

New Safeguards for Investors in Ukraine

By Nazar Chernyavsky

For many years Ukraine has been terra incognita for most of the foreign investors, and the only thing they knew was that it was difficult to invest in Ukraine and even more difficult to get investment proceeds out of it. However, in the course of 2012 – 2013 the Ukrainian government decided to change this perception and made a number of steps to improve the overall business and investment climate in the country.

The major steps relate to centralizing and converting into electronic form the most important data, such as information on ownership rights to various assets. In particular, the corporate law reform, which started few years ago with the adoption of the law on joint stock companies and aimed, inter alia, to convert all shares into electronic form, is likely to complete by the end of 2013 when the single central depository is created and all documentary shares effectively cease to exist (as their owners will not be able to vote or dispose of such shares). As a result, title to shares in joint stock companies will become more transparent and less susceptible to any manipulations or raiding activities. Furthermore,

the central depository to be created is going to be used for other transactions with securities, including transactions with derivatives, which should hopefully appear in the market in 2013-14 as a result of adopting the brand new derivatives law. As members of the working group preparing the draft law upon mandate of the EBRD we note that it largely reflects the best practices of the developed European markets and upon its adoption is likely to launch the derivatives market in Ukraine after many years of standstill.



As part of the recent reforms new listing rules, new insider trading rules and new rules for acquiring significant share in financial services companies or stock market participants were adopted. All these measures are aimed to boost local capital markets which currently lack liquidity and professional institutional investors.

One more significant step was made in that direction in 2013 by allowing international financial institutions such as EBRD or IFC issue bonds in Ukraine denominated in local currency. It is expected that such instruments would be more popular in view of the credit rating of their issuers and would inject additional local currency liquidity in the market. Furthermore, starting from 2014 Ukraine will get the new law on mutual investment funds, which should make such funds more transparent and as a result even more attractive vehicle for investment activity in Ukraine, as it appears that currently foreign investors perceive them as some complicated animal and do not use them when structuring their investments despite all tax and corporate governance advantages such funds can offer.

Another centralised register that was created is the Register of Rights to Real Estate, which is supposed to contain information on mortgages and other encumbrances, as well as on title to immovable property. It is supposed to bring various previously disconnected registers (register of property rights, land cadastre, register of mortgages, register of en-

cumbrances) together and integrate into one database. Quite naturally, a number of practical issues have been encountered in the course of such transition, including the technical impossibility to reflect the transfer of a mortgage until the existing owner applies for registration of the respective object with the new register. However, now it takes just few hours to document the transfer of the property and obtain a new title document.

Apart from such major changes, Ukraine has significantly simplified the rules for incorporating new businesses by removing the minimum statutory capital requirement for new limited liability companies and reducing the number of authorities involved in the registration process. As a result, a company may be registered now on a “one-stop shop” basis with a minimum set of documents to be submitted. Furthermore, some flaws in the corporate governance rules, which existed in the initial text of the law on joint stock companies and resulted from the clumsy efforts to protect minority shareholders, were removed and the rules became clearer, although the position of the minorities is still

not as protected as in jurisdictions with developed corporate laws.

At the same time, a number of hardships related to making investments in Ukraine remains, with restrictive currency control regime being on top of the list. While some improvements were made in this direction as well, including the facilitation of the procedure for the purchase of foreign currency and transferring funds in case of repatriation of the foreign investment, investors still need to structure carefully their investment and keep all necessary papers in order to be able to remit abroad their money together with any profits they made.

One more consideration, which has to be taken into account when investing in Ukraine, is imperfect judicial system with courts often making conflicting and unpredictable judgments. Along with underdeveloped legal system it makes many investors dealing with Ukrainian parties choose foreign law, predominantly English, as governing law of their contracts and provide for the dispute resolution either through international commercial arbitration or at foreign courts. A positive

development in this regard has become the recent change in the Civil Procedure Code of Ukraine allowing for the recognition and enforcement in Ukraine of foreign court judgments on the principle of reciprocity. Given that we have already seen a few instances of recognizing foreign court judgments, it has become a viable option for dispute resolution along with foreign arbitral awards, which have been recognized in Ukraine already for a while pursuant to the New York Convention.

In summary, we can say that Ukraine offers a number of opportunities to foreign investors and those, who know how to employ various legal instruments provided in its laws or are practical enough to step on the untested ground of new legislation, may be rewarded with lucrative benefits in the long run.

Nazar Chernyavsky, partner, specializes in banking, capital markets, secured and structured finance. Mr. Chernyavsky advises clients on a wide range of major private and public securities offerings, syndications and secured finance transactions.

He has extensive experience of handling the most complex financing projects in the Ukrainian market, which include the first securitizations in Ukraine, Rule 144A share offerings, Tier II Euro-bond offerings, UAH linked LPN issues, etc. Prior to joining Sayenko Kharenko, Mr. Chernyavsky worked for the leading Ukrainian law firms.



Nazar has been recognized in banking and finance by Chambers Global, The Legal 500, IFLR 1000, PLC Which Lawyer?, The Best Lawyers International and ranked among top two in Information Technologies & Communications and among notable practitioners in Banking & Finance, and Capital Markets by Ukrainian Law Firms 2013 compilation by Yuridicheskaya Praktika, the leading legal publishing house in Ukraine.

Nazar can be contacted via telephone at +380 44 499 6000 or email at NChernyavsky@sk.ua

