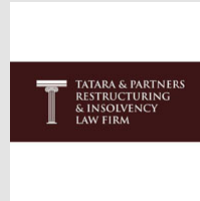




The Legal 500 & The In-House Lawyer  
Comparative Legal Guide  
Poland: Restructuring & Insolvency (3rd edition)

This country-specific Q&A provides an overview to restructuring and insolvency laws and regulations that may occur in Poland.

This Q&A is part of the global guide to Restructuring & Insolvency (3rd edition). For a full list of jurisdictional Q&As visit <http://www.inhouselawyer.co.uk/practice-areas/restructuring-and-insolvency-3rd-edition/>



## **Country Author: Tatara & Partners Restructuring & Insolvency Law Firm**



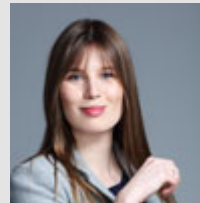
**Karol Tatara, Senior Partner**

[\*\*k.tatara@tatara.com.pl\*\*](mailto:k.tatara@tatara.com.pl)



**Anna Czarnota, Senior Associate**

[\*\*a.czarnota@tatara.com.pl\*\*](mailto:a.czarnota@tatara.com.pl)



**Sandra Bartkowska, Associate**

[\*\*s.bartkowska@tatara.com.pl\*\*](mailto:s.bartkowska@tatara.com.pl)



**Mateusz Kaliński, LL.M., Associate**

[\*\*m.kalinski@tatara.com.pl\*\*](mailto:m.kalinski@tatara.com.pl)

### **1. What forms of security can be granted over immovable and**

## **movable property? What formalities are required and what is the impact if such formalities are not complied with?**

### **Registered pledge**

Registered pledge may be established on movable property and transferable property rights. It is regulated by Act on registered pledge and Register of Pledges (O.J. 1996, No 149, item 703, as amended). The pledge agreement and entering the pledge into the Register of Pledges are required in order to successfully establish registered pledge. The pledge agreement should be made in writing.

### **Mortgage**

Mortgage may be established on immovable property. It is regulated by Act on Land and Mortgage Registers and Mortgage (O.J. 1982, No 19, item 147, as amended). The mortgage is established effective under the condition that relevant entry has been made in the Land and Mortgage Register. It is also necessary to comply with requirements as to the document that constitutes the basis for entering mortgage into the Land and Mortgage Register (e.g. notarial deed, Court's decision in the case of compulsory mortgage), as well as requirements as to the form of the document (drawn up in writing with a signature certified by notary). There are several types of mortgages regulated under the Act on Land and Mortgage Registers and Mortgage, in particular: contractual mortgage, compulsory mortgage, etc.

Mortgage and registered pledge become valid provided that competent Court makes relevant entry into the Land and Mortgage Register or the Register of Pledges respectively.

If the application for entering mortgage or registered pledge into respective register does not comply with formal requirements set out in Polish law, depending on gravity and type of failure (in particular errors and omissions), the Court requests applicant to remedy any errors or omissions, or dismisses the application if given failure is irreparable.

There also exist less popular securities like pledge, treasury pledge or ship's mortgage.

2. **What practical issues do secured creditors face in enforcing their security (e.g. timing issues, requirement for court involvement)?**

Entering the security into the respective register, in majority of situations, is executed within judicial proceedings, hence the biggest practical issue is the necessity to involve the Court in order to create (establish) a security. That is the reason why establishing the security may take a lot of time. Moreover application for entering security into the respective register submitted to the Court, may be accompanied by application for granting interim injunction for the period of judicial proceeding, which also affects duration of proceedings.

In particular legal circumstances it is also possible to enforce security within extrajudicial proceedings, e.g. in the case of a notarial deed in which the debtor submits to enforcement, or in the case of taking over ownership of the pledged property.

3. **What is the test for insolvency? Is there any obligation on directors or officers of the debtor to open insolvency procedures upon the debtor becoming distressed or insolvent? Are there any consequences for failure to do so?**

Under the Polish law, insolvent is a debtor, who has lost the ability to fulfill his matured pecuniary liabilities, or a debtor which is a legal person, or an organizational unit without legal personality upon which a separate Act confers legal capacity, if its pecuniary obligations are in excess of the value of its assets, and this state of facts persists throughout a period exceeding twenty four months.

Any individual authorized to represent the debtor and to manage debtor's affairs

under the law or articles of association (board members in particular) is obliged to file a bankruptcy petition within the due date - which falls 30 days after the grounds for declaring bankruptcy arise.

Article 299 of the Commercial Companies Code (in the case of the management board of limited liability company), along with Article 21 para 3 of the Bankruptcy Law (and other legal provisions, including criminal liability and liability for tax obligations) set the board members' and other persons' (upon whom the obligation to file a bankruptcy petition rests) liability towards creditors for obligations of insolvent body in the event the bankruptcy petition is not filed within the due date.

**4. What insolvency procedures are available in the jurisdiction? Does management continue to operate the business and / or is the debtor subject to supervision? What roles do the court and other stakeholders play? How long does the process usually take to complete?**

In Poland, with regard to insolvency procedures, there exists one insolvency procedure - liquidation bankruptcy. The Bankruptcy Law regulates that in result of declaring bankruptcy the debtor loses the right to manage and operate business. The trustee appointed by the bankruptcy Court, is the person who takes over temporarily (for duration of bankruptcy proceedings) responsibility to manage and operate the debtor's business. The Court and appointed Judge-Commissioner supervise the trustee, and issue several decision within the course of proceedings. There is also possibility to establish Creditor's Committee, which receives several competences of the Judge-Commissioner. Individual creditors can also receive information and may play active role within proceedings.

As of today estimated time of bankruptcy proceedings in Poland is up to few years. Duration of proceedings is determined by constantly growing number of consumer bankruptcy, which is resolved in the same Bankruptcy Courts.

**5. How do creditors and other stakeholders rank on an insolvency of a debtor? Do any stakeholders enjoy particular priority (e.g. employees, pension liabilities)? Could the claims of any class of creditor be subordinated (e.g. equitable subordination)?**

Rank of claims is regulated within the Bankruptcy Law. The main rule is to satisfy costs of proceedings with the highest priority (they are satisfied in the first place). Remaining claims are satisfied in the order specified in Article 342 of the Bankruptcy Law, depending on category to which they fall (claims falling into the lower category may be satisfied only if claims falling into higher categories have been fully satisfied). First category of claims covers among others: employees' claims, maintenance claims and workers' compensation, social security contributions defined in the Social Security System, particular amounts resulting from restructuring proceedings of the debtor.

Apart from rank of claims, the secured creditors enjoy preferential treatment with regard to liquidation of secured assets. Except as otherwise provided in specific regulations, secured creditors should be satisfied from the proceeds of the liquidation of the encumbered asset, reduced by the costs related to the liquidation of the asset and other costs of bankruptcy proceedings.

**6. Can a debtor's pre-insolvency transactions be challenged? If so, by whom, when and on what grounds? What is the effect of a successful challenge and how are the rights of third parties impacted?**

Under Polish Bankruptcy Law, particular transactions (or broaden: acts in law), are - by operation of law - ineffective with respect to the bankruptcy estate or may be ineffective with respect to the bankruptcy estate based on the Judge - Commissioner's decision. In result - said transactions or acts in law are construed within bankruptcy proceedings as they have never occurred.

Acts in law that may be challenged include among others those performed gratuitously (or significantly undervalued) within 1 year before filing the bankruptcy petition,

whereby the debtor disposed of his assets. The same applies respectively to the court settlement, admission of an action, and waiver of a claim.

Moreover, ineffective with respect to the bankruptcy estate are securities and payments of an unenforceable debt, given or made by the debtor within 6 months before the filing the bankruptcy petition.

There is also possibility to challenge by the Judge-Commissioner transactions with related-parties and/or family, performed by debtor within 6 months preceding the date of filing the bankruptcy petition, as well as encumbrance of the bankrupt's assets with (among others) mortgage or registered pledge, if the bankrupt was not a personal debtor of the secured creditor and if the encumbrance was established within one year prior to the filing of a bankruptcy petition, and the bankrupt did not receive any consideration for the establishment of such encumbrance.

The other party to ineffective transaction/ act in law is obliged to contribute to the bankruptcy estate anything that has been transferred out of, or has not been contributed to, in result of ineffective act.

In particular cases reciprocal consideration provided by other party may be returned to the same. If the consideration cannot be returned, that party may assert its claims in bankruptcy proceedings on a par with other creditors.

On the other hand, party who received the payment or the security may, by bringing an action or charge, seek the recognition of such acts as effective if at the time when the same were performed they were unaware of the existence of grounds for declaring bankruptcy.

**7. What form of stay or moratorium applies in insolvency proceedings against the continuation of legal proceedings or the enforcement of creditors' claims? Does that stay or moratorium**

## **have extraterritorial effect? In what circumstances may creditors benefit from any exceptions to such stay or moratorium?**

Under Polish Bankruptcy Law, declaring bankruptcy is connected with stay of enforcement of claims, and moratorium to commence such proceedings.

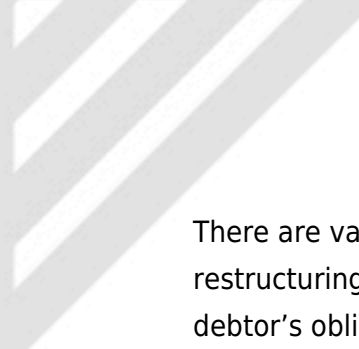
Execution proceedings initiated prior to the declaration of bankruptcy, should be, by operation of law, stayed on the date of declaration of bankruptcy. Once decision on declaring bankruptcy becomes final and non-appealable such proceedings should, by operation of law, be discontinued.

Said legal instruments have extraterritorial effect, however declaring bankruptcy is not an obstacle for awarding immovable property ownership if the bid for the property was validly knocked down prior to the declaration of bankruptcy and the execution acquirer pays the acquisition price on time.

## **8. What restructuring and rescue procedures are available in the jurisdiction, what are the entry requirements and how is a restructuring plan approved and implemented? Does management continue to operate the business and / or is the debtor subject to supervision? What roles do the court and other stakeholders play?**

In Poland, we have 4 restructuring proceedings: arrangement approval proceedings, accelerated arrangement proceedings, arrangement proceedings and remedial proceedings.

In addition, there is also a possibility to conclude partial arrangement, covering creditors selected by objective criteria. Conclusion of partial arrangement is allowed in arrangement approval proceedings and accelerated arrangement proceedings.



There are various forms of restructuring of the debtor's obligations within all kinds of restructuring proceedings, for instance debt-for-equity swap, reducing the amount of debtor's obligations or spreading repayment into instalments. It is also permissible, however as an exception, to vote, conclude the arrangement and adopt it within the bankruptcy proceedings.

One of the most interesting new rescue proceedings is pre-packaged sale (pre-pack), regulated in the Bankruptcy Law. Pre-pack is yet not as popular as it is for instance in the USA or UK, where around 25% of all applications include pre-pack, and one of the highest value acquisitions are made within pre-packaged liquidation procedures. However, there are solid grounds to presume that also in Poland the pre-pack procedure should gain popularity, mainly because while acquiring in pre-pack, investor enjoys execution sale effect, what means that the investor is not liable for old liabilities and commitments of the debtor. Moreover, transaction executed within pre-pack procedure is really quick and investor acquires enterprise as functioning company, ready to continue conducting business. Pre-pack sale is also possible in favour of affiliated entities, however the price cannot be less than stated by the Court's appraiser. The Court's decision whether to approve sale-purchase conditions, is made by the bankruptcy Court, along with the decision regarding declaring bankruptcy. Main feature of pre-pack is possibility to sale insolvent debtor's assets to investor within bankruptcy proceedings without auction or tender. Pre-pack is intended for selling enterprise as ongoing business, with significant benefit which is execution sale effect, meaning that the investor is not liable for old liabilities and commitments of the debtor.

For each restructuring proceedings the debtor may file upon insolvency situation or threat of insolvency. For arrangement approval proceedings and accelerated arrangement proceedings, there is additional premise. Those proceedings may be conducted provided that the total sum of disputed receivable debts giving the right to vote on the arrangement does not exceed 15% of the total sum of receivable debts giving the right to vote on an arrangement, while for arrangement proceedings, the sum of disputed claims may exceed 15% of the total sum of receivable debts giving the right to vote on an arrangement.

Debtor's management is still in hands of former board members, however under supervision of the Court Supervisor (in certain circumstances, for example if the debtor has violated the law with regard to the administration of assets thereby causing or



threatening to cause detriment to the creditors, it is possible to revoke debtor's administration of the enterprise), in remedial proceedings however the Court appoints Receiver, who usually takes over the responsibility to manage the debtor's enterprise.

Restructuring plan is prepared by the Arrangement Supervisor (within arrangement approval proceedings) or by the Court Supervisor (within accelerated arrangement proceedings and arrangement proceedings). The restructuring plan is then executed by the debtor under supervision of appointed supervisor.

Within remedial proceedings the restructuring plan is prepared by the Receiver. Receiver is also the person who executes the restructuring plan once it is approved by the Judge – Commissioner. The creditors vote on the arrangement once the restructuring plan is executed fully or in part.

The Court and the appointed Judge – Commissioner supervises the course of the proceedings and issue some ruling thereof.

It is also possible within restructuring proceedings to establish Creditors' Committee (said body may i. a. change the person of the Court Supervisor or of the Receiver, or decide that administration of the enterprise should be kept by the debtor). Creditors may also submit their own arrangement proposals.

**9. Can a debtor in restructuring proceedings obtain new financing and are any special priorities afforded to such financing (if available)?**

Such possibility exists, and up to certain limit, new financing enjoys preferential treatment, especially in the event of unsuccessful restructuring when case leads to the bankruptcy. In such situation financing is satisfied within the first category of claims in bankruptcy proceedings.

10. **Can a restructuring proceeding release claims against non-debtor parties (e.g. guarantees granted by parent entities, claims against directors of the debtor), and, if so, in what circumstances?**

Such possibility exists, but is of extrajudicial, less formal and less strict nature – usually is done within workouts or standstill agreements, instead of in formal restructuring proceedings.

11. **Is it common for creditor committees to be formed in restructuring proceedings and what powers or responsibilities to they have? Are they permitted to retain advisers and, if so, how are they funded?**

Establishing Creditors' Committees is much more common in restructuring proceedings than within bankruptcy proceedings. It is driven, in a broad sense, by nature of the Restructuring law, which is formed for active creditors.

Creditors' Committee enjoys control and supervisory task over the acts of the Court Supervisor and the Receiver. It may audit the books and documents of the debtor's enterprise and demand explanations from the debtor. Creditors' Committee is entitled to grant permission for several actions of the debtor, like encumbering components of the arrangement estate or remedial estate with a mortgage, pledge, registered pledge or ship's mortgage in order to secure a receivable debt which is not covered by the arrangement; transfer of ownership of things or rights for securing a receivable debt which is not covered by the arrangement; encumbering components of the arrangement estate or remedial estate with other rights; taking out credits and loans; sale of assets of the value exceeding 500.000 PLN.

Members of Creditors' Committees can act with advisers, but funding should be secured by themselves.

**12. How are existing contracts treated in restructuring and insolvency processes? Are the parties obliged to continue to perform their obligations? Will termination, retention of title and set-off provisions in these contracts remain enforceable? Is there any ability for either party to disclaim the contract?**

Existing contracts within restructuring proceedings may be managed in various ways depending on nature and subject of the given contract. Under Article 98 of the Bankruptcy Law appointed trustee may, with the prior consent of the Judge - Commissioner, perform the debtor's obligation resulting from contract and demand the other party to render reciprocal performance, or withdraw from the contract with effect as of the date of declaration of bankruptcy. It is also possible to withdraw from a reciprocal contract by appointed Receiver under the Restructuring Law - in remedial proceedings.

Certain contracts' clauses may be questioned under the Bankruptcy Law, e.g. clause stipulating that a legal relation to which the bankrupt is a party, may be modified or terminated if a bankruptcy petition is filed or if bankruptcy is declared. Such a clause under the Article 83 of the Bankruptcy Law is invalid. Clauses preventing or hindering the achievement of the purpose of bankruptcy proceedings have no effect to the bankruptcy estate.

Moreover, as to the: contract of agency, contract of lending for use, contract of loan, contract of lease or tenancy, credit contract, contracts of bank account, contracts of securities account, contracts of derivatives account or settlement account, or contracts of operating an omnibus account, as well as contracts for making safe-boxes available and contracts for safekeeping, leasing contracts or mandatory property insurance contracts, the Bankruptcy Law provides individual and specific regulations reflecting nature of said contracts. In particular the Bankruptcy Law regulates possibility of expiration of the contract by operation of law, possibility to withdraw from contract or to terminate contract.

Under the Restructuring Law there are some restrictions as to the possibility of termination of the tenancy contract and lease contract of the unit or immovable property, in which the debtor's undertaking is run.

**13. What conditions apply to the sale of assets / the entire business in a restructuring or insolvency process? Does the purchaser acquire the assets “free and clear” of claims and liabilities? Can security be released without creditor consent? Is credit bidding permitted? Are pre-packaged sales possible?**

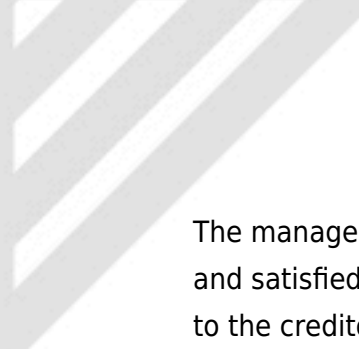
Sale of assets/business within bankruptcy proceedings enjoys execution sale effect, what means that the purchaser acquires the assets “free and clear” of claims and liabilities, and security is released even without the permission of creditor, but such creditor is satisfied from money received in result of sale transaction. In restructuring proceedings, in turn, sale of assets or business enjoys execution sale effect only within remedial proceedings.

Credit bidding is planned to be introduced within amendment to the Bankruptcy Law, which is currently in legislative process.

Pre-packaged sales (so-called pre-pack) are possible to execute from 2016. They are – as discussed also above – beneficial for all involved parties and become more and more popular among creditors and debtors.

**14. What duties and liabilities should directors and officers be mindful of when managing a distressed debtor? What are the consequences of breach of duty? Is there any scope for other parties (e.g. director, partner, shareholder, lender) to incur liability for the debts of an insolvent debtor?**

Most important legal duty of the board members relates to filing the bankruptcy petition in the due time. Failure to do so can result in liability towards creditors – directly from board member’s assets.



The management board is obliged also to ensure that all creditors are treated equally and satisfied proportionally. The management board may be liable for damages caused to the creditors in the event of satisfaction of certain creditors selectively as well as in the case of establishing security in favour of certain selected creditors to the detriment of remaining creditors. Such action of the management board may cause (in certain cases) criminal liability of board members.

Other parties cannot incur liability for the debts of an insolvent debtor. However, if given act in law is declared ineffective due to detriment of creditors, the creditors may be satisfied from consideration received by other party to the act.

15. **Do restructuring or insolvency proceedings have the effect of releasing directors and other stakeholders from liability for previous actions and decisions?**

Under the Polish Law, there is no direct rule regarding release of liability for previous actions performed and decisions made by directors or stakeholders. Filing the bankruptcy petition, opening of restructuring proceedings or approving the arrangement within arrangement approval proceedings – made within 30 days after the grounds for declaring bankruptcy arise, releases members of the board (or other persons obliged to take action in accordance with the law) from liability for insolvent debtor’s obligations.

16. **Will a local court recognise concurrent foreign restructuring or insolvency proceedings over a local debtor? What is the process and test for achieving such recognition? Has the UNCITRAL Model Law on Cross Border Insolvency or the UNCITRAL Model Law on Recognition and Enforcement of Insolvency-Related Judgments been adopted or is it under consideration in your**

## **country?**

In Poland, like in other EU countries, concurrent proceedings are automatically recognized and there is also the possibility of commencement of secondary insolvency proceedings, limited to assets located within Poland's territory.

With regard to other countries, recognition is usually regulated in bilateral agreements, most commonly compliant with UNCITRAL.

### **17. Can debtors incorporated elsewhere enter into restructuring or insolvency proceedings in the jurisdiction?**

Yes, if their place of business (so-called COMI – center of main interest) is located within Poland's territory.

### **18. How are groups of companies treated on the restructuring or insolvency of one or more members of that group? Is there scope for cooperation between office holders?**

There is space for cooperation between office holders in the case of groups of companies treated on the restructuring or insolvency of one or more members of that group, but informally, given there is no direct legal basis for such activities. Restructuring and insolvency of groups of companies is regulated under the EU Law only and it touches international cases, not domestic groups of companies.

### **19. Is it a debtor or creditor friendly jurisdiction?**

Polish system of regulations related to insolvency has been amended significantly quite recently because of i. a. lack of effectiveness in recovery rates for creditors and insufficient number of successful restructuring procedures conducted within

bankruptcy with possibility to make an arrangement.

After the reform of 2016, there are now 4 new restructuring proceedings, and new legal institution – pre-packaged liquidation/administration, based on British and American regulations – so called pre-pack, regulated in the Bankruptcy Law.

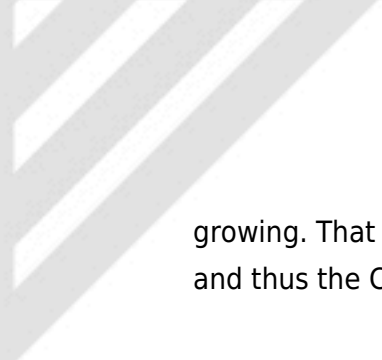
All this new legal instruments create a framework which places Poland as beneficial and encouraged restructuring environment for both debtor and active creditors. It should be pointed out however, that the Restructuring Law significantly improved the situation for the debtor with relation to previous law provisions, and – what is even more important – introduced pre-packaged sale which is a new legal institution, beneficial for all involved parties – insolvent debtors, creditors, investors, the economy and the judiciary.

20. **Do sociopolitical factors give additional influence to certain stakeholders in restructurings or insolvencies in the jurisdiction (e.g. pressure around employees or pensions)? What role does the state play in relation to a distressed business (e.g. availability of state support)?**

In Poland, state sometimes plays active role in restructuring, by agencies or state-aid, when it is available and allowed under the EU regulations. Quite often that leads to improvement of employees situation and protection of workplaces.

21. **What are the greatest barriers to efficient and effective restructurings and insolvencies in the jurisdiction? Are there any proposals for reform to counter any such barriers?**

The greatest barrier to efficient and effective restructuring and insolvencies in Poland is the lack of division in Courts between complicated and complex restructuring and sometimes small, but numerous consumer bankruptcies, which number is constantly



growing. That means that judges in Bankruptcy Courts are handling too many cases, and thus the Court's decisions are delayed.

There is proposal of reform in abovementioned scope, but it surely will take time to restore effectiveness within Bankruptcy Courts.

Another obstacle is lack of electronical system, which is planned to be implemented and enter into force by December 2020.