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Briefing note June 2016

Reform of Polish Insolvency Law

On 1 January 2016 the new restructuring law of 15 May 2015 (the "**Restructuring Law**") came into force. It implements a significant reform of Polish insolvency law, comprising:

- the introduction of new restructuring procedures, allowing the restructuring of a debtor's undertaking and preventing its bankruptcy, and
- major amendments to the Bankruptcy and Recovery Law of 28 February 2003 (the "**Bankruptcy** Law") in order to streamline "classic" bankruptcy proceedings, reduce unnecessary formalities and expedite liquidation and to implement substantive changes (such as redefining bankruptcy tests, removing priority of tax and social insurance claims, implementing procedures facilitating pre-packs, extending hardening periods and improving protection against fraudulent conveyances, etc.).

The Restructuring Law provides important, large-scale changes to the Polish insolvency regime, hence, naturally, only selected aspects of the reform may be signalled in this briefing.

The Restructuring Law was published in the Journal of Laws dated 14 July 2015 (item 978).

New Restructuring Law

Four types of Restructuring Proceedings

The Restructuring Law introduces four new types of restructuring procedures which aim to avoid bankruptcy of insolvent or distressed businesses by allowing them to restructure by way of an arrangement with their creditors. As a rule, restructuring proceedings will be initiated by the debtor (subject to certain exceptions[1]) with a view to concluding an arrangement (composition) with all the creditors whose claims are by law covered by the arrangement, once the consent of the required majority has been obtained. These are:

- **arrangement approval proceedings**, which are available to debtors who are able to reach an arrangement with the required majority of creditors without the court's involvement. This procedure may be used if the sum of disputed claims does not exceed 15% of the total claims. The debtor will continue to manage its estate, but will be required to appoint a licensed supervisor (*nadzorca układu*), who will: (i) prepare a restructuring plan, (ii) cooperate with the debtor in preparing the arrangement proposals, (iii) prepare a list of claims and a list of disputed claims, (iv) assist the debtor in collecting the votes of creditors, and (v) prepare a report containing a feasibility assessment of the arrangement. The debtor will present the restructuring plan to its creditors and collect their votes made in writing (no creditors' meeting is envisaged for the purposes of voting). Once the approving votes of the required majority have been obtained, the debtor will file a motion with the court for the acceptance of the arrangement. The filing should be made within three months of the appointment of the arrangement supervisor;

- **accelerated arrangement proceedings** are available only if the sum of disputed claims does not exceed 15% of the total claims[2]. The procedure is simplified (in comparison to "standard" arrangement proceedings), especially in relation to the allowance of claims carrying voting rights[3]. Once they have commenced, the debtor is not allowed to perform its obligations, whether pecuniary or non-pecuniary, to be covered by the arrangement (as a rule, this applies to any pre-commencement obligations, except for labour claims and claims secured in rem and to post- commencement interest). Execution proceedings relating to claims to be covered by the arrangement will be stayed by operation of law, and the judge-commissioner will be in a position to revoke attachments relating to the debtor's assets. The court will notify creditors of a creditors' meeting and the creditors will vote on the arrangement proposals during this meeting (as opposed to arrangement approval proceedings). The debtor's estate ("arrangement estate") will continue to be managed by the debtor-in-possession, but a court supervisor (*nadzorca sądowy*) will be appointed to supervise its management (however, the court may decide not to allow the debtor to manage the estate and appoint an administrator (*zarządca*) to assume management). The legislators intended that it should take approximately two months to complete accelerated arrangement proceedings (unless state aid is to be sought to support the restructuring);

- "standard" **arrangement proceedings** will be available only if the sum of disputed claims exceeds 15% of the total claims[4]. For the interim period (between the filing and the opening of arrangement proceedings), the court will be able to secure the debtor's estate by appointing a temporary court supervisor (*tymczasowy nadzorca sądowy*). Otherwise, the scope of protection against creditors afforded to the arrangement estate, the debtor's right to manage the business and other effects of the initiation of the proceedings will be similar to those applicable to accelerated arrangement proceedings. However, because of the higher percentage of disputed claims, the allowance of claims is more formalized

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[1] For example, also creditors will be entitled to file a petition for the commencement of remedial proceedings in relation to an insolvent legal person.
[2] This threshold determines whether accelerated arrangement proceedings or "standard" arrangement proceedings can be initiated (the debtor is not in a position to freely choose between these two procedures).
[3] In accelerated arrangement proceedings, creditors can only make reservations to a list of claims prepared by the court supervisor or administrator. Such a reservation only results in the relevant claim's being transferred to the list of disputed claims, but does not have an impact on further steps in the proceedings (in particular, on the voting) as long as the sum of disputed claims falls within the threshold of 15%. In "standard" arrangement proceedings, creditors can file objections, which will be examined by the judge-commissioner.
[4] See footnote 2.

and time-consuming[5], and there are further consequential differences (e.g. relating to the determination of the components of the estate and the impact of the proceedings on pending litigation and administrative proceedings). It is assumed that, depending on the number of pleas against the list of claims and their complexity, it should take approximately six to 10 months to complete "standard" arrangement proceedings;

- **remedial proceedings** (*postępowanie sanacyjne*), which offer the broadest restructuring options and the broadest scope of protection of the debtor's assets against creditors . The appointment of an administrator (*zarządca*) to manage the debtor's estate ("remedial estate") will be mandatory, unless the debtor's involvement is necessary for successful restructuring and the debtor guarantees "proper management" (in which case the court may agree to the debtor's retaining management over the whole or a part of the business within the ordinary scope of management). Remedial proceedings offer certain remedial options previously available only in liquidation proceedings under the Bankruptcy Law in order to facilitate thorough economic restructuring of an undertaking. For example, (1) the court can secure the remedial estate by appointing an interim court supervisor (*tymczasowy nadzorca sądowy*) or an interim administrator (*tymczasowy zarządca*) for the period between the filing and the opening of remedial proceedings, (2) powers of attorney and commercial procuration (*prokura*) expire by operation of law, (3) it is possible to adjust the employment level to the needs of the reorganised undertaking, (4) the administrator is entitled to withdraw from executory contracts ("cherry-picking right"), (5) redundant assets can be sold free of encumbrances (as if they were sold in execution proceedings), etc.

Selected key features of the different types of restructuring proceedings

	Arrangement Approval Proceedings	Accelerated Arrangement Proceedings	Arrangement Proceedings	Remedial Proceedings
Eligibility criteria	Debtor is insolvent or threatened with insolvency; disputed claims below 15%.	Debtor is insolvent or threatened with insolvency; disputed claims below 15%.	Debtor is insolvent or threatened with insolvency; disputed claims above 15%.	Debtor is insolvent or threatened with insolvency.
Availability to the issuers of bonds[6]	No (except for partial arrangement, provided that it does not cover bondholders' claims).	Yes.	Yes.	Yes.
Moratorium on pre-commencement debt?	No	Yes	Yes	Yes

[5] See footnote 3.

[6] In relation to the issuers of revenue bonds, where the issuer's liability is limited to the sum of revenues or the value of assets of the project, the arrangement must not cover the claims of bondholders, and the sums allocated to their satisfaction do not form part of the arrangement or remedial estate.

	Arrangement Approval Proceedings	Accelerated Arrangement Proceedings	Arrangement Proceedings	Remedial Proceedings
Automatic stay of executions?	No	Yes, except for execution of claims excluded from arrangement (such as labour or secured *in rem*[7]; their stay may be ordered for up to 3 months if the asset is necessary for the running of the enterprise).	Yes, except for execution of claims excluded from arrangement (such as labour or secured *in rem*[8]; their stay may be ordered for up to 3 months if the asset is necessary for the running of the enterprise).	Yes (no exception for excluded claims), automatic stay applies to executions directed against any assets of the remedial estate.
Stay of actions?	No	No	No (but the creditor will bear costs if the claim can be included in the list).	No (but the creditor will bear costs if the claim can be included in the list).
"Cherry-picking" rights?	No	No	No	Yes
Debtor in possession?	Yes, with no restrictions (limited supervision by an arrangement supervisor appointed by the debtor).	Yes, subject to supervision by a court supervisor (esp. in transactions beyond the ordinary course of business). Exceptionally, the court may appoint an administrator who takes over full management.	Yes, subject to supervision by a court supervisor (esp. in transactions beyond the ordinary course of business). Exceptionally, the court may appoint an administrator who takes over full management.	No (a court administrator takes over full management). Exceptionally, the court may accept debtor in possession supervised by a court supervisor (and appoint the supervisor).
Method of voting on the proposed arrangement	Debtor collects votes in writing.	At the creditors' assembly (unless the court decides otherwise).	At the creditors' assembly (unless the court decides otherwise).	At the creditors' assembly (unless the court decides otherwise).

Concurrent petitions for restructuring and bankruptcy

Restructuring cases are handled by commercial divisions of district courts. In the event of conflicting petitions for bankruptcy and for restructuring, the bankruptcy court will refrain from examining the bankruptcy petition until the restructuring court has examined the restructuring petition (and if the restructuring petition is accepted, it will not be possible to declare bankruptcy as long as restructuring proceedings are pending). In exceptional cases, if the withholding of the bankruptcy petition were to be contrary to the interest of all creditors, the bankruptcy court may decide to consider both petitions at the same time, adjudicating the two petitions in a single order.

[7] A creditor secured *in rem* can only conduct enforcement against the encumbered asset (but not against other assets).
[8] A creditor secured *in rem* can only conduct enforcement against the encumbered asset (but not against other assets).

Arrangement and voting

As a rule, restructuring proceedings and arrangement proposals (setting out the method of restructuring the debtor's liabilities) can only be commenced by the debtor. However, after proceedings commence, alternative arrangement proposals can also be submitted by the council of creditors, the court supervisor (or the administrator), or a creditor (or group of creditors) holding at least 30% of the total claims[9].

The arrangement may comprise a number of possible workouts, including debt rescheduling or reduction and debt for equity swaps. It may also comprise a liquidation plan.

The proposed arrangement will be voted at a creditors' meeting (except in the case of arrangement approval proceedings, where the debtor collects votes in writing).[10] Arrangement proposals may envisage that the creditors will be divided into groups (classes) based on the criteria of "common economic interests".

In relation to all types of restructuring proceedings (other than arrangement approval proceedings), if creditors vote in a single group, the arrangement will be concluded if accepted by the majority of voting creditors who hold in aggregate at least two-thirds of the total sum of claims held by the voting creditors. If the creditors are split into separate groups (classes) based on the criteria of "common economic interests", the arrangement will be concluded if accepted in each group by the majority of voting creditors in the group whose claims in aggregate amount to at least two-thirds of the total sum of claims held by the voting group members. But even if there is no required majority in one or more of the groups of creditors, the arrangement will still be deemed concluded if (1) creditors representing in aggregate at least two-thirds of the total sum of claims held by the voting creditors have voted in favour of the arrangement, and (2) the creditors from the dissenting group or groups would be satisfied through the arrangement to an extent which is not less "favourable" than in the case of bankruptcy.

Similar rules apply to the acceptance of an arrangement in arrangement approval proceedings where the debtor collects votes itself, except that the required majority is measured by reference to the total value of the claims held by the creditors entitled to vote (and not by reference to the value of the claims held by voting creditors).

An arrangement accepted by the required majority of creditors will be subject to approval by the court. The court will reject the arrangement if it violates the law or if it is obvious that the arrangement will not be performed. The court will also be entitled to reject the arrangement if it is blatantly detrimental to creditors who voted against it and submitted reservations.

"Partial" arrangements

In arrangement approval proceedings and accelerated arrangement proceedings[11], the debtor may make arrangement proposals concerning only certain liabilities the restructuring of which has a fundamental impact on the continued functioning of its business. The selection of creditors to be affected by the partial arrangement must be based on objective, unequivocal and economically justified criteria with respect to the legal relationships between the creditors and the debtor under which the arrangement proposals arise and must not be driven exclusively by the desire to eliminate dissenting creditors .

The following claims in particular may be claims covered by a "partial" arrangement (*układ częściowy*): (i) financing granted to the debtor in the forms of credit facilities, loans and other similar instruments, (ii) claims of fundamental importance to the operation of the debtor's undertaking, in particular claims in respect of the supply of the most important materials or agreement to lease assets necessary for the business run by the debtor, (iii) claims secured by a mortgage, pledge, registered pledge or over objects and rights essential for the running of the debtor's undertaking, or (iv) claims that are the largest in terms of value.

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[9] Certain creditors will be disregarded for this purpose, such as creditors related to the debtor (affiliates, relatives, etc.), or creditors who acquire the claim by way of assignment or endorsement after the commencement of restructuring proceedings.
[10] General procedural rules empower the judge-commissioner to decide to collect votes without a meeting if it is difficult to organise it because of a significant number of creditors. However, there are doubts whether this exception applies to voting on an arrangement.
[11] Exceptionally, in the course of remedial proceedings it is permitted to file a motion for the approval of a partial arrangement (or file a motion for the opening of accelerated arrangement proceedings contemplating a partial arrangement), provided that the creditors to be covered by the partial arrangement are not covered by it by operation of law and have not agreed to be covered by an arrangement in remedial proceedings.

A significant novelty is the possibility of having a partial arrangement that relates to claims secured *in rem* without obtaining the secured creditor's consent. It is permissible if the debtor offers such secured creditor either (i) full satisfaction of the principal claim together with all ancillary claims contemplated by the relevant agreement, on the date specified in the arrangement, even if the agreement has been terminated or expired, or (ii) satisfaction to an extent that is not worse than in the case of enforcement of the claim and ancillary claims against the relevant encumbered asset.

Impact on contracts

Any contractual provisions stipulating a modification or termination of a legal relationship with the debtor in the event of a filing or commencement of restructuring proceedings is void by operation of law. This also applies in relation to the filing of a petition for the approval of an arrangement as well as the issuing of a decision approving an arrangement in arrangement approval proceedings. This does not mean that it is impossible to terminate or modify a contract with the debtor after a filing is made or after the commencement of restructuring proceedings, but it is impossible to do so by reference to the filing or to the commencement of restructuring proceedings.

Upon the commencement of restructuring proceedings (other than arrangement approval proceedings), it is prohibited to terminate a tenancy or lease agreement relating to the premises in which the debtor's enterprise is operated, unless the council of creditors agrees otherwise. The same restriction applies to bank credit agreements (but only in relation to funds made available to the debtor before the commencement date)[12], leasing agreements, property insurances, bank account agreements, suretyships, licences granted to the debtor and guarantees and letters of credit issued before the commencement date. However, it should still be possible to terminate each of those contracts by reference to the debtor's failure to perform or another termination event occurring after the commencement date (subject to applicable contractual and statutory restrictions).

Further, only in respect of remedial proceedings does the administrator have the right to "cherry-pick" executory contracts (i.e., any mutual agreements (*umowy wzajemne*) which have not been performed in full or in part prior to the commencement of the remedial proceedings), subject to the judge-commissioner's consent.

The commencement of restructuring proceedings does not restrict the possibility of terminating master agreements relating to derivative transactions or futures and the sale of securities with an obligation to re-purchase (such as ISDA, GMRA or GMSLA). They can be terminated, subject to contractual provisions relating to the settlement of mutual claims upon termination, and close-out netting is permissible.

The Restructuring Law stipulates that the terms of agreements with the debtor which make it impossible or difficult to achieve the purposes of restructuring proceedings (other than arrangement approval proceedings), are ineffective *vis-à-vis* the debtor's arrangement estate or remedial estate. That provision, if it is construed quite broadly (especially in the context of the general principle that the purpose of restructuring proceedings is to avoid bankruptcy by allowing the debtor to restructure through an arrangement with creditors) may have far-reaching consequences (because many terms of contracts with the debtor may be seen as potential obstacles to a successful arrangement).

If an arrangement is reached in restructuring proceedings, it will cover all claims against the debtor that originated prior to the commencement date, together with interest accruing from the commencement date. As a novelty, claims under executory contracts will be covered by the arrangement only if the counterparty's performance is divisible and only to the extent that the counterparty has performed the contract prior to the commencement date and has not received a consideration ("counterperformance") from the debtor.

The Restructuring Law makes it clear that any arrangement will relate both to pecuniary and non-pecuniary claims (with exceptions, such as certain social insurance contributions, claims under employment contracts or claims for the handover of property). If a creditor objects to the restructuring of its non-pecuniary claim (or if the nature of a non-pecuniary claim is such

[12] Accordingly, the filing for or commencement of restructuring proceedings should constitute a legitimate "draw-stop" event, but not an acceleration event in relation to a bank credit agreement. Additional complications with regard to modification or termination of bank credit agreements, comprising a mandatory grace period and an attempt to restructure the terms and dates of repayment, apply under Art. 75c of the Banking Law, as amended by the Act of 25 September 2015 (Dz.U. 2015. 1854).

that it is not capable of being restructured), the relevant claim will be converted to a pecuniary one (with effect from the commencement date).

Preservation of security in Restructuring Proceedings

As a rule, once restructuring proceedings (other than arrangement approval proceedings) have commenced, it is not possible to create a new security interest to secure a pre-commencement debt (unless the council of creditors agrees otherwise). However, if a motion to register a mortgage or a registered pledge is filed more than six months before the filing of a motion to open restructuring proceedings, the mortgage or pledge will be registered.

The reform does not modify the general rule that the arrangement is not detrimental to the rights under pre-commencement *in rem* security interests (e.g. mortgage, pledge, registered pledge, security assignment) and the claims secured by any of these security interests are not affected by the arrangement. However, the arrangement will cover secured claims to the extent that these claims are not covered by the value of collateral, or the relevant secured creditor agrees to be covered by the arrangement (although there is an important exception to this rule in relation to partial arrangements, as mentioned above). Secured creditors consenting to the arrangement may be allocated to a separate class of creditors for the purposes of voting and be afforded special treatment in the arrangement (i.e. different from unsecured creditors).

Amendments to the Bankruptcy Law

Bankruptcy tests

Bankruptcy can be declared only in relation to a debtor who has become "insolvent". There are two substantive statutory tests of insolvency, i.e. the liquidity test and the balance sheet test. These tests have been significantly modified with effect from 1 January 2016.

As regards the liquidity test, the debtor is deemed insolvent if it loses the ability to settle its due and payable liabilities (which will be presumed to be the case if the delay in payment exceeds three months).

The balance sheet test applies to corporate debtors and partnerships[13], which will also be deemed insolvent if their pecuniary obligations exceed the value of their assets[14]. However, an important proviso has been added to the balance sheet test: this state of affairs must continue for longer than 24 months, and future liabilities (including liabilities subject to a suspensory condition) and shareholder loans are to be ignored for this purpose.

The court is in a position to dismiss a bankruptcy petition even if the balance sheet test is met, provided that there is no threat to the debtor's ability to settle its due and payable liabilities in the "short term".

Purpose of the proceedings and composition in bankruptcy

With the entry into force of the Restructuring Law and the introduction of new restructuring procedures, the provisions of the Bankruptcy Law regulating the recovery proceedings (*postępowanie naprawcze*) have been repealed, along with those contemplating two alternative purposes of bankruptcy proceedings (liquidation or composition). Accordingly, any bankruptcy proceedings are initiated in order to satisfy claims by liquidating the debtor's assets, while restructuring proceedings are aimed at leading to an arrangement. However, there has been no amendment to the general rule that the aim of bankruptcy is not only to satisfy creditors, but also to preserve the distressed business if "rational reasons" so permit. Accordingly, it is still possible to reach an composition in the course of bankruptcy proceedings, although the submission of composition proposals will not automatically result in a stay of liquidation. The provisions of the Restructuring Law apply accordingly to a

[13] Other than partnerships involving at least one private individual who is liable with his/her entire property for the obligations of the partnership.
[14] The Bankruptcy Law does not specify whether this relates to the market value or book value, and this will remain open to interpretation. Arguably (and in line with the intention of legislators), it should be the market value, because the test should measure whether enough money can actually be raised through liquidation in order to satisfy creditors.

composition concluded in bankruptcy proceedings and its effects (to the extent not regulated otherwise in the amended Bankruptcy Law).

"Pre-packs"

The term "pre-packed sale" typically denotes an arrangement under which the sale of key assets or even the whole business of a distressed company is negotiated and pre-agreed with a purchaser prior to the commencement of bankruptcy or enforcement proceedings, and such a pre-agreed sale is completed shortly thereafter. Until 31 December 2015, the legislative framework in Poland did not support pre-packed sales and they were practically impossible to accomplish in insolvency proceedings, although a similar result could have been achieved in relation to assets encumbered with a registered pledge with a foreclosure option or (in exceptional cases) based on "forum shopping" for a "pre-pack friendly" jurisdiction where a foreign court assumes jurisdiction in the case.

The Bankruptcy Law now regulates pre-packs (*przygotowana likwidacja*). It is possible to file with the court, together with a bankruptcy petition, a motion for approval of the terms of sale of the whole distressed business or a substantial part thereof. It must specify the terms of the sale (stating at least the price and the purchaser, although it is also possible to submit a draft sale agreement to be concluded by the trustee), and be accompanied by a valuation report prepared by a certified court expert. It will be possible to request that the debtor's enterprise be handed over to the buyer on the day bankruptcy is declared, in which case the full price will have to be paid in advance to the court's deposit account.

The court will approve the motion if the offered price is higher than the estimated liquidation proceeds that could be raised in "standard" bankruptcy proceedings, less the estimated costs of the proceedings. If the offered price is lower than (but still close to) the estimated net liquidation proceeds, the court will still be in a position to approve the sale if this is supported by an "important social interest" or if this allows the distressed enterprise to be preserved.

It is expressly permitted to sell the enterprise to a person related to the debtor (i.e. its affiliate or a dominant entity). However, in this case the offered price will have to be higher than or equal to the value determined in a separate valuation requested by the court.

Each creditor will be entitled to appeal against the court's decision approving a pre-packed sale within a week of its publication (whereas only the petitioner may appeal against a negative decision).

Priority of unsecured creditors

Since 1 January 2016, the priority of designating liquidation proceeds and satisfaction of creditors has changed and is simpler. As a rule, the costs of proceedings and (to the extent that the funds of the estate are sufficient) post-petition claims will be satisfied on an on-going basis, before the first category. Pre-commencement labour claims will be attributed to the new 1st category, while tax and private creditors will belong to the new 2nd category. Interest will be satisfied in the 3rd category, and there will be a separate category (4th) for shareholder loans.

As a result, tax claims will no longer enjoy statutory priority and will be satisfied pro rata with private creditors (in the same category). It is expected that this will motivate the tax authorities to adopt a more proactive and flexible approach to proposed restructurings because so far, they have been reluctant to vote in favour of an arrangement if its terms do not afford them a better position than in the case of liquidation.

Enforcement of security

Although the Bankruptcy Law does not give a secured creditor control over enforcement against encumbered assets, it does adopt a clear and sensible approach to enforcement.

There have been no significant changes to the principle of a separate distribution of proceeds realised on the sale of encumbered assets. Such sale proceeds, after deduction of the costs of the sale, are distributed to the secured creditors according to their relevant priorities, subject to certain exceptions[15].

The sale proceeds are used to satisfy the principal of the secured claims, then interest (to the extent that interest is covered by the security interest) as well as the costs of the proceedings (up to 10% of the principal). Any excess sale proceeds that remain undistributed following the full satisfaction of claims of secured creditors are added to the general funds of the bankrupt estate. Those secured claims that remain unsatisfied after the sale of encumbered assets and subsequent distribution of proceeds are satisfied from the general funds of the bankrupt estate *pari passu* with unsecured claims (to the extent that there are funds available for distribution)[16].

There has been no change to the principle that a pledgee may assume ownership of the pledged asset (foreclose), provided this option was envisaged in the pledge agreement. However, the court may set a deadline for the creditor to exercise the foreclosure option, following which it expires. An express proviso was added that no pre-pack sale will be permitted in relation to assets encumbered with a registered pledge with a foreclosure option, unless the pledgee agrees otherwise in writing.

Impact on contracts

In the previous regime, any contractual provisions stipulating a modification or termination of a legal relationship with the debtor in the event of a bankruptcy declaration were void by operation of law. The recent reform upholds and further expands this rule to cover also the filing of a bankruptcy petition. This does not mean that it is impossible to terminate or modify a contract with the debtor after a bankruptcy petition is filed or after it is declared bankrupt, but it is impossible to do so by reference to the filing or to the declaration of bankruptcy. Notably, under the Banking Law, banks are able to terminate loan agreements if the borrower fails to comply with the loan agreement or if it loses its "creditworthiness" subject to a shorter (seven days') notice period if the borrower is threatened with bankruptcy.

The Bankruptcy Law sets out specific rules applicable to termination of certain contracts and it grants the trustee the right to "cherry-pick" executory contracts (i.e. those that have not been performed in full or part before the commencement of the bankruptcy proceedings), but otherwise, if the trustee fails to perform a contract, the other party should be able to terminate it based on generally applicable provisions of law and subject to the terms of the contract.

The declaration of bankruptcy does not affect the right to terminate master agreements relating to futures or derivative transactions or the sale of securities with an obligation to re-purchase (such as ISDA, GMRA or GMSLA). They can be terminated, subject to contractual provisions relating to the settlement of mutual claims upon termination, and close-out netting is permissible.

The Bankruptcy Law still provides that the terms of agreements with the debtor that make it impossible or difficult to achieve the purposes of bankruptcy proceedings will be ineffective vis-à-vis the bankrupt estate. This provision is still open for interpretation and may give rise to doubts in practice.

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[15] In particular, in the case of mortgages over real property, certain claims have priority over the mortgagee's claim, such as alimony claims; claims of the bankrupt's employees who worked on the encumbered real property in the three months preceding the sale (capped at three times the minimum salary); and pensions due as compensation for causing a disease, injury or death.

[16] This does not extend to interest accrued after the date bankruptcy is declared. This interest can only be satisfied from the encumbered assets (collateral).

Authors

Grzegorz Namiotkiewicz
Partner

T: +48 22 627 11 77
E: grzegorz.namiotkiewicz@cliffordchance.com

Andrzej Stosio
Partner

T: +48 22 627 11 77
E: andrzej.stosio@cliffordchance.com

Jan Zdzienicki
Of Counsel

T: +48 22 627 11 77
E: jan.zdzienicki@cliffordchance.com

Miłosz Gołąb
Counsel

T: +48 22 627 11 77
E: milosz.golab@cliffordchance.com

Norway House, ul. Lwowska 19, 00-660 Warsaw, Poland

www.cliffordchance.com