

AMENDMENT OF THE BANKRUPTCY AND REHABILITATION LAW

The Act of 6 March 2009 Amending the Bankruptcy and Rehabilitation Law, the Bank Guarantee Fund Act and the National Court Register Act entered into force on 2 May 2009. The amendment has introduced numerous changes in the Bankruptcy and Rehabilitation Law of 28 February 2003. These changes are chiefly intended to straighten up and clarify some of the existing provisions of Polish bankruptcy law. Below we discuss a few of the more significant changes.

Subjective Scope of the Act

The definition of a "business entity" created specifically for purposes of the Bankruptcy and Rehabilitation Law has been deleted. The definition of a "business entity" from the Civil Code will now be used instead.

The act also makes it possible for individuals who have ceased to be partners in personal capital companies to declare bankruptcy. Previously, only natural persons conducting business activity independently had the possibility to declare bankruptcy after ceasing business operations.

Business Insolvency and the Threat of Insolvency

A new definition of "insolvency" has been introduced under which a debtor may be deemed insolvent only if it is not performing its financial obligations. The debtor's failure to perform non-financial obligations will not affect the possibility of recognizing the debtor as insolvent.

Provisions allowing commencement of rehabilitation proceedings by business entities have been made less stringent. Previously a rehabilitation proceeding could be brought solely with respect to business entities at risk of insolvency, that is, businesses that were still performing their obligations but anticipated that they would soon become insolvent. Now, if the court dismisses a bankruptcy petition, the court may, upon the debtor's motion, allow the debtor to commence rehabilitation proceedings, if the debtor's debts do not exceed 10% of the balance sheet value of the enterprise, and the debtor has been in default for no longer than three months.

Proceeding to Secure Claims

The mandatory requirement for the court to secure claims in a proceeding seeking a declaration of bankruptcy has been lifted. Now the court will secure the assets of the debtor on the court's own motion if the bankruptcy petition is filed by the debtor. If the bankruptcy petition is filed by a creditor or other entity with the right to secure its claims, the debtor's assets are secured only upon such entity's request.

Rights of Creditors

The obligation to convene a preliminary creditors' meeting if there are grounds for declaration of bankruptcy and the purpose of the proceeding is not solely to liquidate the debtor's assets has been lifted. Now the court may convene a preliminary creditors' meeting for the purpose of adopting a resolution on the manner of carrying out the bankruptcy proceeding, election of a creditors' committee, or approval of a reorganization plan.

Changes have been made in procedures for voting at the creditors' meeting after the declaration of bankruptcy. In reorganization cases, if the debtor is a company, creditors who are natural persons are deprived of the right to vote if they represent over 25% of the share capital of the company.

What is also new is lifting the requirement to establish classes of creditors for voting on a reorganization plan. Now, after approving the list of claims, the judge-commissioner may decide that voting will be held by classes. In such case, the judge-commissioner will prepare a separate list of creditors with the right to vote under specific classes based on their interests.

Classification of Claims

Changes have been made in the classification of claims and interests. Now they are divided into five categories. The previous Category 1 has been split into Category 1 and Category 2. Category 1 now includes only the costs of the bankruptcy proceeding and claims that have arisen after the declaration of bankruptcy, i.e. claims against the bankruptcy estate. All priority claims that arose prior to the declaration of bankruptcy are included in Category 2.

Should you wish to obtain additional information on this topic, please contact Iwona Osiak-Parkowska (iwona.osiak@laszczuk.pl).

STRICT PROCEDURAL SANCTIONS LIFTED IN COMMERCIAL DISPUTES PROCEDURES

A ruling by the Polish Constitutional Tribunal in which the second sentence of Article 479^{8a} § 5 of the Polish Civil Procedure Code was held to be partly unconstitutional went into effect on

5 May 2009. The provision in question applies to separate civil proceedings in commercial matters – primarily cases between business entities related to their business activity.

Previously, if professional attorneys in such cases, i.e. mainly advocates or legal advisors, made formal errors when drafting certain types of pleadings seeking judicial review, i.e. objections to an order of payment in a proceeding by order of payment or in an enforcement proceeding, the court dismissed the objections without summoning the party to supplement or correct the pleading. The Constitutional Tribunal decided that this sanction was too strict and unfairly favoured the plaintiff's position over the defendant's in these proceedings.

The judgment is favourable to business entities, who, since 5 May 2009, no longer risk losing this avenue of judicial review solely because of an error by their attorney.

On 1 July 2009 an amendment to the Civil Procedure Code will go into effect repealing the code section which was partly held to be unconstitutional. The ruling of the Constitutional Tribunal constitutes yet another benefit for some business entities. In the case of proceedings already ended with a final and unappealable decision in which the court dismissed one of these forms of review on the basis of the provision that has now been held to be unconstitutional, the party may demand that the proceeding be reopened within three months from the date of publication of the judgment of the Constitutional Tribunal in the *Journal of Laws*, that is, until 5 August 2009.

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