The International Capital Markets Review

Fifth Edition

Editor
Jeffrey Golden

Law Business Research

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Fifth Edition

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EDITOR'S PREFACE TO THE FIFTH EDITION

A review of the Editor's Prefaces from prior editions (which the publishers have kindly included in this volume) of *The International Capital Markets Review* will reveal a common thread: what I referred to last time around as 'a somewhat nervous look-back over the shoulder' both at the global financial crisis (GFC) and the impact that it has had on the professional opportunities and workload of international capital markets lawyers.

That should hardly be surprising. Seven years on from the collapse of Lehman Brothers in September 2008 and nearly four years since the first edition of this review appeared, a great deal of ink has been spilt, so to speak, in recording the lessons of the GFC, much of it reflecting an attempt to focus on what brought the crisis about: risk-taking by bankers, blind spots and lack of understanding on the part of regulators, rating agencies asleep at the wheel and wrong economic incentives from policymakers and management.

Lots of answers with hindsight. (But as Queen Elizabeth II profoundly asked, after having been briefed by a group of academics about the causes of the GFC when opening a building at the London School of Economics in 2008, if it was all so obvious how come everyone missed it?)

Again, none of that should be surprising. But what is certainly interesting, if not surprising, is that with all the finger-pointing – bankers, regulators, rating agencies and policymakers – law firms and lawyers in them have emerged relatively unscathed. There has been no shortage of lawsuits, enforcement actions, penalty fines, and most recently criminal prosecutions for financial market misconduct. However, it has been non-lawyers, and not their counsel, who have found themselves in the hot-seat.

Still, that begs, rather than answers, the question, 'What was, or should have been, the role of the lawyer in mitigating the risk of a financial market meltdown?' Was sufficient resort to outside counsel made by financial institutions in the run-up to the GFC? Would greater utilisation of independent counsel have made a difference? What public responsibility, if any, do international capital markets lawyers have to ensure not just that underlying transactions are legal as a matter of positive law but that the financial marketplace is benefited, and financial market stability not threatened, by them? Until now, these are questions that seem to travel mostly beneath the radars of the financial market commentators who have been reflecting on the GFC.

Let us put to one side for a moment the increasing specialism in our area of law and the special challenges that follow from it – I will return to this. Let us leave aside too the fact that the technical skills that may position an international capital markets (ICM) lawyer so as to be able to structure a transaction and render the required legal opinions on enforceability or tax consequence may not qualify that lawyer to assess the business merits of the transaction, give deep knowledge of the customers who sign up to them or provide the necessary context to assess the macro-finance impact of large-scale development of a particular financial product or service. In either case, two questions remain: Can ICM lawyers do a better job to mitigate financial market systemic risk? And, if a more expansive role for the lawyer is to be expected to achieve this, will clients be prepared to pay for it?

It is interesting, is it not, that in what could be argued to have been their earlier 'glory years', financial institutions did rely heavily on outside counsel to keep on the legal straight and narrow. However, there is much evidence to suggest that there was much greater reliance on in-house teams in 2008 following the considerable build-out of these in the preceding decade. Cost-cutting became the 'buzz word'.

Did that institutional ring-fence, however, heighten the risk of seeing everything through too narrow an institutional prism? Gillian Tett, in her excellent new book *The Silo Effect*,[1] reminds us of the major risk of insular groupthink in an age of increased specialisation.

Seeking outside and independent advice on such matters had been seen as a kind of insurance against that. Of course, that insurance was never thought to be cheap. But was it cheap in fact, at least when compared with the penalties, fines and other conduct costs many financial institutions have paid since the GFC? And did the financial institutions in any way connect the cutbacks in legal spend on independent counsel with the GFC? Here's the paradox: the more that lawsuits and enforcement actions have followed in the wake of the GFC, the greater the pressures seem to have been to reduce the budget for independent legal advice in connection with ongoing transactional work. And those pressures continue.

Still, to change our clients' thinking about legal cost-cutting, ICM lawyers must do two things: first, they must avoid giving the impression themselves of being victims of the silo effect. And for many ICM lawyers in modern practice there is similarly the risk both of the silo of their law firm and the silo of their jurisdiction. Failure to share the expertise of lawyers in different law firms and from different jurisdictions can be catastrophic. In this regard, *The International Capital Markets Review* aims to be what Ms Tett would call a 'silo buster'.

And second, important as it may be to demonstrate value added by being aware of the widest possible range of relevant issues and global market practice, it is important too to get there in as cost-efficient a manner as possible. As has just been noted, this is a time when clients have never been more cost-conscious. Since it first appeared, this publication has sought to reduce the costs of staying current in a rapidly changing,

1 G Tett, *The Silo Effect* (Little, Brown 2015).

multi-jurisdictional and expansive area of practice by bringing a wide range of relevant experience within a single volume and constantly updating its content.

As I write this preface, my morning newspaper reports, in addition to bond funds experiencing record inflows, that US$50 billion of global market deals were announced this week, adding to US$300 billion of M&A activity in a record August and more than US$3 trillion since January – keeping things on track for record levels seen only before the GFC. This is all good news for international capital markets lawyers. Plenty of opportunity.

Still, plenty of risk too, especially for any lawyer living in a silo and looking down instead of around. This is not a time to follow the ostrich and its habit of putting its head down when it senses risk in the air.[2] For today's ICM lawyer, the risk comes from a complicated and ever-changing landscape, and not least the plethora of new regulatory developments and regulations reported in the pages that follow. You constantly need to look about you.

So, heads up, bust out of that silo, get your copy of this new edition of *The International Capital Markets Review* at the ready and share in the expertise that follows. Fingers crossed, may the record year continue, and I wish our readers more than their fair share of it!

In the meantime, I tip my hat once again to the impressive and growing group of experts who have taken on the challenge of this book. This year we welcome five new jurisdictions: Bulgaria, India, Kazakhstan, Mexico and Nigeria. I want to thank all our authors sincerely for their contributions and for allowing me the continuing privilege of serving as their editor.

Jeffrey Golden
P.R.I.M.E. Finance Foundation
The Hague
November 2015

2 Pliny the Elder had led us to believe that the ostrich buries its head in sand to avoid danger, but we now know the behaviour of the ostrich is more a matter of 'duck and cover'.

EDITOR'S PREFACE TO THE FOURTH EDITION

It is good of the publishers to include in this volume the Editor's Preface to each of the previous editions of *The International Capital Markets Review*. Reading through these is like an archaeological dig.

The first begins with a somewhat nervous look-back over the shoulder at the then-recent financial crisis. An expression in that preface of admiration for the 'resilience' of the markets sounded at the time more a hope and expectation than a certainty or done deal.

In the second, further signs that a 'big freeze' on capital market transactional work was 'thawing' were noted; however, the challenge of new and voluminous regulation, as much as the potential for deal flow, made this publication of particular relevance when that edition appeared.

By the time the third preface was written, the major global financial institutions were hiring again, but we were still looking for hard evidence or 'confirmation' that an uptick in deal flow lay ahead and that the extra staffing was in anticipation of opportunity rather than more simply a reaction to a compliance burden.

Now, as I put pen to this Editor's Preface to the fourth edition of the work, we have just witnessed the successful launch of the world's largest-ever stock flotation. Alibaba shares soared 39 per cent on the first day of trading and, after the bankers exercised a greenshoe option, raised US$25 billion. Meanwhile, *The Times* reports a buoyant London braced for a 'listing stampede'. Hong Kong is rivalling New York for the greatest number of cross-border deals. The *Financial Times* also reminds us that in fact, measured by deal value, year-to-date listings in New York have raised twice as much as in London and Hong Kong combined – the fastest pace since 2000. A corner turned? Hopefully, we are seeing real opportunity, at least for the informed ICM lawyer. As in the past, this book seeks to keep at the ready for just such an ICM lawyer relevant analysis as a means for staying on top of an ever-expanding flow of necessary information.

New capital market regulation increases exponentially, and often purports to have extraterritorial reach. More than half of the Dodd-Frank rulemakings have now been finalised but nearly a quarter of the rulemaking requirements are still yet to be proposed. This past year has also been a busy period for regulatory reform at the European level and in other key jurisdictions covered in this volume. Notably as well, courts around the world have been building up a significant jurisprudence in disputes involving complex products and other capital market structures. We have almost certainly seen more ISDA

contract cases since this book first appeared than in all the years that preceded that first edition put together.

Not surprisingly then, this volume keeps getting 'fatter'. Soon the publishers will have to provide wheels for the book! What started as coverage of 19 relevant jurisdictions, now surveys 33 – five of which (Colombia, Kuwait, Norway, Peru and Portugal) are included for the first time.

There has, however, certainly been no dilution in the quality of contributions. Someone clever once said that you are only as good as the company that you keep, on which basis the reader can feel very good indeed when turning to the lawyers and law firms that share their collective experience in the pages that follow. It remains a privilege and an honour to serve these contributors as their editor.

I am confident that the latest surveys that follow will prove useful to our practitioner readers, and I will not be surprised if a few legal archaeologists among those get to excavating beyond the prefaces and examine the strata of the jurisdictional landscapes of earlier editions as they aim to equip themselves for their professional journeys ahead. Who knows? One of you may even be an Indiana Jones, who, armed with the information herein, may be tempted to grab that bullwhip and fedora and undertake a particularly ground-breaking transactional adventure or two. Indeed, it may even be that those adventures form part of the ICM story when it gets told in future editions of *The International Capital Markets Review*!

Jeffrey Golden
P.R.I.M.E. Finance Foundation
The Hague
November 2014

EDITOR'S PREFACE TO THE THIRD EDITION

As I write the preface to this third edition of *The International Capital Markets Review*, my morning newspaper reports that one of the major global banks, having shrunk its workforce by more than 40,000 employees over the past two years, will now embark on a hiring spree to add at least 3,000 additional compliance officers.

It would be nice if the creation of these new jobs evidenced new confidence that capital markets activity is on the rise in a way that will justify more hands on deck. In other words, capital markets lawyers will have something to celebrate if this bolstering of the ranks was thought necessary to ensure that requisite regulatory approvals and transactional paperwork would be in place for a projected expansion in deal flow.

And, indeed, my morning newspaper also reports a new transaction of some significance, namely, Twitter's filing for a multi-billion dollar international public offering, accompanied by a tweet, of course – but with a true sign-of-the-times disclosure: 'This Tweet does not constitute an offer of any securities for sale'!

Yes, confirmation of an uptick in deal flow – especially 'big deals' flow – would be nice. In the preface to the last edition of this work, I speculated that there were 'signs that any 'big freeze' on post-crisis capital markets transactional work may be thawing'. All the better if the current newspaper reports provide continued and further support for that inference. After all, when our first edition appeared a little over two years ago, the newspapers were saying terrible things about the capital markets.

What is more likely, however, is that this increased staffing aims to cope with regulatory complexity that will now impact the financial markets regardless of any growth and perhaps may even have been designed to slow down the business being done there. That complexity, but also just the scale of recently promulgated new regulation and the practitioner's resulting challenge in 'keeping up' have all encouraged this new third edition. The 8,843 pages of Dodd-Frank rule-making that I reported in my preface to the last edition have now grown to more than 14,000 pages at this time of writing – and approximately 60 per cent of the job remains unfinished. Other key jurisdictions have been catching up. Plus the rules are purposive and aim to change the way things have been done. If compliance and even ethics in the capital markets were ever instinctual, rather than matters to be taught and studied, that is probably a thing of the past.

The thickness of this volume has grown as well because of the increased number of pages and coverage in it. Nine new contributors (Finland, Indonesia, Italy, the Netherlands, the Philippines, Spain, Switzerland, Tanzania and the UAE) and an overview of EU Directives have been added. Banks are lending less to corporates, which in turn are having to issue more to meet liquidity needs. Moreover, with the low interest rate environment of quantitative easing, central banks are encouraging risk-taking rather than hoarding. For investors, risk-free assets have become very expensive. So we see a growing willingness to get off the traditional highway in search of yield. Investment banks are, as a result, often taking their clients (and their clients' regular outside counsel) to difficult, or at least less well-known, geographies.

Having a pool of country experts and jurisdictional surveys that facilitate comparative law analysis can be very helpful in this instance. That is exactly what this volume aims to provide: a 'virtual' legal network and global road map to help the reader navigate varying, and increasingly difficult, terrain to arrive at right places.

There has been much relevant change in the legal landscape surveyed in the pages that follow. However, what has not changed is our criteria for authors. The invitation to contribute continues to go to 'first in class' capital market specialists from leading law firms. I shall be glad if, as a result, the biographical notes and contact details of the contributing firms prove a useful resource as well.

The International Capital Markets Review is not a novel. Impressed I might be, but I would certainly also be surprised by anyone picking up and reading this volume from cover to cover. What I expect instead, and what is certainly the publisher's intention, is that this work will prove a valuable resource on your shelf. And I hope that you will have plenty of opportunities to take it off the shelf and lots of excuses to draw on the comparative jurisdictional wisdom it offers.

Let me again express my sincere gratitude to our authors for their commitment to the task and their contributions. It remains a privilege to serve as their editor and a source of great pride to keep their company in the pages of this book.

Jeffrey Golden
P.R.I.M.E. Finance Foundation
The Hague
October 2013

EDITOR'S PREFACE TO THE SECOND EDITION

It was my thought that we should also include in this second edition of *The International Capital Markets Review* my preface to the first edition. Written less than a year ago, it captures relevant background and sets out the rationale for this volume in the series. The contemporary importance of the global capital marketplace (and indeed you must again admire its resilience), the staggering volume of trading and the complexity of the products offered in it, and the increased scrutiny being given to such activity by the courts all continue. And, of course, so does the role of the individual – the difference that an informed practitioner can make in the mix, and the risk that follows from not staying up to date.

However, I was delighted, following the interest generated by our first edition, by the publisher's decision to bring out a second edition so quickly and to expand it. There were several reasons for this. The picture on the regulatory front is much clearer for practitioners than it was a year ago – but no less daunting. According to one recent commentary, in the United States alone, rule-making under the Dodd-Frank report has seen 848 pages of statutory text (which we had before us when the first edition appeared) expand to 8,843 pages of regulation, with only 30 per cent of the required regulation thus far achieved. Incomplete though the picture may look, the timing seems right to take a gulp of what we have got rather than wait for what may be a very long time and perhaps then only to choke on what may be more than any one person can swallow in one go! Regulatory debate and reform in Europe and affecting other key financial centres has been similarly dramatic. Moreover, these are no longer matters of interest to local law practitioners only. Indeed, the extraterritorial reach of the new financial rules in the United States has risen to a global level of attention and has been the stuff of newspaper headlines at the time of writing.

There are also signs that any 'big freeze' on post-crisis capital markets transactional work may be thawing. In the debt markets, the search for yield continues. Equities are seen as a potential form of protection in the face of growing concerns about inflation. Participants are coming off the sidelines. Parties can be found to be taking risks. They are not oblivious to risk. They are taking risks grudgingly. But they are taking them. And derivatives (also covered in this volume) are seen as a relevant tool for managing that risk.

Most importantly, it is a big world, and international capital markets work hugs a bigger chunk of it than do most practice areas. By expanding our coverage in this second edition to include six new jurisdictions, we also, by virtue of three of them, complete our coverage of the important BRIC countries with the addition of reporting from Brazil, Russia and China. Three other important pieces to the international capital markets puzzle – Belgium, the Czech Republic and New Zealand – also fall into place.

The picture now on offer in these pages is therefore more complete. None of the 24 jurisdictions now surveyed has a monopoly on market innovation, the risks associated with it or the attempts to regulate it. In light of this, international practitioners benefit from this access to a comparative view of relevant law and practice. Providing that benefit – offering sophisticated business-focused analysis of key legal issues in the most significant jurisdictions – remains the inspiration for this volume.

As part of the wider regulatory debate, there have been calls to curtail risk-taking and even innovation itself. This wishful thinking seems to miss the point that, if they are not human rights, risk-taking and innovation are hardwired into human nature. More logical would be to keep up, think laterally from the collective experience of others, learn from the attention given to key issues by the courts (and from our mistakes) and 'cherry-pick' best practices wherever these can be identified and demonstrated to be effective.

Once again, I want to thank sincerely and congratulate our authors. They have been selected to contribute to this work based on their professional standing and peer approvals. Their willingness to share with us the benefits of their knowledge and experience is a true professional courtesy. Of course, it is an honour and a privilege to continue to serve as their editor in compiling this edition.

Jeffrey Golden
London School of Economics and Political Science
London
November 2012

EDITOR'S PREFACE TO THE FIRST EDITION

Since the recent financial markets crisis (or crises, depending on your point of view), international capital markets (ICM) law and practice are no longer the esoteric topics that arguably they once were.

It used to be that there was no greater 'show-stopper' to a cocktail party or dinner conversation than to announce oneself to be an ICM lawyer. Nowadays, however, it is not unusual for such conversations to focus – at the initiation of others and in an animated way – on matters such as derivatives or sovereign debt. Indeed, even taxi drivers seem to have a strong view on the way the global capital markets function (or at least on the compensation of investment bankers). ICM lawyers, as a result, can stand tall in more social settings. Their views are thought to be particularly relevant, and so we should not be surprised if they are suddenly seen as the centre of attention – 'holding court', so to speak. This edition is designed to help ICM lawyers speak authoritatively on such occasions.

In part, the interest in what ICM lawyers have to say stems from the fact that the amounts represented by current ICM activities are staggering. The volume of outstanding over-the-counter derivatives contracts alone was last reported by the Bank for International Settlements (BIS) as exceeding US$700 trillion. Add to this the fact that the BIS reported combined notional outstandings of more than US$180 trillion for derivative financial instruments (futures and options) traded on organised exchanges. Crisis or crises notwithstanding, ICM transactions continue apace: one has to admire the resilience. At the time of writing, it is reported that the 'IPO machine is set to roar back into life', with 11 flotations due in the United States in the space of a single week. As Gandhi said: 'Capital in some form or another will always be needed.'

The current interest in the subject also stems from the fact that our newspapers are full of the stuff too. No longer confined to the back pages of pink-sheet issues, stories from the ICM vie for our attention on the front pages of our most widely read editions. Much attention of late has been given to regulation, and much of the coverage in the pages of this book will also report on relevant regulation and regulatory developments; but regulation is merely 'preventive medicine'. To continue the analogy, the courts are our 'hospitals'. Accordingly, we have also asked our contributors to comment on any lessons to be learned from the courts in their home jurisdictions. Have the judges got it right? Judges who understand finance can, by fleshing out laws and regulations and applying them to

facts perhaps unforeseen, help in the battle to mitigate systemic risk. Judges who do not understand finance – given the increase in financial regulation, the amounts involved, and the considerable reliance on standard contracts and terms (and the need therefore for a uniform reading of these) – may themselves be a source of systemic risk.

ICM lawyers are receiving greater attention because there is no denying that many capital market products that are being offered are complex, and some would argue that the trend is towards increasing complexity. These changing financing practices, combined with technological, regulatory and political changes, account for the considerable challenge that the ICM lawyer faces.

ICM activity by definition shows little respect for national or jurisdictional boundaries. The complete ICM lawyer needs familiarity with comparative law and practice. It would not be surprising if many ICM practitioners felt a measure of insecurity given the pace of change; things are complex and the rules of the game are changing fast – and the transactions can be highly technical. This volume aims to assuage that concern by gathering in one place the insights of leading practitioners on relevant capital market developments in the jurisdictions in which they practise.

The book's scope on capital markets takes in debt and equity, derivatives, high-yield products, structured finance, repackaging and securitisation. There is a particular focus on international capital markets, with coverage of topics of particular relevance to those carrying out cross-border transactions and practising in global financial markets.

Of course, ICM transactions, technical though they may be, do not take place in a purely mechanical fashion – a human element is involved: someone makes the decision to structure and market the product and someone makes the decision to invest. The thought leadership and experience of individuals makes a difference; this is why we selected the leading practitioners from the jurisdictions surveyed in this volume and gave them this platform to share their insights. The collective experience and reputation of our authors is the hallmark of this work.

The International Capital Markets Review is a guide to current practice in the international capital markets in the most significant jurisdictions worldwide, and it attempts to put relevant law and practice into context. It is designed to help practitioners navigate the complexities of foreign or transnational capital markets matters. With all the pressure – both professional and social – to be up to date and knowledgeable about context and to get things right, we think that there is a space to be filled for an analytical review of the key issues faced by ICM lawyers in each of the important capital market jurisdictions, capturing recent developments but putting them in the context of the jurisdiction's legal and regulatory structure and selecting the most important matters for comment. This volume, to which leading capital markets practitioners around the world have made valuable contributions, seeks to fill that space.

We hope that lawyers in private practice, in-house counsel and academics will all find it helpful, and I would be remiss if I did not sincerely thank our talented group of authors for their dedicated efforts and excellent work in compiling this edition.

Jeffrey Golden
London School of Economics and Political Science
London
November 2011

Chapter 16

KAZAKHSTAN

Shaimerden Chikanayev and Marina Kahiani[1]

I INTRODUCTION

i Structure of the law

Kazakhstan's legal system is a civil law system similar to the systems in most other former Soviet jurisdictions. Its laws are contained in the Constitution,[2] various codes, laws, edicts, decrees (having the force of law), regulations, instructions, orders and other normative acts of the Republic of Kazakhstan.

The securities market is primarily regulated by the provisions of the Kazakh Civil Code,[3] the Securities Law,[4] regulations of the National Bank of the Republic of Kazakhstan (NBK) and internal rules of the Kazakhstan Stock Exchange (KASE).[5]

Unlike the international capital market, the domestic capital market is heavily regulated by the laws of Kazakhstan. The local securities market, in particular, is divided into an organised market (transactions with securities are executed in accordance with the trade organiser's (i.e., the KASE's) internal documents) and an unorganised market (transactions with securities are executed without observing the requirements established by the trade organiser's internal documents).

ii Structure of the courts

Kazakhstan's judicial system comprises three levels of courts:

a first instance courts – district courts and courts deemed equivalent thereto;

---

1 Shaimerden Chikanayev and Marina Kahiani are partners at GRATA Law Firm.

2 The Constitution of the Republic of Kazakhstan dated 30 August 1995.

3 The Civil Code of the Republic of Kazakhstan (Common Part) dated 27 December 1994.

4 The Law of the Republic of Kazakhstan 'On Securities Market' dated 2 July 2003 No. 461-II (the Securities Law).

5 Rules of the KASE are not considered as legislation, but they are mandatory for all issuers and securities that are intended to be included or are included in the official list of the KASE.

b courts of appellate and cassation instances – oblast courts and courts deemed equivalent thereto; and

c the highest judicial body performing the functions of supervisory instance – the Supreme Court.

Kazakhstan has general and specialised courts, whose competence encompasses review of different categories of cases (economic, administrative, etc.). The review of property and non-property disputes between entrepreneurs and legal entities, as well as corporate disputes, is referred to the competence of specialised inter-district economic courts.

Alternatively, the Law on Arbitration Tribunals of 28 December 2004 and the Law on International Arbitration of 28 December 2004 set out the key provisions relating to the proceedings in arbitration tribunals or courts of arbitration. For instance, certain[6] disputes between residents of Kazakhstan can resolved by 'arbitration tribunals' in Kazakhstan. These arbitration tribunals are not state courts, but various private arbitration tribunals roughly analogous to private arbitration tribunals in Western countries.

Kazakhstan is a party to the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the Convention). Accordingly, a foreign arbitral award obtained in a state which is party to that Convention should be recognised and enforced by a state court of Kazakhstan, subject to the terms of the Convention and compliance with local procedural rules.

Foreign court judgments may be recognised and enforced in Kazakhstan only if provided for by an international treaty for the mutual enforcement of court judgments (based on reciprocity). Kazakhstan is not a party to any such treaties with the most Western jurisdictions. Consequently, should a judgment be obtained from a court in such jurisdictions, it is unlikely to be enforceable in Kazakhstan courts.

iii Regulatory authorities

The following institutions are involved in regulating and monitoring capital markets activity in Kazakhstan:

NBK

The NBK as a financial mega regulator (in 2011 Kazakhstan consolidated its financial and securities regulators under the auspices of the NBK) is the governmental authority that executes, *inter alia*, regulation, control and supervision over the financial market and financial and other organisations within its competence. The NBK issues licences for financial activities to market participants and adopts legal acts that regulate capital markets in Kazakhstan. The NBK is currently based in Almaty (the 'financial centre' of Kazakhstan). However, pursuant to a recent presidential decree, the NBK shall move to Astana (the capital of Kazakhstan) by 1 January 2017.

KASE

The Kazakhstan Stock Exchange is the only local stock exchange in Kazakhstan and is currently based in Almaty (the KASE will be relocated to Astana after the NBK relocation

6 In particular, Kazakh law prohibits arbitration by arbitral tribunals of disputes involving state interests, state enterprises, natural monopolies, and entities with a dominant market position.

mentioned above). The KASE acts on the basis of relevant licences issued by the NBK and as of September 2015 has more than 100 companies listed on it. The KASE is a universal financial market, which can be conditionally divided into five major sectors: the foreign currency market, the government securities market, the market of shares and corporate bonds, the repo operations market and the derivatives market. Currently, the KASE comprises 53 members,[7] including banks, broker, dealer and investment companies. Foreign legal entities may be recognised as KASE members subject to meeting certain requirements established by the KASE.

AFK

The Financial Institutions' Association of Kazakhstan (AFK) is a non-governmental organisation whose members include banks, insurance companies, brokers and other professional participants in the securities market, leasing companies, audit organisations, consultancies and scientific-educational organisations. The AFK does not have a regulatory role. However, it does play an active role in the development of the financial market and relevant legislation in Kazakhstan by issuing its recommendations to the NBK and the KASE.

II THE YEAR IN REVIEW

i Developments affecting debt and equity offerings

General regulation of the securities market in Kazakhstan

Under Kazakh law, security means 'a complex of particular records and other symbols certifying proprietary rights'[8] and, in particular, the following constitute securities:

a shares and bonds;
b derivatives (as defined in law);
c securities of foreign issuers;
d mortgage certificates;
e warehouse certificates; and
f other types of securities.

Equity securities

Kazakh joint-stock companies can issue shares, convertible securities, corporate bonds and other securities both to the public and as a private placement. Participatory interests in Kazakh limited liability companies are not securities under Kazakh law and may not be issued to the public or traded in the organised market.

Debt securities

Both Kazakh joint-stock companies and limited liability companies may issue corporate bonds. The bonds may be secured (by the property of the issuer or bank guarantee) or unsecured. Kazakh law also recognises mortgage bonds and infrastructure bonds.

7 KASE members are professional participants of the securities market entitled to deal with securities and other financial instruments on behalf of themselves and their clients.

8 Article 129 of the Civil Code.

Mortgage bonds shall be secured by the pledge of rights under a mortgage loan and, in addition, may be secured by the pledge of other high liquid assets established by the NBK (such as money, Kazakh and foreign state securities (if the issuer has a sovereign rating not less than BBB- of Standard & Poor's or the equivalent of other rating agencies and highly rated Kazakh securities). Money and securities shall not exceed 20 per cent of the total security provided during the circulation of the mortgage bonds.

Infrastructure bonds are issued in concession projects and are secured by the suretyship of the state within the frameworks of the concession agreement on realisation of infrastructure project between the state and the issuer. The value of such suretyship shall be equal to the value of the object transferred to the state. The state suretyship is only provided if the infrastructure bonds are listed on the KASE.[9]

Kazakhstan depositary receipts

Kazakhstan depositary receipts (KDRs) are derivative emission securities confirming the ownership for the certain amount of emission securities issued under foreign law as underlying assets. KDRs can be issued by the Kazakh custodians, the shares of which are included to the supreme category of the official list of the KASE and have risk management and corporate governance systems in place. KDRs may be placed and circulated in the organised market only, and any payments under KDRs shall be made in the local currency – tenge. The issuer of the underlying assets may not be registered in those offshore jurisdictions listed by the NBK, or be an affiliate of an offshore jurisdiction company. The issuer of the underlying assets or the underlying assets themselves shall have a rating of not less than BB- by Standard & Poor's or Fitch or a Ba3 by Moody's. The concept of KDRs has been introduced for the purposes of diversification of investment portfolios and risks of the investors and to give them the opportunity to invest in the securities of foreign issuers with decreased transaction costs. To the best of our knowledge, however, no issuance of KDRs has happened in Kazakh securities market thus far.

Islamic securities

In 2009, Kazakhstan was the first county in CIS and Central Asia to introduce Islamic banking and Islamic securities. In 2012, JSC 'Development Bank of Kazakhstan' issued Islamic securities – *sukuk al-murabaha* (that was, however, governed by foreign rather than Kazakh law).

Islamic securities issued under Kazakh law are subject to separate regulation in Kazakhstan. In particular, Islamic securities may be paid only in cash. Until an offered Islamic security is paid in full, the issuer may not issue an order to charge it to the acquirer's personal account.

The key principles of Islamic finance as prescribed by Kazakh laws are as follows: the issuer may not accrue interest as a percentage of the Islamic securities value, or guarantee income on Islamic securities; and the funds received as a result of issue and placement of Islamic securities cannot be used to finance activities related to the production of, or trade in, tobacco, alcohol, weapons, ammunition, or to gambling business, etc.

9 The Law of the Republic of Kazakhstan 'On Concessions' dated 7 July 2006 No. 167-III.

Islamic securities certify the right of their holder for the portion of the material assets and the right to disposal of such assets and the income derived from such assets, services and other assets of the particular projects for financing of which Islamic securities have been issued. The prospectus of Islamic securities shall be approved by the so-called council on principles of Islamic finance that may be engaged by the issuer based on the agreement.

Islamic securities include: shares and units of Islamic investment funds; Islamic lease certificates; Islamic participation certificates; and other securities recognised as Islamic securities by Kazakh law.

Types of investors

The Securities Law recognises three types of investors: individual, institutional and qualified.

An institutional investor is a legal entity attracting the funds for the purposes of investment. An individual investor is any other investor. Individual investors may invest independently or through professional participants in the securities market, whereas institutional investors may invest only through professional participants in the securities market.[10]

Qualified investors are legal entities and individuals specified as such by Kazakh law or recognised as such by Kazakh broker-dealers.[11]

The following persons are specified as qualified investors by law:

a financial organisations, which are defined to include Kazakh legal entities with a licence to conduct a certain type of regulated financial activity, such as:
- banks;
- pension funds;
- insurance companies; and
- entities that perform professional activities on the securities market (such as broker-dealers);

b legal entities that under Kazakh law have the right to perform professional activities on the securities market without a licence (e.g., entities that operate on the basis of a special law, such as the Development Bank of Kazakhstan);

c legal entities that are deemed to be 'national holding companies' and 'national managing holding companies' (such as, for example, Sovereign Wealth Fund 'Samruk-Kazyna' JSC); and

d international financial institutions.

Certain securities and other financial instruments specified in the Resolution on Qualified Investors[12] may be purchased only 'with funds of' the qualified investors. Generally, these are (subject to certain exceptions):

10 Article 5 of the Securities Law.

11 Article 5-1 of the Securities Law.

12 Resolution of the Management Board of the National Bank of the Republic of Kazakhstan dated 27 July 2012 No. 228 'On Establishing the List of Financial Instruments That are Allowed for Acquiring Only with the Funds of the Qualified Investors' (the Resolution on Qualified Investors).

a securities issued by foreign entities that are governed by foreign law and not listed on the KASE;
b shares and units of high-risk investments funds; and
c derivative securities and derivative financial instruments, if they are not traded on either the KASE or Kazakh commodity exchange or foreign stock or commodity exchanges.

Registration of securities issue and transactions with securities
Under the Securities Law, local shares and bonds can be placed only after their issuance has been registered with the NBK. The list of securities holders is kept by 'Integrated Securities Registrar' JSC, the only organisation in Kazakhstan authorised to maintain the system of securities holders' registers. All transactions with securities in Kazakhstan are subject to mandatory registration[13] by either the 'Integrated Securities Registrar' JSC or the nominal holders of securities (e.g., broker-dealers) with the transaction being registered in the system of the Central Depositary JSC.[14]

Circulation of foreign securities[15] in Kazakhstan
Foreign securities may be included on the official list of the KASE, subject to requirements that are similar to those established for local issuers or securities by the NBK Resolution on the Requirements for Issuers and Securities[16] and the KASE Listing Rules.[17]

Foreign securities issued by an issuer who is not a Kazakh resident (as defined under the Securities Law and described below) do not need to obtain permission from the NBK or any other body to be placed among Kazakh investors on the organised or non-organised market, although certain securities may be acquired by qualified investors only, as discussed below.

International securities offerings
The below statutory requirements are applicable to the issuance and placement of shares and bonds by a Kazakh resident[18] in the territory of a foreign state.

13 Article 36 of the Securities Law.
14 Article 61.1 of the Securities Law.
15 Foreign securities means securities governed by foreign law, see Article 1.7 of the KASE Listing Rules.
16 Resolution of the Management Board of the National Bank of the Republic of Kazakhstan dated 22 October 2014 No. 189 'On Establishing of Requirements for the Issuers and Their Securities to be Admitted (Admitted) to Circulation on the Stock Exchange and Separate Categories of the List of the Stock Exchange' (the NBK Resolution on the Requirements for Issuers and Securities).
17 Listing Rules approved by the resolution of the KASE Board on 5 November 2009 (the KASE Listing Rules).
18 Importantly, for the purposes of the requirements below, 'Kazakh resident' means a legal entity (1) established under Kazakh law; and/or (2) with not less than two-thirds of the assets of located in the territory of Kazakhstan or issued under Kazakh law; and/or (3) with its place of effective management (place of execution of major management and taking of strategic

Issue of bonds

NBK consent

The issuer must obtain the prior written consent of the NBK to issue and place bonds outside Kazakhstan. The NBK has 15 days from the date of application to decide whether to give its consent. The NBK will give its consent if an issuer meets requirements identified below relating to: obtaining the KASE listing; complying with local offer requirements; and complying with additional requirements established by the NBK, including the leverage ratio requirement.

KASE listing

Bonds must be listed on the KASE in either the 'debt securities issued by subjects of quasi-state sector' category or the 'other debt securities' category. In addition, if the issuer has previously issued securities (debt or equity), at least one of such securities shall be listed on the KASE in any category. In order to be listed on the KASE, the issuer and its securities shall comply with certain requirements described in the 'KASE listing' section, *infra*.

Local offer requirement

The bonds must be offered for sale on the KASE to investors in Kazakhstan on the same terms as, and simultaneously with, the international offering. If the local demand is less than or equal to 20 per cent of the total size of the offering, then such demand should be satisfied in full. If the local demand exceeds 20 per cent of the total size of the offering, then not less than 20 per cent of the total size of the offering must be allocated to local investors.

Additional NBK requirements for issuance and placement of bonds abroad[19]

The debt securities may be issued and placed by the Kazakh resident in the territory of the foreign state provided that: there was no default on other securities (except shares) of the issuer; there was no delisting of securities (except shares) of the issuer; and the leverage ratio of the issuer does not exceed two as of the last financial quarter (except banks and organisations performing certain types of banking activity). The leverage ratio is calculated as the ratio of all outstanding liabilities of the issuer to own capital. The ratio is tested at the end of the financial quarter immediately prior to the application for NBK

decisions required for business activity) located in Kazakhstan. This means, effectively, that for the purposes of securities market regulation, even companies incorporated abroad may be recognised as 'Kazakh residents' and issuance and placement of their securities will be subject to Kazakh Securities Law requirements. For example, a foreign company that owns the shares of Kazakh company may be considered as 'Kazakh resident' if such shares comprise not less than two-thirds of assets of the foreign company.

19 The Resolution of the Management Board of the National Bank of Kazakhstan 'On Approval of Rules for Issuance and/or Placement of Emission Securities of Organisation – Resident of the Republic of Kazakhstan in the Territory of the Foreign State, Provision of Notification on Issuance of Depositary Receipts or Other Securities, the Underlying Assets of Which Are Emission Securities of Organisations – Residents of Kazakhstan, and on Report on Results of Their Placement' No. 70 dated 24 February 2012 (the NBK Rules for Issuance and Placement Abroad).

consent and, therefore, does not include any debt proposed to be incurred in connection with the contemplated bond issue. Where the issuer is a bank it must be in compliance with prudential and other requirements of the NBK.

Foreign listing

The bonds can be listed on the foreign stock exchange only upon receipt of NBK consent provided that the bonds are admitted to listing on the KASE.[20]

NBK reporting requirements

Following the placement of the bonds, the issuer shall provide to the NBK confirmation that the local offer requirement has been satisfied and provide certain information on the local offer. The issuer shall also notify the NBK on the issue of the bonds for currency control purposes.

Local offer prospectus requirement

Under the KASE Listing Rules, the issuer shall prepare the information memorandum in relation to local offer. In practice, a Russian version of international prospectus is generally accepted by the KASE as the information memorandum.

Issue of shares/GDRs

The prior written NBK consent is required to issue and place shares (or derivative securities representing shares of a Kazakh JSC) (the shares) outside Kazakhstan. The NBK will give its consent if an issuer meets requirements identified below relating to: obtaining the KASE listing; complying with local offer requirements; and provided that the prospectuses of the bonds earlier issued by the issuer (if applicable) do not contain covenants that will allow the bondholders claim early repayment or repurchase of the bonds on the ground of change of persons holding 10 or more per cent of the issuer's shares.[21]

KASE listing

The shares must be listed on the KASE in either the 'first' category or the 'second' category.[22] In addition, Kazakh law requires that previously issued securities (debt or equity), if any, of the issuer who considers international offering, shall be listed on KASE in any category.

Local offer requirement

A Kazakh resident, in the case of placement abroad of the shares, shall mandatorily offer at least 20 per cent of the total issuance (after execution by the existing shareholders of their pre-emptive purchase right) on the KASE. Unlike in case of bonds, the Securities Law does not expressly require the issuer to actually place such 20 per cent on the KASE. Our interpretation of the law suggests, however, that local offer requirement in relation to the shares shall extend to the placement (i.e.. the issuer shall not only offer, but actually

20 Article 22-1.2 of the Securities Law.

21 Article 3.2 of the NBK Rules for Issuance and Placement Abroad.

22 Article 3.3 of the NBK Rules for Issuance and Placement Abroad.

place at least 20 per cent of the total issuance of the proposed shares on the KASE, if there is a local demand).

The requirements applicable to foreign listing of the bonds and NBK reporting (described above) apply to the shares as well.

Infrastructure of the securities market

The following activities in the Kazakh securities market are considered as 'professional activities in the securities market' and are subject to NBK licensing:

a brokerage;
b dealing;
c custodial activities;
d portfolio management;
e transfer agent activity;
f pension fund management;
g clearing activity in transactions with financial instruments; and
h organisation of trade in securities and other financial instruments.

The legal entities performing such activities (the professional participants) shall be Kazakh legal entities and are subject to mandatory requirements such as prudential ratios, requirements as to organisational structure and management, reporting requirements, etc. Money and securities of the professional participants shall be recorded separately from money and securities of their clients in order to protect the clients' assets in insolvency of a professional participant.

Brokers/dealers

Brokers perform transactions with emission securities and other financial instruments on behalf of, in the interests of, and at the expense of their clients (investors or issuers). Dealers perform transactions with emission securities and other financial instruments in their own interests and for their own account over the counter or in the organised market, with direct access thereto.

Under recent 2014 amendments to the Securities Law, brokers, among others, shall receive NBK approval[23] for offering to the clients of marginal transactions.[24]

Underwriters

Underwriters provide services to the issuer on issuance and placement of emission securities. An underwriter may provide such services by itself or as part of an emission consortium based on the agreement of joint activity.

23 The Resolution of the Management Board of the National Bank of Kazakhstan 'On Approval of the List (Types) of Financial Products That Require Consent of the National Bank for Offering by Financial Organisations to the Consumers of Financial Services' dated 22 October 2014 No. 202.

24 Brokerage services that contemplate conclusion of a securities sale and purchase transactions upon instruction from the client using money or securities of the broker lent to its client for the purposes of such transactions.

Bondholders' representative

Under Kazakh law, the bondholders' representative is an organisation acting in the interests of the bondholders on the basis of an agreement with the issuer in the process of circulation of the bonds in the secondary securities market, interest payment and repayment.[25] The functions of the bondholders' representative include control over the proper use of funds by the issuer if the bonds were issued for a specific purpose, monitoring of the security and financial condition of the issuer, taking measures for the protection of rights and interests of the bondholders (including filing a suit with the court on behalf of 50 per cent or more of the bondholders). The bondholders' representative reports quarterly to the NBK and the bondholders.

Information on the bondholders' representative shall be mandatorily included in the bonds prospectus,[26] and a copy of the agreement concluded between the bondholders' representative and the issuer is an integral part of the bonds prospectus.[27]

The bondholders' representative shall hold a licence issued by the NBK for custody/broker/dealer activities in the securities market. The bondholders' representative may not be affiliated with the issuer. The issuer chooses the bondholders' representative at its own discretion and concludes with the bondholders' representative a services agreement that is subject to mandatory requirements of Kazakh law.

Integrated Securities Registrar

In 2013 all Kazakh corporate registrars were abolished and their functions gradually transferred to the legal entity that is currently entitled to act as the one and only registrar in the territory of Kazakhstan – JSC 'Integrated Securities Registrar' (the Integrated Registrar). This measure was aimed to improve control over the registration of transactions with securities, ensure secure storage of information and generally aid the development of the securities market in Kazakhstan.

The Integrated Registrar is a professional participant of the securities market that is in charge of maintaining the system of registers of securities holders. The system of registers of shareholders of Kazakh joint-stock companies shall be mandatorily kept by the Integrated Registrar. The Integrated Registrar may also keep the list of participants and their participatory interests in limited liability companies. The Integrated Registrar registers the transactions with emission securities (sale and purchase, pledge, blocking, etc.) that are concluded over the counter and are held by their owners directly, without involvement of a nominal holder.

Central Depository

The Central Depositary is the only professional participant of the securities market authorised to perform depositary activity. The Central Depositary performs settlement of the transactions concluded in the organised market and transactions concluded over the counter between its deponents (clients), and it provides nominal holding services for other nominal holders (brokers, custodians, etc.). The deponents (clients) of the Central Depositary are local nominal holders and foreign depositaries and custodians.

25 Article 1-67 of the Securities Law.

26 Article 9.1.10 of the Securities Law.

27 Article 9.2-2.2 of the Securities Law.

Custodians
Custodians perform the recording of the financial instruments and the money of their clients, confirm the rights thereto and store documentary financial instruments of their clients. Only commercial banks holding the relevant licence and the NBK may act as custodians in the Kazakh securities market.

Trades organisers
Trades organisers are stock exchanges (for the organised trades) and quotation organisations (for over-the-counter trades). Currently, there is only one stock exchange in Kazakhstan – the KASE. The quotation organisation may be established for the exchange of quotations in relation to the securities between its members. Only professional participants may be members of a quotation organisation.

Measures taken by Kazakh regulators as a response to the financial crisis
The most important legislative changes in relation to capital markets have been adopted in Kazakhstan as a response to 2008–2009 financial crisis. In February 2012, the Law on the Minimisation of Risks[28] came into effect; it contained certain amendments to various legal acts, mainly aimed at strengthening banking regulation and improving local securities market performance. We describe the latter in more detail below.

Mandatory covenants of a local bonds issuer
The Law on the Minimisation of Risks introduced a list of mandatory negative covenants that all Kazakh issuers have to undertake and comply with until the maturity of the local bonds. Namely, the Kazakh issuer is prohibited from:

a disposing of the assets of the issuer for more than 25 per cent of the total assets of the issuer as of the date of disposal;
b defaulting under the obligations, other than bonds, for more than 10 per cent of the total assets of the issuer as of the date of state registration of the bonds issue;
c changing the main types of its activities (and amend its charter to that effect); and
d changing its organisational legal form (e.g., from JSC to LLP).[29]

In case of breach of the above covenants, the issuer shall repay the local bonds and pay accrued interest. The mandatory covenants requirement does not apply to the organisations undergoing the restructuring and banks or organisations performing certain types of banking operations. Other covenants may be established in the local bonds prospectus provided that they are approved by the relevant corporate body of the issuer.[30]

28 The Law of the Republic of Kazakhstan dated 28 January 2011 No. 524-IV 'On Amendments and Additions to Certain legislative Acts of the Republic of Kazakhstan on Questions of Regulation of Banking Activity and Financial Organisations in Terms of Risks Minimisation'.

29 Article 15 of the Securities Law.

30 Article 50 of Appendix I of the Resolution of the Agency of the Republic of Kazakhstan for Regulation and Supervision over Financial Market and Financial Organisations dated 30 July 2005 No. 269 'On Approval of the Rules of State Registration of Non-State Bonds

Increase of bondholders' representative powers

To protect the interests of the bondholders, the Law on the Minimisation of Risks broadened the statutory powers of the bondholders' representative so it has been empowered with the following additional rights: to control the use of the proceeds by the issuer for a specific purpose; to monitor the financial position of the issuer; and to file a suit with the court on behalf of 50 per cent or more of the bondholders.

Issues to be approved by the bondholders' meeting

Due to amendments to the Securities Law in 2011, the changes in the prospectus of local bonds related to the below issues shall be mandatorily approved by a bondholders' meeting:[31]

a providing security for the bonds (in case of secured bonds);

b changes in the number of bonds, their type, ways of payment, receipt of income on the bonds (including nominal value of bonds), tenor or circulation and repayment procedure; and

c changes in the conversion procedure (in case of convertible bonds).

The above changes shall be approved by not less than:

a 85 per cent of the total amount of the placed bonds (except the bonds redeemed by the issuer); or

b 75 per cent of the total amount of the bondholders in the case that there are two bondholders, each holding more than 10 per cent of the issuance.

The above requirements do not apply to financial organisations or to the parent company of a banking conglomerate (non-financial organisation) in case of restructuring of their debt.

Introduction of the above requirements gave corporate issuers the possibility to restructure their bonds subject to approval of 85 per cent of the bondholders (previously bonds restructuring was possible only upon approval of 100 per cent of the bondholders).

Local placement requirement

The Law on the Minimisation of Risks introduced the mandatory 20 per cent local placement requirement in relation to the bonds issued by the 'Kazakh resident'. As discussed above, in case of bonds placement abroad, Kazakh residents are required not only to offer bonds on the local stock exchange (the KASE), but to actually sell at least 20 per cent of the total issuance on the KASE, if there is demand. This requirement evidently was aimed at the development of the KASE and local securities market generally.

Insider trading

The Law on Minimisation of Risks has also considerably expanded the list of persons classified as 'insiders' for the purposes of the Securities Law. Auditors, brokers,

Issuance and Consideration of the Reports on Results of Placement and Repayment of the Bonds, Cancellation of the Bonds Issuance'.

31 Article 9.4-1 of the Securities Law.

independent appraisers, stock exchange, state officials of the NBK and any other persons who have access to insider information are now considered insiders.

ii Developments affecting derivatives, securitisations and other structured products

General regulation of derivatives in Kazakhstan

Definition of derivatives under Kazakh law

The Kazakh Civil Code contains the following definition of 'derivative financial instrument': '[a] contract whose value depends upon the size (including the fluctuation in the size) of an underlying asset of the contract and which envisages the effectuation of settlement under such contract in the future.'[32] Swaps, options, forwards and futures are then defined as examples of derivative financial instruments in line with commonly used market definitions and, in particular, with IAS definitions.

Further, the Securities Law contains the definition of 'derivative securities': 'securities certifying rights in relation to the underlying asset of such derivative securities'. It seems that the concept of a 'derivative security' is evidence of the general confusion of the legislator in its understanding of the nature of derivatives (since generally the derivatives are not securities). We understand that the definition of 'derivative securities' was intended to express a certain type of the 'derivative,' as such term is used in the law of Western jurisdictions. From a practical perspective, this distinction has limited impact, as Kazakh law often refers to a 'derivative security' or 'derivative financial instrument'. Thus relevant regulation covers both definitions of derivative financial instruments and derivative securities in one go.

Cherry-picking

It seems that under current Kazakh law there is apparent risk of cherry-picking as the rehabilitation manager has a right to reject certain contracts deemed burdensome to the insolvent company while affirming contracts beneficial to the insolvent company. Article 8 of the Bankruptcy Law,[33] in particular, provides the possibility for a rehabilitation manager to refuse to perform transactions made by a Kazakh counterparty before institution of rehabilitation proceedings, which are not performed by either party, whether in full or in part, if one of the following criteria is met:

a the performance of the agreement will result in a loss for a debtor;

b the agreement contains onerous terms in comparison with similar and analogous contracts, which are commonly executed under comparable circumstances;

c agreement is a long-term contract (i.e., for more than one year) or is designed for the results to be obtained by the counterparty in remote future; or

d there are reasons to believe that the performance of the transaction will result in unfavourable consequences for other creditors.

32 Article 128-2 of the Civil Code.

33 The Law of the Republic of Kazakhstan 'On Rehabilitation and Bankruptcy' No. 176-V dated 1 March 2014 (the Bankruptcy Law).

The bankruptcy manager is obliged, based on the decision of the creditors' committee, to amend, terminate, reject or challenge the contracts concluded prior to initiation of bankruptcy proceedings and to claim to return the property transferred by a debtor prior to initiation of bankruptcy proceedings (Article 8.3 of the Bankruptcy Law).

Close-out netting

Kazakh law does not specifically recognise close-out netting and is rather ambiguous on enforceability of any netting arrangements. It is evident, therefore, that without specific guidance under Kazakh law, a Kazakh court might prevent the application of close-out netting in an insolvency proceeding, for example, where local policy interest might be seen as overriding the parties' choice of law for their contract.

Relevant developments in bankruptcy law

The Bankruptcy Law introduced in 2014 includes the following important provisions that may further affect derivative transactions.

Automatic early termination

The Bankruptcy Law now explicitly provides that the initiation of bankruptcy proceedings shall not be a ground for early termination or unilateral refusal to fulfil the contract, and any agreement between the parties on such early termination or unilateral refusal is invalid (see Article 8.1 of the Bankruptcy Law). This is a mandatory provision of Kazakh law and, accordingly, there is a significant risk that an automatic early termination provision in, for example, an ISDA master agreement, will not be recognised in Kazakhstan if the Kazakh counterparty goes bankrupt.

Bankruptcy set-off

Set-off is generally not possible upon bankruptcy. The Bankruptcy Law now explicitly provides that the insolvent debtor and its creditors may not set off their claims at their discretion upon initiation of rehabilitation or bankruptcy proceedings (see Article 8.4 of the Bankruptcy Law). Set-off shall be effected, however, by the rehabilitation or bankruptcy manager if such set-off does not breach the priority of other creditors, is direct, mutual, does not involve any other party, and is in relation to monetary claims only.

Limitations for transactions with derivatives in Kazakhstan

In 2012, certain amendments have been introduced to Kazakh law in order to minimise the risks in the financial market following the recent global financial crisis. Such amendments affected the possibility of certain local investors to deal with derivatives.

Restrictions to deal with derivatives for Kazakh banks

Generally, the Kazakh banks are allowed to deal with derivatives subject to over-the-counter (OTC) dealing prohibition, underlying asset requirements and bank's own capital requirement.

OTC dealing prohibition

Kazakh banks are prohibited from dealing with derivatives OTC subject to certain exceptions established by the legislation (i.e., generally derivative transactions shall be concluded by the bank through the stock exchange). The exceptions include low risk transactions, the list of which is established by the NBK Derivatives Regulation.[34] For example, a derivative transaction with a non-resident counterparty with a credit rating of not less than BBB- according to the international scale of Standard & Poor's or by the analogical rating of Moody's or Fitch may be concluded by the Kazakh bank OTC.

Underlying asset requirements

Kazakh banks are prohibited from dealing with derivatives if the underlying asset of the relevant derivative is not permitted by the NBK Derivatives Regulation. The permitted underlying assets include tenge and foreign currency, currency indices, refined previous metals, interest rates, certain securities and indices, credit risk (subject to certain requirements provided by the NBK Derivatives Regulation), certain non-delivery commodities and commodities indices.

Bank's own capital requirement

From 1 January 2014 the NBK has introduced a limit on the capacity of a Kazakh bank to trade derivatives. Such trades may not exceed 30 per cent of the bank's own capital.[35] By establishing this limit, the NBK is demonstrating a negative attitude toward Kazakh banks trading excessively with derivatives.

Restrictions on dealing with derivatives for financial institutions

Financial institutions other than banks are also subject to certain restrictions. For example, insurance companies are allowed to enter derivative transactions only for hedging purposes.

A unified pension fund is allowed to enter into derivative transactions without limitation for the purpose of hedging of investment risks. The amount of the transactions

34 Resolution of the Management Board of the Agency of the Republic of Kazakhstan for Regulation and Supervision of Financial Market and Financial Organisations dated 16 July 2007 No. 210 'On Establishment of the List and Order of Acquisition of Base Assets of Derivative Securities and Derivative Financial Instruments with which the Second Tier Banks are Allowed to Perform Broker and/or Dealer Activity in the Securities Market, and Cases of Execution of the Deals with State Securities and Non-state securities in the Secondary Market, Derivative Financial Instruments in the Non-organised Securities Market' (the NBK Derivatives Regulation).

35 See Article 47 of the Resolution of the Management Board of the Agency for Regulation and Supervision of Financial Market and Financial Organisations dated 30 September 2005 No. 358 'On Approval of Instruction on Normative Ratios and Methodology of Calculation of Prudential Requirements for Second Tier Banks'.

entered into for any other purpose shall not exceed 10 per cent of the total pension assets.[36]

A voluntary accumulative pension fund shall, generally, conclude transactions with derivatives through the stock exchange; for the purposes of hedging; and the base asset shall be on the list of the assets permitted for the investment of pension or own assets of the pension fund.[37]

Restrictions to deal with derivatives for non-qualified investors

Article 2 of the Resolution on Qualified Investors states that certain financial instruments (including derivatives that are not traded in the Kazakh or foreign stock or goods exchange) may be purchased only 'with the funds of qualified investors'. Our interpretation of the law suggests that this provision means that, generally, only qualified investors may deal with derivatives that are not traded in the Kazakh or foreign stock or goods exchange.

There is, however, an exception to the above rule. If all of the following requirements are met: (1) the underlying assets of the derivative is permitted by the Resolution on Qualified Investors; (2) the transaction is concluded OTC; and (3) one of the conditions established in the Resolution on Qualified Investors is met (e.g., the derivative transaction is entered into with a highly rated counterparty), such derivatives may be purchased with the funds of any legal entity (even a non-qualified investor).[38]

Securitisation in Kazakhstan

Local securitisation transactions in Kazakhstan are regulated by the Law of the Republic of Kazakhstan 'On Project Finance and Securitisation' dated 20 February 2006 No. 126.

The Law establishes the legal basis and conditions of project finance and securitisation in Kazakhstan; in particular it introduces the concepts of 'SPV', 'true sale' and 'bankruptcy remoteness'. To the best of our knowledge, there have only been foreign law governed cross-border securitisations in Kazakhstan so far, and no Kazakh law governed local securitisation transactions.

iii Cases and dispute settlement

Kazakh law refers to a continental system of law and, accordingly, court precedent is not a source of law and the judges are not obliged to follow previous decisions on similar matters (though they tend to). Kazakhstan court practice is limited generally, and in the sphere of securities market in particular. There is no comprehensive database where one may find all the court decisions on a certain matter. In addition, Kazakhstan's state bodies and judges are generally unfamiliar with and inexperienced in modern commercial law terminology, concepts and practices. Therefore, it is impossible to predict with

36 Point 11 of Appendix I of the Resolution of the Management Board of the National Bank of the Republic of Kazakhstan dated 6 May 2014 No. 75 'On Approval of Investment Declaration of the Unified Pension Fund'.

37 Resolution of the Management Board of the National Bank of the Republic of Kazakhstan dated 27 August 2007 No. 237 'On Approval of the Rules of Activity of the Unified Accumulative Pension Fund and/or Voluntary Accumulative Pension Funds'.

38 Article 2 of the Resolution on Qualified Investors.

any certainty how the rights and obligations of the parties in cross-border financial transactions would be interpreted by judges or arbitrators in Kazakhstan.

iv Relevant tax and insolvency law

Tax law

Bonds

Interest

Under Kazakh law, payments of interest on bonds to non-residents of Kazakhstan[39] will be subject to 15 per cent withholding tax, unless reduced by up to 10 per cent by an applicable double taxation treaty. Payments of interest to investors registered in countries with a favourable tax regime are subject to 20 per cent withholding tax, unless reduced by an applicable double taxation treaty. The list of countries with favourable tax regimes is established by the Kazakh government and includes, *inter alia*, the Republic of Cyprus, Hong Kong, the British Virgin Islands, the US state of Delaware, among others.

The withholding tax on the interest would not apply if the bonds are listed on the KASE as at the date of accrual of interest.

Gains

The net gain received by the non-resident seller from the sale of the bonds is subject to 15 per cent withholding tax in Kazakhstan. If such non-resident seller is registered in a country with a favourable tax regime, the net gain is subject to 20 per cent withholding tax. Such withholding tax may be reduced or eliminated under an applicable double taxation treaty.

Any gain derived from the sale of the bonds through open trades on the KASE or a foreign stock exchange is tax-exempt, provided that such bonds are admitted to the official list of such stock exchange at the time of sale.

Shares

Dividends

Dividends are generally subject to 15 per cent withholding tax, unless reduced by double taxation treaties (5 or 15 per cent depending on the country of residence and satisfaction of certain other conditions). If dividends are paid on the shares held by a resident of a country with a favourable tax regime, such dividends are subject to 20 per cent withholding tax.

The dividends on the shares listed on the KASE at the time the dividends are accrued is exempt from tax. Dividends paid on the shares that are not listed on the KASE will be exempt from tax if the shareholder is not a resident of a country with a favourable tax regime and the shareholder has been holding the shares for more than three years.

39 An individual who is not a resident of Kazakhstan for tax purposes or to a legal entity that is neither established under Kazakh law, nor has its actual governing body (place of actual management), nor maintains a permanent establishment in Kazakhstan or otherwise has no legal taxable presence in Kazakhstan.

Gains

The net gain received by non-resident of Kazakhstan from the sale of shares is subject to a 15 per cent withholding tax in Kazakhstan, unless such non-resident seller is registered in a country with a favourable tax regime, in which case a 20 per cent withholding tax will apply.

Kazakhstan tax law provides relief from capital gain tax in respect of the shares if the non-resident seller is not a resident of a country with a favourable tax regime and has held the shares for more than three years as at the date of sale. This relief applies if the issuer is not a Kazakh subsoil user and not more than 50 per cent of the issuer's assets comprise property of Kazakh subsoil users. Further, any income of a non-resident derived from the sale of the shares through open trades on the KASE or a foreign stock exchange is tax-exempt, provided that such shares are admitted to the official list of such stock exchange at the time of sale.[40]

Stamp duties

There is no stamp duty or similar tax payable in Kazakhstan.

Insolvency law

The Bankruptcy Law provides for the following three insolvency regimes that may be applied to an insolvent debtor: accelerated rehabilitation, rehabilitation and bankruptcy. Importantly, the Bankruptcy Law does not apply to state enterprises and institutions, pension funds, banks and insurance (reinsurance) organisations that are covered by special bankruptcy regimes.

Accelerated rehabilitation and rehabilitation[41] are intended to rescue the debtor. A final liquidation (i.e., bankruptcy) guillotines the debtor.

Accelerated rehabilitation can be initiated by the debtor in the court proceeding provided that no rehabilitation or bankruptcy proceeding has been initiated against the debtor and the debtor is insolvent[42] or will not be able to meet his or her monetary obligations on the dute date within the next 12 months.

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40 Income of a Kazakh resident is tax-exempted only if it is derived from the sale of the shares through open trades on the KASE (i.e., it is not tax-exempted if trade is on a foreign stock exchange), provided that such shares are admitted to the official list of KASE at the time of sale.

41 Both procedures may be applied to commercial entities only.

42 The debtor is insolvent if one or more of the following conditions are met:

a non-payment under health or life damage obligations, obligations to its employees, social insurance and pension payments, payments under copyright agreements within three months after they became due for the amount of 100 monthly calculated indexes (approximately US$735);

b non-payment under tax and other budget obligations within four months after they became due for the amount of 150 monthly calculated indexes (approximately US$1,100);

c non-payment by a debtor – legal entity under any other obligations within three months after they became due for the total amount of 1,000 monthly calculated indexes (approximately US$7,340).

Accelerated rehabilitation is conducted based on a rehabilitation plan that shall be agreed upon by the debtor and its affected[43] creditors prior to the initiation of the court proceeding. The interests of other (i.e., not affected by initiation of the accelerated rehabilitation procedure) creditors shall, however, be taken into consideration in the rehabilitation plan. The tenor of accelerated rehabilitation is up to two years and may be extended by an additional six months at the request of the debtor with the consent of the affected creditors.

Upon introduction of accelerated rehabilitation by the court, the following main legal implications arise:

a the debtor may not use and realise its property except in the course of regular commercial operations, if provided by the rehabilitation plan or upon consent of the affected creditors;

b a stay of enforcement of court decisions or arbitration awards issued earlier upon claims of affected creditors;

c the affected creditors cannot file for bankruptcy of the debtor; and

d withdrawal of money from the debtor's account and foreclosure of the debtor's property is prohibited.

Payments to the affected creditors are made according to the schedule included in the rehabilitation plan. Payments to any other (i.e., not affected) creditors are made in the course of regular commercial operations of the debtor (i.e., none of the implications discussed above shall be applicable). Any creditor that is not an affected creditor may file an application to the court for the bankruptcy of the debtor.

Rehabilitation may be initiated in the court proceeding by either the debtor itself or its creditors. The debtor may file for rehabilitation if he or she is either insolvent or unable to meet his or her monetary obligations on the due date within the next 12 months. Creditors may file for rehabilitation if the debtor is insolvent.

An insolvent debtor is entitled to apply to the court for the suspension of the bankruptcy proceedings and the introduction of the rehabilitation procedure within 10 days of the date it received a copy of the court ruling on the initiation of bankruptcy proceedings.

A mandatory prerequisite for the rehabilitation is that the debtor must be able to improve his or her financial position. The rehabilitation plan, unlike in accelerated rehabilitation, shall be approved by the creditors within three months from the moment

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The monthly calculated index is a coefficient used for calculation of benefits and other social payments and for the application of fines, sanctions, taxes and other payments according to Kazakh legislation. The amount of the monthly calculated index is established annually by the Law of the Republic of Kazakhstan on the Republican Budget. The monthly calculated index of 2015 is equal to 1,982 tenge.

43 Accelerated rehabilitation would not affect all of the creditors of the debtor, but only certain groups of creditors with 'homogeneous' claims (e.g., bondholders, lenders under loans, etc.) that the debtor decided to include in the rehabilitation plan. At least 50 per cent plus one vote of total amount of the claims of each of the affected group of creditors with the homogeneous claims is required for due approval of the accelerated rehabilitation.

of the court ruling on introduction of rehabilitation procedure. The tenor of accelerated rehabilitation shall be indicated in the rehabilitation plan and may be extended by an additional six months at the request of the rehabilitation manager with the consent of the creditors.

Unlike accelerated rehabilitation, within a rehabilitation procedure creditors may decide to deprive existing shareholders and pass management over the debtor to a specially appointed rehabilitation manager.

The legal implications of the introduction of rehabilitation by the court are generally the same as for the accelerated rehabilitation discussed above. The main difference is that all creditors (unlike only affected creditors in accelerated rehabilitation) may make their claims only within rehabilitation proceeding and may not file for bankruptcy.

Bankruptcy may be initiated in the court proceeding by the debtor itself, creditors, the prosecutor, the rehabilitation manager, or if, in the course of rehabilitation, it turns out that rehabilitation is not possible, the state body responsible for tax and other payments to the budget. The tenor of a bankruptcy proceeding shall not exceed nine months and may be extended by an additional three months at the request of the bankruptcy manager with the consent of the creditors' meeting.

A resolution of the court on the bankruptcy of the debtor results in the following legal implications:

a the debtor may not use and realise its property and repay its debt except in the course of regular commercial operations;
b all debt obligations shall be considered as due;
c the accrual of fines and interests on all obligations of the debtor is terminated;
d all court disputes of a proprietary nature in relation to the debtor are terminated;
e all claims may be made against the debtor only in bankruptcy proceeding (except claims where third persons are acting as guarantors or pledgors);
f all arrests and liens on the debtor's property are eliminated upon application of administrator; and
g any new arrests on the property of the debtor may be imposed only in case of claims for invalidation of the transaction and reclamation of property from illegal possession of the debtor.

Upon resolution of the court on the bankruptcy of the debtor, the bankruptcy manager realises the debtor's property through public auction and satisfies the claims of the creditors included on the register of creditors' claims in the following order of priority:

a administrative and court expenses;
b claims under health or life damage obligations, obligations to employees, social insurance and pension payments, payments under copyright agreements;
c secured creditors' claims;
d tax and other budget payment claims;
e claims of other creditors;
f claims for damages and fines; and
g distribution of the remainder, if any, to the bankrupt entity's shareholders.

In 2014 a new mechanism was introduced for the satisfaction of claims of secured creditors whereby the secured creditor may, upon approval of the creditors' meeting, directly take over the collateral in-kind. Prior to this amendment, the secured creditor

could not take the collateral in-kind and his or her claims could only have been satisfied upon the sale of the bankrupt debtor's estate, including the collateral.

v Role of exchanges, central counterparties and rating agencies

KASE

As mentioned above, the KASE is the only stock exchange in Kazakhstan. The securities (including derivative securities) issued under both Kazakh and foreign law may be admitted to the official list of the KASE, subject to the requirements established by the NBK Resolution on the Requirements to Issuers and Securities and the KASE Listing Rules.

The official list of the KASE includes the following sectors (and each sector may include categories):

a shares ('first' and 'second' categories);
b debt securities ('debt securities issued by subjects of the quasi-state sector' category, 'other debt securities' category, 'buffer' category);
c Islamic securities ('Islamic lease certificates' category and 'Islamic participation certificates' category);
d investment funds securities;
e derivative securities;
f securities of international financial organisations; and
g state securities.

From 1 January 2015, the new amended version of the NBK Resolution on the Requirements to Issuers and Securities and relevant amendments to the KASE Listing Rules came into force in order to make the requirements of the KASE listing more flexible (especially in relation to bonds) and, accordingly, to attract new issuers to list their securities on the KASE (the KASE 2015 Amendments). The main amendments are listed below.

Shares

Prior to the KASE 2015 Amendments, the 'shares' sector of the official list of the KASE included three categories, depending on the level of requirements to the issuer. The third category has been abolished, and currently there are only two categories (first category and second category).

Basic Listing Requirements

In order to be included in the first category, the issuer of the shares shall exist for not less than three years and shall be subject to the following basic listing requirements established by the NBK Resolution on the Requirements to Issuers and Securities (the Basic Listing Requirements):

a the issuer's financial statements are prepared in accordance with IFRS or GAAP and provided for three financial years for the first category and one financial year for the second category;[44]
b financial statements are audited by an audit organisation recognised by the KASE;

44 If the audited annual financial statements are more than six months old, interim financial statements (which must either be audited or reviewed by auditors) shall also be provided.

c audited financial statements shall be provided for the last three years;
d the issuer shall adopt a corporate governance code; and
e the constitutional documents of the issuer or the prospectus of the issuance do not restrict for transfer of shares.[45]

New Listing Requirements

In addition to the Basic Listing Requirements, the KASE 2015 Amendments require the issuer to comply with the following requirements, applicable only to the first category of shares:[46]

a prior to inclusion of the shares to the first category, the issuer or selling shareholder must have already completed an IPO;
b the issuer shall have not less than 200 shareholders;
c one of the members of the KASE shall apply to be a market maker in relation to the shares; and
d the issuer shall comply with one of the following three packages of requirements:
- the own capital (OC) of the issuer shall not be less than its charter capital and shall not be less than 15 billion tenge and the issuer has attracted not less than 7 billion tenge through the IPO (the IPO total proceeds), 3.5 billion tenge out of which has been attracted in Kazakhstan (the IPO local proceeds) and the issuer received a net profit for one year out of the past two years and not less than 5 per cent of total placed shares of the issuer shall be freely traded on the KASE (the free float[47]);
- the OC shall not be less than the issuer's charter capital and not less than 10 billion tenge and the IPO total proceeds shall not be less than 4.5 billion tenge, the IPO local proceeds not less than 2.25 billion tenge and the issuer received a net profit for the past two years and 15 per cent free float; or
- the OC shall not be not less than the issuer's charter capital and not less than 5 billion tenge and the IPO total proceeds shall not be less than 2.5 billion tenge, IPO local proceeds not less than 1.25 billion tenge and the issuer received net profit for the past three years and 25 per cent free float.

It seems from the requirements packages above that the free float requirement is currently determined by the size of issuer, as opposed to the previous approach where all the issuers irrespective of their size had to maintain an equal level of free float (starting from 10 per cent of the total placed shares during the first six months of the KASE listing up to 25 per cent in two years following the KASE listing). The new differentiated approach to the free float requirement facilitates listing on the KASE of major issuers and, accordingly, makes the KASE listing more attractive.

45 NBK Resolution on the Requirements to Issuers and Securities.

46 Article 10.1.8 of the KASE Listing Rules.

47 The free float means that at least one placed share from the issuance does not belong a person (or a group of affiliated persons) who owns all other placed shares of this issuance, and such shares may be purchased on the stock exchange – see Article 1.24 of the KASE Listing Rules.

As for the second category, the following requirements on the issuer of shares have been abolished: minimal own capital; minimal annual profit; the free float requirement; and the existence of a market maker in relation to the listed shares. Accordingly, in order to be listed in the second category the issuer shall now comply with the Basic Listing Requirements only.

For both categories, the minimal number of shares for the purposes of the KASE listing shall be not less than 100,000 for the common shares and not less than 10,000 for privileged shares.[48]

Bonds

Introduction of a new category

The KASE 2015 Amendments introduced a new category in the 'debt securities' sector of the KASE: 'debt securities issued by subjects of the quasi-state sector'. In order to be included in this new category, the issuer shall be directly or indirectly controlled by the state, the NBK, national holding or national managing holding[49] and shall comply with some other simple requirements. Interestingly, unlike for other categories of securities, the requirements to this category does not contain the requirement for the issuer to have been in existence as a company for a certain period (i.e., such securities can be issued by an SPV that has just been established by quasi-state entities and listed on the KASE).

Abolishment of rating requirement

Prior to the KASE 2015 Amendments, debt securities could be included in the official list of the KASE only if such securities have been rated by the rating agencies recognised by the KASE. The mandatory rating requirements have been abolished and, accordingly, any non-rated debt securities may now be included in the category 'other debt securities', provided that the following requirements are met:

a the issuer has been in existence as a company for at least two years;
b IFRS or GAAP financial statements;
c financial statements are audited by an audit organisation recognised by the KASE;
d audited financial statements shall be provided for the last financial year;
e the issuer shall adopt a corporate governance code; and
f the constitutional documents of the issuer or the prospectus of the issuance does not contain provisions restricting the transfer of relevant debt securities.

Lightening of the market maker requirement

The market maker requirement that was mandatory for the listing of the debt securities has been amended. Currently, a market maker is required in relation to the debt securities only if there are 10 or more holders of such securities[50] (previously a market maker was required in any case except where one person owned all the securities of one issue).

48 Article 10.1.2-1 and 10.1.2-2 of the KASE Listing Rules.

49 Article 9 of the NBK Resolution on the Requirements to Issuers and Securities.

50 Article 10.1.10 of the KASE Listing Rules.

Depositary receipts

The KASE 2015 Amendments clarified that, in case of listing of depositary receipts, listing requirements apply to the underlying shares rather than to depositary receipts and to the issuer of the shares rather than the issuer of depositary receipts (i.e., bank – depositary). In order to be listed on the KASE, the underlying shares and their issuer shall comply with the requirements applicable to the second category of the 'shares' sector of the official list of the KASE. If the shares are included in the first category, the mandatory market maker requirement applies to the depositary receipts. The minimum number of depositary receipts to be listed on the KASE is 50,000.[51]

Simplified listing procedure

Securities issued under foreign law by 'non-residents' of Kazakhstan are included on the official list of the KASE through a simplified procedure.[52] For application of the simplified procedure, it is required that securities shall be included on the official list of foreign stock exchanges recognised by the KASE and disclose the information on the websites of such stock exchanges in accordance with applicable law and listing rules.

Buffer category

In 2009, right after the peak of the financial crisis, the NBK and the KASE decided to introduce a 'buffer' category to the 'debt securities' sector of the KASE official list. The grounds of inclusion of the securities are default under interest payment obligations or restructuring of the issuer. The purpose of the buffer category is to give the defaulted issuer or issuer under restructuring one year in which to improve its financial position and to avoid delisting of its debt securities for this period. Avoiding delisting protects the interests of the securities holders, since they are able to track the information on a defaulted issuer and market price of its securities through the KASE.

Central counterparty

The Law on the Minimisation of Risks has introduced the concept of the central counterparty (CCP). In theory, the introduction of the CCP shall lower the market-side risks and the costs of post-trade processing (e.g., as part of the current process of introduction of the T+2 settlement for certain types of shares by the KASE). We note, however, that although the CCP implementation normally requires the establishment of a special reserve and guarantee funds, the Law on the Minimisation of Risks failed to mention this matter.

Rating agencies

In Kazakhstan, ratings issued by the rating agencies have played a substantial role in securities market regulation. The NBK tends to rely on ratings assigned by international rating agencies, such as Standard & Poor's, Moody's, Fitch and others. Ratings assigned by the local rating agencies are not considered by the NBK as reliable. Ratings issued by international rating agencies are used by the NBK for establishment of requirements to

51 Article 8-1 of the KASE Listing Rules.

52 Article 17 of the KASE Listing Rules.

prudential ratios of local financial institutions, investment limitations for certain types of investors (e.g., pension funds are only allowed to invest in debt securities with a credit rating assigned by an international credit rating agency).

It seems that recognition by the NBK of the role of local credit rating agencies for the purposes of regulation will contribute to the development of the local securities market, since the local rating agencies, apparently, have better knowledge of local issuers and environment, the service fees of local rating agencies are substantially lower and affordable for the issuers, and using securities with local credit ratings for the purposes of calculation of the prudential ratios will promote investment in such securities by local investors.

vi Other strategic considerations

In May 2015, the President of Kazakhstan issued a decree providing for the establishment of the Astana International Financial Centre (AIFC),[53] with the aim of creating an attractive investment climate, the development of a local capital market and integration with international capital markets, the development of banking, insurance and Islamic finance services, and the improvement of financial and professional services based on international practice. The AIFC is a free financial zone located in the capital of Kazakhstan (Astana) providing to its participants substantial tax advantages, a free visa and foreign employees attraction regime and, most importantly, the unprecedented mechanism of dispute resolution. Civil, financial and administrative disputes between the participants of the AIFC will be resolved by either the AIFC financial court or AIFC international commercial arbitration (if the relevant agreement contains an arbitration clause). Such disputes may be resolved under English law in English by foreign judges. The transactions concluded between the participants of the AIFC will be executed and court proceedings will be held in English. The AIFC will be established based on the experience of the Dubai International Financial Center and relevant Kazakh officials and judges are currently in talks with their Dubai colleagues for this purpose.

III OUTLOOK AND CONCLUSIONS

Although the Kazakhstan securities market is the most developed in Central Asia, its development has been slow compared to the country's banking sector. It now faces an uphill struggle due to intense competition from foreign capital markets for Kazakhstan's attractive pipeline of IPOs and Eurobonds.

Kazakhstan's largest companies typically choose to list their shares or GDRs and issue Eurobonds in London, to gain access to high-quality international investors. Meanwhile, smaller Kazakh companies have been deterred from listing and raising finance locally because of the high listing conditions set by the KASE and lack of liquidity (there is, effectively, only one investor in Kazakhstan, the Unified Pension Fund).[54]

53 It seems another initiative to have Almaty as a financial centre of Central Asia (RFCA) has been, effectively, abolished by the Kazakhstan authorities.

54 The decision made in 2013 to nationalise 11 private pension funds into the Unified Pension Fund managed by the NBK is hampering capital market development, as evidenced by lower trading volumes in the local securities market.

Kazakh authorities, evidently, realise the importance of development of the local capital market (e.g., they recently lowered the bar for the companies listing as discussed herein). The 'Conception of development of financial sector of the Republic of Kazakhstan until 2030', as approved by the Resolution of the Government of Kazakhstan dated 27 August 2014, envisages that by 2020 Kazakhstan shall, *inter alia*, double the ratio of capitalisation of its equity market to GDP by way of implementation of the 'People's IPO' programme and IPOs of non-government corporations, and gain recognition of the RFCA (or, in view of recent events, the AIFC) as one of the top 10 financial centres in the whole of Asia. It is hoped the recently announced global privatisation of state-owned companies, including by way of the 'People's IPO' programme, and the impending accession of Kazakhstan to the WTO in 2016, will help in achieving these challenging objectives.

Appendix 1

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Shaimerden Chikanayev is a partner in GRATA's banking and finance group and head of the firm's Mongolia practice. Shaimerden received his LLM from the Duke University School of Law (USA), his bachelor degree in law from the Eurasian National University Faculty of Law (Kazakhstan), and completed a non-degree course of studies for foreign diplomats at the China Foreign Affairs University (PRC). He has been admitted to practise in Kazakhstan since 2003 and passed exams of the Ministry of Justice of Kazakhstan to be a notary (2003) and an advocate (2004).

Shaimerden Chikanayev has over 10 years of experience in the Kazakh legal services market as well as experience in matters dealing with the former Soviet Union and Mongolia. Prior to joining GRATA Law Firm, he worked as an associate in the Almaty office of Dewey & Leboeuf and as in-house counsel in the London office of the European Bank for Reconstruction and Development. Shaimerden focuses his practice on a wide range of finance and M&A transactions, including project finance and capital markets, infrastructure transactions, and workouts and restructurings in many industries.

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Marina Kahiani is a partner in GRATA banking and finance group. She joined GRATA Law Firm as a London representative office in September 2008, and relocated to Almaty head office in September 2009.

Ms Kahiani received her LLM from the London School of Economics and Political Science (LSE), her Kazakh master's degree with distinction from the Kazakh Humanitarian Law University (specialisation – international and European law) and a bachelor's degree with distinction from Kazakh State Law Academy (specialisation – civil and corporate law).

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