

(g) demanding the repayment of the loan after the expiration of the statute of limitations.

In 2007 the NBU adopted regulations on mandatory disclosure to individual customers of the essential information relating to consumer loans by Ukrainian banks. According to the NBU Regulation "Rules Governing Disclosure of Consumer Information by Ukrainian Banks, Related to Consumer Loans Terms and

Overall Cost of Credit", approved by NBU Resolution No.168 dated 10 May 2007, all banks are required to disclose the effective rate of interest under loans granted to individual consumers in the text of the loan agreement. Also, banks are required to obtain a written confirmation from the consumer stating that he/she has received all the information from the bank relating to the terms and conditions of the loan and, specifically, the costs of the loan to the consumer.

BANKRUPTCY/ FINANCING RESTRUCTURING

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BANKRUPTCY / RESTRUCTURING

Legal framework

Ukrainian bankruptcy law differs from the bankruptcy laws of England and the United States, and is subject to varying interpretations. The primary legislation in the sphere of bankruptcy is Law of Ukraine "On bankruptcy" No. 2343-XII dated May 14, 1992 ("Bankruptcy Law"). The Bankruptcy Law has been regularly amended since 1993. Bankruptcy procedures are also regulated by separate chapters of Commercial Procedural Code of Ukraine No.1798-XII dated November 6, 1991, Commercial Code of Ukraine No.436-IV dated January 16, 2003, and Civil Code of Ukraine No.435-IV dated January 16, 2003. Furthermore, certain specific rules for bankruptcy of banks are established by Law of Ukraine "On banks and banking activity" No.2121-III dated December 17, 2000 ("Banking Law").

Insolvency

If a company is not able to fulfill its monetary obligations in due time with regard to other parties, a local community or the state, in any way other than through restoration of its solvency, this entity (a debtor) shall be recognized insolvent. The owners of a debtor may try to restore a debtor's solvency. Debtor's incapability to restore its solvency and satisfy the creditors' claims in any way other than through liquidation procedure carried out by the court shall be deemed as bankruptcy.

Bank's insolvency. Provisional administration

In case of existence of considerable threat to the bank's solvency the National Bank of Ukraine ("NBU") is entitled to establish a provisional administration for not more than one year. The provisional administration is imposed *inter*

alia in the following cases: systematic violations by a bank of the NBU regulations, decreasing the bank's regulative capital by 30% within the last six months with simultaneous violation of at least one economic normative, failure of a bank within 15 working days to fulfil at least 10 % of its overdue liabilities, etc. Provisional administration is carried out by a provisional administrator appointed by the NBU. Since appointment of the provisional administration, the powers of the General Shareholders' Meeting, Supervisory Board and Board of Directors of the bank are suspended and transferred to the provisional administrator.

Since the day of his appointment the provisional administrator has a full and exclusive right to manage and control the bank, and to take any actions aimed at restoring the bank to satisfactory financial condition, or if possible, to prepare the bank for sale, reorganization or liquidation in order to protect the interests of depositors or other creditors. For these purposes a provisional administrator is entitled *inter alia* to continue or stop any operations of the bank and to terminate any contracts to which the bank had been a party that are, in the judgement of the provisional administrator, no longer necessary or beneficial to the bank. In addition, the Banking Law permits a provisional administrator of a bank to request a Ukrainian court to declare invalid, among other agreements to which such bank may be party, an agreement between the bank and a third party, if there has been, under such agreement, "any operation" (meaning a payment or other transaction):

- (i) within a six month period before the appointment of such provisional administrator, and the purpose of the operation was to grant a preference to such third party compared to the bank's other creditors;
- (ii) within one year before the appointment of such provisional administrator between the bank and a related

party, and the operation contravened the requirements of Ukrainian legislation or “threatened the interests of depositors and creditors” of the bank;

(iii) within three years before the appointment of such provisional administrator, with the purpose of alienating any of the bank’s assets free of charge or purchasing assets or services by the bank at a price significantly higher than the value of such assets or services;

(iv) within three years before the appointment of such provisional administrator, with the purpose of concealing assets from the bank’s creditors or otherwise violating the rights of such creditors;

(v) at any time, if such operation has been based on forged documents or if it was of fraudulent nature.

Institution of bankruptcy proceedings by the court

Upon a request of a debtor or a creditor the bankruptcy proceedings shall be instituted by the court if the aggregate indisputable claims of the creditor (creditors) to the debtor amount to at least 300 minimum wages (at the moment minimum wage equals UAH 545) and have not been satisfied by the debtor within 3 months upon the deadline set for the satisfaction of such claims. However, a creditor may submit application for institution of the bankruptcy proceeding irrespective of the amount of its claims to the debtor and the maturity of liabilities in case of absence of management bodies of the debtor at the registered address of the debtor, or in case of failure of the debtor to submit to the state tax department tax declarations, accounting documents as required by Ukrainian law during more than one year, or in case of other findings attesting to termination of debtor’s business activity.

The bankruptcy proceedings are held exclusively through the court. There are four stages of bankruptcy proceedings according to the Bankruptcy Law: disposal of the debtor’s property; execution of amicable agreement; sanation (restoration of solvency) of a debtor; and liquidation of a bankrupt. The debtor may be declared a bankrupt at any of the above stages. Ukrainian bankruptcy law regulates in details each of the above stages.

Participants of the bankruptcy procedures

According to the Bankruptcy Law the following persons may participate in bankruptcy proceedings: a court, a debtor, its owner(s), its creditors, arbitration manager, representative of the state authorities, etc.

Creditors

All the creditors in bankruptcy proceedings are divided into three categories: (i) bankruptcy creditors, (ii) secured creditors and (iii) current creditors. While each of

these three categories of creditors has the same basic interest – prompt and complete payment of all debts – the law affords each distinctive rights and remedies. Bankruptcy creditors are creditors which claims to the debtor arose prior to the institution of bankruptcy proceedings and whose claims are not secured. Secured creditors are bankruptcy creditors whose claims to the debtor are secured. Current creditors mean creditors which claims to the debtor arose after the institution of bankruptcy proceedings.

Not all bankruptcy creditors may require settlement of their claims but only those that have submitted to the court their claims to the debtor within 30 days upon the publication of the announcement about instituting the bankruptcy procedure in newspapers “Holos Ukrainy” or “Uryadovi Kuryer”. The claims of bankruptcy creditors stated after expiration of the period determined for their submission, or are not stated in general shall not be examined and shall be considered as discharged. The specified period is limited and shall not be subject to the renewal. Secured creditors shall have the right to put forward claims to the debtor to the extent not covered by the collateral or in the amount of the difference between the claim and the proceeds, which can be derived from the sale of the collateral, if the value of the collateral is not sufficient for the satisfaction of the claim in full.

Interests of the creditors whose claims were included into the registry of the claims elect the committee of the creditors at the meeting of the creditors for presentation of their interests in the course of the bankruptcy proceedings. The committee of the creditors is entitled *inter alia* to apply to the court for termination of the powers of the arbitration manager and appointment of the new arbitration manager, to approve material agreements (agreements which book value exceeds 1% of the property of the debtor’s assets), etc.

Arbitration manager

Arbitration manager is a licensed person acting as a property manager, sanation manager or liquidator at the respective stage of the bankruptcy proceedings. The same person may act as arbitration manager (property manager, sanation manager, and liquidator) at all stages of the bankruptcy proceedings.

Upon appointment of the arbitration manager powers of the manager and other management bodies of a debtor shall be considerably restricted or terminated. The Bankruptcy Law empowers arbitration manager with wide scope of authorities varying depending on the certain stage of the bankruptcy proceedings. Thus, if on the stage of disposal of the debtor’s property, the scope of the authorities of the arbitration manager is rather narrow and includes approval of the debtor’s significant decisions and material transactions related to disposal of the debtor’s property, on the sanation and liquidation stages,

they also include certain authorities related to management of the debtor, rights to refuse from performance under debtor's agreements and to recognize the agreements executed by the debtor invalid through the court.

Moratorium

The court may introduce a moratorium for settlement of creditors' claims simultaneously with initiating of bankruptcy proceedings and till their termination. As to banks such moratorium may be established by the NBU during the provisional administration (prior to the bank's entering into bankruptcy proceedings), but no longer than for the six-month period. During the term of moratorium, a debtor may not perform its monetary obligations and obligations related to payment of taxes and other state duties arose prior to imposition of moratorium. The debtor may not be held liable for the non-performance of its obligations to its creditors resulting from imposition of moratorium. Upon the termination of the moratorium the creditors would be entitled to make and to enforce claims against the debtor in the amounts existing as of the date when the moratorium was imposed.

Priority of Settlement of Creditors' Claims

Often, a debtor lacks sufficient assets to pay all of his creditors. In such a case, Ukrainian bankruptcy law establishes certain priority rules. The priority rules of the Bankruptcy Law distinguish from the ones envisaged by the Banking Law for banks. Thus, the Bankruptcy Law establishes the following priority for settlement of creditors' claims:

- 1) secured claims and monetary claims related to the salary, which have arisen from liabilities of the bank to its employees prior to the initiation of the bank liquidation procedure; expenses of the Individual Deposit Guarantee Fund; court expenses;
- 2) liabilities that have arisen as a result of damaging life and health of individuals;
- 3) liabilities related to payment of taxes and other state duties (statutory payments);
- 4) not secured creditors' claims, including claims of creditors arising from the liabilities in the course of the debtor's property management or sanation procedure;
- 5) claims of debtor's employees as to return of their contributions into the debtor's charter capital;
- 6) other claims.

The claims of each following line shall be satisfied as long as funds derived from the sale of the bankrupt's property are received at the account and after the full satisfaction of claims of the previous line.

The Banking Law envisages a slightly different priority for settlement of creditors' claims:

- 1) liabilities that have arisen as a result of damaging life and health of individuals;
- 2) monetary claims related to the salary, which have arisen from liabilities of the bank to its employees prior to the initiation of the bank liquidation procedure;
- 3) claims of individual depositors in terms of excess over the amount envisaged by the individual deposit guarantee fund system, but not more than an amount equivalent to UAH 50,000;
- 4) claims of individual depositors in excess of the amount equivalent to UAH 50,000;
- 5) claims of the Individual Deposit Guarantee Fund;
- 6) claims of individuals, whose payments or payments to whom have been blocked (except for individual entrepreneurs);
- 7) other claims.

Amicable agreement

At any stage of the bankruptcy proceedings the debtor and creditors may conclude an amicable agreement regarding the respite and/or deferral of the payment, as well as remission (write off) of debtor's debt by the creditors.

On behalf of creditors, the decision to conclude an amicable agreement shall be passed by the committee of creditors by a majority vote and deemed adopted if all secured creditors expressed their consent to the conclusion of the amicable agreement in writing. On behalf of the debtor, the decision to conclude an amicable agreement shall be taken by the debtor's manager or arbitration manager (property manager, sanation manager, liquidator) acting as management bodies of the debtor.

The amicable agreement shall be executed in writing and subject to approval by the court. The amicable agreement shall become valid from the date of its approval by the court. The amicable agreement may not be terminated unilaterally. The approval of the amicable agreement by the court shall constitute the grounds for termination of bankruptcy proceedings.

FINANCING RESTRUCTURING

General

Ukrainian law views restructuring primarily through the prism of insolvency and bankruptcy proceedings and regulations or as a solvent corporate restructur-

ing. In the bankruptcy context it is regarded as a set of organisational, financial, legal and technical measures aimed at improving the company's financial condition, solvency, production effectiveness and ability to satisfy creditors' demands. Solvent restructuring is affected in connection with corporate reorganisations related to changes in profile of commercial activities, shareholding structure, and other similar issues related to the conduct of business or fine-tuning legal relationships between owners. These aspects of restructuring are regulated by general rules of the Civil Code of Ukraine and the Economic Code of Ukraine both dated 16 January 2003 (as amended). Certain laws and regulations provide for specific restructuring features for certain group of companies (e.g., banks, special regime companies, or companies subject to privatization). A number of rules are contained in the Law of Ukraine "On Bankruptcy" No. 2343-XII dated May 14, 1992. With the added pressure of the financial crisis, Ukrainian companies are beginning to consider various aspects of financial restructuring with the view to revitalizing the loan portfolios, optimizing the repayment schedules and refinancing troubled loans outside of bankruptcy proceedings and corporate restructurings. Financial restructuring entails restructuring of the company's assets and liabilities, including its debt-to-equity structures, in line with its cash-flow needs. In this sense financial restructuring embraces various solutions, ranging from simple rearranging of loan portfolio and refinancing exercise, to a more complex combination of financings and M&A tools, such as sales of distressed assets, recapitalizations, private equity, leveraged buyouts, sales to financial or strategic investors, etc.

Corporate reorganisation (that could be a part of a larger financial restructuring exercise) is the process of increasing the economic viability of the underlying business model. Under Ukrainian laws corporate restructuring along with liquidation is viewed as termination of the company's activity and can be exercised by merger, accession, division or transformation. However, if looking more widely, examples may also include sale of divisions or abandonment of product lines, or cost-cutting measures such as closing down unprofitable facilities. In most turnarounds and bankruptcy situations, both financial and operational restructuring are effectuated.

Financial Restructuring

Among various stress-induced financial solutions, acquisition of loans extended by Ukrainian lenders to

non-residents seems to be the most attractive and the most productive financial solution for both Ukrainian companies and foreign investors. Ukrainian laws generally permit assignment of monetary claims (such as claims against a borrower under a loan agreement) from a Ukrainian resident to a non-resident. However, due to ambiguity of some of the provisions of Ukrainian legislation regulating assignments by the lender and lack of precedents on such assignments as well as absence of any publicly available guidance from the regulator, potential investors may face certain problems, which may considerably complicate the restructuring process. Some of the apparent problems are briefly highlighted below.

(i) Currency control issues:

- a possibility of a substitution of a Ukrainian lender with a foreign lender in general is not clearly spelled out in Ukrainian law, and since borrowing from foreign lenders is subject to special regulation by the NBU, it is not entirely without doubt whether and how the NBU will permit foreign lenders to take the place of an original Ukrainian lender;
- registration of a loan agreement with the National Bank of Ukraine (the "NBU") after an assignment to a foreign lender of a loan initially extended by a Ukrainian lender may be required under NBU regulations governing loans extended by foreign residents to Ukrainian residents;
- in the absence of NBU registration of the loan agreement, an individual licence from the NBU by Ukrainian borrower may be needed to permit a Ukrainian borrower to transfer, after an assignment of a loan to a non-resident creditor, funds abroad to a foreign lender due to absence of any express requirement or exemption on this issue from a general rule according to which payments abroad could not be made unless (a) there is either an individual license of the NBU or registration of the NBU obtained for such payment or (b) such payment falls under one of the available exemptions from licensing or registration requirement;
- since the assignment of a loan agreement to a foreign lender may trigger the NBU registration requirement, maximum interest rate cap (the "MIR") will apply at the then determined rate established by the NBU for loan agreements between Ukrainian borrowers and foreign lenders. If MIR requirements are deemed applicable, an assignment of a loan agreement would be prohibited in case aggregate amount of payments un-

¹ Currently, the following MIRs are effective:

- (i) if a loan agreement with a foreign lender is registered with the NBU before 27 October 2008:
 - a) for loans with maturities of not more than one year - 9.8 per cent per annum;
 - b) for loans with maturities more than one year and less than three years - 10 per cent per annum, and
 - c) for loans with maturities more than three years - 11 per cent per annum.
- (ii) for loan agreements with a foreign lender registered with the NBU after 27 October 2008:
 - a) for loans with maturities not more than one year - 11 per cent per annum, and
 - b) for loans with maturities over one year - no MIR is applicable.

der a loan agreement exceeds the MIR applicable to loans from a foreign lender with similar maturities².

(ii) Factoring issues:

- where an assignment could be deemed a factoring operation, (i.e. a financing extended in consideration for an assignment of a monetary claim), specific rules regulating factoring would apply;
- due to application of such rules, assignment between banks by way of factoring of certain types of receivables could be restricted, including receivables under loans;
- to avoid risks to the validity of such operations, a certain fee or other consideration will need to be payable by the Ukrainian lender to a foreign lender acting as an assignee based on the general legal requirement applicable to all financial services, including factoring operations.

Corporate Reorganisation – Possible Restrictions

Corporate reorganisation is often inevitable for companies in or approaching financial distress, especially for the subsidiaries and affiliates of large industrial groups and holdings. Well-planned corporate reorganisation could assist in eliminating or mitigating financial problems of a group by diversifying and/or concentrating its assets and liabilities and optimising its operational activities. However, in most cases any kind of corporate reorganisation is generally limited by financing arrangements (such as loan agreements) executed by group companies. This includes contractual provisions ranging from early repayment right granted to lenders in case of a change of control or corporate restructuring to events of default of similar nature leading to immediate acceleration under the respective loan. Therefore, prior to exercising any corporate reorganisation, the following issues should be taken into consideration and possible brought up with existing lenders:

- **Wording:** exact wording should be checked and compared against the contemplated action plan. Corporate reorganisation is usually defined broadly in fi-

ancing agreement and may include announcement or occurrence of any amalgamation, merger, division, spin-off, transformation or other reorganisation or restructuring under applicable Ukrainian legislation, or any other reorganisation or restructuring under the laws of any other relevant jurisdiction and, as such, should be construed more widely than what can be expected under the Ukrainian laws;

- **Communications:** a borrower and its subsidiaries are often prohibited from conducting any corporate reorganization or are required to obtain a prior written consent from a lender. It should be noted however that such restriction is typically limited by a material adverse affect caveat (defined in each separate loan agreement). In addition, subject to certain specific requirements, intergroup reorganisations as well as corporate reorganisations required by law are often required. Failure to comply with “no corporate reorganisation” covenants and undertakings under customary provisions of financing agreements are deemed to constitute an event of default under a loan agreement and trigger acceleration;
- **Interplay:** special attention should be paid to interrelation between parents companies and subsidiaries. Often parent company’s financing arrangements would prohibit corporate reorganisation for its affiliates and/or subsidiaries, so whenever a reorganisation of a company is considered it is advisable that financing arrangements of both such company and its parent companies are examined.

This article is intended as a summery overview of potential solutions, risks and considerations available to Ukrainian and foreign companies in connection with restructuring of Ukrainian entities. We should like to emphasize that resolving the above issues and taking a decision on proceeding with a situation-specific restructuring solution requires thorough analysis of company’s business, its financial conditions and prospects, debt portfolio, capital structure as well as detailed examination of all effective loan agreements and other related arrangements.