SOŁTYSIŃSKI KAWECKI SZLĘZAK

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Restructuring: new solutions and possibilities

Dear Client,

On 1 January 2016, a new restructuring law will enter into force which is to offer business entities which have found themselves in a difficult financial situation a broader range of possibilities to exit the crisis and return to normal functioning on the market.

The new act is accompanied by a far-reaching reform of the applicable bankruptcy law (which will also lose the "reorganization" element). The reform creates a situation whereby the bankruptcy of a business entity will become a 'last-ditch' solution, only to be used when all realistic possibilities of restoring the debtor's ability to meet liabilities have been exhausted. The new provisions will apply in all cases in which a bankruptcy petition is received after 1 January 2016 (the existing provisions will apply to petitions filed before this date).

Time will tell whether it will be possible in practice to achieve the new regulation's goals. We believe however that it is worth taking a closer look at the main assumptions, above all because the new mechanisms do not have a purely formal-procedural character, but also include a number of potentially attractive business solutions for creditors who wish to secure their interests or investors who are open to unconventional legal structures.

We encourage you to study the summary below. We remain at your disposal should you have any questions.

Regards,

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1. Main changes in bankruptcy law

New definition of insolvency

Insolvency that constitutes the basis for declaring bankruptcy or the opening of restructuring proceedings has been re-defined as "**a loss of the ability to meet due and payable cash liabilities"** (more than their "simple" non-performance, albeit periodic). At the same time, a presumption was introduced, in accordance with which, one may speak of a loss of the ability to meet cash liabilities only when the delay in performing them exceeds **three months**. The criteria for so-called balance sheet insolvency has also been changed. According to the new regulations, insolvency arises only when the cash liabilities of the debtor exceed the value of its assets, and this state of affairs continues for **a period exceeding twenty four months**.

Longer deadline for submitting a bankruptcy petition

The amendments have also extended the deadline for submitting a bankruptcy petition from fourteen **to thirty days** for the officers of the insolvent entity.

Change in the privileged position of the State Treasury

The State Treasury has resigned from having priority in the satisfaction of its receivables. **Taxes and public dues will be on an equal footing with the trade debts of the bankrupt.** Due amounts resulting from an employment relationship will remain privileged, as will dues in respect of social security falling in the last three years before the declaration of bankruptcy. It is hoped that this levelling of public-law and private-law creditors vis-à-vis the bankruptcy estate will lead to an increase in the effective level of satisfaction of trade debts in bankruptcy proceedings.

Pre-pack, i.e. prepared liquidation

An entirely new element within bankruptcy law is the institution of pre-pack, i.e. prepared liquidation. This consists of the **sale of the bankrupt's enterprise or its organized part or asset components constituting a significant part of the enterprise on terms (price, buyer, etc.) specified in advance in the application attached to the bankruptcy petition.** Such bankruptcy is thus jointly 'prepared', as it were, by the debtor and the investor interested in acquiring the debtor's business. In practice, pre-pack is aimed at extending the possibility of retaining the continuation of the enterprise's operation, as well as the satisfaction of creditors. Following the court's approval of the application, the receiver concludes a sale agreement on

the terms set out in the application within thirty days, and such sale has the effect of an execution sale (allows the buyer to acquire 'clean' assets).

2. Restructuring law

Chance for those threatened with insolvency

The new restructuring law introduces **four ways to restructure an enterprise** which has found itself in a difficult situation or 'is going downhill'. These four ways will have priority over bankruptcy, and will be available to entities which are insolvent or **threatened with insolvency**. Along with the restructuring law, the function of a **restructuring advisor** will be introduced, who will operate as part of court proceedings as a receiver, court supervisor or administrator, while at the same time advising the business entity on how to optimally restructure the firm, obtain new financing, etc. The powers of the restructuring advisor will be automatically granted to all persons holding the license of receiver.

Proceedings for the approval of an arrangement

The least formalized and quickest form will be proceedings for the approval of an arrangement. Under this procedure, the debtor retains full control over its assets, and the choice of restructuring advisor with whom it draws up arrangement proposals and collects votes as part of the vote on the arrangement. The arrangement will be concluded if the majority of entitled creditors vote in favor of it; and at the same time those in favor are collectively entitled to at least two thirds of the debt amount. The **role of the court is limited to a minimum** – in principle, the decision on the approval of the arrangement is issued within two weeks of receipt of the relevant application.

Express arrangement proceedings

The next proceedings are express arrangement proceedings which, in principle, should last from two to three months. Under these proceedings, **the court appoints a court supervisor** who draws up a restructuring plan, list of receivables, and a list of disputed receivables. The drawn-up lists then form the basis for a vote on the arrangement at the meeting of creditors. For the duration of the proceedings, the so-called 'protective umbrella' operates, protecting against execution, i.e. creditors covered by the arrangement cannot conduct execution proceedings, and proceedings already commenced are suspended (with the exception of secured creditors who

may continue execution from the object of security; however, also with a possibility to withhold).

Arrangement proceedings

Arrangement proceedings are similar to express arrangement proceedings. The basic difference concerns the existence of a **formal procedure for the approval of the list of receivables by the judge-commissioner** and the possibility for creditors to raise objections to the inclusion of receivables on the list.

Sanative proceedings

The fourth (and most restrictive) type of proceedings provided for in the restructuring law is that of sanative proceedings. Under these proceedings, **the debtor, in principle, loses the right to manage its assets and an administrator is appointed (a person holding a restructuring advisor's license).** Under these proceedings, there operates the so-called total anti-execution umbrella: all execution proceedings are suspended. Under sanative proceedings there is a possibility of restructuring employment, as well as the possibility of preferential termination of unfavorable contracts.

Partial arrangement

A novelty introduced by the restructuring law is also the possibility of concluding a partial arrangement, i.e. **an arrangement understanding covering only some of the creditors (e.g. only credit institutions).** The basic condition for the possibility to conclude a partial arrangement is 100% satisfaction of the remaining creditors. A partial arrangement will be possible under the proceedings for the approval of an arrangement, as well as express arrangement proceedings.