

Poland: Dynamics, participants, statistics and the future

Dr Patryk Filipiak examines Polish out-of-court arrangement approval proceedings



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The Polish Restructuring Law of 2015 allows for the conclusion of an arrangement with creditors in out-of-court proceedings (“arrangement-approval proceedings”).

It is one of four proceedings under the Law. Creditors’ votes are collected by the debtor under the supervision of an arrangement supervisor. Having obtained the majority of two thirds of the value of claims, the arrangement is approved by the court¹.

Dynamics and timing

Proceedings are divided chronologically into *out-of-court* and *court* phase. It begins with the agreement between a debtor and a restructuring advisor on the supervision of the proceedings. Such advisor will act as the arrangement supervisor. The amount of claims covered by the arrangement (principal amount plus interest) and the voting power of creditors are determined on the arrangement day set by the parties. The subsequent claims do not fall under the arrangement.

The supervisor prepares a restructuring plan which sets forth, *inter alia*, restructuring measures and financial projections. Then, the debtor sends voting cards to his creditors along with the arrangement proposals. Creditors vote in writing, thus, the general meeting of creditors is not convened. Creditors can address the supervisor to obtain information necessary to make an economically rational decision.

As the creditors are unable to object to the amount of their



claims, the proceedings may not be continued if the value of disputed claims exceeds 15% of the total value of claims. The arrangement is concluded when: half of the number of votes and two thirds of the value of all claims covered by the arrangement are reached.

The debtor then files a petition to the court for approval of the arrangement. The court shall issue a decision within two weeks and thereafter the debtor enjoys protection against enforcement. All creditors can appeal to the regional court. When the decision becomes final and binding, the proceedings end and the arrangement is executed. If the debtor fails to execute the arrangement, it will be revoked by the court and the claims will return to their original amount.

The out-of-court stage may last for a maximum of three months from the arrangement day. The court usually approves the arrangement within two-four weeks and then a possible appeal procedure will last another two-three months. The whole procedure lasts about five-six

months if the court’s approval is appealed and three-four months if it is not appealed.

For whom are the arrangement approval proceedings?

These proceedings are intended for debtors in an early phase of the financial crisis (imminent insolvency). Then, debtors generally pay their creditors on time. The situation of a small number of creditors with whom the debtor has a direct relationship still based on trust and partnership is optimal in such a case. These proceedings will function perfectly in order to conclude a selective arrangement (art. 180) with a selected group of creditors. These could be, for example, financial institutions or a small group of suppliers.

Main actors in the proceedings

Debtor: The procedure is available for entrepreneurs, including individuals and companies that are insolvent or



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threatened with insolvency. In accordance with article 11 of the Bankruptcy Law², the insolvent shall be considered a person who is no longer able to pay their liabilities when they fall due (cash-flow test) or an organisation whose all liabilities exceed the value of assets and such a situation has continued for more than two years (over-indebtedness test).

Creditors: The arrangement covers claims arising prior to the arrangement day. The creditors *in rem* do not participate in the proceedings without their consent, unless a partial arrangement with the use of the cram-down mechanism is implemented. Creditors have one vote with a weight corresponding to the principal amount and interest of their claims.

Arrangement supervisor: It is an individual or a company that has a licence of a restructuring advisor. The arrangement supervisor ensures that the proceedings are conducted legally, provides all information to the creditors and accepts their reservations. He or she assists with the preparation of arrangement proposals and in carrying out the vote-collection. The supervisor assesses whether the arrangement can be executed and submits a comprehensive report to the court.

The remuneration of the supervisor results from a contract with a debtor and is not limited by law. The supervisor is an entity strictly controlled by the Minister of Justice and the local restructuring court.

Restructuring court: The function of the court is limited to a decision on the arrangement approval that will be issued if the arrangement is lawful and does not grossly harm creditors who vote against.

Statistics

Within the period from 1 January 2016, i.e. from the date of entry into force of the Restructuring Law, a total of 1,262 restructuring

proceedings were opened, out of which 335 ended with the concluded and approved arrangement, 380 were discontinued without the conclusion of the arrangement and 547 proceedings are still pending.³ Out of this number, there were only 27 petitions submitted for approval of the out-of-court arrangement. In three cases, the court dismissed the petition, and for the remaining 24 – the court's decision was positive.

We do not have any information about the number of executed arrangements. We can only assume that this number will be higher than in other proceedings. It derives from a better economic situation of a debtor using this instrument.

Comparing a number of arrangements concluded in these proceedings with a number of arrangements concluded in *twin accelerated arrangement proceedings*, we can see a great potential for an increase in the number of out-of-court proceedings.

Pros and cons of the proceedings and the need for change

The *arrangement approval proceedings* is quick, efficient and practically independent of court decisions which require time and sometimes may not take into account the economic conditions. The debtor may independently choose the supervisor with whom the relationship requires trust. The legal framework also ensures the confidentiality of the procedure, although in practice, information about financial problems gets to the market. Moreover, in the course of these proceedings a selective arrangement may be concluded with certain creditors.

Despite these advantages, presented statistics show that arrangement approval proceedings are used very rarely. As far as I am concerned, the main reason is a lack of enforcement prohibition at the pre-litigation stage, as well as a lack of ban on terminating

contracts of key importance for a debtor.

In practice, the only successful out-of-court proceedings are those in which the group of creditors is very small or in which a partial arrangement is concluded. In such cases, the protection of a debtor results from stand-still agreements. Fortunately, Poland's internal plans to amend the Law are in line with the obligation imposed by the EU Directive on preventive restructuring framework⁴.

Measures provided for in articles 6 and 7, such as automatic stay of individual enforcement actions and a prohibition on terminating executory business agreements, will make these proceedings more attractive, provided that the Polish legislator does not make such measures dependent on the discretionary decision of the court. The stay should be applied automatically at the request of a debtor. Work on the implementation of the Directive will begin later this year within the working groups of the Ministry of Justice. ■



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Footnotes:

- 1 The arrangement approval proceedings shall be conducted pursuant to articles 210 - 226 of the Act of 15 May 2015 - Restructuring Law Journal of Laws of 2019, item 243, available at: <http://prawo.sejm.gov.pl/isap.nsf/DocDetails.xsp?id=WDU20190000243>. The Act entered into force on 1 January 2016.
- 2 Journal of Laws of 2019, item 498, available at: <http://prawo.sejm.gov.pl/isap.nsf/DocDetails.xsp?id=WDU20030600535>. The Act entered into force on 1 October 2003.
- 3 See: Zimmerman Filipiak Restrukturyzacja - Report on the Restructuring Proceedings for the Q2 2019: <http://zimmermanfilipiak.pl/aktualnosci/prezentacje/raport-restrukturyzacje-w-polsce.-q2-2019.html> (available in pdf version).
- 4 Directive (EU) 2019/1023 of the European Parliament and of the Council of 20 June 2019 on preventive restructuring frameworks, on discharge of debt and disqualifications, and on measures to increase the efficiency of procedures concerning restructuring, insolvency and discharge of debt, and amending Directive (EU) 2017/1132 (Directive on restructuring and insolvency), Official Journal of the EU of 26 June 2019, L 172/18.