# War-related claims and Insolvency-related judgments in Ukraine

Dr Olha Stakheyeva-Bogovyk reports on insolvency-related judgments and Ukraine's recent insolvency court practice



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> *This case further provides food for thought as to the prospects of qualifying such a court decision as 'an insolvency-related judgment' for the purposes of future recognition*

**Russia's military aggression against Ukraine since 24 February 2022 not only dramatically changed the lives of millions of Ukrainians, but inevitably triggered the need 'to move faster' and re-adjust to new war-related circumstances. The law and judiciary are no exception.**

This article aims to briefly shed light on Ukrainian recent landmark court practice in insolvency cases, which has pushed the envelope due to war circumstances and given a green light to consider the debtor's claims on compensation of damages caused by Russia's aggression against Ukraine at the location of and within the debtor's pending insolvency case in Ukraine.

Naturally, this case further provides food for thought as to the prospects of qualifying such a court decision as 'an insolvency-related judgment' for the purposes of future recognition and enforcement thereof abroad with the view to the UNCITRAL Model Law on Recognition and Enforcement of Insolvency-Related Judgments ('MLIRJ').

## Ukrainian court practice

On 2 February 2023, the Commercial Court of Zaporizhzhia Region (Ukraine) rendered a Decision in Case No. 908/1100/22 (908/2455/22)[1] (Judge: Mr O.O. Yuldashev), upholding in full a pecuniary claim of a farming entity 'SYu Zhnyva' (СЮ Жнива) ('Claimant' and 'Debtor') against the state of Russia, in the person of the Ministry of Justice of the Russian Federation ('Defendant'), for the compensation of proprietary damage ('war-related claims') in the amount equivalent to USD 130,307,773.95. The claim was filed by the Debtor at the location of and within the pending insolvency case, which was opened against the Debtor by a creditor – LLC 'Agrarij of Ukraine', Kyiv.

The Claimant/Debtor relied on Article 7, paragraph 2 of the Bankruptcy Code of Ukraine ('BCU'),[2] which allowed for the commercial court, hearing an insolvency case, to consider all proprietary claims, which 'the debtor is a party to', within the pending insolvency case.

The Claimant/Debtor submitted that, due to Russia's military aggression against Ukraine, the temporary occupation of the territories of Zaporizhzhia and Kherson Regions of Ukraine, and illegal actions of the military forces of Russia in Ukraine, such as the theft of Ukrainian grain from the warehouses and destruction of the grain harvest, the Claimant/Debtor suffered losses in the total amount of UAH 3,812,140,896.11 (equivalent to USD 130,307,773.95). In brief, the court was satisfied with the evidence on the balance of probabilities, which substantiated the statement of claim, and upheld the claim in full.

This court decision is deemed a landmark judgment, as it gave a green light to:

a) considering such war-related claims within the debtor's pending insolvency case for the purposes of concentrating all proprietary claims in the hands of one 'insolvency' judge so as to exercise judicial control over all the debtor's matters, when the debtor has been placed in a 'special regime' triggered by the opening of the insolvency case;
b) potentially deeming and qualifying such claims as 'insolvency-related' (for potential foreign recognition and enforcement purposes);
c) reinforcing the commercial court's territorial jurisdiction to hear such claims, not at the location of a defendant or the damage caused, but at the location of the pending insolvency case;[3]
d) reinforcing the stripping of Russian state immunity against adjudication of such claims in Ukraine (incidentally allowing for the possibility of service of documents on the Defendant via the embassy of the Russian Federation in Poland, in light of termination of diplomatic relations between Ukraine and Russia since 24 February 2022, and an alternative additional method of notifying the Defendant of the opening of the proceedings by online notification at the Ukrainian official website of the judiciary 'Judicial Power'); and
e) emphasizing the 'preponderance of probabilities' standard of proof test for such civil tort claims for compensation of damage caused by war.

More importantly, this landmark decision does not remain only on paper, but could potentially be

granted swift recognition and enforcement abroad, so as to enable the efficient fulfilment of the insolvency estate for the future distribution and satisfaction of creditors' claims. Meanwhile, the state immunity and public policy considerations are left aside, so for the states to decide how to overcome that hurdle.

## The definition of 'an insolvency-related judgment' under the MLIRJ

It is appreciated that it is up to each jurisdiction to define the scope and what type of judgments can be capable of recognition and enforcement as an 'insolvency-related judgment' in a particular jurisdiction.

Article 2 (d) of the MLIRJ[4] sets two (2) cumulative attributes for a judgment to qualify as 'insolvency related', i.e.:

(1) it arises as a consequence of or is materially associated with an insolvency proceeding, whether or not that insolvency proceeding has closed; and
(2) it was issued on or after the commencement of that insolvency proceeding.

At the same time, a judgment commencing an insolvency proceeding is expressly excluded from the definition of the 'insolvency-related judgment'.[5] It is deemed that the suggested definition of an 'insolvency-related judgment' under the MLIRJ is quite vague as *de facto* almost any further judgment that is handed down by the court when the insolvency proceeding has been opened would inevitably or most likely 'arise as a consequence of or be materially associated with an insolvency proceeding', due to introduction of a 'special regime'.

For instance, with the opening of an insolvency proceeding usually a stay/moratorium would apply, which would inevitably trigger disputes around a number of issues, i.e.: the scope and extend of a moratorium and a 'special treatment' of contracts, potential *ipso facto* clauses disputes around their performance/non-performance, acceleration of payment or termination; potential disputes around foreclosure on a collateral and other enforcement actions in the zone of insolvency and further transactions when in insolvency, including transaction avoidance claims; tax- and employee-related claims, etc.

At the same time, paragraph 60 of the Guide to MLIRJ provides an unexhaustive list of the types of judgment that might be considered as insolvency-related judgments. They still lack any commonality of criteria that could define an insolvency-related judgment. Meanwhile, item (d) of paragraph 60 of the Guide seems to fit our purposes most as it covers any money/ performance judgment, other than the one arisen from transaction avoidance or alike claims. This may be a good fit for the war-related claims on compensation of proprietary damage to the debtor, which was considered within a pending insolvency case. But again, it will be at the discretion of a particular jurisdiction. Let's live and see how the MLIRJ gets enacted by the respective states.

## Conclusion

Setting two rather broad cumulative criteria for a judgment to qualify as 'insolvency related' under Article 2(d) of the MLIRJ (i.e., to arise as a consequence of or is materially associated with an insolvency proceeding, and to be issued on or after the commencement of the insolvency proceeding) will inevitably trigger disputes. Given that the debtor gets placed into a 'special regime' with the opening of the insolvency proceeding, it is highly likely that each claim thereafter could potentially qualify as insolvency related. Therefore, maybe it would be worthwhile to simply list the type of claims/judgments which will be expressly excluded from the implemented MLIRJ. Food for thought! ■

**Footnotes:**

1 Decision of the Commercial Court of Zaporizhzhia Region (Ukraine) in Case No. 908/1100/22 (908/2455/22) dated 2 February 2023 (Judge: Mr O.O. Yuldashev).



2 *Para 2 of Article 7 of the BCU*: 'the commercial court, considering an insolvency case, shall hear within this [insolvency] case, all proprietary claims/ disputes, which the debtor is a party to; the claims against the debtor and its property; the claims on invalidation of auction results; claims on invalidation of any transactions/ agreements, entered into by the debtor; claims on vindication of debtor's assets or recovery of its value; salary-related claims; debtor's employee-related claims; other claims against the debtor.'

3 Under the recent Law of Ukraine 'On Amendments to Certain Legislative Acts of Ukraine Regarding the Conduct and Administration of Bankruptcy Procedures in Martial Law' No. 3249-IX dd. 13 July 2023 (in force as of 29 July 2023), para 2 of Article 7 of the BCU has been *amended* in such a way so that now 'the claims for compensation of damages and/or loss caused to the debtor' have *expressly been added to the jurisdiction of commercial courts considering a pending insolvency case.*

4 See: https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/ml_recognition_gte_e.pdf

5 (a) A judgment dealing with constitution and disposal of assets of the insolvency estate, such as whether an asset is part of, should be turned over to, or was properly (or improperly) disposed of by the insolvency estate;

(b) A judgment determining whether a transaction involving the debtor or assets of its insolvency estate should be avoided because it upset the principle of equitable treatment of creditors (preferential transactions) or improperly reduced the value of the estate (transactions at an undervalue);

(c) A judgment determining that a representative or director of the debtor is liable for action taken when the debtor was insolvent or in the period approaching insolvency, and the cause of action relating to that liability was one that could be pursued by or on behalf of the debtor's insolvency estate under the law relating to insolvency […];

(d) A judgment determining whether the debtor owes or is owed a sum or any other performance not covered by subparagraph (a) or (b);

(e) A judgment (i) confirming or varying a plan of reorganization or liquidation, (ii) granting a discharge of the debtor or of a debt, or (iii) approving a voluntary or out-of-court restructuring agreement, and

(f) A judgment for the examination of a director of the debtor, where that director is located in a third jurisdiction.

> ***It is up to each jurisdiction to define the scope and what type of judgments can be capable of recognition and enforcement as an 'insolvency-related judgment'***