The International Insolvency Review

Second Edition

Editor
Donald S Bernstein

Law Business Research

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For further information please email
Nick.Barette@lbresearch.com

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Nick Barette

SENIOR ACCOUNT MANAGERS
Katherine Jablonowska, Thomas Lee, James Spearing

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EDITOR'S PREFACE

This second edition of *The International Insolvency Review* once again offers an in-depth review of market conditions and insolvency case developments in a number of key countries. Building on the first edition, coverage has been expanded to include Belgium, Greece, Jersey, Poland, Portugal, Singapore and South Africa bringing the total number of jurisdictions covered to 31. Once again, a debt of gratitude is owed to the outstanding professionals in geographically diverse locales who have contributed to this book. Their contributions, of course, reflect their diverse viewpoints and approaches, which in turn reflect the diversity of their respective national commercial cultures and laws. These differences drive the steadily emerging pattern, described in these pages, of resistance on the national level to the universal application of a single 'home' country's law in cross-border commercial insolvency cases.

This pattern, though understandable, poses a significant challenge. While a large and increasing coterie of countries have adopted legislation based on the UNCITRAL Model Law, with its universalist vision of global recognition of a single controlling 'main' or home country insolvency proceeding, countries continue to find it difficult to allow the rules of the foreign main proceeding to control within their borders. In addition, neither the Model Law, nor other enactments, like the European Union's Regulation on insolvency,[1] provide the tools necessary for consolidated administration of insolvencies involving multiple legal entities in a corporate group, with operations, assets and stakeholders under different corporate umbrellas in different jurisdictions. It is difficult enough for local authorities and local commercial interests to relinquish local control of the treatment of a single foreign company's local assets and stakeholders. It is almost impossible for them to do so with respect to a locally organised entity with

1 Council Regulation (EC) No. 1346/2000 of 29 May 2000 on insolvency proceedings, 2000 O.J. (L 160) 1, available at http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2000:160:0001:0018:en:PDF.

local operations, employees, assets and creditors. Embedded expectations that local law, local courts, local procedures and local insolvency administrations will apply are simply too strong.

Insolvent corporate groups are obliged to initiate separate plenary insolvency proceedings for individual companies under local insolvency regimes in multiple jurisdictions (as illustrated in the cases of Nortel and Lehman Brothers, among others), and the daily conflicts among the controlling insolvency administrations destroy value and vastly increase costs. Since there seems to be no appetite for allowing a single home country's insolvency law to take precedence in such cases, alternatives that allow a single court to administer the proceedings, but make adjustments to the treatment of each entity's stakeholders reflecting applicable foreign law, are being explored. These approaches pose a complex set of questions for which there is no legal framework or consensus. Can a single court be given control over the entire corporate group and its assets and stakeholders wherever located? How and when should adjustments in treatment be made to reflect foreign substantive law? Although possible answers to these questions are beginning to emerge, they all involve a relinquishment of national sovereignty and an expansion of jurisdiction that may be difficult to accomplish, especially without greater convergence in national insolvency laws.

Aware of the issues arising out of this deficiency in current law, in 2006, UNCITRAL referred the matter of enterprise groups to its Working Group V (Insolvency Law) for further discussion.[2] The efforts of the working group led to the publication, in 2012, of Part Three of the UNCITRAL Legislative Guide on Insolvency Law, addressing the treatment of enterprise groups in insolvency.[3] Although the Guide recognises that 'it is desirable that an insolvency law recognise the existence of enterprise groups', discusses the importance of cross-border cooperation and offers various proposals to facilitate enhanced coordination,[4] there is no consensus regarding definitive proposals. Publication of Part Three of the Guide did not mark the end of Working Group V's mandate to address the issue of enterprise groups, but everyone recognises the road to a solution, if one is possible, may be long and hard.[5]

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2 United Nations Commission on International Trade Law, Report of Working Group V (Insolvency Law) on the Work of its Thirty-First Session (Vienna, 11–15 December 2006), U.N. Doc. A/CN.9/618 (8 January 2007), available at http://daccess-dds-ny.un.org/doc/UNDOC/GEN/V07/800/89/PDF/V0780089.pdf?OpenElement.

3 United Nations Commission on International Trade Law, UNCITRAL Legislative Guide on Insolvency Law; Part Three: Treatment of Enterprise Groups in Insolvency, U.S. Sales No. E.12 V. 16 (2012), available at www.uncitral.org/pdf/english/texts/insolven/Leg-Guide-Insol-Part3-ebook-E.pdf.

4 Id.

5 See United Nations Commission on International Trade Law, Report of Working Group V (Insolvency Law) on the Work of its Forty-Fifth Session (New York, 21–25 April 2014), U.N. Doc. A/CN.9/803 (6 May 2014), available at http://daccess-dds-ny.un.org/doc/UNDOC/GEN/V14/028/64/PDF/V1402864.pdf?OpenElement. The European Commission is also considering amending the European Union Regulation on Insolvency to better encompass

I once again want to thank each of the contributors to this book for their efforts to make *The International Insolvency Review* a valuable resource. As each of our authors, both old and new, knows, this book is a significant undertaking because of the current coverage of developments we seek to provide. My hope is that this year's volume will help all of us, authors and readers alike, reflect on the larger picture, keeping our eye on likely, as well as necessary, developments on the near and, alas, distant horizon.

Donald S Bernstein
Davis Polk & Wardwell LLP
New York
October 2014

enterprise groups. See European Commission, Proposal for a Regulation of the European Parliament and of the Counsel Amending Council Regulation (EC) No. 1346/2000 on Insolvency Proceedings (2012), available at http://ec.europa.eu/justice/civil/files/insolvency-regulation_en.pdf.

Chapter 26

POLAND

Krzysztof Żyto and Milena Bełczącka[1]

I INSOLVENCY LAW, POLICY AND PROCEDURE

i Statutory framework and substantive law

Polish bankruptcy law (the Bankruptcy and Rehabilitation Law of 28 February 2003 (Dz.U.2012.1112 (BRL)) provides for two types of bankruptcy proceedings: liquidation bankruptcy and arrangement bankruptcy. Under the former type, a court-appointed trustee liquidates the debtor's estate, usually by selling the debtor's enterprise in whole or in part. The objective of arrangement bankruptcy is to preserve the debtor's enterprise by entering into an arrangement with its creditors. The arrangement scheme provides for restructuring of the debtor's liabilities, primarily through debt reduction and rescheduling. In declaring arrangement bankruptcy, the court may leave the administration of the debtor's assets with the debtor, under court supervision, or may appoint an administrator to administer the debtor's assets. The BRL also provides for separate rehabilitation proceedings if the debtor faces a threat of insolvency. The objective of rehabilitation proceedings is to arrive at an arrangement with creditors while avoiding a declaration of bankruptcy. However, the regulations governing rehabilitation proceedings are imperfect and are seldom used in practice.

Order of payments

Bankruptcy proceedings are to be conducted in a manner ensuring the fullest possible repayment of creditors without harm to them or their interests. Under bankruptcy proceedings involving the liquidation of the debtor's estate, each claim submitted is assigned to a class. The class assignment affects the order of repayment during the

1 Krzysztof Żyto is a partner and Milena Bełczącka is a senior associate at Chajec, Don-Siemion & Żyto Legal Advisors. The authors wish to thank Małgorzata Sas, Jakub Łabuz, Radosław Rudnik and Dariusz Zimnicki for their contribution to this chapter.

liquidation of the debtor's estate. The highest-ranking class includes, among other items, the costs of the bankruptcy proceedings; liabilities under contracts executed prior to the declaration of bankruptcy whose performance is required by the trustee; liabilities resulting from the actions of the trustee or administrator; and liabilities resulting from actions taken by the debtor after the bankruptcy declaration that do not require the court supervisor's consent or actions taken with his or her consent. The subsequent classes include, among other items, liabilities under employment contracts, alimonies and disability pensions, social insurance premiums, taxes and other public impositions. The fourth class includes other liabilities, including claims under contracts executed by the debtor prior to the bankruptcy declaration.

In the case of arrangement proceedings, some claims are unaffected by the scheme of arrangement and may be pursued according to general principles of law, without bankruptcy proceedings. Such claims primarily include liabilities originating after the bankruptcy declaration, alimonies and disability pensions, social insurance premiums and employment-related liabilities.

Claims secured by property rights over the debtor's estate (e.g., by a mortgage) are repaid separately from all other claims. Secured creditors are to be repaid from the proceeds from the liquidation of the bankruptcy estate. In arrangement bankruptcy, claims secured with property rights are excluded from the arrangement scheme unless the secured creditors consent to inclusion prior to a vote on the arrangement.

Ineffectiveness of legal transactions

The BRL provides for a range of situations in which actions taken by the debtor before filing for bankruptcy are considered ineffective by law or as a result of a court ruling. These measures are designed to protect creditors from the debtor's actions in the period preceding the bankruptcy declaration.[2]

Any actions taken by the debtor in the year preceding bankruptcy declarations to dispose of the debtor's assets (including admission of a claim to the assets by the debtor or waiver of such a claim and entry into a court settlement), whether for a consideration or gratuitously with the value of the debtor's performance flagrantly exceeding the value of the mutual performance of the claim, are held to be ineffective by law.

Furthermore, any security or payment by the debtor of debt that is not yet due, if it is made in the two months before the date of submission of the bankruptcy declaration, are also held to be ineffective. A beneficiary of such actions may, however, demand that they be declared effective if, at the time they were made, he or she was unaware that grounds for a bankruptcy declaration existed.

Any security interest established in connection with forward transactions, loans of securities or sales of financial instruments with an obligation to buy back before the date of the bankruptcy declaration may not be deemed ineffective.

Any legal transaction for a consideration effected by the debtor in the six months prior to the filing of the bankruptcy declaration will also be deemed ineffective if the

2 Articles 127 to 130 of the BRL.

counterparty is a spouse or any other 'closest person'[3] (or, in the case of companies or partnerships, if the transaction is between the debtor and their partners, shareholders, representatives or their spouses; with affiliates, their partners, shareholders, representatives or their spouses; as well as with a holding or subsidiary company controlled by the debtor).

The court may also declare other legal transactions (or their parts) ineffective if certain conditions stipulated in the BRL are met (this applies, for instance, to consideration paid to the debtor's representatives, the establishment of security interests, etc.). In such cases, only the trustee, court supervisor or administrator is authorised to demand that the transaction be declared ineffective.

ii Policy

Bankruptcy law in Poland is evolving towards an emphasis on company restructuring and reflects the European tendency to pursue a policy of a second chance for entrepreneurs.

The BRL regulates the joint pursuit of claims against debtors who are entrepreneurs and the consequences of declaring bankruptcy, as well as the rules of rehabilitation proceedings that apply to entrepreneurs facing a threat of insolvency.

Current court and business practice reflects an ever stronger tendency to keep entrepreneurs in business by maintaining the debtor's enterprise after creditors are evenly repaid. Thus, this practice is in line with the tendency to bolster the competitiveness of home markets through corporate restructuring and keeping entrepreneurs in business.

iii Insolvency procedures

As mentioned above, the BRL regulates two separate types of proceedings: liquidation bankruptcy and arrangement bankruptcy. An alternative procedure is rehabilitation, which in practice is applied very infrequently.[4]

Liquidation proceedings

The basic criterion for the declaration of a debtor's bankruptcy is his or her insolvency.

Insolvency occurs when:

a the debtor fails to meet his or her liabilities as they fall due; or

b his or her liabilities exceed the value of his or her assets, even if the debtor meets the liabilities as they fall due.

A court may refuse to declare bankruptcy if the delay in meeting mature liabilities does not exceed three months and their sum does not exceed 10 per cent of the balance-sheet value of the debtor's enterprise. A debtor's bankruptcy is declared after evidence has been collected and the debtor's assets have been secured.

Upon the declaration of liquidation bankruptcy, the debtor's assets become a bankruptcy estate and are used to repay creditors. The debtor's cash liabilities whose

3 Defined as a descendant, ancestor, sibling, relative by marriage in the same line or degree, adoptee or adopter and his or her spouse, as well as a partner.

4 http://bip.ms.gov.pl/pl/dzialalnosc/statystyki/statystyki-2011/download,1721,6.html, Table 41 (in Polish only).

due date has not been reached become due, and non-cash liabilities become due as cash liabilities, even if their due date has not been reached. A declaration of liquidation bankruptcy also affects, among other matters, pending court and collection proceedings, and the possibility of setting off mutual claims. Under liquidation bankruptcy, it is no longer possible to conduct court and collection proceedings against the debtor, and all arbitration clauses expire.

When bankruptcy is declared, the debtor forfeits his or her right and ability to administer and dispose of his or her estate. The administration of the estate is taken over by the trustee, whose objective is to carry out proceedings for the repayment of the claims of all creditors using his or her powers to manage and dispose of the estate. The trustee liquidates assets, prepares a list of creditors and prepares the distribution of the proceeds from liquidation among creditors. Once the liabilities of the estate and preferential claims are repaid or secured, the court delivers a ruling ending the bankruptcy proceedings.

A declaration of bankruptcy materially affects contracts executed by the debtor, and 'any contractual provisions stipulating the right to modify or terminate, in the event of declaration of bankruptcy, a legal relationship to which the debtor is a party shall be invalid'.[5]

Arrangement proceedings

A petition to open arrangement proceedings is filed by a debtor who is unable to meet his or her obligations and wants to defer debt repayment to remedy the financial situation of his or her enterprise without liquidating it. The debtor may file such a petition if he or she demonstrates that under the arrangement scheme creditors will be repaid to a higher degree than under liquidation proceedings. The debtor's petition should contain the proposed arrangement and should offer reasons for the proposal.

The objective of arrangement proceedings is to induce the majority of creditors to reduce considerably their debt claims, with repayment of the remaining portion deferred or arranged to take place in instalments. This solution results in debt restructuring and offers the indebted enterprise a chance to overcome its financial crisis.

It is always possible to change the type of bankruptcy proceedings being undertaken; any proceedings started as arrangement proceedings may be converted to liquidation proceedings, and vice versa.

Rehabilitation proceedings

One legal solution enabling entrepreneurs to remove the threat of bankruptcy is the commencement of separate rehabilitation proceedings. Usually, these are out-of-court proceedings and are intended to restructure the entrepreneur's firm and restore its normal operations. Under this solution, the entrepreneur presents a rehabilitation plan and enters into a scheme with creditors to restructure his or her debt. Rehabilitation and debt reduction may be applied by entrepreneurs who manage to effect repayment of their liabilities (except in the situation when they default but the sum of overdue liabilities

5 Article 83 of the BRL.

does not exceed 10 per cent of the balance sheet value of the enterprise) but expect that their enterprise will become insolvent.

The rehabilitation procedure is as follows:

a the entrepreneur threatened with insolvency initiates rehabilitation proceedings by filing a statement with the relevant court stating and substantiating the details of the debtor's case and the circumstances for the petition;

b the entrepreneur must also submit a rehabilitation plan and all relevant documents regarding his or her financial situation; and

c after the first two stages are completed, the creditors vote on the proposed arrangement. If it is accepted, the arrangement is filed with the bankruptcy court for approval. The approved rehabilitation arrangement is binding to the same degree as a scheme entered into during arrangement bankruptcy proceedings.

In practice, the provisions governing rehabilitation proceedings are a dead letter and the procedure itself has no wider application.

iv Starting proceedings

A petition for bankruptcy may be filed by the debtor or any of his or her creditors.

A creditor is defined as anyone entitled to seek payment from the bankruptcy estate, irrespective of what legal relationship his or her debt claim arises from, but only if the claim already existed at the time bankruptcy was declared.

The debtor is obliged to file a petition for bankruptcy within 14 days after the statutory prerequisites are met. Polish bankruptcy law provides for serious consequences for managers of the debtor's enterprise who delay filing for bankruptcy. They may suffer civil consequences (damages), tax liability and, in the case of companies, criminal liability.[6]

A petition to declare the bankruptcy of legal persons and unincorporated organisational units (e.g., commercial partnerships) may be filed by anyone who is empowered to represent these entities individually or jointly with others.

A petition to declare the bankruptcy of a deceased entrepreneur may be filed by his or her creditor, heir, spouse or each of his or her children or parents, even if they do not stand to inherit any of the debtor's estate.

The procedure for filing for bankruptcy, whether it is carried out by the debtor or by creditors, includes quite formal documentation requirements. If the bankruptcy petition is filed by a creditor, his or her debt claim must be substantiated in the petition, and if he or she files for arrangement bankruptcy, a preliminary arrangement proposal must be provided.

Bankruptcy proceedings, whether they are of the arrangement or the liquidation type, are relatively lengthy. Participants in the proceedings always include the debtor and the party who filed for bankruptcy. Courts issue bankruptcy

6 Article 299 of the Civil Companies Code (liability for damages), Article 116 of the General Tax Regulations (tax liability), and Article 586 of the Civil Companies Code (criminal liability).

rulings within two months from the date of filing the petition, and the debtor, has the right to file a complaint with the court when his or her bankruptcy is declared.

v Control of insolvency proceedings

Usually, insolvency proceedings are controlled by a judge commissioner and a trustee. The control exercised by the judge commissioner involves verification and approval functions.

The control functions of the board of directors of the debtor vary depending on the type of bankruptcy proceedings being conducted.

When liquidation bankruptcy is declared, the debtor forfeits the right to manage, use and dispose of the property comprising the bankruptcy estate. The debtor is obliged to identify and deliver to the trustee all of his or her assets and submit all documents related to his or her business, property and accounts. He or she is also obliged to furnish the judge commissioner and the trustee with all necessary explanations related to the property.

When arrangement bankruptcy is declared, the debtor continues to administer his or her property under the supervision of the court supervisor and the judge commissioner, unless the bankruptcy court deprives the debtor of this right and appoints an administrator to administer the debtor's property. Upon declaration of arrangement bankruptcy, the debtor is obliged to furnish the judge commissioner and the trustee with all necessary explanations related to the property and enable the court supervisor to make himself or herself acquainted with the debtor's enterprise. The court may also impose further duties on the debtor. If the court deprives the debtor of the right to administer his or her property, the debtor is obliged to cooperate closely with the appointed administrator.

The following bodies may be appointed in the course of bankruptcy proceedings to represent creditors' interests:

a the preliminary creditors' meeting – convoked by the court to pass a resolution on the type of bankruptcy proceedings to be initiated, elect the creditors' council and (where relevant) enter into an arrangement;

b the creditors' meeting – convoked by the judge commissioner in certain situations (e.g., in the case of a change in the composition of the creditors' council) upon request by at least two creditors who jointly hold not less than one third of the total sum of acknowledged debt claims, or whenever the judge commissioner considers it necessary; and

c the creditor's council – if not already appointed by the preliminary creditors' meeting – may be appointed by the judge commissioner if he or she considers it necessary. In certain cases, the judge commissioner is obliged to appoint the creditor's council. The main role of the council is to support the trustee, the court supervisor or administrator, oversee their actions, assess the estate funds, approve actions that may be taken only with the approval of the creditors' council (e.g., withdrawal from the sale of the enterprise as a whole), as well as express their opinion on other issues if required by the judge commissioner, a trustee, the court supervisor or an administrator. In performing its duties, the creditors' council acts in the interests of all creditors.

vi Special regimes

Bankruptcy proceedings may be conducted only against those entities that have the capacity to be declared bankrupt. The following entities have no such capacity: (1) the Treasury, (2) units of local government; (3) independent public health-care centres; (4) institutions and legal entities established by statute and in performance of obligations imposed by statute; (5) individual farmers; and (6) universities. No bankruptcy may be declared with respect to the National Bank of Poland and certain types of research and development units carrying on scientific research and developmental work.

The BRL also contains regulations related to separate bankruptcy proceedings for developers, banks and cooperative savings and credit funds, insurance and reinsurance companies, bond issuers and individuals not conducting business activities. Detailed regulations governing insolvency are also included in statutes in such areas as companies law, labour law, civil law, banking law, etc.

Bankruptcy proceedings for banks and other financial institutions differ markedly in form from the typical proceedings. The key role in such a case is played by the Polish Financial Supervision Authority (PFSA), which supervises the operations of financial institutions in Poland. If a bank's balance sheet at the end of a reporting year shows that its assets are insufficient to meet its liabilities or, for reasons connected directly with its financial situation, the bank fails to pay out funds deposited by its clients, the PFSA will suspend the bank's operations and permit its takeover by another bank. Only the PFSA may file a petition to declare a bank bankrupt.

The PFSA may also file a petition to declare the bankruptcy of an insurance company.

The right to file a petition for the bankruptcy of debtors that were granted public aid with a value of €100,000 or more is also bestowed on the authority that granted the aid.

Polish bankruptcy law does not provide for separate regulations for the bankruptcy of groups of companies.

In 2009 the BRL was supplemented by provisions related to consumer bankruptcy that, on account of their provisions, were hardly ever applied in practice.[7] Currently, legislative work is under way on a bill to amend these rules.[8]

vii Cross-border issues

With respect to bankruptcy proceedings in the European Union area, Poland applies European Council Regulation (EC) No. 1346/2000 of 29 May 2000 on insolvency proceedings (O.J. EC L.00.160.1 (Regulation 1346)). Under this Regulation, the opening of bankruptcy proceedings in one EU Member State results in the automatic recognition of the opening of the proceedings in Poland. The recognition of the opening of the main proceedings does not preclude the initiation of ancillary bankruptcy proceedings in Poland (without reference to the reason for the debtor's insolvency). Rulings by EU courts regarding the conduct and completion of bankruptcy proceedings, court approval

7 In the period from 31 March 2009 to 31 December 2011, out of 1,875 petitions to declare consumer bankruptcy, only 36 bankruptcies were declared.

8 www.sejm.gov.pl/Sejm7.nsf/PrzebiegProc.xsp?nr=2265 (in Polish only).

of the arrangement scheme and all decisions related to the securing of claims are all recognised in Poland under the principles of Regulation 1346. Polish courts may refuse to recognise a foreign ruling related to bankruptcy proceedings only if its recognition or execution contradicts the fundamental principles of Polish law.

Forum-shopping is limited by EU rules on court jurisdiction. Pursuant to Article 3 of Regulation 1346, the courts with the jurisdiction to open insolvency proceedings are those within the EU territory where the debtor's main interests are situated. In the case of legal persons, the place of the registered office stated in the organisations' articles of association is presumed to be the site of their main interests. The courts of another Member State have jurisdiction to open insolvency proceedings against the debtor only if he or she possesses an establishment within the territory of that Member State, and the proceedings may be conducted only in respect of the assets of the debtor situated in the territory of that Member State.

Rulings on insolvency originating outside the European Union are recognised in accordance with the rules set forth in the BRL. Proceedings to recognise foreign insolvency proceedings are initiated upon the request of a foreign administrator, who must submit, among other documents, a copy of the ruling initiating bankruptcy proceedings and appointing the administrator to his or her function in the case, or any other credible form of written proof stating these facts (e.g., a statement from a foreign court). These documents must be translated into Polish. A foreign decision is recognised unless it falls within the exclusive jurisdiction of Polish courts and unless such recognition is contrary to the fundamental principles of the Polish legal system.

Legal regulations require courts and participants of bankruptcy proceedings to cooperate. Within the EU, the provisions of Regulation 1346 apply; thus, the administrator of the main proceedings and the administrators of the ancillary proceedings (trustees, appointed administrators or court supervisors) are obliged to cooperate with and to provide information to one another. In turn, under the BRL, Polish courts are entitled to contact foreign courts and foreign administrators directly, and are obligated to cooperate with foreign units in insolvency cases. Trustees, court supervisors and administrators perform their duties by way of the court.

II INSOLVENCY METRICS

The Polish economy emerged largely unscathed from the 2008 recession and financial crisis, but in recent years a gradual reduction in the rate of gross domestic product (GDP) growth has been observed. In 2013, an upward trend in domestic activity was observed. According to the initial estimates of the Polish statistical office, in 2013 GDP increased by 1.6 per cent in real terms, and an annualised growth rate of 3.3 per cent occurred in the first quarter of 2014. Both industrial output and activity in construction and assembly sectors have improved, as have exports and investments. These factors have resulted in a recovery in the financial situation of businesses and, consequently, may lead to a reduction in the number of bankruptcy proceedings being opened. The current political situation in Ukraine and its effects on exporters to Russia and Ukraine (among other factors, as a result of imposed embargoes) may pose risks for the Polish economy.

According to a report by Euler Hermes, international adviser for the Allianz Group, in 2013 there occurred in Poland 926 bankruptcies of businesses, with approximately 11.4 billion złotys in combined turnover, leading to around 42,400 lost jobs. These numbers do not differ much from those from 2012. In 2013, the businesses that went bankrupt were mainly from the distribution, services and manufacturing sectors. In the same year, a considerable number of bankruptcies in the construction sector involving largely local businesses was recorded, in contrast to 2012, when it was mainly larger-volume construction companies with a nationwide presence that became insolvent. Service providers also experienced difficulties in 2013, which may have resulted from, among other causes, weak domestic demand.

These numbers do not reflect the actual number of insolvent businesses, since no account is taken of the petitions that were dismissed by courts because the assets of the insolvent debtors were insufficient to cover the costs of bankruptcy proceedings. Research conducted by Coface of the BPCE, a French banking group, shows that in 2013 there were 4,806 petitions for bankruptcy filed with Polish courts and that, in the first quarter of 2014, 1,078 petitions were received. From among the 1,068 petitions examined by Polish courts in the first quarter of 2014, 204 bankruptcies were declared (of which 178 were liquidation bankruptcies and 26 arrangement bankruptcies) and the other petitions were dismissed.

In the past 12 months, bankruptcy was declared by companies including Mix Electronics SA (electronics), FOTA SA (car parts), IDM SA (finance) and GANT Development SA (construction).

III PLENARY INSOLVENCY PROCEEDINGS

In January 2014, a Polish court declared the arrangement bankruptcy of GANT Development SA. The court changed this declaration in July 2014 to one of liquidation bankruptcy. Proceedings were ultimately discontinued because the company's assets were insufficient to cover the costs of the bankruptcy proceedings, which were estimated to be at least 2.5 million złotys.

This company is the third largest development and construction company in Poland (based on the number of apartments sold throughout Poland) and is listed on the Warsaw Stock Exchange. Its financial problems began when it failed to repay 250,000,000 złotys in bonds owed to around 2,500 investors. At present, the number of investors exceeds 1,000.

When the ruling discontinuing the bankruptcy proceedings becomes final, creditors who purchased apartments under construction by GANT will be forced to pursue their claims according to general principles of law. Unimplemented amendments to the provisions of Polish bankruptcy law introduced in April 2012 would have given them an opportunity to pursue successfully their claims in bankruptcy proceedings. Under the amended regulations, any funds paid with a view to purchasing apartments would have been deposited in an escrow account. Upon declaration of bankruptcy, the funds related to a particular project would have become a separate estate, as would the title to the land on which the project is being constructed and the funds that would have paid in the course of the bankruptcy proceedings for construction to be completed.

These creditors would have become exclusively entitled to repayment from these separate estates, independently of any bank mortgages. Additionally, the creditors would have been able to organise a meeting and pass a resolution on repayment from the funds collected in the escrow account or those allotted for the continuation and completion of the project by the trustee.

IV ANCILLARY INSOLVENCY PROCEEDINGS

i Alpine Bau GmbH of Wals, Austria

In January 2014, ancillary insolvency proceedings were opened in connection with the liquidation of the assets of Alpine Bau GmbH, an Austrian construction company from the Alpine Holding Group based in Wals, Austria.

The company built three stadiums, in Gdansk, Poznań and Warsaw, for the 2012 UEFA European Championships hosted by Poland and Ukraine, as well as several segments of Polish dual carriageways and motorways. The latter series of operations by the company in Poland led to claims by its Polish subcontractors estimated at several dozen million złotys. The pursuit of these claims in the main insolvency proceedings before the Austrian insolvency court had the result that GDDKiA, the Polish central road management authority, was left with a limited capacity to satisfy the claims, on the basis of a special statute enacted by the Polish parliament in 2012 following a large number of bankruptcies in the construction industry.

Under this statute, a Polish subcontractor who has performed a contract with the main contractor of a segment of dual carriageway or motorway but has not received due payment because the latter was declared bankrupt, may submit its claims to GDDKiA. In this way, such claims may be repaid more promptly outside the pending bankruptcy proceedings. To receive such repayment, a list of claims must be submitted specifying claims against the contractor that have been acknowledged and are undisputed. However, in this case, obtaining such a list from the Austrian insolvency court proved too time-consuming.

The initiation of ancillary bankruptcy proceedings in Poland allowed a list of claims to be obtained in a shorter time and facilitated the repayment of the subcontractors' claims by GDDKiA, which minimised the risk of their bankruptcy. This was of particular importance because the contracts with Alpine Bau GmbH were often the only source of income for these entrepreneurs.

ii Fabryka Mebli Tapicerowanych Christianapol sp. z o.o.

The ancillary bankruptcy proceedings involving the liquidation of the estate of Christianapol were declared in May 2013 and may therefore seem less topical in light of the current issues connected with cross-border bankruptcies. However, the ancillary bankruptcy of this company is noteworthy for at least two reasons.

First, the rulings issued by the Polish Supreme Court in a number of cases related to this bankruptcy have affected the interpretation of the public policy clause contained in Article 26 of Regulation 1346.[9]

Second, the fact that the main insolvency proceedings involving this company were opened in France while it had its registered office in Poland has contributed to an amendment of the legal regulations related to the repayment of employees' cash claims in the case of their employer's insolvency. In this respect, the concept of employer insolvency (whose occurrence was a condition for the repayment of certain benefits to employees) was changed, such that an employer whose ancillary insolvency was declared would also be considered insolvent simpliciter. This change made possible the repayment of employees' claims resulting from the work performed by them in Poland in the period following the main declaration of insolvency in France and before the declaration of ancillary insolvency in Poland.

As mentioned above, the main 'safeguard' insolvency proceedings against Christianapol were opened in France in October 2008 in accordance with the French Commercial Code, although the company's registered office (the site of its main interests), and the majority of its creditors were in Poland. The French court established its jurisdiction over the case, holding that the core of the defendant's business activities were located in France, given that the defendant was a member of the Cauval Industries Group, and that the grounds for opening bankruptcy proceedings were not directly connected with the financial situation of Christianapol but with the entire group of companies. In addition, in July 2009, a plan to protect creditors, providing for their repayment in instalments over a period of 10 years, was agreed and approved.

In the course of court proceedings initiated by Polish creditors against Christianapol before Polish courts, usually for the payment of overdue amounts, an issue arose as to whether it was admissible, in light of Article 26 of Regulation 1346, for a Polish court to appraise the ruling of a foreign court regarding the initiation of bankruptcy proceedings as concerns the establishment of jurisdiction by the foreign court and the grounds that it identified for opening bankruptcy proceedings. The Supreme Court held that such a ruling may be automatically recognised only when such recognition does not lead to a result that is clearly contrary to Polish public policy. Therefore, the Supreme Court established that what is relevant for acceptance of a ruling by a foreign court is not the basis of the ruling but whether a contradiction exists between the result of the ruling and Polish public policy. In this case, the result of the Supreme Court's decision was the initiation of proceedings similar to Polish rehabilitation proceedings.

V TRENDS

2014 and 2015 are expected to bring a lower number of bankruptcies. This is because of improving economic growth rates and a relatively small expected number of bankruptcies

9 Judgments of the Supreme Court of 16 February 2011 (file ref. II CSK 326/10, II CSK 406/10, II CSK 425/10, II CSK 541/10), of 12 January 2012 (file ref. II CSK 202/11) and of 2 February 2012 (file ref. II CSK 305/11).

of large companies that would undermine the financial position of other businesses. Apart from potential problems for food exporters related to the unstable situation in Ukraine, there does not seem to be any particular sector facing a threat of bankruptcy.

Among the practical measures taken to limit corporate bankruptcy, two trends are noteworthy. The first is the attempt to hold company managers liable for their failure to file for the bankruptcy of an insolvent company on time. In particular, these measures are being applied against the boards of directors of limited liability companies under the additional grounds for liability regulated in Polish companies law. The other trend is the tendency for courts to file for prohibitions on the conduct of business activity for managers who fail to file for bankruptcy on time or who obstruct bankruptcy proceedings by concealing assets.

The team appointed by the Polish Minister of Justice has prepared a draft of a new restructuring act. The changes envisaged in the bill encompass both modifications to the existing BRL Act and the introduction of a new statute governing restructuring processes that would reorient the Polish legal system towards a model aiming to protect the economic value of an enterprise and preserve the debtor's enterprise through debt or asset restructuring.[10] The changes are designed in response to the reality that the filing of a petition for bankruptcy adversely affects entrepreneurs' capacity to operate on the market, giving entrepreneurs the incentive to unlawfully delay filing for bankruptcy. The introduction of restructuring procedures as a supplement to bankruptcy proceedings would provide an opportunity for genuine improvement in the market position of entrepreneurs filing for bankruptcy and the success of their later operations, which in turn should translate into an improvement in the overall economic situation. The solutions proposed in the bill are in line with the trends occurring in countries with more extensive experience in this area.

10 http://ms.gov.pl/pl/nowelizacja-prawa-upadlosciowego-i-naprawczego/ (in Polish only).

Appendix 1

ABOUT THE AUTHORS

KRZYSZTOF ŻYTO

Chajec, Don-Siemion & Żyto Legal Advisors

Krzysztof Żyto was admitted to practise as a judge in 1989 and as a legal adviser in 1998.

Before beginning private practice, Krzysztof spent 10 years working as a judge. Beginning in 1995, he served in the commercial division of the Voivodeship Court in Poznań. His judicial practice concentrated on commercial law and civil procedure related to commercial claims. In 1993, he held an internship at a court in Hanover, Germany.

Between 1996 and 1997, Krzysztof lectured on civil and commercial law at the Poznań University of Economics and the Poznań School of Banking.

Beginning in 2000, he worked at one of the leading Polish law firms, where he became partner in 2002. He left this position to found CDZ.

Currently, his practice focuses on the representation of business clients in court and arbitration proceedings.

In 2011, he was appointed as an arbitrator in the Court of Arbitration at the Polish Chambers of Commerce in Warsaw.

MILENA BEŁCZĄCKA

Chajec, Don-Siemion & Żyto Legal Advisors

Milena Bełczącka graduated from the department of law studies at the University of Konstanz (Germany, 2004–2005) and the department of law studies at the John Paul II Catholic University of Lublin (Poland, 2001–2006), as well as completing a course of study at the German law school of the Maria Skłodowska Curie University, in cooperation with the University of Hanover (Germany). Milena qualified to practise law as an advocate in Poland in September 2011, and since July 2014 she has practised as a legal adviser.

Milena is experienced in rendering legal services related to court proceedings and has participated in the preparation of numerous drafts of court documents for

CDZ clients, including a construction company, insurance companies (in lawsuits for damages, including in Austrian and German courts); and creditors and bankrupt parties in bankruptcy proceedings.

Since 2008, Milena has worked with the Helsinki Foundation for Human Rights, for which she prepares draft documents for proceedings before the European Court of Human Rights in Strasbourg.

Milena has also participated in projects related to capital markets law; in particular, she has prepared prospectuses and has drafted documents securing real estate market transactions.

CHAJEC, DON-SIEMION & ŻYTO LEGAL ADVISORS
Ul. Lwowska 19
00-660 Warsaw
Poland
Tel: + 48 22 492 40 00
Fax: + 48 22 370 07 08
krzysztof.zyto@cdz.com.pl
milena.belczacka@cdz.com.pl
www.cdz.com.pl