

Has Poland forgotten to list its special COVID-19-related Restructuring Proceedings in Annex A of the EIR?

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„Good law is: necessary, clear, coherent,
effective and accessible”

Starting point

- March 2020 – COVID-19 pandemic in Poland breaks out
- June 2020 – new special COVID-19-related restructuring proceedings enters into force
- 30.11.2021 – special COVID-19-related restructuring proceedings ceases to be in force after more than 2,000 entrepreneurs have taken benefit of it

Why so popular?

- extremely limited involvement of the insolvency/restructuring courts
- the initiation of the proceedings required only the conclusion of an agreement with a restructuring adviser and a notice in a publication body
- from the date of the notice, the debtor was protected against i.a. enforcement and the termination of contracts by creditors
- the notice could exempt the „managers” from liability for not filing the bankruptcy petition in time

Case study – introduction 1/2

- a Polish company initiates COVID-19-related restructuring proceedings in Poland
- it has creditors not only in Poland but also in other EU-member states, including state A
- before the restructuring proceedings has been initiated a creditor from state A had initiated a court proceedings against the debtor in state A and obtained an enforcement title
- creditor from state A initiated enforcement proceedings in:
 - 1) Poland and
 - 2) state A

Case study – introduction 2/2

- following the opening of the restructuring proceedings the enforcement proceedings in Poland were stayed and, following the conclusion and approval of the arrangement, discontinued
- the debtor filed also for the discontinuance of the enforcement proceedings in the state A
- the creditor responded that the COVID-19-related special proceedings has not been listed Annex A of the EIR and it cannot be recognised in the state A, therefore the enforcement should be continued

Annex A of the EIR

- Article 2(4) – „insolvency proceedings” means the proceedings listed in Annex A

What are we looking for?

- „uproszczone postępowanie restrukturyzacyjne” or
- „uproszczone postępowanie o zatwierdzenie układu”

(simplified restructuring proceedings / simplified proceedings for the approval of an arrangement)

What do we see?

POLSKA

- Upadłość,
- Postępowanie o zatwierdzenie układu,
- Postępowanie o zatwierdzenie układu na zgromadzeniu wierzycieli przez osobę fizyczną nieprowadzącą działalności gospodarczej,
- Przyspieszone postępowanie układowe,
- Postępowanie układowe,
- Postępowanie sanacyjne,

Case study – debtor’s argument No. 1 – 1/2

- special COVID-19-related proceedings was only a special sub-type of the already existing proceedings, listed in Annex A of the EIR
 - argument based in particular on the name of the proceedings
- Polish restructuring court, in its decision to approve the arrangement, indicated Article 3(1) of the EIR as the basis for its jurisdiction

Case study – debtor’s argument No. 1 – 2/2

POLSKA

- Upadłość,
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- Postępowanie o zatwierdzenie układu na zgromadzeniu wierzycieli przez osobę fizyczną nieprowadzącą działalności gospodarczej,
- Przyspieszone postępowanie układowe,
- Postępowanie układowe,
- Postępowanie sanacyjne,

We are looking for „uproszczone postępowanie o zatwierdzenie układu”.

Case study – creditor’s answer 1/2

- two equally binding names of the COVID-19-related proceedings
- no explicit provision that the COVID-19-related proceedings is a subform of an already existing one
- the COVID-19-related proceedings introduced in a special act of law concerning rules of conduct for the time of the pandemic and not by amending the existing restructuring law – systematic interpretation not possible

Case study – creditor’s answer 2/2

- „in matters not regulated, the provisions on proceedings for the approval of an arrangement shall apply” – such a norm not needed if the proceedings was a subtype
- COVID-19-related proceedings as a hybrid proceedings
- starting from 1.12.2021 a subtype of the proceedings for the approval of an arrangement actually introduced to the act on restructuring law
- at least one of the requirements of Article 1 of the EIR [paragraph 1(c)] not met
- other proceedings on „the approval of an arrangement” listed in Annex A in December 2021

Case study – court decision (first instance)

- the special COVID-19-related restructuring proceedings has not been listed in Annex A
- it is not permitted to apply the EIR by analogy
- the enforcement proceedings in state A can be continued

Case study – debtor’s argument No. 2

- if the proceedings is not covered by the EIR, the decision of the restructuring court on the approval of the arrangement is covered by the Brussels I bis regulation
 - note that the Polish restructuring court issued a certificate provided for in Article 53 and Annex I of the Brussels I bis regulation for its decision on the approval of the arrangement

Case study – creditor’s answer 1/2

- Article 1(2) of the Brussels I bis regulation – the regulation shall not apply to „bankruptcy, proceedings relating to the winding-up of insolvent companies or other legal persons, judicial arrangements, compositions and analogous proceedings”
- Article 32(2) of the EIR- „The recognition and enforcement of judgments other than those referred to in paragraph 1 of this Article shall be governed by Regulation (EU) No 1215/2012 provided that that Regulation is applicable.”

Case study – creditor’s answer 2/2

- recital 7 of the EIR: „However, the mere fact that a national procedure is not listed in Annex A to this Regulation should not imply that it is covered by Regulation (EU) No 1215/2012.”
- CJEU: „it is conceivable that, among those judgments, there are some judgments which will come within the scope of application neither of Regulation No 1346/2000 nor of Regulation No 44/2001” (German Graphics Graphische Maschinen, C-292/08, EU:C:2009:544, No. 14-20)

Case study – court decision (second instance)

- the special COVID-19-related restructuring proceedings has not been listed in Annex A and so it is not covered by the EIR
- however the decision of the Polish restructuring court on the approval of the arrangement is covered by the Brussels I bis regulation's provisions on recognition and enforcement of court decisions

Conclusions

- not clear, not coherent, not well-thought-out legislation in the area of insolvency and restructuring law may cost citizens / enterprises a lot of money and it may undermine even the best restructuring plan
- courts in two EU-member states decided that a decision on the approval of an arrangement in a Polish restructuring proceedings not listed in Annex A of the EIR may be recognised and enforced under the Brussels I bis regulation

Thank you for your attention!

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