

LONG AWAITED AND MUCH ANTICIPATED: POLAND'S NEW ACT ON RESTRUCTURING: ITS SIGNIFICANCE FOR DEBTORS AND CREDITORS.

I. INTRODUCTION

The majority of provisions of the new Act on Restructuring Law (Journal of Laws from 2015, item 978) (the "**Restructuring Law**") become effective as of the 1st of January 2016. The new law implements the so called „*politics of the new or second chance*” and seeks to provide balanced protection of entrepreneurs, workplaces, creditors and employees in the face of a company's financial problems. In contrast to prior law, bankruptcy and restructuring proceedings will be regulated in two separate acts.

Four restructuring proceedings are available: (a) arrangement approval proceedings (*postępowanie o zatwierdzenie układu*), (b) accelerated arrangement proceedings (*przyspieszone postępowanie układowe*), (c) arrangement proceedings (*postępowanie układowe*) and (d) remedial proceedings (*postępowanie sanacyjne*). The reorganisation proceedings under the prior Bankruptcy and Composition Law were rarely applied in practice as they were considered to be associated with bankruptcy proceedings which usually led to liquidation.

The overriding policy of the Restructuring Law is that, generally¹, a restructuring motion will take precedence over a bankruptcy petition.

The following tables contrast: (1) the prior Bankruptcy and Composition Law and (2) the new Restructuring Law and Bankruptcy Law.

PRIOR BANKRUPTCY AND COMPOSITION LAW			
Proceeding	Bankruptcy by liquidation (<i>upadłość likwidacyjna</i>)	Bankruptcy with the possibility to make a composition (<i>upadłość układowa</i>)	Reorganisation proceedings (<i>postępowanie naprawcze</i>)
Precondition of initiation	Debtor's insolvency <u>Insolvency tests:</u> LIQUIDITY TEST (failure of debtor to perform its obligations when they become due) and/or ASSETS TEST (debtor's liabilities exceed asset value, regardless of the timely performance of obligations).		Debtor's threat of insolvency.

¹ If withholding of the bankruptcy petition would be contrary to the interest of all creditors, the bankruptcy court may exceptionally decide to consider bankruptcy and restructuring petitions jointly.

NEW RESTRUCTURING LAW				
Proceeding	Arrangement approval proceedings	Accelerated arrangement proceedings	Arrangement proceedings	Remedial proceedings
Precondition of initiation	Debtor's insolvency or threat of insolvency + disputed claims not exceeding 15% of the total claims.		Debtor's insolvency or threat of insolvency + disputed claims exceeding 15% of the total claims.	Debtor's insolvency or threat of insolvency.
Responsibility for managing debtor's estate	Debtor being under control of a supervisor (<i>nadzorca układu</i>)	Debtor being under control of a court supervisor (<i>nadzorca sądowy</i>) (however, if debtor is deprived of management the administration of the debtor's estate will be vested in a court appointed administrator (<i>zarządca</i>))		Administrator (<i>zarządca</i>) appointed by a court (however, the court may also approve ordinary course of business management by the debtor)
Means of adoption of arrangement	As result of individual collecting of votes performed by the debtor	As a rule at the creditors' meeting convened by the court		
Suspension of / prohibiting civil/administration proceedings	No		No, however the creditor will be obliged to bear the costs of the proceedings if there were no obstacles to include the claim in the list of claims.	
Suspension of / prohibiting enforcement proceedings	Protection against the executions of unsecured creditors only from the day of the issuance of the court order approving the arrangement until the day it becomes final.	Full protection against the executions of unsecured creditors from the date of the opening of proceedings.	Full protection against the executions of unsecured creditors from the date of the opening of proceedings ² .	Total protection against all executions, including secured creditors, from the day of the opening of proceedings ³ .
Estimated duration	2 weeks	2 months	6-10 months	12 months

² In addition the court may apply protection at the stage of verification of the application for opening of the proceedings.

³ In addition the court may apply protection at the stage of verification of the application for opening of the proceedings.

BANKRUPTCY LAW CHANGES	
Proceeding	Bankruptcy by liquidation (An arrangement is still possible within the course of bankruptcy proceedings)
Precondition to initiation	Debtor's insolvency
	<p style="text-align: center;">CHANGES TO INSOLVENCY DEFINITION:</p> <p>LIQUIDITY TEST: the debtor losing the ability to perform its obligations as they fall due (presumed if delay in payment exceeds 3 months).</p> <p>Substantial modifications of the ASSETS TEST ***:</p> <ul style="list-style-type: none"> a) insolvency status triggered by liabilities exceeding asset value for longer than 24 months, b) future and conditional liabilities as well as shareholders' loans are not considered. <p>*Even if the ASSETS TEST is met, the bankruptcy court may reject a bankruptcy petition if there is no threat of the debtor losing its ability of duly fulfilling its financial obligations in the short term.</p> <p>** The market value of assets, not balance sheet value, is taken into account.</p>

II. RESTRUCTURING LAW

1. ARRANGEMENT

In the case of three of the reorganisation proceedings (in arrangement approval proceedings votes are collected by the debtor), the arrangement will be voted and concluded at the creditors' meeting⁴ under the following conditions: (a) at least 1/5 of creditors entitled to vote have to be present, (b) the majority of voting creditors, having jointly at least 2/3 of the total claims held by the voting creditors, must vote in approval.

NOTE: The position of active (i.e., voting) creditors under the Restructuring Law is strengthened. Prior law required a majority approval taking into account creditors entitled to vote, i.e., both voting and nonvoting creditors.

The creditors vote is based on the aggregated sum of the claims entered into the approved list of claims or in the enforcement title. A judge-commissioner may also admit a creditor, whose claim is conditional or is disputed but has been shown to be credible. Proposals for an arrangement with the creditors may be submitted by: (a) the debtor, (b)

⁴ If there are difficulties with holding a meeting due to the number of creditors, the judge-commissioner may decide to collect the votes without convening a meeting.

the creditors' committee, (c) the court supervisor or the administrator, as well as (d) creditor/-s holding more than 30% of the total sum of claims.

The arrangement proposals will determine the method of restructuring the debtor's obligations and may include, in particular: (a) deferment of performance of obligations, (b) payment of debts in instalments, and (c) reduction of debts.

Generally, only claims which arose before the arrangement day will be covered by the arrangement, which, in the case of accelerated arrangement proceedings, arrangement proceedings and remedial proceedings, will be the day of issuance of the court decision on opening the proceedings. Under the arrangement approval proceedings the arrangement day will be determined by the debtor in accordance with the rules described in point 3 a) below.

An arrangement concluded by the required majority of creditors has to be approved by the court.

2. PARTIAL ARRANGEMENT

A partial arrangement (*układ częściowy*) concluded only with selected (e.g., the biggest or secured) creditors is generally only available in arrangement approval and accelerated arrangement proceedings⁵. Under prior law the debtor had to either conclude the arrangement with all creditors or not. If not there was usually a liquidation.

3. RESTRUCTURING PROCEEDINGS (FURTHER DETAILS)

NOTE: As a general rule, the broader the restructuring option and protection against creditors, the more limited is the debtor's eligibility for management of its estate.

a) Arrangement approval proceedings

Such proceedings, which in simpler cases may be conducted out of court, include the collecting of the creditors' votes by the debtor and begin with the conclusion of an agreement between the debtor and a licensed supervisor (*nadzorca układu*) whose main responsibilities are: (a) preparing a restructuring plan, (b) cooperation with the debtor in formulating arrangement proposals, and (c) preparing a list of claims and a list of contested claims. Immediately after that the debtor determines the arrangement day, which must not be earlier than three months and not later than one day before the day the motion for the approval of the arrangement is to be submitted with the court. In the next step the debtor will present to its creditors arrangement proposals and collect their votes. A motion for an arrangement's acceptance may be submitted to the court only if the majority of creditors entitled to vote, holding at least 2/3 of the sum of receivables entitling to vote, approve such arrangement.

⁵ Such arrangement will be exceptionally possible also in the remedial proceedings.

NOTE: The main difference in comparison to the other restructuring proceedings is that that the required majority will be calculated according to the total number of creditors entitled to vote, not just the total number of creditors that actually vote.

The need for this difference arises from the need to eliminate the potential that the debtor would fail to actually notify the creditors. In other proceedings it is the court that notifies creditors.

b) Accelerated arrangement proceedings

An accelerated arrangement proceeding features a restructuring plan prepared by an independent court advisor and not by a licensed supervisor acting on the basis of an agreement concluded with the debtor.

Accelerated arrangement proceedings are, as a rule, conducted with the participation of a court supervisor who prepares, a restructuring plan that takes into consideration the restructuring proposals presented by the debtor, and delivers it to the judge-commissioner along with: (a) a list of claims and (b) a list of disputed claims. Immediately after submission of these documents, the judge-commissioner sets a deadline for the creditors' meeting for the purpose of voting on the arrangement.

Under this procedure only the debtor is entitled to express reservations in respect of particular claims and cause them to be put on the list of disputed claims. In order to accelerate the procedure, a list of assets is prepared by the debtor in lieu of conducting an inventory.

c) Arrangement proceedings

The rules of the arrangement proceedings are similar to the accelerated arrangement proceedings. The most important differences are: (a) the possibility to appoint a temporary supervisor of debtors' assets at the stage of verification of the application for opening of proceedings, (b) conducting an inventory of debtor's (arrangement) estate, (c) debtor's and creditors' entitlement to submit objections against a claim's recognition or not including an amount on the list of claims. Within one month from the court decision on opening of the proceedings, the court supervisor draws up a list of claims and a restructuring plan. The plan will be verified by the the judge-commissioner. Voting on and approval of the arrangement is based on the general principles described under point II. 1 above.

d) Remedial proceedings

Remedial proceedings will offer the most comprehensive restructuring possibility. It is intended for entrepreneurs who for various reasons are not able to enter into an arrangement with creditors under the previously discussed proceedings.

Remedial proceedings can be conducted not only upon application of the debtor but, in the case of an insolvent legal person, also upon creditors' application.

As a rule, the debtor's ability to exercise the management over its own assets will be significantly restricted by the supervision of the judge-commissioner and the creditors. Only if the effective performance of the remedial proceedings requires individual participation of the debtor or its representatives, and simultaneously a guarantee of a due performance of management duties is given by them, may the court permit management by the debtor within the ordinary course of business.

The proceedings provide new elements that were once available only in bankruptcy by liquidation under the Bankruptcy and Composition Law, e.g.: (a) the receiver may rescind non-performed disadvantageous mutual agreements ("*cherry picking rights*"), (b) it is possible to adjust the employment level to the needs of the restructured enterprise, (c) powers und commercial powers of attorney will expire by operation of law, (d) the sales of assets by the receiver may be effected without encumbrances, and (e) some legal acts will be ineffective with respect to the debtor's estate (remedial estate).

Remedial proceedings will differ from other restructuring proceedings also due to the fact that the restructuring actions will be undertaken in whole or in part before voting on the arrangement. Thus, creditors will have a wider knowledge of the reality of the arrangement proposals and possibilities for regulating liabilities by the debtor.

III. CHANGES COMMON TO BOTH THE RESTRUCTURING AND THE BANKRUPTCY LAWS

1. Increasing the impact of creditors on the restructuring/bankruptcy proceedings

The impact of creditors on the course of proceedings is increased by the following:

- a) the ability to allocate a trusted person chosen by the largest creditors to the position of the administrator (in the remedial proceedings) or the supervisor (in accelerated arrangement proceedings and arrangement proceedings) as a consequence of the debtor's proposal, which will be binding, on condition of its acceptance by the creditor/-s having jointly more than 30% of the total amount of claims,
- b) the mandatory appointment of a creditors' committee at the request of at least 3 creditors holding together at least 1/5 of the total amount of claims,
- c) the obligation, to appoint to a creditors' committee, a creditor specified by the creditor/-s holding together at least 1/5 of the total amount of claims,
- d) the creditors' committee will be headed by a creditor and no longer by a supervisor (receiver, trustee),

- e) the obligatory changing of the trustee by the court resulting from the resolution of the creditors' committee and appointing a person specified by the creditors' committee.

2. Restructuring advisor

Under the Restructuring Law only persons having a licence as a restructuring advisor may act as supervisor or administrator in the restructuring proceedings or as a trustee in the bankruptcy proceedings. As a rule a person acting as supervisor or administrator in the restructuring proceedings cannot be a trustee in a bankruptcy proceedings conducted with respect to the same entity. This should encourage such persons to do their best in order for the restructuring proceedings to succeed. The remuneration of a restructuring advisor will depend on the conclusion of the arrangement with creditors and its execution.

3. New electronic platform - Central Register of Restructuring and Bankruptcy

In order to facilitate access to information relating to bankruptcy and restructuring proceedings, the Restructuring Law will implement a new electronic platform, the Central Register of Restructuring and Bankruptcy ("**CRRB**") (*Centralny Rejestr Restrukturyzacji i Upadłości*). The CRRB will include all decisions and rulings, documents and information concerning each proceeding, and required templates of pleadings and forms. The platform will also enable participants to file electronically applications and other documents. The CRRB should be free of charge and available to all participants of the proceedings and to some extent to other interested parties. The planned date for its launching is scheduled for 1 February 2018.

IV. BANKRUPTCY LAW/ CRUCIAL BENEFICIAL CHANGES

1. New definitions of insolvency

The new definitions of insolvency have been described in the table on Page 3 of this Client Alert. It should be mentioned that this change to the Bankruptcy Law confirms court precedent and legal doctrine that the insolvency status has to be long-lasting. However, under prior law only two outstanding invoices could constitute grounds for bankruptcy.

2. Bankruptcy petition

Under the new Bankruptcy Law the statutory deadline for filing for a bankruptcy petition will be extended from 2 weeks to 30 days from the date when a debtor became insolvent. Liability for damages caused by the failure to timely file the petition within the statutory time limit will be subsequently excluded in particular, if restructuring proceedings are opened or an arrangement under the proceedings described in point 3a) above is approved.

3. Pre-pack

The Bankruptcy Law includes availability of a pre-pack (*przygotowana likwidacja*) sale of a bankrupt enterprise opening the possibility of faster and greater satisfaction of creditors and considerably shortening the duration of the bankruptcy proceedings.

The motion for approval of the sale must be recognized simultaneously with the bankruptcy petition. The acceptance of the motion is only possible if, as a result of the pre-pack sale, creditors are satisfied to a greater extent than would be the case in a liquidation of assets.

An approved pre-pack sale will have the same effect as an execution sale, i.e., it will enable the buyer to acquire distressed assets without encumbrances⁶.

4. Limitation of the priority status of public (tax and social insurance) claims

The limitation of the privilege of public-law claims will be based on: (i) narrowing the scope of receivables included in the first privileged category to social security contributions due for the last three years before declaring bankruptcy, and (ii) the total abolition of the privilege of all other public-law claims, including tax claims.

5. The privileged position of new financings

The privileged category in the bankruptcy proceedings consists also of liabilities arising in restructuring proceedings in connection with activities of the trustee or the debtor⁷, if the bankruptcy was declared due to recognition of a simplified bankruptcy petition.

NOTE: A simplified bankruptcy petition may be filed by a person authorised to submit an (ordinary) bankruptcy petition in accordance with the provisions of the Bankruptcy Law, within the period defined for filing a complaint against the decision to discontinue the restructuring proceedings or the decision to refuse to approve the arrangement.

In general new financings during restructurings will be encouraged by the privileged position they are given, if the restructuring fails and a bankruptcy does occur.

6. Facilitating filings of claims

It is now possible to file claims electronically via CRRB. This should eliminate formal defects of filings and facilitate submissions by the creditors as well as forwarding claims to the trustee. Another important facilitation for the creditors will be the abolishment of the requirement to submit evidence supporting claims along with the filing of claims. Only if the filed claim is not indicated in the accounting books or other documents of the bankrupt or in the registers (e.g., in the land and mortgage register) will the trustee call upon a creditor to back-up its claim.

⁶ With some exceptions, such as transmission line easements.

⁷ which in the latter case do not require the consent of the creditors' committee or the court supervisor or which have been undertaken with their consent.

V. CONCLUSION

The new regulation, inspired by various European and U.S. examples, e.g., U.S. Chapter 11, the English scheme of arrangements, the Austrian *Insolvenzordnung* and the French *sauvegarde*, should be assessed as a significant step forward. Time will tell whether and to what extent entrepreneurs will take advantage of the benefits offered by the Restructuring Law. It is hoped that from 1 January 2016 restructurings increase significantly and bankruptcy proceedings will only be turned to if restructurings fail.

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