

Polish insolvency law Restructuring proceedings

Dr Marek Porzycki



Purposes of restructuring proceedings

- ▶ „second chance” policy
- ▶ protection of jobs
- ▶ interest of creditors
- ▶ need to balance different interests and reasons – restructuring should not result in maintaining outdated business models and ineffective enterprises
- ▶ purposes set in Art. 3 RL: avoiding the debtor’s bankruptcy by enabling him to restructure by an arrangement with creditors, including – in case of reorganization proceedings – by applying reorganization measures; with justified rights of the creditors being duly respected.

Structure of restructuring proceedings

▶ Restructuring proceedings

- covered by the Restructuring Law of 15.5.2015
- applicable to debtors which are already insolvent or only threatened with insolvency
- in principle aim at the conclusion of an arrangement (*układ*), allowing for the continuation of the debtor's enterprise, but an arrangement for winding-up is also possible
- appointment of a supervisor (*nadzorca*) or an administrator (*zarządca*)
- purpose: avoiding bankruptcy by enabling restructuring of the debtor, while securing justified interest of the creditors
- ▶ **4 proceedings:**
 - arrangement approval proceedings (*postępowanie o zatwierdzenie układu*)
 - fast arrangement proceedings (*przyspieszone postępowanie układowe*)
 - arrangement proceedings (*postępowanie układowe*)
 - reorganization proceedings (*postępowanie sanacyjne*)

Restructuring proceedings

- ▶ **arrangement approval proceedings**
 - only on request of the debtor
 - the debtor cooperates with the arrangement supervisor while preparing the restructuring plan and arrangement proposals → no limitations to the right of the debtor to manage and dispose of his estate
 - the debtor individually collects votes of creditors over the arrangement
 - the debtor submits arrangement proposals together with collected votes for approval by the court
 - the court decision constitutes, at the same time, the opening of proceedings and their closure → it allows for keeping the earlier phase confidential and avoiding the stigma of insolvency

Restructuring proceedings

- ▶ new modified option within arrangement approval proceedings applicable from 1 Dec 2021:
 - a facultative announcement by the arrangement supervisor (no court decision needed) results in automatic stay (protection of the debtor from compulsory enforcement for the duration of proceedings)
 - duration of the automatic stay is limited to 4 months → if no request to confirm the arrangement is submitted, the automatic stay ceases to apply

In result, the debtor has a choice between:

- confidentiality in the crucial phase of proceedings but no automatic stay; or
- automatic stay but no confidentiality.

Restructuring proceedings

- ▶ **fast arrangement proceedings**
 - only on request of the debtor
 - applicable in cases where the amount of contentious claims does not exceed 15% of the total amount of claims against the debtor → the establishment of the claims list can be accelerated
 - after the opening of proceedings the debtor continues to administer his enterprise („debtor-in-possession”) under supervision of a court supervisor
 - preparation of the list of claims and of the restructuring plan
 - vote of creditors on the arrangement proposals
 - confirmation of the arrangement by the court

Restructuring proceedings

- ▶ **arrangement proceedings**
 - only on request of the debtor
 - similar to fast arrangement proceedings but applicable in cases where the amount of contentious claims exceeds 15% of the total amount of claims against the debtor → more detailed procedure for establishing the list of claims is needed

Restructuring proceedings

▶ reorganization proceedings

- on request of the debtor (in case of threat of insolvency or actual insolvency) or of a creditor (only in case of actual insolvency of the debtor)
- the debtor loses the right to manage and dispose of his estate, an administrator (*zarządca*) is appointed
- the administrator carries out a professional restructuring of the debtor's enterprise, using instruments typical for bankruptcy proceedings, e.g. possibility to repudiate pending contracts, ineffectiveness of acts detrimental to the creditors
- the course of proceedings similar to arrangement proceedings (vote on the arrangement and its confirmation by the court)

Arrangement

- ▶ Arrangement proposals (Art. 155 RL) can be submitted by:
 - the debtor;
 - the creditors committee, the court supervisor or administrator, a creditor or creditors holding jointly at least 30% of the total amount of the claims.
- ▶ Contents of the proposals (Art. 156 RL) – restructuring the obligations of the debtor. An open catalogue is provided in the law:
 - extension of the payment deadline,
 - rescheduling the payments, installments,
 - reduction of debts („haircut”),
 - conversion of claims into shares in the debtor company,
 - winding-up of the debtor’s assets, including a takeover by creditors (a ‚liquidation arrangement’)
 - taking of the debtor’s enterprise under administration and payment of debts from its future income.

Claims subject to the arrangement

- ▶ Rule: claims against the debtor originated before the date of the opening of the restructuring proceedings (Art. 150(1) RL)
 - claims for which the debtor is only liable as a collateral giver are excluded;
 - current claims originated after the opening of proceedings are excluded. The debtor needs to be able to satisfy current claims in full → otherwise the restructuring proceedings are not opened or are terminated (Art. 8(2), Art. 326(2) RL)
- ▶ Creditors excluded from the arrangement:
 - total exclusion: alimony claims, a part of social security contributions (Art. 151(1) RL);
 - choice left to the creditor: employees' claims (Art. 151(2) RL) → included in the arrangement only if the creditor agrees
 - claims secured by rights in rem → see next slide.

Bottom line: exclusion from the arrangement means that the claim is not affected by the arrangement and can be enforced, as a rule, without limitations.

Claims secured by rights in rem

- ▶ Rights in rem (collateral arrangements): mortgage, pledge, registered pledge, Treasury pledge, maritime mortgage
- ▶ Same treatment: title transfer (Art. 151(3) RL)

RULE: claims secured by rights in rem are **not subject to the arrangement, unless the creditor agrees to be included** (Art. 151(2) RL)

EXCEPTION: when the arrangement proposals provide for full satisfaction of the secured creditor or satisfaction at least in the amount expected in case of enforcement from the collateral → consent of the creditor not needed to include him/her in the arrangement (Art. 151(2a) RL)

Result: protection of the value of the claim up to the actual value of the collateral, BUT extensions of payment deadlines can be imposed against the creditor's will

Vote on the arrangement – groups

- ▶ The arrangement proposal specifies whether the vote on the arrangement should be held by a single creditor meeting or in creditor groups corresponding to categories of interests.
- ▶ Groups to be specified in the arrangement proposal, with examples given in Art. 161 RL:
 - employees (if agreed to be included in the arrangement);
 - farmers in regard to claims resulting from sale of their farm produce;
 - creditors secured by collateral arrangements/rights in rem (if included in the arrangement);
 - creditors being shareholders in the debtor company;
 - other creditors.
- ▶ Restructuring conditions under the arrangement have to be equal for all creditors (if the vote is not held in groups) or equal for all creditors within a group (in case of group vote) (Art. 162 RL) → vote by groups allows to differentiate between creditors in separate groups.

Vote on the arrangement – majorities

- ▶ Majorities needed to adopt the arrangement (Art. 119 RL):
 - 50% of the number of creditors taking part in the vote;
 - 2/3 of the total amount of claims of creditors taking part in the vote;
 - if the vote is held in groups – corresponding majorities in each group (in some cases the negative vote in some groups can be overridden, see below)
 - no minimum participation threshold – passive creditors cannot obstruct the arrangement
 - exception: arrangement approval proceedings where the majorities are calculated not in relation to creditors actually taking part in the vote but to creditors entitled to vote

Vote on the arrangement

- ▶ Cram down → negative result of the vote in one or more groups can be overridden (=the arrangement is considered adopted) if:
 - creditors in other groups voting for the arrangement have at least 2/3 of the total amount of the claims;
 - creditors from the groups voting against would be satisfied under the arrangement at least to the extent of the expected satisfaction in the hypothetical bankruptcy proceedings → the arrangement puts them in a situation no worse than otherwise expected
- ▶ Basis: Art. 119(3) and Art. 217(3) RL

Adoption and confirmation of the arrangement

- ▶ if the arrangement is not adopted by creditors → termination of the restructuring proceedings (Art. 325(1)(3) RL)
- ▶ if the arrangement is adopted → the court has to issue a decision confirming the arrangement (Art. 164 RL)
- ▶ Refusal to confirm the arrangement (Art. 165 RL):
 - illegality;
 - it is obvious that the arrangement will not be carried out;
 - the arrangement is grossly detrimental for those creditors who voted against and raised objections.
- ▶ When the decision on confirmation or refusal to confirm the arrangement becomes final, the restructuring proceedings are concluded (Art. 324 RL)

Effects of the arrangement

- ▶ The arrangement is binding on all creditors included in the arrangement, even if not listed in the list of claims (Art. 166 RL)

exception: claims not revealed by the debtor, if the creditor did not take part in the proceedings

- ▶ In case of collateralized claims included in the arrangement, the arrangement changes also the scope of the right in rem/security interest (Art. 168(2) RL)
- ▶ Conversion of claims into shares in the debtor company waives the procedure required under company law (Art. 169(3) RL):
 - no need for a resolution of shareholders,
 - no application of priority rights resulting from company law.
- ▶ The supervisor or administrator becomes the supervisor of the realisation of the arrangement (*nadzorca wykonania układu*) (Art. 171 RL)

Effects of the arrangement

- ▶ No effect for security interest on assets belonging to third parties or guarantees given by third parties (Art. 167 RL) → the creditor can enforce his/her claims from the collateral/against third parties according to original terms, without modifications resulting from the arrangement
- ▶ The creditors obtain enforcement deeds for their claims included in the arrangement (Art. 102(2) RL).
- ▶ After the realisation of the arrangement the court issues, on request, a decision confirming the realisation (Art. 172 RL)
 - the decision on realisation of the arrangement is the basis for deleting entries on the arrangement in registries
 - if the debtor was limited in his administration rights by the arrangement, this decision causes him to regain full administration rights

Change or annulment of the arrangement

- ▶ Subsequent **change to the arrangement**: in case of an extraordinary change of circumstances with significant influence on a durable increase or decrease of the income from the debtor's enterprise (Art. 173–175 RL)
 - on request of a creditor, the supervisor of the realisation of the arrangement or the debtor,
 - procedure: a repeated vote on the adoption of an amended arrangement
- ▶ **Annulment of the arrangement**: if the debtor does not realise the arrangement or if it becomes obvious that the arrangement will not be carried out (Art. 176–179 RL)
 - on request of a creditor, the supervisor of the realisation of the arrangement or the debtor, or another person entitled to carry out or supervise the arrangement;
 - after annulment of the arrangement the creditors can pursue their claims in the original amount. Any amounts paid out under the arrangement are acknowledged and subtracted.

Partial arrangement (*układ częściowy*)

- ▶ Art. 180–188 RL
- ▶ A new scheme introduced by the 2015 reform
- ▶ Possible in arrangement approval proceedings or in fast arrangement proceedings
- ▶ The debtor selects only a group of creditors for concluding an arrangement
- ▶ The selection has to be made according to objective, clear and economically sound criteria and the selected group has to be significant for the debtor's business. Examples:
 - financial creditors (banks)
 - creditors with security interest
 - long-term business partners
- ▶ Creditors excluded from the group are not affected by the arrangement. The arrangement cannot reduce their chances of being satisfied (e.g. by depriving the debtor of assets). In case of infringement of their rights the court shall refuse to confirm the arrangement.
- ▶ Important: secured creditors might be included against their will (Art. 181 RL)!
- ▶ Might run in parallel with other restructuring proceedings (Art. 191–192 RL)