other reasons provided for under this law.

SECTION II: PROCESS OF SPECIAL ADMINISTRATION WITHOUT COURT INVOLVEMENT

Article 8 Process of Special administration without court involvement

- I. A bankruptcy process without court participation may be initiated on the grounds set for the in Article 4(1) by a decision of the creditors or by the owners of the insolvent debtor (including state bodies when state enterprises are involved). In case of initiation by owners, the amount of the debt is not relevant and the insolvency of the debtor is assumed.
- II. A process of Special administration in respect of an insolvent debtor, without court involvement, is possible if all of the following apply:
 - A. if the decision to initiate the process has been taken :
 1. by the owners of the insolvent debtor, in accordance with the prescribed order, including State bodies in relation to State enterprises, and in the case of a bank, additionally with the Agreement of NBK; or
 2. by creditors who are owed 40% or more of the total unsecured debts of the insolvent debtor, who have requested the insolvent debtor in writing to initiate the process of its own Special administration, who have waited for one week since the date of delivery of that request and who have informed the insolvent debtor of the intention to initiate a bankruptcy process in case of its refusal.
 - B. if an advertisement in one national and one oblast (or local) newspaper in both Kyrgyz and Russian nearest to the places of principal activity of the insolvent debtor, of the decision to initiate the process of Special administration against the insolvent debtor, has been published not less than twice, at intervals of not less than 10 days. Each advertisement is to indicate the time, date and place of the creditors' meeting.;
 - C. if letters notifying creditors who hold debt in excess of 100 minimum salaries have been sent;
 - D. if not earlier than 2 weeks after the last advertisement mentioned in subpoint b above and the letters mentioned in subpoint c above, a meeting of creditors is held at the place and time shown in the advertisement
 - E. if the meeting of creditors decides to commence the process of Special administration against the insolvent debtor without the court's involvement and appoints a Special Administrator in compliance with requirements provided by Article 3, 9 and Section 7 of this Law.

Article 9 Decisions of Creditors

- I. The creditors at the meeting of creditors may decide
 - A. to commence a process of Special administration without court supervision; or
 - B. to apply to the court by petition for a process of Special administration subject to court supervision
 - C. not to commence a process of special administration (in which case the insolvent debtor may apply to the court for a process of special administration)
 - D. to defer their decision until a further creditor's meeting, the time and date and place of which must be agreed at the present meeting.
- II. Any creditor or the insolvent debtor always has the right, within seven (7) days, to petition the court if it disagrees with the decision of the meeting of creditors.
- III. A process of Special administration without court participation is possible only in the case of an Special administration of a juridical person, and is not possible in the case of an insolvent debtor which is a physical person.

- IV. Matters relating to the quorum for a meeting of creditors and the majority of votes and the methods by which it decides are set out in Section 7 of this Law and in Instructions issued under this Law.
- V. The creditors who appointed a Special Administrator may conclude a contract with him not contravening any of the provisions of this Law. Fees are set by the Instructions.
- VI. The fees and expenses of the Special Administrator are paid as expenses of the liquidation, but if there are insufficient funds to pay his fees and expenses, the creditors who nominate him and any other creditors who join in a contract with him, are liable to pay his fees and expenses.

Article 10 Effect of appointment of Special Administrator

- I. From the moment of appointment of the Special Administrator by a creditors' meeting all provisions of Section 6 of this law apply and all court and other actions against the insolvent debtor relating to repayments of debts or seizure of its assets are to be terminated in the same way as if the Special Administrator is appointed by a court.
- II. A secured creditor's rights are not affected in any way by the appointment of the Special Administrator by the meeting of creditors and he may take those actions permitted to him by the legislation (including Article 47 of this Law) in relation to his security.
- III. The Special Administrator appointed by creditors publishes information concerning his appointment in newspapers in both Kyrgyz and Russian not later than 5 days after the relevant decision has been taken by the meeting of creditors. Only one advertisement is required in one national and one oblast (or local) newspaper in the principal places of activity of the insolvent debtor.
- IV. Unless otherwise expressly stated in this Law, all of the provisions of this Law relating to Special Administrators and all other matters except where reference to the courts is made, apply equally to a process of Special administration without court participation as they do to a process of Special administration with court participation.

SECTION 3: SOLVENT ENTERPRISES

Article 11 The decision on the liquidation of a solvent enterprise and the conditions of liquidation

The decision to liquidate a solvent enterprise is taken in accordance with Articles 96 , 97, 98 and 99 of the Civil Code and is not further regulated by this Law, except for Article 12 and 61.

Article 12 (13) Commitments of owners of a solvent enterprise

- I. In accordance with Article 98(6) of the Civil Code, the owners of an enterprise at the time a decision is taken to liquidate the enterprise as a solvent one, bear the responsibility to meet the obligations of the enterprise to creditors. Article 61 of this law specifically applies to such a case.
- II. When it becomes apparent during the process of liquidation that the enterprise is insolvent, the owners of the enterprise must transform the process of liquidation of the enterprise as a solvent one into a process of Special Administration or Reorganization of an insolvent one.

SECTION 4: PROCESS OF SPECIAL ADMINISTRATION OF INSOLVENT DEBTOR WITH COURT PARTICIPATION

Article 13 Court with responsibility for process of Special administration

- I. All matters concerned with processes of bankruptcy of an insolvent debtor (other than matters such as applications under Article 44(4) and 91 which must be heard by a People's Court pursuant to the legislation) must be heard by the Arbitrazh court. This includes bankruptcy cases relating to insolvent debtors who are physical persons as well

as to bankruptcy cases that are initiated by creditors who are physical persons. Bankruptcy cases are to be considered in the Arbitrazh court in the place which is the address of registration of the insolvent debtor .

II. Bankruptcy cases may not be referred by the Arbitrazh court to an arbitration panel.

Article 14 Persons given the right to initiate a process of Special administration

A special administration process with court participation may be initiated on the grounds set out in Article 4(1) provided the debt is as set out in Article 5, by petition to the court:

a) by a creditor, or by any group of creditors, (including a secured creditor or creditors)

or

b) by the owners of the insolvent debtor, including State Bodies when State enterprises are involved, or by the insolvent debtor himself in case of physical persons, or by such other persons as stipulated by law or in founding documents- such as persons entitled to initiate a process of bankruptcy for foundations.

Article 15 Basis for the process of Special administration to be considered by the court

1. The basis for consideration of a process of Special administration by the court is:

(a) a suit of a creditor (or group of creditors); or

(b) a petition by the owners of an insolvent debtor, or state bodies in the case of a state enterprise ; or

(c) or any group of these.

The petition is to be presented in accordance with the Arbitrazh Procedural Code.

2. Before the process of Special administration has commenced in accordance with Article 7 of this Law, petition may be withdrawn by the person presenting it. All costs in this case are borne by Petitioner.

3. The State duty payable for a petition to the court shall not exceed one minimum salary, in the case of a petition by a physical person, or 10 minimum salaries in the case of a petition by a juridical person or a group of physical or juridical persons. This point does not apply to persons exempted from paying the state duty by law. In the event of commencement of the process of Special administration, these payments are considered to be expenses of the process of Special administration and are paid to the person who makes the petition according to Article 64 of this Law.

Article 16 Requirements for an application to a court to commence the process of Special administration of an insolvent debtor

I. If a dispute arises as to whether the process of Special administration should be commenced the Petitioner must prove to the court:

A. any of the grounds set out in Article 4(1) of this Law; and

B. the existence of the debt of the insolvent debtor, as stipulated in Article 5 of this Law; and

C. that the petitioner is a person mentioned in Article 14 of this Law.

II. The petitioner can prove the grounds set out in Article 4(1) of this Law in the following ways:

A. demonstrate that a judgment of a court concerning the repayment of outstanding debts has not been obeyed;

B. demonstrate that the debtor failed to pay within 21 days after receiving a written demand for payment from the petitioner. The period of 21 days can be shortened or lengthened by prior written Agreement between the parties.

C. if the petitioner can show an explicit refusal to pay or an unjustified denial of liability to pay or a statement of inability to pay.

D. if, pursuant to point (d) of the first point of Article 4 of this law, the petitioner convinces the court that the total assets of the insolvent debtor are less than the total of its liabilities;

E. if the petitioner can show that the insolvent debtor does not have the means (is unable) to pay.

In cases (a), (b) and (d) of this subpoint 2, it is not necessary to show that an insolvent debtor is unable to pay, but it is sufficient to show that it should have paid and has not done so.

III. The court is empowered to recognize on other grounds that the debtor is insolvent.

Article 17 Periods for consideration by the court of petitions

I. Unless the process is earlier stopped, the court is to consider a petition for special administration within 1 month of its receipt, and is to reach a decision as per Article 19 following.. This term can be extended by reasoned decision of the court, but for a further period not exceeding 1 month except in cases where the court can not make a reasoned decision without awaiting a decision of another related court case pursuant to Article 72 point 1 of the Arbitrazh Procedural Code. In case there are no disputed facts and all parties agree that a basis for special administration exists, the court must order special administration within one week of the petition.

II. Bankruptcy cases should always be considered urgently by the court in order to avoid further possible losses to creditors and the possibility of fraud. The period of 1 month is the normal maximum for the hearing of arguments based on the petition and if possible the court should hear the case within 1 week of delivery of the petition and should decide the issue within a further week.

III. Instruction may lengthen or shorten the period allowed to the court in appropriate cases.

Article 18 Court proceedings

I. The commencement of a process of Special Administration involves the consideration of the petition by the court to determine whether it is well founded.

II. The court must in writing inform the insolvent debtor of the receipt of the petition and should set a time, normally within 1 week, to hear the petition.

III. In the case of an insolvent debtor which is a juridical person, the hearing shall not be delayed merely because of the absence of one or more of the members of the management of the enterprise. In the case of an insolvent debtor which is a physical person, the case shall not be delayed by the absence or illness of the physical person, and the physical person may appoint a representative to appear in court on his behalf.

IV. A party to the case may appeal any decision of the court that has no legal basis pursuant to the Procedural Arbitrazh Code .

Article 19 Decisions available to court

The court is to take one of the following decisions on the basis of the evidence it receives:

I. for the immediate termination of the process of Special administration;

II. for immediate commencement of the process of Special administration, and for making the relevant adjudication. In this case the court must immediately appoint a Special Administrator;

III. for postponement of the proceedings (but only in exceptional cases, and not for more than a total period of 2 months from the date of the petition) in order to gather additional evidence, and for other reasons. In this event the court has the right on request by the petitioner immediately to appoint a temporary conservator of the insolvent debtor, in order to preserve its assets until a decision is taken and to make orders as to the cessation of all court actions relating to debt repayment and the seizure of the assets of the insolvent debtor (but not so as to affect the rights of a secured creditor.)

IV. Decisions of the court in points 1,2 and 3 above become effective upon the date they are taken

V. The court may review its decisions based on new evidence as per Article 173 of the Procedural Arbitrazh Code

Petitioner, or insolvent debtor in cases where the petitioner is a creditor, may appeal the decision of the court within 7 days.

Article 20 Decision on dismissal of suit

1. The court has the right to dismiss petition for a process of Special administration if when the petition is submitted:
 - a the debtor is not insolvent, pursuant to Article 4 of this Law or
 - b the debt does not meet the requirements in the first part of Art. 5 of this Law; or
 - c the person submitting the petition is not a person mentioned in Article 14 of this Law.
2. When the suit is dismissed the court is to make a reasoned decision, simultaneously settling issues of presence or absence of loss caused to the insolvent debtor as the result of an unreasonable suit, the size of the losses, and the times of its reimbursement by the creditors. If the court determines that the petition is unfounded and the debtor is actually solvent, then in addition to dismissal of the case, the court may fine the petitioner 100 minimum salaries pursuant to Article 28, point 3 of the Arbitrazh Procedural Code
3. The court does not have the right to refuse a petition for the Special administration made by the of an insolvent debtor owners (unless the court determines that he petition is fictitious), or a petition of a group of creditors authorized by a creditors' meeting which was initiated by the owners of the insolvent debtor unless the court determines that the petition is fictitious and the debtor is actually solvent.
4. For purposes of point 3 of this Article, a petition may be treated as fictitious if a solvent debtor files a petition for bankruptcy with the sole intent of delaying payment of his debts or for taking advantage of other protections offered by this law.

Article 21 Payment by debtor after date of petition

- I. If the person whose petition it is shows that before the date of the petition the insolvent debtor has refused to pay or has not paid a debt (in accordance with Article 4 of this Law), but it is shown that after the date of the petition the insolvent debtor has offered to pay the entire amount of the debt due at the time the court considers the matter (including any sums which, under any agreement, can be demanded in advance in case of breach of any agreement), the court shall not dismiss the petition for Special administration, unless with the Agreement of the court:
 - A. the insolvent debtor agrees to make payment of the debt within 1 week (or a longer time acceptable to the person whose suit or petition it is); and
 - B. pays the court costs and state duties which would have been paid if the person petitioning had instead brought a court action for the debt.
- II. If payment of the debt due and of the court costs is not made within the 1 week or longer time agreed in accordance with point 1(a) of this Article, the court shall order the immediate Special s administration of the insolvent debtor, unless the person whose petition it is agrees to a longer period.
- III. In order to ensure that payment by court sanction in accordance with this Article does not unfavourably prefer a particular creditor, the court shall order that payment of the debt shall not be made until (a) an advertisement of the offer of the insolvent debtor to pay has been made at the expense of the insolvent debtor one time in a national and oblast (or local) newspaper nearest to the principal place of business of the insolvent debtor in both Kyrgyz and Russian, (b) the insolvent debtor has written a letter to those of his creditors owed the 100 minimum salaries or more and (c) other creditors then have two weeks following the date of the last of these advertisements and the postage of the last of the letters in which to apply to the court for the Special administration of the insolvent debtor. If one or more other creditors who would be entitled to apply for

Administration then do apply to the court to be considered as a party to the original application, or with its own application for Administration, the court shall not dismiss the application for the Administration unless all of the creditors who have applied are satisfied by the insolvent debtor.

- IV. The Court shall not dismiss the suit on the ground of promises by an insolvent debtor to pay its debts in a period longer than that stated above, and shall order Special Administration if it is shown that the facts set out in Article 16 of this Law exist.

Article 22 Advertisements of appointment

1. If the court decides in favour of the commencement of Special administration and appoints a Special Administrator, the Special Administrator is responsible for placing advertisements of his appointment and of the decision to place the insolvent debtor into Administration. Two advertisements should be made, not less than 7 days apart, in a nationally circulating newspaper in both Kyrgyz and Russian and the advertisements should also specify the time date and place at which a creditors' meeting will be held, which meeting must not be less than 2 weeks after the date of the second advertisement.
2. The court or Instructions issued pursuant to this Law may, in certain cases, specify other methods of informing creditors and specify other requirements regarding the manner in which the fact of Special administration must be published or officially recorded. For example, the court or Instruction may in some instances excuse the need for advertisement or reduce the number of advertisements.

Article 23 Fees and Expenses of Special Administrator

- I. A temporary conservator or Special Administrator (appointed by the court or by a meeting of creditors has the right to be paid for his work at least to the extent which follows:
 - A. a basic salary of 15 minimum salaries per month; and
 - B. if provided by Instructions, additional payments, based on the result of his work, which may be a percentage of what he succeeds in recovering.
 - C. minimum fee provided by the Instructions in case there are not enough assets to pay for the regular fees
- II. A Special Administrator appointed by the creditors is paid according to the same schedule provided by the Instructions as is a Special Administrator who is appointed by the Court.
- III. The Special Administrator's first duty after appointment is to secure the assets of the insolvent debtor, but he should also attempt as a matter of urgency to determine whether the unsecured assets of the insolvent debtor are sufficient to pay for his expenses (wages and costs, including the expenses of advertising his appointment.) If he determines that the assets of the insolvent debtor seem likely to be insufficient to pay his expenses, the Special Administrator must immediately inform the court and make a recommendation to the court as to how the process of Special administration should proceed. In this case, the court may decide that
 - A. the Special Administrator should cease his activities, after informing the state bodies responsible for registration of enterprises of the fact of completion of the process of Special administration of the insolvent debtor, so that the insolvent debtor should be deregistered. In this case the Special Administrator is to be paid a minimum fee set by Instructions, and this sum is to be paid by from a special fund.
 - B. if the Special Administrator determines that the assets (premises, equipment) of the insolvent debtor involve some danger to the public, the Special Administrator shall estimate the amount of funds required to prevent the danger or to cure the defect. These amounts are also expenses of the process of Special administration. If the value of the unsecured assets is insufficient to pay for all of the expenses of the process of Special administration, including the expenses of

making the assets safe, it is the responsibility of the Ministry of Emergency Situations either to pay for the additional amounts required to make the assets safe, or to take such steps as are necessary to cure or prevent the danger. On the application of the Special Administrator the Ministry of Emergency Situations must either promptly pay the sum requested by the Special Administrator or agree to take responsibility to prevent or cure the danger, and if it fails to take one of these steps the court may on the application of the Special Administrator order that the Ministry shall make the payments requested by the Special Administrator to the Special Administrator, within the time specified by the court.

SECTION 5: TEMPORARY CONSERVATOR

Article 24 Appointment of temporary conservator

- I. Pursuant to Article 19(3) of this Law, a temporary conservator may be appointed by the court at the request of a petitioner where the court is undecided whether to order the commencement of a process of Special administration. The temporary conservator's primary function is to ensure that assets of the insolvent debtor are not wrongly disposed of pending the court's decision but he must also conduct a preliminary financial analysis of the insolvent debtor. His appointment does not signify that the court has made a final decision to commence a process of Special administration and his appointment does not prevent the enterprise from carrying on its business under the supervision and control of the temporary conservator.
- II. A temporary conservator may also be appointed where a process of Special administration without participation of the court has been initiated, but not yet commenced, by an appropriate application by a creditor to the court. In this case, the court may appoint the temporary conservator even though the creditors and not the court will make the final decision as to the commencement of the process of Special administration. If the creditors decide to commence the process of Special administration without court participation, the temporary conservator becomes or is replaced by the Special Administrator selected by the creditors. If the creditors decide not to commence the process of Special administration without court participation, the temporary conservator is automatically dismissed from his office *after 7 days* unless a petition to the court for a court supervised process of Special administration is brought within those 7 days.
- III. The appointment of a temporary conservator is merely a precautionary step, and if on the application of a petitioner the court is in any doubt as to the safety of assets, or even considers that the evidence before it is insufficient to decide, it should immediately appoint the temporary conservator and should reconsider the matter at a later date, if necessary. On the subsequent application of the insolvent debtor the court may dismiss the temporary conservator if the court is convinced that the assets are in no danger.
- IV. Where there is an application for a temporary conservator, the case should be received and considered by the court as a matter of extreme urgency and never later than 3 business days from the date of application. If possible the application should be heard and decided on the same day as the petition is received by the court.
- V. At the request of the insolvent debtor, the court may order, as a condition of appointment, that if the court does not finally take a decision to commence the process of Special administration, the creditor who requests the appointment should pay the expenses of the temporary conservator and should compensate the insolvent debtor for any losses caused to it as a result of the appointment. If the court finally orders the commencement of a process of Special administration, the expenses of the temporary conservator are also expenses of the Special administration.

- VI. When the temporary conservator is appointed without hearing the insolvent debtor, the court must within 7 days if the insolvent debtor wishes, hear the insolvent debtor, and if necessary review its decision.

Article 25 Rights and Duties of the temporary conservator

- I. A temporary conservator from the moment of his appointment by the court carries out his duties to manage the insolvent debtor and control its activities. All the assets of the insolvent debtor are taken into the possession and control of the temporary conservator in order to preserve them until the final decision of the court. At that time, the powers of the management and owners of the insolvent debtor shall cease, unless the court orders otherwise or the temporary conservator decides otherwise
- II. All managers and owners of the insolvent debtor have a duty to cooperate with the temporary conservator and to allow him full access to the premises, assets, bank accounts, and records of the enterprise, and all persons (such as auditors, or banks) who have duties to the insolvent debtor owe those duties to the temporary conservator while he holds his office.
- III. The temporary conservator may order that a full or partial audit of the insolvent debtor be carried out at the expense of the insolvent debtor. He may order all managers and owners, or those who have been within the last year managers or owners, to cooperate with his investigation and with the audit and to produce to him all records and information relating to the insolvent debtor which the insolvent debtor itself is entitled to possess. He must preserve the confidentiality of commercial information which he receives and use such information only for the purposes of the insolvent debtor or to reveal it to the court or the Special Administrator if appointed.
- IV. The temporary conservator may order the exclusion of owners or managers of the insolvent debtor from the premises of the insolvent debtor, if he considers this necessary.
- V. Persons obstructing the actions of the temporary conservator in carrying out his powers, are considered to obstruct the court, and are answerable in compliance with the legislation.
- VI. When a temporary conservator is appointed, court or other actions in relation to the insolvent debtor may proceed insofar as they are aimed at establishing the liability of insolvent debtor, but may not be enforced in any way (except by a secured creditor.)
- VII. Unless he considers it necessary in order to preserve the assets, or unless he is unable to do so for some reason such as lack of working capital or lack of a market, the temporary conservator shall continue to operate the business of the insolvent debtor.
- VIII. The temporary conservator should immediately review the financial position of the insolvent debtor and for this purpose and to protect its assets has the right:
- A. to interview any person who is or has in the last year been connected with the insolvent debtor as managers or employees or owners;
 - B. and to request and receive for his own disposition, any account books or records concerning the insolvent debtor, to which the insolvent debtor is entitled, (or copies of them if he is willing to accept copies) from
 - 1. the insolvent debtor or
 - 2. from such connected persons or
 - 3. from persons connected with those persons in point (ii) of this subpoint.
- IX. If the temporary conservator concludes that the financial position of the insolvent debtor is unsound, he should immediately inform the court of this, and on the basis of this the court may immediately order commencement of a process of Special administration and appoint a Special Administrator. In any case, the temporary conservator is within a period of 2 weeks of his appointment to make a report to the court on the financial position of the insolvent debtor, but if he has insufficient information, this report may be a temporary report. The court shall take the report of the temporary conservator into account when making its final decision about Special administration, or about removing

the temporary conservator. The appointment of a temporary conservator does not extend the time allowed the court under Article 17 to decide upon the process of Administration. In case of an out of court process, the temporary conservator provides the report to the creditors and the creditors decide whether to appoint a Special Administrator.

- X. Other rights and obligations of the temporary conservator are determined by the court when he is appointed. When necessary, the temporary conservator may apply to the court concerning issues relating to his rights and obligations.

Article 26 The cessation of the process, after the appointment of a temporary conservator

- I. If the court decides not to commence the process of Special Administration, after the appointment of the temporary conservator the court is to make a reasoned decision, simultaneously dismissing the temporary conservator from his office.
- II. From the moment the decision of the court is effective, for the dismissal of the temporary conservator in connection with the decision not to commence the process of Special Administration, the insolvent debtor shall be again managed by its management and owners, and the temporary conservator is to surrender his powers to them.

SECTION 6: CONSEQUENCES OF COMMENCEMENT OF ADMINISTRATION

Article 27 Disposal of the property of insolvent debtors subject to Special administration

- I. This Article applies from the earliest of:
- A. from the moment the insolvent debtor or its managers inform any of its creditors by any means that the insolvent debtor is insolvent and is unable to pay its debts generally;
 - B. from the first newspaper advertisement calling a meeting of creditors to consider Special Administration, following a decision by the insolvent debtor itself or by its creditors for its own Special Administration, or
 - C. from the moment a petition for Special Administration is filed in court by the insolvent debtor
 - D. the moment of the commencement of Special Administration in accordance with Article 7, or
 - E. from the moment a decision of the owners of the insolvent debtor has been taken, concerning the transformation of a liquidation process for a solvent debtor into an Special Administration process for an insolvent one.
- II. In accordance with Article 102 Part 1 of the Civil Code, from the time mentioned in the foregoing point, the insolvent debtor or its owners or managers have no right to dispose of its assets or funds or voluntarily discharge its obligations. Such a decision may be made only by the court or of the temporary conservator or the Special Administrator or by the insolvent debtor with the permission of a properly advertised meeting of creditors of the insolvent debtor or the creditor's committee. However, the insolvent debtor may without such permission make ordinary payments of the following kind
- A. payment of ordinary levels of earned wages; and
 - B. ordinary operating expenses which are necessary in order to secure fresh supplies of goods or services where payment in advance for fresh supplies or deliveries is a condition of fresh delivery or continued supply (gas, telephone, rent, light, or fresh deliveries of already ordered materials used in production). This does not authorise payment of sums payable for past deliveries or supply of goods or services.
- III. Any assets or funds disposed of contrary to this Article which the insolvent debtor owns may be taken back by a Special Administrator from third parties who have acted in bad faith, unless the court decides otherwise. If it is impossible to recover the assets or funds, the third parties bear personal responsibility to pay the creditors their value.

- IV. The court is to decide in favour of the return of the assets by third persons, unless the latter prove to the court that the assets were (i) acquired by them at market price and (ii) without their knowledge of the events mentioned in the first point of this Article. Failing this, such persons shall be considered to have acted with knowledge of the intention of the insolvent debtor to conceal the property from its creditors, and to have acted in bad faith, pursuant to Article 104 of the Civil Code
- V. Those wrongly disposing of assets or funds after the time mentioned in the first point of this Article also bear personal liability to compensate creditors for the losses concerned, if the funds or assets disposed of are not returned fully and without losses.
- VI. Nothing in this Article affects the right of a secured creditor to enforce his security if the security is valid and was given before the events set out in point 1 of this Article. However, pursuant to Article 49 of this Law and Article 102 of the Civil Code, a security cannot be given after the events set out in point 1 of this Article except as set out in Article 49 of this Law.
- VII. If a decision is taken by the court or by a creditors' meeting not to commence a process of bankruptcy, this Article ceases to apply.

Article 28 Decision of the court on Special Administration

- I. After the consideration of material relevant to the Special administration and evaluation of the evidence presented to and acquired by the court, the court is to make a reasoned decision on the Special administration of the insolvent debtor, and simultaneously decides the issue of the appointment of the Special Administrator.
- II. In accordance with Article 103(1) of Part 1 of the Civil Code of the Kyrgyz Republic, from the moment of commencement of the process of Special administration (liquidation), all court and other actions directed at repayment of the debts of the insolvent debtor and the arrest of its assets, are to be stopped.
- III. The following also applies from the moment of commencement of the process of Special administration, pursuant to Article 103(2) of the Civil Code, whether the insolvent debtor is a juridical person or a physical person:
 - A. all debt obligations of the insolvent debtor not already current shall be deemed current;
 - B. the calculation of penalties and interest on all debt obligations shall cease (but penalties and interest already due at the moment of commencement remain payable pursuant to Article 64);
 - C. all limitations provided by law on recovery against the insolvent debtor's property shall be removed (but not if a third party has a legitimate right to retain such property);
 - D. all property disputes in which the insolvent debtor acts as a defendant are terminated, except those on which court decisions have come into effect;
 - E. all property claims can be presented to the insolvent debtor only within the framework of the process of Special Administration;
 - F. pursuant to that process a secured creditor may present his claim to the Special Administrator and is entitled to payment or to the secured property, in accordance with Article 47 of this Law;
 - G. Where the Civil Code or any legislation permits a participant in an enterprise, (other than a joint stock company) to withdraw his capital contribution from the enterprise, such a withdrawal may not be made after the initiation of a process of Special Administration against the enterprise.
- IV. If the insolvent debtor has settled its debts with the creditors, or if the insolvent debtor and creditors have agreed on a plan which observes the conditions set out in Part 3 of this Law, or if a court approves a process of sanation pursuant to Article 80 of this Law, then, subject to Article 21 of this Law, the court is to make a reasoned decision for refusing to commence the process of Special Administration against the insolvent debtor.

Article 29 Informing the body responsible for deregistration of legal entities

Where a process of Special Administration commences, it is the responsibility of the Special Administrator, pursuant to Article 97 of Part 1 of the Civil Code of the KR, to inform the agency which carries out registration of legal entities so that an appropriate warning may be given to those inspecting the register.

SECTION 7: RIGHTS AND DUTIES OF CREDITORS MEETING.

Article 30 Application of this section

The provisions of this section apply both to Administrations conducted with court participation and to those conducted without court participation unless the contrary is clear from the relevant Article.

Article 31 The role of a meeting of creditors

- I. A meeting of creditors should take place no sooner than two weeks after the last advertisement concerning the process of Special administration of the insolvent debtor has been made by the creditors, insolvent debtor or Special Administrator pursuant to Article 22, showing the time and the place.
- II. An initial or subsequent meeting of creditors which has been validly called to consider commencing a process of Special Administration or any other questions may continue even if no creditors attend the meeting. Where no creditors attend, those who initiated the process by advertisement, or the Special Administrator if he has been appointed, may chair the proceedings and may propose questions and these questions (including the question of appointment of a Special Administrator) may be taken to have been agreed by the meeting once they are recorded by a memorandum of the meeting signed by the chairman or Special Administrator. Those who initiated the meeting must within 1 week notify the creditors in writing of any decisions taken at the meeting.
- III. Where an initial meeting of creditors has been held at which a Special Administrator was appointed, no second meeting is required unless it is decided otherwise at the initial meeting, or Instructions issued pursuant to this Law otherwise provide. However, the Special Administrator may call other meetings of creditors, and if there is a committee of creditors, it may require the Special Administrator to call for further full meetings of creditors.
- IV. A meeting of creditors is empowered to make any decision connected with the debt obligations of the insolvent debtor which do not contradict this Law or decisions of the court, and do not obstruct the activities of the Special Administrator.
- V. Decisions of the initial or any subsequent meeting of creditors on any issue - with the exception of questions about expressing lack of confidence in the Special Administrator - are considered to be taken if they are voted in favor by more than 51% of the debt represented at the meeting. The amount of debts owed to those not attending the meeting is irrelevant.
- VI. A creditor wishing to vote at the initial creditors meeting, must present a formal claim 7 days prior to the meeting to the Special Administrator (if one has been appointed) or to person(s) initiating the meeting. Procedure for submitting such claim is set out in the Instructions.
- VII. All decisions of a meeting of creditors in a bankruptcy process with court participation are effective only after they are confirmed by the court.
- VIII. A secured creditor may vote at a meeting of creditors but his vote is valued (for purposes of determining the percent of the total debt) on the basis of the difference between the amount of debt owed to the secured creditor and the estimated value of his collateral. A Special Administrator may purchase the collateral at the price at which the secured creditor values it for purposes of calculating the value of his vote. When a secured creditor wishes to vote, he must first estimate the value of his security and

declare this at the first meeting of creditors. The estimated value of the security is deducted from the value of the secured creditor's claim, when it is necessary to calculate the votes of creditors, because a secured creditor has the priority over other creditors by virtue of his property rights in the secured property. If the secured creditor estimates the value of his asset too highly, he will lose a greater share of his vote. If he estimates the value of his asset too low, in order to increase his vote, the Special Administrator is entitled to buy it from him at that price.

Article 32 The creditors' committee

- I. To assist the Special Administrator in carrying out his duties, and to exercise control over his activities, a meeting of creditors may at any time elect a creditors' committee comprised of 2 to 7 persons.
- II. The creditors' committee has a quorum for its properly convened meetings if 2 of its creditor-members are present, and decides by a simple majority of those present at its meetings (or majority by value in case an even number of creditors are present). It has the power to give recommendations to the Special Administrator, which are to be taken into account by him if they are consistent with the interests of all creditors. The Special Administrator is not obliged to follow the recommendations of the creditors' committee, (or of the meeting of creditors) but he is always justified if he does so.
- III. If the actions of the Special Administrator are considered unsatisfactory, the creditors' committee has the right itself to convene a meeting of creditors and to raise the issue of lack of confidence in the Special Administrator. Such a meeting can be convened by the creditors' committee only by informing by letter all of the creditors and holding the meeting not earlier than 2 weeks from the date of posting the last letter. The Special Administrator is obliged to provide the creditors' committee with the names of all the creditors of which the Special Administrator knows.

Article 33 Expression of lack of confidence in the Special Administrator and his removal from office

- I. A decision of the meeting of creditors expressing lack of confidence in the Special Administrator and nominating a new Special Administrator is considered to be taken if in favour of the decision are:
 - A. a majority of the total number of creditors attending the meeting, and also
 - B. creditors attending who claim 75% or more of the total outstanding debts of the insolvent debtor owed to those at the meeting.
- II. In a court supervised process, the court may accept or reject the decision of the meeting of creditors and to dismiss the Special Administrator, and to appoint a new Special Administrator who was nominated by the creditors meeting, on condition that the interests of all the creditors are observed, and the requirements of Section 13 of this Law are met.
- III. When an insolvent debtor is subject to a process of Special administration without the involvement of the court, the Special Administrator is appointed and dismissed by the meeting of creditors in compliance with the procedure provided in the present Article, without court sanction.

Section 8: RIGHTS AND DUTIES OF THE SPECIAL ADMINISTRATOR

Article 34 Rights and Powers of Special Administrator

- I. The main function of the Special Administrator is to sell the assets of an insolvent debtor for the benefit of creditors and after satisfying secured creditors and the covering expenses of special administration to distribute the proceeds of sale to the creditors in accordance with the priorities set out in this Law. For this purpose, the Special Administrator may, if he decides that it would be more profitable to do this, decide to restructure the insolvent debtor and sell the restructured enterprise (assets) in

accordance with either of the methods set out in Article 39, or he may decide that he will simply sell the assets of the insolvent debtor (simple liquidation).

- II. The Special Administrator is the sole legal representative of an insolvent debtor which is subject to a process of Special administration. He signs contracts as Special Administrator of the insolvent debtor, and it is the insolvent debtor which is bound by these contracts, and not the Special Administrator personally. The Special Administrator is not the successor in title to the insolvent debtor. The insolvent debtor continues to exist until its deregistration, after which it has no successor in title.

Article 35 Particular Rights of the Special Administrator

The Special Administrator has the right:

- I. to carry out actions in accordance with the legislation with the assets of the insolvent debtor in order to satisfy claims in the most optimal way including initiating court actions to collect accounts receivable without paying court fees;
- II. to repudiate or transfer without payment any rights of ownership or other rights in respect of any property which cannot be sold at a profit, This includes rights of ownership to accounts receivable due to the insolvent debtor;
- III. to repudiate any obligations and duties including executory contracts, which would not bring profit or would lead to liabilities (that is, without satisfying the claims of persons, who will then become creditors of the insolvent debtor during the Special administration process for any losses which are caused to them by the repudiation of any valid obligations of duties);
- IV. to substantiate claims and to reject unsubstantiated claims (or those parts of claims that are unsubstantiated). A creditor may petition the court if he disagrees with the decision of the Special Administrator regarding his claim.
- V. to manage the affairs of the insolvent debtor in place of the existing management, and to hire and dismiss employees or managers, including pregnant women and any others who according to the labor legislation cannot be dismissed immediately by an insolvent debtor except in case of restructuring where the new enterprise is successor in title pursuant to Article 39 of this Law.
- VI. to dispose of the insolvent debtor (as a whole, or in parts) as well as its assets;
- VII. to interview any person connected with the insolvent debtor (those (i) working for or with the insolvent debtor during the last 12 months, or (ii) who are or were co-owners of the insolvent debtor within the last 12 months, or (iii) any spouses, parents, or children of the insolvent debtor or of persons mentioned in points (i) or (ii) of this subpoint. Instructions shall specify the procedures involved.
- VIII. to request and obtain for his disposal any account books or records or other documents concerning the insolvent debtor;
- IX. to receive fees for his work, as per Article 23. of this Law and the Instructions;
- X. to call a meeting of creditors or creditors committee (if one exists) as necessary;
- XI. to make interim payments under priorities set out in Section 13 of this law.

Article 36 Specific Aspects of Passing Title to Assets Held by an Insolvent Juridical Person by Right of Operative or Economic Management

Where an insolvent juridical person has merely rights of operative or economic management over its property as per Articles 229 and 230 of the Civil Code, upon the appointment of a Special Administrator, the owner of this juridical person (or organ of control or management including state bodies in the case of state property) is automatically required to assign to the Special Administrator (and to confirm to him or to a purchaser from him on his request) the right to pass full ownership rights in any of the assets sold in the process of Special Administration over which the juridical person had had merely rights of operative or economic management..

Article 37 Duties and obligations of the Special Administrator

The Special Administrator must:

- I. advertise his appointment in accordance with Article 22 of the Law;
- II. as soon as possible after the moment of his appointment exercise control over the activities of the insolvent debtor and the assets of the insolvent debtor including debts and other obligations owed by other parties to the insolvent debtor and also assets which the insolvent debtor acquires or will acquire after the commencement of Special administration;
- III. sell (dispose of) all assets which are in non-cash form in the shortest possible period taking into account the requirements of Article 43 of this Law, and distribute the proceeds of sale of the assets among creditors in accordance with the priorities and the procedures and rules (po pravilam) set out in Section 13 of this Law. He is excused if he cannot sell at a profit and exercises his rights under Article 35(b) of this Law;
- IV. report to the court or to the creditors in accordance with Article 69 of this Law and then inform the body responsible for state registration pursuant to Article 70 of this Law..
- V. ensure that the insolvent debtor includes in all its external documents (letters, invoices and financial documents) information which notifies that the insolvent debtor is subject to a process of Special administration.
- VI. In case of the special administration of a 100% government owned enterprise which has not been privatized, in regard to social assets, the special administrator must abide by the Law on Privatization.

Article 38 Further provisions on rights and duties of Special Administrator

- I. Regardless of the form by which the Special administration is carried out - by the court, or without it - the Special Administrator has exactly the same rights and powers.
- II. If a dispute arises as to the powers of the Special Administrator the court, using the principles postulated in this Law and Instructions issued pursuant to this Law, and in order to ensure the correct process of Special administration, has the right to make a decision to allow the Special Administrator to take or to restrain him from taking, specific actions relating to the insolvent debtor or its property (even if the Special Administrator is appointed by creditors.)

Article 39 Restructuring of the insolvent debtor in the Special administration process

If the Special Administrator believes that it is feasible to restructure an insolvent debtor which is a legal person he may do so by:

- I. simply restructuring the legal entity by any means and then selling it so as to pay the debts of creditors from the proceeds of sale. In this case, the restructured legal entity is successor in title to the rights, duties and obligations of the insolvent debtor. In restructuring an insolvent debtor the Special Administrator can adopt any of the means of reorganization permitted for legal persons by the Civil Code or by the legislation; or
- II. setting up a new legal entity (or more than one) which he temporarily owns, transferring into the new legal entity the viable assets of the enterprise or such assets of the insolvent debtor as he chooses, and then transferring his rights to the new legal entity to a third person, and distributing the proceeds received from the transfer of his rights to the creditors. The new legal entity which is established for the purpose of the restructuring may be in any form allowed by the legislation of the KR and need not be a joint stock company. It will, however, not be the successor in title to the insolvent debtor.

Article 40 Restructuring by means of new legal entity which is not successor in title

- I. Unless there is a specific agreement to the contrary between the Special Administrator and the new legal entity the procedure in point 2 of Article 39 of this Law. does not involve the new legal entity inheriting the debts of the insolvent debtor. In accordance with Article 96(1) of the Civil Code, the new legal entity is not the successor in title of the old debtor and has no responsibility for any of the debts of the old debtor including tax debts, social fund debts, pension debts or debts to workers who may be transferred to the new debtor. No state organ or body has the right to take funds from the new legal entity to pay for the debts of the old.
- II. When a Special Administrator establishes a new legal entity pursuant to point 1 of this Article, the Special Administrator has the right to sell the shares (aktsii or dolya) of the new debt-free legal entity set up by him, as part of the assets of the insolvent debtor, and to settle accounts with its creditors from the proceeds of sale. If the creditors agree, he may even distribute the shares (aktsii or dolya) in the new legal entity to the creditors, in return for settlement of their debts, having regard to the order of priorities set out in Section 13 of this Law.
- III. A Special Administrator who establishes a new legal entity pursuant to this Article has no duty to register the shares with the State Securities Agency and has no duty to seek permission for the issue or open sale of the shares, notwithstanding anything contained in the Law of the Kyrgyz Republic "on Securities and Stock Exchanges" but the sale must be advertised in such a way that it is clear that it is a sale by a Special Administrator.

Article 41 Limitations on the rights of the Special Administrator in connection with assets of the insolvent debtor, which are share capital in another debtor

- I. Where an insolvent debtor is owner of a capital contribution (aktsii or dolya) in another enterprise as part of the authorized (founding) contribution or as an investment, this capital contribution in the other enterprise is not recoverable by the insolvent enterprise or the Special Administrator of the insolvent debtor except where the shares (aktsii or dolya) in the other debtor are redeemable in accordance with the terms of their issuance or where, according to the Civil Code, the participants have a right of withdrawal. The Special Administrator has no greater right of withdrawal than the insolvent debtor had.
- II. The Special Administrator has the right to sell the aktsii or dolya of the insolvent debtor to a third party. Where the right of the insolvent debtor is to aktsii or dolya in a closed type legal entity, the liquidator must observe the requirements of the charter of the legal entity and of the legislation, in selling the aktsii or dolya.

Article 42 Limitations on the rights of the Special Administrator in respect of the assets of an insolvent debtor, which are in the disposition of other persons on the basis of an agreement (dogovor)

- I. In compliance with point 2 of Article 35 of this Law, the Special Administrator can repudiate any obligations of the insolvent debtor, but has no right to demand back the property of the insolvent debtor which in accordance with the legislation of the KR has been put at the disposal of third parties on the basis of an agreement until the expiry of the period provided in the agreement, except for accounts and books and records related to the insolvent debtor which he has the right to examine or make copies of. If, however, the contract with the third parties permits the recovery of the property (for example, in case of breach of the contract) the Special Administrator may demand back the property.
- II. Where property has been leased to another person by the insolvent debtor, the Special Administrator may sell the property to that person, or may sell to a third person the right to receive back the property at the end of the lease, together with the right to receive payments of rent.

- III. A Special Administrator may sell property that is under the control of third parties if the seller is willing to assume the obligations of the insolvent debtor in relation to the contract.

Article 43 Further duties of the Special Administrator

- I. The Special Administrator accepts obligations to the insolvent debtor and to its creditors to notify them in advance of the sale of any assets (for example, by newspaper advertisement of the fact of the sale) and to sell the asset without any unreasonable delays at the highest available price - taking into account that the selling of assets is done under forced circumstances within restricted periods of time, and that the realisation of assets is at lower prices than under more favourable conditions is possible.
- II. Without the assent of the court or the committee of creditors or a creditors' meeting, the Special Administrator has no right to postpone the selling of assets for an extended period in order to await changes in the market situation with the hope of selling assets at higher price. The Special Administrator's duty is to sell assets as soon as possible, following proper advertisement, and not to retain assets and to manage debtors. He may retain assets for extended periods without sale only with the consent of the court or the committee of creditors or a creditors meeting.
- III. There may be cases where the obligations of the Special Administrator cannot be fulfilled, and he will not bear responsibility for the selling of assets at a price which the creditors or the insolvent debtor disagree with, if he has some justification.
- IV. There are considered to be justifiable reasons, and the Special Administrator is justified to sell at any price he can obtain, when:
- a) the assets are sold within the period indicated in the notification of selling, even if the price received does not equal the price which can be received by selling at another time; or
 - b) the assets are sold in a timely way without waiting for a change in the market situation with the aim to sell the assets at a higher price; or
 - c) the assets are sold without notification of selling because of lack of time resulting from the deterioration in the quality of the assets, or for other objective reasons.
 - d) the assets cannot be sold because of lack of interest, or the costs of holding a sale would exceed the value of the assets, or if for some other good reason the assets cannot be sold (in which case the Special Administrator has the right to repudiate the assets pursuant to Article 35(2) of this Law).
- V. The Special Administrator may be made responsible by the court on the application of the owners of the insolvent debtor or of creditors, for any loss they suffer that is a result of any action of the Special Administrator taken contrary to this Law or the Instructions.
- VI. In selling the assets of an insolvent debtor, the duties of the Special Administrator are imposed by this Law and by Instruction made under this law. Provided he attempts to obtain the best price, and follows the provisions of this Law, he is not subject to instructions by any person as to the timing of or the manner or procedure of sale, and any such instructions lack legal force.
- VII. Where the Special Administrator is a specialised agency of government, its duty is the same as for any other Special Administrator.
- VIII. The Special Administrator may set starting prices for asset sales conducted by public auction, but he is not to set minimum prices, and at a properly advertised public auction, he should sell to the highest bidder. Instructions may provide differently for state owned enterprises.

Article 44 Responsibility for refusing cooperation with the Special Administrator

- I. It is an offense for persons to refuse to cooperate with a Special Administrator in the exercise of his authority. This provision and those below apply also to a Special Administrator appointed by creditors.

- II. Persons who obstruct the Special Administrator (or a temporary conservator) in the exercise of his duties are considered guilty of violating the orders of the court, and the Special Administrator has the right to apply to the court to make them answerable, and to enable the fulfillment of his own main functions. The court shall hear and decide any application made by a temporary conservator or a Special Administrator as a matter of extreme urgency and may decide any issue on a temporary or permanent basis without hearing the other side.
- III. If necessary, the court may make an order requiring observation of the Special Administrator's rights.
- IV. A court of general jurisdiction may decide upon and make out a reasoned order for the arrest of a person connected with the insolvent debtor (employee, former employee, shareholder, adviser or anyone who had business contacts with the insolvent debtor), who seeks to leave the territory of the Republic in order to evade interrogation, or destroy or conceal any documents or other evidence of the insolvent debtor, and it may also delegate immediate execution of its decision to the law safeguarding [pravakranitelni] bodies.

Article 45 Resignation of Special Administrator or temporary conservator

- I. A temporary conservator, or a Special Administrator appointed by the court, may resign with permission of the court. The court shall grant such permission if these persons cannot be paid or if these persons are ill or otherwise unfit for their duties, and in other cases if there is good reason and an alternative person is available to fill the position.
- II. A Special Administrator appointed by a meeting of creditors may resign with approval of the creditors' committee or a meeting of creditors, but in accordance with any contract which the Special Administrator may have with the creditors appointing him.

SECTION 9: TAXATION

Article 46 Taxation in view of non-commercial role of Special Administrator

- I. In carrying out his duties to sell assets for the benefit of creditors, the Special Administrator is not undertaking a commercial operation. Therefore in accordance with Article 3 of the Tax Code, neither the Special Administrator nor the enterprise which he is administering is subject to the VAT on sales of assets for distribution to creditors. In addition, in selling the assets of a insolvent debtor, he does not make a profit purely by reason of the receipt of proceeds from such sales, and is not subject to profit tax for this reason. [should be added to list of exempts In Tax Code].
- II. If, however, an insolvent debtor, while under the management of a Special Administrator, continues its commercial activities, it is liable to pay all applicable taxes on such activity including tax on profits, VAT and other taxes.
- III. If during the process of Special Administration, the Special Administrator pays any wages (whether for retained workers or newly hired experts or others) he must pay all applicable taxes on wages and other obligatory payments on wages (such as to the Social Fund).

SECTION 10: SPECIAL ADMINISTRATOR AND CREDITOR SECURED WITH A PLEDGE

Article 47 Rights of creditor secured with a pledge

- I. The rights of a creditor with a security from an insolvent debtor which is subject to a process of Special administration are regulated by the Civil Code of the KR and also by the Law of the KR "on Pledge" in so far as it does not contradict this Law.
- II. A secured creditor is entitled to exercise his rights against the secured property whether or not Special administration has started. The Special Administrator must give the secured creditor possession of the secured property if requested by the secured creditor.

126

If the secured creditor permits the Special Administrator to sell the secured property together with other property, the secured creditor does not thereby give up his rights of priority under Section 13 of this Law.

- III. A secured creditor does not give up or affect his rights to enforce his security merely because he initiates the process of Special administration.

Article 48 Recognition of invalidity of security

- I. During the process of Special administration the Special Administrator must ascertain the validity of the security of the creditor.
- II. The security is considered invalid in the following cases (as well as in cases which are stipulated in the Civil Code and the Law of Pledge of KR):
 - A. if it was given after the events defined in point 1 of Article 27 of this Law (pursuant to Article 102 of the Civil Code);
 - B. if it was given at any time during the year prior to the commencement of Special administration of the insolvent debtor, and
 - 1. at the time when such security was granted the insolvent debtor was unable to pay its debts, or was otherwise insolvent, or became unable to pay its debts or otherwise insolvent because of the Agreement to give this security; or
 - 2. in cases when a security was given by an insolvent debtor for past debts.
- III. The procedure and conditions for non-recognition of security which is invalid under subpoint b) of point 2 above shall be established by Instructions.

Article 49 Security given after the commencement of Special administration

A security which is given after the commencement of Special administration is considered invalid, except:

- I. a security given with the permission of the Arbitrazh court or the Special Administrator; a security given by a creditor secured with a pledge. A secured creditor has the right to transfer his rights to the collateral to a third party in exchange for payment of his claim.

SECTION 11: PRINCIPLES OF LIMITED, EXTENDED AND UNLIMITED LIABILITY

Article 50 Concept of unlimited liability of juridical persons

In accordance with Part 1 of the Civil Code of the KR, an insolvent debtor which is a legal person which is in the process of Bankruptcy is fully responsible for its debts and liabilities to the extent of its capital and assets. The insolvent juridical person itself cannot have limited liability. The principle of limited liability or unlimited (or extended) liability refers to the limited or unlimited (or extended) liability of the owners of an insolvent debtor.

Article 51 Unlimited or extended liability of shareholders and founders

- I. When the owners of an insolvent debtor in accordance with the legislation of the KR are required to, or the owners of the insolvent debtor themselves accept unlimited personal liability to bear responsibility for the debts of the insolvent debtor (unlimited liability), or to answer beyond the limits of the volume of the assets of the insolvent debtor (extended liability), then they become jointly and separately responsible to the extent mentioned (without limit, or upon the extended basis) for the debts of the insolvent debtor which is subject to the process of bankruptcy.
- II. If the Special Administrator determines that liabilities outweigh assets, he must, through all legal means, seek the possibility of repayment of the debts remaining after the liquidation of all assets by those shareholders and founders who have unlimited or extended liability and may seek repayment or indemnities from all or any of the shareholders and founders as he shall choose.
- III. The owner with unlimited or extended liability who has paid the whole debt, or a part of it which is greater than his share (considering the amount of his dolya or aksii in

relation to the dolya or aktsii of the other owners or having regard to any agreement between him and the other owners relating to the sharing of profits and losses) has the right to recover compensation from the other owners who have unlimited or extended liability for the additional payments he has made.

- IV. Where the owner of an enterprise is the state or a state organ, and has unlimited or extended liability, the state or the state organ is not itself subject to a process of bankruptcy, but in accordance with the legislation, a judgment in respect of its debt may be given against it, and may be enforced to the extent permitted by legislation.

Article 52 Features of unlimited liability of a physical person

- I. General Principles:
- A. This Article applies to natural persons conducting commercial activities without being a legal person (physical person) and registering with the government as individual entrepreneurs
 - B. All requirements of this law applicable to a process of bankruptcy of juridical persons apply equally to physical persons except in such cases where this law specifically states otherwise
 - C. Pursuant to Part 1 of the Civil Code of the KR, and in particular to Article 60 of the Civil Code, a physical person always bears unlimited liability and is fully liable from his own property for his debts to creditors.
- II. Special Feature of a process of Special Administration against a physical person
- A. A process of bankruptcy may be initiated by the physical person himself or by a creditor of a commercial debt pursuant to Articles 4 and 5 of this Law.
 - B. A physical person can be declared insolvent only by order of the court. When a physical person is declared bankrupt, his registration as an individual entrepreneur immediately loses effect, and the state body responsible for registration is to be informed by the court and is to cancel the registration.
 - C. Once a process of Special Administration is commenced, creditors of non commercial debt may present claims for payment to the Special Administrator as well as creditors holding commercial debts. Non commercial debts that are thus presented are subsequently paid pursuant to Section 13 of the Law and any part remaining unpaid are discharged. Creditors of non commercial debt are not obligated to present their claims within the process of bankruptcy. In this case the debts are not discharged and remain the obligation of the insolvent debtor after the conclusion of the process of bankruptcy.
- III. Limitations on seizure and sale of property:
- A. The following property of a physical person cannot be taken and sold in order to meet the claims of the creditors:
 - 1. pensions and various social payments;
 - 2. professional tools, if the bankrupt would be deprived of his only means of living if they were taken;
 - 3. invalid cars, and other means of transport for invalids;
 - B. The house, flat, furniture, or utensils of the physical person are to be taken only by an order of the court, if the following conditions are met:
 - 1. if the house or flat of the insolvent debtor exceeds minimum or basic standards, taking into account the size of his family, then the Special Administrator has the right to sell the house or flat after having given the insolvent debtor one month's time to find other housing that meets the requirements of this Article.
 - 2. when furniture and utensils are taken away, it is obligatory that minimum conditions for living are made available for him and for any members of his family living with him.
- IV. Conclusion and effects of a bankruptcy of a physical person. In accordance with Article 60(6) of the Civil Code, by decision of the court, a physical person who has been

declared insolvent may be prohibited from undertaking new commercial activities for a specified period of time not to exceed three years. A person violating such a stricture is liable under the law.

Article 53 Limited liability of shareholders and founders

When the founders or shareholders of an insolvent debtor, in accordance with the Civil Code and other legislation of the KR, are not liable for the debts of the insolvent debtor which is subject to the process of Special administration, then during the Special administration of the insolvent debtor they are responsible for and risk only the capital which they have invested into the insolvent debtor (shares, founders contributions) or that part of the capital which they should have invested in the insolvent debtor, such a principle being called limited liability.

**SECTION 12: BASES FOR ACQUIRING PERSONAL LIABILITY
FOR THE DEBTS OF AN INSOLVENT DEBTOR**

Article 54 Liability by reason of Guarantees

In accordance with Part 1 of the Civil Code, if a person with limited liability who gave a personal guarantee (including signing a transferable bill of exchange or a similar document signed as a guarantor) or gave a guarantee to a third party in respect of a debt or obligation of an insolvent debtor, then he is responsible and must bear responsibility in the amount of the guarantee.

Article 55 Liability by reason of default of duties to avoid loss, to take care, or to warn

Articles 55-61 of this law that deal with liability for breach of duties of care, to avoid loss and to warn apply to Managers of a troubled debtor:

- I. A troubled debtor for purposes of this article shall include:
 - A. a debtor who is unable to pay its debts or does not pay its debts as they fall due for payment, or
 - B. an debtor against whom a process of Special administration has been initiated or threatened; or
 - C. an debtor who is trading at a loss or is likely to trade at a loss if its situation does not change, or
 - D. an debtor whose liabilities outweigh his assets,
- II. Managers of a troubled debtor for the purposes of this article shall include:
 - A. persons with the power to make binding decisions regarding the daily operation of the enterprise (the president, directors, managers, chief accountant etc.)
 - B. other persons (such as a shareholder who owns a significant amount of voting shares, even if not a majority shareholder) who in practice controls the insolvent debtor by giving instructions to directors, managers or the staff of the insolvent debtor (which they usually follow)

Article 56 Duty of Care

By virtue of this law, it is the duty of Managers to ascertain (familiarise themselves with) and to act upon all facts relevant to the business in order to safeguard creditors from any unnecessary losses. Instructions issued under Article 93 of this Law may specify that this duty is stricter depending on the role of the Manager in question. Below in this Law this is referred to as the "duty of care".

Article 57 Duty to Avoid Loss

By virtue of this law, it is the duty of a Manager to attempt to prevent a troubled debtor from engaging in any activity or transaction (including any disposal of assets) which results in a loss to the troubled debtor or to third parties. Below in this Law, this is referred to as the "duty to avoid loss."

Article 58 Breach of Duty to Avoid Loss

- I. A Manager is in breach of the duty to avoid loss if:
 - A. a troubled debtor engages in an activity or transaction (including a disposal of assets) which results in a loss to the troubled debtor and he failed to ascertain such facts as would have enabled him to prevent such activity or transactions (breached his duty of care); or
 - B. a troubled debtor engages in an activity or transaction (including a disposal of assets) which results in a loss to the troubled debtor and he knows that the debtor is a troubled debtor (that is, he knows of any of the facts set out in subpoint 1(a) above) and he is not excused by point 3 below.
- II. A manager (other than the managing director or finance director) does not breach his duty to avoid loss if he has taken the necessary steps to familiarise himself with the business and financial situation of the insolvent debtor (not breached his duty of care), and
 - A. he did not know of the activity or transaction which resulted in a loss to the troubled debtor, or
 - B. he did know of the activity or transaction which resulted in a loss but had inquired about either the activity or transaction or about the business and financial situation of the troubled debtor and was given false information by another Manager; or
 - C. he voted or spoke against the activity or transaction in question and also resigned his position as Manager when he discovered that the activity or transaction would proceed despite his objection.
- III. The managing director or finance director or a person controlling the troubled debtor, is never excused if point 2(c) of this Article applies.
- IV. A Manager of an troubled debtor which becomes subject to a process of Special administration, who is in breach of the duty to avoid loss has an administrative liability to pay compensation to creditors for all additional losses which are caused to the troubled debtor (and therefore to the creditors of the troubled debtor) because of the carrying on of the activity or transactions in question.
- V. The Special Administrator of an insolvent debtor has the right to assess those losses and to demand compensation, and in the event that the Manager refuses to pay, the court may assess the validity of the Special Administrator's claim and make an appropriate reasoned order.

Article 59 Duty to Warn

A Manager knowing because of his position or who ought to know that the insolvent debtor is a troubled debtor (Article 55(1) of this law) and acting on behalf of the insolvent debtor to induce another person to enter into contractual relations with the troubled debtor, or knowing that another Manager or person working for the troubled debtor is entering a contract with another person, bears full administrative responsibility for losses caused to that other person, as does the troubled debtor itself, if he does not inform that other person that the troubled debtor is or may be subject to Special administration. This may be referred to as the "duty to warn".

Article 60 Wrongful transfer

- I. Where a Manager or owner of a debtor, knowing that the debtor is a troubled debtor, transfers its property to third parties without receiving full payment in money or in kind for this transfer, so that the creditors of the insolvent debtor are deprived of the benefit of these assets - those managers or owners will be fully liable for the losses caused by such a transfer to creditors.
- II. Articles 102 and 104 of Part 1 of the Civil Code of the KR and Article 27 of the present Law also apply to wrongful dispositions of property of a juridical person after its Special administration has commenced and are additional to this Article of this Law.

Article 61 Special administration when solvent

If it is discovered during the process of a solvent liquidation under Part I of the Civil Code that the enterprise is actually insolvent and if upon this discovery the process of solvent liquidation is not converted to a process of insolvent special administration under Article 12(2) of this law, then the owners and managers of this debtor become fully responsible for any consequential loss to creditors of the insolvent debtor.

SECTION 13: CONDITIONS AND PRIORITY OF REPAYMENT OF DEBT

Article 62 General rules on observation of priority during repayment of debts

The Special Administrator satisfies creditor claims on the of the assets of an insolvent debtor, in accordance with the following principles:

- I. He may sell assets and distribute the proceeds of sale to creditors, or he may transfer assets directly to creditors in satisfaction of their claims.
- II. Every category of creditors with an earlier priority must be fully satisfied before any creditor from a following category is satisfied.
- III. When creditors of one category are being satisfied, the principle to be observed is that all creditors of one category are equal between themselves and have equal rights for compensation, dependent on the amount of their outstanding debts. If there are insufficient funds to repay all creditors in this category, the creditor who has claims for a greater part of the share of debt of the insolvent debtor will receive proportionately more compensation.
- IV. Creditors secured with a pledge, in accordance with this Law, may have priority over certain other secured creditors. The priority between secured creditors depends on which secured creditor was first in time, or on which one was registered first as a secured creditor, in accordance with the legislation of the Kyrgyz Republic.
- V. If, during the Special administration process, it is discovered that the insolvent debtor has outstanding debts (existing debt) or will have future debt, or may have contingent debt to another person, while at the same time this other person also has an existing, future or contingent debt or debt obligations to the insolvent debtor, then:
 - A. if these debts or debt obligations arose before the commencement of the Special administration process and are in the form of money or have a money equivalent, then the difference between these two debts is taken into account in order to determine what one side must pay to the other side;
 - B. if the money equivalent of the debt or debt obligations is uncertain, it is to be estimated by the Special Administrator in order to take account of it under the procedure stipulated in point 1 of Article 67 of this Law.
 - C. any debts and obligations arising after the commencement of Special administration may not be taken into account:
- VI. The procedure stipulated in point 5 of this Article is not allowed if:
 - A. in relation to these two debts there is a third party whose interests would be encroached upon.
 - B. one of the debts which is to be set off against the other is the claim of an owner of an insolvent debtor for his capital contribution to the insolvent debtor (since an owner is not considered to be creditor in relation to his claim for repayment of his capital contribution).

Article 63 Items not included in liquidation mass (secured property and expenses of special administration)

- I. A secured creditor claims against the property of the insolvent debtor by virtue of his right of ownership in the pledged property. The secured property, therefore, is not part of the assets subject to disposition by the Special Administrator, (not a part of

liquidation mass) although with the Agreement of the secured creditor the Special Administrator may sell it and pay the proceeds to the secured creditor. The first to be paid, in this case, are the claims of creditors secured with a pledge, within the amount received from the realisation of their security. If the proceeds of realisation of the security turn out to be insufficient to meet the claims of a secured creditor, the unpaid part of the secured creditor's claim is to be paid third in priority in accordance with the procedure and conditions set out in point 3 of Article 63 of this Law.

- II. Subject to distribution is the liquidation mass which consists of the proceeds from the sale of the unsecured assets (or, with the consent of the creditors, the unsecured assets themselves) less the costs of the Special administration process. The costs of the Special administration process include the expenses of advertising the Special administration, the court expenses and the expenses of the Special Administrator, temporary conservator, and other persons hired by them, as well as other expenses of the insolvent debtor which is subject to the process of Special administration, incurred in the period when the Special Administrator found it necessary to continue the activities of the insolvent debtor;

Article 64 Priorities of distribution

The distribution of the *liquidation mass* to discharge the debts of an insolvent debtor is done in accordance with the following priority pursuant to Articles 60, 99 and 100 of the Civil Code.

- I. first in priority are claims of citizens to whom the insolvent debtor subject to Special administration is liable for damaging their health or for the causing the death of their provider by means of capitalising the corresponding periodical payments;]
- II. second in priority are severance and salary payments for workers who worked for the insolvent debtor under a labour Agreement, but for no more than a 3 months period;
- III. third in priority are the claims of ordinary (unsecured) creditors, including staff (workers, personnel) of the insolvent debtor for debts other than in points 1 and 2 above;
- IV. fourth in priority are the claims of State bodies for taxes and other payments into the Republican and local budgets, as well as claims of State insurance bodies, and social insurance bodies.
- V. fifth in priority are all other claims, including creditors who have given up their priority rights and have (whether before the Special administration or after it) informed in writing the insolvent debtor or the Special Administrator that they agree to receive their debts after all or some of the previous creditors indicated in this Article. Such creditors may also agree that their claim is paid even after the last class (f, below);
- VI. last in priority, after satisfying all the above claims of creditors and any interest or penalties which they were to receive before the commencement of the process of Special administration of the insolvent debtor, the balance is to be paid to the owners of the insolvent debtor.

Article 65 Interest and penalties

Pursuant to Article 103(2) of Part 1 of the Civil Code of the KR, interest and penalties cease to accrue on any debt after the commencement of the bankruptcy and cannot be claimed from the Special Administrator. This applies even to a secured creditor. Interest or penalties which the creditors were to receive before the commencement of the process of Special administration are paid together with the debts on an equal basis, according to the categories of creditors, and observing the appropriate priority.

Article 66 Claims for profits

All creditors have the right to make claims for profits not received, or benefits lost as the result of the insolvency of the insolvent debtor, having included them in the amount of any outstanding debt.

Article 67 Assessment of claims

- I. Where a creditor claims debts or obligations under an agreement, it is for the Special Administrator and not the court to assess the payments which are due including compensation for non-monetary obligations of the insolvent debtor (pursuant to Article 28(2) of this law which follows the Civil Code and provides that all court actions cease).
- II. Where the Special Administrator repudiates duties or obligations of the insolvent debtor pursuant to Article.35(3) of this Law, the person affected by the repudiation is entitled to claim damages from the insolvent debtor and to claim a debt in the Special administration.
- III. In all cases where debts or obligations of the insolvent debtor lie in the future, the time of their performance is considered to be brought forward so that there is considered to be an immediate breach of agreement and the right to make an immediate claim. When the liquidator calculates the compensation payable for a claim which has been brought forward in this way, he is to make a discount [reduction] from the value of the claim to reflect the fact that the claim has been paid early. The discounted value of the claim is described as the net present value of the claim. Instructions pursuant to this Law may specify how the net present value is calculated in any case. In accordance with Article 100(3) of the Civil Code all such calculations must be made pursuant to this Law and not to any other Law. *Per social fund: wants to include that no discount on invalid claims probably a lack of understanding of net value - but net value may not be calculable in Kyrgyzstan now due to uncertainty of interest rates and inflation so may should not be discounted.*
- IV. Where the insolvent enterprise has liabilities to employees in respect of invalidity benefits, those liabilities are accelerated in the same way as other debts, and are capitalised at their net present value. The liquidator bears responsibility for payment of the capitalised net present value of these invalidity benefits, from the assets of the insolvent enterprise, in the priority set out in this Article. The liquidator is to pay the net present value of the sums in question to the Social Fund which has the responsibility to pay to the employee in question periodical payments in the full amount specified by the Labour Protection Laws to the employee in question. If the assets of the insolvent debtor are insufficient to pay the full amount of the net present value of the claims, the liquidator shall pay to the Social Funds such funds as he can pay and the Social Fund must assume the obligation to pay the full amount to the employee in question.
- V. The shareholders or owners of an insolvent enterprise are entitled to recover their capital contributions to the enterprise after payment of creditors of the enterprise in accordance with this Article. However, a shareholder or owner is not, by reason of this, a creditor of the enterprise and his right to recover his capital contribution if the assets are sufficient does not entitle him to vote at a creditor's meeting or otherwise to take part in the liquidation proceedings, unless he has some separate debt under another transaction by virtue of which he is a creditor. The shareholder or owner has no right to set off any obligation owed to him by the enterprise in respect of his capital contribution, against any debt which he may owe the enterprise. A Special Administrator may take into account type of shares in determining priority in paying shareholders pursuant to the Law relating to economic partnerships and associations (dividends owed to preferred stock holders are generally paid before those owed to common stock holders, for instance).
- VI. A secured creditor is paid by reason of his title to the secured assets and not by reason of any priority given by this Law. He does not have any special priority in respect of assets which are not secured, or in respect of the proceeds of sale of assets not included in his security. In respect to any part of his claim not covered by his security, he is an unsecured creditor, fourth in priority.
- VII. Pursuant to Article 6 of this Law, except by agreement with all creditors whose priorities are in question, no measures may be taken by any person, including the Special Administrator, which have the effect of changing the order of payments. In particular,

- A. where one creditor of an insolvent enterprise owes another creditor an obligation, and where the second creditor owes the enterprise an obligation, the setting off of these different obligations is not allowed if this has the consequence that the creditor whose debt is discharged (and who is, therefore, paid by this means) is advanced in the priority of his payment. However, in accordance with Article 62(5) of this Law, the setting off of an obligation owed by the insolvent enterprise to a creditor against an obligation owed to the enterprise by that same creditor, is allowed;
- B. neither the tax authorities nor any other budget organisation or organ of government is entitled to seize money in the bank account of an insolvent enterprise after the initiation of a bankruptcy process in accordance with Article 27(1)(subpoints b to e). All such authorities, organisations or organs must recover their debts in the same way as other creditors (via the Special Administrator and his sales) and in the same order of priority as set out in this Article. If such authorities, organisations or organs wish to ensure that assets are not wrongly removed from an enterprise then in the same way as other creditors they may ask the court to appoint a temporary conservator to ensure that the assets are not improperly removed.

SECTION 14 CONCLUSION OF SPECIAL ADMINISTRATION

Article 68 Recognition of the entity as solvent

- I. An insolvent debtor which fully pays the claims stipulated in Article 64 of this Law (excluding the claims of or coming after the owners mentioned in Article 64(6)) is recognised to be solvent.
- II. Where point 1 of this Article applies, the owners of the insolvent debtor - with the exception of the owners of an insolvent debtor which acts without a license or engages in an activity banned by the law - have the right to continue the activities of the insolvent debtor, and the court or the Special Administrator (in case of a special administration without court participation) must take steps to terminate the special administration.

Article 69 The Special Administrator's report

- I. After the distribution of liquidation mass under Article 64 of this law, the Special Administrator is to submit to the court the final report on his activities, attaching to it the Special administration balance sheet and a report on the use of any funds remaining after the claims have been satisfied. This applies even where the process of Special administration is stopped in accordance with Article 68 of this law. The report shall also contain the Administrator's comments on the behaviour and responsibility of the managers and shareholders of the insolvent debtor and their blame if any for the failure of the insolvent debtor.
- II. The court confirms the Special Administrator's report, makes a decision, and shall instruct the Special Administrator to so inform the body charged with the State registration of debtors.
- III. In the case of Special administration without court participation the Special Administrator must make his report to the creditors and is responsible for informing the body charged with the State registration of debtors.
- IV. The process of Special Administration is deemed to be completed when the liquidator produces his final report although the Special Administrator (whether appointed by the court or by the creditors) must still inform the body charged with State Registration of the completion of the process.

Article 70 Actions by body charged with state registration

- I. When the body charged with State registration is informed by the court that the process of Special administration has been stopped, that body shall remove from the register the note made pursuant to Article 29 of this Law.
- II. If that body is informed by the Special Administrator that the process of Special administration has been completed, pursuant to Article 69 of this Law, that body shall within 3 days note on the register the fact that Special administration has been completed, and after such deregistration the insolvent debtor shall be considered to have ceased all its activities and (if it was legal entity) it shall cease to exist as a legal entity.

Article 71 Body charged with registering a liquidated debtor

A liquidated debtor is subject to registration in the body where it was registered when established or in the subsequent body which according to legislation replaces that former body.

Article 72 Records

On the conclusion of the process of Special administration, all records of the Administration and of the liquidated insolvent debtor may be returned by the Special Administrator to the former owners of the liquidated insolvent debtor.

Article 73: Reopening case of bankruptcy:

A creditor may at any time (but not later than 10 years after the conclusion of the process of Special Administrations) petition the court to reopen a concluded case of bankruptcy in the event that assets that were secreted by the owners or managers during the administration are discovered, or in the event that other assets are discovered or recovered.

SECTION 15: PARTICULAR FEATURES OF INSOLVENT BANKS

Article 74 Powers of NBK when a bank is insolvent

When NBK considers that a bank is insolvent and presents a threat to creditors (including depositors) it has the right - in addition to the powers given by Laws issued by the KR "on the National Bank of the KR" and the Law "on Banks and Banking Activities" - to take any of the following measures - to:

- I. withdraw the banking license;
- II. instruct the bank to take specified measures, or not to take specified measures designed to protect the integrity of the banking system and to protect depositors;
- III. replace some or all of the managers;
- IV. order that shareholders grant additional capital to the bank or if they do not wish to so or fail to do so, then to then to surrender their shares to those who wish to buy them at the price determined by NBK;
- V. order that the bank sell some or all of its property, in order to receive liquid funds, without starting the process of Special administration;
- VI. provide its own liquid funds to the bank, if it [NBK] is secured;
- VII. prescribe that the bank will be given the status of a conserved one, without starting the process of Special administration;
- VIII. support a petition of the bank or its shareholders or a suit of creditors, and start the Special administration process with an application to the court.
- IX. Specify the commencement of the process of Special administration.

Article 75 Conservation of a bank

- I. When the National Bank of the KR, considering the petition of a bank or its owners or of a petition of creditors about the lack of means of the bank to pay its debts, or on its own initiative having examined the affairs of the bank, decides that conservation of the bank is more appropriate than the Special administration, then it may take the corresponding

decision to confer on the bank the status of a conserved one and appoint a qualified specialist to be manager-conservator of the bank.

- II. The special status of the bank - its conservation - begins from the moment of taking by the NBK of a decision and the appointment of a conservator.

Article 76 The powers of the conservator

- I. The conservator decides whether the bank is to be subject to Special administration or whether it is capable of being reorganised.
- II. All rights of the existing management of the bank will cease from the moment of the appointment of the conservator, and the bank has the right to perform only those activities which the conservator permits.
- III. When the conservator considers it appropriate that the bank may be saved by means of its reorganisation, he himself is to carry out the reorganisation, using the existing management of the bank, or replacing them, and attracting voluntary borrowed funds.
- IV. From the time of the appointment of the conservator and during the period of conservation, unless the conservator or the National Bank otherwise agrees, the following apply to the bank:
 - A. no resolution may be passed by the bank itself, for Special administration, and any resolution already passed shall become of no effect;
 - B. no person other than the National Bank or the conservator may initiate the process of Special administration and any application already made shall be dismissed;
 - C. no steps may be taken to enforce any security over the bank's property, or to repossess any goods which are in the bank's possession;
 - D. no other legal proceedings of any kind may be commenced or continued against the bank or its property;
 - E. any creditor entitled to make a claim for a payment under any scheme established by law or by the National Bank for the protection of depositors shall be entitled to claim immediately upon the appointment of the conservator.
- V. The conservator of a bank (or a temporary conservator) is entitled with the consent of NBK to repay some or all of the depositors of the bank some or all of the amounts owing to them.
- VI. The bank bears full responsibility for all contracts of the bank and for all expenses, to which the conservation gives rise, including the wages of the conservator.
- VII. NBK and the conservator do not bear personal responsibility for contracts or for any expenses of the bank, related to its conservation and the appointment of the conservator.
- VIII. NBK has the right to continue the process of conservation until (a) the bank is returned to solvency and is in compliance with the normative rules which apply to banks in accordance with the legislation, or (b) it is clear that the bank cannot be returned to solvency and must be liquidated, in which case NBK may specify its liquidation.

Article 77 Special administration of a bank

- I. NBK decides the question of the appropriateness of Special Administration of a bank. NBK represents the interests of depositors in the insolvent bank and of the banking system generally, and if NBK does not support the petition of a creditor or of the bank itself on Special Administration of a bank, then the bank may not be made subject to Special Administration.
- II. A person (physical or juridical) who wishes to initiate the process of Special administration of a bank does so by his petition or suit in writing to NBK.
- III. NBK may itself, without the request of a petitioner, decide upon the Special Administration of a bank.
- IV. NBK may also support the decision of the owners of the bank to initiate the process of Special Administration without court participation.

- V. NBK commences a process of Special Administration of a bank by written notice to the bank in question informing it of the appointment of a Special Administrator. The owners or depositors then have the right to apply to the court for the process of sanation of the bank pursuant to Article 80 of this Law but the special administrator shall stay in office and exercise his functions until the court has decided whether the process of sanation shall proceed.
- VI. When NBK decides to commence a process of Special Administration, at the request of a creditor, the owners of the bank or on its own decision, NBK shall then call a meeting of creditors in the manner set out in Article 8(2)(b to d) of this Law to explain to the creditors the reason for its decision.
- VII. Point 2(e) of Article 8, and Article 9 of this Law (except for Article 9(3), 9(5) and 9(6) do not apply in the case of banks.

Article 78 Special features of the Special administration of a bank

- I. The process of Special administration of the bank is carried out in accordance with and on terms stipulated by this Law for other insolvent debtors, without supervision of the court, with the following exceptions:
 - A. the first priority to be satisfied are the claims of creditors who lend to the conservator during the conservation of the bank;
- II. A pledge given by any bank to its creditors at any time (whether before or after the Special administration) is invalid unless the consent of NBK was received at the time of making the agreement on the pledge, and in case such a consent is given their claims are satisfied after those creditors who lend to the conservator.
- III. NBK has the right to issue detailed recommendations and regulations in the form of instructions concerning Special administration, reorganisation, merger and other measures for an insolvent bank, complementary to this Law and not contradictory to it.

Article 79 Sanation of banks

Banks may be subject to the process of sanation set out in Article 80 of this Law, in accordance with the procedures in Article 80 if a petition is made to the court within 1 week of the date of NBK's decision to commence the process of Special Administration.

**SECTION PARTICULAR FEATURES OF BANKRUPTCY OF
INSOLVENT DEBTORS ENGAGED IN AGRICULTURAL ACTIVITIES**

Article- Special aspects of Bankruptcy of physical persons engaged in agriculture

Instructions issued pursuant to this Law may determine, in relation to physical persons engaged in agriculture, what constitutes tools of trade, what property the insolvent debtor (farmer) may retain and other special features related to the insolvency of farmers.. Instructions may also limit the ability of an insolvent debtor (farmer) to be declared bankrupt during growing season and the harvest season.

Article - Special Aspects of Bankruptcy of juridical persons engaged in agriculture

Instructions issued pursuant to this Law may determine, in relation to juridical persons engaged in agriculture, special features related to the insolvency of farmers. Instructions may also limit the ability of a juridical person engaged in agriculture to be declared bankrupt during growing season and the harvest season.

**PART 3:
REORGANISATION OF INSOLVENT DEBTORS
WITHOUT CHANGE OF OWNERSHIP OF ASSETS**

SECTION I: SANATION

Article 80 Sanation

- I. When a petition to commence a process of Special administration against a juridical person has been submitted to the court, the juridical person or its owners may within one week of the date of the petition (which period shall not be extended) bring a motion before the court to suspend the proceedings and to exercise rehabilitation, in accordance with Article 101 of the Civil Code. A petition by a juridical person is deemed to be brought by its owners. The court shall within a further two weeks decide whether to order rehabilitation. This period shall not be extended, and if at the expiry of it the court has not ordered rehabilitation, the case must proceed as one of Special administration.
- II. It is a condition of the application to the court by the juridical person or its owners that
 - A. it or its owners shall admit that it is insolvent and
 - B. the juridical person and its owners accept liability for additional losses to creditors caused during the period the court considers rehabilitation, if the court decides not to order rehabilitation.
- III. The only ground for the court to suspend Special administration and order rehabilitation is if clear evidence is shown to the court by the insolvent juridical person seeking the rehabilitation that its can be restored, on terms established in points 4 and 5 below.
- IV. One method of demonstrating to the court that solvency can be restored is to present evidence that a third person or persons fully guarantee the claims of the creditors, including their legal or court expenses.
- V. A second method of demonstrating to the court that solvency can be restored, in the absence of a guarantee from a third person, is for the court to announce, by means of a single publication in the national press, (not more than 3 weeks after the petition for the commencement of Special administration), a competition of juridical and natural persons who are willing to carry out the rehabilitation proceedings and undertake personal liability for any additional losses to creditors which arise during the rehabilitation. Such a publication shall be made at the expense of the persons petitioning for rehabilitation and if they do not pay in advance for the publication, rehabilitation shall not proceed and Special administration is compulsory.
- VI. All persons who offer guarantees or who volunteer to carry out the rehabilitation proceedings must have unquestioned solvency and the financial means to ensure payment to creditors. Specifically, the guarantor must demonstrate his ability to guarantee all the debt of the insolvent juridical person and the volunteer must demonstrate his ability to undertake personal liability for any additional losses to the creditors which arise during the process of rehabilitation, from whatever cause.
- VII. If within a period of one month after the publication (not more than 7 weeks after the date of the petition for Special administration) the insolvent juridical person has not found any guarantors and if no-one volunteers to be the responsible party, or the insolvent juridical person (debtor) does not accept the conditions of those volunteering, the court shall immediately order special administration
- VIII. During the time when the court is considering rehabilitation, a temporary conservator must be appointed to administer the affairs of the insolvent debtor. This shall be at the expense of the persons petitioning for the rehabilitation.
- IX. If the court orders rehabilitation, it shall establish a time period, which shall not exceed 6 months. At the end of that period the insolvent debtor or its owners or volunteers must show the court that the insolvent debtor has paid off all debts to creditors which existed at the time of commencement of Special administration. If this is not shown, or if a creditor again petitions for Special administration on the ground of failure or refusal to

- pay a debt which has arisen since the commencement of the Special administration, the court shall immediately order Special administration.
- X. An insolvent debtor cannot be subject to rehabilitation more than once, if the later rehabilitation would commence within a period of 12 months after the previous period of rehabilitation.
 - XI. During the period of rehabilitation, all court actions directed at repayment of the debts of the insolvent debtor and the arrest of its assets, are to be stopped. Interest but not penalties may continue to accrue during the period of rehabilitation, but may be claimed only at the termination of the period.
 - XII. An application to the court for rehabilitation, or the court order to appoint a temporary conservator or to order rehabilitation does not affect the right of a secured creditor to enforce his security pursuant to Articles 324 to 341 of the Civil Code.

Section 2: REORGANIZATION (without change of ownership or deregistration)

Article 81 Fundamental Features of a Reorganization

- I. Reorganization may take place with or without the participation of the court and is applicable to both physical and juridical persons.
- II. A reorganization includes the following:
 - A. submission of a written reorganization plan by the insolvent debtor for acceptance by a duly constituted meeting of creditors - such plan must demonstrate a reasonable expectation of return to profitability by a set date;
 - B. acceptance or rejection of a plan by the meeting of creditors. Reorganization commences upon acceptance;
 - C. upon acceptance, appointment of an external manager at the optional decision of the meeting of creditors.
 - D. involvement of the court at the petition of any party to the reorganization
 - E. modification of the reorganization plan at any stage of the reorganization but only upon agreement between the insolvent debtor and creditors as set out in Article 82;
 - F. a conclusion of the reorganization upon fulfillment of the plan or agreement between the insolvent debtor and all the creditors
- III. Once accepted and signed by the authorized representative of the insolvent debtor or the external manager (if one is appointed) and the creditors accepting the plan, a plan of reorganization is binding on all creditors.
- IV. Upon commencement of reorganization all court or other actions directed at repayment of debt and seizure of the assets of the insolvent debtor or enforcement against it shall cease (with the exception of actions or enforcement by a secured creditor). Any property claims may be presented only within the framework of the process of reorganization.
- V. Penalties do not accrue during the period of reorganization. Interest on any outstanding claims does not accrue for the first 3 months of a reorganization.
- VI. A process of reorganization may be converted to a process of special administration at any stage as follows:
 - A. the insolvent debtor may petition the court or request at a duly constituted creditors meeting to have a process of reorganization converted to a process of special administration;
 - B. creditors may petition the court or decide at a duly constituted creditors meeting to convert a process of reorganization into a process of special administration but only if there is a breach of the accepted reorganization plan. In case creditors at a creditors meeting decide to convert to special administration, the insolvent debtor may, within 7 days, petition the court to reverse such decision.
 - C. the court may on its own initiative decide to convert a process of reorganization to a process of special administration based on breach of the accepted reorganization plan;

132

- VII. A process of special administration may be converted to a process of reorganization at any stage of special administration as follows:
 - A. the insolvent debtor requests, at a duly constituted creditors meeting, to convert a process of special administration to a process of reorganization by presenting a reorganization plan for a vote by creditors as per Article 82
 - B. in case of an in court process, the insolvent debtor must inform the court of the convocation of the creditors meeting to consider conversion to reorganization and also of any decisions reached at the meeting. If the creditors accept the reorganization plan then the court must convert the process of special administration to reorganization provided that all procedures and rules set out in this section of the law have been complied with.
- VIII. The court may reject a plan of reorganization or convert a process of reorganization to a process of special administration when:
 - A. the plan was not accepted pursuant to procedures establish by this law
 - B. the plan itself does not fulfill the requirements set forth in this law
 - C. the plan is breached

Article 82 Initiation of reorganization and the role of the creditors meeting

- I. A reorganization may be initiated only voluntarily by the insolvent debtor himself either by petition to the court or by convening a creditors meeting.
- II. No minimum debt is required to initiate a voluntary process of reorganization but the insolvent debtor must have an unsatisfactory balance sheet or be generally unable to meet its debts as they come due. Such insolvency is presumed and need not be demonstrated by the insolvent debtor.
- III. Upon a decision by the insolvent debtor to reorganize under the law of bankruptcy (whether it be with or without court participation) the insolvent debtor must:
 - A. place an advertisement in one national and one oblast (or local) newspaper in both Kyrgyz and Russian nearest to his principal place of business. This advertisement must be published not less than twice, at intervals of not less than 10 days. Each advertisement is to indicate the time, date and place of the creditors' meeting;
 - B. mail to all creditors:
 - 1. notification of the time, date, place and purpose of the creditors meeting;
 - 2. preliminary financial report that includes a balance sheet and a list of all creditors with names and amounts due;
 - 3. preliminary reorganization plan;
 - C. not earlier than 2 weeks after the last advertisement mentioned in subpoint (a) above and the mailing of the written materials mentioned in subpoint (b) above, hold a meeting of creditors at the place and time indicated.
- IV. The insolvent debtor must provide full financial disclosure to the creditors at the initial creditors meeting and present a written reorganization plan.
- V. The creditors at the initial meeting of creditors may decide:
 - A. to accept the reorganization plan in which case they may decide to appoint an external manager;
 - B. to offer a modified plan for acceptance by the insolvent debtor who then has 2 weeks to accept or reject the modified plan. In case of rejection, the process of reorganization may be converted to a process of special administration in accordance with Article 81 of this law;
 - C. to postpone its decision but not by more than 2 weeks at the end of which period a second meeting is convened;
 - D. to reject the plan and commence special administration.
 - E. to reject the plan.
- VI. Decisions taken at a duly constituted creditors meeting are valid if 60% or more of the debt represented at the meeting vote in favor..

- I. transfer of debt to third parties
 - J. any other reasonable means to return insolvent debtor to solvency allowable by law
- IV. A reorganization plan may provide for the impairment of any class of claims not protected under point 1 of this Article. Such impairment may consist in discounting the claim, changing the interest rate, extending the maturity dates or any other modification that is not inconsistent with the general interest of creditors, that leads to resumed profitability of the insolvent debtor and is allowable by law.
- V. A reorganization plan may provide for the assumption, rejection or assignment of any executory contract or unexpired lease provided the following apply:
- A. any assumption or assignment must be by mutual consent of the parties and any defaults must be cured prior to any assumption or assignment
 - B. no provisions regarding modification or termination may be enforced upon assumption or assignment that are triggered solely by the insolvency of the debtor.
 - C. any claims for damages that result from rejection may be for actual, compensatory damages only and may not include penalties;

PART 4: GOVERNMENT BANKRUPTCY AGENCY

Article 85 Establishment and primary functions of Government Bankruptcy Agency

- I. The primary function of the Government Bankruptcy Agency (GBA) is to implement government policy regarding bankruptcy or the inability of an insolvent debtor to fully satisfy the claims of its creditors in a timely manner (including debt owed to the budget and also to nonbudgetary government funds) and also to help prevent any negative social consequences of a bankruptcy process.
- II. The GBA is established by the Government of the Kyrgyz Republic.

Article 86 Basic Rights of the GBA

- I. The essential functions of the GBA shall include the following:
 - A. to protect the interests of the state in relation to the insolvent debtor when any application is made by any person (including the GBA), to the court. For this purpose the GBA has the right to participate in all bankruptcy court proceedings as an interested party;
 - B. to protect the interests of the state in relation to the insolvent debtor when any bankruptcy process is initiated out of court by a creditor or the insolvent debtor itself;
 - C. generally to protect the interests of the state in relation to the insolvent debtor and if it thinks fit to represent all organs of state administration and all budget creditors in any bankruptcy process;
- II. Where the government (or any agency of government) is owed 40% or more of the total debt owed by an enterprise, the GBA may initiate a process of bankruptcy by calling a meeting of creditors in accordance with the provisions of this law.
- III. Where the government (or any agency of government) is owed the minimum amounts specified in Article 5, the GBA may initiate a process of bankruptcy by application to the court, in accordance with the provisions of this law.
- IV. Where the government (or any agency of government) owns 51% or more of the dolya or aktsii of the insolvent debtor, the GBA may itself initiate a process of bankruptcy against the insolvent debtor, either by application to the court or by calling a meeting of creditors in accordance with the provisions of this law.

- VII. Creditors may form a creditors committee as per Article 32 of this law.
- VIII. Any creditor or the insolvent debtor always has the right, within seven (7) days, to petition the court if it disagrees with the decision of the meeting of creditors. In case of a petition to the court, the petitioner must attach to the petition a copy of the reorganization plan, minutes of the creditors meeting and written objections of other interested parties disagreeing with the plan (if such exist).
- IX. Subsequent meeting of creditors may be initiated by the external manager (if one has been appointed), by the owners of the insolvent debtor or by creditors holding 20% or more of the total debt. Such subsequent meetings may be convened to call for modification of the plan, conversion of the reorganization to special administration and for other valid reasons.

Article 83 Rights and Duties of the External Manager

- I. The external manager is the sole legal representative of the insolvent debtor. His main function is to implement the reorganization plan.
- II. All rights and duties of the special administrator enumerated in Section 8 of Part 2 of this law apply equally to the external manager except those that logically may apply only to a process of special administration and contradict the requirements of a process of special administration (such as the requirement to sell all assets for distribution in the shortest possible time).
- III. Fees of the external manager are paid *as part of the administrative expenses. The amount of the fee is determined by agreement between the creditors and the external manager.* (~~delete: by the insolvent debtor by agreement.~~)
- IV. The external manager is responsible for informing the agency which carries out registration (and deregistration) of legal entities that the insolvent debtor is in the process of reorganization under the law on bankruptcy so that an appropriate warning may be given to those inspecting the register.

Article 84 The Reorganization Plan

- I. A reorganization plan may group creditors into logical groups and subgroups for purposes of equitable implementation of the plan. These groups should correspond to creditor groups established by Article 64 but may differ if there is a convincing legitimate reason to do so. However, no reorganization plan may:
 - A. affect the rights of a secured creditor or of a creditor of the first or second priority except by mutual agreement,
 - B. affect the rights of creditors of the fourth priority
 - C. provide for any creditor to receive less than he would have received in a liquidation except by mutual agreement.
 - D. treat creditors of the same group differently unless by mutual agreement and creditors who voted against the plan (or failed to vote) must be treated equally with creditors who voted for the plan.
- II. A reorganization plan must specify the treatment under the plan of all creditor claims.
- III. A reorganization plan must provide for adequate means for the plan's implementation which may include:
 - A. retention by the insolvent debtor of all or any part of the assets
 - B. sale or distribution of any part of the assets of the insolvent debtor
 - C. merger or annexation of the insolvent debtor with one or more legal entities
 - D. renegotiation of contracts
 - E. change in management
 - F. new product lines, new marketing strategies
 - G. renegotiation of debt by postponement of due dates, agreement to an installment plan, discount or other means allowable by law;
 - H. transfer to creditors rights to receivable, *setoff*, or agree with creditors to swap equity for debt;

Article 87 Other Functions of GBA

- I. The GBA also has functions in relation to any juridical or physical person which is suspected of conducting commercial activity in bad faith knowing that such activity will lead to insolvency (purposeful or bad faith bankruptcy) or knowing that the enterprise is already insolvent and that its actions will lead to further, irreparable losses for the creditors.
- II. In the case specified in subpoint 1 of this Article, the GBA has:
 - A. the right to collect such information as the GBA needs within a reasonable time from the juridical or physical person in question, or from any government organ including the Tax Inspectorate, about the financial position and business activities of the juridical or physical;
 - B. the right to initiate a process of bankruptcy against such juridical or physical person;
 - C. the right to act on behalf of a creditor or group of creditors in initiating a process of bankruptcy at their request;
 - D. the duty to keep confidential any information received by the GBA from any juridical or physical person or government body, to use such information strictly in accordance with its functions and duties under this Law, and to make it public only (i) in the course of court proceedings or (ii) when revealed to meetings of creditors or (iii) when reported to other government agencies which have rights or duties in respect of the person to whom the information relates;
 - E. such other rights, powers and duties given to the GBA by the decree establishing the GBA and not contrary to this law or to other legislation of the Kyrgyz Republic.
- III. If the GBA discovers that an insolvent debtor is conducting activities without a license, or activities prohibited by law, or commits any other repeated or gross violations of legislation, or systematically conducts activities which contradict its charter, the GBA must report such activity to the appropriate law enforcement agency so that proper measures are taken pursuant to Article 96.2 of the Civil Code.

Article 88 Payment of fees and liability

When the GBA initiates a process of bankruptcy by application to the court, it is exempt from paying court fees.

Article 89 Training and certification

- I. The GBA is entitled to establish a system for training bankruptcy administrators (Temporary Conservators, Special Administrators, and External Managers) and to issue a certificate or license to those successfully completing such training. Both Kyrgyz nationals and foreign nationals are eligible to receive this license or certificate.
- II. Such certificate or license is mandatory for all persons (except auditors and lawyers) who wish to serve as bankruptcy administrators as specified in point 1 of this Article (except in the case of banks where the National Bank may establish its own system of training and licensing).
- III. Conditions upon which these certificates or licenses are obtained, surrendered, or become invalid are regulated by the Instructions issued under this law.

Article 90 Law reform

- I. The GBA shall also be solely responsible for submitting to the government amendments, additions or deletions to the Instructions issued under this law, or for submitting for consideration to the appropriate bodies amendments, additions or deletions to this Law or other legislation concerning bankruptcy.
- II. The GBA shall keep a running list of all bankruptcies in progress both with and without court participation to be available to creditors or others interested parties including

MB

bankruptcy administrators, lawyers or auditors, upon request. This information the GBA must periodically publish in a special official bulletin. The GBA is also responsible for promoting other information essential to bankruptcy professionals such as amendments to the law or Instructions and other normative documents related to bankruptcy. This information may also be included in the official bulletin.

- III. It shall be the duty of the special administrator, external manager (if appointed) or the insolvent debtor to notify the GBA upon the commencement of a process of bankruptcy for purposes of the list mentioned in point 2 of this Article.
- IV. The GBA shall establish a law reform committee, which must meet not less than twice each year, to consider the need for amendments or additions to the Instructions or to this Law, and which shall review any Instructions made under this Law, with a view to determining the consistency of these with this Law, and any other legislation or proposed legislation with a view to determining its consistency with this Law and with Instructions made under this Law. The law reform committee shall report to the GBA which shall report to the Government of the Kyrgyz Republic. The GBA shall invite as members of the law reform committee a representatives from relevant ministries, government organs or agencies, offices of the President and Government, the State Property Fund, The National Bank of the Kyrgyz Republic as well as non government associations (such as associations of bankruptcy administrators, lawyers and other groups) and foreign and local experts.
- V. The GBA may issue guidance and advice upon matters relating to bankruptcy, either in general form or in specific cases, whether for a fee or without payment. Any guidance or advice shall have advisory effect only, shall not be binding on the recipient or third parties, and shall not give rise to liability to the GBA

PART 5: CONCLUSION

Article 91 Wrongful actions

In accordance with this Law, and with Instructions issued under it, the following actions by a person are considered wrongful - where he knowingly or deliberately:

- I. initiates fraudulent process of bankruptcy
- II. conceals, transfers or removes the property or debts of the insolvent debtor;
- III. conceals or destroys, spoils or falsifies records, or inserts falsified records in the accounting books related to the insolvent debtor;
- IV. presents false claims
- V. sells or gives as security any property of the insolvent debtor which was taken on credit or is not paid for;
- VI. conceals the property of an insolvent debtor after the commencement of Special administration;
- VII. gives, offers, receives or attempts to obtain any money or assets, remuneration, compensation, reward, advantage or promise for acting or forbearing to act in any case under the law of bankruptcy
- VIII. having connections with the insolvent debtor, does not cooperate with a Special Administrator in order to disclose the property of the insolvent debtor, or to obtain the property of or other information about the insolvent debtor, or its debts and debt obligations, or makes false declarations to the Special Administrator;
- IX. being an administrator, directly or indirectly purchases any asset of the insolvent debtor
- X. uses the name of an insolvent debtor which is subject to Special administration or has been liquidated;
- XI. deliberately creates or increases the insolvency of the insolvent debtor, or incurs damage to the insolvent debtor in his personal interests or in the interests of other persons.

Persons who commit the wrongful actions stipulated by this Article are answerable in accordance with the legislation of the KR.

Article 92 Disqualification of persons on grounds of abuses of bankruptcy processes

- I. This Article applies where a physical person or a legal person is an owner or a director of an insolvent debtor which is subject to Special administration or reorganization and the same physical or legal person is owner or director of a second insolvent debtor which is subject to a process of bankruptcy within 5 years of the first process of bankruptcy.
- II. In the circumstances set out in point 1 of this Article, the court has the power, on the application of a Special Administrator, or NBK in the case of banks, or the special body established pursuant to Article (regardless of the share of state ownership or even if there is no state ownership) or the Ministry of Industry, to declare that the physical or legal person is disqualified for a period of between 5 and 10 years (which the court shall decide) from being director or manager of any other enterprise in the Kyrgyz.
- III. The court shall order the disqualification of the physical or legal person pursuant to point 2 of this Article, unless the court is convinced by evidence that one or more of the bankruptcy processes occurred entirely without the fault of the physical or legal person in question.
- IV. If there is a third bankruptcy process involving the same physical or legal person, the court shall on an application pursuant to point 2 of this Article, order disqualification of the physical or legal person for life.
- V. Where any person is disqualified pursuant to this Article, and breaches the terms of the disqualification, that person, on an application by persons mentioned in point 2 of this Article:
 - a) can be punished in accordance with the legislation;
 - b) can be removed from office on the order of the court;
 - c) can be deprived of his rights to his share or dolya (which shall be forfeited to the State).

Article 93 Instructions (Regulations) complementing this Law

- I. Instructions indicated in this Law, and other instructions which contribute to the effective use of this Law and complement it shall be issued (a) by the Government of the Kyrgyz Republic or (b) in the case of banks, by the NBK
- II. Only one single set of Instruction for enterprises in general and one single set of instructions for banks shall be issued, and any amendments or additions must be made by amendment or addition to these single sets of Instructions.
- III. Instructions contradicting this Law are prohibited.

Article 94 Powers of the court as to the application of this Law

If in the process of bankruptcy an issue arises which is not specified by this Law or by complementing instructions, the court on the basis of an examination of the circumstances, evidence gathered, and having heard the Special Administrator or creditors or the creditors' committee, may in its discretion take any necessary decisions which do not contradict this Law and Instructions issued in pursuance of this Law.

Article 95 Transition

This Law applies to all processes of bankruptcy started after it comes into force. Any process of bankruptcy which started before this Law came into force will continue to be governed by the former Law of the KR "On Bankruptcy".

APPENDIX 6

**USAID BANKRUPTCY AND RESTRUCTURING PROJECT IN
KAZAKSTAN AND THE KYRGYZ REPUBLIC**

LIQUIDATION MANUAL

**BISHKEK, THE KYRGYZ REPUBLIC
NOVEMBER 1996**

D R A F T

BOOZ-ALLEN & HAMILTON, INC.
ENI/PER Task Order Reference No. 03-0064-BOOZ-05
Contract No. EPE-0014-I-00-5071-00

FOREWORD

An extensive revision of the Law and the General Instructions has recently been completed and is currently being edited and translated prior to consideration by Parliament, which is anticipated in the early spring of 1997. Enactment of the revised Law may affect some of the material in this manual. The anticipated changes are both substantive and procedural. However, it is hoped that much of the information contained herein will remain a viable tool for Liquidators. Revisions to the manual may be anticipated after enactment of the Law.

ACKNOWLEDGEMENTS

The purpose of this task was to produce a handbook for use by Liquidators working on liquidations of insolvent enterprises in an out-of-court process. This handbook is a product of the US AID/ Booz-Allen & Hamilton, Inc. Bankruptcy and Restructuring Project with additional funding for up-dating and revision by Iris Center of University Research Corporation, International.

Many individuals and sources provided assistance during the writing of this handbook. A substantial portion of the manual was written by the professional local staff of the Booz-Allen & Hamilton, Inc. Bankruptcy Project. Specifically, grateful acknowledgement and thanks are given to Victor Albrecht, Nurlan Alymbaev, Rosa Kulmatova, Tatjana Osipova, Svetlana Osmanolieva, Bolatbek Soldatov and Kutmanbek Toktosunov. Special recognition and thanks is given to Vera Haugh, Attorney and Team Leader of the Project, who not only wrote several sections of the manual, but also provided able leadership to the Team and who, through the entire venture, has remained a steadfast and loyal friend. Additionally, a special thank you to Vladislav Kiryanov, Translator, who personally translated the major portions of both the English and Russian versions of the manual and, in addition, who coordinated the entire translation effort, and enabled us to meet the deadline to complete the manual. I could not have written, compiled and produced this handbook without the professionalism and dedication of each of them. Without their assistance, the manual would never have been realized.

Recognition is also given to the Honorable Sidney B. Brooks, United States Bankruptcy Judge, District of Colorado, Deloitte Touche and Arlene Mirsky for use of training materials developed through an US AID project for training judges in the CIS. It is not possible to recognize all of the sources which were utilized to research and compile this manual. However, materials were reviewed from several CIS countries, Eastern Europe, and western market economies.

Linda L. Moore
Attorney at Law
Senior Bankruptcy Consultant
November, 1996

TABLE OF CONTENTS

CHAPTER 1 INTRODUCTION.....	5
CHAPTER 2 BASIC ROLE OF BANKRUPTCY LAW	
Introduction.....	6
A. Overview of Bankruptcy Law.....	6
B. How a Liquidation Begins.....	7
CHAPTER 3 THE ROLE OF THE MEETING OF CREDITORS	
Introduction - Creditors' Meeting in the Out-of-Court Process.....	9
A. Commencement of the Process of Voluntary Liquidation of an Insolvent Enterprise.....	9
B. Creditors' Meeting in the In-Court Process.....	13
C. Creditors' Committee.....	13
D. Expression of Lack of Confidence in Liquidator.....	15
CHAPTER 4 LIQUIDATOR'S ROLE	
Introduction - Appointment of the Liquidator.....	16
A. Liquidator Qualification Requirements (Rules Implementing the Law On Bankruptcy--Articles 100-102).....	16
B. Conflicts of Interest.....	17
C. Appointment Process - Voting on the Candidature of Liquidator.....	17
D. Liquidator's Rights (Article 26. Liquidator's Powers.....	18
E. Liquidator's Obligations (Article 26. Liquidator's Authority).....	18
F. Cooperation Between the Liquidator and Creditors.....	19
G. Duties of the Liquidator at Creditor's Meeting's.....	20
H. Owners' and Directors Duty to Cooperate.....	21
CHAPTER 5 INITIAL DUTIES OF THE LIQUIDATOR	
Introduction.....	22
A. Notice of appointment.....	22
B. Inventory of Assets and Liabilities.....	22
FORMS (BLANKS) AND INSTRUCTIONS ON INVENTORY OF PROPERTY AND FINANCIAL OBLIGATIONS LIQUIDATED BALANCE	
.....	25
C. Determination and Administration of Insufficient Asset Cases.....	49
D. Enterprise Bank Accounts.....	50
E. The System for Preservation and Safety of Property (Assets).....	50
F. Financial Record Keeping.....	55

Handwritten signature

FORMS (BLANKS) AND INSTRUCTIONS TO LIQUIDATOR'S REPORT RELATED TO PROPERTY EXISTENCE, REQUIREMENTS AND PAYMENTS TO CREDITORS	55
.....	55
G. Employment of Professionals.....	62
H. Fee Applications.....	66

CHAPTER 6 INITIAL ANALYSIS BY A LIQUIDATOR OF AN ENTERPRISE

A. Production/Technical Analysis.....	67
B. Financial Analysis.....	70
FORMS (BLANKS) AND INSTRUCTIONS ON ANALYSIS OF FINANCIAL OBLIGATIONS OF ENTERPRISE - DEBTOR. RELATED TO CREDITORS' CLAIMS	70
.....	70
C. Revaluation of Fixed Assets.....	72
D. Legal Analysis of Contracts.....	73
E. Practical assessment of contracts.....	77
F. Dealing with Accounts Receivable.....	84
G. Peculiarities of employees' claims (third priority creditors).....	86
H. Review for Assets.....	86
I. Methods of Estimating Market Value.....	90
J. Review for Substantial Abuse.....	94
K. Criminal and Civil Responsibilities of Parties.....	94

**CHAPTER 7. SELECTING THE APPROPRIATE BANKRUPTCY PROCEDURE (THE
BANKRUPTCY PLAN)**

Introduction.....	115
A. The Three Procedures.....	115
B. Selecting the Appropriate Procedure.....	116
C. Restructuring Pursuant to Article 27 of the Law on Bankruptcy.....	118
D. Analysis of adoption of the decision on restructuring.....	118
E. Preparation of a business plan.....	119
F. Model business plan.....	122

CHAPTER 8 LIQUIDATION PROCESS

Introduction.....	131
A. Operating the Enterprise's Business.....	131
B. Contested Matters	131
C. Liquidator's Report to Court Concerning the Behavior and Responsibility of Managers and Shareholders of the Enterprise.....	132
D. Sale of Assets.....	132
E. Claims.....	152
F. Interim Payouts.....	178

G. Refusal of Property, Obligations and Duties.....180
H. Taxation in the Process of Liquidation.....183
I. Repossessing Property of Debtor Sold to Others for Less than Fair Price.....190
J. Paying Administrative Expenses.....191

CHAPTER 9 TERMINATION OF LIQUIDATION

A. Final Report (Pre-Distribution Report)193
B. Distribution of Funds194
C. Final Account (Post Distribution Report)194

CONCLUSION195