I. Introductory questions on the insolvency procedures available in the relevant jurisdiction: Ukraine.

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1. What insolvency procedures – either liquidation or reorganization procedures – are available for distressed or insolvent companies?

There are two court procedures aimed at solving the problems of insolvency envisaged by the Law of Ukraine On Restoration of Solvency of the Debtor or Declaring him Bankrupt (“Pro vidnovlennya platospromozhnostyi borzhyka abo vyznayya yogo bankrutom”) of 1992 in the new wording came into force in January 2013 (hereinafter – the Bankruptcy Law): liquidation and judicial sanation (reorganization).

However, the Bankruptcy Law names four formal procedural stages that are used in an open court proceeding within the bankruptcy case: disposition of the debtor’s property; amicable agreement; sanation (judicial); and liquidation (Art. 7.1 of the Bankruptcy Law). The first procedure – disposition of the debtor’s property – is applied to all debtors with further transforming the process into liquidation or sanation procedure in ordinary course of bankruptcy case consideration by the court (Art. 7.3 of the Bankruptcy Law).

Defined by the law peculiarities within the bankruptcy proceeding are applied to some categories of the debtors. The Bankruptcy Law sets forth special provisions containing peculiarities of the insolvency procedures applied for other financial institutions and debtors. Chapter VII (Arts. 84–96 of the Bankruptcy Law) contains some specific rules for insurance companies, institutes of collective investments, providers of professional services on the capital market among those companies, issuers of securities and joint investments fund’s managing companies; as well as agricultural enterprises and farmers, natural person-entrepreneur, state-owned companies and sole entrepreneurs. These are not independent procedures: the Bankruptcy Law suggests applying some peculiarities when administering a bankruptcy case commenced against those persons.

2. Are there special insolvency procedures available for financial institutions or for other special classes of companies?

The Bankruptcy Law suggests some specifics towards financial institutions among which are: additional participants can be invited to participate in the bankruptcy proceeding (a regulator can be among those); the term of sanation can be extended; the court can combine the debtor’s property disposition and sanation procedures. Summary proceeding can be applied without application of the procedure of the debtor’s property disposition or sanation.
A special regime is provided in Ukraine for banks. According to the Bankruptcy Law, insolvency of banks is governed by this law with peculiarities envisaged by the Law of Ukraine On Banks and Banking Activities of 2001. Chapter V titled “Problem and Insolvent Bank. Liquidation of a Bank” provides a special procedure of insolvent banks, the main features of which are: a) non-liquidation procedures are applied to banking institutions; and b) the National Bank of Ukraine plays a key role through recalling back a license and appointing an insolvency administrator. Besides it, the Fund of Guarantying Natural Persons’ Deposits acts an administrator to move of the insolvent bank out of the market through interim administration and liquidation procedures according to the Law of Ukraine On the System of Guarantying Natural Persons’ Deposits of 2012 (Art. 35).

3. Are there any specific legal provisions that apply to debt restructurings achieved without a full formal insolvency process?

Ukrainian Bankruptcy Law provides for specific measures for debt restructuring without a full formal insolvency process before the parties may file a formal bankruptcy petition with the court. Article 5 of the Bankruptcy Law titled “Measures for Prevention of Bankruptcy of the Debtor and Out-of-court Procedures” stipulates that the founders (participants, shareholders) of the debtor, the owner of the property of the debtor, central state and local governmental bodies within their powers shall take relevant actions for preventing bankruptcy of the debtor. This can be done in the form of providing necessary financial aid to pay debts of the company (Art. 5.3 of the Bankruptcy Law). In exchange the debtor takes correspondent obligations before the providers of financial aid.

Besides it, the Bankruptcy Law provides a special procedure called pre-court sanation. This is a set of measures aimed at restoration of solvency which may include economical, financial, managerial, organizational, technical, investment, legal and other measures. Pre-court sanation procedure maybe initiated by a debtor or a creditor. In addition, sanation can be administered also by founders of the debtor among who are shareholder and participants (Art. 5.1 of the Bankruptcy Law). The plan of sanation must be agreed with secured creditors, approved at the creditors’ assembly and sent to the economic court for adoption within 5 days.

The Higher Economic Court of Ukraine approved on 17 December 2013, decree No. 15., the Rules On Conduct of Sanation Before Commencement of a Bankruptcy Case.

4. What are the commencement criteria for insolvency procedures?

Ukrainian Bankruptcy Law sets forth that the economic court shall make a decision to commence a bankruptcy proceeding if the assets are less than aggregate liabilities of the debtor that came due.

The formal requirements are these: the court commences a bankruptcy case if undisputed claims of a creditor (creditors) to the debtor aggregate not less than 300 minimum wage amounts which were not paid out within tree months (Art. 11.4 of the Bankruptcy Law). As of September 1, 2014 the amount in US Dollars is approximately 22, 300.00.

The debtor files a bankruptcy petition with the court only if there are enough assets to cover court expenses (Art. 11.4 of the Bankruptcy Law).

The debtor must file a petition if the threat of insolvency (when satisfaction of one or several creditors’ claims may course inability to pay the debts in full), and when inability...
to pay all debts is discovered during a non-bankruptcy liquidation.

When the debtor initiates commencement of the bankruptcy proceeding a threat of insolvency is also examined (Art. 16 of the Bankruptcy Law).

5. Who can propose a restructuring plan? (e.g. corporate bodies, insolvency representatives, creditors)

The Bankruptcy Law determines who can propose a sanation (restructuring) plan depending on a stage (a formal procedure) of the bankruptcy case. The Law explicitly states (Art. 23.11 of the Bankruptcy Law) that in the procedure of disposition of the debtor’s property (the first procedure in a bankruptcy case) the debtor develops a sanation plan with participation of an arbitral administrator (hereinafter – insolvency administrator). This plan shall be presented to the creditors’ committee within two months after commencement of a case.

During a sanation procedure the Law unloads responsibility to develop the sanation plan on the insolvency administrator who is appointed to act a sanation administrator. When a decision on a sanation procedure opening is taken the responsibility to develop a plan lays on the insolvency administrator (Art. 29 of the Bankruptcy Law). The Law requires that the insolvency administrator develops the plan within 3 months after initiation of the sanation procedure and presents the plan to the court for approval after agreeing it with the creditors’ committee (Art. 29.1 of the Bankruptcy Law). In the case when the debtor is an enterprise with more than 50% of the state participation the sanation administrator preliminary agrees the plan with authorized state body operating this enterprise.

In cases where investors are willing to participate in the sanation procedure the plan is developed with their participation and they shall sign the plan. In this situation legal and natural persons send a petition with their propositions to the sanation plan to the insolvency administrator (Art. 23.10 of the Bankruptcy Law).

6. Please describe whether and to what extent shareholders’ rights can be affected by a situation of distress/insolvency of a company before and/or irrespective of the opening of a formal insolvency proceeding (e.g., are there any fiduciary duties of the shareholders to approve corrective measures/plans proposed by the board?)

As mentioned above, the Bankruptcy Law (Art. 5 of the Bankruptcy Law) sets forth measures for prevention of insolvency of the debtor, among which is a requirement for the founders (participants, shareholders) of the debtor to provide financial support in exchange of the debtor’s correspondent obligations before the providers of financial aid.

The Bankruptcy Law prescribes that from the day of the bankruptcy case commencement corporate rights shareholders shall be realized in accordance with limitations set forth by the Law (Art. 16.15 of the Bankruptcy Law). From the moment of commencement of the bankruptcy case it is prohibited to satisfy requests of the company’s shareholders (participants) in case of allotment of their parts (shares) in regard to their disaffiliation with a joint-stock or a limited-liability company.

1 Depending on a formal procedure opened within the bankruptcy case insolvency administrator acts as administrator at the debtor’s property disposition procedure, sanation administrator, or liquidator.
II. Shareholders’ Rights in Companies Subject to Insolvency Proceedings

As a general comment, Ukrainian Bankruptcy Law and the Law On Joint-Stock Companies have only few provisions devoted to shareholders’ rights in a bankruptcy proceeding.

As to shareholders position in bankruptcy cases, it is necessary to explain that the Bankruptcy Law provides a special procedural status for shareholders in a bankruptcy case – they are participants to the bankruptcy case. As participants to the court proceeding the shareholders and other participants of the company have all envisaged by bankruptcy and procedural laws procedural rights including information rights. In this status they have some procedural rights, for instance file motions, etc.

According to the Bankruptcy Law shareholders and participants of the debtor are represented in the bankruptcy case by a special person called authorized person of founders. The shareholders and participants holding more than 50% statutory capital of the debtor appoint this person to represent them in the bankruptcy case (Art. 1 of the Bankruptcy Law). S/he may take part at the creditors’ meeting with advisory vote (Art. 26 of the Bankruptcy Law).

Position of the shareholders and their bodies on each stage of the bankruptcy process is quite different depending on a formal procedure in place. During the first procedure – disposition of the debtor’s property— normally the company continues its activity but disposition of the debtor’s property is done with consent of the appointed insolvency administrator acting her as administrator of the procedure of the debtor’s property disposition. Among a number of important consequences of commencement of the procedure of disposition of the debtor’s property is prohibition to exit the company and acquire the earlier issued shares of the debtor (Art 22.5 of the Bankruptcy Law).

A sanation plan may contain a provision on increasing the statutory capital of the debtor – a joint-stock company through issuing shares and bonds, but this can be done exclusively for converting the debtor’s liabilities into securities (Art. 32.1 of the Bankruptcy Law). Shareholders of the debtor have preferential rights to acquire shares and bonds of the new issues (Art. 32.2 of the Bankruptcy Law).

In the liquidation procedure the authorized person of the founders (shareholders and participants) must be a member of a liquidation commission (Art. 40.2 of the Bankruptcy Law). The liquidator sells shares and other securities through a licensed professional participant of the stock market. The termination of securities in the course of insolvency is done in accordance to the securities regulation (Art. 46.6 of the Bankruptcy Law). The process of termination of the securities issue registration is governed according to the Rules of Termination of the Registration of Securities Issue adopted by the National Commission on Securities and Stock Market on 4 March 2014, Decision No. 276.

7. Are shareholders notified of the initiation of an insolvency process? If notification is individualized, what are the mechanisms used to identify shareholders?

The Bankruptcy Law does not require notifying the shareholders about initiation or commencement of the insolvency proceeding. Information on commencement of the bankruptcy case is open to public and is made through publication a notice in official mass media and posting it on the official web-site of the Higher Economic Court of Ukraine (Art. 38.3 of the Bankruptcy Law).

8. Are shareholders required to file claims in the insolvency proceeding? What are the consequences of not filing a claim?
The shareholders can file a claim in the insolvency proceeding if they are creditors. Shareholders are not considered creditors under the Bankruptcy Law. It is clearly stated when the Law defines the notion ‘monetary obligations’ (Art. 1 of the Bankruptcy Law).

Not filing a claim has negative consequences: after termination of the bankruptcy case the claims of those creditors are deemed to be satisfied, and the debtor becomes free of its debts (Art. 83.4 of the Bankruptcy Law).

9. Can shareholders continue to trade and transfer shares after the initiation of an insolvency proceeding affecting the company?

There are no general limitations to trade and transfer shares of the insolvent debtor unless a court judgment is issued on this. However, all transactions involving the debtor’s assets should be approved by the administrator in the procedure of disposition of the debtor’s property.

After commencement of the bankruptcy case the following is prohibited: reorganization of the debtor (including through transfer of shares) and payment of dividends. In addition, acquisition of shares of the debtor earlier issued is prohibited (Art. 22.5 of the Bankruptcy Law).

The Law On Joint-Stock Companies of 2008 sets forth limitations for share buyback: they are prohibited if the company is insolvent or that buyback may drive to insolvency (Art. 67.1(2) of the Joint-Stock Companies Law).

10. Do shareholders have the right to request that a shareholders’ meeting is held, even if the company is insolvent? (If there are separate reorganization and liquidation procedures, does this affect the response?)

There are no restrictions on the possibility that shareholders’ meetings are held if the company is insolvent, accept during a sanation or liquidation procedure. After a sanation or liquidation procedure is commenced all managing bodies of the debtor stop their activity: all powers go to sanation administrator or liquidator.

When the insolvent debtor is a bank the Fund of Guarantying Natural Persons’ Deposits acts an administrator in interim administration and liquidation procedures (Art. 36.1 of the Law On the System of Guarantying Natural Persons’ Deposits).

11. Do shareholders have the right to request information in an insolvent company? Do they have information rights as to the progress of a reorganization procedure? Can they exercise that right vis-à-vis the directors of the company -if they remain in charge of the company-or vis-à-vis the insolvency representative?

As mentioned above a representative of the shareholders and other participants of the debtor represents them in the bankruptcy process. As participants to the bankruptcy case they have information rights like other persons with similar status.

According to the Bankruptcy Law shareholders may suggest to senate the debtor. In this case s/he will have a full access to the information about the company to develop a sanation plan.

12. Can shareholders make proposals for nomination of directors, if the directors
continue managing the company?

As a general rule everything happening in the bankruptcy case should be done in accordance to the Bankruptcy Law. The court takes control over everything happening with the debtor, including nomination and removal from the position of the director. All participants in the bankruptcy have a right to make proposals individually or through their representatives or collective bodies (representative of the shareholders or creditors’ meeting or committee if they are creditors); even the director remains managing the insolvent company.

When the bankruptcy case is commenced against a bank the Fund of Guarantying Natural Persons’ Deposits becomes the only managing body of the debtor (Art. 36.1 of the Law On the System of Guarantying Natural Persons’ Deposits).

13. If special categories of shares exist whose holders are granted additional governance rights, are these additional rights affected by the opening of an insolvency procedure? (If there are separate reorganization and liquidation procedures, does this affect the response?)

There are no special shares with additional governance rights exist under Ukrainian bankruptcy and company laws.

14. Can shareholders challenge the decisions of the shareholder meeting, if it is still active? Do they retain the possibility of taking action against the acts of the directors? And against the acts of an insolvency representative? Is any authorization by a judicial or administrative body required to do so or, more generally, to exercise corporate rights? (If there are separate reorganization and liquidation procedures, does this affect the response?)

There are no specific limitations in the bankruptcy or corporate legislation related to the possibility to challenge the decisions of the shareholders’ meetings and taking action against the acts of directors or insolvency representatives.

15. Do shareholders have the right to call a special investigation of the affairs of the insolvent company?

According to the Bankruptcy Law insolvency administrator who is appointed at the moment of commencement of the bankruptcy case checks whether there are signs of a crime related to the insolvency of the debtor. In the event s/he finds these s/he should file a petition requesting authorized state agency (procuracy office) to conduct an official investigation. The shareholders have the right to inform insolvency administrator about any facts to be checked.

16. Does the law provide for the establishment of a shareholders’ committee (or several committees, in case of different share classes)? What are their powers? Who bears the related costs?

The Bankruptcy Law does not provide for the establishment of shareholders’ committees. As mentioned, the authorized representative of shareholders represents their interests in all collective bodies established within the bankruptcy case.
17. Can shareholders voluntarily transfer shares of the company undergoing insolvency proceedings against any provisions in the articles/bylaws restricting transfers of shares?

There are no limitations set forth in the Bankruptcy Law in this regard. According to the procedural law the judge may impose prohibition to transfer of shares.

18. Can outstanding shares of the company undergoing insolvency proceedings be assigned to third parties without the consent of the relevant shareholders? If yes, under what conditions? Are existing shareholders entitled to compensation? What other safeguards are provided? (e.g., does the law include a principle according to which the affected shareholders should not receive less than in a liquidation procedure?)

Shares cannot be assigned to third parties without consent of the owners.

19. Can outstanding shares of the company undergoing insolvency proceedings be cancelled without the consent of the relevant shareholders? If yes, under what conditions? Are existing shareholders entitled to compensation? What other safeguards are provided? (e.g., does the law include a principle according to which the affected shareholders should not receive less than in a liquidation procedure?)

As a general rule shares cannot be cancelled or expropriated without their consent. Any forcible transfer of shares can be done only according to a court decision.

20. Do shareholders of the company undergoing insolvency proceedings have pre-emption rights over new issues of shares? (2) Are there special conditions for the suppression of pre-emption rights if the company is insolvent (if there are separate reorganization and liquidation procedures, does this affect the response?).

Yes, the shareholders have pre-emption rights over new issues of shares. It is necessary to say again that a new issue of shares is allowed only for conversion them into obligations agreed in the sanation plan.

21. Can shareholders retain a participation in the company that has emerged from an insolvency process (or in the company to which the insolvent company's assets have been transferred) even if the company was insolvent according to a balance-sheet test? (i.e., where the value of its liabilities exceeds the value of its assets) If yes, under what conditions? (If there are separate reorganization and liquidation procedures, does this affect the response?)

No specific limitations in regard to retaining a participation of shareholders in the emerged company set forth in the Bankruptcy Law.

22. Are the ranking of classes of shares and the preferential rights of classes of

(2) Please, note that the power to decide new issues or conversions of shares, as well as the power to decide operations that affect the structure of the corporate entity (e.g., by merger, spin-off, or change of the legal form) are dealt with in Questions 33 and 34 below.
shares affected (and if yes, to what extent) by the fact that the company is undergoing an insolvency process? (If there are separate reorganization and liquidation procedures, does this affect the response?)

The ranking of classes of shares and the preferential rights of classes of shares are not affected by the fact that the company is undergoing an insolvency process.

23. Can shareholders, in the course of an insolvency procedure, supply goods, services or financial resources to the company? If yes, under what conditions (e.g., judicial authorization)? What would their ranking position be towards other creditors?

The shareholders can continue supplying goods, services or financial resources to the company in ordinary course of business during an insolvency process if it is not clearly prohibited by the court. If the contracts are concluded after commencement of the bankruptcy case those claims are out of moratorium action established by the court at the moment of commencement of the bankruptcy case.

24. Can shareholders, in their capacity as counterparties, be under a duty to continue a contractual relationship with the insolvent company during an insolvency procedure? (If there are separate reorganization and liquidation procedures, does this affect the response?).

The Bankruptcy Law states that shareholders-counterparties continue contractual relationships unless insolvency administrator initiates to terminate them under some conditions, among which the main are unreasonableness or when continuation of these contractual obligations turns out burdening. This decision of the insolvency administrator may be appealed. However, in a liquidation procedure all contractual relationships come due.

25. Can shareholders (or companies of the same group) holding credit claims against the company under insolvency procedure participate in the creditors’ meeting and vote on the insolvency plan without restrictions? (If there are separate reorganization and liquidation procedures, does this affect the response?)

Shareholders holding credit claims files their petitions in the bankruptcy case are concurs creditors with all rights to participate in that capacity in the bankruptcy process, including participation in the creditors’ meeting with the right to vote.

26. If shareholders (or companies of the same group) do not hold credit claims against the company under insolvency procedure, must/can they participate in the creditors’ meeting? If that is the case, what rights or duties do they have in that meeting? (If there are separate reorganization and liquidation procedures, does this affect the response?)

The Bankruptcy Law clearly says that only creditors filed their claims in the insolvency procedure can participate in the creditors’ meeting with defined votes depending on amount of their claims.

Individually the shareholders not holding credit claims against the company under insolvency procedure cannot participate in the creditors’ meeting.
27. Do shareholders in an individual company have information rights as to the filing of insolvency proceedings by the parent or other related companies?

If shareholders are creditors they may file a bankruptcy petition and enjoy information rights through the whole bankruptcy process.

III. The Role of the Shareholders’ Meeting in Companies Subject to Insolvency Proceedings

28. Does the shareholders’ meeting continue to exist in insolvency proceedings? (If there are separate reorganization and liquidation procedures, does this affect the response?)

The shareholders’ meeting continues existing in insolvency proceedings.

Meanwhile, the Joint-Stock Companies Law sets forth that extraordinary shareholders’ meeting on initiation of the executive body is convened when the company is declared insolvent or when there is a need to approve so called significant transactions (for the amount more than 1% of the capital of the company) in the insolvency process.

29. Does the shareholders’ meeting preserve all of its competences, generally? (If there are separate reorganization and liquidation procedures, does this affect the response?)

The shareholders’ meeting preserves all of its powers set forth in the Joint-Stock Companies Law with restrictions envisaged by the Bankruptcy Law.

30. Does the shareholders’ meeting need to approve the accounts of the distressed/insolvent company?

The shareholders’ meeting’s competences are limited to the extent provided by the Bankruptcy Law. In the sanation (reorganization) and liquidation procedures the sanation administrator and liquidator conduct the powers of all managing bodies of the debtor.

31. Does the shareholders’ meeting have the power to dismiss directors – if directors are still in charge of the insolvent company? Can the shareholders’ meeting request the removal of the insolvency representative? (If there are separate reorganization and liquidation procedures, does this affect the response?)

According to the Bankruptcy Law only the court may dismiss director who does not act promptly in the bankruptcy process. Shareholders’ meeting may request the bankruptcy judge to remove the insolvency administrator if s/he does not fulfill it obligations in good manner.

32. Is a shareholders’ meeting authorisation required to start an insolvency procedure? (If there are separate reorganization and liquidation procedures, does this
affect the response?

No, it is not required a shareholders’ meeting authorization to start an insolvency procedure, but such a decision is obliged for the director of the debtor to file a petition with the court.

33. Does the shareholders’ meeting need to approve an insolvency or reorganization plan? Can shareholders, even individually, challenge an insolvency or reorganization plan?

No. A sanation (reorganization) plan is agreed by the creditors’ meeting and approved by the court.

34. Is a shareholders’ meeting decision required to issue new shares of the company undergoing insolvency proceeding? Can a new share issue be decided by the board? Can a new share issue be decided by the insolvency representative? (3) If a capital increase has to take place through the conversion of claims into new shares, does this affect the response?

No, it is not required a shareholders’ meeting decision to issue new shares of the debtor. A new share issue should be included into a sanation (reorganization) plan. The Bankruptcy Law requires that new shares issue in order to convert them into obligations of the debtor. Participants to the bankruptcy case may suggest any propositions to be included into the sanation plan.

35. Can an insolvency/reorganization plan affect the structure of the corporate entity (e.g., by merger, spin-off, or change of the legal form)? Is a shareholders’ meeting authorization required for this?

A sanation (reorganization) plan may affect the structure of the corporate entity. No shareholders’ meeting decision is required for this.

36. On what conditions can the company carry on business during an insolvency procedure? (If there are separate reorganization and liquidation procedures, does this affect the response?) Is a shareholders’ meeting authorisation required?

The company can carry on business during an insolvency process within the first procedure – disposition of the debtor’s property, but only under control of appointed insolvency administrator. A sanation (reorganization) plan is realized during the sanation procedure. No authorization of the shareholders’ meeting to continue trading is required.

37. In the course of an insolvency procedure, what provisions apply to the sale of specific assets out of the ordinary course of business and to the sale of the entire

(3) These questions are aimed at understanding whether the fact that the company is subject to insolvency proceedings allows or causes deviations from the company law rules determining the body competent to take decisions on the issue of new shares of the company, and/or from the company law rules establishing the criteria and purposes with which such decisions must comply.
business operation of the company? Is a shareholders’ meeting authorisation required? (If there are separate reorganization and liquidation procedures, does this affect the response?)

No authorization of the shareholders’ meeting is required to the sale of specific assets of the debtor.

The whole procedure of sale of assets of the debtor is set forth in details in the Bankruptcy Law (from Art. 49 to Art. 76).

38. Does the shareholders’ meeting have any power in relation to a decision of the board or the insolvency representative to continue or reject any favourable, unfavourable or essential contract during an insolvency procedure? (If there are separate reorganization and liquidation procedures, does this affect the response?).

Favourable, unfavourable or essential contract are subject for revision within an insolvency procedure. Shareholders as well as any participant to the bankruptcy case may initiate review of the contract concluded within one year before the commencement of the bankruptcy case. Such decisions shall be taken by the insolvency administrator with further approval by the judge in the bankruptcy case.

39. If an insolvency plan can be presented for a whole corporate group, must that plan be approved by the shareholders’ meetings of each company of the group, including of those that are balance-sheet insolvent? How are the different meetings’ decisions coordinated? Are there specific safeguards (e.g., any veto power or other remedy) for the minority shareholders of the companies that are not insolvent?

There are no specific rules related to the corporate groups in the Bankruptcy Law.

40. If companies belonging to the same group file separate insolvency proceedings, are there specific requirements/mechanisms to provide for coordination of those proceedings? Are shareholders’ meetings of the relevant companies involved in the coordination mechanisms, if any?

The Bankruptcy law contains only a general rule regarding coordination of several opened proceedings. There are no specific mechanisms exist in the Ukrainian bankruptcy legislation.

IV. Other Obstacles for Insolvency Procedures Found in Company Law

41. Please list any other legal provision in company law that, in your opinion or in your experience, may interfere with the insolvency procedure of a company in your jurisdiction.

The Joint-Stock Companies Law has only several very general provisions related to insolvency of the company that reflected above.