

Insolvency of Ukrainian Banks



by Taras K. BURHAN

The Ukrainian economy has experienced a significant downturn as a result of the current global financial crisis. This has had a detrimental effect on its banking system and contributed to the financial difficulties experienced by a number of its banks. About a dozen banks have decided to pass a majority stake to the state. In such circumstances, unsecured creditors of debtor banks start to review their enforcement options.

As of 1 January 2009, over 14,000 general insolvency proceedings were pending in Ukrainian courts. Only 13 of 199 registered banks are currently in liquidation – 10 due to decisions adopted by the National Bank of Ukraine and three as a result of court judgments. These figures indicate how little experience Ukrainian courts have of insolvency involving banks.

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Court judgment

If a bank defaults on a payment, a creditor may apply to a commercial court for judgment which would, in effect, compel the debtor to pay the creditor the amount due. This would not be possible if there were an arbitration clause in the relevant loan agreement ousting the court's jurisdiction.

Assuming it is possible, the court judgment would represent an enforcement document which could be legally enforced against the debtor's assets, with the assistance of bailiffs if required. It would also make the creditor's claim indisputable, enabling him to initiate insolvency proceedings if the claims are not satisfied within three months.

If the debtor bank does not satisfy the claim within 6 months of the judgment date, the National Bank of Ukraine must revoke its banking licence.

Insolvency proceedings

The statutory insolvency of Ukrainian banks is regulated by the *On Banks and Banking Activities Act of Ukraine* and the *On Restoring a Debtor's Solvency or Declaring a Debtor Bankrupt Act of Ukraine*. Where two laws clash, the former prevails.

Before initiating proceedings, a creditor must first apply to the NBU. His eligibility to proceed depends on him having an indisputable claim for at least EUR 18,000 (about 300 times the size of the statutory minimum wage) which is at least 3 months overdue. Proceedings must be brought in the commercial court where the bank is located.

The law is unclear whether the debtor bank can itself initiate bankruptcy proceedings against itself.

The NBU has a number of statutory powers which enable it to influence the insolvency proceedings, including the right to conduct an assessment of the bank, initiate proceedings, revoke licences and appoint a liquidator. In some cases, it also has the right of veto.



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In many aspects, insolvency proceedings are no different for banks than they are for other debtors. For example, they are subject to the same notification requirements, the same range of proceedings (administration, amicable settlement, financial rehabilitation and liquidation) and the same right for certain other parties to challenge past transactions.

Liquidation

The worst case scenario arises when a debtor bank goes into liquidation. In this situation, the proceeds from disposal of its assets should be distributed amongst creditors. The claims of secured creditors take precedence over statutory rankings, and should be satisfied from the value of their collateral.

All other claims are satisfied in strict order of priority, with employees and

individual depositors coming before unsecured corporate creditors:

1. Claims for damage to life and health.
2. Claims for unpaid salary.
3. Claims by individual depositors up to UAH 50,000 (above UAH 150,000 due from IDGF).
4. Claims by individual depositors above UAH 50,000 (above UAH 150,000 due from IDGF).
5. Claims by the Individual Deposit Guarantee Fund.
6. Claims for blocked payments to/ from individuals.
7. Other claims.

Licence revocation

If a bank has not satisfied creditors' claims within 6 months of a court judgment being obtained, the NBU must

revoke its licence. In doing so, it would publish a notice in the national press, either in the *Holos Ukrainy* or *Uryadovy Kuryer* newspapers.

Revocation of the licence would result in the termination of all banking operations, thereby preventing the leakage of funds and assets from the bank. All management powers would pass to the liquidator. A rescue would not be possible: liquidation would be inevitable.

Temporary administration

The process of temporary administration is in many ways similar to financial rehabilitation in statutory insolvency proceedings, and will lead to a change in control of the bank. It is imposed by the NBU if there is a financial threat to the bank's solvency, and is typically accompanied by a six-month moratorium.

The NBU appoints a temporary administrator to run the bank for up to 12 months, with the power to make crucial decisions for its future, including any reorganisation or share issue, and the ability to challenge certain transactions in court.

If the bank is not returned to solvency by this process, it will go into liquidation.

Practical advice

Creditors wanting to protect their position against banks in financial difficulty face a number of possible options. They should pay close attention to the notices in *Holos Ukrainy* and *Uryadovy Kuryer* and also to encumbrance register, to check for enforcement actions by other creditors.

They might also consider trying to freeze the situation by asking the NBU to appoint a temporary administrator or revoke the bank's licence. Alternatively, they may offer the bank some breathing space, perhaps by signing a standstill agreement to allow it restructure elements of its business. Before doing so, they should ask it to sign the act of verification of debts, which may save them valuable time on the way to filing an insolvency petition in the event that restructuring arrangements fall apart. ■

