Mapping Preventive Restructuring Frameworks and the EU Directive for the JCOERE Project

Country Report

Poland

Michał Barłowski[1]
Sylwester Zydowicz [2]

The Polish Perspective on Restructuring

Poland has a developed a restructuring framework that includes a range of four differentiated preventive restructuring procedures, which apply to both solvent and insolvent companies. Once a company has entered into insolvency proceedings, described as bankruptcy proceedings in Poland, the option still exists to restructure through a pre-packaged sale of a business (or its organised part or substantial assets) or by way of reaching an arrangement. The last option is rarely followed in practice. As with other European countries, the four restructuring procedures may also be perceived as early warning tools, to notify the public that a given debtor may face bankruptcy if its restructuring fails. The reorganisation proceedings included in Annex A to the EIR Recast ("bankruptcy liquidation proceedings" and "bankruptcy proceedings with the possibility of an arrangement") may, however, be misleading because since 1 January 2016 these proceedings can no longer be opened. They have been retained in Annex A for a transitional period only. Despite the advanced nature of restructuring frameworks in Poland, this report indicates that further reform is likely in implementing the PRD.

PART 1: The General Context of Preventive Restructuring

Function and Aims of Insolvency and Rescue

The purpose of restructuring in Poland is to restore a debtor's capacity to trade so that it can avoid insolvent liquidation by enabling it to agree a plan with its creditors to rehabilitate the company or its businesses. With respect to rehabilitative proceedings, there is a further purpose: to restructure or rehabilitate the debtor while safeguarding the legitimate interests of creditors.[3] Each of the four types of Polish restructuring procedures are centred around the adoption of a plan that must be voted upon by the debtor's creditors and approved by a competent court.

Existing Legislative Frameworks

The current legislative framework in Poland is set in the Restructuring Law Act of 15 May 2015 (*Prawo restrukturyzacyjne*)[4] (the "RL"). There are four types of restructuring proceedings covered by the RL: (i) arrangement approval proceedings, (ii) accelerated arrangement proceedings, (iii) arrangement proceedings, and (iv) remedial proceedings. The first two proceedings can also be conducted in limited

[1] Senior counsel at Wardynski & Partners.
[2] Partner at Taylor Wessing.
[3] RL, art 3.
[4] Consolidated text, Journal of Laws of 2019, item 243, with subsequent amendments.

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form where a (partial) arrangement plan covers only certain key creditors who have a fundamental influence over the debtor's business while there remain other creditors who are unaffected.

Any company that is in danger of insolvency[5] or is already insolvent[6] can commence restructuring by way of an application to a court, with the exception of arrangement approval proceedings, where a court accepts a plan that has been previously approved through a private and secret voting process.[7] In the three other restructuring proceedings, a court will appoint a supervisor after launching the procedure. The debtor continues to manage the business with oversight by the supervisor, with the exception of remedial proceedings in which the court will by default appoint an administrator to take over the management of the debtor's business.

Restructuring or rescuing a debtor's business can also take place during bankruptcy (insolvent liquidation) as covered by the Bankruptcy Law (*Prawo upadłościowe*)[8] (the "BL") through a prepared liquidation procedure (pre-packaged sale of business as a going concern or of an organised grouping or substantial assets). In such a case the sale is executed by a receiver on terms previously approved by a court after bankruptcy proceedings have been opened. In general, after the opening of restructuring proceedings (this does not apply to arrangement approval proceedings) if the debtor can no longer pay the debts covered by an arrangement, in some restructuring proceedings, enforcement or security proceedings are stayed. Once an arrangement is adopted by the creditors and approved by the court it must be implemented, which is supervised by a court nominated a supervisor.

If a debtor is insolvent, each of its executive directors is required to file for a declaration of bankruptcy, failure of which may result in personal liability. This is not the case in relation to any restructuring proceedings where it is a right and not an obligation of the director(s). If concurrent motions are filed, one for the opening of bankruptcy proceedings and one for restructuring proceedings, a court will give priority to opening restructuring proceedings.

While it is commonly accepted that the entry into force of the Restructuring Law in 2016 and a reformed Bankruptcy Law has had a positive effect on the market as many businesses have used the new procedures to avoid a bankruptcy declaration, it is clear after three years that certain changes are needed. This may well be done together with enactment of the PRD. Pre-pack procedures under the Bankruptcy Law have already been amended[9] and the change entered into force on 24 March 2020. The aim of the reform is to promote restructuring under rules of the Bankruptcy Law.

The original aims and goals of the Restructuring Law of 2016 may be found in the justification of the draft act.[10] Statistics show that not all of its aims were met in practice.[11]

PART II: Specific Substantive Aspects of Preventive Restructuring in Domestic Processes and in the Directive

The Stay of Individual Enforcement Actions

In Poland, in three out of the four restructuring procedures (accelerated arrangement proceedings, arrangement proceedings, and remedial proceedings) the enforcement of claims is stayed with the opening of restructuring proceedings. This does not apply to creditor claims not participating in an arrangement.[12] The most notable exception from the stay, apart from claims stemming from employment contracts, are claims secured by rights *in rem* during accelerated arrangement proceedings and arrangement proceedings to the extent that such claims can be satisfied from the secured collateral. Such

[5] RL, art 11.
[6] RL, art 6.
[7] RL, art 223.
[8] Act of 28 February 2003 of Bankruptcy law (Consolidated text, Journal of Laws of 2019, item 498, with subsequent amendments).
[9] Act of 30 August 2019 amending the Act - Bankruptcy Law and some other acts (Journal of Laws of 2019, item 1802), published on 23 September 2019.
[10] See website: http://www.sejm.gov.pl/Sejm7.nsf/druk.xsp?nr=2824 – document word "2824-uzas.docx".
[11] See website: http://acuria.eu.
[12] RL, art 151.

creditors can enforce their claims against the property constituting the collateral.[13] This rule does not apply to remedial proceedings where all claims are stayed.[14]

The general rule is that a stay lasts for the duration of a restructuring proceeding, specifically until a court order accepting an arrangement becomes final when stayed enforcement proceedings are discontinued.[15] Since in the accelerated arrangement proceeding and arrangement proceedings the automatic stay does not cover the right to enforce claims against secured property, the judge commissioner supervising restructuring proceedings may, upon application of the debtor or court supervisor, release objects or rights constituting collateral from enforcement, but only if the debtor requires the secured asset for the continuation of its business.[16] The total length of such release from enforcement cannot exceed three months. The RL regulates situations where restructuring proceedings may be discontinued before creditors vote on an arrangement. This could be circumstances in which the continuation of proceedings is detrimental to creditors or when it is clear from the case that an arrangement will not be executed or, in the case of arrangement and remedial proceedings, the court discontinues proceedings if the debtor fails to cover debts accrued after opening the proceedings or the costs of proceedings.[17] However, there are no provisions *per se* that directly relate to the lifting of a stay and reflect all of situations covered by article 6(9) of the Directive. The introduction of a maximum duration, including extensions of 12 months, will likely be required as amendments to the current frameworks or as elements of a new procedure as will a provision for the court to lift a stay.

The Adoption of Restructuring Plans

Polish law as a rule grants the right to creditors affected by restructuring proceedings to vote on an arrangement plan.[18] Employment-related debts and secured creditor debts, to the extent that such debts can be satisfied from collateral, will be included in an arrangement only if the creditor explicitly agrees to be so included. Separate regulations apply to proceedings where a partial arrangement plan is to be adopted if a secured creditor can be bound to participate in an arrangement, irrespective of its decision.[19] In practice, the right to vote is given to creditors whose claims have been entered in an approved table of claims or to creditors are present at an assembly of creditors with proof of those claims who can also be permitted to vote at the meeting. Creditors who are close relatives, equity holders (when meeting certain qualifications), and creditors holding claims that have been acquired by way of transfer and/or endorsement after the opening of restructuring proceedings are excluded from voting.[20] Not covered are therefore provisions of non-compulsory article 9(3)(b) of the Directive. At this point it is yet unclear what legislative changes will be proposed to amend the RL and the BL to render them compliant with the PRD.

Despite the fact that this is common practice, the organisation of creditors into classes is currently optional in that legislation provides for a right, but no obligation, to form classes. The formation of classes may be based on the following non–exclusive list:[21]

(i) among creditors entitled to claims under employment and who have agreed to be covered by an arrangement;

(ii) farmers entitled to claims under contracts for delivery of products from their own farm;

(iii) creditors whose claims are secured by a debtor's property with a mortgage, pledge, registered pledge, tax lien and/or maritime mortgage, as well as by the transfer to the creditor of ownership of an asset, claim and/or another right, and who have agreed to be covered by the arrangement;

(iv) creditors who are partners and/or shareholders of a debtor that is a capital company, with shares and/or stock of the company ensuring at least 5% of votes at the shareholders'

[13] RL, art 260(1) & 279.
[14] RL, art 312.
[15] RL, art 170.
[16] See, for example RL art 260(2).
[17] See details in RL arts 324-333.
[18] RL, art to be read in conjunction with art 150.
[19] RL, arts 180 - 188.
[20] RL, arts 107, 116, & 109.
[21] RL, art 161.

meeting or the general meeting of shareholders, even if they are entitled to claims specified in subsections 1-3.

To make the RL compliant with article 9(4) of the Directive, an amendment to the RL would need to make the division of creditors into classes mandatory. In case of partial arrangements, it seems that any amendment of the RL would need to provide for the explicit formation of classes. Under the current RL it is unclear whether this right, even on a non-compulsory basis, can be derived from existing RL provisions.

If an arrangement plan is in breach of the law or is considered to be grossly unfair to those creditors who have voted against it and have made their reservations known, the court may refuse its approval. Indirectly, this acts as a verification of the classification of creditors and the fairness of voting in an arrangement.[22] It is therefore unclear whether an amendment of the RL will be required. If so, the amendment will be to make it explicit that a court has an obligation to analyze creditor voting rights and formation into classes as provided by article 9(5) of the Directive.

An arrangement is adopted by the assembly of creditors if it is approved by a majority of creditors who hold a total of at least two-thirds of the sum of claims owed to voting creditors. If voting on an arrangement takes place in classes of creditors, an arrangement shall be adopted if in each group the majority of voting creditors in such group votes in its favour, with a total of at least two-thirds of the sum of claims owed to voting creditors from that group. This is not so, however, during arrangement approval proceedings where an arrangement is accepted only if the majority of creditors entitled to vote on an arrangement having a total of at least two-thirds of the sum of claims that give the right to vote on an arrangement are in its favour. Furthermore, if the vote takes place in classes of creditors, it shall be adopted if, in each group, the majority of creditors entitled to vote on an arrangement have a total of at least two-thirds of the sum of claims vested in creditors from that group eligible to vote on an arrangement. The view prevails that the RL will need to be amended to comply with article 9 of the Directive, in particular, due to the wording of its sub-section 4 that sets minimum implementation requirements.

The Confirmation of Restructuring Plans

The Polish RL provides for an arrangement plan to be confirmed by a court and thereby to be binding on participating creditors,[23] including dissenting creditors who have voted against the arrangement plan. There are, however, no specific compliance criteria as provided in detail by article 10(1) of the Directive. If it turns out that any of the situations covered by the article 10(1) are part of an arrangement plan and the negative conditions for a court not approving an arrangement are absent, a court will approve an arrangement plan.[24]

In Poland, the RL provides for conditions whereby a court has either a duty or a right to refuse confirmation of an arrangement plan, while the rule is that it will confirm an arrangement plan if it has been accepted by an assembly of creditors.[25] The court will reject an arrangement if it violates the law, in particular, if it provides for state aid contrary to regulations or if it is clear that the arrangement will not be executed.[26] A court may refuse to approve an arrangement if its conditions are grossly unfair to creditors who voted against it and submitted reservations to the arrangement.[27] A court will discontinue restructuring proceedings if it determines that an arrangement has not been adopted due to lack of a required majority.[28] In arrangement approval proceedings and in accelerated arrangement proceedings the court will refuse approval of an arrangement if the sum of disputed claims which entitle creditors to vote on an arrangement exceeds 15% of total claims.[29] There are no specific provisions in law giving a right to a judicial authority (i.e. court) to confirm an arrangement plan that has not been accepted in the first place by an assembly of creditors.[30] In view of the implicit obligation imposed by the PRD

[22] RL, art 165(2).
[23] RL, art 166.
[24] RL, art 164.
[25] RL, art 164.
[26] RL, art 165.
[27] *ibid*.
[28] RL, art 165(5).
[29] RL, art 165(3).
[30] See PRD, recital 54.

article 10(2) where the condition for confirmation must be "*clearly specified and include at least*"… the RL may well require a rewording of its provisions. That would probably also apply in view of article 10(3).

Cross-Class Cram-Down

There are provisions regulating a cross-class cram-down mechanism,[31] which state that an arrangement will be adopted by an assembly of creditors despite failure to obtain the required majority in some groups of creditors. This is if creditors with a total of two-thirds of the sum of claims vested with creditors entitled to vote on an arrangement have voted for the arrangement, and when creditors from the group or groups that are against the arrangement are satisfied on the basis of an arrangement to a degree not less favourable than in the case of bankruptcy proceedings (liquidation). The Polish provision is not as detailed as the cross-class cram-down provided in the PRD. There is, however, no specific provision addressing the need for particular judicial confirmation of a cross-class cram-down other than that in the principle that a court generally approves an arrangement and will not confirm it in defined situations, including a situation when it breaches the law.[32] The court may also refuse to confirm an arrangement if its conditions are grossly detrimental to creditors who voted against the plan. At present, dissenting classes can be overruled following a rule covered by law, and court confirmation is required as is in the case of any arrangement plan.

The Polish test of fairness in relation to cramming down dissenting creditors focuses on ensuring that an arrangement is agreed on terms that are not less favourable than in an insolvent liquidation. There are no sophisticated tests in the Polish Restructuring Law such as the absolute or relative priority rules contained in the PRD. Since the PRD provisions set a certain minimum, it seems that the RL will need to be amended to adopt a test reflective of those contained in article 11 of the PRD. Poland does not currently have specific plans in relation to the adoption of the tests.

Protection of New and Interim Financing

The Polish RL treats preferentially any new financing provided to a debtor aimed to support a restructuring proceeding as long as it complies with certain detailed conditions.[33] The preference arises from the provision that such financing and other acts cannot be subject to a claw back action (treated as ineffective - a concept based on *actio pauliana*) if subsequent bankruptcy proceedings are opened after restructuring proceedings. Financing granted under a facility, loan, security, guarantee, letter of credit, or any other type of financing under an arrangement is ranked in the first category of priority for the satisfaction of claims in the event of subsequent bankruptcy proceedings.[34] The application of such preference is subject to compliance with conditions set by the RL (*inter alia* filing a simplified motion to open bankruptcy proceedings within three months from the date when a ruling on setting aside of the arrangement plan has become final).

PART III: Specific Procedural Aspects of Preventive Restructuring in Domestic Processes and in the Directive

The Threshold of Insolvency

In Poland, insolvency is defined by article 11 of the BL[35] and covers both liquidity and asset to liabilities tests (cash flow and balance sheet). Meeting either of the two tests implies that a debtor is insolvent and that its representatives have a duty to file for a declaration of bankruptcy. On the other hand, restructuring proceedings can also be opened in relation to an already insolvent debtor. A court will not open restructuring proceedings if their effect is detrimental to creditors. Moreover, in the case of arrangement and remedial proceedings, the court will not open proceedings if a debtor's ability to pay current costs of proceedings and obligations arising after opening is not believed to be possible.[36] There is no specific test for the commencement of a preventive restructuring proceedings that is separate from those set out in Polish insolvency law.

[31] RL, art 119(3).
[32] RL, art 165(1).
[33] RL, art 129.
[34] RL, art 342.
[35] BL, art 11.
[36] Art. 8 of the RL.

Debtor in Possession

In Poland, the involvement of an insolvency practitioner on a mandatory basis is already covered by the RL. In each restructuring proceeding, an individual who has passed a state exam and is entered on a list of restructuring advisers can act in any of the four restructuring proceedings and perform different roles in them depending on the type of proceeding. Such persons also act as receivers during bankruptcy proceedings.[37] In approval arrangement proceedings, a restructuring advisor acts as an arrangement supervisor and the debtor enters into an agreement with the restructuring advisor which defines its duties.[38] In accelerated arrangement and arrangement proceedings, the court nominates a court supervisor at the same time as its decision to open proceedings,[39] whereas in remedial proceedings the debtor as a rule loses control over decision-making relating to asset distribution and other key business decisions and the court appoints an administrator who takes over administration of a remedial estate, managing it independently on behalf of the debtor. If the success of remedial proceedings requires involvement of the debtor or his representatives, a court may permit a debtor to administer all or part of an undertaking if it also provides a guarantee of proper performance and does not exceed ordinary administrative tasks.[40] In accelerated arrangement and simple arrangement proceedings, a court supervisor approves acts exceeding ordinary business management activities.[41] In arrangement approval proceedings, the conclusion of an agreement with an arrangement supervisor does not limit the debtor in his freedom to manage the property of the company.[42] In addition, the sale of real estate or other assets worth more than PLN 500,000 always requires authorisation of the creditors' committee or is otherwise invalid[43] It seems that the Polish Restructuring law is already compliant with article 5 of the Directive.

Rights *in Rem* under the EIR Recast and the PRD

A right *in rem* in Poland enjoys protection both during an insolvency (bankruptcy) or restructuring proceedings. During bankruptcy this is mostly visible in the so called "right of separation" where secured creditors are satisfied from the proceeds (with some statutory deductions) of the sale of the right or object upon which the security was established. Whereas during a restructuring proceeding - in principle and subject to detailed provisions - the secured creditor participates in the arrangement plan only if it consents to it. However, that part of the receivable claim which surpasses the value of the security is treated as a non- secured receivable and is therefore covered by an arrangement plan automatically. With the exception of the remedial preceding, a secured creditor will thus be able to continue enforcement proceedings from the object or right constituting security even after the restructuring proceedings have been opened[44].

[37] Companies with the involvement as representatives of restructuring advisers are also allowed to be appointed as insolvency practitioners.
[38] RL, art 210.
[39] RL, art 233(1&2).
[40] RL, ss 3, 51, 52, 53, and 288.
[41] RL, s 39.
[42] RL, s 36.
[43] RL, s 129(2).
[44] RL, art. 276 and 312.