

Global Restructuring & Insolvency Guide

Ukraine

Overview

This Guide summarises the impact of the main provisions of the law relating to bankruptcy in Ukraine and the manner in which it affects the claims of those involved in the insolvency or restructuring of a Ukrainian debtor.

Legislation

Ukraine's first Law On Bankruptcy entered into force on 1 July 1992. On 30 June 1999, the law was significantly amended and restated, and now exists as the Law On Re-establishing Solvency of Debtors or Recognition of Debtors' Bankruptcy (the "**Bankruptcy Law**"). On 19 January 2013, a new edition of the Bankruptcy Law came into force, which significantly amended the rules of bankruptcy proceedings and their conduct in Ukraine.

Debtors Exempt from Bankruptcy

The Bankruptcy Law and certain other Ukrainian legislation establish a number of fundamental principles that must be borne in mind when making deals with potential Ukrainian debtors.

Under the applicable Ukrainian legislation, the following debtors have absolute or limited immunity from the judicial bankruptcy procedures:

- state enterprises included in the list approved by the Law of Ukraine On List of State Owned Objects Which Cannot Be Privatized;
- state enterprises that fall under the category of "*kazenne pidpryyemstvo*";
- mining companies with a market share of at least 25% owned by the state, which have been privatized within one year from the commencement of the relevant privatisation plan, with the exception of companies liquidated through the decision of their owners; and
- public joint-stock companies in the business of providing railway transport for general use established under the Law On Specifics of Establishment of Public Joint-Stock Companies of Railway Transport for General Use.

Pre-Trial Rehabilitation of Debtors

A debtor or a creditor is entitled to initiate the debtor's financial rehabilitation procedure prior to the commencement of the debtor's declaration of bankruptcy in court. The procedure of the debtor's rehabilitation can be envisaged in an agreement between the debtor and the creditor. A pre-trial rehabilitation may be commenced upon the following conditions:

- obtaining the written consent of the debtor's supervising authority;
- obtaining the written consent of the creditors whose aggregate amount of claims exceeds 50% of the debtor's debts according to the debtor's financial statements; and
- obtaining approval for the solvency rehabilitation plan by all secured creditors and the General Creditors' meeting.

The General Creditors' Meeting is called when a written notice is sent to the creditors, in accordance with the debtor's accounting information.

The debtor or a representative of the creditors shall file with the court, at the location of the debtor, an application for the approval of the debtor's rehabilitation plan within five calendar days from the date of its approval by the creditors.

Upon the court's approval of the debtor's rehabilitation plan, the court will impose a moratorium prohibiting the satisfaction of the creditors' claims during the debtor's rehabilitation. The moratorium cannot last longer than 12 months. During the pre-trial rehabilitation of the debtor, the debtor's declaration of bankruptcy cannot be commenced in court.

Specifics of Bankruptcy Proceedings for Certain Categories of Debtors

Bankruptcy proceedings for certain categories of debtors have important specific features, compared with the generally applicable bankruptcy regime. Such categories of debtors include companies of special social importance or companies having special status, banks, insurance companies, securities traders and joint investment institutions, issuers or managing companies of mortgage certificates, managers of utility (construction financing) funds, managers of real property operation funds, enterprises at least 50% of whose charter capital is owned by the state, agricultural producers, farms, private (individual) entrepreneurs, and debtors liquidated by their owners. Specific features of the bankruptcy proceedings for such enterprises include unique terms and conditions of the bankruptcy proceedings, obligatory participation of competent state authorities in bankruptcy proceedings, provision of guarantees, a special list of priorities for the satisfaction of creditors' claims, extension of the term of the bankruptcy hearings, special sale procedures, and restrictions on the attachment of the debtor's assets.

Initiation of Bankruptcy Proceedings

A bankruptcy petition may be brought to a Ukrainian commercial court ("*hospodarsky sud*") at the location of the debtor by any creditor (other than a fully secured creditor), the debtor itself, the State Tax Administration and certain other state agencies acting as the creditors. A creditor (an individual or a business entity) that holds an incontestable claim against the debtor may initiate the bankruptcy proceedings against the debtor, if the amount of the claim is not less than 300 minimum monthly salaries and the claim remains unsatisfied by the debtor three months after the expiration of the established term for its initial satisfaction. From January 2016 to April 2016, the minimum monthly salary in Ukraine was UAH 1,378; starting from May 2016 and until December 2016 the minimum monthly salary is UAH 1,450; and starting from 1 December 2013, UAH 1,550. Where the claim is denominated in a foreign currency (e.g. US dollars, euros, etc.), the creditor must apply the official exchange rate established by the National Bank of Ukraine (<http://www.bank.gov.ua/control/en/index>) as of the day of filing of the application for the commencement of the bankruptcy proceedings with the competent court, in order to determine the amount of the claim in Ukrainian *hryvnias* and to prove that it meets the minimum amount requirement established by the Bankruptcy Law for the commencement of the bankruptcy proceedings.

In principle, there are two ways in which a creditor may participate in bankruptcy proceedings: a creditor may either bring the bankruptcy petition itself or, if another party has already initiated the bankruptcy proceedings, it may join the proceedings by way of filing of a participation petition.

Once the bankruptcy proceedings have been triggered, any creditor (except a fully secured creditor) may, within 30 days of the formal publication of the commencement of the bankruptcy proceedings against the debtor on the official site of the Supreme Commercial Court of Ukraine (<http://vgsu.arbitr.gov.ua/pages/157>), submit a participation petition substantiating its claims against the debtor. Creditors whose claims have matured prior to the commencement of the bankruptcy proceedings and were submitted after the expiration of the aforesaid 30-day period will not have the right to participate and to vote in the creditors' committee (the "**committee**"), and their claims will be satisfied in the sixth (i.e. the last) order of priority.

A creditor whose claims were fully secured by collateral is deemed to be a secured creditor and, as a matter of law, such creditor may not initiate bankruptcy proceedings. If a secured creditor considers its claims as not fully secured, or if the collateral has been lost or is missing, the creditor can initiate the bankruptcy proceedings or participate as a creditor with respect to the unsecured part of its claims or all its claims.

Stages of Bankruptcy Proceedings

The judicial bankruptcy proceedings in Ukraine may include the following stages:

- special proceedings for the disposal of the debtor's assets (the assets administration proceedings);
- solvency renewal proceedings;
- amicable settlement; and
- liquidation proceedings.

Assets Administration Proceedings

Under the assets administration proceedings, the Ukrainian commercial court appoints a bankruptcy administrator ("*rozporядnyk mayna*") who will supervise and approve the disposal of the debtor's assets. The court may impose a moratorium on the discharge of the claims of the debtor's creditors that arose before the date of the initiation of the bankruptcy proceedings.

A bankruptcy administrator is an individual who is registered as a private entrepreneur and licensed to act as the administrator of the debtor's assets, the solvency renewal administrator or the liquidator at each respective stage of the bankruptcy proceedings.

In the assets administration proceedings, the bankruptcy administrator: (i) identifies the creditors; (ii) prepares the register of the creditors and the amounts claimed from the debtor for further approval by the court; and (iii) organises the general meeting of the debtor's creditors, which in turn appoints the committee.

Once elected, the committee is entitled to: (i) initiate the solvency renewal proceedings or the liquidation proceedings against the debtor; (ii) agree on the terms and conditions of the solvency renewal plan and apply to the court for its approval; (iii) provide the court with candidates for the appointment of the solvency renewal administrator and the liquidator, as well as to apply for their replacement; (iv) agree on the terms and conditions of the amicable agreement and apply to the court for its approval; and (v) decide on other practical issues of the bankruptcy proceedings.

The creditors participating in the general meeting of the creditors or in the meetings of the committee are allocated a number of votes determined *pro rata* on their respective claims, and they make their decisions by the majority of the votes.

Assets administration proceedings may last 115 calendar days and may be further extended by the court for two months upon a request by the bankruptcy administrator, the committee or the debtor.

Solvency Renewal Proceedings

Solvency renewal proceedings may be introduced by the court as the next stage of the bankruptcy proceedings. This may last for six months, and may be extended for another 12 months upon a request by the committee or the solvency renewal administrator.

Upon the ruling on the introduction of the solvency renewal proceedings, the court appoints the solvency renewal administrator, who acts as the head of the debtor. For the period of the solvency renewal proceedings, other managing bodies of the debtor will not be able to exercise their statutory powers.

The solvency renewal administrator must submit the solvency renewal plan to the court for approval within three months from the day of the court ruling on the appointment of the solvency renewal administrator. If the debtor is a state-owned company in which the state owns not less than 50%, the solvency renewal plan is subject to approval by the state authority supervising the disposal of the property.

The solvency renewal plan may include the corporate restructuring of the debtor, the sale of its assets, the recovery of receivables, debt restructuring, restructuring of assets, the sale or cancellation of the debt, and other means of renewal of the debtor's solvency. The solvency renewal plan may also provide for the replacement of assets, a procedure according to which a part of the debtor's assets and obligations can be alienated to a newly established entity created by the debtor. The shares of such newly created entities can be included in the debtor's assets and sold through auction.

Liquidation Proceedings

If the solvency renewal administrator fails to provide the solvency renewal plan to the court for approval within six months from the day the solvency renewal proceedings commence, the court may recognise the debtor as bankrupt and commence the liquidation proceedings (i.e. the final stage of the bankruptcy proceedings).

The court may also introduce the liquidation proceedings with the relevant ruling, if the debtor has failed to restore its solvency in accordance with the solvency renewal plan, upon the request of the committee.

It should be noted that the committee may ask the court to commence the liquidation proceedings after the assets administration proceedings, omitting the solvency renewal proceedings. Upon the introduction of the liquidation proceedings, the court will appoint the liquidator, who will act as the head of the debtor. For the period of the liquidation proceedings, other managing bodies of the debtor will not be able to exercise their statutory powers.

In liquidation proceedings, the liquidator must determine the liquidation value of the debtor's assets, sell these assets and pay off the debt to the creditors in accordance with the priority order of the satisfaction of the creditors' claims as established by the law.

Upon the completion of the liquidation proceedings, the liquidator will prepare the report, as well as the liquidation balance sheet of the debtor, and provide them to the court for consideration and approval. Based on the results of the liquidation proceedings, the court may approve the report and the liquidation balance sheet of the debtor, dissolve the debtor and terminate the bankruptcy proceedings.

According to the Bankruptcy Law, liquidation proceedings may take 12 months from the day of commencement.

Amicable Agreement

At any stage of the bankruptcy proceedings, the creditors and the debtor may enter into an amicable agreement with a view to restructuring and/or cancellation of the debt. However, the first priority debt cannot be cancelled or restructured, and the debt arising from mandatory pension and social security contributions cannot be cancelled by the amicable agreement.

The parties to the amicable agreement may agree on the transfer of the debt to third parties or the transfer of the debtor's assets or corporate rights to its creditors in exchange for the cancellation of the debt.

The amicable agreement is subject to the approval of the committee, all secured creditors and the court, and becomes effective on the day the court approves the amicable agreement. Upon the approval of the amicable agreement, the court terminates the bankruptcy proceedings.

It should be noted that the amicable agreement may be invalidated by the court on the legal grounds provided by the Civil Law of Ukraine. When the amicable agreement is invalidated, the court may reinstate the bankruptcy proceedings against the debtor.

The creditors may apply to the court for the termination of the amicable agreement in the event of non-performance of the agreement by the debtor with regard to not less than one-third of the total amount of the debt. The termination of the amicable agreement for a specific creditor or creditors will not terminate the agreement for the rest of the creditors.

Priority of Claims

Amounts received from the sale of the bankrupt's assets are used to pay the claims of its creditors in the following order:

First priority:

- The payment of termination allowances to the bankrupt's employees, and repayment of any loan received by the bankrupt for the purpose of the payment of such termination allowances.
- Claims of the creditors under insurance agreements.
- Claims for recovery of costs associated with the conduct of the bankruptcy proceedings.

Second priority:

- Liabilities arising from the infliction of harm to life or health of an individual, by means of capitalization of the respective payments, *inter alia*, to the Employment Injuries and Occupational Diseases Insurance Social Fund regarding the employees insured in this fund.
- Liabilities relating to mandatory pension and social security contributions.
- Claims of individuals whose property or funds are deposited with the bankrupt (where the bankrupt is a trust company or "*dovirche tovarystvo*", a bank or other credit-financial institution, or any other business entity attracting the assets of individual depositors).

Third priority:

- Local and state taxes and other mandatory payments.
- Claims of the State Reserve Fund.

Fourth priority:

- Claims of creditors not secured by a pledge (mortgage) of the bankrupt's assets (other than the claims of the fifth priority and the sixth priority), including claims that have arisen during the assets administration proceedings or the solvency renewal proceedings.

Fifth priority:

- Claims for the "repayment of the bankrupt's employees' contributions to the charter fund" of the bankrupt.
- Claims for the payment of additional remuneration to the solvency renewal administrator or the liquidator.

Sixth Priority:

- Other remaining claims.

Higher priority claims must be satisfied in full before any lower ranking claims may be paid. In the event that the cash proceeds from the sale of the property are insufficient to satisfy all claims with equal priority, they must be satisfied *pro rata*. Claims not paid due to the insufficiency of funds in the liquidation proceedings are deemed extinguished. Any assets remaining after the satisfaction of the claims of the creditors are to be returned to the "owners" of the debtor (i.e. its shareholders or holders of its participatory interests) if the court decides to dissolve the debtor. The court will not be able to dissolve the debtor if the remaining assets of the debtor exceed the amount of assets that is required by the law for the operation of a relevant legal entity.

Note that Ukrainian legislation establishes a special order of priority of satisfaction of creditors' claims for certain categories of debtors (including banks).

Clawback

A transaction entered into by a Ukrainian debtor after the commencement of the bankruptcy or within one year before the commencement may be challenged by the bankruptcy administrator or by the creditors within the bankruptcy proceedings, if:

- the debtor alienated its assets, assumed obligations or surrendered its claims without compensation;
- the debtor has fulfilled its obligations before the due date;
- prior to commencement of the bankruptcy proceedings, the debtor entered into the agreement that led to its insolvency;
- the debtor paid to its creditor or accepted any property/assets as a set-off of payment obligations of its contractor when the debtor's assets became insufficient to satisfy the creditors' claims;
- the debtor alienated or acquired property at a price that was lower or higher, respectively, than the market price, provided that the debtor's assets were insufficient for the satisfaction of the creditors' claims at that time; or
- the debtor pledged its property to secure the fulfilment of pecuniary claims.

Criminal Liability

Under the Criminal Code of Ukraine, "letting bankruptcy" is defined as the intentional activity, with mercantile or personal motives or in the interest of third parties, of an individual shareholder (participant) or a corporate official of an enterprise, that has caused the sustainable financial incapability of such enterprise and substantial material damages (i.e. for 2016 – starting from 1 May an amount exceeding UAH 344,500) to the state or a creditor. This crime is punishable with a monetary penalty of 2,000 to 3,000 monthly standard non-taxable incomes of individuals as determined yearly by the law (i.e. from UAH 34,000 to UAH 51,000), and the perpetrator is prohibited from occupying certain positions and conducting certain activities for a period of up to three years.

The Criminal Code of Ukraine, as amended on 16 July 2015, provides for criminal liability for the falsification of information regarding contracts, obligations or property which is provided by a financial institution in its records or accounting documents and for the disclosure of such information if the falsification was aimed at concealing bankruptcy or persistent financial insolvency. The Criminal Code of Ukraine provides for punishment for such actions in the form of a monetary penalty of 800 to 1,000 times the monthly non-taxable salary (i.e. from UAH 13,600 to UAH 17,000) or imprisonment for up to four years with a prohibition against occupying certain positions or conducting certain activities for a period of up to 10 years.

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