Consumer Insolvency Proceedings in Poland

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Comment

The present paper is a draft chapter from the comparative study „Consumer Insolvency Proceedings in the European Union, Switzerland and Russia” supervised by Dr. Veronika Sajadova, Prof. Thomas Kadner (University of Geneva) and Prof. Juris Bojars (University of Latvia). Publication of the results of the study in form of a book is planned in 2016.

Abstract

On 31 December 2014 a new Polish regulation of consumer bankruptcy entered into force, replacing previous provisions criticised for their inefficiency. The new regulation liberalized access criteria and introduced State financing for debtors with insufficient assets to pay for the costs of the proceedings. Consumer bankruptcy under Polish law involves a sale of the debtor's assets in ordinary bankruptcy proceedings and subsequent adoption and realisation of a payment plan over a period of up to 3 years (extendable by further 18 months). A possibility for an arrangement with creditors adopted by majority vote has also been provided. More than 2000 consumer bankruptcy cases have been opened under new provisions during 2015, as opposed to ca. 120 cases during the whole period of application of the previous provisions (2009-2014).

Keywords

Consumer insolvency, bankruptcy, overindebtedness, insolvency reform, bankruptcy, bankruptcy proceedings, payment plan, discharge
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* This survey has been prepared based on legal acts in force on 1 January 2016. Later changes have not been reflected.
1. HISTORICAL BACKGROUND

Poland was relatively late to adopt a regulation allowing for the discharge of debts of natural persons in insolvency proceedings. First such regulation was adopted in Art. 369–370 the Law of 28 February 2003 on Bankruptcy and Rehabilitation [Prawo upadłościowe i naprawcze] (hereinafter ‘BRL’)¹ (a general bankruptcy law covering also legal persons), providing only for the possibility of discharge of debts of natural persons who are entrepreneurs (conducting independent business activity). Consumer bankruptcy proceedings, applicable to non-entrepreneur natural persons, were first introduced by the law of 5 December 2008², entering into force on 31 March 2009, as Art. 491¹–491¹² of the Bankruptcy and Rehabilitation Law. Both discharge options did not function well in practice and the number of cases was extremely low. The main reason for the failure of consumer bankruptcy proceedings in their 2008 version was the restrictive accessibility criteria (discharge was only available for debtors whose insolvency resulted from extraordinary circumstances beyond their control) and the need to fund the proceedings from the debtor’s assets, effectively excluding all debtors with insufficient assets to cover the costs of the proceedings.

This led to a reform introduced in two stages³. First, the law of 29 August 2014⁴ has introduced a substantial reform of the provisions on consumer bankruptcy, liberalising access criteria and streamlining the proceedings. The redrafted Art. 491¹–491²³ of the Bankruptcy and Rehabilitation Law entered into force on 31 December 2014. Second, a comprehensive overhaul of Polish insolvency laws has been introduced by the Law of 15 May 2015 on Restructuring [Prawo restrukturyzacyjne]⁵. This law changes the title of the Bankruptcy and Rehabilitation Law into Bankruptcy Law [Prawo upadłościowe] (hereinafter ‘BL’) and redrafts the provisions on discharge of natural persons who are entrepreneurs (Art. 369–370f BL) bringing them broadly in line with the provisions on consumer bankruptcy. This second stage of the reform has entered into force with the Restructuring Law on 1 January 2016.

This chapter discusses only consumer bankruptcy proceedings under Art. 491¹–491²³ BL, with necessary references to the general provisions of the BL as in force from 1 January 2016, leaving provisions on discharge of natural persons – entrepreneurs (Art. 369–370f BL) outside its scope. References to Art. 491¹–491²³ BL in the chapter refer to specific regulations of the consumer bankruptcy proceedings, while references to other provisions of the BL discuss regulations of the general bankruptcy proceedings applicable also in consumer cases.

¹ Initial quotation Dz.U. of 2003 No. 60, item 535, consolidated text Dz.U. of 2015, item 233.
² Dz.U. of 2008 No. 234, item 1572.
³ Disclosure: one of the authors, Marek Porzycki, has participated in the expert group of the Ministry of Justice working on the reform.
⁴ Dz.U. of 2014, item 1306.
⁵ Dz.U. of 2015, item 978.
2. A PRE-ACTION STAGE

According to the BL, the debtor is not required to take any extrajudicial actions before filing the bankruptcy petition.

3. ACCESS TO PROCEEDINGS

3.1. Types of proceedings

Until 01.01.2016 the Polish legislation provided for two types of bankruptcy proceedings – winding-up bankruptcy (upadłość obejmująca likwidację) and reorganization bankruptcy (upadłość z możliwością zawarcia układu). Consumer bankruptcy (bankruptcy of natural persons not carrying out a business activity) is a specific subtype of the winding-up bankruptcy.

From 1.1.2016 Polish insolvency laws provide for one type of bankruptcy proceedings (postępowanie upadłościowe) and four types of restructuring proceedings (postepowania restrukturyzacyjne). Consumer bankruptcy is a specific subtype of bankruptcy proceedings.

3.2. Thresholds for proceedings

The opening of bankruptcy proceedings can take place in the case of the debtor’s insolvency, i.e. if the debtor has lost his or her ability to perform his or her due monetary obligations (Art. 491², Art. 10, Art. 11(1) BL). The law requires the debtor to provide prima facie evidence for his or her insolvency (Article 491²(4)(3) BL). A consumer may file for bankruptcy even if he has only one creditor whom he is unable to satisfy (Art. 491²(2) BL). Insolvency of the debtor is presumed if the delay in performing his or her obligation exceeds three months (Article 11(1a) in conjunction with Art. 491², BL).

A petition for consumer bankruptcy proceedings can only be filed by the debtor himself (Art. 491²(3) BL). Unlike entrepreneurs, consumers are not obliged by law to file for bankruptcy and there is no penalty for failure to file or late filing.

As an exception, a creditor may file for consumer bankruptcy proceedings against his or her debtor if the debtor is a former entrepreneur, i.e. he or she ceased to carry out his or her business activity within last year before the filing of the bankruptcy petition either by the way of cancellation from the registry of entrepreneurs or by actual cessation in case of non-registered activity (Art. 8 and 9 BL). In such case the bankruptcy proceedings are conducted according to provisions on consumer bankruptcy but with one important difference – some circumstances that would normally lead to a dismissal of consumer bankruptcy petition or discontinuation of proceedings (e.g. infringements during the proceedings, causing detriment to the creditors, see items 3.4 and 3.8) in case of a petition of a creditor lead only to exclusion of provisions on the payment plan and discharge (Art. 491¹⁴a BL). In such a case, the proceedings, although technically consumer bankruptcy proceedings, are actually aimed not at discharge but at the satisfaction of creditors.

In a major departure from the general rules of Polish bankruptcy law, the costs threshold does not apply in consumer bankruptcy (Art. 491² excludes the application of Art. 13 and 361 BL). Consequently, if the debtor does not have enough assets to cover the costs of proceedings, the costs are temporarily borne by the State Treasury (see item 12.1).
3.3. Types of debtors

Bankruptcy proceedings are available to all natural persons. There are important structural differences between bankruptcy proceedings applicable to natural persons who are entrepreneurs, i.e. operating a business (regular bankruptcy proceedings) and bankruptcy proceedings applicable to debtors not carrying out a business activity (consumer bankruptcy proceedings). Consumer bankruptcy proceedings are available in general to those natural persons to which regular bankruptcy proceedings do not apply (Art. 491(1) BL). It needs to be noted that regular bankruptcy proceedings are applicable not only to entrepreneurs, but also to partners in a registered partnership or a professional partnership, as well as partners in a limited partnership or a limited joint-stock partnership who bear the unlimited, personal liability for the obligations of the partnership, even if they are not carrying out their own independent business activity (Art. 5(2)(2) and (3) BL). All those persons are also excluded from the scope of application of the consumer bankruptcy.

Former business activity does not exclude the debtor from filing for consumer bankruptcy.

3.4. Restrictions to apply for proceedings

There are some restrictions in access to consumer bankruptcy proceedings in Poland based on the concept of a “deserving debtor” but they have been significantly liberalised by the 2014 reform and most of them can be waived in case of compelling equity or humanitarian grounds.

First and foremost, the court shall refuse the opening of consumer bankruptcy proceedings if the debtor has caused or significantly worsened his or her insolvency intentionally or by gross negligence (Art. 491(4)(1) BL). This restriction cannot be waived on equitable or humanitarian grounds.

Furthermore, the opening of consumer bankruptcy proceedings shall be refused if any of the following situations occurred within the period of ten years before the filing the bankruptcy petition (Art. 491(4)(2) BL):

- consumer bankruptcy proceedings were already opened against the debtor and were discontinued because of an infraction of the debtor;
- consumer bankruptcy proceedings against the debtor were concluded but the subsequent payment plan had been revoked according to Art. 491(20) BL, i.e. because of an infraction of the debtor (e.g. the debtor did not perform his or her obligations according to the payment plan or did not fulfil other duties);
- the debtor failed to file for his or her bankruptcy while being obliged to do so by law (i.e. when carrying out his or her own business activity or being representative of company or partnership);
- the debtor’s actions were declared detrimental to the creditors by the court.

The above restrictions can be waived by the court if equitable or humanitarian grounds justify the opening of proceedings.

The restrictions listed above relating to previous bankruptcy proceedings or to the detrimental actions (Art. 491(4)(2)–(4) BL) do not apply if a creditor files a petition for bankruptcy proceedings against a former entrepreneur (see item 3.2 above). In such a case, the circumstances listed in Art. 491(4)(2)–(4) BL exclude the application of provisions on the payment plan and discharge (Art. 491(14a) BL).
Access to consumer bankruptcy proceedings is also restricted for debtors who have already been granted a discharge in bankruptcy proceedings (either regular or consumer bankruptcy) within ten years prior to filing for consumer bankruptcy (Art. 491(3) BL). The opening of proceedings in such a case is possible if the debtor’s insolvency or worsening of his or her insolvency resulted despite due diligence in administering his affairs, as well as on equitable or humanitarian grounds. In fact this provision results in the restrictions of access to consumer bankruptcy proceedings within 10 years from a previous discharge – while in general access to consumer bankruptcy is excluded only by intention or gross negligence of the debtor, during 10 years from a previous discharge consumer bankruptcy is excluded by any degree of the debtor’s fault.

3.5. Persons eligible to file a petition

Pursuant to Art. 491(3) BL, only the debtor is entitled to file for consumer bankruptcy.

As an exception, creditors are entitled to file for consumer bankruptcy of former entrepreneurs within a year of their cancellation from the registry of entrepreneurs or from the actual cessation of a non-registered activity (Art. 8, 9 BL, see also item 3.2).

3.6. Costs of filing a petition

According to Art. 76a of the Law on judicial costs in civil matters⁶, the debtor is charged PLN 30 as the court fee for filing the petition for consumer bankruptcy. Although the fee can be waived under general provisions on legal aid, applying for the waiver alone is unpractical in view of the very low fee and possible delays resulting from the need to examine the application⁷.

The debtor filing for consumer bankruptcy is not obliged to pay an advance for the cost of proceedings that applies otherwise in general bankruptcy proceedings (Art. 491² BL excluding the application of Art. 22a and 32(5) BL).

Also, taking into account the provisions on temporary State financing of the proceedings (see below, item 12) enabling the opening of consumer bankruptcy proceedings even in case of insufficiency of assets, the reform introduced in 2014 aims at making consumer bankruptcy proceedings fully accessible regardless of assets (or lack of assets) of the debtor and/or his earning power.

3.7. Consequences of commencement of the proceedings

Upon the opening of the bankruptcy proceedings (both general and consumer proceedings) against the debtor, his or her assets become the bankruptcy estate (Art. 61 BL). The debtor loses his or her right to administer, use and dispose of the assets. Those rights are taken over by the liquidator, acting in respect to the bankruptcy estate in his or her own name but with effects for the debtor. The actions of the debtor regarding assets included in the bankruptcy estate are null and void (Art. 75(1), Art. 77(1) BL).

The opening of the bankruptcy proceedings has the following additional consequences:

- monetary obligations of the debtor are accelerated (become due) (Art. 91(1) BL);

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⁷ The waiver however can be beneficial to the debtor, as it allows him to apply for the appointment of a representative ex officio (see item 15).
- non-monetary obligations of the debtor are converted into monetary obligations and become due (Art. 91(2) BL);
- interest due for the period after the opening of the bankruptcy proceedings cannot be satisfied from the bankruptcy estate, except for interest on claims secured by mortgage, maritime mortgage, pledge, registered pledge, fiscal pledge or any other entry into the register, to be satisfied by proceeds of the collateral (Art. 92 BL);
- court proceedings by or against the debtor are suspended and may be further continued either with the liquidator as participant or with the participation of the debtor if the liquidator refuses to join the proceedings (Art. 174, Art. 180 of Code of Civil Proceedings);
- enforcement proceedings are discontinued (Art. 146 BL).

3.8. Termination of proceedings

The consumer bankruptcy proceedings are concluded with the valid adoption of the payment plan (Art. 491\(^{14}\) (3) BL). In such case the debtor is due to obtain discharge after the realisation of the payment plan (see item 4.4). Exceptionally, if the personal situation of the debtor obviously demonstrates that he or she is unable to carry out any payments under a payment plan, the court can refrain from the adoption of the payment plan and conclude the proceedings by granting the debtor an immediate discharge (Art. 491\(^{16}\), Art. 491\(^{14}\) (3) BL).

The court shall discontinue the proceedings in the following situations (Art. 491\(^{10}\) BL):
- upon request of the debtor;
- if grounds for dismissal of the bankruptcy petition became evident only after the opening of proceedings;
- if the debtor did not perform his or her obligation to hand over his or her estate and all related documents to the liquidator or otherwise failed to fulfil his or her duties.

The discontinuation of proceedings excludes the adoption of the payment plan and the subsequent discharge. The court can refrain from discontinuing the proceedings on equitable or humanitarian grounds or if the infringement by the debtor is not significant.

In a later phase, the payment plan can be cancelled by the court if the debtor (Art. 491\(^{20}\) (1)–(2) BL):
- failed to perform his or her obligations assumed under the payment plan;
- did not deliver the compulsory report on implementation of the payment plan;
- failed to report his or her income or the purchase of assets of significant value;
- took actions with regard to his or her assets effectively impairing his or her ability to perform obligations specified in the payment plan without obtaining court’s permission;
- concealed his or her assets;
- concluded a contract declared as detrimental to the creditors by a valid court decision.

In the case of cancellation of the payment plan the court does not issue the decision on discharge (Art. 491\(^{20}\) (3) BL). As a result, the obligations of the debtor are to be performed according to their original extent. The court can refrain from cancelling the payment plan if the infringement by the debtor is minor or if further realisation of the payment plan (and subsequent discharge) is justified by equitable or humanitarian grounds.

3.9. Publicity of proceedings

Information on consumer bankruptcy proceedings is made public according to the same rules as information on general bankruptcy proceedings. No specific limitations exist for disclosing data related to consumer
debtors. In general it means a public announcement of the opening of bankruptcy proceedings and announcements of several events during the proceedings until the final distribution. No announcements during the payment plan phase and of the final discharge take place.

The Restructuring Law of 15.5.2015 envisages the creation of an on-line insolvency register, Central Restructuring and Bankruptcy Register (Centralny Rejestr Restrukturyzacji i Upadłości, CRRU). The CRRU will provide access to information on insolvency proceedings in a searchable and chronologically sorted format, divided into publicly available announcements and information available only to participants in the proceedings after signing in. Provisions on the Register enter into force on 1.2.2018. Until then the announcements will be made in the Court and Commercial Gazette (Monitor Sądowy i Gospodarczy, MSiG) (transitional provision of Art. 455(1) of the Restructuring Law) which is available on the internet8 in an unsorted and unsearchable format.

4. THE PAYMENT PLAN

4.1. Basic procedure

The court adopts the payment plan after a hearing of the debtor, the liquidator and the creditors in two following situations (to Art. 49114 (1) BL):

- after the final distribution plan in bankruptcy proceedings has been carried out;
- in the case of a lack of debtor’s assets, after the list of creditors has been approved.

The decision on the adoption of the payment plan should be served to the creditors and can be challenged by them within a period of one week (Art. 49114 (2) BL). The decision of the second instance court can be challenged by a cassation complaint (i.e. an extraordinary remedy against legally valid court decisions) to the Supreme Court (Art. 49117 BL).

Valid adoption of the payment plan results in the conclusion of consumer bankruptcy proceedings (Art. 49114 (3) BL, see also item 3.8).

The payment plan specifies to what extent the debtor has to satisfy claims left unsatisfied during the bankruptcy proceedings within a set period of time and to what extent the debtor will be granted discharge, after the realisation of the payment plan, from debt originating before the commencement of the proceedings (Art. 49115 (1) BL). A validly adopted payment plan becomes binding on creditors in respect of all claims included in it. During the period of realisation of the payment plan the creditors are prevented from enforcing any claims originating before the adoption of the plan, except claims excluded from the discharge (Art. 49115(6)BL). After the obligations specified in the payment plan have been performed by the debtor, the court issues a decision on discharge of the remaining part of the claims unsatisfied under the plan (Art. 49121 BL). Some claims, in particular alimony claims, periodic claims for damages for causing illness, incapacity to work, disability or death, fines and punitive payments are exempt from the discharge. This rule applies also

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8 See: https://ems.ms.gov.pl/msig/przegladaniemonitorow
to pre-commencement claims that the debtor had deliberately failed to disclose if the creditor in question did not take part in the proceedings (see below, item 5.2).

Subsequent changes to the payment plan are allowed in the following situations (Art. 491\(^{19}\) BL):

- at the request of the debtor, if he is unable to satisfy claims specified in the payment plan, the court may grant the debtor an additional period for payment not extending eighteen months;
- at the request of the creditor or the debtor, in the event of a change of circumstances resulting in a significant improvement of the financial situation of the debtor, except an increase of his or her salary or income from personal activity (the purpose of this exception is to motivate the debtor to seek more income from employment or personal activity).

According to Art. 491\(^{14}\)(1) and Art. 491\(^{16}\) BL, consumer bankruptcy proceedings may be concluded by immediate discharge **without the adoption of the payment plan** if the personal situation of the debtor obviously demonstrates that he or she is unable to carry out any payments under a payment plan (see also above, item 3.8). Immediate discharge is also possible if such situation only occurs after the adoption of the payment plan, during the period of its realisation, and results from circumstances beyond the control of the debtor, justifying the cancellation of the payment plan by the court (Art. 491\(^{19}\)(2) BL)

4.2. Making the plan binding on all creditors

The payment plan becomes binding on all claims included in it as soon as the court decision becomes legally valid. Moreover, other pre-commencement claims not included in the plan (e.g. as a result of failure by the creditor to submit his or her claim in the proceedings) cannot be enforced during the realisation of the payment plan (Art. 491\(^{14}\)(6) BL). The enforcement ban does not only apply to categories of claims excluded from discharge by Art. 491\(^{21}\)(2) BL (see item 5.2).

4.3. Methods of implementation of the plan

The payment plan is a scheme according to which the debtor is obliged to satisfy monetary obligations specified in the plan within a set period of time.

It needs to be noted that the debtor subject to consumer bankruptcy proceedings can also, as an alternative, enter into an arrangement (**układ**) in accordance with slightly modified rules on arrangement in general bankruptcy proceedings (Art. 491\(^{22}\)–491\(^{23}\) BL; Art. 266a–266f BL referring to the Restructuring Law). The arrangement may allow the debtor to keep at least part of his assets (that would be otherwise subject to liquidation in bankruptcy proceedings) and the terms of payment under the arrangement and its duration may vary according to the rules applicable to the payment plan. The conclusion of an arrangement depends on the consent of a majority of participating creditors representing 2/3 of the total value of their claims (Art. 119 RL), with a possibility of overriding the dissent of creditors with minor claims by holding the vote separately in creditor groups (see also item 11.6 for details of the creditors’ vote).
4.4. Duration of the plan

The court sets the period for the realisation of the payment plan, which should not exceed thirty six months (Art. 491\(^{15}\) (1) BL). If the debtor demonstrates that he is unable to satisfy claims included in the payment plan within this period, the court may grant him or her an extension of up to eighteen months (Art. 491\(^{19}\) (1) BL).

4.5. Minimum repayment amount

The Bankruptcy Law does not provide any minimum repayment amount. According to Art. 491\(^{15}\) (4) BL the court has to determine payments under the payment plan taking into account the debtor’s earning possibilities, the need to cover costs of personal maintenance of the debtor and his or her dependents (including their housing needs), the amount of the unsatisfied debt and the prospects for its satisfaction. Depending on those factors, repayment amounts under the plan may even be symbolic in case of debtors with very limited earning possibilities.

4.6. Treatment of debtors with no capacity to repay

The Bankruptcy Law does not exclude debtors with no capacity to pay their debts from access to the consumer bankruptcy proceedings. If the personal situation of the debtor obviously demonstrates that he or she is unable to satisfy any claims under a payment plan, the court may grant him an immediate discharge without adopting a payment plan (Art. 491\(^{14}\)(1), Art. 491\(^{16}\) BL). Moreover, if a permanent inability to pay outstanding debts occurs first after the adoption of the payment plan, during the period of its realisation, and results from circumstances beyond the control of the debtor, the court can also cancel the payment plan and grant the debtor immediate discharge in this case (Art. 491\(^{19}\) (2) BL).

5. DISCHARGE

5.1. Granting discharge

Under Polish consumer bankruptcy law, discharge is in principle only granted after the conclusion of bankruptcy proceedings and subsequent realisation of the payment plan\(^{9}\), with earlier immediate discharge possible in earlier stages. Discharge can be granted in three cases:

- as a result of the realisation of the payment plan (regular case) (Art. 491\(^{21}\)(1) BL),
- during the realisation of the payment plan, if the debtor is permanently unable to carry out the payment plan as a result of circumstances beyond the control of the debtor (Art. 491\(^{19}\)(2) BL),

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\(^{9}\) Readers are therefore advised to take note that the structure of items in this chapter does not reflect the chronological order of stages of the proceedings under Polish law.
- immediate discharge instead of adoption of a payment plan if the personal situation of the debtor obviously demonstrates that the debtor is unable to carry out any payments under a payment plan (Art. 491 BL).

As a general rule, discharge occurs upon full realisation of the payment plan. The scope of the discharge in such a case depends on the previous decision on the adoption of the payment plan (Art. 491(1) BL) which specifies the part of claims that will be satisfied in the payment plan and the remaining part to be covered by the discharge\(^{10}\).

Both other cases of earlier discharge are intended for social reasons, for debtors who are not able to carry out or continue payments because of objective grounds (e.g. permanent incapacity to work resulting from disability or incurable illness).

5.2. Claims excluded from discharge

The discharge only includes claims existing on the day of the opening of the bankruptcy proceedings which are not satisfied during the realisation of the payment plan (Art. 491(1) BL). Correspondingly, post-commencement claims (those that arose during the bankruptcy proceedings or during the realisation of the payment plan) are excluded if still unsatisfied at the time of discharge.

A few categories of pre-commencement claims (existing at the time of the opening of the bankruptcy proceedings) are excluded from discharge by Art. 491(2) BL:

- alimony claims,
- periodic claims for damages for causing illness, incapacity to work, disability or death,
- fines imposed by a court,
- punitive payments and damages imposed by a court in relation to a crime or misdemeanour, including those imposed as probationary measures,
- pre-commencement claims that the debtor had deliberately failed to disclose if the creditor in question did not take part in the proceedings.

5.3. Consequences of discharge

The discharge results in the extinguishing of claims. This effect is not limited to claims listed in the payment plan but applies to all claims existing on the day of the opening of the bankruptcy proceedings which have not been satisfied during the realisation of the payment plan (Art. 491(1) BL), except those specifically excluded (see above). The payment plan and discharge do not affect the rights of the creditor in relation to a co-debtor or guarantor or the creditor’s security interest on collateral belonging to a third person (Art. 491(5) BL). However, such creditor or guarantor or third party owner of collateral is prevented from taking action against the debtor, as the recourse claims against the debtor are subject to the payment plan and subsequent discharge (Art. 491(5) BL).

\(^{10}\) Correspondingly, the cassation complaint to the Supreme Court can be brought against the decision adopting the payment plan (Art. 491 BL) but not against the final decision on discharge which only confirms that the discharge has taken place as a result of the realisation of the payment plan.
Additionally, those claims that arose during the bankruptcy proceedings but before the adoption of the payment plan, although not covered by the discharge, are rendered unenforceable (Art. 491\(^{21}\)(3) BL), unless belonging to one of the categories listed in Art. 491\(^{21}\)(2) BL as excluded from the discharge.

6. COMPETENT COURT

General rules of bankruptcy law on court competence apply. As a result, somewhat incoherently, consumer bankruptcy cases are heard by bankruptcy courts consisting of commercial divisions of the district courts (\(sąd\) \(rejonowy\)), the lowest rank of the court system (Art. 18 BL). Despite their low ranking, commercial divisions hearing bankruptcy cases are centralised to some degree, with only 44 bankruptcy courts existing nationwide.

The expert group of the Ministry of Justice working on insolvency law reform had recommended shifting commercial bankruptcy cases to higher level regional courts (\(sąd\) \(okręgowy\)), while consumer bankruptcies would remain in district court but, in civil law divisions, which are currently competent i.a. in matters relating to enforcement proceedings\(^{11}\). However, proposals for such amendments have been voted against during the parliamentary procedure on the Restructuring Law.

In court, a single professional judge rules in consumer bankruptcy cases (Art. 491\(^{3}\) BL). The territorial competence of the court is established according to the centre of main interests of the debtor, which is defined in Art. 19 BL in line with the recast European Insolvency Regulation\(^{12}\).

As the decisions taken in consumer bankruptcy proceedings involve a final and irrevocable modification of the rights of creditors, cassation to the Supreme Court can be brought against second instance decisions determining the discharge and its scope, decisions adopting the payment plan and decisions granting earlier discharge because of inability to carry out the payment plan (Art. 491\(^{17}\), Art. 491\(^{19}\)(2) BL). This is an exception from the general rule existing in Polish law of non-applicability of cassation in bankruptcy proceedings. It is to be expected that the decisions of the Supreme Court will contribute to the unification of interpretation of provisions on consumer bankruptcy countrywide and will shape practice in consumer bankruptcy cases.


7. INSOLVENCY OFFICE HOLDER

7.1. Types of insolvency office holders

There is a single type of the insolvency office holders (syndyk, also frequently translated into English as “bankruptcy liquidator” or “liquidator”) appointed in consumer bankruptcy proceedings in Poland, even if the conclusion of an arrangement is envisaged.

7.2. Role of the insolvency office holder

The liquidator’s role under general provisions of bankruptcy law is to take over the bankruptcy estate from the debtor, to secure it from loss and to manage it, as well as to proceed with its liquidation (Art. 173 BL). The liquidator’s tasks also include verification of submitted claims and drawing up the list of claims (Art. 243–244 BL), to be later confirmed by the judge-commissioner.

The liquidator also has to investigate the debtor’s assets. In consumer bankruptcy a specific provision requires the liquidator to check the debtor’s records with the tax authorities for the previous five years before filing for bankruptcy as well as to search the National Court Register in order to verify whether the debtor is a shareholder in commercial companies or partnerships or whether he has been a member of managing bodies of commercial companies or partnerships in the previous 10 years before filing (Art. 491 BL). On the basis of such information the liquidator has to verify the correctness of data provided by the debtor in the bankruptcy petition. Any inconsistencies, in particular if the liquidator makes a subsequent discovery of a ground to refuse the opening of consumer bankruptcy proceedings, may lead to the termination of proceedings and refusal of discharge (Art. 491(2) and (3) BL).

7.3. Qualification of the insolvency office holder

Only a person licensed as a restructuring advisor (doradca restrukturyzacyjny)13, a company with at least one licensed representative or a partnership with at least one fully liable partner licensed can be appointed as a liquidator (Art. 157(1) BL). The necessary qualifications for obtaining a license include a university degree, impeccable repute, at least three years of experience in enterprise management and a positive result in an exam in law, economics, finance and management (Art. 3 and 8 of the Law on restructuring advisor license). Citizens of Poland, other EU Member States, EEA member states and Switzerland are eligible for the restructuring advisor license, subject to sufficient Polish language skills (Art. 3(1)(1) and (2) of the Law on restructuring advisor license).

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13 Law of 15 June 2007 on the restructuring advisor license (ustawa o licencji doradcy restrukturyzacyjnego) (Dz.U. of 2014 item 776, as further amended from 1.1.2016 by the RL). Until the entry into force of the RL on 1.1.2016 the profession’s general name was ‘liquidator’ (syndyk). The RL has changed it into ‘restructuring advisor’, while the term ‘liquidator’ is only used as a specific function of a restructuring advisor in the bankruptcy proceedings, as distinguished from functions of an administrator (zarządca) or supervisor (nadzorca) in restructuring proceedings.
No additional specific requirements exist for the appointment as liquidator in consumer bankruptcy proceedings.

7.4. Licensing of the insolvency office holder

The licensing procedure for restructuring advisors is regulated by the Law on restructuring advisor license. The license is granted by the Minister of Justice, subject to the positive result in the exam referred to above, also held by the Minister of Justice. The Minister of Justice can also withdraw or suspend the license in certain conditions.

7.5. Restrictions to act as the insolvency office holder

The restructuring advisor license cannot be granted to persons (Art. 3 of the Law on restructuring advisor license):

- who were convicted of a criminal or fiscal offence;
- who are suspected or accused of an offence subject to public indictment or a fiscal offence;
- who are listed in the register of insolvent debtors ran by the National Court Register.

7.6. Appointment of the insolvency office holder

The liquidator is appointed by the court in the decision on the opening of bankruptcy proceedings (Art. 4915 (5) BL). The choice of the liquidator is at the court’s discretion, subject to the license requirement.

The court is only required to appoint a specific person as a liquidator in the case of a change of liquidator at the request of the creditors committee (as provided for in Art. 207a BL), although even in this case the court can refuse to appoint the person indicated by the committee if that would violate the law, flagrantly infringe the interest of the creditors or if it is obvious that the person indicated would not carry out the liquidator’s duties properly.

7.7. Release of the insolvency office holder

The liquidator can be dismissed by the court in the case of a continued blatant infringement or continued improper performance of his duties despite an earlier warning and a fine (Art. 170(1) BL). The liquidator shall also be changed if his restructuring advisor license is suspended or revoked (Art. 170(5) BL) or on demand of the creditors committee (Art. 207a BL, see above).
7.8. Liability of the insolvency office holder

The liquidator is liable for damages resulting from improper performance of his duties (Art. 160(3) BL). A restructuring advisor appointed as liquidator in bankruptcy proceedings is required to enter into a civil liability insurance contract, with minimum insurance coverage to be specified in an implementing act of the Minister of Justice (Art. 17a of the Law on restructuring advisor license).

8. POSITION OF THE DEBTOR

8.1. Debtor and his or her spouse

The situation of the common estate of the spouses (statutory regime under Polish family law) is controversial under Polish law. According to the general provision applicable in non-consumer bankruptcy proceedings the common estate of the spouses belongs to the bankruptcy estate of the bankrupt spouse and its division is not allowed during the bankruptcy proceedings (Art. 124 (1) BL). However, items used by the other spouse in his or her business activity unless they have been purchased within the past two years before filing the bankruptcy petition are excluded from the bankruptcy estate. The other spouse may submit a claim for his or her share in the joint property in the bankruptcy proceedings as an unsecured bankruptcy creditor (Art. 124(3) BL). The contractual regime establishing the separation of the spouses’ estates (in general allowed under Polish family law) becomes ineffective in the bankruptcy proceedings if the contract has been concluded within two years before filing the bankruptcy petition. The division of the spouses’ joint property also becomes ineffective in the bankruptcy proceedings if it resulted from a court decision, divorce or separation or the incapacitation of one of the spouses occurring within one year before filing the bankruptcy petition (Art. 125 BL).

The above provisions have not been excluded in Art. 491²(1) BL, and, accordingly, they shall apply mutatis mutandis in consumer bankruptcy cases. Application of Art. 124 BL has however been criticized for leading to an unduly harsh result for the non-bankrupt spouse, in particular in the case of estranged spouses or during divorce proceedings before the divorce has taken effect. An alternative view is based on Art. 41 of the Family and Guardianship Code¹⁴ limiting liability for the common estate of the spouses to only those debts that result from acts of one spouse agreed to by the other spouse. As a result, and in view of the fact that Art. 124 BL applies mutatis mutandis but not directly, it has been suggested that the opening of consumer bankruptcy proceedings against a spouse results in an automatic division of the spouses’ estate and only the share belonging to the bankrupt spouse is to be included in the bankruptcy estate. The second, non-bankrupt spouse is entitled to keep his or her share resulting from the division of the common estate.¹⁵ It remains to be seen which interpretation will be adopted by the judiciary.

The Bankruptcy Law does not provide the possibility for the debtor and his or her spouse to jointly file the bankruptcy petition. If both spouses have filed for their respective bankruptcies, the court may hear the case jointly (Art. 219 of the Code of Civil Procedure) and eventually join bankruptcy proceedings against both spouses appointing the same persons as judge-commissioner and liquidator in both proceedings, combining

the creditors committee and creditors meeting (Art. 215 BL). Joining cases does not however result in substantive consolidation of the bankruptcy estates of both spouses.

8.2. Principle of good faith

In principle, infringements by the debtor against the principle of good faith in various stages of the proceedings lead to the refusal of discharge.

If the information provided by the debtor in the bankruptcy petition is false or incomplete, the petition shall be dismissed, unless the incorrectness or incompleteness of the information is irrelevant or the opening of proceedings is justified on equitable or humanitarian grounds (Art. 491(4) BL).

The court shall discontinue the consumer bankruptcy proceedings without adopting a payment plan (resulting in refusal of discharge) if the debtor did not perform his or her obligation to hand over his or her estate and all related documents to the liquidator or otherwise did not fulfil his or her duties, unless the infringement by the debtor is insignificant or the continuation of proceedings is justified on equitable or humanitarian grounds (Art. 49110 BL).

The payment plan can be cancelled by the court, resulting in refusal of discharge, if the debtor (Art. 49120 (2) BL):

- did not deliver his or her report on implementation of the payment plan;
- failed to report his or her income or the purchase of assets of significant value;
- took any actions in regard to his or her assets effectively impairing his or her ability to perform obligations specified in the payment plan without obtaining the court’s permission;
- concealed his or her assets;
- concluded a contract declared as detrimental for creditors by a valid court decision.

Again, the court shall refrain from cancelling the payment plan if the infringement by the debtor is insignificant or the continuation of proceedings is justified on equitable or humanitarian grounds.

8.3. Restrictions imposed on the debtor

With the commencement of the bankruptcy proceedings the debtor loses the right to manage, use and dispose of the assets included in the bankruptcy estate to the liquidator (Art. 75 (1) BL). The debtor is obliged to hand over his or her estate and all related documents to the liquidator (Art. 57 (1) BL).

During the realisation of the payment plan the debtor is not allowed to take actions in respect of his or her assets which would effectively impair his or her ability to perform obligations specified in the payment plan. As an exception the court may allow such actions in justified cases (Art. 49118 BL).
8.4. Persons connected to the debtor

For the purposes of declaration of ineffectiveness of debtor’s actions according to Bankruptcy Law (see item 10.2), the following persons are deemed to be connected with the debtor:

- the debtor’s spouse
- the debtor’s descendant or ascendant or their spouse,
- the debtor’s sibling or their spouse,
- the debtor’s adoptee or adoptive parent,
- the debtor’s life partner or a person who lives with the debtor;

For the purposes of declaring the ineffectiveness of detrimental actions of the debtor according to the Civil Code (Art. 527–534 of the Civil Code, applicable according to Art. 131 BL) the category of “closely connected persons” is provided in Art. 527(3) of the Civil Code. This provision does not further define this category which is deemed to include any person remaining with the debtor in such a familiar or factual relationship to justify the presumption that this person should know debtor’s financial situation and his or her intentions.

9. DEBTOR’S ASSETS

9.1. Disposal of debtor’s assets

Upon the opening of bankruptcy proceedings the debtor loses the right to manage and dispose of his assets, with the exception of those assets that are exempt from the bankruptcy estate (Art. 61, Art. 75(1) BL). No debtor-in-possession arrangements are possible in consumer bankruptcy under Polish law. The debtor can only be authorized by the liquidator to sell movable assets belonging to the estate but such sales are realised on behalf of the estate (Art. 491\textsuperscript{12} BL).

Any acts of the debtor in respect of assets included in the bankruptcy estate are void (Art. 77(1) BL).

9.2. Assets included in the proceedings

General provisions on the composition of the bankruptcy estate apply in consumer bankruptcy. In principle, all assets of the debtor, both belonging to him on the date of the opening of proceedings and acquired thereafter in the course of proceedings, constitute the bankruptcy estate \textit{(masa upadłości)} and are included in the proceedings (Art. 61 and 62 BL). Some assets are exempt from the bankruptcy estate (see below).

9.3. Assets excluded from the proceedings

Assets not belonging to the debtor shall be excluded from the bankruptcy estate (Art. 70 BL). The person entitled to such assets can file a request for exclusion of the asset in question from the estate to the judge-commissioner (Art. 72–73 BL). The procedure of exclusion of assets from the estate in consumer bankruptcy
is somewhat simplified in comparison to the general rules, in particular with regard to the appeal against the ruling of the judge-commissioner to the bankruptcy court (Art. 491 \(^1\) (2) and (3) BL; and Art. 491 \(^2\) (1) excluding the application of Art. 74 BL).

The category of ‘assets not belonging to the debtor’ subject to exclusion from the bankruptcy estate does not apply to collateral subject to title transfer arrangements even if technically transferred to the creditor’s ownership. Such assets are treated as collateral subject to pledge, with the creditor being correspondingly entitled to separate satisfaction within the bankruptcy proceedings (Art. 70 \(^1\) BL).

9.4. Exempt property

Some assets belonging to the debtor are exempt from the bankruptcy estate and left to the sole disposal of the debtor. Exempt assets include (Art. 63 BL):

- assets exempt from seizure in enforcement proceedings under the Code of Civil Procedure. Under Art. 829 of the Code, such assets include i.a. basic household goods, necessary clothing, assets needed for the debtor’s personal professional activity (the exemption does not however extend to vehicles) as well as several other categories of assets necessary for the basic level of maintenance of the debtor and his family;
- the debtor’s remuneration for work in the part exempt from seizure. The extent of the exemption is specified in Art. 87–87\(^1\) of the Labour Code as half of the remuneration amount but, in any case, is at least the amount corresponding to the net minimum wage (currently PLN 1,286.16). In relation to creditors entitled to alimony claims, the exemption is limited to two fifths of the remuneration amount, without the lower limit in the amount of the net minimum wage;
- assets exempted from the estate by a resolution of the creditors meeting.

9.5. Assets in joint ownership

Divergent interpretations exist, as to whether assets jointly owned by the debtor and his or her spouse as their common property are included in the bankruptcy estate of the spouse (which would result from Art. 124(1) BL). Should this provision be applied, the other spouse could only submit a claim for his or her share of the common property in the bankruptcy proceedings and obtain pro-rata satisfaction as an unsecured ordinary creditor (Art. 124(2) BL). An alternative interpretation assumes that the common property of the spouses is subject to automatic division upon the opening of consumer bankruptcy proceedings and only the share belonging to the bankrupt spouse is included in the bankruptcy estate. See above, item 8.1.

Under the first of the abovementioned interpretations, if both spouses are to be subject to bankruptcy proceedings, their common property would be included in the bankruptcy estate of the spouse for whom the proceedings were first opened, while the claim of the other spouse for his or her share of the common property would be included in the latter’s bankruptcy estate. Under the second interpretation, the common property would be split between the bankruptcy estates of each spouse. The law does not regulate the situation in which bankruptcy proceedings against both spouses are opened at the same time. The practical solution in such cases would most probably include merging the two sets of proceedings, which is permitted under Art. 215(5) BL.
9.6. Sale of assets

The sale of assets of the bankruptcy estate in consumer bankruptcy takes place according to general rules of bankruptcy proceedings (Art. 306–334 BL). The sale of assets by the liquidator should be preceded by an inventory and a general report on the condition of the insolvency estate, to be drafted as soon as possible after the opening of bankruptcy proceedings (Art. 306–308 BL). The judge-commissioner may suspend the sale of assets until the opening of bankruptcy proceedings becomes final (Art. 309 BL). In general, the liquidator should aim to conclude the sale of all assets of the estate within six months of opening the proceedings (Art. 308(2) BL), although this time limit is not enforceable.

The sale of assets in consumer bankruptcy proceedings may be suspended by the judge-commissioner if the creditors’ meeting is summoned for the vote on an arrangement (Art. 491 22(2) BL).

Assets included in the bankruptcy estate should be in principle sold at an auction (Art. 320 BL) but sale without an auction is possible if agreed by the creditors committee (Art. 206(1)(3) BL) or if a prompt sale of movable assets is needed to cover the costs of proceedings or to avoid loss of value (Art. 310 BL). In the case of movable assets a specific provision applicable only in consumer bankruptcy allows the sale to be performed by the debtor, subject to authorization by the liquidator (Art. 491 12 BL).

9.7. Sale of mortgaged property

Under Art. 313 BL, the sale of assets in bankruptcy proceedings has the same effects as a sale in enforcement proceedings. Consequently, mortgages and other rights in rem on assets are extinguished by the sale in bankruptcy proceedings (Art. 313(2) BL). The respective mortgagee or creditor with a right in rem is satisfied by the proceeds of the sale of the collateral with priority to other creditors (so called right to separate satisfaction, similar to Absonderungsrecht under German and Austrian law) (Art. 336 and 345 BR).

In consumer bankruptcy the satisfaction of the secured creditor may sometimes be hampered by the provision on housing allowance for the debtor. If an apartment or a house where the debtor has lived is included in the bankruptcy estate, and the debtor and his dependents have no other housing available, the debtor is entitled to a housing allowance from the proceeds of the sale of his apartment or house, in an amount equivalent to average rent of a residential apartment in the same or neighbouring locality for 12 to 24 months, to be specified by the judge-commissioner (Art. 491 13 BL). Such allowance is financed from the proceeds of the sale with priority even to the mortgagee. Particularly in the case of low-value housing in less-attractive locations, the housing allowance can amount to a considerable part of those proceeds.

Proceeds from the sale of mortgaged real estate are distributed under a separate distribution plan (Art. 348 BL).
10. DEBTOR’S CONTRACTS AND TRANSACTIONS

10.1. Treatment of contracts

Monetary claims against the debtor become due upon the opening of the bankruptcy proceedings (Art. 91 (1) BL). Non-monetary claims against the debtor are converted into monetary claims and become due at the same time (Art. 91 (2) BL).

Under Art. 98 BL, the liquidator has the right to choose whether to accept or reject executory (reciprocal) contracts that are outstanding at the moment of the opening of the bankruptcy proceedings, i.e. not fully performed by either of the parties. If choosing to accept the contract, the liquidator has to perform the debtor’s obligations (which are then considered administration claims) and can demand performance from the counterparty. In the case of rejection of the contract, the counterparty’s claims are reduced to the general category of unsecured ordinary claims (Art. 342(1)(2) BL).

Special rules apply to some other specific contracts not fully performed at the time of the opening of the proceedings. In particular, rental contracts are excluded from the liquidator’s right to accept or reject the contract, either if the debtor is the landlord or the tenant. Rental contracts over real estate belonging to the debtor remain in force and binding on the bankruptcy estate if the real estate has already been delivered to the tenant before the opening of the bankruptcy proceedings. However, the contract can be terminated by the liquidator (acting on the basis of a decision of the judge-commissioner) even if the debtor himself would not be entitled to terminate the contract under general rules, if the rent agreed in the contract varies from average rent for similar real estate or if the continuation of the contract would impede the liquidation of the bankruptcy estate (Art. 109 BL). If the debtor is a tenant and the asset (movable or immovable) has not yet been delivered to him or her at the time of the opening of bankruptcy proceedings, both parties can withdraw from the contract. The contract is then considered cancelled. If the asset has been delivered to the debtor, the liquidator can terminate the contract even if termination by the debtor would not be allowed under general rules (Art. 110 BL).

It is also worth mentioning that a contract for bank loan (kredyt bankowy) expires with the commencement of the bankruptcy proceedings to the extent to which the money has not been delivered to the debtor before that date (Art. 111 BL). If the money has been delivered, the debtor is hit by the acceleration of the bank’s claim under Art. 91(1) BL (see above). The opening of the bankruptcy proceedings has no effect on other bank contracts, i.e. bank accounts or deposits (Art. 112 BL).

10.2. Voidable and revocable transactions

Under Art. 77(1) BL any of the debtor’s transactions related to his or her assets included in the bankruptcy estate, entered into after the opening of the bankruptcy proceedings, are null and void.

The Bankruptcy Law also provides for ineffectiveness of some transactions entered into by the debtor before the commencement of the bankruptcy proceedings considered detrimental to the creditors. Such transactions,
listed below, do not become invalid but only ineffective in relation to the bankruptcy estate, resulting in a duty of the counterparty to return any benefits received to the bankruptcy estate (Art.134 BL).

**Gratuitous contracts** become ineffective by law, if they have been entered into within a period of one year before filing for bankruptcy; the same rule applies to the contracts where the consideration received by the debtor was in flagrant disparity with the benefits for the counterparty, to the degree that the contract can be considered in fact gratuitous (Art. 127 (1) BL).

**Transactions with a range of persons connected to the debtor**, including the debtor’s spouse, debtor’s descendant or ascendant or their spouse, debtor’s sibling or their spouse, adoptee or adoptive parent, debtor’s life partner or a person who lives with the debtor, regardless whether the debtor received consideration can be declared ineffective by the judge-commissioner, acting ex officio or on request of the liquidator, if the transaction was made within a period of six months before filing for bankruptcy (Art. 128 (1) BL). The counterparty can avoid the ineffectiveness of the transaction by proving that no detriment to the creditors is caused.

**Securities granted by the debtor in favour of a third party** (not being a personal creditor) within a period of one year before filing for bankruptcy can be declared ineffective by the judge-commissioner acting on request of the liquidator (Art. 130 BL), if the security was granted without a consideration or for merely symbolic consideration, or if it was granted in favour of persons connected to the debtor, as provided for by Art. 128 (1) BL, even if the debtor has received consideration, unless the beneficiary proves that no detriment to the creditors is caused.

**Other detrimental transactions** can be declared ineffective, at the request of the liquidator, by the court in separate civil proceedings according to general rules provided for in the Civil Code (Art. 131 BL). The transaction is considered detrimental (i.e. it damages the interests of the creditors) if by entering into it the debtor has caused his or her insolvency or increased its level (Art. 527 (1),(2) of the Civil Code) or concluded the contract with intention to damage the interest of his or her future creditors (Art. 530 of the Civil Code). The transaction can only be declared ineffective if the debtor was aware of its detrimental effects and the other party knew or should have known it (Art. 527 (1) of the Civil Code), unless the transaction has been gratuitous (Art. 528 of the Civil Code). Persons close to the debtor are presumed to know that the debtor damages the interest of the creditors (Art. 527 (3) of the Civil Code).

According to Art. 127 (3) BL, **early payment of a debt not yet due** or granting security for a debt not yet due, if effected within a period of six months before filing for bankruptcy, becomes ineffective by law at the moment of the opening of the bankruptcy proceedings. As a result the liquidator can claim the amount received by the creditor in such ineffective payment back to the bankruptcy estate. The receiving party can demand in a separate civil action that the payment is declared effective if he or she was unaware of the insolvency of the debtor.

**A marital property agreement** between the debtor and his or her or her spouse introducing the separation of the spouses’ estates becomes ineffective in relation to the bankruptcy estate by law if the agreement has been concluded within the past two years before filing the bankruptcy petition (Art. 126(1) BL, see also item 8.1).
11. POSITION OF THE CREDITOR

11.1. Protection of creditors’ rights

The court decision on the opening of the bankruptcy proceedings calls on the creditors to submit their claims within a month of its publication in the Court and Commercial Monitor (from 1 February 2018 it will be published online in the Central Restructuring and Bankruptcy Register, CRRU, Art. 491(5), Art. 236(1) BL, see also item 3.9). The creditors whose addresses are known from the debtor’s bankruptcy petition or his or her documentation are nevertheless individually notified about the opening of bankruptcy proceedings by the liquidator (Art. 176 BL). Creditors whose claims are secured by mortgage, maritime mortgage, pledge, registered pledge, fiscal pledge or any other entry into the real estate register or maritime register enjoy even better protection since their claims should be included in the list of claims ex officio by the liquidator even if not submitted by the creditor (Art. 236(2) BL).

The court decision on the adoption of the payment plan or immediate discharge without adopting the payment plan should be issued after the hearing of the creditors (Art. 491(14)(1) BL). The creditors are then entitled to challenge the respective court decision with a regular appeal and also with the (extraordinary) cassation complaint (Art. 491(14)(2) and Art. 491(17) BL).

Pursuant to Art. 491(5) BL the adoption of the payment plan does not hinder secured creditors from satisfying their claims from collateral granted by third persons or from demanding satisfaction from guarantors or other third persons jointly liable for the debtor’s debt. The payment plan does not also affect claims of creditors that were deliberately not disclosed by the debtor and did not participate in the proceedings (Art. 491(21)(2) BL).

The creditors committee can be appointed for the protection of creditors’ rights. The creditors committee is entitled i.a. to request the appointment of a particular person as a liquidator (Art. 170(3), Art. 207a BL).

11.2. Submission and approval of creditors’ claims

The creditors have to submit their claims to the judge-commissioner within 30 days of the publication of the decision on the opening of the bankruptcy proceedings (Art. 491(5), Art. 236(1) BL). A general call to creditors to submit their claims is included in the decision on the opening of the proceedings. Moreover, creditors whose addresses are known from the debtor’s bankruptcy petition or his or her documentation are individually notified about the opening of bankruptcy proceedings by the liquidator (Art. 176 BL). Claims secured by mortgage, maritime mortgage, pledge, registered pledge, fiscal pledge or any other entry in the real estate register or maritime register should however be included in the list of claims ex officio by the liquidator even if not submitted by the creditor (Art. 236(2) BL).

Creditors are also entitled to lodge their claims after the submission deadline has lapsed. In this case the creditor remains excluded from any previous stages of the proceedings he had missed, in particular from any previous distributions or votes in creditors meetings (Art. 262 BL).
The claims are to be submitted in writing in two copies. Once the CRRU is operational, submissions online via the Registry will also be possible (Art. 239 BL). The submission should fulfill all general formal requirements under civil procedure law and additional requirements provided for by the BL, including information on the creditor, particulars of the claim, any security interest and the status of civil or administrative proceedings regarding the claim if such proceedings are pending.

Claims should be lodged with the judge-commissioner who decides whether the formal requirements are met (Art. 241(1) BL). The submissions are then forwarded to the liquidator who examines them against debtor’s books, any other documents (especially enforcement titles), real estate register or any other registry and subsequently includes them in the list of claims, if the existence and amount of the claim is confirmed (Art. 243 BL). The debtor is asked to declare whether he acknowledges the claim (Art. 243(1) BL). A public announcement on the conclusion of drafting of the list of claims is then made, with the contents of the list being made available to interested parties (currently in the court secretariat, from 1 February 2018 online via the CRRU (Art. 255 BL).

After the announcement of the compilation of the list all creditors are in principle allowed to challenge the list of approved claims by raising an objection within a period of two weeks following the announcement (Art. 256 BL). Their rights vary depending on whether their claims have been rejected or approved. Creditors whose claims have been rejected are only entitled to challenge the rejection. Creditors admitted into the list can challenge both the scope of admission of their own claim as well as the admission of any other creditor (Art. 256(1) BL). Claims adjudicated by final court decision may only be challenged on the grounds of circumstances arising after the hearing on the case has been closed (Art. 258 BL).

The objections are examined by the judge-commissioner in oral hearings involving the liquidator, the debtor, the challenging creditor and the creditor whose claim has been challenged (Art. 259 (1) BL). The decision of the judge-commissioner is subject to further appeal by the concerned creditor to the bankruptcy court (Art. 259 (2) BL).

11.3. Curtailment or modification of creditors’ claims

In principle, neither the opening of bankruptcy proceedings nor the subsequent adoption of the payment plan lead to any modification of creditors’ claims (however, see above for the acceleration of claims and effects on contractual relationships, at item 10.1). However, the creditors are prevented from enforcing their claims both in bankruptcy proceedings (Art. 146 BL) and during the realisation of the payment plan (Art. 49115 (6) BL). Eventually, claims not satisfied during the bankruptcy proceedings or under the payment plan expire as a result of the discharge (see above, items 5.1–5.3).

An alternative way for a modification of creditors’ claims without their full discharge exists in the form of an arrangement with creditors (układ, in accordance with slightly modified rules on arrangement in general bankruptcy proceedings, Art. 49122–49123 BL and Art. 266a–266f BL referring to the Restructuring Law, see item 11.6 for required majorities). The arrangement may allow the debtor to keep at least part of his or her assets (that would be otherwise subject to liquidation in bankruptcy proceedings) while terms of payment under the arrangement and its duration may vary from the rules applicable to the payment plan. The introduction of an arrangement into the consumer bankruptcy proceedings creates a possibility for both the
debtor and the creditors to agree a deal allowing the creditors to keep at least part of their claims, possibly in a modified form, in return for allowing the debtor to keep part of his or her assets.

11.4. Right of set-off

After the opening of the bankruptcy proceedings, the creditor is entitled to set-off his or her claim against the debtor’s claim if both claims already existed at the moment of the declaration of the bankruptcy, even if one of them was not yet due (Art. 93(1) BL).

A claim acquired after the opening of the bankruptcy proceedings cannot be set-off against a debt towards the debtor (Art. 94 (1) BL). Set-off is only allowed for those creditors who became the debtor’s creditors after the opening of the bankruptcy proceedings as a result of paying a debt of the debtor for which they were liable personally or in rem, provided they were unaware of the debtor’s insolvency at the moment of assuming the liability or they had assumed the liability at least one year before the opening of the bankruptcy proceedings (Art. 94(2) BL).

11.5. Satisfaction of creditors’ claims

Proceeds from the liquidation of the bankruptcy estate are to be distributed among creditors according to distribution plans drafted by the liquidator and confirmed by the judge-commissioner (Art. 347–351 BL). Once the bankruptcy estate has been fully liquidated, a final distribution plan is to be prepared. The realisation of the final distribution plan paves the way for the conclusion of the bankruptcy proceedings by adoption of the payment plan (Art. 49114 BL) or immediate discharge in justified cases (Art. 49116 BL) (see also items 3.8 and 5.1).

Distribution of proceeds under a distribution plan among unsecured creditors takes place according to the ranking provided for in Art. 342(1) BL, listing four categories:

- privileged claims including alimony claims and periodic claims for personal damages and annuities;
- general category for unsecured ordinary claims, including tax claims16;
- subordinated claims including interest on higher-ranking claims (if not satisfied together with the principal), fines and administrative penalties, claims resulting from donations and legacies.

The fourth category is irrelevant for consumer bankruptcy as it includes claims against companies resulting from shareholder loans.

Claims are satisfied according to the principle of priority between categories (i.e. claims ranking in a higher category need to be fully satisfied before creditors from a lower category obtain any payment) and proportionally (pari passu) within categories (Art. 344 BL).

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16 It needs to be noted that the abolishment of privileged treatment of tax claims in Polish bankruptcy law has only been introduced by the Restructuring Law of 15.5.2015 and entered into force on 1.1.2016. This amendment changes a long-established Polish legislative tradition of privileged treatment of public law creditors. Tax claims continue to be privileged in the enforcement proceedings.
A separate distribution plan is prepared and carried out for proceeds of assets encumbered by rights in rem (mortgage, pledge, registered pledge), providing for separate satisfaction of the secured creditor from proceeds of the collateral (Art. 336 and 345 BL, see also item 9.7).

11.6. Creditor bodies

In consumer bankruptcy proceedings, as in general bankruptcy proceedings, there are two creditor bodies: the creditors meeting and the creditors committee.

The creditors meeting is summoned by the judge-commissioner if its resolution is required by the law, at the request of individual creditors representing a specified amount of approved claims or in any other case if the judge-commissioner considers it necessary (Art. 191 BL). The liquidator, the debtor and members of the creditors committee can be summoned to the creditors meeting and asked to provide explanations. Their absence however does not preclude vote by the creditors meeting (Art. 194 BL).

In principle, only creditors holding approved claims are entitled to participate in the creditors meeting with voting rights (Art. 195(1) BL). The judge-commissioner may additionally allow a creditor with a conditional or contentious claim to vote if sufficient prima facie evidence supporting the claim has been presented. The creditors vote with the amount of the claim. If the creditor has been allowed to vote by the judge-commissioner, the judge-commissioner should also specify the amount of the claim used to calculate his or her voting rights (Art. 195(2) BL).

As a general rule, a resolution of the creditors meeting is adopted by a simple majority of creditors present (no quorum required) whose claims need to represent at least one fifth of the total amount of claims held by creditors entitled to attend the meeting (Art. 199(1) BL). However, specific majority requirements apply to most of the resolutions required by law. In particular, the resolution on the adoption of the arrangement (układ), allowed in consumer bankruptcy under Art. 49122–49123 BL (see also items 4.3 and 11.3), requires a simple majority of voting creditors (no quorum required) whose claims amount to at least two thirds of the total amount of claims held by voting creditors. If the vote on the arrangement is held in groups of creditors (as determined by the judge-commissioner), this majority should be reached in each group. As an exception, the resolution on the adoption of the arrangement is also passed if the required majority has not been reached in one or more groups but if the majority of creditors supporting the arrangement is holding claims amounting to at least two thirds of the total amount of claims held by voting creditors (Art. 266f BL, Art. 119 RL).

The appointment of the creditors committee is in principle non-mandatory and depends on discretion of the judge-commissioner. However, the judge-commissioner is required to appoint the creditors committee at the request of the debtor or at least three creditors or creditors holding claims representing at least one fifth of the total amount of the claims (Art. 201 BL). If the creditors committee is not appointed, or if it fails to reach its decision within a specified deadline, its powers are carried out by the judge-commissioner (Art. 213 BL).

The creditors committee consists of three or five creditors and one or two deputies, with corporate creditors being represented by their representatives (Art. 202 and 204 BL). As an exception, the creditors committee may consist of three members if the total number of creditors participating in the proceedings is less than seven. Selection of the members of the creditors committee depends in principle on a discretionary decision of the judge-commissioner. Creditors holding claims amounting to at least one fifth of the total amount of
claims are entitled to appoint (or change) one member of the creditors committee for each one fifth of the total amount of claims (Art. 202a, Art. 203 BL).

According to Art. 205 BL, the creditors committee assists the liquidator, controls his or her activities, examines the bankruptcy estate and exercises an advisory role. More importantly, authorization of the creditors committee is required in several cases, including e.g. borrowing on behalf of the bankruptcy estate (rarely, if ever, needed in consumer bankruptcy proceedings) or establishing security interest over debtor’s assets (Art. 206 BL).

The creditors committee makes decisions by a simple majority. Decisions of the creditors committee can be challenged by the creditors, the debtor and the liquidator and overturned by the judge-commissioner on grounds of illegality or if the decision violates the rights of the creditors (Art. 210 (4) BL). The inspection of the activities of the liquidator and the examination of the estate may be delegated to selected members of the creditors committee (Art. 207 BL).

Members of the bankruptcy committee are liable for damage caused to the debtor or a creditor as a result of negligence in fulfilling their duties (Art. 212 BL).

11.7. Rights of the creditor bodies

In consumer bankruptcy proceedings the creditors meeting decides on two issues:

- the exclusion of assets from the bankruptcy estate (Art. 63 para 2 BL);
- and the adoption of the arrangement (Art. 491\textsuperscript{22} – 491\textsuperscript{23}, Art. 266c, Art. 266f BL).

According to Art. 205 BL the creditors committee assists the liquidator, controls his or her activities, examines the estate and provides advice. Authorization of the creditors committee is required for borrowing and establishing security interest over the debtor's assets as well as for sales of assets of the bankruptcy estate without a tender (Art. 206 BL). The actions of the liquidator taken without the authorization of the creditors committee, if such authorization is required by law, are null and void.

The creditors committee (Art. 205 BL) and the judge-commissioner (Art. 152(1) BL) may subject further acts of the liquidator beyond the list provided for in Art. 206 BL to the approval of the creditors committee.

The creditors committee is also entitled to take a resolution obliging the court to appoint a specific person as a liquidator (Art. 207a BL). A qualified majority of four out of five creditors committee members or a unanimous decision of a creditors committee composed of three members is required. With the debtor’s consent, such resolution of the creditors committee can also be taken by simple majority.
12. COSTS OF THE PROCEEDINGS

12.1. Administrative costs of the proceedings

The costs of proceedings, as listed in Art. 230(1) BL, include:

- expenses of securing, managing and liquidating of the bankruptcy estate, in particular the remuneration of the liquidator,
- expenses of the creditors committee and the general creditors meeting,
- costs of correspondence and announcements,
- taxes and other levies related to the liquidation of the bankruptcy estate.

In practice, in most consumer cases, the remuneration of the liquidator is the single biggest cost. The reform introduced in 2014 aimed at reducing the costs of consumer bankruptcy proceedings by streamlining the provisions on the remuneration of the liquidator (see below, item 12.2) and abolishing the requirement for costly and inefficient announcements in newspapers (see also item 3.9 on publicity of proceedings).

According to Art. 343(1) BL, the costs of proceedings are covered with absolute priority in relation to any other claims or expenses.

The costs of proceedings should be in principle covered from the bankruptcy estate. However, in a deviation from the general rule of bankruptcy law requiring sufficient assets of the debtor for the opening and conduct of bankruptcy proceedings, consumer bankruptcy proceedings are opened regardless of sufficiency of assets (Art. 491\(^2\)(1) BL excludes the application of Art. 13 and Art. 361 BL). The removal of the costs threshold by the 2014 reform has been justified i.a. by constitutional grounds as debtors should not be refused access to discharge in bankruptcy proceedings solely because of their inability to cover the costs of proceedings\(^{17}\). If the assets of the debtor are not sufficient to cover the costs of proceedings or there are no liquid funds in the bankruptcy estate to cover the costs, they are temporarily covered by the State Treasury on the basis of a decision of the judge-commissioner specifying the amount of the costs (Art. 491\(^7\)BL). The State Treasury is then reimbursed with priority if any funds appear in the bankruptcy estate (Art. 491\(^7\)(4)BL). If the State Treasury does not recover its costs during the proceedings, its claim for reimbursement should be included in the payment plan and paid in full by the debtor during the realisation of the plan (Art. 491\(^15\)(3) BL). Correspondingly, only in cases of earlier discharge for social reasons\(^{18}\) can the costs of proceedings be definitively borne by the State Treasury, in part or in full.

So far no statistics exist on the percentage of consumer bankruptcy cases that are financed by the State Treasury, both temporarily and definitively.

\(^{17}\) See explanatory memorandum to the draft law introducing the 2014 reform, Sejm document no. 2265 from 7 February 2014, p. 15.

\(^{18}\) During the realisation of the payment plan, if the debtor is permanently unable to carry out the payment plan as a result of circumstances beyond the control of the debtor (Art. 491\(^{19}\)(2) BL), or instead of adopting the payment plan if the personal situation of the debtor obviously demonstrates that he or she is unable to carry out any payments under a payment plan (Art. 491\(^{16}\) BL), see item 5.1.
12.2. Remuneration of the insolvency office holder

The 2014 reform has introduced a specific provision on remuneration of the liquidator in consumer bankruptcy proceedings. According to Art. 491(9) BL, the level of remuneration is set by the court and ranges from ¼ of the average monthly wage in the enterprise sector in the fourth quarter of the preceding year to double the average monthly wage (currently from ca. PLN 1,035 to ca. PLN 8,280, as on the basis of 2014 data). In exceptionally justified cases requiring heavier workload because of complexity of the case and the number of creditors, remuneration up to four times the average monthly wage can be granted (currently ca. PLN 16,560). The above amounts exclude value-added tax (Art. 167a BL).

When determining the amount of the remuneration, the court has to take into consideration the value of the bankruptcy estate, the degree of the creditors’ satisfaction, the workload of the liquidator required in the case, the degree of difficulty of the liquidator tasks and the duration of the proceedings.

12.3. Approval of administrative costs

There is no general provision on approval of costs of proceedings. A decision of judge-commissioner is required to order a payout of the costs temporarily borne by the State Treasury (Art. 491(2) BL, see item 12.1).

13. SUPERVISION

13.1. Supervisory body

According to the Law of 15 June 2007 on the restructuring advisor license (see item 7.3), the Minister of Justice can be considered a supervisory body for the profession of restructuring advisors (appointed as liquidators in bankruptcy proceedings), as it is the authority competent for granting, suspending and revoking restructuring advisor licenses. No compulsory professional bodies of organizations exist for the restructuring advisors. Existing chambers of liquidators are private organisations and the participation in them is voluntary.

13.2. Competence of the supervisory body

The Minister of Justice is competent for granting, suspending and revoking restructuring advisor licenses, as well as for maintaining the list of licensed restructuring advisors.

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19 The biggest and most important one in practice is the National Chamber of Liquidators (Krajowa Izba Syndyków), see [http://www.izbasyndykow.pl/](http://www.izbasyndykow.pl/).
As the ongoing supervision of the liquidator’s activity in the proceedings belongs to the bankruptcy court, the court informs the Minister of Justice about cases of dismissal of the liquidator on the basis of a flagrant or repeated infringement (Art. 170 BL). The bankruptcy court is also competent to establish a flagrant or repeated infringement by a liquidator in already concluded bankruptcy proceedings (Art. 18a of the Law on the restructuring advisor license). In both cases the Minister of Justice revokes the restructuring advisor license of the delinquent liquidator.

13.3. Disciplinary liability of the insolvency office holder

The judge-commissioner can first reprimand a liquidator for improper performance of his or her duties. Failure to correct the improper performance despite a reprimand or a significant infringement can result in a fine of PLN 1,000 to PLN 30,000, imposed by the judge-commissioner. Failure to correct the improper performance despite a fine or a flagrant infringement justify a dismissal of the liquidator by the bankruptcy court (Art. 169a–170 BL). Two dismissals for disciplinary reasons lead to the revocation of the restructuring advisor license by the Minister of Justice (Art. 18(1)(2) of the Law on the restructuring advisor license).

The liquidator is also liable for damages resulting from the improper performance of his or her duties (Art. 160(3) BL).

14. CRIMINAL OFFENCES IN CONNECTION WITH BANKRUPTCY

Insolvency-related criminal offences are provided for in Art. 300–302 of the Criminal Code:

- hampering the satisfaction of creditors by hiding or fraudulent disposal of assets in the case of threat of insolvency or bankruptcy (Art. 300(1));
- deliberate causing of insolvency (Art. 301(2));
- negligent causing of insolvency by wasteful disposal of assets or obviously harmful transactions (Art. 301(3));
- selective satisfaction of some creditors to the detriment of other creditors (Art. 302(1)).

An indictment under any of those provisions is usually a strong sign that grounds for refusal to open consumer bankruptcy proceedings probably exist. However, no automatic refusal can be assumed and any case needs to be assessed individually under the provisions on consumer bankruptcy.

Deliberate provision of false information in the request to open bankruptcy proceedings is a further criminal offence defined in Art. 522(1) BL.

15. DEBT COUNSELLING SERVICES

So far there is no nationwide public debt-counselling service providing specific bankruptcy-related advice in Poland.
However, a comprehensive system of publicly financed free legal aid for beneficiaries fulfilling certain social criteria (e.g. social assistance beneficiaries) was launched on 1st January 2016\textsuperscript{20}. This system was designed to offer general legal advice, including bankruptcy-related advice to consumers. Furthermore, assistance in consumer bankruptcy matters is provided by a range of NGOs and institutions providing legal aid, e.g. university legal clinics, consumer protection associations and faith-based charities.

Under general provisions of civil procedure law (Art. 117–124 of the Civil Procedure Code), the debtor is also entitled to request the appointment of a representative \textit{ex officio} at the State Treasury expense if he or she has been given a waiver of court fees (see item 3.6) and demonstrates that he cannot bear the costs of appointing a representative without compromising the maintenance of him or herself and his or her family.

\section*{16. INTERNATIONAL INSOLVENCY LAW}

Until 31.12.2015 Polish consumer bankruptcy proceedings were automatically recognized and effective in other EU Member States except Denmark as winding-up bankruptcy (\textit{upadłość obejmująca likwidację}), listed in Annex A to the Council Regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings\textsuperscript{21}. After the entry into force of the Law of 15 May 2015 on Restructuring, as of 1.1.2016, consumer bankruptcy proceedings now constitute a specific type of bankruptcy proceedings (\textit{postępowanie upadłościowe}). In order to maintain the EU-wide automatic recognition and effectiveness of Polish proceedings the Polish authorities still need to apply to the EU institutions for an amendment in Annex A taking into account the changed structure of Polish insolvency proceedings – both in the Council Regulation (EC) No 1346/2000, which will continue to apply until 25 June 2017, as well as in the Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings (recast)\textsuperscript{22} which will replace it from 26 June 2017.\textsuperscript{23} As of 1 January 2016 no information on a planned amendment to the Annexes to both Regulations has been made publicly available.

\section*{17. STATISTICS}

Under earlier provisions on consumer bankruptcies, in force since 2009 until 2014, consumer bankruptcy proceedings were used very rarely and were widely considered a failure. After the entry into force of the 2014 reform (on 31.12.2014) the number of proceedings being opened initially rose exponentially and now, despite some slowdown, the number continues to grow\textsuperscript{24}. It is still too early to provide any statistics on the success rates of these proceedings.

\textsuperscript{20}The Law of 5 August 2015 on free legal aid and legal education (Dz.U. of 2015, item 1255).
\textsuperscript{22}OJ L 141, 5.6.2015, p. 19.
\textsuperscript{23}See M. Porzycki, Prawo restrukturyzacyjne a zakres zastosowania unijnego prawa upadłościowego, Monitor Prawniczy, 2015, No. 20, pp. 1073-1076.
\textsuperscript{24}Source: Centralny Ośrodek Informacji Gospodarczej (a private sector entity monitoring bankruptcies), \url{http://www.coig.com.pl/2015-upadlosc-konsumenckaLista_osob.php} (1.1.2016). The numbers indicated here have also been confirmed by data from the Ministry of Justice.
<table>
<thead>
<tr>
<th>Period</th>
<th>Number of consumer bankruptcy proceedings opened</th>
</tr>
</thead>
<tbody>
<tr>
<td>Under 2008 provisions:</td>
<td></td>
</tr>
<tr>
<td>2009–2014 (total)</td>
<td>121</td>
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<tr>
<td>Under 2014 reform:</td>
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<tr>
<td>January 2015</td>
<td>2</td>
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<td>February 2015</td>
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<td>April 2015</td>
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<tr>
<td>May 2015</td>
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<td>June 2015</td>
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<tr>
<td>July 2015</td>
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<tr>
<td>August 2015</td>
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<td>October 2015</td>
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<td>November 2015</td>
<td>267</td>
</tr>
<tr>
<td>December 2015</td>
<td>331</td>
</tr>
<tr>
<td>2015 (total)</td>
<td>2112</td>
</tr>
</tbody>
</table>

18. CRITICISM

19. RECOMMENDATIONS

As current provisions on consumer bankruptcy are very recent and no full course of proceedings (except cases of immediate discharge) has yet reached its conclusion, it is still rather too early to identify their weak points in practice. An issue that certainly requires more precise regulation, as divergent interpretations have emerged, is the situation of joint property of spouses in the case that one of them enters into bankruptcy, as well as the situation where bankruptcy cases are being heard jointly against both spouses and proceedings against both of them are opened simultaneously (see above, items 8.1 and 9.5). The recommended solution in such cases would probably be to divide the joint property of the spouses between their respective bankruptcy estates in equal parts, unless grounds for a different division are given by either the spouses or by the liquidator.
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