

# POLAND'S TEMPORARY COVID RESPONSE MEASURES LEAD TO PERMANENT AMENDMENT OF POLISH INSOLVENCY LAW



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In response to the COVID outbreak, new “simplified restructuring proceedings” were introduced in Poland to handle the anticipated increase in the volume of insolvent businesses. This measure was designed to be temporary only and was therefore available from 24 June 2020 to and including 30 November 2021.

However, given that the COVID regulations became widely used and far more popular than the standard measures, Polish policymakers decided to implement the perfected features of this temporary solution into the prevailing insolvency framework. As a result, the significantly amended “arrangement approval proceedings” (*postępowanie o zatwierdzenie układu*) entered in force on 1 December 2021, for an indefinite time period.

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## The fundamental and long-standing principles of Polish insolvency law

The Polish restructuring law was initially founded on the following principles:

1. Arrangement approval proceedings are meant to be faster and less burdensome for the debtor company, while other restructuring proceedings (remedial proceedings in particular)<sup>1</sup> provide for more extensive protection against creditors, but at the expense of greater control of a debtor's operations by the court.
2. Only a court decision can be grounds for a stay of creditors' enforcement actions against a debtor company.
3. During the stay of enforcement, the debtor company is prohibited from making payments to its unsecured creditors.
4. Only the court is competent to perform key actions

1 Under Polish insolvency law, there are four main types of restructuring proceedings, which have their own features:  
(i) arrangement approval proceedings (*postępowanie o zatwierdzenie układu*);  
(ii) accelerated arrangement proceedings (*przyspieszone postępowanie układowe*);  
(iii) arrangement proceedings (*postępowanie układowe*); and  
(iv) remedial proceedings (*postępowanie sanacyjne*).

In addition, the standard bankruptcy proceedings involving liquidation are available, which can also take the form of pre-pack insolvency.

2 Note that the Polish judges handling insolvency matters involving businesses are also responsible for resolving and supervising consumer bankruptcies, which is relatively common among individuals suffering from financial difficulties.

concerning concluding an arrangement. In particular, only a judge is authorised to preside over a creditors' meeting convened for voting on an arrangement.

5. Records / files from the restructuring proceedings are kept by the court and the documents collected in those files can be accessed in person in the court building.
6. The secured creditor cannot be outvoted or crammed down by other creditors and, in case of a secured creditor's dissent, it will not be subject to the arrangement terms. In other words, this rule was derived from: (i) the legal nature of security *in rem*; and (ii) the fact that in bankruptcy liquidation the secured creditors' claims have a higher ranking compared to the claims of unsecured creditors.

From a theoretical perspective, the abovementioned provisions provide the proper equilibrium between creditors' and debtor's interest, as well as compliance with the constitutional right to a fair trial (due to the level of involvement of independent judges in concluding the arrangement).

In practice, however, both debtor companies and officeholders often complain that the secured 'hold-out' creditors were able to frustrate their restructuring attempts. Furthermore, procedural delays and arrears were frequently present in restructuring proceedings, which resulted from the Polish courts being overloaded and understaffed<sup>2</sup>. In many cases, these delays had a negative effect on the businesses (subject to restructuring), including on achieving restructuring milestones on time.

## New approach

To improve the efficiency of restructuring proceedings, Poland introduced the following groundbreaking changes to the arrangement approval proceedings:

1. Although the arrangement approval proceedings remain the least formalised and simplest measure under Polish law, debtor companies subject to these proceedings

can benefit from safeguards, which were previously only available in the restructuring proceedings that require the court's deep involvement and could lead to the debtor losing control over its assets during the formal restructuring. For details, see below.

2. The debtor company can<sup>3</sup> request protection from the creditors' enforcement action, which – in practice – is granted automatically by a public announcement of the company instigating the arrangement approval proceedings<sup>4</sup>. Obtaining a stay on enforcement for four months does not require any court involvement.
3. Despite the debtor company being protected from the enforcement of secured and unsecured creditors, the debtor company remains in possession of its business and the underlying assets. The debtor company is not restricted in terms of taking actions within its ordinary scope of business/day-to-day management, which can involve repaying individual creditors. There are also no restrictions on the set-offs between the debtor and its creditors.
4. The debtor-appointed insolvency practitioner (instead of the court) will play the central role in the proceedings and has powers that in other restructuring proceedings are reserved for the court. The choice of the licensed practitioner, who will formally act as the "arrangement supervisor" (*nadzorca układu*), depends only on the debtor company, which also covers his/her remuneration. The practitioner's duties will be, among others, to: (i) verify whether the debtor company is eligible for the arrangement approval proceedings<sup>5</sup>; (ii) organise creditors voting on the arrangement; and (iii) confirm if the arrangement has been adopted (or not).
5. Since the arrangement approval proceedings are almost entirely out-of-court, the debtor-appointed practitioner: (i) establishes and maintains the case files until the arrangement is voted through by the creditors; and (ii) provides them with relevant information about the status of the proceedings, the debtor's financial situation and the possibility of implementing terms of the arrangement. In addition, new laws introduce an online and publicly available platform (the National Register of Debtors), to which the court and officeholders mandatorily upload all relevant information and documents from all restructuring proceedings. This includes a notice that a debtor company has instigated the arrangement approval proceedings, which triggers a protection from enforcement actions.
6. The arrangement can also cover receivables of secured creditors, without their consent. This consent is not required: (i) if the arrangement terms envisage the full satisfaction of the secured creditor within the payment schedule decided in the arrangement, or (ii) if the recovery rate of the secured creditor under the arrangement will be not less than he/she can expect in a formal enforcement scenario.

## Safety valves

Although key formal actions are conducted by the debtor-appointed licensed practitioner, there are still elements of judicial review in the arrangement approval proceedings.

First and foremost, the court will refuse to approve the arrangement (which was adopted earlier by the relevant majority of creditors) if it violates the law or it is obvious that a debtor company will not comply with the arrangement terms. In particular, the court should not approve the arrangement if it is unlikely that the debtor company has sufficient funds to make all restructuring payments in full and on time. The court may also refuse to approve the arrangement if its terms are grossly detrimental to the creditors who voted against it and raised objections.

During the proceedings, the court can also overturn the four-month relief period from enforcement that the debtor company has gained thanks to announcing publicly that it is initiating the arrangement approval proceedings. The court should do so at the request of a creditor, arrangement supervisor or debtor company, if protection made available to the debtor company is detrimental to creditors. This is, however, dependent on the discretionary assessment and decision of a supervising judge, which is assigned to a particular case.

## Comment

The arrangement approval proceedings are by far the most popular restructuring proceedings in Poland. This is for a good reason, since these proceedings allow for fast-track formal restructuring, which is not possible otherwise. It is obvious that licensed practitioners, who took over the usual powers and duties of the court, will be more business-oriented, act faster and more efficiently compared to the judges and other court officials. This will certainly mitigate risk of procedural delays. By the same token, the introduction of the online platform (National Register of Debtors) is welcomed<sup>6</sup>.

However, the new measure can be seen as a regulatory trade-off from the creditors' perspective. This is because there is an inherent risk of conflict of interest, since a formally independent, licensed practitioner (acting as arrangement supervisor) is appointed and paid by the debtor company. Moreover, debtor companies can benefit from the four-month relief period without prior judicial control. Therefore, in practice, such protection can also be gained by debtors who intend to frustrate pending enforcement only and have no real intention of concluding the arrangement with creditors.

In the event of such irregularities, creditors will need to refer to the judicial review that remains (albeit in limited scope) available in the arrangement approval proceedings.

3 Making such announcement is not mandatory. Therefore, a debtor company can proceed with the arrangement approval proceedings without benefiting from the stay on enforcement.  
4 Furthermore, after such announcement the debtor company gains additional protection against the termination of certain agreements, including credit facilities and other agreements essential for running its business, the list of which is prepared by the arrangement supervisor.  
5 For example, a debtor company that has disputed liabilities exceeding 15% of its aggregated liabilities is ineligible for the arrangement approval proceedings.  
6 Note that at the current, early stage of operating the National Register of Debtors, there are still some errors and complaints that the online platform is not user-friendly. We assume that these issues will be ironed out in the future updates.