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**‘Ukraine vs UK: Limitation Period for Transaction  
Avoidance: (Un)limiting the Possibilities of Asset Recovery  
in Insolvency?’**

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## Agenda

1. Key types of legal acts/ transactions subject to avoidance in insolvency ('transaction avoidance').
2. Key pre-requisites for transaction avoidance in UK, Ukraine and EU (as per EC's Proposal for a Directive on Harmonizing Certain Aspects of Insolvency Law, 7 Dec 2022).
3. Limitation period for transaction avoidance.
4. Proposals – food for thought.



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## **1. Key types of legal acts/ transactions subject to avoidance in insolvency ('transaction avoidance'):**

1.1. transactions at an undervalue;

1.2. preference;

1.3. transactions defrauding creditors/ detrimental to creditors.



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## **2. Key pre-requisites for transaction avoidance in UK, Ukraine and EU (as per EC's Proposal for a Directive on Harmonizing Certain Aspects of Insolvency Law, 7 Dec 2022):**

2.1. a 'relevant time' (claw-back period)/ onset of insolvency';

2.2. state of insolvency (debtor was unable to pay its mature debt at the time of the transaction, or became unable to pay its debts as a result of the transaction);

2.3. \*knowledge of debtor's intent (to cause detriment to the general body of creditors).



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### **3. Limitation period for transaction avoidance:**

3.1. Limitation period ('LP') vs 'claw-back' period: LP must not be confused with the claw-back period, which is the pre-requisite for transaction avoidance;

3.2. LP is a defence against the transactions avoidance/ principle of legal certainty/ predictability;

3.4. Ukraine's and UK's approach to limitation period:

3.4.1. when does the LP start to run – 'accrual of cause of actions'? (the commencement of the insolvency proceeding/ the appointment of an insolvency practitioner/ of a winding-up order or a winding up petition);

3.4.2. what is the length of the LP? (Ukraine - general civil law approach of 3 years / UK - an action of specialty – 12 years for non-money claims or 6 years for money recovery claims);



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- **UK's approach to the limitation period:**

In relation to **preference** and **transaction at undervalue** claims under the Insolvency Act 1986 ("IA86"), the cause of action accrues on the *commencement* of the relevant insolvency procedure.

In relation to the *limitation deadline*, such claims arise from the IA86 and are therefore (potentially) **actions on specialty** to which a 12 year limitation period applies. However, the IA1980 provides that the 12 year limitation period applies only where a shorter period is not prescribed elsewhere in the legislation. Money claims under statute are given a shorter period in the LA1980. Such are afforded a 6 year limitation period. This means that only non-money antecedent actions will benefit from the 12 year limitation period.

To claims under section 423 IA86 (**transactions defrauding creditors**) - the case of **Hill v Spread [2006] EWCA Civ 542** - the accrual date for the cause of action in the insolvency context: is at the date of the *bankruptcy* order.

The date from which the limitation period starts to run for these types of claims is generally **the start of the winding up** (in the case of a compulsory liquidation, the date of the making of the winding up order) or the start of the administration. This is because the cause of action **only accrues** on the company **going into insolvency** (*Overnight Limited; Goldfarb v Higgins [2009] EWHC 601 (Ch)*).



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Changtel Solutions Uk Limited (In Liquidation), Nicholas Reed (Joint Liquidator of Changtel Solutions Uk Limited), Julie Palmer (Joint Liquidator of Changtel Solutions Uk Limited) v G4S Secure Solutions (Uk) Limited –

Judgment Date - **1 April 2022**;

High Court of Justice Business and Property Courts of England and Wales Insolvency and Companies List (ChD)

[2022] EWHC 694 (Ch), 2022 WL 00993841

Before: ICC Judge Barber

**Background:**

On 22 January 2021, Changtel Solutions UK Limited ('the Company') and its liquidators (together, 'the Applicants') issued an application ('the Application') against 16 sixteen respondents, seeking to *recover various sums* allegedly paid by the Company to such respondents in the period *between the presentation of a winding up petition* against the Company on 7 June 2013 and the *making of a winding up order* against it on 28 January 2015.

**Q in respect of limitation period:** *whether the 'cause of action' within section 9 of the 1980 Act accrued immediately on the making of the payments (as the Respondent contends) or not until the making of the winding up order (as the Applicants contend).*

- Applicants contend that: (1) the claim is not time-barred under section 9 of the 1980 Act, because the Application was issued less than 6 years; *Section 9(1) of the 1980 Act* provides: 'An action to recover any sum recoverable by virtue of any enactment shall not be brought after the expiration of 6 six years *from the date on which the cause of action accrued*'.

**The Court held:** The *winding-up order* was an essential ingredient of the cause of action. It followed that *for limitation purposes*, time ran from the date of the winding-up order and not the date of payment, and the [ed. – avoidance] *proceedings had been commenced* less than six years *after the making of the winding-up order* .



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### 3.4.3. Other EU jurisdictions' approach to the LP:

a) Running of a limitation period – when does it start?

Various approaches: from the perfection of performance via the opening of the insolvency proceedings through to the knowledge of the insolvency practitioner of the relevant circumstances.

b) Various approaches to the length of the LP and the accrual of cause of action for its purposes:

- **Ukraine:** 3 years from the date of appointment of an insolvency practitioner;
- **Italy:** 5 years from the perfection of the transaction but no more than 3 years *after* the opening of the proceedings;
- **Greece:** 1 year from obtaining knowledge of the relevant circumstances but not more than 2 years *after* the opening of the proceedings;
- **Romania:** 1 year *from* the moment the insolvency practitioner was due to deliver a report on the debtor's affairs *but no longer than* 16 months *after* the opening of the proceedings.





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## Proposals re the limitation period for transaction avoidance:

- to be long enough for the insolvency practitioner to have enough time to review the transactions and to assess their vulnerability under transactions avoidance law;
- should not start to run from the perfection of vulnerable transaction, since this event not only took place prior to the appointment of the insolvency practitioner;
- to balance the need for legal certainty (fixed time period).

*'Justifiable is linking the commencement of the limitation period to the opening of the proceedings, provided the time period in question is not too short. In our view, a limitation period of 1 (one) year from the opening of the proceedings, is not sufficient, since the insolvency practitioner generally needs more time to assess whether voidable transactions took place, whereas two or three years could suffice. A better solution would be to connect the commencement of the limitation period to the knowledge of the relevant facts, although this can lead to a long period of uncertainty if it is combined with a long time period.'* (Reinhard Bork & Michael Veder, *Harmonisation of Transactions Avoidance Laws, 2022, para 4.279*).

**Food for thought** – to link the LP to the appointment of an insolvency practitioner/preferably: to the production of a IP's report on debtor's state of business/ inventory + special (extended) length of the LP.



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**Thank you for your attention!**

Any questions?