The Insolvency Review

Fourth Edition

Editor
Donald S Bernstein

Law Business Research

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EDITOR'S PREFACE

This fourth edition of *The Insolvency Review* once again offers an in-depth review of market conditions and insolvency case developments in key countries around the world. As always, a debt of gratitude is owed to the outstanding professionals in geographically diverse locales who have contributed to this book. Their contributions reflect diverse viewpoints and approaches, which in turn reflect the diversity of their respective national commercial cultures and laws.

The preface to a previous edition of this book touched upon the challenges faced by large multinational enterprises attempting to restructure under these diverse and potentially conflicting insolvency regimes. These challenges have traditionally been particularly acute in large corporate insolvencies because neither UNCITRAL's Model Law on Cross-Border Insolvency nor other enactments, such as the European Union's Regulation on Insolvency,[1] have provided 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. Insolvent corporate groups have therefore often been obliged to cobble together consensual restructurings with local stakeholders in key jurisdictions or to initiate separate plenary insolvency proceedings for individual companies under multiple local insolvency regimes (as illustrated in the cases of *Nortel* and *Lehman Brothers*, among others), with added costs, disbursed control, legal conflicts and inconsistent judgments.

When we last addressed this issue in these pages, UNCITRAL's Working Group V was continuing its work on cross-border insolvency of multinational enterprise groups,[2] and the

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.

2 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 (May 6, 2014), available at https://documents-dds-ny.un.org/doc/UNDOC/GEN/V14/028/64/PDF/V1402864.pdf?OpenElement.

European Commission was likewise considering amending the European Union Regulation on Insolvency to better encompass enterprise groups.[3] Publication of the 2016 edition of this book provides an occasion to mark the progress made in these efforts over the last two years.

On 20 May 2015, the European Parliament and Counsel published the Recast Regulation on Insolvency 2015/848, which will apply to insolvency proceedings initiated after 26 June 2017.[4] The Recast Regulation acknowledges the fact that it would not be practical to introduce an insolvency regime with 'universal scope' throughout the European Union in light of the diversity of local insolvency laws.[5] Chapter V of the Recast does, however, specifically address insolvency proceedings of members of a group of companies in different jurisdictions. Section 1 of Chapter V (Articles 56–60) addresses 'cooperation and communication' between such proceedings, while section 2 (Articles 61–77) creates a new concept of a 'group coordination proceeding' under the auspices of a 'coordinator'.

Section 1 generally provides that insolvency practitioners (which are defined broadly in the Recast Regulation and include, e.g., liquidators, administrators and trustees) appointed in group members' proceedings and courts presiding over such proceedings 'shall' cooperate with one another so long as cooperation is not incompatible with the rules applicable to such proceedings and does not entail any conflict of interest.[6] In addition, Article 60 of the Recast Regulation grants an insolvency practitioner appointed in the insolvency proceeding of one member of a corporate group the power to be heard in the proceedings of any other member and the power to seek a stay with respect to the realisation on assets in such other proceeding in certain circumstances if such a stay, among other things, is necessary to implement a restructuring plan and is in the best interest of creditors in the proceedings in which the stay is requested.[7]

Section 2 sets forth a framework for voluntary, court-supervised 'group coordination proceedings'.[8] Group coordination proceedings may be requested before any court having jurisdiction over any group member,[9] and the details of the coordination plan would be proposed by the insolvency practitioner appointed to act as 'coordinator'.[10] The coordinator has a number of rights, including the right to participate in proceedings opened in respect of any group member, the right to mediate disputes between members, the right to present the group coordination plan to parties in interest, the right to request information from insolvency practitioners appointed in any member's proceedings, and the right to seek a stay of up to six months in the proceedings of any group member if necessary to implement

3 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 www.europarl.europa.eu/meetdocs/2009_2014/documents/com/com_com%282012%290744_/com_com%282012%290744_en.pdf.

4 Regulation (EU) No. 2015/848 of 20 May 2015 on insolvency proceedings (recast), 2015 O.J. (L 141), available at http://eur-lex.europa.eu/eli/reg/2015/848/oj.

5 Id. at Rec. 22.

6 Id. at Articles 56-58.

7 Id. at Article 60.

8 Id. at Articles 61-72.

9 Id. at Article 61.

10 Id. at Article 72.

a plan that benefits creditors in that proceeding.[11] Participation in the group coordination proceedings is voluntary, though insolvency practitioners appointed to act in respect of each member 'shall' consider the coordinator's recommendations.[12]

In addition to the provisions addressing corporate groups in Chapter V, the Recast Regulation also recognises that '[s]econdary insolvency proceedings may also hamper the efficient administration of the insolvency estate'.[13] Accordingly, the Recast Regulation confers upon the insolvency practitioner in main insolvency proceedings the possibility of distributing to local creditors what they would have received had secondary local proceedings been initiated and empowers courts to refuse to initiate secondary proceedings if these so-called 'synthetic' or 'virtual' proceedings are proposed.[14] These provisions may help facilitate synthetic group restructurings of the sort employed in the *Collins & Aikman* case.[15]

UNCITRAL Working Group V, meanwhile, has continued to develop an addendum to the Model Law to facilitate the effective treatment of cross-border insolvencies of multinational enterprise groups. The Working Group has identified eight key principles of a regime to address insolvency in the context of enterprise groups, which themselves are subject to two fundamental underpinning principles. Those foundational principles are, first, that the jurisdiction of the courts in the state in which the centre of main interest (COMI) of an enterprise group member is located will remain unaffected by a group insolvency solution, and, second, the eight identified principles do not replace or interfere with any process or procedure required by the jurisdiction in which the COMI of a group member is located in respect of that group member's participation in a group insolvency solution.[16] Against that backdrop, the eight key principles can be summarised as follows:[17]

a There is no obligation to commence insolvency proceedings for individual members of an enterprise group.

b When a group enterprise solution is proposed, that solution will require coordination between group members and may be developed through a coordinating proceeding.

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11 Id.

12 Id. at 70.

13 Id. at Recital 41.

14 Id. at Recital 42; Article 36.

15 *In re Collins & Aikman Europe S.A.*, [2006] EW HC (CH) 1343. Indeed, the European Commission specifically referenced the Collins & Aikman case in its proposal for what became the Recast. See Proposal for a Regulation of the European Parliament and of the Counsel Amending Council Regulation (EC) No. 1346/2000 on Insolvency Proceedings (2012), *supra* note 3, at 7.

16 See United Nations Commission on International Trade Law, Report of Working Group V (Insolvency Law) on the Work of its Forty-Eighth Session (Vienna, 14–18 December 2015), U.N. Doc. A/CN.9/864 (8 January 2016), available at https://documents-dds-ny.un.org/doc/UNDOC/GEN/V16/000/83/PDF/V1600083.pdf?OpenElement.

17 United Nations Commission on International Trade Law, Facilitating the Cross-Border Insolvency of Multinational Enterprise Groups: Key Principles, U.N. Doc. A/CN.9/WG.V/WP.133 (28 September 2015), available at https://documents-dds-ny.un.org/doc/UNDOC/LTD/V15/068/39/PDF/V1506839.pdf?OpenElement.

c Group members might designate one member's proceeding to function as the coordinating proceeding, the role of which would be procedural. A proviso might be that such proceeding take place in a state that is the COMI of at least one group member that is a necessary and integral part of the enterprise group solution.

d The court located in the COMI of a group member participating in a group insolvency solution can authorise the insolvency representative appointed in proceedings taking place in the COMI to seek (1) to participate in a planning proceeding taking place in another jurisdiction and (2) recognition by the court of the proceeding in the COMI jurisdiction.

e Participation in the coordination process for group members whose COMI is located outside of the jurisdiction of the coordinating proceeding is voluntary. For members whose COMI is located in the same jurisdiction as the coordinating proceeding, the recommendations of part three of the Legislative Guide on Insolvency Law with respect to joint application and procedural coordination could apply.

f Creditors and stakeholders of group members participating in a group solution would vote in their own jurisdictions on the treatment they are to receive according to applicable domestic law.

g Following approval of a group reorganisation plan by creditors and stakeholders, each COMI court would have jurisdiction to implement the plan in accordance with domestic law.

h The insolvency representative appointed in the coordinating proceeding should have a right of access to the proceedings in each COMI court to be heard on issues related to implementation of the group reorganisation plan.

These eight principles are largely consistent with the Recast Regulation's approach to resolution of enterprise groups within the European Union. Like the Recast Regulation, the UNCITRAL proposal contemplates a voluntary coordination framework that allows for a group solution (including, by not requiring proceedings for all members, a 'synthetic' solution) and allows representatives of the group members' proceedings to participate in the proceedings of other members to facilitate such a solution, but one that ultimately does not attempt to alter the substantive insolvency law in individual jurisdictions. Notably, in commentary to the second principle, the Working Group allows that another approach to coordination between member insolvencies is the approach taken in the Recast Regulation.[18]

The Recast Regulation will have just come into effect when the next edition of this book is published, and there has been no indication regarding when Working Group V will be in a position to put forward final proposals, whether along the lines described above or otherwise. It therefore remains to be seen how these measures will function in practice, and also whether the voluntary nature of the proposed regimes will limit their utility. It is also possible that there will be resistance in some jurisdictions to ceding sovereignty over local insolvency law even to the limited degree contemplated by the Recast Regulation and the Working Group V principles.

I, once again, want to thank each of the contributors to this book for their efforts to make *The 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

18 Id.

we seek to provide. As in prior years, 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, both on the near and distant horizons.

Donald S Bernstein
Davis Polk & Wardwell LLP
New York
October 2016

Chapter 21

POLAND

Krzysztof Żyto[1]

I INSOLVENCY LAW, POLICY AND PROCEDURE

i Statutory framework and substantive law

On 1 January 2016 two pieces of legislation came into force in the Polish legal system that separately regulate bankruptcy proceedings and restructuring proceedings.

Rules for the bankruptcy proceedings were set out in the Bankruptcy Law of 28 February 2003 (Dz.U.2015.233, as amended; the Bankruptcy Law) that provides for one basic type of bankruptcy proceedings: liquidation bankruptcy. Under this type, a court-appointed trustee liquidates the debtor's estate, usually by selling the debtor's enterprise in whole or in part. It is also possible to carry out a pre-pack liquidation that is described in detail in Section I.iii, *infra*. An arrangement with creditors may be entered into during bankruptcy proceedings if it has been substantiated that the arrangement will be accepted by creditors and implemented.

The second piece of legislation, the restructuring law of 15 May 2015 (Dz.U.2015.978 as amended; the Restructuring Law) regulates as many as four types of restructuring proceedings, which have the objective of avoiding a declaration of a debtor's bankruptcy through enabling the debtor to restructure by entering into an arrangement with its creditors or taking remedial actions while securing equitable rights of creditors. It is noteworthy that restructuring proceedings have priority over bankruptcy proceedings.

Order of payments

Bankruptcy proceedings are to be conducted in such a manner as to enable repayment of creditors' claims to the greatest extent possible and, if reasonable considerations so permit, keep the debtor's enterprise in existence. Under bankruptcy proceedings, each claim

1 Krzysztof Żyto is a partner at Chajec, Don-Siemion & Żyto. The author wishes to thank Małgorzata Sas-Madej, Marcin Bącal, Radosław Rudnik and Dariusz Zimnicki for their contribution to this chapter.

submitted is assigned to a specific class. The class assignment affects the order of repayment during the liquidation of the debtor's estate. The highest-ranking class includes, among other items, the costs of the bankruptcy proceedings, claims under employment contracts for the time prior to the declaration of bankruptcy (except for the remuneration of representatives or members of the debtor's governing bodies), claims of farmers under contracts for delivery of produce from their own farms, child support or alimony and disability pensions. The subsequent classes mainly include liabilities under contracts executed by the debtor, taxes and public impositions, as well as interest, penalties and fines and any liabilities under donations and bequests. The fourth (and last) class includes liabilities of shareholders under a loan or a different legal transaction with similar effects, made for the benefit of the debtor being a company during a period of five years prior to the bankruptcy declaration, with interest.

Claims secured by property rights over the debtor's estate (e.g., a mortgage) are repaid separately from all other claims. Proceeds from the liquidation of such estate are used to repay secured creditors.

Under restructuring proceedings, a list of claims is made specifying claims against the debtor raised prior to the opening of the restructuring proceedings. The list includes claims covered by the arrangement, both by law and with the creditor's consent. The arrangement does not cover, by law, any child support or alimony and partially disability pensions, claims for surrender of property or cessation of an infringement of rights, and partially social insurance premiums. The arrangement does not cover any claims under employment contracts or any claims secured on the debtor's assets by a mortgage, ordinary or registry pledge, a tax lien or a ship mortgage, to the extent covered by the value of a collateral, unless the creditor consents to their inclusion in the arrangement scheme. Such claims may be pursued outside restructuring proceedings, according to general principles of law.

Ineffectiveness of legal transactions

The Bankruptcy Law 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, 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 during the period of six 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 before the date of the bankruptcy declaration in connection with forward transactions, loans of securities or sales of financial instruments with an obligation to buy back may not be deemed ineffective.

2 Articles 127 to 130 of the Bankruptcy Law.

A judge commissioner may find ineffective any legal transaction for a consideration effected by the debtor during the six months prior to the filing of the bankruptcy declaration if the counterparty is a spouse or any other 'closest person',[3] including a person in an informal but actual relationship with the debtor.

The court may also declare other legal transactions (or their parts) ineffective if certain conditions stipulated in the Bankruptcy Law are met (this applies, e.g., to consideration paid to the debtor's representatives, the establishment of security interests, contractual penalties if the obligation has been performed to a considerable degree or if the penalties are flagrantly inflated). In such cases, only the trustee 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.

In the period before 1989, bankruptcy law provisions were virtually a dead letter in the centrally planned economy model prevalent in Poland at that time. In 1990 an amendment was made to the Bankruptcy Law Regulation of the President of 28 October 1934 that related to proceedings ending with liquidation of the debtor's estate. The essence of the introduced changes was to extend the scope of application of bankruptcy law provisions to include a broader array of entities. This change made it possible for individuals, legal persons and organisational units without a legal personality to have the capacity to become bankrupt (with certain exceptions). During this time, both the regulations in force and the judgments of the Supreme Court contributed to a marked increase in the number of bankruptcy proceedings, albeit not always to the benefit of creditors.

Another amendment in 1997 resulted mainly from the necessity to harmonise the bankruptcy law with other new or amended regulations related to business dealings, and to a lesser degree was connected with adjustment of the fundamental assumptions of the bankruptcy law. Introduced were, among other regulations, provisions of the penal bankruptcy law relating to the penal liability of a debtor for actions contributing to bankruptcy. Further legislative work culminated in the Bankruptcy and Rehabilitation Law of 28 February 2003 that regulated bankruptcy and rehabilitation proceedings in Poland for over a decade. There were three types of proceedings within the bankruptcy proceedings: bankruptcy with an option to arrange with creditors, a liquidation-type bankruptcy and rehabilitation proceedings (which was hardly applied in practice).

A fundamental change to Polish bankruptcy law came into force on 1 January 2016 as a result of enacting the Restructuring Law of 15 May 2015. At present, there are two types of proceedings:

a restructuring proceedings regulated in the Restructuring Law; and
b bankruptcy proceedings regulated in the Bankruptcy Law.

This fundamental amendment introduces a new, separate legislative act introducing four types of restructuring proceedings and is designed to ensure better possibilities of rescuing entrepreneurs from impending bankruptcy. The key principles of the new Restructuring Law

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.

include the principle of balance and protection of equitable rights of debtors and creditors, the principle of resolution of conflicting interests by mediation and respect for the concurring intentions of the debtor and creditors.

The most recent change in bankruptcy regulations fits well within current court and business practice reflecting 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

Essentially, the Bankruptcy Law regulates liquidation bankruptcy and makes it possible to carry out a pre-pack liquidation and enter into an arrangement scheme. Consumer bankruptcy is regulated separately.

Liquidation proceedings

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

Insolvency occurs when:

a the debtor has become unable to meet its cash liabilities as they fall due; or

b his or her cash liabilities exceed the value of its assets and this condition subsists for more than 24 months.

A court may dismiss a petition for bankruptcy if there is no threat that the debtor will lose its ability to meet its cash liabilities in a short time. The court may, if necessary, hear the debtor and the creditor who filed for bankruptcy. Once the petition is filed, the court may secure the debtor's assets.

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 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. Court, administrative or court-and-administrative proceedings regarding the bankruptcy estate may be conducted exclusively by or against a trustee.

When bankruptcy is declared, the debtor forfeits his or her right and ability to administer and dispose of its 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 filing for or declaration of bankruptcy, a legal relationship to which the debtor is a party shall be invalid.'[4]

4 Article 83 of the Bankruptcy Law.

Pre-pack liquidation

A pre-pack liquidation is initiated by filing, along with a petition for bankruptcy, an additional application for approval of the conditions of the sale of the debtor's enterprise, its organised component or individual assets comprising a considerable portion of the enterprise. The application is accompanied by a court expert's description and valuation of the asset to which the application relates, as well as the terms of sale (the price and the buyer) or a draft sale agreement. If the presented price is, in the court's view, higher than the amount obtainable in the bankruptcy proceedings plus the costs of proceedings, the court must grant the application. The court may also grant the application when the price is similar to the obtainable amount, on account of an important social interest or the possibility of saving the debtor's enterprise. Once the buyer pays the entire price, the sale agreement is executed within 30 days from the ruling becoming final and non-appealable. The application of the above procedure may be beneficial for debtors and creditors alike, as the costs involved are smaller and the bankruptcy proceedings are shorter.

An arrangement in the bankruptcy proceedings

Provisions regulating bankruptcy with an option to enter into an arrangement were removed from the Bankruptcy Law. This option was not eliminated but was replaced with an arrangement procedure under bankruptcy proceedings. A proposal to enter into an arrangement under bankruptcy proceedings may be made by the debtor, each of its creditors or a trustee. Once the list of claims is approved (or partially approved as an exception), the judge commissioner convokes a creditors' meeting to vote on the arrangement if the proposal is supported by creditors jointly holding at least 50 per cent of the amount of claims vested in creditors who are eligible to vote on the arrangement. The judge commissioner may convoke a creditors' meeting if it is substantiated that the arrangement will be adopted and implemented.

The possibility of entering into an arrangement in the course of bankruptcy proceedings is an advantage on account of flexible procedures available that (despite a prior impossibility of conducting restructuring proceedings) offer an opportunity to save the debtor's enterprise and repay the creditors to a greater extent than in the case of the total liquidation of the estate.

Consumer bankruptcy

The Bankruptcy Law also regulates bankruptcy of natural persons. A debtor being a natural person may file for bankruptcy even if he or she has only one debt resulting in his or her insolvency. The rule is that the court dismisses a bankruptcy petition if the debtor contributed to his or her insolvency or considerably increased its extent intentionally or as a result of gross negligence or if other bankruptcy proceedings were conducted in the last 10 years preceding the filing for bankruptcy.

The court, granting the petition, requests creditors to submit their claims and appoints a trustee and a judge commissioner. Next, the court makes a repayment schedule or cancels the debtor's liabilities, if the debtor's personal situation clearly shows that he or she would not be capable of making any repayments.

The debtor is obliged to repay any acknowledged and listed claims within 36 months. During this period, the debtor may not execute any legal transaction concerning his or her property that might deteriorate his or her ability to carry out the repayment schedule.

iv Reconstruction procedures

Restructuring proceedings may be conducted with respect to an insolvent debtor or a debtor that may soon become insolvent given its economic situation. Under the Restructuring Law, the following procedures are available: arrangement approval proceedings; accelerated arrangement proceedings; (ordinary) arrangement proceedings; and remedial proceedings.

A restructuring petition filed by the debtor initiates restructuring proceedings. The court will refuse to initiate such procedure if it were to harm creditors or it were not substantiated that the debtor is able to pay the costs of proceedings and any liabilities arising after it is open.

The proceedings are conducted with the participation of a judge commissioner and an arrangement supervisor (in arrangement approval proceedings) or a court supervisor (in ordinary and accelerated arrangement proceedings) or an administrator (in remedial proceedings). The supervisor may supervise the debtor's activities related to its assets and enterprise, whereas the administrator takes over the administration of the remedial estate.

The Restructuring Act precisely specifies the rules for the supervisor or administrator making the list of claims and a procedure for filing objections and their consideration. The final list of claims is subject to approval and announcement by the judge commissioner.

Next, an arrangement is entered into at the creditors' meeting and approved by the court. The judge commissioner may then appoint a creditors' council that provides assistance and controls the work of the supervisor or administrator and consents to certain actions related to the estate.

When the arrangement becomes final and non-appealable, it will have the following consequences:

a any proceedings to secure or enforce claims against the debtor are discontinued by operation of law;

b any enforcement or execution titles are no longer enforceable; and

c the supervisor or administrator assume the function of a supervisor over the arrangement's implementation.

It is still possible, however, to initiate court, administrative and court-and-administrative proceedings against the debtor. The debtor is also protected against termination of lease or tenancy contracts, and a number of other contracts related to the debtor's business activity.

Once the arrangement has been performed or claims covered by the arrangement have been collected, the court will issue a decision on the arrangement's performance. Upon the decision becoming final and non-appealable, the debtor regains the right to freely manage and dispose of its assets.

In certain cases the arrangement may be cancelled.

The presented rules are general in nature and are subject to exceptions depending on individual proceedings provided for by the law.

Arrangement approval proceedings

The arrangement approval proceedings involve two stages. The first stage takes place out of court and makes it possible to enter into an arrangement as a result of the debtor alone collecting creditor's votes. It may be conducted if the sum of disputable claims that entitle creditors to vote on the arrangement does not exceed 15 per cent of the sum of all claims entitling creditors to vote on the arrangement.

At this stage, the debtor must enter into a contract with a restructuring adviser whose role is to supervise the proceedings, in particular over the preparation of arrangement proposals, the collection of votes by the debtor alone, and the filing of a motion to approve the arrangement. A consent of creditors is required to adopt the arrangement.

When the arrangement is adopted, the debtor files an application for its approval with the restructuring court. The application must state information that is sufficient for the court to verify whether the arrangement was duly entered into and the vote was duly conducted.

Once the arrangement is approved, the debtor may alone take actions within the scope of ordinary management but the supervisor's consent is required to any action beyond such scope.

This procedure is quick, flexible and formalised to a relatively small degree, and it minimises the need for court involvement, which also contributes to its effectiveness. It is also important that in this procedure the debtor retains its full rights to manage its enterprise and assets. In addition, no consent of all creditors is required, as it would be a difficult condition to meet.

Accelerated arrangement proceedings

Accelerated arrangement proceedings make it possible for a debtor to enter into an arrangement after a list of claims is made and approved in a simplified procedure. The proceedings may be conducted if the sum of disputable claims entitling creditors to vote on the arrangement does not exceed 15 per cent of the sum of all claims entitling creditors to vote on the arrangement. The proceedings are intended to be quick, the court should make a decision on the submitted application within one week.

The court decides on the initiation of proceedings only on the basis of documents attached to the application by the debtor. In its decision to open the accelerated arrangement proceedings, the court appoints a court supervisor, who may be the person named by the debtor in the application.

The debtor retains the management of its assets but in certain circumstances the court may decide that an administrator will take over such management. Limitations connected with certain legal actions have been introduced.

Ordinary arrangement proceedings

Another type of restructuring proceeding that is more advanced as regards the debtor's rights to manage its assets and more formalised (which entails closer court supervision) is arrangement proceedings. The arrangement proceedings make it possible for a debtor to enter into an arrangement after a list of claims is made and approved. Unlike the aforementioned restructuring proceedings (i.e., the arrangement approval proceedings and the accelerated arrangement proceedings), the ordinary arrangement proceedings may be conducted if the sum of disputable claims entitling creditors to vote on the arrangement exceeds 15 per cent of all claims entitling creditors to vote on the arrangement.

During the initial stages to open the arrangement proceedings, the court may secure the debtor's assets by appointing a temporary court supervisor and suspending enforcement proceedings.

Within 30 days from the arrangement proceedings opening, a court supervisor takes an inventory, makes a list of claims and a restructuring plan. An arrangement entered into in restructuring proceedings may also involve liquidation (i.e., arrangement proposals may provide that creditors will be repaid by liquidating the debtor's assets).

Remedial proceedings

Remedial proceedings are the most formalised, with the debtor having the least freedom and with the largest degree of restructuring.

Upon the opening of remedial proceedings, the debtor's assets used to run the enterprise become a remedial estate. The debtor loses control of the estate to an administrator. The debtor must release to the administrator all the assets and all documents relating to the conducted business and provide the administrator with all required explanations. The opening of the remedial proceedings has the effect that any legal transactions carried out during one year prior to the filing of the application to initiate these proceedings, under which the value of a disposal by the debtor considerably exceeds the value of the mutual benefit the debtor received, is ineffective towards the remedial estate. The same result applies to any established security that is not directly connected with the benefit received by the debtor or that exceeds the value of the secured obligation by more than half on the day of opening the proceedings; it also applies to any court settlements, any admission or waiver of claims.

The administrator is obliged to submit to the judge commissioner a restructuring plan and the list of claims within 30 days from the proceedings opening.

Once the restructuring plan is implemented, no later than 12 months from the proceedings opening, the judge commissioner convokes a creditors' meeting to carry out a vote on the arrangement. The arrangement may provide for a debtor's restructuring through extending the time limit for debt repayment, splitting the debt into instalments, reducing the debt amount, converting claims into shares, or changing, exchanging or waiving the right securing a specific claim.

v Starting proceedings

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

A creditor is defined as anyone entitled to seek payment from the bankruptcy estate, even if the claim does not have to be notified.

The debtor is obliged to file a petition for bankruptcy within 30 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), economic consequences (ban on the conduct of a business activity), tax liability and criminal liability (in the case of companies).[5]

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 filed 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.

5 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).

Bankruptcy proceedings are relatively lengthy. Participants in the proceedings always include the debtor and the party who filed for bankruptcy. Courts issue bankruptcy 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.

In the case of restructuring proceedings, an application to open such proceedings may be filed by the debtor only. An exception to this rule includes remedial proceedings under which it is also the debtor's creditors that are entitled to file for opening of such proceedings.

vi 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.

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 its assets and submit all documents related to its business, property and accounts. The debtor is also obliged to furnish the judge commissioner and the trustee with all necessary explanations related to the property. The judge commissioner may also prohibit the debtor as a natural person from leaving the country without permission.

The trustee is obliged to transfer to an interest-bearing bank account or a deposit account of the Finance Minister any cash amounts making up the bankruptcy estate and any proceeds from the sale of items and rights encumbered with property rights. The above limitation does not apply to cash that must be surrendered immediately in accordance with the rules set out in the bankruptcy law.

As regards the restructuring proceedings, the rules for exercising management over the debtor's property are described in Section I.i, *supra*. The course of the restructuring proceedings is managed by the judge commissioner. He or she supervises the actions of the court supervisor and the administrator, specifies actions that cannot be performed by them without his or her approval or without permission of the creditors' council, and he or she also points out any shortcomings in their actions.

After the accelerated or ordinary arrangement proceedings are open, the debtor furnishes the judge commissioner and the court supervisor with all necessary explanations, provides documents on the debtor's enterprise and property, and enables the court supervisor to become acquainted with the debtor's enterprise and accounts. The court has the right to cancel the debtor's own management in the following cases:

a the debtor breached the law while exercising management and such breach results in harming the creditors or a possibility of such harm in the future;

b it is evident that the way the management is exercised does not guarantee that the arrangement will be performed or a curator has been appointed for the debtor after opening the restructuring proceedings; or

c the debtor does not comply with instructions of the judge commissioner or court supervisor, in particular the debtor has not filed lawful arrangement proposals within due time given by the judge commissioner.

The debtor has considerable freedom in carrying out the restructuring under the arrangement approval proceedings. It is the debtor alone that selects the arrangement supervisor and enters into a contract regulating the arrangement supervisor's fee, among other things. The debtor must provide the supervisor with complete and true information to be used in the restructuring proceedings and provide access to any documents relating to the debtor's

assets and liabilities. The supervisor's actions include, among other things, drafting of the restructuring plan, preparation – in tandem with the debtor – of arrangement proposals, drafting of the list of claims and a list of disputable claims, cooperation with the debtor in efficient and lawful collection of votes while preserving creditors' rights, and the submission of a report on whether the arrangement can be performed.

Once the remedial proceedings are opened, the debtor indicates and delivers to the administrator all of its assets and provides documents related to its business, property and financial settlements, in particular accounts, other registers kept for tax purposes and any correspondence. The debtor confirms that these obligations have been fulfilled in a written statement submitted to the judge commissioner. The court may permit the debtor to manage its enterprise within the scope of ordinary management, if the effective conduct of the remedial proceedings requires the personal participation of the debtor or its representatives, and they guarantee that management will be duly exercised. The court may withdraw its permit for identical reasons for which the debtor's own management is taken away in the accelerated and ordinary arrangement proceedings (as described in Section I.vi, *supra*).

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

a the creditors' meeting – convoked by the judge commissioner to pass a resolution in certain situations (e.g., exclusion of the debtor's assets from the estate other than those that are usually excluded by law) or 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

b the creditor's council is appointed by the judge commissioner if he or she considers it necessary or on request of (1) at least three creditors or (2) a creditor or creditors holding jointly one-fifth of all claims, and (3) the debtor. The main role of the council is to support the trustee, oversee his or her 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, a sole-source sale of assets, acknowledgement, waiver and settlement of disputable claims and referring the dispute to an arbitration court), as well as express their opinion on other issues if required by the judge commissioner or a trustee. In performing its duties, the creditors' council acts in the interests of all creditors.

Similar bodies representing creditors' interests may be appointed in the restructuring proceedings, but the creditors' meeting is convoked by the judge commissioner to vote on the arrangement, when the creditors' council passes a resolution convoking the meeting and when the judge commissioner considers it necessary. The creditors' council is appointed by the judge commissioner on request of the debtor, at least three creditors or a creditor (creditors) holding at least one-fifth of all debt claims. Approval of the creditors' council is required, among other things, to encumber the elements of the arrangement or remedial estate, to transfer title of an item not covered by the arrangement, to enter into a tenancy agreement for the debtor's enterprise or for the debtor to sell real estate or other assets with the value in excess of 500,000 zlotys.

vii 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: the Treasury; units

of local government; independent public healthcare centres; institutions and legal entities established by statutes and in performance of obligations imposed by statute; individual farmers; universities; and investment funds. 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 Bankruptcy Law 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 approximately 400,000 zlotys 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.

Provisions of the Restructuring Law contain specific regulations applied to developers, banks, cooperative savings and credit unions, and bond issuers.

viii Cross-border issues

With respect to bankruptcy proceedings in the EU, Poland applies European Council Regulation (EC) 1346/2000 of 29 May 2000 on insolvency proceedings (O.J. EC L.00.160.1; Regulation 1346)[6]. 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, and 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

6 The Regulation of the European Parliament and of the Council (EU) 2015/848 of 20 May 2015 on insolvency proceedings (recast) that will repeal Regulation 1346 will come into force on 26 June 2017.

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 Bankruptcy Law. Proceedings to recognise foreign insolvency proceedings are initiated upon the request of a foreign administrator or a debtor-in-possession, 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 proceedings, or any other credible form of written proof stating these facts (e.g., a statement from a foreign court), as well as a list of creditors whose domicile, registered office or principal place of business are located in Poland; whose claims originate from the debtor's business activity in Poland; and who have debt claims secured on the debtor's assets situated in Poland with a mortgage, pledge, tax lien, registered pledge, a ship mortgage or fiduciary transfer of items, debt claims or other property rights. These documents must be translated into Polish. An advance towards the costs of proceedings must be also paid. 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.

If in recognised main bankruptcy proceedings abroad an arrangement is entered into whose wording is not fragrantly contrary to Polish law, the court will appoint a date of a creditors' meeting to vote on the recognition of the effectiveness of the foreign arrangement scheme. The meeting is attended by creditors who have voting rights and who must be included in the list of creditors mentioned above.

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 are obliged to cooperate with and to provide information to one another. In turn, under the Bankruptcy Law Polish courts are entitled to contact foreign courts and foreign administrators directly, and are obliged to cooperate with foreign units in insolvency cases. Trustees perform their duties through the judge commissioner or through direct contact with a foreign court or a foreign administrator. Similar rules apply to the court and court administrators in restructuring proceedings.

II INSOLVENCY METRICS

The Polish economy emerged largely unscathed from the 2008 recession and financial crisis, but since 2009 the gross domestic product (GDP) growth has slowed down. Since 2013, a gradual upward trend in domestic activity has been observed, which became stronger in 2014 largely because of improving internal demand. According to the initial estimates of the Polish Statistical Office, in 2015 Poland's GDP increased by 3.6 per cent in real terms. This result is above expectations of experts. The growth was bolstered mainly by the domestic demand connected with an increase in household spending. 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 certain difficulties for the Polish economy, particularly the farming and transport sectors.

According to a report by the Euler Hermes advisors of the Allianz Group, 747 bankruptcies were declared in Poland in 2015, which is a much better result than the 2014 result (9 per cent less than in 2014). The number of bankruptcies in 2016 is projected to be three times smaller than in 2015. The most marked improvement was noted in the construction and wholesale sectors where the number of bankruptcies fell by 21 per cent and 14 per cent, respectively. Smaller businesses from the retail and distribution sectors that employed up to 49 employees fared worse because, given the current deflation, they are forced to apply minimum margins and consequently are unable to compete with larger companies. Services and manufacturing also stagnated and the number of bankruptcies fell by 2 per cent and 1 per cent, respectively. Problems of the manufacturing sector concern mainly manufacturers of building materials and steel products. A sharp increase (28 per cent) in the number of bankruptcies affected the transport industry but according to the Euler Hermes report this does not reflect the general condition of the sector and mainly results from the loss of eastern European markets and an greater competition for cabotage in the markets of western Europe.

There were nearly three times more consumer bankruptcies than corporate bankruptcies in 2015. According to the data presented by the Business Information Centre in 2015, 2,112 consumer bankruptcies were declared, whereas under the previous bankruptcy law (prior to the amendment that came into force on 1 January 2015) there were nearly 60 such bankruptcies over a span of a few years.

These numbers do not reflect the full number of insolvent businesses, since no account is taken of the petitions that were dismissed by courts owing to the fact that the assets of the insolvent debtors were insufficient to cover the costs of bankruptcy proceedings.

In the last 12 months, bankruptcy was declared by companies including SKOK Wołomin (a cooperative savings and credit union), Hydrobudowa Gdańsk SA (hydrotechnologies and construction), Q9 Sp. z o.o. (fuels and fuel derivatives) and Zakład Usług Gospodarczo-Socjalnych ANTEMA Sp. z o.o. (specialised clean-up services in industrial buildings and facilities).

III PLENARY INSOLVENCY/RESTRUCTURING PROCEEDINGS

i Spółdzielcza Kasa Oszczędnościowo – Kredytowa Wołomin

In February 2015, Spółdzielcza Kasa Oszczędnościowo – Kredytowa Wołomin (SKOK Wołomin), one of over 50 savings and loan associations providing financial services to their members was put to liquidation bankruptcy. With nearly 80,000 members who deposited 2.7 billion zlotys, SKOK Wołomin was the second-largest savings and loan association in Poland.

Factors contributing to the bankruptcy of SKOK Wołomin included, among others, irregularities in granting substantial loans that affected the loan portfolio quality.

SKOK Wołomin was covered by a guaranteed deposit system being a part of the bank guarantee fund existing in Poland. Deposits of up to approximately 400,000 zlotys are guaranteed in their entirety irrespective of the number of accounts of a client with a particular association. This means that these clients of SKOK Wołomin who had deposits of

up to 400,000 zlotys were able to recover them fully. For the other clients, the bankruptcy of SKOK Wołomin means that they will have to pursue their claims by reporting them to the judge commissioner individually.

The procedure is in progress. A decision on how the estate will be liquidated will have a material impact on the creditors' situation. If the debtor's business is sold as a whole, its buyer will be liable for the debtor's obligations towards creditors having bank accounts with the debtor. The liquidation of the estate in any other form (e.g., through sale of individual assets) will not have such a result.

ii Biomed-Lublin Wytwórnia Surowic i Szczepionek Spółka Akcyjna

In January 2016 the accelerated restructuring proceedings of Biomed-Lublin Wytwórnia Surowic i Szczepionek Spółka Akcyjna were initiated. The company is one of the largest producers of vaccines and biopreparations in Europe and is listed on the Warsaw Stock Exchange. Financial problems started at the end of 2015 as a result of prolonged negotiations related to obtaining financing for the company's project that were coupled with the requirement to account for subsidies obtained by the company.

As a result of the restructuring proceedings, the company's creditors were divided into five classes, each of which had certain rules for claim repayment. In June 2016 the creditors' meeting accepted an arrangement in accordance with the proposals put forward by the company. In July 2016 the arrangement was approved by the court.

The restructuring proceedings of Biomed-Lublin were one of the first initiated under the regulations in force since 1 January 2016. The fact that the proceedings were effective and efficient shows that the new legal solutions stand a good chance of significantly facilitating the restructuring of liabilities of entrepreneurs and thus enabling them to continue their businesses.

IV ANCILLARY INSOLVENCY PROCEEDINGS

No material ancillary insolvency proceedings have been opened in Poland in the last 12 months.

V TRENDS

During the first half of 2016 corporate bankruptcies fell gradually, as was the case in 2015. The situation of the transport sector improved after a particularly high number of bankruptcies in 2015. Despite generally robust results of construction companies, the number of bankrupt companies specialising in infrastructural projects is on the rise.[7] There does not seem to be any specific sector of economy that would be particularly prone to bankruptcy. There is a considerable, steady growth in consumer bankruptcies – in the first half of 2016 their number nearly reached the level for the entire 2015.

7 Data resulting from an analysis by Euler Hermes, www.eulerhermes.pl/euler-hermes-w-polsce/centrum-prasowe/wiadomosci/Pages/160704_Upad per centC5 per cent82y_362_firmy_w_Polsce.aspx.

In the wake of the reform introducing the new provisions of the Bankruptcy Law and the Restructuring Law that have been in force since the beginning of 2016, no material legislative work on this matter is being carried out. New restructuring regulations should contribute to a growing number of proceedings resulting in corporate restructuring and a fall in liquidations resulting from bankruptcy. The application of the new mechanisms introduced into bankruptcy proceedings should be expected, primarily petitions for pre-pack liquidation bankruptcies. On account of the relatively short period of the new regulations being in force, it is difficult to assess at this stage how they will impact the corporate practice.

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 board directors of limited liability companies under the additional grounds for liability regulated in Polish companies law. The other trend is the tendency by 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.

Appendix 1

ABOUT THE AUTHORS

KRZYSZTOF ŻYTO

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Krzysztof Żyto is an attorney-at-law, partner and head of the litigation, restructuring and insolvency departments at Chajec, Don-Siemion & Żyto.

Krzysztof specialises in litigation, restructuring and insolvency law. His practice is focused on representing corporate clients in court and arbitration proceedings. Krzysztof has extensive expertise in civil procedure.

He advises media and telecommunication companies with foreign ownership and has represented major Polish telecoms operators. He represents bankruptcy trustees of companies operating in the banking, real estate and construction, TMT and healthcare sectors, in-court proceedings against debtors as well as on matters connected with insolvency proceedings. Currently he is engaged in over 100 cases handled by Chajec, Don-Siemion & Żyto's litigation and restructuring and insolvency departments.

Krzysztof is an arbitrator at the Court of Arbitration at the Polish Chamber of Commerce in Warsaw. He has worked for 10 years as a judge at the Commercial Division of the Voivodeship Court in Poznań. His judicial practice concentrated on commercial law and civil procedures related to commercial claims.

Krzysztof is recommended by *The Legal 500 EMEA* 2016 in the field of dispute resolution.

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