

**THE REGULATION OF DEBT COLLECTION AGENCIES IN THE US: LESSONS  
FOR KAZAKHSTAN**

by Margarita Cherkasheninova

LL.M. SHORT THESIS  
COURSE: Comparative Secured Transactions  
PROFESSOR: Tibor Tajti  
Central European University  
1051 Budapest, Nador utca 9.  
Hungary

## **ABSTRACT**

Debt collection agencies play an important role in the economy of Kazakhstan helping banks in their need to collect debts in delinquency to ensure proper cash flow. However, there is a tension from the side of consumers, because, as reports show, some collectors use abusive conduct to collect debts. This happens allegedly because there is no regulation of the debt collection industry in Kazakhstan and collectors are free and tempted to use opportunistic methods in their work, because their payment depends on the collected amount.

Unlike Kazakhstan, in the US the debt collection industry is regulated at federal, state and local levels. There is also a comprehensive self-regulatory mechanism based on soft law tools, thus ensuring proper functioning of the collection industry and providing different protection avenues for consumers.

Thesis provides a comprehensive analysis of both the US experience and the current debt collection situation in Kazakhstan with an aim to infer what Kazakhstan can learn from the US to resolve the problem with debt collection activities. The major finding of the research suggests that the diverse US experience could be a model of an efficient regulatory scheme to be adopted in some parts and applied to Kazakh debt collection industry.

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## LIST OF ABBREVIATIONS

FDCPA	=	Fair Debt Collection Practices Act
Dodd-Frank Act	=	The Dodd-Frank Wall Street Reform And Consumer Protection Act of 2010
FTC	=	Federal Trade Commission
CFPB	=	Consumer Financial Protection Bureau

## INTRODUCTION

*“In the 21st century, the main factor of development is continuous modernization of all spheres of national life. We are working on a large-scale transformation of the state, public and private institutions on the principles of [...] high social responsibility and targeted assistance for the most vulnerable segments of the population.”<sup>1</sup>*

Thereby the president of the Kazakh nation wanted to emphasize that for the dynamic development of Kazakhstan, there is a need for transformation and modernization of all spheres of the economy, including the financial, commercial and industrial, which are closely interlinked with each other and private debt collection agencies are one of those private institutions that need major transformation.

The recent drop of oil prices has led to a huge financial crisis and the severe devaluation of the national currency of Kazakhstan, which depends mostly on oil exports.<sup>2</sup> Many people acquired loans in national and foreign currencies and because of that, their debts after devaluation, doubled. This caused a mass inability of people to pay their debts. The National Bank of Kazakhstan stated that during times of post crisis rehabilitation, the state should take into consideration the problem of consumer loans in Kazakhstan. This is because the percentage of doubtful and bad debts<sup>3</sup> in 2012 amounted to 32.95% of the total loan portfolio of banks. In 2014, the share of non-performing loans in the loan portfolio banks amounted to 23.5%, which is quite high taking into account the reduction of the overall credit activity of

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<sup>1</sup> Nursultan Nazarbayev, President of the Republic of Kazakhstan, State-of-the-nation Address “The Strategy 2050” (Nov.30, 2015). Available at [https://strategy2050.kz/en/page/message\\_text20142/](https://strategy2050.kz/en/page/message_text20142/). (Last visited on 03/17/2016).

<sup>2</sup> World Bank, *Kazakhstan – Low Oil Prices, an Opportunity to Reform*, Kazakhstan Economic Update (Spring 2015) available at [http://www-wds.worldbank.org/external/default/WDSPContentServer/WDSP/IB/2015/05/04/090224b082e34ac4/1\\_0/Rendered/PDF/Kazakhstan000LOpportunity0to0reform.pdf](http://www-wds.worldbank.org/external/default/WDSPContentServer/WDSP/IB/2015/05/04/090224b082e34ac4/1_0/Rendered/PDF/Kazakhstan000LOpportunity0to0reform.pdf). In August 2015 tenge, national currency in Kazakhstan, devaluated severely in relation to dollar, changing from approximately one hundred and eighty five (185) tenge per dollar to approximately three hundred and fifty (350).

<sup>3</sup> Bad debt - A debt that is uncollectible and that may be deductible for tax purposes. Black’s Law Dictionary (10<sup>th</sup> Ed. 2010).

banks during crisis since 2012.<sup>4</sup> These figures suggest that the amount of outstanding bad debts inflict damage on the country's economy and, at this stage, developing effective mechanisms for dealing with such debts is necessary.

As Robert Kagan stated, “If the extension of credit is the lifeblood of a dynamic commercial society, the forcible collection of unpaid debts is its backbone,”<sup>5</sup> and this is applicable to Kazakhstan’s economy as well. For the efficient functioning of the market economy, the state is in need of active loan financing, proper development of which largely depends on the recoverability of debts.

International experience shows that turning to services of collection agencies is the most operative and competent way of debt recovery.<sup>6</sup> Most creditors are not specialized in collecting bad debts and chasing debtors may harm their reputation, hence, recourse to debt collection agencies is the best option for them. In general, collection agency and debt collection agents are referred to be a duly created legal entity or individual performing third party collection activities in compliance with legal regulations. Collectors provide professional services of collecting delinquent accounts receivable for its clients using letters and telephone calls, by approaching or visiting the debtor in his/her work place or home, representing the creditor in court proceedings and controlling the enforcement of the award. Agencies show impressive results of their work, which is very good for creditors and economy in general.<sup>7</sup> Hence, this is the main reason why debt collection is a rapidly developing and an in demand business in Kazakhstan.

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<sup>4</sup>National Bank of Kazakhstan, 34 Annual Report for 2014, 15 (May 2015). See online: <http://www.nationalbank.kz/?docid=31&switch=russian>.

<sup>5</sup> Robert A. Kagan, *The Routinization of Debt Collection: An Essay on Social Change and Conflict in the Courts*, 18 Law & Society Rev. 323, 324 (1984).

<sup>6</sup> Debt collection industry recovers more than \$14 billion each year in the US, more than £2 billion in the UK. See: IBIS World, Debt Collection Agencies Market Research Report (Nov, 2015) <http://www.ibisworld.com/industry/default.aspx?indid=1474>, <http://www.ibisworld.co.uk/market-research/debt-collection-agencies.html>.

<sup>7</sup> See *Id.* In addition, research shows that Kazakh collection agencies also show impressive results, for instance, one of the biggest collection agencies in Kazakhstan, reported that they collected more than 38 billion tenge since 2006.

In the United States (hereinafter: US) debt collection agencies are well developed, widespread and have a long history of evolution. We can trace the development of collection activities in the US from the time when there was a rise of cases on collection practices. For instance, “Debt cases accounted for almost 30 percent of the opinions of 16 representatively selected American state supreme courts in 1870, and about 26 percent of their opinions in the 1870-1900 period.”<sup>8</sup> It is clear from this that lawsuits related to debt collection process covered a meaningful amount of cases and formulating a good set of rules regarding collection ranked high on the legislative agenda. From this time on, the gradual development of debt collection practices began and the next rapid change took place during the 1960s and 1970s when the state was concerned with the implementation of federal regulation. While there were several attempts, including FTC Guidelines for fair debt collection practices of 1968, it was only in 1977 that the Congress enacted the Fair Debt Collection Practices Act (hereinafter: FDCPA) which aimed to protect consumer rights from abuses, misleading and other wrongful actions, which were defined as wrongful practices of collection agencies in working with consumer debtors.<sup>9</sup> At this moment in time, debt collection industry generates over \$14 billion of creditors revenues, employing more than 130,000 workers in America.<sup>10</sup> On these grounds, it seems evident to suggest that the US is the best example of debt collections industry’s successful and developing experience to learn from and derive lessons for Kazakhstan.

However, it is important to clarify that in the US there is a self-help repossession right, which is limited by the “without the breach of peace” rule, meaning that if there is any

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<sup>8</sup> Debt collection cases are defined to include not only lawsuits attempting to collect or prevent collection of loans, but also suits attempting to collect or prevent collection of moneys allegedly owed as a result of sales of property interests, goods and services (whether on an installment basis or not), court judgments, surety agreements, and suits among creditors for priority in payment from a debtor's assets. See Kagan, *supra* note 5, at 325.

<sup>9</sup> 15 U.S.C. §1692 (1996). Fair Debt Collection Practices Act. (Text available at <https://www.ftc.gov/enforcement/rules/rulemaking-regulatory-reform-proceedings/fair-debt-collection-practices-act-text>).

<sup>10</sup> CFPB Annual Report 2015: Fair Debt Collection Practices Act 6 (2015). (Hereinafter, CFPB, FDCPA Rep. (2015)) Available at: <http://www.consumerfinance.gov/reports/fair-debt-collection-practices-act-annual-report-2015/>.



opposition from the debtor, then the creditor or collector has to stop his actions. As long as in Kazakhstan, self-help is prohibited, all repossession actions may take place only after judicial proceedings and obtaining a court order on seizure of property. Therefore, this thesis will not extend to the self-help repossession aspects of US law.

In Kazakhstan, at the present time, there are only private collection agencies, which operate through “legal engineering” of existing legislation without any governmental control. The study shows that attorneys and law firms in Kazakhstan express their concern on legitimacy of debt collection agencies. Because, as opposed to the experience of developed countries, there is no sector-specific regulation, which would clarify what debt collection is and regulate the industry with an account of the features of the industry. For example, imposing rules either protecting consumers from improper practices or rules on how these actions must be conducted. The actual way of the debt collection practice conducted by the agencies is not controlled by any sectorial governmental body, which gives freedom to collectors to behave in an opportunistic way of acquiring money, and sometimes by using improper methods such as lies, harassment and other abuses of debtors, who may be unfamiliar with the law.

However, as a response to these points, debt collectors can argue that everything that is not explicitly prohibited is allowed, and thus collection agencies work under the existing legislation as ordinary business legal entities performing their goals by concluding relevant agreements with the creditors.<sup>11</sup> They created an Association of Collectors in Kazakhstan, which imposes self-regulatory rules on conduct and ethics of debt collection professionals and claim that membership in the Association signals the integrity of a collection agency.

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<sup>11</sup> Ukaz Prezidenta Respubliki Kazahstan ot 13 avgusta 2013 goda “O Kontseptsii dalneishego Razvitiia Institutov Nezavisimoi Otsenki Kontraktsii Riskov I Kollektorskih Agentstv ” [Decree “On the Concept of further development of the institutions of an independent assessment of the risk contraction and collection agencies.”] 2013, No 362. [The Concept].  
See [https://tengrinews.kz/zakon/prezident\\_respubliki\\_kazahstan/hozyaystvennaya\\_deyatelnost/id-U1200000362/](https://tengrinews.kz/zakon/prezident_respubliki_kazahstan/hozyaystvennaya_deyatelnost/id-U1200000362/).

Nevertheless, it appears that there are still a number of concerns related to the legality of this business, the issues of bank secrecy and protection of constitutional rights to privacy and dignity and consumer rights. As Tibor Tajti argues, “The point to be stressed is that there is no proper solution without a sector-specific regulatory response. The systemic gaps abound starting with the fact that private debt collection companies may escape regulatory oversight by being registered only as a general commercial business with the Company Registry.”<sup>12</sup> Because of these grounds, due to the special nature of this kind of business, this thesis argues that debt collection has to be fully regulated. There must be a certain level of governmental interference into this sphere in pursuit to have a transparent and professional debt collection business in the country.

The data appears to suggest that the National Bank of Kazakhstan expressed its bafflement about this issue in 2013 and tried to convey to the state about the importance of debt collection agencies in the economy and necessity of their regulation. These efforts resulted in a Draft Law “on collection agencies”, (hereinafter, the Draft Law), which is, however, still not enacted and legislative process remains inactive for more than two years. Hence, the author provides an analysis of the key provisions of the Draft Law with an aim to determine whether it would be effective and provide recommendations.

The main purpose lies in the necessity to analyze the existing practices of debt collection agencies in both Kazakhstan and the US, and infer what Kazakhstan can learn from the practice of the US. The author will analyze how the debt collection agencies are organized by structure and type, whether public or private, subsidiary of a big financial organization or independent company, and systematize them according to what grounds and what services they provide.

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<sup>12</sup> TIBOR TAJTI, SYSTEMIC AND TOPICAL MAPPING OF THE RELATIONSHIP OF THE DRAFT COMMON FRAME OF REFERENCE AND ARBITRATION 112 (2013). Available at SSRN: <http://ssrn.com/abstract=2512790> or <http://dx.doi.org/10.2139/ssrn.2512790>.

Hence, the goal of this study is to make a comprehensive analysis of legal regulation of collection activities, define what would be the proper mechanism of functioning of debt collection agencies and their control through legal and administrative regulations due to comparative analysis of the current situation and the draft law in Kazakhstan with the developed regulations in the US.

The significance of the problem lies in the absence of any research on legal aspects of debt collection agencies' functioning in Kazakhstan. This work can be a practical research to be continued in Kazakhstan and useful for proposing relative changes to the draft law, which is still not enacted. The importance also lies in capitalizing upon the long practice of the United States in order to benefit from, and derive lessons and recommendations for, Kazakhstan. In addition, this thesis includes an analysis of the features of debt collection with regard to Islamic finance since this is an emerging type of finance in Kazakhstan.

The author will use qualitative methods of comparison, analysis of legislative acts, as well as scholarly opinions. Along with the above mentioned, the author will analyze relevant cases to make a study that is more specific on the issues the debt collection agencies faced in the US. In addition to this, when making analysis of the current situation in Kazakhstan, the author will use the publications and information available on the official websites of different debt collection agencies of Kazakhstan.

The thesis consists of an introduction, two chapters and a conclusion. The first chapter is concerned with the feature of debt collection business in the US, pointing out the features of both federal and state level regulations. The second chapter is about the situation in Kazakhstan, namely the analysis of operational and regulative aspects of debt collection, including reported abuses and the Draft law. The last chapter will be devoted to the main lessons that Kazakhstan can learn from the US experience to tackle the problems with the existing situation in the country.

## CHAPTER 1. DEBT COLLECTION AGENCIES IN THE US

### 1.1. THE HISTORY OF PRIVATE DEBT COLLECTION AND ITS ECONOMIC ROLE IN THE US

Nowadays private debt collection agencies are big and profitable businesses in America and play an important role in the country's economy. According to the Annual Report of Consumer Financial Protection Bureau (hereinafter, CFPB), in 2015 debt collection has become a thirteen billion dollar industry, and more than 140,000 workers have been employed in this sphere of business. About 35% of American population have overdue debts and are subject to debt collection. Debt collection agencies are mostly generating their profits from debts owed by consumers like medical debts, student loans and financial services obligations.<sup>13</sup>

Today it is an overwhelmingly regulated industry, whereas more than thirty years ago, in 1960s, only some States and local authorities regulated consumer debt collection and there was no federal level regulation. Little could be done in cases when consumers were harassed, abused or called at unreasonable times by debt collectors. The situation differed from state to state, but the only thing that could be done was to file a complaint to the Federal Trade Commission (hereinafter, FTC), which would investigate and order debt collection agency to cease certain actions. However, this procedure had used to take years until the final decision would be issued, so it was burdensome for both FTC and consumers.<sup>14</sup>

This problem lead to a federal regulation era, which started when in 1968 the Federal Trade Commission published guidelines describing unfair and deceptive debt collection practices subject to prosecution. From this time and up to 1976, it sued more than ten debt collection agencies annually.<sup>15</sup> Subsequently, in 1976 Congress concluded that at that point in

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<sup>13</sup> CFPB, FDCPA Rep. 6 (2015).

<sup>14</sup> Major Joel R. Alvary, *The Case of the Unpaid Debt: An Overview of the Fair Debt Collection Practices Act*, Army Lawyer 1 (Feb., 1982).

<sup>15</sup> Robert M. Hunt, *Collecting Consumer Debt in America*, Q2 Business Review 11, 17-18 (2007) discussing the history of debt collection regulation in the USA. Available at: <https://www.philadelphiafed.org/results?sort=rel&start=0&text=collecting+consumer+debts+hunt>.

time, collection agencies committed egregious abuses by harassing consumers, disclosing information to third parties and using profanity, calling at unreasonable times, and even simulating legal processes.<sup>16</sup> These practices caused a number of family and employment problems, personal bankruptcies, privacy abuses etc.<sup>17</sup> Congress identified that there were several reasons why debt collectors would act in such a way. First, because debt collection agency is not concerned about its reputation among consumers unlike creditors, who try to maintain good relationships with consumers. Secondly, as a rule they get their share from collected money, so as long as their revenues depend on results of their work, they tend to use any methods in order to collect.<sup>18</sup>

On these grounds, in 1977 Congress enacted Fair Debt Collection Practices Act, which is the main federal regulation that protects consumers from unfair, abusive and deceptive debt collection practices.<sup>19</sup> It provides for a number of minimum fundamental rules, which can be further developed by States and local authorities. Consequently, the debt collection industry is now regulated on both federal and state levels. In order to provide the whole picture of the multi-tiered regulation system of the USA, thesis coherently analyses the federal regulation first, which is the FDCPA, then state level rules.<sup>20</sup>

## **1.2. THE TYPOLOGY AND FUNCTIONS OF PRIVATE DEBT COLLECTION AGENCIES IN THE US**

In general, debt collection agencies are legal entities created in order to collect debts for third parties, in other words, to provide third party services for creditors. However, debt collectors are not limited to collection agencies only, but individual collectors and attorneys involved in debt collection, but operating independently from any collection agency are also

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<sup>16</sup> Alvary, *supra* note 14, at 2.

<sup>17</sup> 15 U.S.C. §1692 (note).

<sup>18</sup> Viktor Fedaseyev, Robert Hunt, *The Economics of Debt Collection: Enforcement of Consumer Credit Contracts* 4 (Research department, Fed. Res. Bank of Philadelphia, Working Paper No. 14-7, March 2014).

<sup>19</sup> *Id.*

<sup>20</sup> See **Appendix A** on p. 68 to have a general overview on the Debt Collection Regulation Scheme in the US.

regarded as debt collectors. Creditors, such as banks or other financial organizations may have their own collection divisions, for example, in-house lawyers dealing with delinquent debts at initial stages, but they are not debt collection agencies, since in-house lawyers would be regarded as creditors collecting their own debts.<sup>21</sup>

Debt collection begins after thirty days of delinquency of a debt, and as mentioned earlier usually original creditors try to collect debts themselves through in-house debt collection departments. If unsuccessful, then creditors hand over the debt to collection agencies, which, depending on the nature of contractual relationship, can be of several types.<sup>22</sup> In general, there are two major types of debt collection agencies, which differ depending on what basis they carry out collection activities. These are third party debt collection agencies and debt buyers. Third party debt collectors operate under agency agreements. These collectors act on behalf of the original creditors and generally get interest from the collected money. Debt buyers<sup>23</sup> as opposed to debt collectors buy delinquent debts on a discount and get profit from the difference of the collected money, which is considered as riskier for the collector than the agency agreement as long as debtor may subsequently be unable to pay.<sup>24</sup> Debt buyers may collect purchased debts themselves or through debt collection agencies, but in any event they have to act in compliance with the debt collection regulations.<sup>25</sup>

Regarding debt collection procedure, *West v. Costen* case provides an example of how an ordinary collection agency conducted its work on prejudicial stages, which include the first

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<sup>21</sup> Alvary, *supra* note 14, at 2-3.

<sup>22</sup> Lukasz A. Drozd and Ricardo Serrano-Padial, *Modeling the Revolving Revolution: The Role of IT Reconsidered*, Online Appendix (June 24, 2014) discussing the development of debt collection techniques in the US.

<sup>23</sup> May be confused with factoring agencies. Factoring - the buying of accounts receivable at a discount. The price is discounted because the factor (who buys them) assumes the risk of delay in collection and loss on the accounts receivable. (Black's Law Dictionary). The basic difference is that factoring company purchases debts, which are not delinquent or problematic. The creditor sells debts because of need for urgent money or other purposes. Whereas collection agencies buy bad debts.

<sup>24</sup> Drozd, Sierrano-Padial, *supra* note 22.

<sup>25</sup> SVEN DE BOER, FAIR DEBT COLLECTION PRACTICES ACT 43-44 (Nova Science Publishers, Inc., 2013).

communications with a debtor.<sup>26</sup> On the first stage, the collection agency's secretary sent the debtors a letter, also known as a dunning letter, informing them about the amount of the debt, the creditor, and settlement proposal. If no respond received from debtors within two weeks, they started involving individual collectors to work with each debtor, by sending a standard printed form with a specific payment demand and a deadline. Second, if it did not work, then collectors commence telephone communication with a debtor. They may even make personal visits to debtors at places of their residence or invite debtors to their offices to discuss the debt. This is the standard followed by the majority of debt collection agencies and during all stages, they have to act in compliance with the FDCPA together with State and local rules, if any. The third stage is a judicial stage, when after unsuccessful prejudicial stages, when collectors bring legal actions against consumers.

### **1.3. ACA INTERNATIONAL**

ACA International stands for the Association of Credit and Collection Professionals, independent private organization, with its own Code of Conduct and reviewing Ethics Committee.<sup>27</sup> It represents the member collection agencies and individuals, collection attorneys, lawyers, debt buyers and other service providers involved in third party debt collections. According to the ACA International Code of Conduct, the main purpose of the organization is to contribute to success, by promoting high ethical and professional standards, and increase the positive reputation of the credit and collection professionals, through means of education, representation and advocacy, and providing other services. This is an industrial initiative with a purpose to promote compliance with federal, state and local US regulations and develop high professional values and goals. Being a part of this organization gives

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<sup>26</sup> This is not a procedure adopted by a law, but just an example of collection agencies' standard practice. *West v. Costen*, 558 F. Supp. 564, 571 (1983).

<sup>27</sup> See official website of ACA International: <http://www.acainternational.org/about-aca-international-code-of-conduct-12909.aspx>.

additional value to the reputation of an agency and enhances working condition through better access to information etc., so debt collection professionals are themselves striving to become members of it.

Ethics Committee is in charge of supervision and enforcement of the ACA International's Code of Conduct. It monitors and reviews the compliance of member companies, receives complaints from consumers, conducts investigation and imposes different sanctions depending on the type of a violation. This is a great help for the government, because the organization collaborates with governmental agencies, helps in management of consumer complaints, educating consumers etc.<sup>28</sup>

In order to become a member, companies and individual professionals have to abide and implement in their work the ACA Code of Conduct and commit to providing all the necessary information about the company's previous business and background information. They have to agree to abide to the requirements of treating the consumers with dignity and respect, and help consumers to pay their just debts.<sup>29</sup>

Apart from FDCPA, this industry self-regulation mechanism seems quite promising, because it imposes obligations on its members, for noncompliance of which they can be sanctioned, they educate consumers and are available to receive complaints from them, however, in order not to interfere with the powers of CFPB and FTC, they direct consumer complaints to these bodies. Organization is like a guardian for the member collection agencies, which directs them, by conducting research, providing different sources of information necessary for agencies, however, only for those who act within legal borders and comply with internal rules.

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<sup>28</sup> See ACA International, The Ethics Committee Review Rules (March 18, 2014). Available at <http://www.acainternational.org/files.aspx?p=/images/12909/ethicscommitteereviewrules20140318.pdf>. Regarding consumer education and complaints management, you can read more on their relevant website: <http://www.askdoctordebt.com/>.

<sup>29</sup> ACA International Code of Conduct, Rule 1 (H), 4 (2014). PDF Version available online: <http://www.acainternational.org/files.aspx?p=/images/12909/acacodeofconduct20140318.pdf>.



Bearing in mind that in Kazakhstan the numbers of collection agencies and credits in general are much smaller than in the US, this self-regulation mechanism could be successfully applied and fit the needs of the collection industry players and consumers in Kazakhstan. Hence, ACA International represents a good industry initiative that could become one of the possible approaches to change the situation in Kazakhstan, which will be analyzed in a subsequent Chapter 2 of this thesis.

#### **1.4. THE FEDERAL FAIR DEBT COLLECTION PRACTICES ACT.**

As mentioned earlier, before FDCPA, Congress reported that consumers faced a long list of different abuses from debt collectors and because of these practices, people started losing their jobs and families, privacy rights were violated significantly etc. In order to tackle with these problems, on the one side, and to provide a proper mechanism for debt collectors' functioning in an environment of healthy competition and respect to consumers, the Congress enacted Fair Debt Collection Practices Act in 1977.<sup>30</sup>

It is a federal regulation of debt collection practices, an amendment and new title chapter to Consumer Credit Protection Act, the purpose of which is the prohibition of abusive practices by debt collectors in the US. It contains rules regarding finding the debtor, proper respectful communication without profanity, prohibition of harassment and abuse, misrepresentations, unfair conduct. In addition, it imposes obligation of verification of debts, complying with state laws, prescribes enforcement mechanisms for consumers and administrative bodies, and provides remedy for abuses. As Lauren Goldberg and Jeffrey S. Peters show, the main purposes are to prevent debt collectors from using abusive practices and to ensure consistent

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<sup>30</sup> Yosefa A. Englard, *Unfair Practices and Practicing Attorneys: Should the Fair Debt Collection Practices Act apply to communications between debt collectors and debtors' attorneys?*, 87, St. John's L. Rev. 1107, 1110 (2013). Original Source: S. Rep. No. 95-382, at 1696.

State action with this regard, however, it is not intended at making consumers enabled to avoid paying their debts, which must be lawfully repaid.<sup>31</sup>

In other words, FDCPA has a purpose of allowing a good faith debtor to pay debts in a lawful manner without being subject to misrepresentation, fraud, abuses and harassment; this is for the protection of consumers. In addition, it prescribes the standards of a proper, non-abusive conduct for debt collection professionals, puts limits on civil remedy that can be collected from collectors and supports them from consumers who act in bad faith.

Another thing is that, historically, “consumer groups, labor groups, state and federal law enforcement officials, and collection industry trade associations supported the law’s passage”<sup>32</sup>, which means that the industrial actors were in need for governmental regulation of debt collection for development in fair and healthy competition without the breach of peace of consumers. However, there were many cases of abuses witnessing that the problems Congress meant to abolish were still on the agenda. Even though, from the theoretical point, the regulation seems to be effective, because there is a comprehensive regulatory scheme of debt collection industry, supervising and enforcement authorities and scholars believe that it is hardly possible to fully eliminate consumer abuses.<sup>33</sup> For instance, report shows that in 2014 Consumer Financial Protection Bureau received about 88,300 complaints from consumers about wrongful debt collection practices. The same reports then suggests that enforcement efforts of CFPB resulted in 45 per cent of complaints being resolved, whereas 44 per cent of complaints were sent to other governmental agencies for investigation and further law enforcement, while other complaints were incomplete or pending.<sup>34</sup> Hence, based on the

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<sup>31</sup> Jeffrey S. Peters, *Meaningful Involvement in Collections: Should Ethics or the FDCPA Govern?*, 34 Pace L. Rev. 1240, 1244 (2014) Available at: <https://digitalcommons.pace.edu/plr/vol34/iss3/7>. (Citing Lauren Goldberg, Note, *Dealing in Debt: The High-Stakes World of Debt Collection after FDCPA*, 79 S. Cal. L. Rev. 711, 720 (2006)).

<sup>32</sup> Federal Trade Commission, “A Workshop Report: Collecting Consumer Debts: The Challenges of Change”, III (2009). Available at: <http://www.ftc.gov/bcp/workshops/debtcollection/dcw.pdf>.

<sup>33</sup> Notes, *The Fair Debt Collection Practices Act: The need for reform In the Age of Financial Chaos*, 76 Brooklyn L. Rev. 1554, 1557 (2011).

<sup>34</sup> CFPB, FDCPA Rep. 12 (2015).

evidence examined, it seems fair to suggest that even if there are still violations, FDCPA is a strong tool, which provides for an effective protection mechanism whereby the government is controlling the situation, most consumers know where to go to seek protection and remedy, and debt collection agencies in majority are complying with regulation.

Consequently, this study provides for an analysis of the key features of FDCPA, in order to understand what makes it relatively efficient, how the governmental agencies and consumers apply it to eliminate violations and protect consumers' rights, what hinders the full effectiveness of the law and what can be used for the wrongful purposes.

The FDCPA applies to all third-party debt collectors, including debt buyers, who are defined as "any person, who regularly collects or attempts to collect, directly or indirectly, debts owed or due or asserted to be owed or due another."<sup>35</sup> There are a number of exemptions from the Act's applicability, comprising creditors, government officials including marshals, bailiffs and sheriffs, and legal service providers.<sup>36</sup> In the beginning, back in 1977, FDCPA did not apply to lawyers and attorneys, but then as the legislative history reveals, lawyers engaged in debt collections could act in an opportunistic way using all means to collect debts. FTC could not police these actions of attorney due to the absence of authorization. Even debt collectors could act in the name of attorneys in order to be excluded from the FDCPA compliance rules. In order to stop attorneys and lawyers involved in debt collection from acting in bad faith, in 1986 Congress removed the attorney exemption.<sup>37</sup>

Last, but not least, debts covered are personal, family, and household debts, including money that consumers owe on a personal credit card account, an auto loan, a medical bill, and

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<sup>35</sup> 15 U.S.C. §1692a

<sup>36</sup> *Id.*

<sup>37</sup> O. Randolph Bragg, Daniel A. Edelman, *Fair Debt Collection: The need for private enforcement*, 7 Loyola Consumer Law Reporter 89, 92 (1995).

your mortgage, the debts connected to ones incurred to run a business are not within the Act's applicability.<sup>38</sup>

#### **1.4.1. REQUIREMENTS FOR DEBT COLLECTORS**

Debt collectors in conducting their work have to act within allowed limits and in compliance with the federal and state law. FDCPA imposes carefully drafted requirements for debt collector, so that consumers' rights for privacy, reputation and dignity are not violated, as well as in order to prevent loss of jobs because of debt collection agent's communication with an alleged debtor's employer concerning the debt.<sup>39</sup> It consists of rules on the proper acquisition of location information, communication with a debtor, obligation on validation or verification of a debt upon request etc.

Firstly, it is important to keep in mind that debt collectors have to check whether debts assigned by the creditors are valid or not. For instance, the court in the *Beattie v. D.M. Collectors* case (hereinafter, *Beattie case*) emphasized that the main rule that should be complied by the collectors, but usually omitted, is that collection of any amount including principal obligation, interest fees, charges is prohibited "unless proven that this amount is expressly authorized by the agreement creating the debt or permitted by law."<sup>40</sup> In support, the court uses "the reasonable care" standard, meaning that debt collectors have to exercise reasonable care in ascertaining facts that creditor or any other person provides, and avoid "relying upon information that reasonable person would not have relied upon."<sup>41</sup>

Secondly, if the collector has no doubts that the debt owed is valid and lawfully documented, it starts communication process with the debtor. Usually, it is a letter, also referred to as a dunning letter, which has to be in compliance with FDCPA and should contain

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<sup>38</sup> Federal Trade Commission, Debt Collection (2015), <https://www.consumer.ftc.gov/articles/0149-debt-collection> (as reported by Federal Trade Commission in FAQ for American consumers).

<sup>39</sup> See also *West v. Costen*, 558 F. Supp. 564, 575 (1983).

<sup>40</sup> 15 U.S.C. § 1692f (1)

<sup>41</sup> *Beattie v. D.M. Collections Inc.*, 754 F. Supp. 383, 390 (D. Del. 1991).

a warning, also known as the “civil Miranda Warning”<sup>42</sup> that, verbatim “the debt collector is attempting to collect a debt and that any information obtained will be used for that purpose.”<sup>43</sup> Upon requirement of a consumer, debt collector has to make a verification of a debt.

According to FDCPA, verification or validation of a debt means that during five days after the first communication with the debtor, debt collector has to send a written notice with the full information regarding the amount of the debt, the name of the creditor. There must be statement regarding the consumer’s rights to dispute the validity of the debt within 30 days, and if consumer disputes the debt, then debt collector will obtain verification of the debt and send it to consumer. In addition, when debt is being disputed by the consumer, debt collector is obliged to stop collection efforts until verification.<sup>44</sup> In the event when consumer owes multiple debts, debt collector has to apply the payments of the consumer to those debts as directed by the consumer, and must not apply such payments to disputed debts.<sup>45</sup>

If debtor asked debt collector to cease communication, he is obliged to do so. The subsequent action that can be done by the collector is initiation of a legal action aimed to enforce the debtors to pay delinquent debts.<sup>46</sup> The collector would be able to communicate with a debtor only after acquiring a court ruling that debtor should release his property, make payments from salary etc.

Apart from all the requirements considered, it seems essential to comment on individual bankruptcy in the US. FDCPA in essence requires debt collectors to work honestly, help debtors and make it possible for them to pay their just debts in a healthy environment and a due process, without any pressure, abuses and harassment. However, there are some debtors, who are not in a condition to pay their debts at all, due to different circumstances. Because,

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<sup>42</sup> Bragg, Edelman, *supra* note 37, at 90.

<sup>43</sup> 15 U.S.C. § 1692e (11).

<sup>44</sup> *Id.* § 1692g

<sup>45</sup> See *id.* § 1692h

<sup>46</sup> 15 U.S.C. 1692i.

usually when debtors acquire money for credit, they act in good faith believing they will be able to repay debts in due installments. Here is when a debt collector as a third party mediator, may advise debtor to file for a personal bankruptcy. This is a very important feature of American law, that consumers have opportunity to enter into bankruptcy in order to discharge their debts in accordance with Chapter 7 or to organize a good plan for future repayment of debts with the help of the court-appointed trustee.<sup>47</sup> However, not many of debtors know about this possibility and creditors and debt collectors continue to seek to recover their debts using all legal means available, be it foreclosure proceedings or repossession for secured loans and court proceedings and garnishment of wages for unsecured loans.<sup>48</sup>

#### 1.4.2. PROHIBITED ACTIONS OF COLLECTORS

Along with the requirements for debt collector, there are also strict prohibitions expressly stated in FDCPA. To begin with, among other prohibitions set forth, FDCPA prohibits a debt collector from engaging in any conduct the natural consequence of which is *to harass, oppress, or abuse* any person in connection with the collection of a debt.<sup>49</sup> The elements constituting FDCPA violations are the following: “(1) the use or threat of use of violence; (2) use of language that is obscene, profane, or abuses the hearer or reader; (3) publication of a list of consumer debtors who allegedly refuse to pay their debts; (4) advertisement for sale of any debt to coerce its payment; (5) causing a phone to ring or engaging a person in telephone conversation repeatedly or continuously with intent to annoy, abuse, or harass any person at

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<sup>47</sup> Hunt, *supra* note 15, at 12.

<sup>48</sup> It is noteworthy that none of the mentioned features is present in Kazakh law, not to mention that the citizens could have the opportunity to declare an individual bankruptcy. (Individual bankruptcy is absent under Kazakh law, hence this could be a good issue to conduct a further research on. There is no statute of limitations on personal indebtedness, and according to the current legislation, debt are inherited by the relatives of a debtor and so on. Read more on <https://finance.nur.kz/136773-byt-li-individualnomu-bankrotstvu-v-kazahstane.html>).

<sup>49</sup> Sherry S. Zimmerman, “*What constitutes harassment or abuse under provisions of fair debt collection practices act, 15 U.S.C.A. § 1692d, which proscribes conduct the natural consequence of which is to harass, oppress, or abuse any person in connection with collection of debt*”, American Law Reports ALR Federal 2d (Originally published in 2006).

the called number; and (6) placement of telephone calls without meaningful disclosure of the caller's identity.”<sup>50</sup>

Secondly, FDCPA provides sixteen instances when conduct of debt collector constitute *false and misleading representations*,<sup>51</sup> which is prohibited by the regulation and leads to civil liability. Violation of this provision happens when communication of a debt collector and information delivered to a debtor can be interpreted in such a way as misleading the debtor.<sup>52</sup> One of the landmark cases, where the basic standard in determining the violation of the mentioned provision used by courts were coherently and fully explained is the Beattie case.<sup>53</sup> Accordingly, in deciding whether there is a violation of FDCPA the courts use the “least sophisticated consumer” standard, meaning that the court has to determine whether not the particular consumer, but the least sophisticated of consumers would have been deceived, misled or harassed by the conduct or communication of the debt collector.

In the light of this misrepresentation provision, an interesting point to mention is that it also applies to cases when debt collectors use their names and signatures in letters informing consumers about debts. The courts established a doctrine of “meaningful involvement”, which means that collectors should try to make it clear that he or she is a debt collector, but not an attorney involved in debt collection. In order to comply with law, they have to indicate the name of debt collection agency or just debt collector.<sup>54</sup> The essence of the doctrine was reasoned in Avila v. Rubin case, where the court stated that if consumer receives a letter from an attorney it adds a sense of authority lawyer and “the attorney letter implies that the attorney

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<sup>50</sup> See *Id.* and original source: 15 U.S.C. § 1692d.

<sup>51</sup> *Id.* § 1692e.

<sup>52</sup> See Peters, *supra* note 31, at 1245 (citing Christian Stueben, *Note, Judge or Jury? Determining Deception or Misrepresentation under the Fair Debt Collection Practices Act*, 78 Fordham Law Rev. 3107, 3115 (2010)).

<sup>53</sup> Beattie, 754 F. Supp. at 384.

<sup>54</sup> Peters, *supra* note 31, at 1254.

has reached a considered, professional judgement that the debtor is delinquent and is candidate for legal action.”<sup>55</sup>

Given these points, the language used by a debt collector is very important and they should be very careful with using a proper communication with a consumer. However, this doctrine derived from the perspective of the “least sophisticated consumer” doctrine, as long as using the name of an attorney should not be misleading as far as there is a reasonable explanation of the purpose of the communication. Hence, there is no defining test whether debt collector violated FDCPA using his name and signature, but the outcome differs and is determined particularly on case-by-case basis.

Additionally, disclosing information about consumer’s debt to other people is prohibited under FDCPA, meaning that debt collector when looking for a debtor through communication with third parties shall not state that the consumer concerned owes a debt.

Regarding time for commination with an alleged debtor, according to FDCPA, debt collectors should contact the consumer within the period from 8 am until 9 pm and calling at times falling outside of this frame is in violation of the Act.<sup>56</sup>

Another point to mention is that the time-barred debts cannot be litigated under FDCPA; however, it does not mean that debt collector cannot prompt the debtor to pay it voluntarily. The court in *Johns v. Northland group* case (hereinafter, *Johns case*) stated that “a debt collector may seek voluntary repayment of a time-barred debt, so long as the debt collector does not initiate or threaten to initiate legal action in connection with the collection efforts.”<sup>57</sup>

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<sup>55</sup> See *Avila v. Rubin*, 84 F. 3d 222, 229 (7<sup>th</sup> Cir. 1996).

<sup>56</sup> 15 U.S.C. § 1692c (1).

<sup>57</sup> See *Johns v. Northland Group, Inc.*, 76 F. Supp. 3d 590, 591-594 (E.D.Pa. 2014).



### 1.4.3. ADMINISTRATIVE ENFORCEMENT

The FDCPA provides different avenues for enforcement consisting of administrative (public) and private enforcement opportunities. In theory, public enforcement is an authority and a duty of governmental agencies to detect and sanction violations of rules of law, with the aim of enhancing social welfare and safety.<sup>58</sup> The Federal Trade Commission and Consumer Federal Protection Bureau are the main public authorities responsible for public enforcement, compliance control and supervision of debt collection activities in US.

Private enforcement is providing opportunity for victims of illegal conduct to declare about the harm, file complaints or lawsuits and thus provide all the information about the wrong and the wrongdoer, which will help the government in law enforcement. Hence, joint forces of the two enforcement avenues working consistently lead to a very efficient law enforcement system and contribute to strengthening of the rule of law in the country.

#### 1.4.3.1. FEDERAL TRADE COMMISSION

The Federal Trade Commission (hereinafter, FTC) was established under Federal Trade Commission Act in 1914 and was the first governmental authority to be responsible for implementation and enforcement of FDCPA. The Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (hereinafter, Dodd-Frank Act) made several changes in the allocation of responsibilities between FTC and CFPB, newly created agency responsible for consumer financial protection, and constituted CFPB to have the primary enforcement authority.

FTC equates FDCPA violations to ones of the Federal Trade Commission Act, which authorizes FTC to enforce the compliance with FDCPA.<sup>59</sup> FTC functions to protect consumers

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<sup>58</sup> A.M. Polinsky, S. Shavell, *The Theory Of Public Enforcement Of Law*, 1 Handbook of Law and Economics Ch.6, 405 (2007).

<sup>59</sup> BOER, *supra* note 25, at 9.

and maintain a fair competition between collection professionals. FTC has authority to receive complaints<sup>60</sup> and conduct investigations, and if such investigation reveals alleged FDCPA violations, it can sue in federal court, seek injunctive relief to prohibit and prevent debt collector from violating FDCPA, order to pay back the wrongfully acquired money, and impose other relief.<sup>61</sup>

FTC compiles complaints received with the ones sent by the CFPB, uploads them in a special system, so that federal and State authorities may use them for monitoring and enforcement. As CFPB reported, “The FTC uses consumer complaints generally to monitor the debt collection industry, select targets for investigation, and conduct preliminary analysis that, with further factual development, might reveal or help prove a law violation.”<sup>62</sup> FTC has no authority to issue and impose new rules regarding the collection of consumer debts, however, may exercise any other authority such as issue advisory opinions in order to ensure compliance with FDCPA, provide clarifications on the provisions and application of the Act.<sup>63</sup>

#### **1.4.3.2. CONSUMER FINANCIAL PROTECTION BUREAU**

Consumer Financial Protection Bureau was founded based on the Dodd-Frank Act of 2010 as a primary independent administrative authority responsible for the implementation and enforcement of the FDCPA. Its main objective is to provide and ensure that all American consumers have access to fair, transparent and competitive financial products and services.<sup>64</sup> The Dodd-Frank Act transferred the bulk of responsibilities from FTC to CFPB and since then, CFPB has a duty to prepare annual reports on FDCPA to Congress, supervise the performance of financial organizations and nonbank entities, enforce the federal consumer financial

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<sup>60</sup> See the FTC’s online complaint form at <https://www.ftccomplaintassistant.gov/#&panel1-1>.

<sup>61</sup> 15 U.S. Code § 53 b (2) (2006), FTC Act. See: <https://www.law.cornell.edu/uscode/text/15/53>.

<sup>62</sup> CFPB, FDCPA Annual Report 17 (2016). See <http://www.consumerfinance.gov/reports/fair-debt-collection-practices-act-annual-report-2016/>.

<sup>63</sup> 15 U.S.C. §1692l.

<sup>64</sup> 12 U.S. Code § 5511 (2010).

protection laws and educate consumers. The Bureau has the power to implement rules with respect to debt collection, provide guidance on compliance, collect complaints and analyze them, and conduct research on consumer debt collection and make policy initiatives.<sup>65</sup> The Dodd-Frank Act entitles the CFPB with powers to prohibit unfair, deceptive practices and abuses connected to consumer financial products and services.

Working with consumer complaints by collecting, investigating, and responding to is one of the main responsibilities of the CFPB in enforcement of FDCPA.<sup>66</sup> For this purpose, CFPB established the Office of Consumer Response, which deals directly with consumers, who report on challenges they are facing because of collectors, engages with collection agencies for response and helps consumers to tackle with these issues.<sup>67</sup> Consumers may complain in different forms such as through filing out complaint forms available on CFPB's website<sup>68</sup> and by telephone, mail, email, etc.

#### 1.4.4. PRIVATE ENFORCEMENT

Private enforcement provision in FDCPA allows any abused or aggrieved consumer to sue collectors whether individually or as a group in order to recover damages from debt collector, who acts in violation of FDCPA. The court rightfully stated in *West v. Costen* case that, “although FDCPA provides means for public enforcement, it is primarily self-enforcing, through private causes of action.”<sup>69</sup> Because if there is no possibility for people to report on abuses or file lawsuits to recover damages, the public enforcement authority will not be able to fully and transparently supervise and enforce compliance with the law. Correspondingly, the

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<sup>65</sup> BOER, *supra* note 25, at 19.

<sup>66</sup> CFPB Rep. (2016) at 16. Original source: Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 1021(c)(2) (2010).

<sup>67</sup> *Id.*

<sup>68</sup> CFPB Complaint form online at <http://www.consumerfinance.gov/complaint/>.

<sup>69</sup> See *West v. Costen*, 558 F. Supp. 564, 569 (1983). Consumers may complain to FTC, CFPB or relevant State's Attorney General, file individual lawsuits or class actions for judicial enforcement during one year from the date the violation occurred. (Read more on <https://www.consumer.ftc.gov/articles/0149-debt-collection>).

Public authorities, including FTC, CFPB and courts seek to make all means for consumers' complaints available and accessible.

Regarding judicial enforcement, in the Johns case the court clarified that before seeking civil remedy under FDCPA, consumers have to be able to state a claim. It should establish that: he is a consumer who faced harm under FDCPA caused by the actions of a debt collector, that debt was acquired for personal, family or household purposes and embodied in an agreement, defendant collecting a debt is a debt collector covered by FDCPA, and that defendant violated FDCPA by his action or omission to act.<sup>70</sup>

As mentioned earlier the number of complaints have tremendously been increasing in recent years, and this may lead us to the point that creating more means for consumer complaints in the state, for instance in Kazakhstan, may come out not to be so advantageous as it seems at first. Collectors may always create new ways to collect debts and find elaborated ways to bypass the rules, the number of complaints will increase, and legislature will be forced to tackle these problems by enacting new rules and this may finally become an endless struggle between legislature and collectors. However, leaving the situation in the same position and continuing to ignore the violations is certainly not the case. Ignorance may lead to even more sophisticated issues in the future, hence, it is better to make a necessary reform and may collectors act within this system, within the borders of the law. For instance, in the long run, having a civilized system of problem solving and huge number of complaints is certainly the least evil compared to what people can do out of fear of collectors.

#### **1.4.5. REMEDIES.**

According to FDCPA, those debt collectors who act in violation of the Act will be subject to civil liability. Private enforcement mechanism allows individual consumer to recover actual

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<sup>70</sup> *Id.* at 595.

and additional damages as the court allows from debt collectors' unlawful practices up to \$1000 including costs of the proceedings and reasonable attorney's fees. If there was a class action, then each member may receive damages "not exceeding the lesser of \$500000 or 1 per cent of the net worth of the debt collector."<sup>71</sup>

The court has to take into account the following factors before granting a certain amount of civil liability:<sup>72</sup> the frequency, persistence and the nature of debt collector's noncompliance, whether it was and to what extent it was intentional. Debt collector may be exempted from liability if proves that the violation was not intentional and was a result of good faith error. Interestingly, the court in *Marx v. General Revenue Corporation* case<sup>73</sup> held that if the consumer loses the case, even though he brought a claim in good faith and the lawsuit was not frivolous, he might be ordered to pay debt collector's costs incurred because of the court proceedings excluding attorney's fees.<sup>74</sup> This was the first time when consumer was obliged to pay costs to the debt collector. FTC joined CFPB and US Department of Justice in filing for amicus brief to urge the court to rule that losing consumers who filed lawsuits in good faith should not be required to pay defendant debt collector's costs, because they considered that it would discourage consumers from complaining and eliminate private enforcement. They considered that it would be better to limit the rule to those consumers who bring lawsuits in bad faith, because, otherwise, it would contradict the initial intent of the Act to deter and eliminate unlawful debt collection practices through private enforcement.<sup>75</sup> In response to this amicus brief, the Supreme Court issued a decision contrary to the position of governmental authorities.<sup>76</sup> This an interesting issue, whether consumers should be required to pay to a

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<sup>71</sup> 15 U.S.C. 1692 k (a).

<sup>72</sup> *Id.* 1692k (b).

<sup>73</sup> *Marx v. General Revenue Corporation*, 133 S.Ct. 1166, 1167 (2013).

<sup>74</sup> Fed. R. Civ. P. 54, according to the "bedrock principle", also known as the "American Rule", unless provided otherwise in statute or contract, "each litigant has to pay his own attorney's fees, no matter if he wins or loses."

<sup>75</sup> BOER, *supra* note 25, at 10.

<sup>76</sup> *Id.* at. 33.

winning debt collector or not. From the one hand, indeed it will discourage consumers from private enforcement, because they will be afraid of losing even if they filed in good faith. Debt collectors may also start maneuvering with this rule to make more consumers lose and earn on this lawsuits. On the other hand, this rule makes consumers more careful and responsible, and they will think twice before filing a lawsuit against debt collector and the number of complaints will decrease, which is a question of the agenda in light of the present situation with thousands of complaints a year.

### 1.5. STATE-LEVEL REGULATIONS

Thesis includes an analysis of the State rules, because as data appears to suggest, they should also be taken into consideration by the Kazakh lawmaker. This is because States impose additional technical rules that are generally more practical in terms of statistics and auditing and impose efficient measures of sanctioning for violations of collection companies in the region such as getting the bond payment, deprivation of a license to conduct collection activities etc. State debt collection laws differ yet their contents to great extent is limited to the following: 1) set licensing and bonding rules<sup>77</sup> for collection agencies; 2) define certain types of misconduct of collectors and give a right of a private action for abused consumers: and 3) establish criminal and civil penalties for specified misconduct, such as simulating legal process.<sup>78</sup> Thesis elaborates licensing and bonding requirements as the most widespread and logical from the point of supervision mechanisms.

**Licensing** is procedure when the collection agency is duly registered in governmental authorities according to the rules of state law and obtained a license stating that it has a right

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<sup>77</sup> The requirements on licensing and bonding, which seems to be very important for different purposes, differ from state to state. However, interestingly, some states do not require neither licensing, nor bonding. But, of course these states still have to follow the rules of the FDCPA. See the following state-licensing map in order to determine the state-to-state requirements: < <http://www.insidearm.com/state-licensing/> >.

<sup>78</sup> FTC, supra note 32, at 4.

to operate the kind of business, in case of collection agencies to collect debts. It may be one of the most important and difficult aspects in operating a collection agency, because the rules of each state differ, hence there is an issue whether the state where it is created requires the company to be licensed or not. Most states require the collection agency to be licensed. This is important because license is an indicator that the company is in compliance with the present legislation and if it commits something wrong, the state can take the license away, which is harmful for the company's reputation and further development. Hence, this is a strong tool of government to control the collection agencies.

**Bonding.** States may also impose an obligation for collection agencies to be “bonded” before acquisition of their debt collection licenses. Bonding company is “a company that insures a party against a loss caused by a third party,” in our case a collection agency.<sup>79</sup> The essence of bonding is providing that professional debt collectors will perform their duties in compliance with the industrial regulations. The logic suggests that bonds act as insurance from the risk that the collection agency will inappropriately use the money received from the debtors instead of transferring to the creditor of the outstanding debts.

Bonding as suretyship involves three parties, which are the obligee, the governmental body that requires the bond, the principal, who acquires the bond and the surety, bond issuing insurance company, which performs suretyship duties.<sup>80</sup>

As with ordinary surety bond, if a collection agency does illegal funds, the state government can seek reimbursement by filing a claim on the agency's bond. If the claim is satisfied, the surety, insurance company, must pay reparation up the bond's full amount. Then the collection agency will have to reimburse the insurance company.

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<sup>79</sup> Black's Law Dictionary (10<sup>th</sup> ed. 2014).

<sup>80</sup> See SuretyBonds.com Insurance Company, “A Guide to a Collection Agency Surety Bonds” (advertisement provided by one of the bonding companies online <https://www.suretybonds.com/collection-agency-bonds.html>). See also general information on “What does a Bonding Company do?” online at <http://www.wisegeek.com/what-does-a-bonding-company-do.htm>.

Bonding is also one of the tools of ensuring that collection agency does not violate the rules. If the agency does not comply with legislation, then it will face financial losses.

Thesis includes two examples of state regulation: states of New York and New Jersey, which impose different requirements. New York State has a contradictory system of requirements, whereas the state law does not require license, but the largest cities' local laws require getting a bond and a license to do a debt collection business. Particularly, thesis emphasizes on New York City laws, which require debt collectors to get license and bond. New Jersey is chosen, because, as opposed to New York City, there is no licensing requirement, so it would be interesting to clarify how important it is to require licensing.

### **1.5.1. NEW YORK**

The New York General Business Law regulates debt collection on a New York State level, according to which licensing and bonding are not required for debt collectors to operate.<sup>81</sup>

However, the largest in the State, New York City and Buffalo impose requirements on debt collection agencies to be bonded and acquire license to operate. Considering New York City only, according to State authorities, one of the reasons the state imposed licensing requirement was to tackle with the debt collection abuses. Debt collection agencies and individuals, debt buyers, law firms involved in debt collection are all covered by the licensing requirement. Nevertheless, the research shows that despite including a licensing requirement, debt collection abuses were the most frequently complained for the fifth time in 2012.<sup>82</sup>

Department of Consumer Affairs, state authority responsible for the issuance of debt collection license, helps the consumers to check if the collection agency has a license, provides

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<sup>81</sup> Art. 29-H, N.Y. G.B.S. Law (1998). New York General Business Law available on: <http://public.leginfo.state.ny.us/lawssrch.cgi?NVLWO>:. See also 23 NYCRR 1, available at: <http://www.dfs.ny.gov/legal/regulations/adoptions/dfs23t.pdf>.

<sup>82</sup> Consumer Affairs Committee and the Civil Court Committee, Report on Legislation (2014). Available at: <http://www2.nycbar.org/pdf/report/uploads/20072473-CommentsonProposedAmendmentsonDebtCollectionAgencies.pdf>



all necessary information of working with debt collection agencies, and ensures that consumer-debtors have a possibility to file a complaint to protect their rights. This is good approach to control the business and make its functioning more effective from the legal perspective, when there are such possibilities for private enforcement.

Working without a license is prohibited and may result in bad consequences for the agency. For instance, in *Kuhne v. Cohen & Slamovitz*, debt collection agency was responsible for violating the FDCPA, that working without a license amounted to “false, deceptive, or misleading representation or means in connection with the collection of any debt.”<sup>83</sup> It means that violation of local requirements amounts to a violation of the Federal law and the civil liability determined by FDCPA.

New York law requires debt collection agencies to be bonded before attempting to get a license.<sup>84</sup> Bonding is a requirement of the Department of Consumer Affairs, which has the main purpose of allowing the state to regulate debt collection professionals. The debt collection agency purchases a bond to guarantee that it will comply with the federal, state and local regulations.

The New York City’s “Debt Collection Agency Surety Bond” currently in the amount of \$5000 for two years protects the debt collection agency against any financial risks of losses caused by poor financial decisions, damages, unethical decisions, or a failure to follow state and local laws on the part of the Principal.<sup>85</sup> This makes the bondholder more responsible with regard to its compliance to the existing laws as long as the misconduct may result in

<sup>83</sup> *Kuhne V. Cohen & Slamowitz, LLP*, F.3d 189, 192 (2nd Cir. 2009). Also see: 15 U.S.C. § 1692e.

<sup>84</sup> Department of Consumer Affairs’ Checklist for those who are attempting to get a license. Please see: <http://www1.nyc.gov/site/dca/businesses/license-checklist-debt-collection-agency.page> (Last visited on 03.15.2016).

<sup>85</sup> Bond Express Surety and Insurance Agency, Advertisement with explanation on acquisition of New York City Bonds. See: <http://www.bondsexpress.com/new-york-bonds/new-york-city-bonds/new-york-city-debt-collection-agency-surety-bond-5000-2-years-only-175/>.

indebtedness to the Principal and badly affect the reputation and further possibility of getting a license.

### **1.5.2. NEW JERSEY**

New Jersey enacted a State level Fair Debt Collection Practices Act, which does not impose any licensing requirements, however, prohibits agencies to function without obtaining a proper bond.<sup>86</sup> The main consideration for such a law may be that the bonding gives the opportunity for a state to control and regulate debt collection professionals. As long as bond performs this function, there is no requirement to imposing licensing requirements. Bonding procedure is the same in both states. Regarding bonds, according to New Jersey law, debt collection agencies and individuals, attorneys and lawyers, involved in debt collection need to be bonded in the amount of \$5000 as in the New York City to duly operate on the state territory. Bonding lasts for two years, after passage of which it has to be renewed. The law subject those who do not comply with this requirement to a fine or even imprisonment for not more than three months.

However, on logical grounds, license is also important, because the state may efficiently put requirements for debt collection professionals who intend to get a license. For instance, they may list the ethical qualities and methods of work that every debt collector has to follow and give a license only to those agencies, which shows that they can successfully implement these requirements in their working process.

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<sup>86</sup> 45 N.J. Fair Debt Collection Statute, Available at: <http://www.fair-debt-collection.com/new-jersey-fair-debt-collection-practices-act.html> , <http://collectionagency.info/laws/new-jersey-debt-collection-laws/>.

## CHAPTER 2. DEBT COLLECTION AGENCIES IN KAZAKHSTAN

### 2.1. THE HISTORY OF PRIVATE DEBT COLLECTION AND ITS ECONOMIC ROLE IN KAZAKHSTAN

At the beginning of the twentieth century throughout the former Soviet Union, there were illegal structures ready to work for banks in order to collect delinquent debts for a certain percentage of the collected money.<sup>87</sup> These days collectors are still associated with criminals and offenders, and the question whether their activities are legal or not is still open.<sup>88</sup>

The concept of a collection agency and debt collection activities, rights and obligations of those involved in this sphere are still a gray area in Kazakhstan. Collection agencies appeared there almost ten years ago in 2006, after the rapid development of individual lending when the banks started having problems with debt recovery.<sup>89</sup> The financial crisis occurred in 2008, one of the reasons of which is a sudden devaluation of the national currency, led to a certain negative impact on the banking sector in the form of relatively high level of outstanding overdue debts.<sup>90</sup> This led to collection problems of banks and individual creditors, who finally had to find solution to their debt collection problems. Initiating court proceedings would be too burdensome and time consuming for creditors,<sup>91</sup> causing them to resort to collection agencies or attorneys involved in debt collection to collect their overdue debts. Recourse to debt collectors is attractive for creditors, because agencies offer their services for no prepayment, but on a condition that they will acquire a certain percentage of the collected money. If creditors

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<sup>87</sup> Collector Partners, *Dolgovaya Tyurma Kak Sredstvo Vozdeistviya Na Dolzhnika [Debt Prison As A Way Of Prompting The Debtor To Pay]* (2014). Available online: <<http://collpart.kz/dolgovaya-tyurma-kak-sredstvo-vozdejs-2/>> (Last visited on 03.15.2016).

<sup>88</sup> The Concept.

<sup>89</sup> Sholpan Tuleulova, *Kreditnaya Istoriya Ili Sem' Voprosov o Kollektorah [Credit History or Seven Questions about Collectors]*, *Aktyubinskiy Vestnik* (May 27, 2010) available online: <http://avestnik.kz/?p=2879>.

<sup>90</sup> Sara Alpysbayeva, *Devalvatsiya Tenge: Plyusy I Minusy [Devaluation of Tenge: The Pros and Cons]*, *KazInform* (2014). (The Article written by the director of the Center for early detection of economic and financial turmoil of JSC "Economic Research Institute"). See <<http://uchet.kz/news/devalvatsiya-tenge-plyusy-i-minusy/>>.

<sup>91</sup> At first, after 30 days of delinquency, banks and other creditors try to collect overdue debts themselves and only after 90 days of delinquency and unsuccessful attempts decide to turn to collectors. Initiating court proceedings may turn out to be worthless and costly, if debtor has no money or property. Hence, collectors are the best option, as long as usually they earn on interests from collected money only. Hence, creditors choose collectors because it is more effective and less risky in comparison to what they could do themselves. See *infra* Subchapter 2.3.

involve their own personnel in debt collection, this becomes costly, because they have to pay salaries and finance their work no matter if there is a result or not.<sup>92</sup> Hence, debt collectors have more collection experience, necessary equipment, databases, and established procedure of work.

At this point in time, reports show that there are seven leading organizations known as collection agencies in Kazakhstan and a lot more other legal entities that are involved in debt collection activities without naming themselves as collection agencies.<sup>93</sup> Thus, these differences in how they call themselves and organizational structures make it quite hampering to determine which organizations are involved in debt collection, understand what specific features are distinguishing collection agencies from other organizations. This inevitably leads to a chaos in debt collection industry of the state.

On the one hand, debt collection is beneficial for both the courts and creditors, because the increasing tendency of collection agencies definitely leads to decrease in the workload of both creditors and courts, which is regarded as a good feature of existence of these agencies. In addition, as debt collection is their major practice they are more experienced in this sphere and may do everything in a fast and effective manner. On the other hand, the absence of a transition line that separates legal from illegal activities of collectors remains an important problem to tackle. Collection agencies remain insufficiently transparent and the expansion of their activities in the existing form may entail risks associated with the violation of the rights of debtors.

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<sup>92</sup> The Concept.

<sup>93</sup> *Id.*

## 2.2. OPERATION THROUGH EXISTING LEGISLATION

Debt collection agencies justify their business to fall under several provisions of the Civil Code of the Republic of Kazakhstan (hereinafter: the Civil Code) depending on the type of the agreement they are concluding with the creditor.

Mostly, collectors rely on the provision of the Civil Code on “The execution of obligations by a third party”, according to which “the execution of an obligation may be delegated, entirely or in part, to a third party, provided it is stipulated in legislation or the agreement [...]”.<sup>94</sup> Agreement under this provision implies providing debt collection services to creditors by collectors like in agency agreement. In most occasions, creditors also provide proxies to debt collectors to authorize particular collectors to collect. The parties of the loan agreement do not change, and collector is just a service provider.<sup>95</sup> Collectors comment on this provision stating that agreement under this provision authorizes them to represent legitimate interests of the creditor, including collection of debts, initiating court proceedings etc.<sup>96</sup>

However, Commentary suggests that, the lawmaker created this provision for another purposes, for instance, cases when seller has an obligation to deliver products to buyer, but there is a contractor, who is authorized for delivery etc.<sup>97</sup> Definitely, relationships between creditor and debt collector were not taken into account by the lawmaker. Hence, this is the case when law is interpreted in favor of collection agencies, somehow enabling them to state that collection activities are legal and there is no prohibition to do so.

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<sup>94</sup> Grazhdanskii Kodeks Respubliki Kazakhstan ot 27 dekabrya 1994 goda [GK RK] [The Civil Code of the Republic of Kazakhstan (General Part), adopted by the Supreme Council of the Republic of Kazakhstan on 27 December 1994], Article 276 (with amendments and additions as of 11.16.2015). (Hereinafter, the Civil Code). See English version of the Code available online at [http://online.zakon.kz/Document/?doc\\_id=1017157#activate\\_doc=2](http://online.zakon.kz/Document/?doc_id=1017157#activate_doc=2).

<sup>95</sup> M.K. Suleimenov, Yu. G. Basin, Kommentarii k Grazhdanskomu Kodeksu Respubliki Kazakhstan, Obschaya Chast' [Commentary to the Civil Code of the Republic of Kazakhstan (General Part)] (2013), available at [http://online.zakon.kz/Document/?doc\\_id=1019750#sub\\_id=2760000](http://online.zakon.kz/Document/?doc_id=1019750#sub_id=2760000).

<sup>96</sup> Byuro Po Rabote S Dolzchnikami (BRD), *O zakonnosti kollektorskoj deyatel'nosti* [About the legality of collection activities]. (Collection agency analyzing the legality of collection activities in Kazakhstan), available at <http://www.brd.kz/o-zakonnosti-kollektorskoj-deyateln/>.

<sup>97</sup> Suleimenov, Basin, supra note 95.

Other provision they rely on is provided by the Civil Code is on “Replacing persons in an obligation.”<sup>98</sup> Accordingly, “any right or claim, which belongs to the creditor on the basis of an obligation, may be transferred by him to another person in a transaction [...]”<sup>99</sup> Agreement under this provision is commonly referred to as an agreement on the assignment of rights, whereby debt collector purchases the debt.<sup>100</sup> The parties of the loan agreement change, because afterwards collector becomes the creditor.<sup>101</sup>

Thus, there are two ways how collectors conduct their work with creditors. These are agency agreement and agreement for the assignment of rights.<sup>102</sup> However, agency agreement is the most widespread practice as long as there were changes in the Tax Code of Kazakhstan, the essence of which is: if there is an assignment or cession of debt with a certain discount, then the buyer has to pay high income tax for the discount.<sup>103</sup> Therefore, it is risky from the point of costs for collectors, because there is never a guarantee that they will be able to collect the debt.

There is also an issue of bank secrecy that has to be resolved by creditors in order to legally provide collectors with information about the debtor. According to Law of Kazakhstan “concerning banks and banking activity in Kazakhstan”, “banking secrecy may be disclosed to any third party on the basis of a written consent of the owner of the account, issued during his personal presence in the bank.”<sup>104</sup> Creditors tend to comply and acquire the consent of the

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<sup>98</sup> BRD, *supra* note 96.

<sup>99</sup> The Civil Code, Art. 339 (On the grounds and procedure for the transfer of the creditor's rights to another person).

<sup>100</sup> Expert opinion, Association of Legal Entities "National Economic Chamber of Kazakhstan, "Union" Atameken" “On the collection activities” (December 21, 2010) Available at [http://online.zakon.kz/Document/?doc\\_id=30859363](http://online.zakon.kz/Document/?doc_id=30859363).

<sup>101</sup> Suleimenov, Basin, *supra* note 95.

<sup>102</sup> Ruslan Anafiyarov, Head of leading collection agency “Byuro po rabote s dolzhnikami”, Interview for Association of Collectors in Kazakhstan (Oct. 07, 2009). See <http://collectorskz.kz/index.php?r=article/show&id=25> (Last visited on March 25, 2016).

<sup>103</sup> Kodeks Respubliki Kazakhstan No 99-IV “o nalogah i drugih obyazatelnykh platezhah v budzhet ot 2008 goda” [Code of the Republic of Kazakhstan № 99-IV “On taxes and other obligatory payments to the budget” (Tax Code) of 2008] Art. 91 (2013).

<sup>104</sup> Zakon Respubliki Kazakhstan ot 31 avgusta 1995 goda No 2444 “o bankah i bankovskoi deyatel'nosti v Respublike Kazakhstan” [The law of the Republic of Kazakhstan № 2444 dated August 31, 1995 Concerning

debtor at the stage of concluding a loan agreement, so that they have the right to transfer information about the debtor to a collection agency. However, collection agency that has the access to information subsequently has no legal obligation to preserve the personal information about the debtor, because of no legal regulation of collection activities and no governmental control.<sup>105</sup>

According to Nurlan Kozhamberdiev, practicing attorney in Kazakhstan, if creditor has to choose between debt collector and an attorney, it is better to turn to attorney, justifying it with a number of reasons.<sup>106</sup> The most important of them are that attorneys are licensed and there is no legislation regulating debt collection activities in Kazakhstan, meaning that any activities conducted by alleged debt collectors are not accredited by law and practically these people are lawyers, who represent creditors and earn on interests.<sup>107</sup>

### **2.3. THE TYPOLOGY AND FUNCTIONS OF PRIVATE DEBT COLLECTION AGENCIES IN KAZAKHSTAN**

Collection agencies in Kazakhstan operate as private legal entities, which provide services of debt collection to banks, micro financial organizations, insurance companies, individual lenders and other consumer creditors.<sup>108</sup> The typology of collection agencies is quite the same as in the US. As there are only two agreements under which they can operate, there are two types of collection agencies, which are third-party debt collectors and debt buyers. The same collection agency can be the both depending on the needs and wishes of the creditors.

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Banks and Banking Activities] Art. 50. See online [http://online.zakon.kz/Document/?doc\\_id=1003931#pos=1:-8](http://online.zakon.kz/Document/?doc_id=1003931#pos=1:-8), English version (not updated) [http://online.zakon.kz/Document/?doc\\_id=1017153#activate\\_doc=2](http://online.zakon.kz/Document/?doc_id=1017153#activate_doc=2).

<sup>105</sup> Vladimir Karatitsky, the General Director of “Nomos”, The Bureau of Legal Research in Kazakhstan, Interview for the “Expert Kazakhstan” on collection activities. (August 18, 2008). See the interview online <http://www.zakon.kz/118492-biznes-na-dolgakh.-otsutstvie-zakona.html>.

<sup>106</sup> Webinar/Interview of “Pravmedia” with Kozhamberdiev Nurlan Sardarovich, Practicing lawyer, Partner, Kozhamberdiev Law Firm (March 4, 2015). See [http://prg.kz/pravmedia/webinars\\_list/page/3/562-vzyskanie-dolgov-v-kazahstane.html](http://prg.kz/pravmedia/webinars_list/page/3/562-vzyskanie-dolgov-v-kazahstane.html).

<sup>107</sup> *Id.* The activities of collection agencies were compared with a game, where people use sometimes-illegitimate methods in order to collect money like citing the Criminal Code of Kazakhstan, calling at night etc.

<sup>108</sup> Yuliya Mel’nik, *Kollektory: Dolgi Vne Zakona [Collectors: Debts are illegal]*, 4 Kazakhstan (2009). Available at <http://www.investkz.com/journals/68/677.html>. (Last visited on March 25, 2016).

The main activities of collection agencies, comprised of lawyers and former personnel of law enforcement authorities, are finding the debtors, prejudicial and judicial proceedings. Due to the practice, agencies started to differentiate the services provided within three categories, which are soft-collection, hard-collection, and legal-collection.<sup>109</sup>

Soft collection is describes an initial, out-of-court, simple notification procedure when collectors contact the debtor, notifies about the requirements to pay the overdue debt. During this stage, collectors usually work with debtors distantly. They contact the debtor through different means of communication like sending personal messages, postal letters and emails, then making telephone calls. If using these means was unsuccessful, then collector moves the second type of collection, namely hard collection.

Hard collection is a secondary, out-of-court, personal visiting procedure, when collector starts organizing meetings with the debtor. It can be of two types: [1] when the debtor comes to the collection agency's office himself and [2] when collector goes to the debtor. At this stage if the debtor comes to the office, he can explain the situation, the reasons of nonpayment and consider ways of paying the debt in the future. Collection agencies usually say that they are not always against the debtor, but sometimes even trying to help them performing as a mediator between the debtor and the creditor.<sup>110</sup> But, if the debtor is still not willing to pay and the initial procedure did not work, then collectors start searching for additional information about the debtor like for the home or work addresses and visiting them there. If not found, then contacting with the neighbors and employers to find out where the debtor is in order to organize the personal meeting and prompt the debtor to pay. If this procedure turns out to be unsuccessful,

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<sup>109</sup> *Id.* This is the procedure how majority of collection agencies operate in Kazakhstan. See Information available on websites of collection agencies of Kazakhstan. For example, <http://www.brd.kz/sample-page-2/>, [http://collpart.kz/en/ru\\_uslugi/ru\\_collection/](http://collpart.kz/en/ru_uslugi/ru_collection/).

<sup>110</sup> Anafiyanov, *supra* note 102. On the question regarding the bad image of collectors stated that often collectors act on the debtor's side in the negotiations with the creditors. For instance, they submitted an application for cancellation of penalties and one of their clients has developed a program for the forgiveness of the debt to the amount of 10 to 30%. Interview given in Russian is available on Association's website <http://collectorskz.kz/index.php?r=article/show&cid=1&id=25>.



collectors start preparing for the judicial procedure, which is the next stage of collection activities.

Legal collection<sup>111</sup> is the last, judicial stage when collectors on behalf of creditors file a lawsuit, prepare all necessary documents and participate in court proceedings. If case is successful, they get the court decision and the writ of execution. They may perform as private bailiff or control the enforcement of judicial award by the governmental bailiffs. At this stage, the payment amount usually increases dramatically for the debtor, as he has to pay fines for each day of nonpayment, state fee, attorney's fees etc. In addition, collectors often warn debtors that leading to legal collection may be very bad for the debtor, because it will be reflected in the debtor's credit history conducted by the Kazakhstan's "First Credit Bureau" and this will result in refusal of banks to give loans in the future.<sup>112</sup> Additionally, in order to be able to verify a debt and file a lawsuit, according the Civil Code, there must be a written proof of the existence of the debt.<sup>113</sup> If the original creditor is bank, then there must be a copy of an agreement between a bank and the consumer, if it is an individual lender, there must be receipt, voucher or note certifying that the creditor gave money and debtor is obliged to pay it.

## 2.4. THE REPORTED ABUSES

To begin with, from the side of professional lawyers, attorneys and population, debt collectors are criticized of moral turpitude for using opportunistic methods in their work.<sup>114</sup>

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<sup>111</sup> Term "legal collection" might sound misleading, because if this type of collection is legal, it means that others are illegal. However, what Kazakhstani collectors mean is that these collection methods are connected with litigation and court proceedings. It might have been better to call this type as "court-based collection", "collection based on litigation" or alike.

<sup>112</sup> Anafiyanov, supra note 102.

<sup>113</sup> The Civil Code, Art. 150 (Form of the agreement).

<sup>114</sup> There is no official information provided by courts, governmental authorities on the number of abuses etc. Research was conducted by analyzing the information provided by mass media, online articles, Kazakh forums where people shared their problems, information provided by lawyers and collection agencies on their websites and analysis of advertisements of collection agencies. Hence, the originality and truthfulness of the material may be doubtful and confusing. See <http://forum.zakon.kz/topic/133622>, <http://vse.kz/index.php?app=core&module=search&do=search&fromMainBar=1>, <https://www.nur.kz/190104-kollektory-v-kazahstane-sobirayut-dolgi-pri-pomoshhi-matov-i-ugroz.html> etc.

Bank ombudsman in his interview related to the problem of unpaid debts stated that as long as there is no regulation of collection agencies in Kazakhstan, this inevitably leads to violations of law in collection activities.<sup>115</sup>

One of the issues is related to the problem of confidentiality of consumer information. Consumers first raised this issue in 2006 and sought clarifications from the government on whether banks or other financial organizations have the right to sell their debts and whether subsequent creditors are allowed to seek additional fees and charges from the consumer who has debt in delinquency.<sup>116</sup> The Agency for Financial Supervision of the National bank of Kazakhstan (hereinafter, AFN) stated that in accordance with the Civil Code of Kazakhstan, this is possible only under the agreement on assignment of rights, when rights of the original creditor are assigned to a new creditor to the extent and under the conditions that existed at the time of vesting.<sup>117</sup> If the original creditor had the right to charge additional fees, then the subsequent creditors gets this right as well. However, as mentioned earlier, collection agencies are mostly working under agency agreements, which are not covered by the exemption. AFN left this issue without an answer, thus the likelihood that such actions are illegal increases and certainly needs governmental investigation and comment.

Another issue is harassment and misrepresentations conducted by debt collectors. Reports show that collectors tend to use profanity in relation to debtors, calling thousands of times a day and harassing debtors to force them to pay. Debtors tried to collect signatures to protest the unusual methods of work of some collection companies.<sup>118</sup> They conducted a meeting with

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<sup>115</sup> S. Dzhurunova, Deputy Director of National Bank of Kazakhstan, E. Siirbayev, Bank Ombudsman, and A. Seitkhalieva, Interview for “Vecherniy Kazakhstan”, “Fast money or long problems” (Sep. 25, 2014). See <http://bank-ombudsman.kz/archives/1728>.

<sup>116</sup> A. Donskih, *Dolgi s pravom pereadresovaniya [Debts with the right to assignment]*, Kazhastanskaya Pravda №194 (August 18, 2006). The Agency for financial supervision of the National bank of Kazakhstan was in charge to answer consumers’ questions. See <http://www.afn.kz/?switch=eng&docid=534>.

<sup>117</sup> The Civil Code, Art. 341.

<sup>118</sup> *Supra* note 114. See *Kollektory Sobirayut Dolgi Pri Pomoschi Matov I Ugroz [Collectors are collecting debts with profanity and abuses]*, Information Portal Nur.kz, <https://www.nur.kz/190104-kollektory-v-kazahstane-sobirayut-dolgi-pri-pomoshhi-matov-i-ugroz.html>. (Last visited March 26, 2016).

mass media representatives to seek help against abusive practices of debt collectors.<sup>119</sup> Consumers on different forums seek help against collectors who contact not only them, but also their relatives and employers.<sup>120</sup> There is an advertisement posted by one of the collection agencies stating that they work with debtors only under strict control of prosecution and financial police. According to the post, collectors make a detailed analysis of the debtor's history and find something for what the person can be prosecuted.<sup>121</sup> It is then clear that they use this information to harass the debtor that if the latter does not pay, his/her freedom will be endangered. This kind of post also raises concerns of the legality of involvement of the prosecutors and financial police in debt collection activities.

Collection agencies admit that there are cases when collectors harass, oppress or abuse consumers. Thus, debtors should always be careful about debt collectors and ask them to provide all the documents certifying that they are working for a collection agency, based on the agreements with creditor. The problem is that debtors are in majority lacking this kind of knowledge and may easily become victims of fraudulent activities.<sup>122</sup>

Leading collection agencies tend to work in a professional manner, respecting the rights of debtors and the rule of law. However, there are still agencies and individual collectors, who operate illegally and thus reduce the reputation of respectable agencies and damage the image of the collector as a profession. The Association of Collectors in Kazakhstan, lawyers and majority of debt collection agencies recognized and tried to call the governmental attention to the problem of abusive debt collection practices conducted because of the absence of the law and supervision.<sup>123</sup>

<sup>119</sup> Irina Berdasheva, *Ne Nado Boyat'sya Kollektorov [No need to be afraid of collectors]*, KN.kz Information Services (April 8, 2013). Available at: <http://www.kn.kz/article/7345/>. (Last visited March 28, 2016).

<sup>120</sup> *Supra* note 114. Information consumers share on unofficial forum devoted to financial problems, including debt collection, available at <http://vse.kz/index.php?app=core&module=search&do=search&fromMainBar=1>.

<sup>121</sup> See the advertismet online <http://yvision.kz/post/317534>.

<sup>122</sup> Ruslan Anafiyanov, *Iskusstvo Sobirat' Dolgi [The Art of Debt Collection]* (InfoTses, 2009). <http://www.info-tses.kz/news/iskusstvo-sobirat-dolgi/>.

<sup>123</sup> Kozhamberdiev, *supra* note 106.

## 2.5. BANK OMBUDSMAN FOR CONSUMER PROTECTION

Bank ombudsman in Kazakhstan is an independent public advocate, who helps consumers to settle their problems with banks and other financial organizations.<sup>124</sup> Settling disputes of consumers with debt collection agencies affiliated with banks has not yet developed into a practice, but there are cases when ombudsman helped people with issues regarding the disclosure of consumer data. The services of bank ombudsman are there to support the consumers who face debt collection abuses by clarifying and making interpretations of the loan agreements for the debtor. Bank ombudsman may contact the creditor, organize a meeting together with a creditor and debtor and this is the only way that ombudsman may influence the work of a collector, through creditor. As mentioned earlier, there is usually an agency agreement or agreement on assignment of rights between creditor and debt collector, which must include some information about collection activities. It would probably determine that collection agency is a legal entity involved in financial activities, so that bank ombudsman would have authority to resolve disputes between debt collector and the debtor.<sup>125</sup> In addition, the same contract usually includes the rights and obligations of the creditor and debt collector, which could help to identify illegal actions of a debt collector if any.

## 2.6. JUDICIAL ENFORCEMENT OF DEBTORS' RIGHTS

Initiating a judicial proceeding is an ordinary private enforcement mechanism, when consumer can file lawsuits against abusive conduct of a collection agency. The claims may include protection of constitutional rights to privacy and dignity, remedies for disclosure of confidential information and moral damages for abuses etc.

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<sup>124</sup> See the official website of Banking Ombudsman <http://bank-ombudsman.kz/?lang=en>. Consumers can file complaints and ask for help online. All the information received is confidential and considered only by the banking ombudsman to provide help for the population of Kazakhstan.

<sup>125</sup> See *Id.* and the Internal Rules of a Bank Ombudsman in Kazakhstan, Ch.4 (2011) describing the rules and procedures of resolving disputed between creditors and debtors.

There is also a possibility to file a class action, which is possible if the subject of the dispute is related to the common rights and responsibilities of several plaintiffs (several defendants), or which have the same basis or the subject of the dispute is about homogeneous rights and responsibilities of several plaintiffs (several defendants).<sup>126</sup> By proxy, they can appoint one of the several claimants to represent the interests of the rest.

According to the Civil Procedural Code, each person is entitled to acquire a professional legal help and the court provides each claimant with an opportunity to seek help from a governmental attorney, who would direct the claimant to properly state the claim, organize evidence and represent interests of a consumer on the proceedings.<sup>127</sup> The debtor should provide the court with all the documents including loan agreement with the creditor, documents received from the debt collector and evidence of collector's illegal conduct.

However, the court may refuse to accept the suit on the ground of failure to state the claim, because there are no prohibitions in the present law regarding debt collection activities, in particular, no restrictions on frequency of calls, calling to third parties and, especially, employers and communicating that debtor owes a debt. Usually in the loan agreement, the debtor authorized the creditor to resort to the services of debt collectors and disclose debtor's information. In addition, debtors may omit filing a lawsuit on the ground of being unable to prove abusive conduct because usually people do not think about using a Dictaphone or any other means in order to be able to prove profanity, harassment or any other abuses. Goldfarb rightfully stated, and this is undoubtedly applicable to Kazakhstan, that "without the consumer's statutory cause of action," provided by FDCPA, "the consumer would have to use the traditional tort remedies such as defamation, invasion of privacy, and emotional distress,

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<sup>126</sup> Grazhdanskii Protsessual'nyi Kodeks Respubliki Kazahstan ot 31 oktyabrya 2015 goda No 377-V [The Civil Procedural Code of the Republic of Kazakhstan dated October 31, 2015 No 377-V], Art. 49. Available at [http://online.zakon.kz/Document/?doc\\_id=34329053](http://online.zakon.kz/Document/?doc_id=34329053).

<sup>127</sup> See *Id.* Art.18.

which are difficult to prove and, if proven, difficult to assess damages.”<sup>128</sup> On these grounds it is logical to suggest that little can be done to help the debtor to prove that his rights were violated and get a court order forbidding a collection agency to do so.

## 2.7. ASSOCIATION OF COLLECTORS IN KAZAKHSTAN

The existing situation presumes setting high professional and ethical standards of the work of collection companies, which was the main reason why leading collection agencies decided to form an Association.<sup>129</sup> The Association of Collectors in Kazakhstan (hereinafter, the Association), a member of the Financial Institutions Association in Kazakhstan, was formed in 2008 with an intent to declare the existence of the collection business in the legal field of Kazakhstan, so that the government would recognize the collection activities.<sup>130</sup>

The Association has several purposes, which are: civilized and proper development of the collection market in Kazakhstan, coordination of debt collection activities between member companies of the Association, development of such tactics and methods of work, which would contribute to prestige and good reputation of collection agencies, imposition and enforcement of the rules of professional ethics of the collection agencies’ personnel, and contribution to initiation and participation in formation of legislation and other governmental programs regulating collection activities.<sup>131</sup>

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<sup>128</sup> Alvary, *supra* note 16, at 18. (Original source: Mr. Lewis H. Goldfarb, Proposed Amendments to the Consumer Credit Protection Act: Hearings on H.R. 111969 Before the Subcommittee on Consumer Affairs, 94<sup>th</sup> Congress, 2<sup>nd</sup> Session (1976)). Recall that in the US, consumers may file complaints to CFPB, FTC and state Attorney General to communicate about their issues with collection agencies. These authorities investigate complaints and send them to relevant collection agencies, which are required to provide an explanatory response to authorities.

<sup>129</sup> The members are the agencies that comprise the ninety percent of the collection industry in Kazakhstan: “Byuro po rabote s dolzhnikami”, “TimeInvest”, “Spektr-Halyk”, “Kazakhstan Security System”, “Center for Collection Services”, and subsidiary of Russian “Financial Debt Collection Agency FASP” etc.

<sup>130</sup> “Association of Collectors in Kazakhstan” is created and registered as an association of legal entities. The official websites are <http://collectorskz.kz/index.php> , <http://www.afk.kz/index.php/en>.

<sup>131</sup> *Id.* See information about the company and its purposes (Dec. 10, 2008), <http://collectorskz.kz/index.php?r=page/show&name=about>.

The Association has its own rules on accession and Code of Honor,<sup>132</sup> which contains rules prohibiting to use or threat of using physical violence or criminal practices to intimidate debtors, the use of obscene or abusive tone etc. It is important to mention that there are also rules on verification of the debt as in FDCPA, rules on conservation of banking and commercial secrecy of the creditor and the debtor. In order to become part of the Association the collection agency has to have its own internal code of conduct with high ethical standards and basic rules of professional activity or simply accept and reproduce the Association's Code of Honor.

In any case, this is an example of the self-regulatory actions conducted by debt collectors and it is interesting to analyze whether it would be enough for the proper functioning of the collection industry. The majority of collection agencies stated that they are in need for law on collection activities and the creation of this Association resembles this necessity. The law would legitimize the terms of “collector”, “collection agency” and “debt collection activities”, clarify the rights and obligations of those involved in debt collection. In addition, collectors could be granted with the legal access to information regarding alleged debtors through cooperation with governmental bodies. The law would also eliminate fraudulent and inefficient collection agencies, because there would be an obligation to get a permission to conduct collection activities. The law is primarily important for consumers, because nowadays it is completely unclear which activities of debt collectors are legal and which are not, and the law would provide protections against wrongful practices.

Compared with the situation in the US, it is reasonable to suggest that at the present moment the Association is unsuccessful in its work. Important point to stress out is that it seems to be inactive in its work, as long as it does not make any reports or have any statistical data, any discussion of the problems to tackle or successful work results. Hence, there is no

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<sup>132</sup> The text of “the Code of the principal professional activity and ethics for employees of collection companies”, which is the internal Code of the “Association of Collectors in Kazakhstan”, soft law tool available on <http://collectorskz.kz/index.php?r=page/show&name=kodex>.

opportunity to analyze the effectiveness of the initiative, because of the lack of transparency and information available. A reasonable approach to solve this issue could be to change the underlying strategies of the Association and make subsequent changes in the internal rules of work. For instance, they could state the purpose “to form a self-sufficient system of industrial regulation of collection activities in the country, and to ensure the proper execution and enforcement of internal rules of the Association, including, but not limited to the Code of Honor.” Second, they should form an enforcement authority within the Association, which would be responsible for monitoring compliance of collection agencies, receiving consumer complaints, helping them to resolve their issues etc. As mentioned earlier, in the US, ACA International has its Ethics Committee and it is responsible for the enforcement of the Code of Ethics. Taking into consideration the fact that usually it provides for the same prohibitions like FDCPA and imposes the professional conduct rules, industrial self-regulation could be enough for Kazakhstan to substitute FDCPA type regulation. However, as stressed by Cătălin Gabriel Stănescu, “a self-regulation - is only soft law, “enforced” by the business association and not by a governmental agency.”<sup>133</sup> However, soft law tool becomes stronger and enforceable if supported by the governmental agency, because affiliation with government means that the rules must be complied.<sup>134</sup> Hence, if the state supported this initiative, the Association would have stood on a solid ground, and there would be no doubt about its enforceability.

Subsequently, at some point, banks and other financial organizations would prefer to turn to those collection agencies that are members of this Association, and the number of collection agencies that violate the law would decrease. Thus, with some major changes in Association’s structure and rules, it could become an efficient self-regulatory mechanism that would solve a

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<sup>133</sup> CĂTĂLIN GABRIEL STĂNESCU, SELF-HELP, PRIVATE DEBT COLLECTION AND THE CONCOMITANT RISKS - A COMPARATIVE LAW ANALYSIS 224 (Springer 2015).

<sup>134</sup> *Id.*



number of issues, satisfy the needs of banks and collectors, and protect debt collectors from abuses.

## **2.8. ANALYSIS OF THE DRAFT LAW OF KAZAKHSTAN “ON COLLECTION ACTIVITIES”**

The National Bank of Kazakhstan, representing the interests of all the financial organizations in Kazakhstan stated that they are in need for the services of professional debt collection agencies.<sup>135</sup> However, because of the concerns regarding the legality of the collection activities in Kazakhstan, the lack of transparency regarding the methods of work used in debt collection and no information on whether any constitutional or other rights of debtors are violated, they feel tension and mistrust of their clients for using the services of collectors. Even if collectors claim to be working under the existing legislation, banks understand that the Civil Code of Kazakhstan and other legislative acts do not take into account all the features of collection activities and relationship that arises between collectors, creditors and consumers, and there are no proper means for the protection of rights and interests of consumers. Therefore, National Bank together with the Government of Kazakhstan prepared The Concept “On the further development of institutions of independent evaluation of contraction risks and collection agencies,” (hereinafter, the Concept).<sup>136</sup> It was approved by the Decree of the President of Kazakhstan in 2012<sup>137</sup> and became a guiding manual for the National Bank and Government in preparation of a project of the Draft Law “On collection agencies”.

Following the provision of the Concept, National Bank prepared a Draft Law “On collection agencies” and a passport of the document, which stated the main reasons for filing

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<sup>135</sup> Inna Yenshina, *The Uniform Rules for Collectors*, Yuridicheskaya Gazeta (2014). Available at <http://www.nomad.su/?a=3-201411190016>.

<sup>136</sup> The Concept of the Law is a document prepared by the relevant governmental authorities on the necessity to enact a legislation on a specific issue, one of the ways of initiating a legislative process.

<sup>137</sup> Decree of the President of the Republic of Kazakhstan dated 13 August 2012 № 362 “On the Concept of further development of the institutions of an independent assessment of the risk contraction (rating agencies, credit bureaus) and collection agencies.” See the text of the Concept available online at [http://tengrinews.kz/zakon/prezident\\_respubliki\\_kazahstan/hozyaystvennaya\\_deyatelnost/id-U1200000362/](http://tengrinews.kz/zakon/prezident_respubliki_kazahstan/hozyaystvennaya_deyatelnost/id-U1200000362/).

the bill for consideration and alleged outcomes of its adoption. In 2014, the Government accepted the Project of The Bill and according to the Kazakh law, the developed draft concepts, laws and regulations before being sent for approval to public authorities have to be placed on official websites for public comment together with other open draft laws.<sup>138</sup> Hence, the draft law “on collection activities” is open on the official websites of the National Bank of Kazakhstan and on the portal of the electronic government of Kazakhstan in Russian and Kazakh languages. As the report suggests, until now there were no comments or proposals received from the side of the mass media and population, that is why it still was not sent to the governmental review. Nevertheless, it is very important to analyze the provisions of the Concept and Draft Law prepared by the National Bank in order to see what innovations are introduced and whether they are coherent and effective in theory.

### **2.8.1. THE CONCEPT**

The reason for approving the Concept was to promote further development of collection agencies by proving guidelines for National Bank to prepare a draft of regulation, which would function for legal accreditation of collection agencies in Kazakhstan and control its proper development. It consists of the information regarding the situation with collection agencies that existed on the time the Concept was prepared, analysis of the foreign systems’ regulations on collection agencies, the aims and tasks of the Concept, the execution period and expected results. In addition, it imposes the main principles that should govern and penetrate the rules on debt collection.

According to the Concept, the problematic aspects of collection activities in Kazakhstan are the lack of accreditation of collection agencies and government regulation, lack of

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<sup>138</sup> Art.14 of the Zakon Respubliki Kazakhstan o Normativno-Pravovih Aktah [Law of the Republic of Kazakhstan “On Normative Legal Acts”] dated 03.24.1998 (2015) and Art. 34-1 of Reglament Pravitel’sstva Respubliki Kazakhstan No1300 ot 12.10. 2002 goda [the Resolution of the Government of the Republic of Kazakhstan “About Regulation of the Government” No1300 dated 12.10.2002].

qualification requirements for the personnel and thus the risk that persons with criminal records and criminal behavior, who may cause harm to consumers, may conduct collection activities. There is no opportunity to assess the behavior of collectors and high risks of infringement of the legitimate rights and interests of creditors and debtors.<sup>139</sup>

The Concept clarifies to National Bank that even though collection agencies work with banks mostly, they should not be considered as financial organizations. Collection agencies can also work on overdue loans granted under any other civil contract, municipal debts, as well as any outstanding consumer debts.

The aim of the Concept is a legislative consolidation of the principles of collection agencies' activities. In particular, the tasks are to introduce industry standards for collection agencies, continuously improve the efficiency of their operations by state regulation and to ensure a balance of protection of the rights of both debtors and creditors from wrong activities of collection agencies.

Regarding expected realization, the Concept anticipated that the Draft Law "On collection activities" would be ready in 2014, which was performed by the National Bank and the Government. Afterward, for the whole process of development of a lawmaking process on collection activities and its enforcement is expected to be carried out within 5 years after first introduction of the Draft Law.

Interestingly, through the whole process of initiation and preparation of the Concept, there is no information that the Association of Collectors in Kazakhstan participated in the legislative process to support and promote acceptance of the law. After all, according to the Association's Rules, its main aim is working in pursuit of legislative accreditation of collection agencies in Kazakhstan. Participation in legislative process is an excellent opportunity to reaching the stated purpose, at least by commenting and working on further improvement of the Draft law.

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<sup>139</sup> The Concept.

Hence, this position of the Association and the whole lawmaking process seems to be contradictory.

Essentially, the Concept implements that the aims and tasks should be achieved by such a regulation, which corresponds to the best international practices.

*“The Republic of Kazakhstan, well integrated into the world’s economic and information space and being in need for free access to the global capital market and attracting foreign capital in the economy, should seek to comply with all aspects of international best practices and standards in the field of development of [...] and collection agencies.”<sup>140</sup>*

The Concept requests to make a list of prohibited actions and identify the legal aspects of collection activities in Kazakhstan from the foreign experience, particularly of the USA. Hence, it is challenging to find out whether the provisions of the Draft law resemble the core elements of FDCPA in America.

### **2.8.2. PROVISIONS OF THE DRAFT LAW: BASICS**

The Draft law regulates public relations related to collection activities, defines the conditions and principles of collection activities, establishes the legal status and peculiarities of creation of a collection agency, and determines the features of state regulation, control and supervision of collection activity in Kazakhstan.<sup>141</sup>

According to the Draft Law, collection agency is a commercial legal entity, official status of which depends on the registration with the authorized body and which performs collection activities with an intend to collect delinquent debts.

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<sup>140</sup> *Id.*

<sup>141</sup> Proekt Zakona o Kollektorskoj Deyatel’nosti [Draft Law of the Republic of Kazakhstan “On collection activity”] put for public discussion on the official website of the government of Kazakhstan on September 8, 2014 (hereinafter, the Draft Law). See [http://egov.kz/wps/portal/ContentDiscussion?contentPath=/egovcontent/discussionproject/nb/act\\_mu/%D1%84/zrk\\_nb&lang=ru](http://egov.kz/wps/portal/ContentDiscussion?contentPath=/egovcontent/discussionproject/nb/act_mu/%D1%84/zrk_nb&lang=ru). Also available on the website of National Bank of Kazakhstan. See <http://www.nationalbank.kz/?docid=218&switch=russian>.

The Draft law intends to allow collection activities only to collection agencies, and only lawyers would be employed by a collection agency as collectors. As a result, all the existing lawyers and individual entrepreneurs performing debt collection activities would have to cease their work. The lawmaker in order to be able to control the collection industry decided to narrow down the law to only collection agencies. There would be only one Registry for collection agencies, where the latter would have to provide the Code of Ethics and Code of Conduct, previously agreed upon with the authorized body.

According to the norms of the Draft law, National Bank of Kazakhstan (hereinafter, Authorized Body) would be the only authorized body responsible for governmental supervision and enforcement of the law on collection activities.<sup>142</sup> It would have powers to impose additional requirements for collection agencies, conduct the registration of them and control the proper functioning of the Registry. It would file lawsuits against those agencies that act in violation of the law in order to force them to comply, also could seek reorganization or liquidation of the agency.

There are requirement for collection personnel, which differ depending on the status of the collector. For example, the managing personnel of the collection agency should have the citizenship of Kazakhstan, have a high legal or economic education, with no criminal record, and who has a relevant background relating to debt collection or also legal and economic backgrounds would be satisfying as well. In addition, regarding ordinary personnel, collectors, they should satisfy certain requirements such as having a high legal or economic education, absence of any criminal record and fulfilling the additional requirements if any imposed by the National Bank or internal Code of Conduct.

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<sup>142</sup> Id. Art. 22

### 2.8.2.1. REGISTRATION AS AN ALTERNATIVE TO LICENSING

In general, there are two most important interdependent preliminary requirements that should be performed by collection agencies in order to be able to do collection activities, which are registration and filing the Code of Conduct agreed upon with the authorized body. Registration resembles the requirement of licensing imposed by some State laws in the US on the ground that each of them is a kind of permission for execution of collection activity, without the presence of which their collection activities would be illegal.

Registration of the collection agencies after them being created in the form of legal entity would be a mandatory procedure, after which the legal entity gets the official status of a collection agency.<sup>143</sup> The outcome of the registration would depend on the quality of the Code of Conduct, which would clarify the methods and procedures that collection agency intended to use, and Code of Ethics, obligatory requirements imposed by the company to its personnel. Otherwise, the authorized body may refuse in registration until fulfillment of the necessary rules.<sup>144</sup> Successful registrants would be included in the Registry, which would look like a list of all the compliant collection agencies, enlisted on the website of National Bank. This Registry performs a variety of advantageous functions, first of which is that it performs informational function for creditors and consumers. It would be available online, so that consumers and creditors would always be able to check which collection agencies are working in compliance with law with all the necessary internal procedures and ethics requirements for collectors. Secondly, it would be a law enforcement tool for the authorized body, meaning that collection agency that act in violation of law would be excluded from the Registry. Thirdly, it would be easier to track the development of the industry by collecting statistical data from the Registry.

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<sup>143</sup> Id. Art. 23 - 25.

<sup>144</sup> Id. Art. 24.

Hence, theory suggests that this innovation of the Draft Law would perform many necessary functions that would improve the quality of the debt collection industry in Kazakhstan.

#### **2.8.2.2. SECRECY OF COLLECTION ACTIVITIES**

Under the Draft Law, collection agencies shall ensure secrecy of collection activities, which means that collectors must keep confidentiality of all information related to debt, debtor and creditor. This requirement was included in support of the constitutional rights to privacy, dignity, confidentiality of personal deposits and savings, etc.<sup>145</sup> Confidentiality protects the debtor from harmful consequences of collection activities such as employment problems and personal dignity. Communicating third parties about the collection activity intended to a particular debtor and disclosing any information about the debtor or creditor would amount to a violation of the regulation, which would lead to bad consequences for the collection agency.<sup>146</sup> Information can be disclosed only upon written consent of the debtor or creditor depending on whom the information concerns. However, the law clarifies that information shall be provided upon due process request and without any consent of the debtor or creditor to courts, bodies of preliminary investigation and execution authorities, bailiffs, tax authorities, and National Bank as an authorized body.

#### **2.8.2.3. THE BASIS FOR COLLECTION ACTIVITY**

Collection activities can be conducted either under an agreement on assignment of rights for those debts that have more than 90 days of delinquency or under a contract on recovery of bad debts or the other debts for creditors.<sup>147</sup>

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<sup>145</sup> Konstitutsiia Respubliki Kazakhstan [The Constitution of the Republic of Kazakhstan] (08/30/1995) Art. 17, 18. English version available online <http://constitution.kz/english/>, <http://constitution.kz/english/section2/>.

<sup>146</sup> Read about the Remedies that would be available in sub-subchapter 2.9.2.5.

<sup>147</sup> The Draft Law, Art.7, 8.

This rule provides that collection agency becomes a representative of a creditor in collecting delinquent debts. The collection agency unless acting under a contract on assignment of rights, has no right to collect money by any means on its own account. Collectors ensure debtors paying debts to creditors' accounts and creditors pay interest fees to collection agency. Considerably, the purpose of the rule was to eliminate collectors taking additional fees from debtors, which is quite peculiar to collectors. Most likely, this provision of the Draft law is created to systematize and unify the procedures of debt collection and make a clear separation of collection activities from factoring, in particular, to clarify the difference between contracts on assignment of rights or debt buying and factoring.

#### **2.8.2.4. REQUIREMENTS AND PROHIBITED ACTIONS**

According the Draft Law, debt collectors would be allowed to contact debtors by means enlisted in the provision, including telephone calls, mails, mobile messages, using internet means of communication, making appointments and meeting with debtors personally or with their attorneys. However, there are a number of requirements and prohibitions, which are necessary for the protection of debtors' rights, including reasonable time period requirements, verification of debts upon request and prohibitions of harassment and misrepresentations.

First, they would have to communicate with a debtor in a certain respectful manner by introducing themselves and the collection agency, and inform him/her about the debt.<sup>148</sup>

Secondly, it would be prohibited to contact the debtor from 9 pm until 8 am on weekdays and from 7 pm to 10 am on weekends and holidays. Also, prohibited to contact a debtor more than three times during a day or more than two times in an hour.<sup>149</sup>

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<sup>148</sup> Id. Art.18 (1).

<sup>149</sup> Id. Art. 18(2)(1).



Thirdly, debtor would have the right to verification of debt and failure of a debt collector to verify the debt would amount to a violation of the regulation.<sup>150</sup>

The Law would prohibit collection agencies to use misrepresentations, harassment and other abuses. For example, misleading information communicated by the collector regarding the amount of the debt and its background would be construed as misrepresentation. Harassment would occur when collector extorts the property or monies of the debtor under the threat of violence, or by stating what the consequences of non-payment of the debt would be. For instance, stating that they will disclose information regarding the debt, which will substantially harm the interests of the debtor or a related third party. In addition, committing such actions that infringe upon the rights and freedoms of citizens, as well as endangering their lives, health and property would amount to harassment and abusive conduct, and upon detection would result in criminal liability and/or exclusion from the Registry.

#### **2.8.2.5. LIABILITY FOR VIOLATIONS**

According to the Draft law, exclusion from the Registry would be the worst outcome for the collection agency as long as it would deprive the agency from its official status and permission to perform collection activities. There are several grounds, because of which agency may be excluded from the Registry, which are, carrying out collection activities with systematic (more than three times a year) violations of the law, failure to make periodic reports to the authorized body or reporting wrongful information, obstructing or preventing the authorized body from conducting periodic inspections and auditing, non-performance of collection activities (inactivity) for more than twelve months from the moment of registration, and when there is a court ruling stating that collection agency should cease to exist and liquidate.

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<sup>150</sup> Id. Art. 18(2)(2).

Moreover, collection agency or collectors employed would bear criminal responsibility for disclosure or unauthorized use of information falling under the provision of secrecy of collection activities protected by law. The criminal responsibility has two important purposes, one of which is to correct the actions of perpetrator, in particular, prevent the agency from committing the same wrong in the future, and the second is insuring general prevention by providing a public notice that any agency violating this law would be subject to a criminal responsibility. However, it is interesting whether individual collector employed by a collection agency would bear criminal responsibility or not. After all, this would make collection agencies and its personnel even more careful and responsible about their activities.

## **2.9. DEVELOPMENT OF ISLAMIC FINANCE IN KAZAKHSTAN AND ITS IMPACT ON DEBT COLLECTION RULES.**

In 2013 National Bank stated that in order to develop the economy of Kazakhstan, the state should support and promote development of Islamic financing in the country. The reason that led to such conclusion is that the world financial crisis revealed the key problems of the existing financial systems of leading economies. Those key causes were deregulation of financial market in the states and increase of fictitious capital, in other words derivatives. The example of the report of the Bank for International Settlement support the stated argument by showing that “in 2008 the global OTC derivatives market amounted to 591.9 trillion USD, 9.5 times higher than the global gross domestic product (62.2 trillion. USD), in other words, only 10% of derivatives served the real economy.”<sup>151</sup> Hence, there is a strong need in creation of such a financial market that would correspond to the actual production market and secured with real assets. Therefore, Islamic finance is of the best relevance because derivatives and any other

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<sup>151</sup> National Bank of Kazakhstan, *Relevance and Topicality of Islamic Finance in Kazakhstan* (2013). See online <http://www.nationalbank.kz/?docid=782&switch=english>.

forms of Gharrar, which constitute such things and actions, which have a certain level of ambiguity or uncertainty.<sup>152</sup>

Even though Kazakhstan is a secular state and its legal system is not dependent on any religion, it is considered to be the only state within CIS,<sup>153</sup> which promotes the development of Islamic finance. As something that is on the edge of development, it would be interesting to know whether such banks can turn to collection agencies and how the former have to deal under Sharia rules. Moreover, the fact that the legislation of collection activities is still open for public consideration means that there is a chance to make additional regulations relevant to collection activities in realm of Islamic finance as well.

Nowadays, Islamic bank in Kazakhstan does not give any credits to physical persons or start-up companies, only engaged into project financing and provides financing to huge companies, however, the situation might change at any time, because it is still on its way to further development.<sup>154</sup>

The existing situation in Kazakhstan without any governmental regulation, collection agencies freely doing whatever they deem necessary to collect debts is completely unacceptable for Islamic finance. Therefore, there is another strong reason for development of regulation on collection activities in the country, because if the state is working on development of a special type of finance, it should care on providing proper environment for its full and proper operation.

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<sup>152</sup> Ryosuke Shimazu, *Opportunities and Challenges in Islamic Finance: Central role of law in its future growth and development* (February 9, 2016) (presentation for Central European University).

<sup>153</sup> Commonwealth of Independent States, regional organization, consisting of former USSR states.

<sup>154</sup> JSC "Islamic Bank «Al Hilal» is the only Islamic bank established in the territory of the Republic of Kazakhstan and the CIS. The Bank has 2 branches in Astana and Shymkent, with its head office in Almaty, offering a wide range of banking products under the relevant rules and principles of the Sharia for retail and corporate clients. Corporate website of "Al Hilal" Bank: <http://www.alhilalbank.kz>. Also, there are other companies working under Sharia, like brokerage company «Fattah Finance», a mutual insurance company Halal insurance "Takaful", as well as several consulting companies. Stock investment mutual fund "Hajj Fund of Kazakhstan" started to provide services of Halal money saving.

The study shows that the project of the regulation on collection activities in Kazakhstan does not contradict to any canons of Sharia law, which prohibits Riba, taking interest and usury, and Gharrar, as mentioned earlier, which is ambiguity. According to the Draft Law, collection agency would be prohibited from taking any interest payment from the debtor or any additional fees from the creditor, but would have a right to get reasonable payment for its services provided from the creditor. Collector shall not personally receive money or request payment to accounts of a collection agency, but debtor would straightforwardly pay delinquent debt to creditor. Hence, this type of regulation of collection activities would not contradict any postulates of Islamic finance.

### **CHAPTER 3. CONCLUSION: LESSONS FOR KAZAKHSTAN**

Although the history of America goes back to more than 250 years, it is still growing and still working on development of its legislative system in order to keep pace with the economical, technological, cultural and other challenges of the world. The Fair Debt Collection Practices Act was introduced almost 40 years ago, back in 1977, and, at this point in time, debt collection is a comprehensively regulated industry in the US with rules imposed on different levels of government: federal, state and local.

Compared to the U.S.A., Kazakhstan as a nation has existed only 25 years and debt collection agencies first appeared around ten years ago. However, globalization and diplomatic relationships along with free access to information allows states to have the possibility to learn from each other and apply the successful experience of the other countries to its own legal system.

The existing situation with debt collection activities in Kazakhstan is quite confusing and messy, because it is completely unregulated, not transparent and there is no official information regarding the number of collection agencies, the grounds for doing collection activities and most importantly what methods do collectors use and in what kind of manner they contact debtors. Nobody knows how to differentiate collection agency from any other organization, which is quite problematic in light of the fact that creditors are assigning confidential information to these organizations claiming to be collection agencies. What is good is that the government is already concerned with this problem of unregulated collection activities and has started to work on its legislative regulation. Hence, recommendations of this thesis can be of practical utility to Kazakh legislator and collection agencies in Kazakhstan.

This thesis was concerned with the issue of how collection agencies are regulated in the US, whether it is a good example of efficient mechanism with strong enforcement and remedial functions, and therefore whether it could be adopted into the Kazakh legislation in the realm

of the current conditions existing in Kazakhstan. The preliminary and undeniable conclusion of the thesis is that the current status quo is unacceptable and there must be some kind of regulation of activities of collection agencies and means for consumers' protection, would it be through soft-law mechanisms or governmental hard-law regulation. This is especially important, because the study suggests that collection agencies are not concerned about their reputation among consumers, and as long as their income depends on the results of their work, they are tempted to violate consumer rights. Moreover, considering the fact that the state wants to become the center of Islamic finance among the countries of CIS makes it even more important to regulate debt collection activities, as debt recovery is an integral part of loan financing. The research shows that the current situation in Kazakhstan is the same as existed in America before FDCPA, when there were violations and when consumers had no legislation, which would provide them with reasonable protection. The results of the comparative analysis conducted in this thesis suggest that there are two ways of resolving this problem.<sup>155</sup>

First is a soft-law approach, which is to encourage improvement of the internal structure and rules of the Association of Collectors in Kazakhstan and creating a supervising and enforcement body of the Code of Honor within the structure of the Association. Currently the Association just provides a Code of Honor that has to be complied by the members of the Association. However, there is no authority or mechanism, which would monitor compliance and be responsible for the enforcement of the Code of Honor. This is the important thing in the structure of the American ACA International, which is successful because of the efficient enforcement mechanism. The Ethics Committee receives complaints from the consumers, cooperates with the FTC and CFPB and imposes sanction for detected violations. To make it more compliant and respectful, there should be a certain level of collaboration with

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<sup>155</sup> Please see *Appendix B* on p. 69 to have a general visual perception of proposed two approaches for resolving the current situation with collection activities in Kazakhstan.

governmental agencies of the state. At the present moment, it is already a member of the Financial Institutions Association of Kazakhstan, and the recommendation would be to collaborate with the National Bank, Credit Bureau and may be other relevant authorities. National Bank, because it is main financial organization in Kazakhstan responsible for proper functioning of the banking market, Credit Bureau for efficient consumer credit history information exchange. As a result, membership in the Association could become a substitution for the licensing requirement in some States of the US. It could serve the same functions as increasing the reputation of the collection agency, providing statistical data on development of the collection industry and exclusion from the membership would signal the bad conduct of an agency and discredit it in the eyes of creditors. This would be even better for the industry as long as being regulated by professional debt collection agencies, ensuring compliance with the current developments in the industry. Hence, this could be an efficient scheme of self-regulated debt collection industry in Kazakhstan.

Second is a hard-law approach, which is to adopt a legislation concerning debt collection activities that would be fully regulated and enforced by the government of Kazakhstan. This is the way that has been started but is still not completed, and there is a need for its further development and solid establishment. The Draft law created by the National Bank already adopted some peculiarities of American regulation. The Concept discussed in this thesis acknowledged that the research of foreign experience suggests that the provision adopted from US experience have protected the rule of law and ethics in the US and ensured the protection of constitutional rights of US citizens. For example, requirements regarding registration of a collection agency to be able to conduct collection activities, rules on communication with debtors, confidentiality of received information, time-periods allowed for contacts, prohibitions of misrepresentations and harassment were adopted from the FDCPA and State rules. Regarding law enforcement, the Draft Law provides several sanctions, which depend on

the type and frequency of the violation. The National Bank would inform the collection agency about the violation and wait until the latter ensures compliance with the law. If a collection agency continues to violate, then the agency would be excluded from the Registry, which is like depriving it from the license in some States in the US. If the violation touches the constitutional rights of citizens and amount to disclosure of confidential information, then there is criminal responsibility.

Nevertheless, special emphasis is needed to clarify that this Draft Law resembles a standard Kazakh substantive law, which is different from regulation, for example FDCPA in the US. As Alastair Hudson clearly pointed out, “the general objectives of substantive law are (1) to ensure enforcement (of contracts), (2) to protect property rights for parties and to protect the participants in (financial) markets from harms suffered as a result of civil wrongs and (3) to punish criminal offenses and civil wrongs.”<sup>156</sup> The substantive law is abstract in its nature, created and controlled by the lawmaker and provides standard rules covering everything possible, where no question is left without an answer. Whereas, as clarified by Stănescu, the purpose of regulation is different. It is to maintain efficiency in industry, in particular, “to maintain its integrity by sanctioning, preventing or deterring abuse; and to protect consumers by providing them with relevant information and education,” and what is more, “regulations are mainly enforced by governmental agencies, although private causes of action may be available to aggrieved parties.”<sup>157</sup> This is noticeable from FDCPA, because it is a self-enforcing strict liability statute, when governmental agencies educate consumers by different means, provide them avenues for complaints, and FDCPA imposes minimum rules on collection agencies, which should not be violated. However, the Draft Law in essence also resembles a regulation with respect to the fact that the governmental agency, National Bank, has the

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<sup>156</sup> Stănescu, *supra* note 121, at 217. Original source: Alastair Hudson, *The law of finance*. Sweet & Maxwell, London, pp. 55–56 (2009).

<sup>157</sup> *Id.*



authority to implement additional rules and enforce the law, however, it does not contain rules stating that National Bank is authorized to review complaints and resolve them. Hence, the Draft law in this respect is a mechanism, which provides exhaustive list of rules, which enables the government and consumers to detect whether collectors are violating the law and imposing liability on them mainly through judicial enforcement. There is no responsibility on the state to educate consumers and provide avenues for complaints, so that the proper functioning of the industry could be regulated by the National Bank dealing with collection agencies, and by court only in extraordinary situations. Thus, some fundamental changes might be considered first, whether to leave the current form of the Draft Law or make relevant changes to make it a regulation. With this respect, there are some provisions in the Draft Law that are confusing, problematic or need further improvement.

Firstly, the Draft law authorizes only collection agencies to perform collection activities, which limits the natural market development. The US experience suggests that the regulation can be applied also to individual attorneys or entrepreneurs involved in debt collection. Hence, the scope of the regulation could be extended and the provision could have the following form “debt collector – individual or legal entity, official status of which depends on the registration with the Ministry of Justice and listing in the Registry, regularly involved in debt collection activities as provided in the present law.”<sup>158</sup>

Secondly, there is no “Civil Miranda Warning”, which is an obligation of an American debt collector. The study shows how important it is to include this obligation, according to which collectors upon first communication would have to inform debtors about their rights and obligations under the existing legislation. This is because, - ordinary consumers tend to have no idea about their rights. For example, that they could ask for verification of a debt, explain their situation to creditors and establish a new repayment plan etc. Hence, it is recommended

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<sup>158</sup> The Draft Law, Art. 1(3).

to add the provision in the debt collectors' obligations section of the Draft Law<sup>159</sup> that "debt collector has a duty to inform an alleged debtor about his rights under the present legislation."

Thirdly, National Bank as an authorized body responsible for supervision and enforcement of the law should ensure that consumers, for whom this law is being created know their rights and obligations. This implies that National Bank should educate consumers on how they should be working with collection agencies. They can make educational videos, lessons, provide periodical reports, news from collection industry etc.

Finally yet importantly, the Draft Law states that consumers have a right to dispute the claims of debt collection agency, however, this does not clarify by which means he could do so. The currently available mechanisms are judicial enforcement or using the help of a bank ombudsman. However, the US experience suggests that the most efficient monitoring mechanism that help to detect law violations and enforce them, is receiving consumer complaints. CFPB receives more than 80,000 complaints each year and resolves the complaint directly with debt collection agencies or with the help of other authorized bodies, for instance, the FTC.<sup>160</sup> This enables them to elaborate statistically what the majority of the complaints are concerned about and address these issues primarily to debt collection agencies, so that they would resolve them through internal rules or impose new regulations in response to these abuses. According to the Draft Law, the National Bank would receive periodic reports from collection agencies only and thus monitor the industry. However, it seems to be one sided only, as long as it does not provide any avenues for citizens' complaints for a transparent supervision of the collection activities. On these grounds, in order to achieve the stated goals of transparent and responsive supervision and enforcement, it would be better if the new regulation included this kind of avenue for consumers' complaints.

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<sup>159</sup> *Id.*, Art.13.

<sup>160</sup> CFPB, FDCA Rep. 18 (2016).

Hence, the purpose of these changes is to make the Draft law be a regulation primarily oriented on detection and prevention of abuses and eliminate overwhelming amount of unnecessary rules.

In conclusion, Sun Tzu stated, “*regulation entails organizational effectiveness, a chain of command, and a structure for logistical support*”.<sup>161</sup> This is applicable to the situation with regulation of debt collection industry in Kazakhstan, no matter whether it is a self-regulatory mechanism or law.

Organizational effectiveness occurs when there is cooperation and transparency between structures involved in debt collection that all the needs of the market are satisfied, meaning that banks and other creditors get necessary services from debt collectors, who in turn work in compliance with the law and in an environment of a healthy competition, and the consumers’ rights are protected.

Chain of command is the vertical structure of the organization, when all responsible authorities, beginning from the governmental body to the head of the collection agency, have the same purpose of ensuring legitimate work of collectors in the state and increasing their good reputation and authority among the nation. For instance, if all collection agencies implement either the Code of Conduct and Ethics prescribed by the Association or rules imposed by law, the company would have to create an environment for functioning of these rules and their effective enforcement.

Finally, regulation should have a good structure for logistical support, a micro level of organization, which ensures operational success of the industry. For instance, as mentioned earlier, the Draft Law imposes several duties on collection agencies, one of which is to have modern technological facilities for debt collection, which would ensure formation of credit

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<sup>161</sup> Joseph L. Walden, *Velocity Management in Logistics and Distribution: Lessons from the military to secure the Speed of Business*, 261 (CRC Press, Taylor & Francis Group, 2006).

history, organization of debtors' information and decrease bureaucracy. In addition, debt collection agencies would have to create a contractual cooperation mechanism with the credit bureau of the state to ensure fast and organized collaboration with these organizations, which would result in legitimate exchange of information for better efficiency of both. Agencies would also have to ensure that all the individual collectors are trained and know how to perform their debt collection activities in a professional and respectful manner.

Ideally, these three elements have to be in essence of any regulation to build up an efficient and transparent system where all levels of a hierarchy are involved in reaching the same purpose. As mentioned in the very beginning of this thesis, the big purpose of Kazakhstan is to become a member of the 50 most developed countries in the world. For this purpose, there is a need to transform and modernize all spheres of national life, including debt collection industry, so that it would work “on the principles of high social responsibility” and the law would be “targeted on assistance for the most vulnerable segments of the population.”<sup>162</sup>

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<sup>162</sup> Nazarbayev, *supra* note 1.

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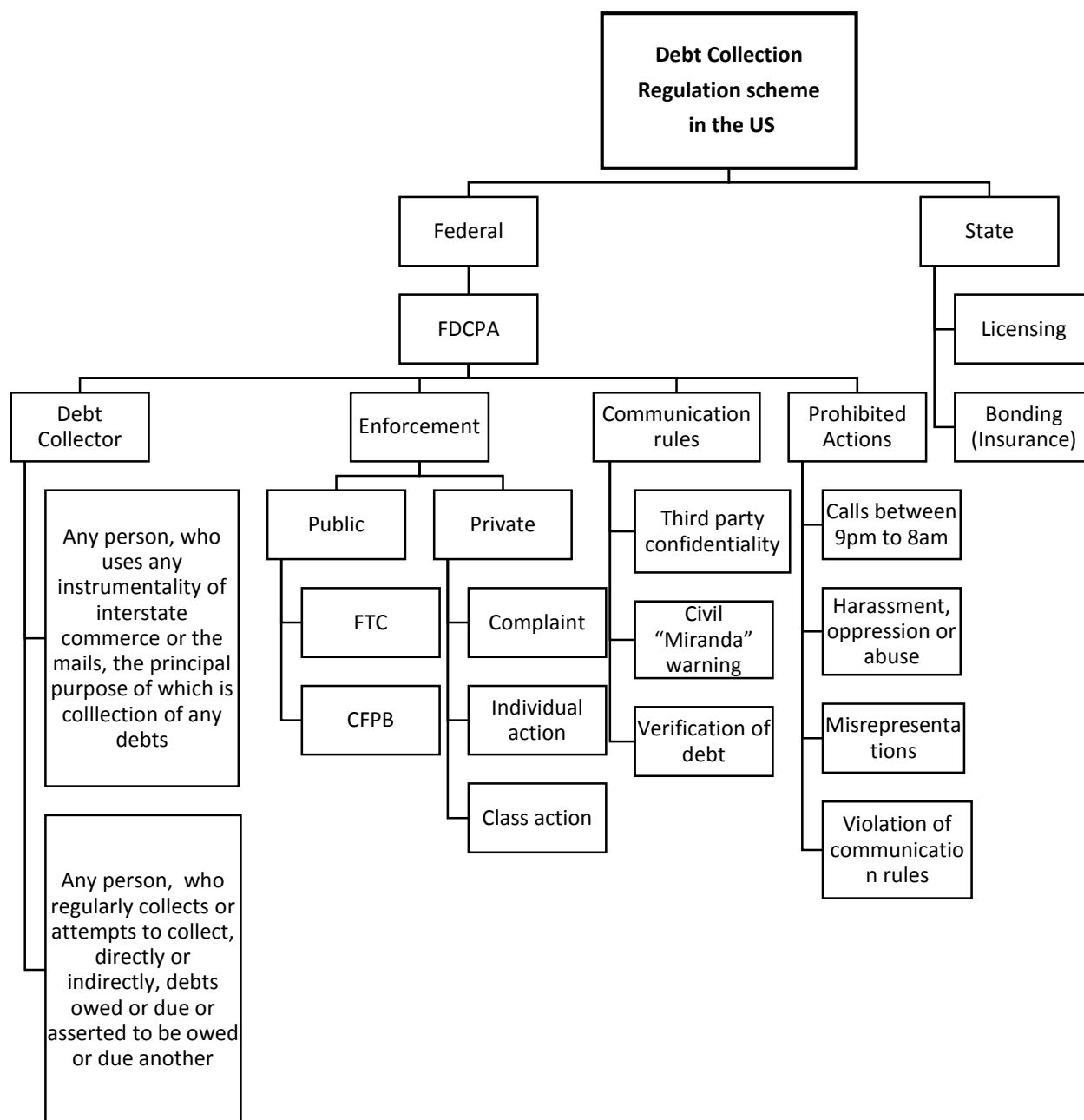
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## APPENDICES

### APPENDIX A: General overview of the debt collection regulation scheme in the US for 2016



*APPENDIX B: Proposed reform approaches that could be applied to Kazakhstan*

