Recent Changes to Insolvency Law in Ukraine

By Olha Stakheyeva-Bogovyk

Changes to Ukraine's insolvency law have been ongoing, with some driven by the natural evolution of law and practice, and others necessitated to respond to new circumstances, particularly the Russian Federation's invasion of Ukraine since February 2022.

Permanent Changes to Ukraine's Insolvency Law

The first set of changes are permanent and were introduced by the Law of Ukraine No. 2971-IX[1] dated 20 March 2023, effective as of 15 April 2023. These changes will remain in effect regardless of the martial law imposed due to war-related circumstances. The key amendments to the insolvency law, specifically the Code of Ukraine on Bankruptcy Procedures (hereinafter 'BCU'), as introduced by this law, are discussed below.

First, the joint and several liability of directors for failure to file for insolvency within one month of the "threat of insolvency"[2] has been expanded to debtor's management. Should the court establish the failure to act accordingly, it shall be a legal basis for seeking creditor compensation from the persons at fault (article 34(6) of the BCU).

Additionally, the transaction avoidance rules (article 42 of the BCU) have also been revised. First, the requirement to demonstrate that a transaction caused loss or damage to the debtor or creditors has been removed. Now, it is sufficient to show that the transaction violated rights of the debtor or creditors. Moreover, persons who executed and approved "antecedent" transactions as defined by article 42 of the BCU can now be held subsidiary liable for the debtor's obligations, equal to the amount of loss or damage (article 42(5) of the BCU). Recent court practice[3] has taken an arguably broad interpretation of the term "persons" in relation to subsidiary liability by including the counterparties to such transactions (including their directors and ultimate beneficial owners) , and without the necessity to pursue transaction avoidance claims as a primary remedy.

A procedural change includes the introduction of summary (simplified) adversarial proceedings in cases where the debtor is a party, within pending insolvency proceedings, for example such as transaction avoidance claims. Whether to allow a claimant's request for full adversarial proceedings remains subject to the court's discretion.

Improvements have been made to the cross-border insolvency framework, specifically regarding the concept of 'reciprocity' under Chapter 8 of the BCU. The former "reciprocity" test, which required an international treaty on cross-border insolvency cooperation, has finally been eliminated. Given that, and together with other provision in place, which allows to refuse recognition of a foreign insolvency proceeding, should there be evidence of non-cooperation from foreign courts or insolvency practitioners, the shift now reflects a concept referred to in academic literature as "negative reciprocity", where reciprocity is presumed, unless proven otherwise. In practice, the burden of proof should now rest on the party contesting recognition, who must provide evidence of a foreign court's refusal to cooperate.

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[1] https://ips.ligazakon.net/document/T232971?an=1

[2] 'Threat of insolvency' is when satisfaction of claims of 1 or more creditors shall lead to inability of the debtor to fulfil its money obligations in full before other creditors, or in other cases envisaged under the BCU.

[3] The Supreme Court Judgment dd. 8 June 2023 in Case No. 910/17743/18 (bankruptcy case against LLC Avrora-U, initiated by PJSC Avant-Bank), https://reyestr.court.gov.ua/Review/112271477 (in UKR).

The scope of court decisions subject to cassation review has been expanded. This now includes preliminary rulings, decisions on creditors' claims filed outside prescribed deadlines, decisions in insolvency-related matters.

Procedural predictability has been reinforced, particularly concerning the territorial jurisdiction of courts that opened insolvency proceedings, with no effect to further forum shopping once proceedings have commenced.

Other amendments include giving priority to the first insolvency application in case of concurrent filings, introducing a composition agreement as a separate ground for closing insolvency proceedings at any stage, allowing for the possibility to return to a rescue procedure even after the debtor has been declared bankrupt and admitted to liquidation) (subject to the creditors' approval of the rescue plan), and permitting the re-opening of closed insolvency proceedings upon discovery of debtor's assets sufficient for covering the costs of such proceedings.

Temporary Modifications to Ukraine's Insolvency Law

The second set of changes, introduced by the Law of Ukraine No. 3249-IX[4] dated 13 July 2023 (effective as of 29 July 2023), primarily addresses temporary modifications to insolvency law in response to war-related circumstances. These provisions will remain in force for the duration of martial law in Ukraine and for six months following its termination, with some exceptions discussed below.

The key provisions introduced by these martial law-related changes include:

1. The ability to hold remote general meetings of creditors via videoconferencing and polling;
2. Exemption of insolvency practitioners from liability for non-performance of obligations under the BCU if such non-performance was caused by armed actions in areas where the debtor, creditors, debtor's, or insolvency practitioner's assets and operations are located;
3. The court's discretion to extend procedural deadlines, including extending the moratorium and time limits for transaction avoidance claims;
4. The ability to commence insolvency proceedings with a deferred advance remuneration payment to the insolvency practitioner;
5. A mandatory assessment of the loss and/or damage caused to the debtor by the armed aggression against Ukraine;
6. Exemption of the debtor's management from joint and several liability for their failure to file for insolvency within one month time of insolvency threat, provided that this failure was due to the armed aggression against Ukraine or the debtor's operations being located in the territories temporarily occupied by the Russian Federation;
7. The court's discretion to refuse opening insolvency proceedings upon a creditor's application if the debtor is involved in defense-related contracts with the state or can prove that its failure to satisfy creditors' claims resulted from the armed aggression against Ukraine, including the occupation of its assets.

In addition to these temporary changes, a permanent amendment allows insolvency practitioners to utilise the Insolvency Practitioner's Request (IPR), allowing them to request information and documents from any state, private or public organizations, including financial and non-financial institutions, to facilitate the administration of the insolvency case and the effective discharge of their duties.

[4] https://ips.ligazakon.net/document/view/T233249?an=19

Way Forward

Finally, a third set of anticipated changes relates to the implementation of the Directive (EU) on Preventive Restructuring Frameworks 2019/1023, a requirement for Ukraine from the European Union for disbursement of€18 billion in micro-financial aid. On 9 May 2024, the Parliament of Ukraine adopted draft law No.10143 in its first reading, with a shortened timeline for preparation for the second reading. The proposed law aims to reform Ukraine's current preventive restructuring framework (i.e., article 5 of the BCU on pre-trial rescue). While the draft law contains numerous contradictions and imperfections, the final adopted version remains to be seen.

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