A&O SHEARMAN

Restructuring across borders
Poland

CORPORATE RESTRUCTURING AND INSOLVENCY PROCEDURES | JANUARY 2024

Contents

Introduction

On 1 January 2016, the Polish insolvency regime underwent a revolutionary change which made it a more "debtor friendly" jurisdiction by opening new opportunities for entrepreneurs to restructure their debts. Since then, there have not been any major changes to the Polish bankruptcy and restructuring regime. However, it is worth noticing that the Polish legislator has sought to make all procedures more convenient, transparent and compliant with the applicable EU legislation by creating a fully computerised system, gathering all the relevant information in one database. The result of these efforts is the newly created National Register of Debtors (Krajowy Rejestr Zadłużonych) which has been in operation since 1 December 2021. At the same time, new information obligations are continually being imposed, especially on debtors.

As for the sources of law in Poland, bankruptcy and restructuring proceedings are governed by two separate acts. The Bankruptcy Law, dated 28 February 2003 and as amended (the **Bankruptcy Law**) (Prawo upadłościowe), governs bankruptcy proceedings resulting in a liquidation of the insolvent debtor's assets, including pre-pack insolvency proceedings.

The Restructuring Law dated 15 May 2015, as amended (the **Restructuring Law**) (Prawo restrukturyzacyjne), provides four court-based restructuring proceedings aimed at entering into composition arrangements.

These comprise:

- fast-track arrangement approval proceedings (postępowanie o zatwierdzenie układu);
- accelerated arrangement proceedings (przyśpieszone postępowanie układowe);
- arrangement proceedings (postępowanie układowe); and
- remedial proceedings (postępowanie sanacyjne).

Since 24 June 2020, there has also been a fifth type, ie simplified restructuring proceedings. These proceedings were intended to be a temporary solution (regarding COVID-19) and were available up to and including 30 November 2021. The European Union Directive 2019/1023 (the **Restructuring Directive**) on preventive restructuring frameworks, discharge of debt and disqualifications, and measures to increase the efficiency of procedures concerning restructuring, insolvency and the discharge of debt has not been transposed yet. Some of the amendments were implemented on 1 December 2021. The Restructuring Directive has not been implemented yet; however, on 8 December 2023, the Polish Parliament presented a draft law changing the Bankruptcy and Restructuring Law and implementing the Restructuring Directive, which is to enter into force on 26 November 2024.

Amendments to legislation since the COVID-19 pandemic

COVID-19 MEASURES

The Polish Act of 2 March 2020 provided specific solutions concerning the prevention, counteracting and eradication of COVID-19, other contagious diseases and related crisis situations, as amended. Debtors (and their management board members) whose insolvency occurred between 14 March 2020 and 1 July 2023 (the date on which the state of epidemiological threat or epidemic in Poland due to COVID-19 ended), **were temporarily exempt from the obligation to file a motion for bankruptcy** if their insolvency was due to COVID-19 (it was presumed that the insolvency was a result of COVID-19 if it arose during the state of an epidemiological threat or epidemic). After the cessation of the state of epidemiological threat or epidemic, the 30-day deadline for filing a petition for bankruptcy runs anew.

A simplified restructuring procedure with very limited court involvement (most of the procedure is conducted entirely out of court) was in place between 24 June 2020 and 3 November 2021 for businesses dealing with challenges as a result of the COVID-19 pandemic.

MORE RECENT AMENDMENTS TO LEGISLATION

On 1 December 2021, some amendments to the Polish insolvency and restructuring laws came into force. Some of these amendments are connected with the implementation of the Restructuring Directive, which provides more protection for debtors during the insolvency proceedings. However, some amendments are connected with the policymakers' intention to permanently keep certain instruments that were available under the COVID-19 proceedings.

The main legislative amendments (explained in more detail in the factsheet) are as follows:

- the introduction of one public electronic register of the insolvency and restructuring, enabling the relevant insolvency searches to be conducted (National Register of Debtors (Krajowy Rejestr Zadłużonych));
- many applications and official letters to the courts can be submitted electronically via the register;
- amendments to the pre-pack liquidation (especially regarding the equivalents for cash in respect of the bid bond);
- during the restructuring proceedings (and bankruptcy proceedings), the creditors' meetings may be organised electronically;
- in each type of restructuring proceeding (and the bankruptcy proceedings accordingly) the secured creditor may be obligatorily covered by the arrangement provided that: (i) the arrangement provides for full repayment of the secured creditor, or (ii) the level of satisfaction of the secured creditor; or claims will be higher than during the enforcement against the secured asset; and
- the rules regarding the simplified restructuring proceedings (as described above under "COVID-19 measures") were implemented in the fast-track arrangement approval proceedings.

Bankruptcy (Postępowanie upadłościowe)

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

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

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

- illiquidity: the debtor is unable to meet its pecuniary obligations as they fall due, which is assumed if the debtor has ceased making payments on time for longer than three months; and
- over-indebtedness (applied only to companies): the debtor's assets no longer cover its liabilities for longer than 24 months, which is assumed if the balance sheet of the debtor reveals such situation (even if the debtor performs its obligations on a day-to-day basis).

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

- the petition was filed by a creditor but the debtor proves that all of the creditor's claims against the debtor are contentious/litigious; or
- the value of the debtor's estate (including the prospective proceeds under the claw-back actions against fraudulent transactions) is not higher than the anticipated costs of the proceedings.

Bankruptcy (Postępowanie upadłościowe) (cont.)

Furthermore, the court may also dismiss the petition if:

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

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

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

The court should decide on whether to commence bankruptcy proceedings within two months of the petition being properly f iled. Nevertheless, there are generally no legal consequences if this takes longer. The bankruptcy order is issued by the commercial division of the district court in the jurisdiction of the debtor's centre of main interests (**COMI**). A company's COMI is presumed to be the place of its registered head office. The court usually deals with the petition confidentially and does not schedule a public hearing. The order is effective and enforceable as of its date, which also denotes the date when the debtor is formally bankrupt.

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

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

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

Since 1 December 2021, the notification of the issuance of a bankruptcy order is published in the newly created National Register of Debtors (Krajowy RejestrZadłużonych). Further, with effect from 1 December 2021, it is obligatory to publish a notification in the National Register of Debtors when the debtor files for bankruptcy and when the bankruptcy order becomes final (ie a notification is to be published in the National Register of Debtors when the appeals period expires).

Following the decision of the court, bankruptcy proceedings can take two routes:

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

These are described in turn below.

Bankruptcy (Postępowanie upadłościowe) (cont.)

STANDARD BANKRUPTCY PROCEEDINGS

The declaration of bankruptcy results in the bankrupt being precluded from administering its assets and business and the court-appointed bankruptcy administrator (syndyk) taking control of the bankrupt's business and being tasked with preparing an inventory list and a liquidation plan. Since 1 December 2021, each inventory list will be published in the National Register of Debtors. The administrator is supervised by the judge-commissioner who conducts the bankruptcy proceedings, except for actions reserved for the bankruptcy court.

The bankruptcy administrator's duty is to close the proceedings by liquidating the bankrupt's estate. However, when appropriate, the administrator may continue the bankrupt's business activity until the successful liquidation. If possible, the debtor's business is sold as a going concern, otherwise the debtor's assets are sold on a piecemeal basis.

The most valuable assets of the bankrupt (eg its enterprise and real property) are typically subject to an expert valuation.

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

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

- Super senior category – costs of the bankruptcy proceedings, including expenses for carrying out the proceedings and managing the bankruptcy estate (eg the bankruptcy administrator's fee);
- Senior category – other liabilities of the bankruptcy estate, including all debts that occurred after the bankruptcy declaration (eg under contracts entered – Second (default) category – into by the administrator with the bankrupt's contractors and receivables under contracts entered into before the bankruptcy declaration that the administrator demands be performed);
- First category – employees' salaries and other employment-related claims (for the period before the declaration of bankruptcy), alimonies and pension payments for the period after the bankruptcy declaration, receivables incurred during the in-court restructuring provided that the bankrupt entity was previously subject to unsuccessful restructuring proceedings and then declared bankrupt under a simplified petition for bankruptcy, liabilities under new financing granted to the debtor under an arrangement concluded previously in successful restructuring proceedings, provided that the borrower was declared bankrupt following a petition made within three months from setting aside the arrangement;
- Second (default) category - other pre-bankruptcy principal debts, including financial and commercial liabilities, taxes, other public levies, pensions and social security premiums;
- Third category – interest accrued on debts listed in the categories mentioned above, court and administrative fines and receivables under donations; and
- Fourth category – receivables under loans and other similar transactions entered by the bankrupt company with its shareholders during the five years before the bankruptcy declaration.

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

Bankruptcy (Postępowanie upadłościowe) (cont.)

The administrator satisfies the claims within the super senior category and senior category gradually, as the amounts are being credited to the bankruptcy estate. If the claims within the senior category are not satisfied in this way, they will be satisfied by a distribution of the proceeds of the bankruptcy estate. Claims within the lower ranking categories may be satisfied only if claims under the higher ranking categories have been fully satisfied. Where it is not possible to satisfy all the claims in one category, they are satisfied proportionally.

PRE-PACK INSOLVENCY

The pre-packaged bankruptcy procedure was introduced in Poland in 2016 as an alternative to the ordinary and usually protected liquidation procedure. This is a court-sanctioned sale process that allows the debtor or any of its creditors to pre-agree the terms of sale of the debtor's enterprise or its material assets with a purchaser and apply for the bankruptcy court's approval of the transaction.

The court will consider the pre-pack insolvency option if, during the process for declaring bankruptcy, one of the participants files a request for consent to the sale of the debtor's company or part 8 of it to a buyer (or buyers) on terms which were agreed before initiating the formal bankruptcy proceedings. Such request must be published in the Official Journal (and, with effect from 1 December 2021, in the National Register of Debtors). If granted, the court's order simultaneously declares the bankruptcy of the company, resulting in the directors losing control of the company, and approves the terms of the sale.

Having received a request for pre-pack insolvency, the court must appoint a temporary court supervisor or a compulsory administrator who is obliged to regularly report on the debtor's financial condition.

The potential purchaser must deposit 10 per cent. of the offered price when f iling the pre-pack motion with the court. The deposit may be "paid" in any of the following ways:

- in cash;
- by bank surety;
- by bank guarantee; or
- by insurance guarantee.

If granted, the security deposit paid by the purchaser (in cash) is applied towards the purchase price. The remaining 90 per cent must be paid to the bankruptcy estate's bank account before executing the final purchase agreement. Only a cash purchase of the assets is possible as "credit bidding" is not permitted. If the purchase agreement is not concluded due to the fault of the purchaser, the deposit is forfeited (if the deposit was paid by way of a bank guarantee or surety, the administrator will satisfy a deposit claim with it). If the court does not approve the transaction, the deposit is returned within two weeks after the date of the court's decision concerning the declaration of bankruptcy becoming final and is not subject to any further appeal.

The main purpose of these proceedings is to ensure that a company can be sold promptly after the bankruptcy order and thus avoid the risk of the business depreciating in otherwise lengthy proceedings. Ideally, pre-pack insolvency leads to the creditors satisfying their claims and the business being successfully continued.

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

Bankruptcy (Postępowanie upadłościowe) (cont.)

Not sooner than 30 days after the request for pre-pack insolvency is filed and 14 days after the creditors receive the request, the court:

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

If two or more applications supporting different bidders are validly filed and both potential purchasers have paid the 10 per cent deposit, the court supervisor must carry out an auction and pick the most beneficial one. The process is supervised by the bankruptcy judge.

As a rule, the bankruptcy court cannot approve a pre-pack application concerning assets encumbered with a registered pledge (if a registered pledge provides for the acquisition of a secured asset or its sale), unless the written consent of the pledgee is enclosed with the application. However, there is an exception to this rule. If the pre-pack application concerns the debtor's enterprise, the debtor can attempt to prove that it is more advantageous to sell an asset encumbered with a registered pledge (which is a component of the enterprise) along with the enterprise rather than in a separate sale. In this case, the pledgee's consent is not required.

The sale is free and clear of claims and liabilities (subject to minor exceptions). The assets are acquired free and clear of all liens and the buyer will not need to negotiate the terms for releasing them with the secured creditors.

Restructuring proceedings (Postępowanie restrukturyzacyjne)

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

- fast-track arrangement proceedings (No. 1);
- accelerated arrangement proceedings (No. 2);
- arrangement proceedings (No. 3);
- remedial proceedings (No. 4); and
- simplified restructuring proceedings (No. 5), which were intended to be a temporary solution (regarding COVID-19) and were available to and including 30 November 2021.

In principle, the proceedings with numbers 1, 2 and 5 are meant to be faster and 10 less burdensome for the debtor, while the numbers 3 - 4 provide for more extensive protection against creditors, but at the expense of greater control of a debtor's operations by the court (or insolvency practitioners appointed by the court).

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

COMMENCEMENT OF PROCEEDINGS

As a rule, arrangement proceedings (ie fast-track arrangement proceedings (No. 1), accelerated arrangement proceedings (No. 2), arrangement proceedings (No. 3), and simplified restructuring proceedings (No. 5) may be initiated only by the debtor and third parties (especially creditors) do not have a say as to whether the restructuring should commence. This is slightly different for remedial proceedings (No. 4), which may be initiated by either the debtor or one of its full-recourse creditors. However, the creditor may only apply for the opening of remedial proceedings if the debtor is already insolvent. Since 1 December 2021, irrespective of who files the petition, with effect from 1 December 2021, information of filing it will have to be published in the National Register of Debtors.

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

The courts are required to examine the petition for restructuring within seven or 14 days (depending on the type of restructuring proceedings) of the date it is filed, which is considerably faster than the two months applicable to a bankruptcy petition. In the case of the arrangement proceedings and the remedial proceedings, if it is necessary to schedule a court hearing, the petition should be examined within six weeks. There is no formal sanction if the above deadlines are not met by the court; however, based on our experiences, the courts indeed make efforts to give decisions on restructuring petitions within weeks rather than months.

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

The court is required to dismiss the restructuring petition if it believes that the proceedings would be harmful to the creditors (for example when there is no chance of a successful restructuring or the debtor's actions, the way it manages its enterprise, and conducts negotiations with creditors indicate that the debtor's goal is to prevent creditors from conducting effective enforcement).

Restructuring proceedings (Postępowanie restrukturyzacyjne) (cont.)

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

Regarding the availability of particular restructuring proceedings, two situations should be distinguished: 11 If the value of disputed claims does not exceed 15 per cent. of the sum of all claims, then the available proceedings are:

- fast-track arrangement approval proceedings (No. 1);
- accelerated arrangement proceedings (No. 2);
- simplified restructuring proceedings (No. 5); and
- remedial proceedings (No. 4).

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

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

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

In the case of accelerated arrangement proceedings (No. 2) and arrangement proceedings (No. 3), the decision dismissing the request for the opening of the proceedings may be appealed in full (in particular, as to the merits of the insolvency and viability of the restructuring) only by the debtor. In the case of remedial proceedings (No. 4) the decision to open the restructuring at the creditor's request may be appealed in full only by the debtor. The decision dismissing the request for the opening of the proceedings may be requested by the debtor or by the creditor (depending on who submitted the application). The creditors may lodge an appeal only regarding the jurisdiction of the Polish courts in the case, which may become a significant issue in certain circumstances only. However, as creditors' appeals need to be filed within seven days (for Polish creditors), and 30 days (for foreign creditors) of the announcement in the Official Journal (and with effect from 1 December 2021 in the National Register of Debtors), it is essential that the creditors closely monitor announcements for the debtors they suspect of insolvency.

DEBTOR IN POSSESSION

Fast-track arrangement approval proceedings (No. 1), primarily take place outside the court. As a rule, the debtor retains full control over its assets and manages the business on its own. The debtor is obliged to hire a licensed supervisor to oversee and facilitate the proceedings, and keep him/her informed of the issues surrounding the restructuring and its operations, but until the court decides to approve the arrangement, the licensed supervisor has no official authority over the debtor. In the interim period after the court issues the decision to approve the arrangement but before the decision becomes final and binding, the consent of the licensed supervisor is required for actions beyond the scope of normal administration of the debtor, ie for material transactions (e.g. transactions of a high value that the debtor does not make on a daily basis).In accelerated arrangement proceedings (No. 2) and arrangement proceedings (No. 3), it is a default position that the debtor manages the estate but the court ex officio appoints a court supervisor to oversee its management. The powers of such restructuring practitioner are quite limited but he/she is obliged to submit monthly reports to the court on the status of the debtor's restructuring, which implies that he/she must be informed of its operations. In addition, the consent of the court supervisor is required for actions beyond the scope of normal administration (material transactions). Any transactions effected without such consent are void by operation of law.

Restructuring proceedings (Postępowanie restrukturyzacyjne) (cont.)

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

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

Note that the debtor may have some control over who is appointed as the court supervisor or compulsory administrator over the restructuring estate. If the debtor proposes a candidate who is supported by creditors that have in total more than 12 30 per cent. of the total claims, the court is in principle bound by such candidacy. However, the court may disregard the proposed candidate if it feels that there are sufficient reasons to do so, and in particular if it suspects that he/she may not perform the functions properly.

SCOPE OF ARRANGEMENT

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

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

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

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

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

However, since 1 December 2021, in each type of restructuring proceedings **the secured creditor may be obligatorily covered by the arrangement**, provided that: (i) the arrangement provides for full repayment of the secured creditor; or (ii) the level of satisfaction of the secured creditor's claims will be higher than during the enforcement against the secured asset.

Restructuring proceedings (Postępowanie restrukturyzacyjne) (cont.)

ARRANGEMENT PROPOSALS

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

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

PARTIAL ARRANGEMENT

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

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

It is worth noting that if the creditor's claims are secured by the collaterals established over a debtor's estate and the arrangement proposal presented by the debtor provides for their full satisfaction together with the incidental claims (which have been secured under the relevant 13 security agreement) or satisfaction to a degree no lower than what the creditor could expect if it enforced its collateral, the consent of such creditor is not necessary to cover claims with the partial arrangement.

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

Restructuring proceedings (Postępowanie restrukturyzacyjne) (cont.)

VOTING ON THE ARRANGEMENT

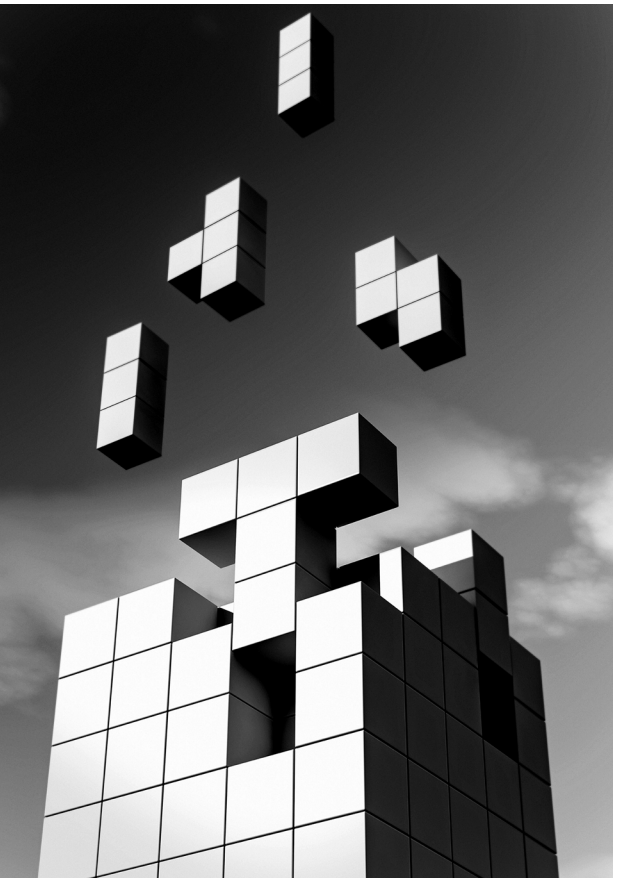
The proposed arrangement is voted on at a creditors' meeting, except for fast-track arrangement proceedings where, since 1 December 2021, the supervisor may collect the votes of the creditors or convene a creditors' meeting. The resolution adopting the arrangement is passed if the majority in number and a 2/3 majority in value of voting creditors who cast a valid vote are in favour of it. If voting is carried out in groups of creditors the same rule applies; however, even if the arrangement does not receive the required majority in one or more groups, it will still be adopted if creditors with two-thirds of the sum of the claims voted in favour of adopting the arrangement and those creditors who were against it are satisfied to a degree not less favourable than in the event of conducting bankruptcy proceedings. This regulation helps to eliminate obstruction if there are a significant number of uncooperative creditors whose claims are of a small value. The introduction of the 'one-fifth of creditors entitled to vote' quorum ensures that common interests are duly represented and reflected in the voting results.

COURT'S APPROVAL

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

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

European Insolvency Regulation



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

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

Under the Recast Regulation, as amended (by Regulation (EU) 2017/353 replacing Annexes A and B to the Recast Regulation and by Regulation (EU) 2018/946 replacing Annexes A and B to the Recast Regulation), bankruptcy and restructuring proceedings are listed in Annex A.

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If you require advice on any of the matters raised in this document, please contact any of our partners or your usual contact at A&O Shearman, or email **rab@aoshearman.com**

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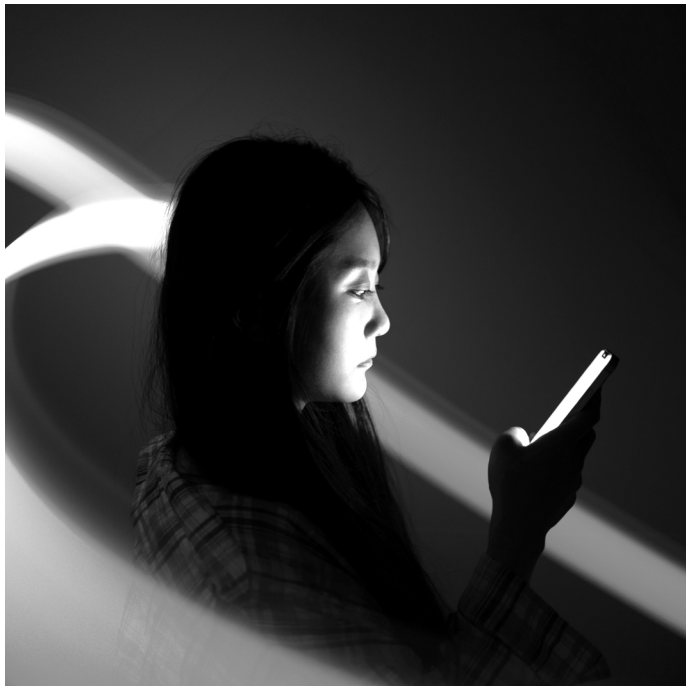
Developed by A&O Shearman's market-leading Restructuring group, "**Restructuring Across Borders**" is an easy-to-use website that provides information and guidance on all key practical aspects of restructuring and insolvency in Europe, Asia, the Middle East and the U.S.

To access this resource, please **click here**.



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