

Restructuring across borders

Poland: corporate restructuring and insolvency procedures

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Introduction

On 1 January 2016, the Polish insolvency regime underwent a revolutionary change which has made it a more “debtor friendly” jurisdiction by opening new opportunities for entrepreneurs to restructure their debts. Bankruptcy and restructuring proceedings are now governed by two separate acts. The significantly amended Bankruptcy Law dated 28 February 2003 (the **Bankruptcy Law**) (*Postępowanie upadłościowe*) governs bankruptcy proceedings resulting in a liquidation of the insolvent debtor’s assets, including pre-pack insolvency proceedings, while the newly introduced Restructuring

Law dated 15 May 2015 provides four new court-based restructuring proceedings aimed at entering into composition arrangements. These comprise:

- fast-track arrangement approval proceedings;
- accelerated arrangement proceedings;
- arrangement proceedings; and
- remedial/rehabilitation proceedings.

Bankruptcy (*Postępowanie upadłościowe*)

The main purpose of bankruptcy proceedings is to satisfy the claims of creditors to the maximum extent possible and, if feasible, to facilitate the continued operation of the debtor’s existing business. These two aims can in principle be achieved by selling the debtor’s entire business as a whole enterprise or as organised parts to a third party through a court-supervised public tender. Therefore, bankruptcy proceedings which result in winding-up/liquidating assets of the bankrupt debtor are a remedy of last resort only.

The provisions of the Bankruptcy Law may in principle be applied to entrepreneurs (ie entities conducting economic or professional activities) and certain other entities referred to in the Act. There is also a specific scheme for consumer bankruptcies.

Bankruptcy can only be declared regarding a debtor who becomes insolvent, ie fails to pay its due and payable obligations. There are two insolvency tests and for a debtor to be deemed insolvent it is sufficient if only one is satisfied:

- illiquidity: the debtor is unable to meet its pecuniary obligations as they fall due, which is assumed if the debtor has ceased making payments on time for longer than three months; and
- over-indebtedness (applied only to companies): the debtor’s assets no longer cover its liabilities for longer than twenty-four months, which is assumed if the balance sheet of the debtor reveals such situation (even if the debtor performs its obligations on a day-to-day basis).

The process for declaring bankruptcy and opening bankruptcy proceedings commences when a petition is filed with the court by the debtor or by any of its full-recourse creditors. However, even if the debtor is insolvent under the insolvency test, the court should dismiss the petition if:

- the petition was filed by a creditor but the debtor proves that all of the creditor’s claims against the debtor are contentious/litigious; and

- the value of the debtor's estate (including the prospective proceeds under the claw-back actions against fraudulent transactions) is not higher than the anticipated costs of the proceedings.

Furthermore, the court may also dismiss the petition if:

- the debtor is insolvent under the over-indebtedness test but there is no threat that the debtor will lose liquidity in the near future;
- the insolvent estate is encumbered to the extent that its remaining assets are not worth more than the anticipated costs of the proceedings (including the prospective proceeds under the claw-back actions against fraudulent transactions), provided that the encumbrance would survive the declaration of bankruptcy.

If a creditor submits a petition for bankruptcy in bad faith, the court in dismissing this petition will hold the creditor accountable for the costs of the proceedings and has the right to order the creditor to make a public statement so as to attempt to avoid any negative impact on the debtor's business of the petition having been presented.

When considering a petition for bankruptcy, the court may, of its own volition or where requested to do so, grant provisional measures to secure the debtor's assets, including by: (i) appointing a temporary court supervisor (*tymczasowy nadzorca sądowy*); or (ii) appointing a compulsory administrator (*zarządca przymusowy*) over the debtor's estate. In addition, at the request of the petitioner, the temporary court supervisor or the compulsory administrator, the court can suspend the enforcement proceedings against the debtor's assets and release the bailif-driven seizure of the debtor's bank accounts.

The court should decide on whether to commence bankruptcy proceedings within two months of the petition being properly filed. Nevertheless, there are generally no legal consequences if this takes longer. The bankruptcy order is issued by the commercial division of the district court in the jurisdiction of the debtor's centre of main interests (**COMI**). For companies, COMI is presumed to be the place of the debtor's registered head office. The court should deal with the petition confidentially, but

usually schedules a public hearing so that the participants are able present their position. The order is effective and enforceable as of its date, which also denotes the date when the debtor is formally bankrupt.

Although immediately enforceable, the bankruptcy order may be subject to the following appeals:

- the debtor can appeal against a decision to open bankruptcy proceedings, provided that the bankrupt debtor was not a petitioner;
- the creditor which filed for the debtor's bankruptcy can only appeal against the dismissal of the bankruptcy petition; and
- any creditor that was not the petitioner can appeal against a decision but only on the grounds of challenging the jurisdiction of the Polish bankruptcy courts. In other words, this creditor could argue that the debtor had its centre of main interest outside Poland and as a result it cannot commence bankruptcy proceedings in Poland against this non-Polish debtor.

A decision of the court of second instance cannot be escalated further to the Supreme Court or subject to extraordinary petition for the revision of the proceedings on the declaration of bankruptcy.

The bankruptcy order is immediately published in the Official Journal (*Monitor Sadowy i Gospodarczy*) and in a local newspaper.

Following the recent changes to the bankruptcy regime, bankruptcy proceedings can take two routes:

- standard bankruptcy proceedings involving liquidation; and
- pre-pack insolvency.

These are described in turn below.

Standard bankruptcy proceedings

The declaration of bankruptcy results in the bankrupt being precluded from administering its assets and business and the court-appointed bankruptcy administrator taking control of the bankrupt's business and being tasked with preparing an inventory list and a liquidation plan. The administrator is supervised by the

judge-commissioner who conducts the bankruptcy proceedings, except for actions reserved for the bankruptcy court.

The bankruptcy administrator's duty is to close the proceedings by liquidating the bankrupt's estate. However, when appropriate, the administrator may continue the bankrupt's business activity until the successful liquidation. If possible, the debtor's business is sold as a going concern, otherwise the debtor's assets are sold on a piecemeal basis. The most valuable assets of the bankrupt, eg its enterprise and real property, are subject to an expert valuation.

As of the date of the bankruptcy declaration, the bankrupt's monetary liabilities that are not yet due become due and payable. In addition, non-monetary liabilities are converted into monetary liabilities and become due and payable as of the date of the declaration of bankruptcy.

The liquidation proceeds are distributed to creditors according to a ranking, as follows:

- Super senior category – costs of the bankruptcy proceedings, including expenses for carrying out the proceedings and managing the bankruptcy estate (eg the bankruptcy administrator's fee);
- Senior category – other liabilities of the bankruptcy estate, including all debts that occurred after the bankruptcy declaration (eg under contracts entered into by the administrator with the bankrupt's contractors and receivables under contracts entered into before the bankruptcy declaration that the administrator demands be performed);
- First category – employees' salaries and other employment related claims (for the period before the declaration of bankruptcy), alimonies and pension payments for the period after the bankruptcy declaration, receivables incurred during the in-court restructuring provided that the bankrupt entity was previously subject to unsuccessful restructuring proceedings and then declared bankrupt under a simplified petition for bankruptcy, liabilities under new financing granted to the debtor under an arrangement concluded previously in successful restructuring proceedings, provided that the borrower

was declared bankrupt following a petition made within three months from setting aside the arrangement;

- Second (default) category – other pre-bankruptcy principal debts, including financial and commercial liabilities, taxes, other public levies, pensions and social security premiums;
- Third category – interest accrued on debts listed in the categories mentioned above, court and administrative fines and receivables under donations; and
- Fourth category – receivables under loans and other similar transactions entered by the bankrupt company with its shareholders during the five years before the bankruptcy declaration.

In addition, secured claims are satisfied from amounts received on liquidation from the encumbered moveable or immoveable assets less the costs of liquidating the assets and other bankruptcy proceeding costs (capped at 10% of the collected proceeds).

The administrator satisfies the claims within the super senior category and senior category gradually, as the amounts are being credited to the bankruptcy estate. If the claims within the senior category are not satisfied in this way, they will be satisfied by a distribution of the proceeds of the bankruptcy estate.

Claims within the lower ranking category may be satisfied only if claims under the higher ranking category have been fully satisfied. Where it is not possible to satisfy all the claims in one category, they are satisfied proportionally.

Pre-pack insolvency

The court will consider the pre-pack insolvency option if the petition for bankruptcy includes a request for consent to the sale of the debtor's company or part of it to a buyer on terms which were agreed before initiating the formal bankruptcy proceedings.

The main purpose of these proceedings is to ensure that a company can be sold promptly after the bankruptcy order and thus avoid the risk of the business depreciating in otherwise lengthy proceedings. Ideally, pre-pack

insolvency leads to the creditors satisfying their claims and the business being successfully continued.

The Act imposes additional requirements when a sale is to be made to related parties (so-called *phoenix trading*) by stipulating that a sale of the debtor's business to related parties can only take place when the agreed price is not lower than the estimated price of sale based on the expert's opinion.

The court:

- must accept the terms of the sale of the debtor's company when the agreed price is higher than the amount of the expected liquidation proceeds minus the expected costs of the bankruptcy proceedings; and
- can accept the terms of the sale of the debtor's company when the agreed price is similar to the amount of the expected liquidation proceeds minus the expected costs of the bankruptcy proceedings, provided that this is dictated by an important public interest or there is a possibility to maintain the debtor's business.

Restructuring proceedings

(Postępowanie restrukturyzacyjne)

The general aim of restructuring proceedings is to avoid the bankruptcy of the debtor by allowing it to restructure its obligations through an arrangement with creditors and, in the case of remedial/rehabilitation proceedings, also through remedial actions. There are, however, substantial differences between the particular proceedings to which we ascribe the following numbers:

- fast-track arrangement proceedings (No. 1);
- accelerated arrangement proceedings (No. 2);
- arrangement proceedings (No. 3); and
- remedial proceedings (No. 4).

In principle, the proceedings with lower numbers are meant to be faster and less burdensome for the debtor, while the higher numbers provide for more extensive protection against creditors, but at the expense of greater control of a debtor's operations by the court (or insolvency practitioners appointed by the court).

It is worth noting that while all commercial companies and partnerships are eligible for restructuring, no procedure is available for consumer restructuring (there is only a specific scheme for consumer bankruptcies, as mentioned above).

Commencement of proceedings

As a rule, arrangement proceedings (ie fast-track arrangement proceedings (No. 1), accelerated arrangement proceedings (No. 2) and arrangement proceedings (No. 3)) may be initiated only by the debtor and third parties (especially creditors) do not have a say as to whether the restructuring should commence. This is slightly different for remedial proceedings (No. 4), which may be initiated by either the debtor or one of its full-recourse creditors. However, the creditor may only apply for the opening of remedial proceedings if the debtor is already insolvent

If both a petition for bankruptcy and a petition for restructuring are filed regarding the same debtor, generally the petition for restructuring will be examined first. This means that any possible bankruptcy petitions may be examined only after all petitions for restructuring are dismissed, which may significantly delay the declaration of bankruptcy of an insolvent debtor. However, if the court feels that the delay in examining the petition for bankruptcy would be to the detriment of the creditors as a whole, it may either: (i) examine the petitions for bankruptcy and restructuring together, and issue one decision regarding both; or (ii) disregard the petition for restructuring and decide only on the petition for bankruptcy.

The courts are required to examine the petition for restructuring within 7 or 14 days (depending on the type of restructuring procedure) of the date it is filed, which is considerably faster than the two months applicable to a bankruptcy petition. There is no formal sanction if the above deadlines are not met by the court; however, based on our experiences, the courts indeed make efforts to give decisions on restructuring petitions within weeks rather than months.

In general, for any restructuring proceedings to be opened the debtor must be insolvent, or threatened with insolvency. The test for insolvency of the debtor is understood to be the same as for the purposes of a bankruptcy declaration, ie either the test of illiquidity or over-indebtedness needs to be satisfied. However, as the threat of insolvency is sufficient to open the proceedings, it may be sufficient if the debtor will become insolvent in the near future, and in particular that it will be unable to satisfy its obligations as they fall due.

The court is required to dismiss the restructuring petition if it believes that the proceedings would be harmful to the creditors.

In addition, as arrangement proceedings (No. 3) and remedial proceedings (No. 4) generate significant costs, similar to the bankruptcy proceedings, and last longer than other types of restructuring proceedings, an application to open these proceedings will be dismissed if the debtor does not prove that it will be capable of bearing the costs of these proceedings and satisfying its obligations arising after the opening of these proceedings.

Regarding the availability of particular restructuring proceedings, two situations should be distinguished:

If the value of disputed claims does not exceed 15% of the sum of all claims, then the available proceedings are:

- fast-track arrangement approval proceedings (No. 1),
- accelerated arrangement proceedings (No. 2), and
- remedial proceedings (No. 4).

If the value of disputed claims exceeds 15%, then proceedings are limited to:

- arrangement proceedings (No. 3), and
- remedial proceedings (No. 4).

Fast-track arrangement proceedings (No. 1) differ significantly as they are dedicated to debtors who are able to reach an arrangement without the court's involvement by obtaining the approval of the required majority of creditors with the assistance of a restructuring advisor, who performs the function of an arrangement supervisor. This type of restructuring proceedings is not available to issuers of bonds, except for a partial arrangement, on the condition that it does not include bondholders' claims. Given that, regarding fast-track arrangement approval proceedings (No. 1), no formal decision is needed from the court for the debtor to initiate them, no appeals can be lodged. If the creditors become aware of the proceedings and are dissatisfied with them, they can express their position in informal negotiations with the debtor, or later by disapproving of the arrangement.

In the case of accelerated arrangement proceedings (No. 2), arrangement proceedings (No. 3), and remedial proceedings (No. 4), the decision to open the restructuring may be appealed in full (in particular, as to the merits of the insolvency and viability of restructuring) only by the debtor. The creditors may lodge an appeal only regarding the jurisdiction of the Polish courts in the case, which may become a significant issue in certain circumstances only. However, as creditors appeals' need to be filed within 7 days (for Polish creditors), and 30 days (for foreign creditors) of the announcement in the Court Gazette, it is essential that the creditors closely monitor announcements for the debtors they suspect of insolvency.

Debtor in possession

In fast-track arrangement approval proceedings (No. 1), which take place primarily outside the court, the debtor retains full control over its assets and manages the business on its own. The debtor is obliged to hire a licensed supervisor to oversee and facilitate the proceedings, and keep him/her informed of the issues surrounding the restructuring and its operations, but until the court decides to approve the arrangement, the licensed supervisor has no official authority over the debtor. In the interim period after the court issues the decision to approve the arrangement but before the decision becomes final and binding, the consent of the licensed supervisor is required for actions beyond the scope of normal administration of the debtor, ie for material transactions.

In accelerated arrangement proceedings (No. 2) and arrangement proceedings (No. 3), it is a default position that the debtor manages the estate but the court *ex officio* appoints a court supervisor to oversee its management. The powers of such restructuring practitioner are quite limited but he/she is obliged to submit monthly reports to the court on the status of the debtor's restructuring, which implies that he/she must be informed of its operations. In addition, the consent of the court supervisor is required for actions beyond the scope of normal administration (material transactions). Any transactions effected without such consent are void by operation of law.

In exceptional circumstances the court may, at its discretion, deprive the debtor of control over its assets and appoint a compulsory manager, as soon as it makes the decision to open the proceedings, or later, during them.

In remedial proceedings (No. 4) it is a default position that the debtor is deprived of the right to manage its business and the compulsory manager is appointed, who takes control of the restructuring estate. However, the court may order that the debtor retains control over its business (either the whole or a part) if it feels this is to the benefit of the process. In any case, the debtor cannot enter into material transactions on its own.

Note that the debtor may have some control over who is appointed as the court supervisor or compulsory manager over the restructuring estate. If the debtor proposes a candidate who is supported by creditors that have in total more than 30% of the total claims, the court is in principle bound by such candidacy. However, the court may nevertheless disregard the proposed candidate if it feels that there are sufficient reasons to do so, and in particular if it suspects that he/she may not perform the functions properly.

Scope of arrangement

The ultimate aim of restructuring proceedings is to restructure the debtor's obligations under an arrangement approved by the relevant majority of creditors.

In general, an arrangement covers full-recourse claims towards the debtor incurred before the restructuring proceedings were opened. If such a claim is subject to a condition precedent, then it is covered by the arrangement only if the condition precedent was met during the performance of the arrangement. Interest accruing on a claim being subject to an arrangement is also covered by the arrangement even if such interest accrued after the restructuring proceedings were opened.

However, claims against the debtor under a reciprocal agreement which have not been fully performed before the opening of restructuring proceedings will be included in the arrangement only if the performance of the other party under that agreement is divisible and only to the extent to which the other party has effected that

performance and has not received a reciprocal performance from the debtor.

There are certain types of claims which are excluded from the arrangement, including, among others, claims arising from social security contributions in part financed by the insured, whose payer is the debtor.

Unless the creditor has agreed to include them in the arrangement, claims under an employment relationship and claims secured on the debtor's property by mortgage, pledge, registered pledge, treasury pledge and/or maritime mortgage, in part covered by the value of the collateral, are excluded from the arrangement. Such consent must be granted unconditionally and irrevocably before voting on the arrangement at the latest.

Arrangement proposals

The debtor shall submit its arrangement proposals. Nevertheless, after the opening of restructuring proceedings: (i) the council of creditors; (ii) the court supervisor (or the administrator); and (iii) a creditor or a group of creditors holding at least 30% of the total claims may submit their own alternative arrangement proposals.

The arrangement proposals may include one or more methods of restructuring the debtor's obligations, in particular these may include deferral of maturity, debt for equity swap or a partial release of these obligations.

Partial Arrangement

Furthermore, the debtor may submit arrangement proposals concerning not all but only certain types of obligations, the restructuring of which has a significant impact on the continued operation of the debtor's business. This solution called partial arrangement (*układ częściowy*) can only be adopted and approved on the basis of fast-track arrangement proceedings (No.1) or accelerated arrangement proceedings (No.2) and is dedicated especially to restructurings which involve only major creditors (ie financial institutions or main suppliers). Identifying the creditors to be covered by a partial arrangement shall be based on objective, clear and economically justified criteria. In particular, the

following claims may be covered by such type of arrangement:

- (i) claims arising from financing the debtor's activity by granted credit facilities, commercial loans, cash loans and other similar instruments;
- (ii) claims arising from contracts which are essential for the operation of the debtor's undertaking, in particular for the supply of key materials and leasing agreements for the property necessary for the activities carried out by the debtor;
- (iii) claims secured by a mortgage, pledge, registered pledge, treasury pledge or maritime mortgage established on objects and rights necessary to operate the debtor's undertaking; and
- (iv) the highest claims determined in terms of the sum.

It is worth noting that if the creditor's claims are secured by the collaterals established over a debtor's estate and the arrangement proposal presented by the debtor provides for their full satisfaction together with the incidental claims (which have been secured under the relevant security agreement) or satisfaction to a degree no lower than what the creditor could expect if it enforced its collateral, the consent of such creditor is not necessary to cover claims with the partial arrangement.

Meanwhile, the proposals must not provide benefits to the creditors covered by the partial arrangement which reduce the possibility of satisfying claims that are not covered by the partial arrangement.

Voting on the arrangement

Except for fast-track arrangement proceedings, the proposed arrangement is voted on at a creditors' meeting. The resolution adopting the arrangement is passed if the majority in number and a 2/3 majority in value of voting creditors who cast a valid vote are in favour of it. If voting is carried out in groups of creditors

the same rule applies; however, even if the arrangement does not receive the required majority in one or more groups, it will still be adopted if creditors with two-thirds of the sum of the claims voted in favour of adopting the arrangement and those creditors who were against it are satisfied to a degree not less favourable than in the event of conducting bankruptcy proceedings. This regulation helps to eliminate obstruction if there is a significant number of uncooperative creditors whose claims are of a small value. The introduction of the 'one-fifth of creditors entitled to vote' quorum ensures that common interests are duly represented and reflected in the voting results.

In fast-track arrangement proceedings, the creditors' acceptance shall be expressed in writing, collected by the debtor or restructuring advisor, and submitted for the court's approval once the votes of all creditors have been obtained. Unlike the other types of proceedings, the required majority is calculated by reference to the total value of claims held by the creditors entitled to vote, instead of the value of voting creditors' claims.

Court's approval

An arrangement adopted by the required majority of creditors is subject to the court's further approval. In addition, the participants in the proceedings may file objections against the arrangement which the judicial authorities will take into consideration.

The court will refuse to grant its approval if: (i) the arrangement violates the law; (ii) it is obvious that it will not be executed (it is assumed that the arrangement will not be executed if the debtor has not fulfilled its obligations which arose after the proceedings were opened); or (iii) in proceedings No.1 and No. 2 disputed claims exceeded 15% of the total sum of the claims. Furthermore, the arrangement may be rejected if the court finds its terms to be grossly unfair to creditors who voted against the arrangement.

European Insolvency Regulation

The EU Regulation on Insolvency Proceedings 2015 (Regulation (EU) 2015/848) (the **Recast Regulation**) applies to all proceedings opened on or after 26 June 2017. Its predecessor, the EC Regulation on Insolvency Proceedings 2000 (Regulation (EC) 1346/2000) (the **Original Regulation**) continues to apply to all proceedings opened before 26 June 2017. One of the key changes in the Recast Regulation is that it brings into scope certain pre-insolvency “rescue” proceedings and these are now listed alongside the traditional insolvency procedures in Annex A to the Recast Regulation. The Recast Regulation retains the split between main and secondary/territorial proceedings but secondary proceedings are no longer restricted to a separate list of winding up proceedings – secondary

proceedings can now be any of those listed in Annex A. By contrast, the Original Regulation listed the main proceedings in Annex A and secondary proceedings (which were confined to terminal proceedings) in Annex B.

Of the above restructuring and insolvency regimes, bankruptcy (including pre-pack insolvency) was available as the main and secondary proceedings under the Original Regulation.

Under the Recast Regulation, as amended (by Regulation (EU) 2017/353 replacing Annexes A and B to the Recast Regulation), bankruptcy and restructuring proceedings are listed in Annex A.

Further information

For further information on Polish restructuring and insolvency procedures, we would refer you to the Sweet & Maxwell book “European Cross Border Insolvency”, edited by Allen & Overy. To purchase a copy of this book, please visit sweetandmaxwell.co.uk.

Allen & Overy has launched an online service for clients focussing on debt restructurings and insolvency issues. Developed by Allen & Overy’s market-leading

Restructuring group, “Restructuring Across Borders” is an easy-to-use website that provides information and guidance on all key practical aspects of restructuring and insolvency in Europe and the US.

To request access for your organisation, please contact your usual Allen & Overy contact, or email rab@allenover.com.

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