Track Changes

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WOLF THEISS

Are Polish distressed assets selling more smoothly?

The legislation regulating the pre-packaged sale of a business as a going concern, which was introduced into the Polish legal system in on 1 January 2016, has been amended recently. On 24 March 2020, amendments to Polish bankruptcy law came into force, including the amendments regarding pre-packaged sales.

A pre-packaged sale is a judicial proceeding where the bankruptcy court approves the sale of a debtor's business as a going concern or the sale of major business assets along with the declaration of its bankruptcy.

REQUIRED DEPOSIT

Starting 24 March 2020, an investor interested in purchasing a business as a going concern in a pre-pack procedure is required to pay a deposit equal to one tenth of the offered price. The deposit is paid to the relevant court's escrow account. A lack of proof of payment of this deposit means the court will not consider a motion for approval of the terms and conditions of sale.

The deposit, paid by the purchaser, will be credited towards the purchase price and the funds will be transferred to the bankruptcy estate. If the sale agreement is not concluded at a purchaser's fault, the bankruptcy administrator will retain the deposit.

GIVING THE CREDITORS A HEADS UP

An interested investor should also attach a list of all collateral security established (that he knows of) in favor of creditors over the debtor's property, along with the names and addresses of such creditors, to the motion for approval of the terms and conditions of sale. Additionally, the motion for approval should be accompanied by copies with attachments to be served to the debtor's creditors. This amendment is introduced mainly in order to notify relevant creditors about the intention of selling the debtor's business in a pre-packaged sale and to give creditors due warning. It will also allow a bankruptcy court to learn about the creditors' opinions on the pre-packaged sale, given that they are entitled to challenge the court decision in this respect.

THE ANNOUNCEMENT ABOUT THE SUBMISSION OF THE PRE-PACK MOTION

Furthermore, pursuant to the yesterday's amendments, filing a motion for approval of the terms and conditions of sale will be followed by a public announcement. The Bankruptcy Court should review the motion for approval of sale no earlier than thirty days from the date of the public announcement and no earlier than fourteen days after serving the motion to the creditors.

AUCTION AMONG PRE-PACK BIDERS

If there is more than one investor interested in approval of purchasing the debtor's assets in a prepackaged sale, and two or more motions in this respect are submitted, a temporary court supervisor proceeds with an auction in order to select the most favorable terms and conditions of sale. Investors should be notified about the auction at least two weeks before the auction is to take place.

It remains to be seen how useful these amendments will prove in the upcoming economic downturn. It should be noted that the pre-pack procedure was highly praised by restructuring practitioners in 2015-2016 when the bankruptcy law was amended. However, it turned out between then and now, the bankruptcy courts tended to think that the pre-pack approach gave the debtors too much leeway in structuring the terms of sale, making those too close to a private sale run by the debtor (hostile creditor driven pre-packs did not really happen as a result of inability of creditor-directed purchasers to conduct proper diligence). Hence the bankruptcy courts reacted in ways making the process far less efficient than originally envisaged. In particular, some prepack cases dragged on for months or the courts attempted to allow competitive prepack bids at a late stage (without a clear legal ground). In summary, while some practitioners started to criticize the amendment well before it entered into force, it may in fact close at least some loopholes in the regulation and let more distressed assets to be sold in the prepack setting.

About WOLF THEISS

Wolf Theiss is one of the leading law firms in Central, Eastern and Southeastern Europe (CEE/SEE). We have built our reputation on a combination of unrivalled local knowledge and strong international capability. We opened our first office in Vienna over 60 years ago. Our team now brings together over 340 lawyers from a diverse range of backgrounds, working in offices in 13 countries throughout the CEE/SEE region.

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