

Poland Bankruptcy and Remedial Act

February 2010

On March 12, 2009 the Poland President signed the Act of 6 March 2009 amending Bankruptcy and Remedial Act, Bank Guarantee Fund Act and National Court Register Act (hereinafter referred to as the "Amendment"). Subject act made material interference in the Bankruptcy and Remedial Act of 28 February 2003 (hereinafter referred to as the "Act"), e. a. by change of some of the principles governing the proceeding conducted in order to satisfy the creditor's claims to the debtor and by material change of the procedural provisions governing the proceeding on bankruptcy declaration.

One of the main achievements of the Amendment was to reform the remedial proceeding, which was in practice very rarely instigated because of the defined criteria for instigating thereof. According to the new regulations, the entrepreneur has possibility, as a principle, to fill the motion to declare bankruptcy together with a demand of permission to instigate a remedial proceeding. Such entitlement deserves to the entrepreneur, if a debtor delays in fulfilling its obligations for less than three months and if the total amount outstanding does not exceed 10% of the balance value of the debtor's enterprise. In the former legal state of affairs, the court could dismiss a motion to announce bankruptcy of an entrepreneur meeting the above conditions. However, the Legislator has assumed that the objective of the conducted bankruptcy proceedings should be – to a greater extent than to date – to improve functioning of enterprises and not to eliminate them from the market. Moreover, under the Amendment, remedial proceeding can concern restructuring not only of monetary liabilities, as had been the case to date, but all liabilities which can be subject to an arrangement in bankruptcy proceeding. The broadening of the scope of the application of remedial proceedings represents another incentive for entrepreneurs to act when financial problems can still be resolved through the restructuring of liabilities.

Material change concerns also the arrangement proceeding. Pursuant to the provisions of the Act within the wording defined through the Amendment, in the event of the bankruptcy declaration providing for the possibility of an arrangement, the debtor will still have the right to represent the bankrupt estate within the scope of ordinary management. Pursuant to the previous experience, it seems that the bankrupt is much more committed to the enterprise than a court receiver and for obvious reasons wishes the enterprise to survive. Previously, it was presumed otherwise: as a rule the court had entrusted the bankrupt estate to a court receiver, and as an exception could deviate from the general rule agreeing for the bankrupt to administer the bankrupt estate under the supervision of a court supervisor. The Amendment has also strengthened the position of creditors whose claims are collaterally secured, whose claims had been previously fully excluded from arrangements. In the legal state of affairs changed through the Amendment, these claims will be excluded from the arrangement only up to the value of the collateral, while the remaining part they will be subject to the provisions of an arrangement. The above regulation will be especially important in the event of a decrease in value of an asset pledged as security. The procedure for voting on an arrangement has also been significantly simplified. According to the new regulations, voting will not be held among the groups of the creditors unless so determined by judge-commissioner. Previously, above mentioned procedure of voting on the arrangement was obligatory. The Amendment precise also the wording of an arrangement concluded in the event of liquidation arrangement, clarifying concerns about the person responsible for its performance and the manner of such performance.

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Changes have also been introduced to the provisions governing the distribution of the bankrupt estate funds among the creditors. Under the Amendment, the claims will be satisfied within the framework of five categories; with the first category encompassing the costs of bankruptcy proceedings as well as claims arising after the bankruptcy declaration. As a consequence, the first category no longer includes claims which arose prior to bankruptcy declaration. Furthermore, the receiver of the bankrupt estate will be able to satisfy claims classified within the first category on an on-going base, according to the income of adequate amounts to the bankrupt's estate fund, as the Amendment has rescinded the provision on the obligation to obtain the consent of the judge-commissioner to satisfy such claims. In practice, some claims grouped within the first category were often not yet defined which prevented the partial distribution of the funds from the bankrupt estate, and as a consequence, delayed disbursements to creditors. Due to the changes implemented through the Amendment, the creditors asserting their claims arising following the entrepreneurs bankruptcy declaration, thus, for example, claims created as a consequence of the fulfillment of a remaining part of a mutual obligation at the request of the bankrupt estate receiver, will be able to see their claims satisfied more quickly.

The Amendment has introduced solutions which will significantly accelerate the proceeding on bankruptcy declaration. The Amendment significantly facilitates operation of the bankrupt estates receivers. As of the date of the entry into force of the discussed Amendment, i.e. 31 March 2009, the bankruptcy estate receiver will have greater freedom in hiring employees, which should also facilitate for the receiver to take advantage of the option of the temporary operation of the bankrupt enterprise. Furthermore, the Amendment provides the court with the possibility to summon the creditors to make pre-payments for the costs of proceeding. New regulation allows obtaining funds necessary to conduct the proceeding in situation, when there are no funds in the bankruptcy estate. Essential is, that there is no complaint for such decision. Important change concerns also the proceeding to secure the claims. According to the former legal state of affair, the court furnished a security ex officio every time, the motion to declare bankruptcy was submitted. However, the Legislator came to a conviction, that it is unfair to hold such far going consequences for the debtor, taking into consideration the fact that motions demanding declaration of bankruptcy are not always justified. According to the new regulation, the court furnishes the debtor estate ex officio only when the motion was submitted by the debtor; in case of other petitioners the court will furnish the security only on their demand.

It should be also remembered that on 31 March 2009 the Act of 5 December 2008 amending the Bankruptcy and Remedial Act and Act on Court Fees in Civil Law Cases came into force. Subject amendment has introduced into the Polish legal system the possibility of declaration of so-called consumer bankruptcy. Under the new regulations, a petition to declare bankruptcy by a natural person not engaged in economic activity can only be filed by the debtor. A bankruptcy can be declared in the procedure implemented through the amendment of 5 December 2008 if insolvency was a consequence of exceptional circumstances over which the debtor had no influence. In particular, the court will not declare bankruptcy of the petitioner if the debtor contracted obligation while insolvent or if an employment relationship was terminated with the debtor as a consequence of his misdoing or with his consent. The legislator has significantly restricted the possibility for announcing bankruptcy if within ten years prior to the submission of a bankruptcy petition bankruptcy proceedings had been instigated against the debtor. However, it should be stressed, that consumer bankruptcy cannot be declared by a person, who conduct business activity indeed, but did not registered it in the proper register. In such situation, provisions concerning bankruptcy declaration of the entrepreneurs should be applied.