



**SELECTED ISSUES
CONCERNING THE NEW
RESTRUCTURING LAW
-
QUESTIONS AND ANSWERS**

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The aim of this presentation is to summarize selected issues relevant to lenders under:

- the new Polish Restructuring Law of 15 May 2015 ("**Restructuring Law**")
- amendments introduced to the Polish Bankruptcy and Restructuring Law of 28 February 2003 ("**Bankruptcy Law**") by the Restructuring Law
- the new restructuring regulations under the Polish Banking Law of 29 August 1997 ("**Banking Law**")

- The Restructuring Law enters into force on 1 January 2016
- It regulates how insolvent debtors or debtors threatened with insolvency may enter into an arrangement with their creditors
- It regulates the performance of rehabilitation activities
- It introduces new procedures, allowing the restructuring of a debtor's undertaking and preventing its bankruptcy
- It introduces substantial amendments to the Bankruptcy Law, which enter into force on 1 January 2016

TYPES OF RESTRUCTURING PROCEEDINGS

WHAT ARE THE TYPES OF RESTRUCTURING PROCEEDINGS?

- **Arrangement approval proceedings**
- **Accelerated arrangement proceedings**
- **Arrangement proceedings**
- **Rehabilitation proceedings**

RESTRUCTURING PROCEEDINGS – WHAT ARE THEIR MAIN CHARACTERISTICS?

Arrangement Approval Proceedings

- the simplest restructuring proceedings
- the debtor is obliged to enter into a contract with an arrangement supervisor who will prepare the restructuring plan
- the debtor collects the creditors' votes independently

Accelerated Arrangement Proceedings

- in contrast to the arrangement approval proceedings, the debtor does not collect the votes, instead the court calls a creditors' meeting

Arrangement Proceedings

- in contrast to the accelerated arrangement proceedings, the court supervisor prepares the inventory
- evaluation of the debtor's assets is also required

Rehabilitation Proceedings

- the most far-reaching restructuring proceedings
- allows the restructuring of the debtor's claims, entering into an arrangement, and performing rehabilitation activities (i.e. activities aimed at restoring the debtor's ability to perform its obligations)

COMMENCEMENT OF RESTRUCTURING AND BANKRUPTCY PROCEEDINGS

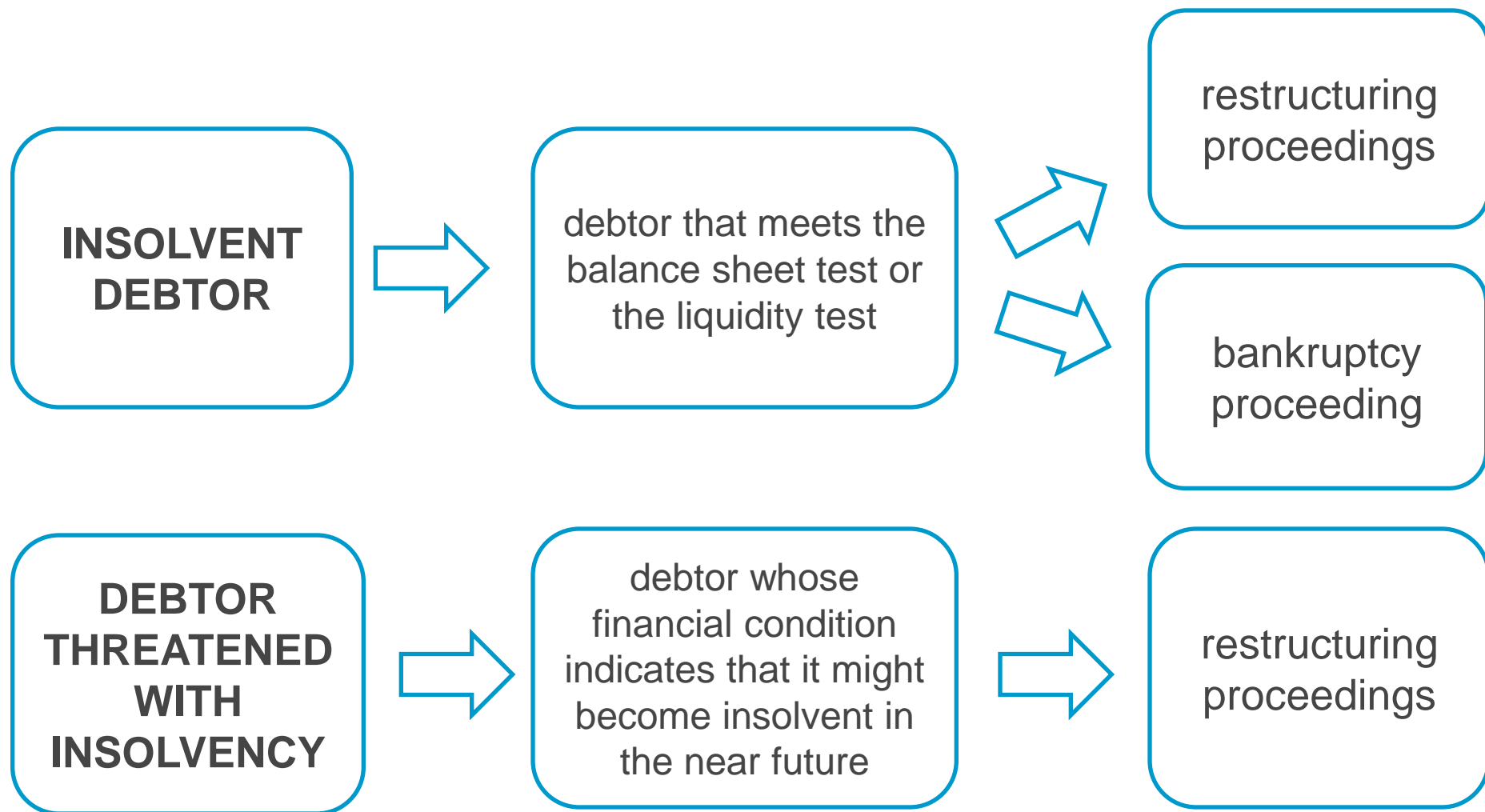
WHEN CAN RESTRUCTURING PROCEEDINGS BE INITIATED?

- Restructuring proceedings may be initiated if the debtor is insolvent or threatened with insolvency
- Arrangement approval proceedings and accelerated arrangement proceedings may be initiated only if the sum of the disputed claims does not exceed 15% of the total claims entitling to vote on arrangement
- Arrangement proceedings may be initiated if the sum of the disputed claims exceeds 15% of the total claims entitling to vote on arrangement
- An application for the commencement of proceedings may only be filed by the debtor (except for rehabilitation proceedings, where the application may also be filed by the curator or by a creditor)

WHEN CAN A DEBTOR BE DECLARED BANKRUPT?

- A debtor who has become insolvent may be declared bankrupt
- The application for the declaration of bankruptcy may be filed either by the debtor or by one of its creditors
- With effect from 1 January 2016, the debtor must file a petition to declare bankruptcy no later than within 30 days of the date on which the basis for declaring bankruptcy occurred (previously the deadline was 14 days)
- Before 1 January 2016, it was possible for the applicant to withdraw the application for the declaration of bankruptcy; with effect from 1 January 2016, the bankruptcy court may consider the withdrawal of the bankruptcy petition inadmissible if it would be to the detriment of the creditors

WHEN IS A DEBTOR INSOLVENT OR THREATENED WITH INSOLVENCY?



BANKRUPTCY TESTS – HOW WILL THE BALANCE SHEET TEST CHANGE FROM 1 JANUARY 2016?

- A debtor that is a legal person or an unincorporated organisational unit granted legal capacity by a separate law will be deemed insolvent when the sum of its pecuniary liabilities exceeds the value of its assets, and this situation continues for longer than 24 months
- Pecuniary liabilities do not cover future liabilities, including liabilities under suspensory conditions and liabilities towards a shareholder under a loan or similar legal act
- Insolvency will be presumed if, according to the balance sheet, the debtor's obligations (excluding reserves for liabilities and liabilities towards affiliates) exceed the value of its assets, and this situation continues for longer than 24 months

BANKRUPTCY TESTS – HOW WILL THE LIQUIDITY SHEET TEST CHANGE FROM 1 JANUARY 2016?

- The debtor will be deemed insolvent if it is unable to perform its due pecuniary liabilities
- The insolvency will be presumed if a delay in payments exceeds three months
- The court may dismiss the application for a declaration of bankruptcy if there is no risk that the debtor will lose its ability to perform its due pecuniary obligations in the near future

IF A RESTRUCTURING APPLICATION AND BANKRUPTCY APPLICATION ARE FILED AT THE SAME TIME, WHICH APPLICATION WILL HAVE PRIORITY?

➤ Rule:

If two applications are filed, one for the commencement of restructuring proceedings and one for a declaration of bankruptcy, the court will recognize the application for the commencement of restructuring proceedings first

➤ Exception:

If withholding the application for a declaration of bankruptcy is contrary to the creditors' interests, the bankruptcy court will take over from the restructuring court the application for the commencement of restructuring proceedings for joint recognition with the application for a declaration of bankruptcy

WHEN WILL AN APPLICATION FOR A DECLARATION OF BANKRUPTCY HAVE PRIORITY?

- The bankruptcy court will proceed only with the application for a declaration of bankruptcy if:
 - the takeover of the application for the commencement of restructuring proceedings for joint recognition would lead to a substantial delay in the issuing of a decision regarding the declaration of bankruptcy
 - the delay would harm the creditors
 - the grounds for restructuring presented by the debtor in its application are known to the bankruptcy court

SELECTED ISSUES

WILL IT BE POSSIBLE TO GRANT A LOAN TO A DEBTOR AND/OR ESTABLISH A SECURITY OVER ITS ASSETS DURING RESTRUCTURING PROCEEDINGS?

Yes, provided that the debtor obtained the consent of the creditors' committee

- The creditors' committee may grant its consent provided that:
 - financing is necessary to ensure that the costs of the restructuring proceedings and the obligations incurred after the commencement of the proceedings are covered, or it is necessary to execute or perform the arrangement; and
 - it was guaranteed that the proceeds of the loan will be transferred to the debtor and used in a manner prescribed by the creditors' committee

WHAT ARE THE ADVANTAGES UNDER THE RESTRUCTURING LAW FOR A CREDITOR GRANTING SUCH FINANCING?

- more favourable terms of restructuring of the debtor's liabilities
- If the debtor is declared bankrupt, the claims under the loans granted after the commencement of the restructuring proceedings will be privileged and satisfied in the first category of claims (provided that the application for a declaration of bankruptcy was filed within three months of the date the arrangement was finally repealed)
- A loan or security granted after the commencement of restructuring proceedings will be effective towards the bankruptcy estate

CAN A LENDER TERMINATE A FACILITY AGREEMENT AFTER THE COMMENCEMENT OF RESTRUCTURING PROCEEDINGS?

- In the case of arrangement approval proceedings, the Restructuring Law does not forbid a lender from terminating a facility agreement
- In the case of accelerated arrangement proceedings, arrangement proceedings and rehabilitation proceedings, the lender may not terminate a facility agreement without the consent of the creditors' committee
- The limitation described above does not apply if the reason for termination occurred after the commencement of proceedings

WILL IT BE POSSIBLE TO TERMINATE A LOAN DUE TO THE FILING OF A RESTRUCTURING APPLICATION?

- No. Any provision in a contract stipulating that the legal relationship to which the debtor is a party is to be changed or terminated in the case of:
- filing a declaration for the approval of the arrangement or the approval of the arrangement, or
 - filing a declaration for the commencement of accelerated arrangement proceedings, arrangement proceedings, rehabilitation proceedings or their actual commencement,

will be invalid

WILL IT BE POSSIBLE TO TERMINATE A LOAN DUE TO THE FILING OF AN APPLICATION FOR A DECLARATION OF BANKRUPTCY?

- No. With effect from 1 January 2016, the Bankruptcy Law will be amended and, as a result, any provision in a contract stipulating that the legal relationship to which the bankrupt is a party is to be changed or terminated if an application for a declaration of bankruptcy is filed or if a declaration of bankruptcy is made will be invalid
- As a result, lenders should carefully review the template loan agreements that they use and adjust the wording concerning events of default to the amended provisions of the Bankruptcy Law

WILL THERE BE ANY HARDENING PERIODS IN THE RESTRUCTURING LAW?

- Yes. The Restructuring Law provides for separate hardening periods in the case of rehabilitation proceedings which apply to:
- all legal actions performed by the debtor within one year prior to the filing of the application for the commencement of rehabilitation proceedings on the basis of which the debtor disposed of its assets and where the value of the debtor's performance significantly exceeds the value of the consideration
 - any security established within one year prior to the filing of the application for the commencement of rehabilitation proceedings, if the security was not established directly in connection with the receipt of a benefit
 - any security established within one year prior to the filing of the application for the commencement of rehabilitation proceedings, concerning the part which, at the date of its creation, exceeds more than a half of the value of the secured claim received by the debtor, together with ancillary claims

TO WHICH AGREEMENTS WILL THE HARDENING PERIODS SPECIFIED IN THE RESTRUCTURING LAW APPLY?

- Hardening periods in the Restructuring Law will apply to suretyships, guarantees, and similar acts performed in order to secure a claim
- Hardening periods in the Restructuring Law will not apply to agreements for the establishment of financial collateral referred to in the Polish Act on Specific Collateral of 2 April 2004

HARDENING PERIODS IN THE BANKRUPTCY LAW – WHAT WILL CHANGE FROM 1 JANUARY 2016?

- The hardening period related to the security interest securing undue debt will be extended from two to six months
- A new hardening period will be introduced, i.e. the assignment of future claims which arose after a declaration of bankruptcy will be ineffective towards the bankruptcy estate unless the assignment agreement was entered into in a form with a date certified by a notary and not later than six months before the date on which the application for the declaration of bankruptcy was filed

- a new institution under Polish law which allows the debtor to enter into an arrangement with only certain creditors
- the arrangement does not include claims secured on the debtor's assets by a mortgage, pledge, registered pledge, tax lien, or maritime mortgage, in the part covered by the value of the collateral, unless the creditor in rem consented to the inclusion of such a claim in the arrangement

- The consent of a creditor in rem is not required if:
 - the sum of the disputed claims does not exceed 15% of the total sum of claims belonging to creditors whose claims are included in a partial arrangement; and
 - the debtor presents the secured creditors with proposals envisaging the full satisfaction of their claims, even if an agreement which was the basis for the establishment of the security has expired or was terminated; or
 - such creditor will be satisfied to an extent not less than it could have expected in the event of the enforcement of the security;

DO ANY HARDENING PERIODS APPLY IN THE CASE OF THE PARTIAL ARRANGEMENT?

- Yes. If the arrangement proposals envisage the establishment of a security in order to secure the claims included in the partial arrangement, this security will be ineffective towards the bankruptcy estate and the creditors if within one year of the date on which the decision on the approval of the partial arrangement was issued:
- the debtor is declared bankrupt
 - the bankruptcy application is dismissed on the grounds that the assets of the insolvent debtor are insufficient to cover the costs of the proceedings

- Pre-pack sale is a new institution introduced to the Bankruptcy Law
- The new provisions will allow the sale of a debtor's enterprise (or an organized part thereof) on terms negotiated with a buyer before the opening of the bankruptcy proceedings
- In order to achieve this, an application for approval of the terms of sale together with a valuation report prepared by a court expert should be attached to the application for a declaration of bankruptcy

- The court will approve the terms of sale if the proposed price is higher than the amount which could be obtained in bankruptcy proceedings involving liquidation minus the costs of the proceedings
- important: an application for approval of the terms of sale may not be filed with regard to assets encumbered with a registered pledge if the agreement for the registered pledge provides for the seizure of the object of this pledge or its sale on the basis on the Polish Act on Registered Pledges and the Pledge Register of 6 December 1996 - unless the pledgee consented thereto in writing

DO THE NEW RESTRUCTURING REGULATIONS AFFECT THE BANKING LAW? (1)

- In principle, if a borrower breaches the terms and conditions of a loan, or if it loses its creditworthiness, the bank may decrease the amount of the loan or may terminate the loan agreement
- With effect from 1 January 2016, the Banking Law will be amended and the bank will not be able to terminate the loan if the Restructuring Law forbids it

DO THE NEW RESTRUCTURING REGULATIONS AFFECT THE BANKING LAW? (2)

- In addition, pursuant to the amendments to the Banking Law which entered into force on 26 November 2015, if a borrower is in delay with the repayment of a loan, the bank must call upon the borrower to repay the loan within a term not shorter than 14 business days
- The bank should inform the borrower about the possibility of filing an application for debt restructuring within 14 business days of the receipt of the call for repayment
- At the request of the borrower, the bank should enable the debt restructuring by changing the terms and conditions of repayment specified in the loan agreement, provided that it is justified by the bank's assessment of the borrower's financial condition

Central Restructuring and Bankruptcy Register:

- should start operating as an electronic register on 1 February 2018
- will contain decisions, documents, and information relating to all bankruptcy and restructuring proceedings
- will enable the participants in the proceedings to file motions and other documents
- will operate as a database of case law
- will be separate from the Polish National Court Register



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