Legal Alert

Amendments to the Bankruptcy and Rehabilitation Law, the Bank Guarantee Fund Act and the National Court Register Act went into effect on 2 May 2009. The amendments were adopted by the Polish parliament on 6 March 2009 and published at Journal of Laws (2009) No. 53 item 434.

The need for the amendments arose from practical experience applying the bankruptcy law, the necessity of eliminating defective or imprecise provisions, as well as a need to adapt to other legislative changes, including the Constitutional Tribunal's Judgment of 19 September 2007 (Case No. SK 4/06).

The amendments are also designed to encourage broader use of rehabilitation proceedings, which were previously available only to a small group of business entities. The amendments include some 150 different changes, only the most significant of which are discussed below.

Most significant changes

Elimination of separate definition of a business entity

The previous law employed a definition of a business entity especially for the purposes of bankruptcy and rehabilitation proceedings. Now the law incorporates by reference the definition from the Civil Code, which in practice means that the definition is now uniform.

New definition of insolvency

The amendment now specifies more clearly that a debtor is insolvent when it is not performing its **monetary** obligations (Art. 11). Previously a debtor could also be found to be insolvent if it were not performing its non-monetary obligations.

Less restrictive grounds for commencing rehabilitation proceedings

The prior law allowed business entities to use rehabilitation procedures only if they were at risk of insolvency but were still performing their obligations on a current basis.

As of 2 May 2009, this procedure is now open as well to business entities with a minimal amount of outstanding debt, not exceeding 10% of the balance-sheet value of the enterprise, and which are in arrears for a period of no longer than 3 months. Now, when rejecting a motion for declaration of bankruptcy, the court will be able to consent immediately to commencement of rehabilitation proceedings.

Securing of assets no longer mandatory

When a motion for declaration of bankruptcy was filed by a debtor or creditor, previously the court was required to secure the assets on its own motion. Now this will be done only upon motion by the debtor.

Moreover, suspension of execution as a way of securing the assets will occur only in the event of a motion to declare a reorganization bankruptcy, and only where execution of claims which would be covered by the reorganization plan could make it difficult or impossible to obtain acceptance of the plan.

Creditors with security on property

The amendment fixes the erroneous wording of the former Art. 81(3). Under the new wording, encumbrance of the debtor's real estate after declaration of bankruptcy is possible only if the motion for entry of a mortgage was filed with the court **at least 6 months prior to the date of filing of the motion** to declare bankruptcy.

In addition, when the judge-commissioner enters an order holding that an entry in the land and mortgage register or other register was impermissible, leading to deletion of the entry, there will now be a right to appeal. This change was dictated by a judgment of the Constitutional Tribunal holding that the provision of Art. 82 depriving creditors of a right to judicial review was unconstitutional.

Creditors have also been given a right to appeal from decisions by the judge-commissioner concerning rejection of a lease or tenancy agreement in a situation where termination by the debtor would not have been permissible under the agreement (Art. 109(1)).

With respect to claims and other property rights assigned by the debtor to a creditor to secure its claim (taking title as security), provisions concerning pledges and claims secured by a pledge will apply, and not the provisions on exclusion from the bankruptcy estate.

Voting on reorganization plan

The amendment has eliminated the requirement of voting on a reorganization plan by classes. In practice, dividing creditors into classes according to the category of their claims dragged out the proceedings.
Now voting by classes will occur only when ordered by the judge-commissioner. Elimination of the requirement for voting by classes also entailed relevant revisions to the provisions concerning the majority required to confirm the plan.

New classification of claims

The amendment introduced a new classification of claims; now there are five categories instead of four. Category 1 was divided into two separate categories. Now Category 1 includes only the costs of the proceeding and claims arising after declaration of bankruptcy.
All priority claims are included in Category 2. This division was designed to allow the trustee to make payments to creditors more quickly and efficiently. Category 3 includes taxes and other public charges and outstanding social insurance premiums, together with interest and enforcement costs.
The other categories remain unchanged.

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