

# Financing in Ukraine

Whether lending directly to a Ukrainian borrower, or relying on guarantees or security from a Ukrainian obligor, there are a number of important Ukrainian law issues which lenders need to consider. When structuring any deal involving Ukraine care needs to be taken to ensure that the unique characteristics of the Ukrainian legal and regulatory environment are taken into account.

**Below we highlight a few of the more common issues which arise in financings connected with Ukraine.**

## Regulatory requirements

**Ukraine currently has in place a very restrictive currency control regime. The main characteristics of this regime are as follows:**

### NBU registration

All loan agreements with a Ukrainian borrower and a non-Ukrainian based lender, except if to, or guaranteed by, the government of Ukraine, must be registered with the National Bank of Ukraine (the "NBU"). Without such registration no bank in Ukraine will permit a Ukrainian entity to transfer money abroad in repayment of the loan or payment of interest or fees in connection with the loan. Registration is evidenced by an inscription which the NBU makes on the form submitted to register the loan ("NBU registration certificate").

The NBU regulations require a clause to be included into cross-border loan agreements, which states that the entire loan agreement only becomes effective after its registration with the NBU. The NBU will only register loan agreements with this clause included. This obviously has implications for lenders. For example, if the cost indemnities are only contained in the loan agreement (and not any other document, such as a mandate letter) and NBU registration is not obtained then the borrower may not be bound to reimburse the lender's costs. This requirement does not apply to loan agreements between a Ukrainian resident and certain international financial institutions (such as EBRD and the IFC).

The NBU may cancel registration of a loan agreement if the first utilisation of the loan has not occurred within 180 days of its registration. Such cancellation can be initiated either by the borrower or its account bank (which is usually the case).

NBU registration certificates need to be amended or updated if certain terms of a loan agreement change, for example, changes in the interest rate, the amount of the loan, the final maturity date or the lenders. This is particularly important for lenders to consider when thinking about syndication or transfers of loans.

If the rights of a lender under a loan agreement are transferred by that lender then, in order for the transferee to receive payments under the loan agreement, the NBU registration certificate must be amended to reflect such transfer. The issue

## Key issues

- Currency and Regulatory Controls
- Registering Security
- Issues with Standard Clauses
- Guarantees and Suretyships
- Parallel Debt
- Syndication/Subparticipation
- Public searches
- Choice of law

## Contact details

If you would like to know more about the subject covered in this publication or services, please contact:

**Jared Grubb** +380 44 390 5885

**Olexiy Soshenko** +380 44 390 2213

**Dmitriy Orendarets** +380 44 390 2217

To email one of the above, please use [firstname.lastname@cliffordchance.com](mailto:firstname.lastname@cliffordchance.com)

with this is that only the borrower is able to apply for the amendment of the NBU registration certificate and so the co-operation of the borrower is needed. This obviously causes difficulties if the relationship with the borrower has broken down due to a default or the borrower's insolvency. Further, in order to effect the amendment the Borrower may be required to submit to the NBU, among other things, the transfer document by which the lender transferred its rights.

These issues arise in both bi-lateral and syndicated loans. With syndicated loans lenders should be particularly careful as if payments are being made through the facility agent then as a matter of practice, the NBU registration certificate may not have been updated when each lender transfer occurred. The reason for this is that as payments are made to the facility agent the Ukrainian account bank may not have been aware of the transfer and the need to update the NBU registration certificate. The concern is that if a lender acquires an interest in a loan that has been transferred several times then, unless such lender can obtain all of the documents evidencing each transfer in the chain, they may not be able to have the NBU registration certificate updated. In most circumstances this may not be an issue, but definitely would be an issue if the facility agent was insolvent and a lender was looking to obtain payments directly from the borrower.

## Cost of funding cap

The NBU has in place a "cost of funding cap" on all cross-border loans, except for cross-border loans granted by certain international financial organisations (such as EBRD and the IFC). The current cap rates are:

### Fixed Rate Loans

Term of less than 1 year	9.8% per annum
Term of between 1 and 3 years	10% per annum
Term greater than 3 years	11% per annum

### Floating Rate Loans

Any term	LIBOR for three months USD deposits plus 7.5%
----------	---

Borrowers are not permitted to make payments under a loan agreement to the extent that the total cost of funding the loan exceeds the cap. In determining the cost of funding, all costs, including interest, default interest, fees, costs and expenses are included into the calculation, irrespective whether it is an actual payment, such as interest, or a contingent payment, such as a default interest or a commitment fee. How the NBU calculates the cost of funds is not clearly regulated and the practice of the NBU is inconsistent. Borrowers are advised to clear this issue with their Ukrainian account bank before signing a loan agreement to avoid having to make subsequent amendments.

When determining which term a loan falls into, the NBU takes into account the actual time of the usage of the funds (i.e., the time period from the date of the first disbursement to the date of the anticipated maturity). However, if the actual time of usage of the funds ends up being different from that initially contemplated, for example as a result of voluntary prepayment or acceleration, then the borrower will be restricted from making payments under the loan agreement to the extent such payments exceed the applicable cost of funding cap for the period the loan was actually outstanding.

## Licence to make payments

As a general point, if anyone in Ukraine wants to make a payment to someone outside of Ukraine a licence is required from the NBU.

Certain exemptions do apply, for example, payments of principal and interest under a cross-border loan agreement are permitted without a licence if the relevant loan agreement is registered with the NBU. However, the exemption does not cover all payments which are typically contemplated in a loan agreement. For example, the payment of amounts in respect of any tax gross-up or tax indemnity, any costs and expenses, any amounts indemnified or the payment of break costs are all not exempted. The result of this is that technically a NBU licence may be required for a Ukrainian entity to make such payments.

A payment by a Ukrainian guarantor (surety) to a lender based outside of Ukraine in respect of a loan to a foreign borrower also requires a NBU licence.

Lenders should be cautious of payments which require a licence, as these licences can only be obtained by the borrower or guarantor themselves, cannot be obtained in advance and are granted at the discretion of the NBU.

The NBU in exercising its discretion to grant or not grant such licences regularly refuses to grant them. In practice, even if the NBU decides to grant the licence, it can take several months to obtain such a licence.

### Bank accounts abroad and disbursements

Subject to a few exemptions, Ukrainian entities and individuals are prohibited from opening and operating bank accounts outside of Ukraine without a NBU licence. Obtaining such licence is difficult and it may be issued only for a period of not more than one year at a time.

Loans to Ukrainian borrowers must be disbursed by foreign lenders either to: (i) the Ukrainian borrower's bank account in Ukraine (which occurs in the majority of cases); (ii) the foreign bank account of a foreign supplier selling goods to the Ukrainian borrower; or (iii) the Ukrainian borrower's foreign bank account if a current NBU licence exists to open and operate such account.

### 90 day rule

Payment for the delivery of goods or services provided by a Ukrainian entity must be received by that entity in Ukraine no later than 90 days after the date of shipping the goods or performing the services. Similarly, where a Ukrainian importer makes a payment (in whole or in part) for goods to be imported, those goods must arrive in Ukraine no later than 90 days after the date of such payment. Failure to comply with either of these rules will result in a fine being imposed on the Ukrainian entity equal to 0.3% of the amount of the contract for each day in excess of the applicable 90 day period until the obligation is satisfied (i.e. the payment received or the goods delivered).

Such restrictions need to be factored into in certain types of financing, for example, pre-export financings and structures that involve assignments of export receivables. In these structures, while the assignment itself will be legal, binding and enforceable the parties need to be aware of the implications for the Ukrainian entity.

### Investing abroad

In order for a Ukrainian entity or individual to acquire shares, securities or make other investments outside of Ukraine, the Ukrainian entity or individual needs to obtain a NBU licence, which can take same time to obtain.

### Price Evaluation Act

Should payments of fees under any agreement exceed EUR100,000, then the borrower will be required to obtain a Price Valuation Act before paying such fees. This is a fairly administrative procedure which takes a couple of weeks to complete; while normally granted, obtaining such an Act is not a certainty.

### Foreign currency and borrowing to make payment under guarantees

The NBU regulates when and for what purposes entities are permitted to purchase foreign currency in Ukraine.

The most common issue facing lenders with this requirement is in relation to payments by guarantors (sureties). Even if a NBU licence is obtained to permit a guarantor (surety) to make a cross-border payment under a guarantee (suretyship), guarantors (sureties) are not permitted to purchase foreign currency to make the payment and therefore need to use their own foreign currency reserves.

The ability of a borrower to purchase foreign currency for the performance of its obligations may be also limited by the currency position of the account bank.

In addition, Ukrainian entities are not permitted to use the proceeds of a loan to make payments under a guarantee (suretyship).

## Enforcement proceeds

There can be issues with converting and transferring abroad funds obtained as a result of the enforcement of security in Ukraine. The legislation has recently been amended to make conversion and transfer abroad by the state bailiffs easier, but in practice this remains an issue as it requires cooperation from the state bailiff and the account bank.

## Security

Other than the issue of registration, we do not deal with taking or enforcing security in Ukraine in this client briefing, as it is the subject of several separate specific client briefings. Please contact us if you would like more information about taking or enforcing security in Ukraine.

## Registration

In general, any security taken over an asset or a right in Ukraine needs to be registered in the applicable public register in order to give the lender priority against third parties and to be recognised in the insolvency of the person granting the security.

Security is normally registered in the following public registers:

- for security over land and buildings, the State Registry of Property Rights to Real Estate ("Property Rights Registry"); and
- for other assets, the Movable Encumbrances Registry.

In both cases the security is registered in real time by a Notary, who can check in real time whether any other security interests are registered in relation to the asset being secured.

There are other registries for certain very specific assets.

## Renewal

The registration of any pledge over movable property (basically anything other than land and buildings) is only valid for five years. In order to extend the validity of the registration for another five years, a lender must file a request to extend the registration with such registry before the expiration of the five-year term.

Any update made during the five year period as a result of any amendments to the pledge will not of itself extend the five year period.

Failure to re-register will not terminate the pledge, but will mean that the registration lapses and will no longer appear in searches and consequently the lender would not have priority against any other registered pledgee or a liquidator. Also, the pledge will not follow the assets if the pledged assets are transferred to a bona fide purchaser without notice of such pledge.

## Notarisation

### Notarisation

The following finance documents must be notarised:

- pledges over vehicles;
- mortgages; and
- pledges over receivables (contractual rights), if the underlying contract (such as a lease contract) was notarised.

In addition, a pledge can also be voluntarily notarised if the parties wish. The benefit in doing so is that it allows enforcement on the basis of a notarial writ of execution without the need to obtain a court order.

## Notary fees

Private notaries charge or collect two fees, the statutory fee payable for certain transactions and their own fee for notarising the document. The second part of a notary's fee is negotiable and varies from notary to notary.

In general the following transactions will require the payment of a fee to a notary:

- notarisation of a mortgage, pledge, assignment or any other agreement;
- obtaining extracts from any state registry;
- registration of certain agreements with a state registry;
- notarisation of a translation of any agreement into Ukrainian or a foreign language;
- notarisation of any power of attorney issued by a Ukrainian entity or individual; and
- notarisation of any copy of a document.

## Standard loan agreement clauses

**Enforcement of some standard loan agreement clauses can be problematic in Ukraine. Some of the clauses of concern are:**

### Market disruption and increased costs

Ukrainian law does not permit:

- the unilateral increase by a lender of interest or other payments due under a loan agreement; or
- a lender to terminate a loan agreement, or demand the prepayment of a loan, if the borrower does not accept an offer from the lender to increase interest or other payments under a loan agreement.

As a result, lenders need to be aware that a borrower may use these prohibitions to challenge market disruption, increased costs or similar clauses in loan agreements. We believe that these clauses do not breach Ukrainian law as they provide a pre-agreed mechanism and as such do not result in a unilateral increase within the sense of Ukrainian law. However, the risk cannot be excluded that should a Ukrainian court ever have the opportunity to review such clauses, it may declare them invalid. As an aside, if these clauses were triggered the borrower may need to register any increased interest rate with the NBU before it could make any payment of such amount and such increase would be subject to the cost of funding cap.

### Waiver of rights

Under Ukrainian law, certain statutory rights and entitlements, such as the right to sue, may not be contractually limited or restricted. This is because they are viewed by Ukrainian law as inherent in the legal capacity of a Ukrainian legal entity or an individual and inseparable from such entity or person.

### Tax Gross-up

Ukrainian law prohibits the inclusion of provisions into contracts where one party undertakes to pay the taxes of another party.

As a result, there is uncertainty about the enforceability of tax gross-up clauses. While tax gross-up provisions are normally drafted as payments of an increased amount rather than as payments of tax, there is a risk that these provisions may be characterised as a payment of tax of another person and held invalid on those grounds.

We note that in some recent cases the NBU has refused to register loan agreements containing tax gross-up language.

## Replacement of Agent

Due to the loan registration requirements, lenders need to be aware of the limitations this imposes in relation to any changes to the agent. In addition, the operation of clauses in standard loan agreements which, for example, provide alternative payment arrangements should the facility agent become insolvent need to be considered carefully.

## Searches

### Public searches

The main searches that can be conducted in Ukraine are:

- of the Unified Registry of Enterprises the subject of Bankruptcy Proceedings to determine if insolvency proceedings have been commenced;
- for banks, of the web-sites of the NBU and the Deposit Guarantee Fund in relation any temporary administration of such bank;
- of the Movable Encumbrances Registry in relation to registered pledges, tax liens and other encumbrances;
- of the Property Rights Registry in relation to registered mortgages, arrests, leases and other encumbrances;
- of the Unified State Registry of Legal Entities and Individual Entrepreneurs to determine if an entity is registered;
- of the database of the Ministry of Economics of Ukraine to determine if a Ukrainian entity has any sections imposed upon it; and
- of the Unified State Registry of Enforcement Proceedings to determine if any enforcement proceedings have been commenced.

While these searches can be made publically, it is our experience that some of these searches are unreliable. In particular, there can be delays in updating the information contained in the databases.

Ukrainian law does not provide any protection for people who rely upon the outcome of these searches.

Another issue with the searches is that registrations in the Movable Encumbrances Registry and the Property Rights Registry are made in Ukrainian. This means that for a foreign company a Ukrainian transliteration of the name of that company will be used. As there are often several ways of transliterating the name of a foreign entity into Ukrainian this can result in unreliable search results.

The search with the Ministry of Economy of Ukraine is undertaken as the Foreign Economic Activity Law permits the Ministry of Economy to impose certain sanctions or restrictions on a Ukrainian company. These can have the effect of prohibiting a company from entering into contracts with foreign entities.

### Searches not able to be undertaken publically

Currently it is not possible to conduct a full search of a particular land plot or building in Ukraine unless you are the owner of that land plot or building. Therefore, anyone looking at purchasing land or a building needs to rely on the search obtained by the vendor.

## Guarantees (suretyships)

Ukrainian companies, other than banks or financial institutions, lack the capacity to enter into what Ukrainian law calls *garantiya*, the English law equivalent of which is the "indemnity" in a "guarantee and indemnity". They do have the capacity to enter into what are called *poruka*, the English law equivalent of which is a "suretyship" or "guarantee".

In practice this results in the following implications for standard English law guarantees and indemnities:

- often the nomenclature is changed so that the guarantee is called a suretyship and the guarantor a surety. This is simply to avoid issues with direct translation of the English word "guarantee" into Ukrainian, which could be mistranslated into the word *garantiya*;
- the difference between the two types of obligations under Ukrainian law is that a *garantiya* will continue if the obligation guaranteed ceases to exist, whereas for a *poruka* if the obligation ceases to exist it will fall away as well. This means that the only offending provision, from a Ukrainian law point of view, in an English law guarantee and indemnity is the indemnity which operates to protect the beneficiary should the guarantee fall away due to the guaranteed obligation falling away. Given the capacity issue, a safer approach would be to remove such clause from the guarantee and indemnity.

## Subordination and Intercreditor Agreements

Subordination and Intercreditor arrangements are difficult in Ukraine. This is because Ukrainian law does not recognise:

- arrangements which attempt to alter the priority of claims in insolvency; and
- the concept of trust.

Further, to the extent that any agreement requires a party to:

- not apply the amount received in discharge of the applicable obligation but rather to make payment of that amount to another person, such arrangement may not be possible and the relevant payment may have to be used to discharge (or be deemed to have discharged) the applicable obligation; and
- make payment of any amount to another person, such payment might not be permitted due to applicable Ukrainian foreign currency control restrictions.

As a result of the above, standard subordination and intercreditor arrangements cannot be adequately documented under Ukrainian law and even if governed by English law may not be completely enforceable against a Ukrainian party to such arrangements. There are ways to overcome or mitigate most of these issues in relation to Ukrainian entities, but as such arrangements are complex they are sometimes considered too expensive or cumbersome from a commercial perspective to be implemented.

## Enforcement

### Choice of law

A Ukrainian entity is able, as a matter of Ukrainian law, to choose a law other than Ukrainian to govern a contract where one of the counterparties to the contract is not a Ukrainian entity and the subject matter of the contract does not relate to land in Ukraine (or a few other very specific matters).

Therefore, the choice by Ukrainian entities of English law, the submission to the English courts or the agreement to refer disputes to arbitration is generally fine where there is a non-Ukrainian lender.

Clauses contained in agreements which provide for:

- both arbitration and court dispute resolution processes may cause issues in Ukraine on the basis that a Ukrainian court may accept an argument that the parties have not agreed to a dispute resolution process; or
- the unilateral right of the lender to refer disputes to a court may cause issues in Ukraine on the basis that a Ukrainian court may accept an argument that this unfairly deprives the borrower of the right to have the dispute settled by arbitration.

The effect of such a decision by a Ukrainian court would be that it may decide to assert jurisdiction itself or not recognise the arbitration clause.

## **Enforcement of Arbitration Awards and Recognition of Foreign Court Judgements**

Ukraine is a party to the 10 June 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards and as a result will, in general, recognise and enforce international arbitral awards, save to the extent that such would breach public policy or the mandatory provisions of Ukrainian law.

A foreign court judgment (as opposed to an award of an arbitration tribunal) may be recognised and enforced in Ukraine if (a) there is a treaty in place between Ukraine and the country in which such judgment was rendered in relation to the recognition of judgments or (b) in the absence of such a treaty, based on the principle of reciprocity.

In relation to the principle of reciprocity, the Civil Proceedings Code contains a presumption that such principle exists unless proved otherwise. In practice, it is unclear if the judgments of New York or English courts will be enforced in Ukraine, although some recent court practice indicates that English court decisions may be enforced.

If any action is taken in Ukraine then in order for documents to be admissible in evidence in Ukraine they will require apostillisation and the preparation of certified translations into the Ukrainian language.

## **Parallel Debt and Joint and Several Creditor**

As trust structures are not recognised in Ukraine and security must be granted to a creditor, security trust structures do not work in Ukraine. As a result, and similar to a number of civil law countries, English law parallel debt or joint and several creditor structures are used to achieve the same commercial effect for syndicated loan agreements.

Using such structures enables one creditor to act as security agent and hold the benefit of the security for multiple persons.

Similarly to other countries, these structures have never been tested in practice in a Ukrainian court. In our view, these structures should work in Ukraine.

## **Syndication and subparticipation**

In general, Ukrainian banks are not permitted to make loans to non-Ukrainian companies (other than certain banks) without the approval of the NBU. As a result, in practice the only way that a Ukrainian bank can take a participation in or enter into a subparticipation in relation to a loan with an off-shore borrower is through highly complex arrangements which have the same economic effect, but which do not breach the basic restrictions. In general, such arrangements are not attractive to Ukrainian banks from a commercial perspective.

Ukrainian banks can take a participation in syndicated facilities where the borrower is a Ukrainian entity. However, the NBU rules relating to provisioning may make such arrangements unattractive to Ukrainian banks. For example, unless the Ukrainian borrower has sufficient income in foreign currency from exports then the Ukrainian bank would need to increase the risk category of such loan and provision higher amounts in respect of its participation in a foreign currency loan.

## **Other issues**

### **Powers of attorney**

A power of attorney is generally revocable under Ukrainian law notwithstanding that it may be expressed as being irrevocable.

### **Ukrainian language**

Ukrainian law requires that a Ukrainian language version of any contract be signed, together with a version in the language chosen by the foreign counterparty, when a Ukrainian entity is a party to an agreement with a non-Ukrainian entity. While there is no specific sanction imposed by law if the parties fail to do this, in general we advise that any contract with a



Ukrainian entity is signed in two languages in order to avoid any issues at a later stage. To the extent of any inconsistency, the parties can agree which language will be the determinative language for the purposes of interpretation.

### Signing in counterparts

Pursuant to Ukrainian law, a Ukrainian law agreement must be executed as a single document. Foreign law governed documents signed by a Ukrainian entity can be signed in counterparts.

### Corporate seal

The rule requiring any Ukrainian entity executing a contract to affix its corporate seal for the contract to be valid will cease to apply starting from 1 October 2014.

### Temporary currency control restrictions

In response to the devaluation of the Ukrainian hryvnia, the NBU imposed the following temporary currency control restrictions and other stabilisation measures:

- Until 20 August 2014: 50% of all foreign currency proceeds received by a Ukrainian company which is not a commercial bank should be converted into the Ukrainian hryvnia. This requirement does not apply to (i) any loans to the state of Ukraine or guaranteed by the state of Ukraine, (ii) any financing provided by international financial institutions such as IFC, EBRD, EIB, etc, (iii) any foreign currency funds placed on the correspondent and deposit accounts of foreign banks with Ukrainian banks, (iv) funds provided under international technical support (TC) programmes and (v) any proceeds received under commission or agency agreements which should be transferred to the owner of the funds by the relevant agent.
- Until 1 September 2014: Ukrainian residents are prohibited from making early prepayment (whether voluntary or mandatory) under foreign currency loans received from non-resident lenders.

## Insolvency

We do not deal with issues of insolvency in this client briefing, as it is the subject of a separate specific client briefing. Please contact us if you would like more information about the insolvency law in Ukraine.

This publication does not necessarily deal with every important topic or cover every aspect of the topics with which it deals. It is not designed to provide legal or other advice.

[www.cliffordchance.com](http://www.cliffordchance.com)

Clifford Chance, 75 Zhylyanska Street, 01032, Kyiv, Ukraine  
© Clifford Chance 2014  
Clifford Chance LLC

---

Abu Dhabi ■ Amsterdam ■ Bangkok ■ Barcelona ■ Beijing ■ Brussels ■ Bucharest ■ Casablanca ■ Doha ■ Dubai ■ Düsseldorf ■ Frankfurt ■ Hong Kong ■ Istanbul ■ Jakarta\* ■ Kyiv ■ London ■ Luxembourg ■ Madrid ■ Milan ■ Moscow ■ Munich ■ New York ■ Paris ■ Perth ■ Prague ■ Riyadh ■ Rome ■ São Paulo ■ Seoul ■ Shanghai ■ Singapore ■ Sydney ■ Tokyo ■ Warsaw ■ Washington, D.C.

\*Linda Widyati & Partners in association with Clifford Chance.