

# ❖ COMMENCING REORGANIZATION PROCEEDINGS

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# Objective

- **Preservation of value**
- **English approach**  
*“Financial distress” not “insolvency”*
- **Judicial development of statutory frame**
- **Available processes**
  - A Selection

# Scheme of Arrangement

- **Company law base: application**
- **By Company** (but could be creditor)
- **Underlying philosophy**
  - Creditors as best judges of their interests
  - Classes
  - Binding dissentients
- **What typically happens**
- **Role of Court**
  - A fair process
  - Timescales
  - Effect of order

# Restructuring Plan

- **Similarity to scheme of arrangement**
- **Necessity for “financial distress”**
- **Overriding a dissentient class**
- **Substantive “fairness”**
- **What typically happens**

# Administration

- Debtor and creditor driven
- Insolvency or near insolvency
- Objectives
  - Rescue of the company (cf “business”)
  - A better outcome for creditors than immediate liquidation
  - Realisation for distribution to a secured creditor
- **Outcome:** independent management by an insolvency practitioner who is an officer of the Court owing duties to the general body of creditors as a whole

# Administration: procedures

## - In Court : administration application

- Who may apply
  - Protection of chargeholder or creditors
- The issues:
  - Financial
  - Objectives
  - Disputed debt
- Evidence: written
- Hearing
- What the Court can do
- Timescales: Interim Moratorium

# Administration: procedures

## Out of Court: appointment

- Why have the option?
- By qualifying chargeholder
  - Contrast “receivership”
  - Filing with the Court
- By the company or directors
  - Outstanding petition or application
- Notice
- Appointment

# Voluntary Arrangements

- **Debtor driven** (by directors of company)
- **“Out of Court” unless challenged**
- **No formal requirement of insolvency or distress**
- **“Better outcome than alternative”**
- **“Nominee” reports to Court and oversees process**
  - **If approved plan implemented by “supervisor”**



# MSEs

- No separate process for micro and small enterprises
- Flexible application of rules in case of SMEs (Small and Medium Enterprises)

# Abuse and its prevention

- Premature application
- Rushing the process
- Oppression of minority
- Role of Court sanction
- Biased administrator
- “Pre-pack” administration
- Role of Court oversight

# Commencing reorganization proceedings in Poland



Małgorzata Jaskulska

## What is their purpose?

Restructuring proceedings are aimed to enable the debtor to regain the ability to settle liabilities by concluding an arrangement with creditors.

In the event of filing an application for liquidation and reorganization, the court will firstly examine grounds for reorganization.

Conversion to liquidation/conversion to reorganization

## Main principles of reorganization proceedings

- the principle of protecting the debtor's legitimate rights
- the principle of collective interest of creditors (group's dominance).

The level of disputed receivables is crucial (less than 15%).

Restructuring proceedings are conducted with the participation of a trustee.

## Is insolvency necessary?

The debtor may file for reorganization if:

1. is already insolvent
2. envisages that, in the near future, will not be in a position to pay its debts when they come due.

## Who commences?

Restructuring proceedings are initiated upon application submitted by the debtor (with one exception).

The court refuses to open restructuring proceedings if the proceedings would result in violation of the interests of the creditors - anticipative review by the court.

The court refuses to open arrangement or restructuring proceedings also if the debtor has no ability to cover the costs of the proceeding.

## What procedures are available?

- approval of a reorganization plan – hybrid nature,
- arrangement procedure,
- accelerated arrangement procedure,
- restructuring proceedings



## Proposal of a reorganization plan

Proposals are submitted by:

debtor

creditors' council

court supervisor

creditor

The plan to be negotiated and proposed after commencement of reorganization proceedings

*(this may be a more flexible option, while the debtor has the protection of the stay).*

Possible misuse - debtors who have no intention of proposing or the ability to propose a plan but are seeking to obtain only the benefits of the stay.

## What is the judicial involvement?

The court ensures compliance with the law and safeguards procedural guarantees of the participants.

Examples of legal regulations protecting creditors include:

- 1) an order to refuse to open restructuring proceedings if it would result in violation of creditor's interest,
- 2) the possibility to refuse the plan if its terms are grossly unfair to creditors who voted against the arrangement and raised objections,
- 3) obligatory discontinuation of reorganization proceedings if it is stated that conducting the proceedings would infringe the creditor's interest.

## Are there special rules for MSEs?

- separate proceedings for entities of special importance
- certain solutions for micro-entrepreneurs and entities of special importance

## What is the potential for abuse?

- Mock “Pre-pack”,
- Late application,
- Apparent application,
- Oppression of minority,
- Conflicting interests of creditors



# **REORGANIZATION PROCEEDINGS**

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## MAIN ISSUES

- **Access only to the debtor.** Creditors may only apply for liquidation
- **Objective:** the goal is to overcome insolvency by reorganizing the company or the debtor's liabilities through an agreement between the debtor and the creditors
- **Judge:** acts as a process director, with broad powers to investigate the debtor's financial situation and carry the process forward to an agreement if possible. If it fails, bankruptcy may be declared, even a second chance for an agreement can occur in the case of some companies, in what is called 'business rescue', where third parties, not just the debtor, can participate by offering agreements

# PROCEEDINGS

- **A.P.E.:** Out-of-court preventive agreements: Expedite or Hybrid proceeding because they may be subject to judicial approval
- **Concurso Preventivo:** Judicial Restructuring proceeding
- **APE approach:** Financial distress
- **C.P. approach:** Insolvency

Both are subject to judicial approval and may be enforced upon the creditors who are included whether they make a claim or not.

The judge is compelled admit the application if all entry condition and formal requirements has been met.

# Hybrid or Expedited arrangements

## **APE –Acuerdo preventivo Extrajudicial: legal guidelines**

- Very limited and imprecise legal regulation and oversight.
- Creditors are appointed by debtor only, not through a judicial process
- Without a trustee: case law: appointment of an Ad-Hoc trustee
- Legal nature: Contractualist? Insolvency process? If they ask for judicial approval, then Insolvency rules apply; otherwise, it is considered of a contractual nature.
- **It's a prepacked solution?**

**Role of Court:** extensive judicial power: legal and abuse control

**Possibility of dismissal:** If the debtor hides creditors or in any way falsifies information, or legal majorities were not obtained

The approved agreement has an expansive effect on all involved creditors.



# Judicial Restructuring Proceeding

- Application by the debtor must meet the formal requirements established by law.
- The debtor may also confess about its insolvency.
- Role of Court: the judge is compelled to admit the proceeding if all the formal entry conditions has been met.
- That decision is not subject to appeal, unless it is a dismissal of the application
- **The court** is unable to choose or convert the type of proceeding applied to the debtor, even if it is shown that there is no chance of restructuring.

## Role of the Court

- During commencement, law assumes that it's better for all parties to open such proceedings.
- They give an adequate safeguard to the debtor due to automatic stay and provisional relief of precautionary measures.
- Reorganization proceedings keep the Debtor in Possession.
- Under the supervision of the trustee. With the power of control and management oversight, and court authorization to disposition of assets
- As a sanction, the court may decide to appoint a judicial administration, even displacing the debtor from the administration of their assets.

# Potential for Abuse

- **In Expedited / Hybrid Arrangements (A.P.E):**
  - By concealing the true financial situation of the debtor
  - By not including a certain creditor and attempting to force the agreement on them with majorities controlled by the debtor.
- **In Judicial reorganizations (C.P.)**
  - It is often very difficult to determine whether an application for commencement is abusive when submitted
  - The legal commencement criteria are of a formal nature.
  - The existence of abuse may be detected later, which may lead to the agreement not being approved. Alternatively, the judge may use their authority to make corrections to avoid abuse.

# MSEs Proceedings

- **Law does not provide for special procedures for MSEs**
- The Court usually simplifies the given rules to reduce formalities, to facilitate access to reorganization.
- The role of the Court has changed: now requires a judge who not only manages the process but also acts as a strong guardian of constitutional principles, often not adequate provided in the bankruptcy law.
- **‘Principles...’ W.B. / ‘Legislative Guide...’ UNCITRAL are of key importance for interpreting the law and adapt it to the current circumstances**
- Examples: Admitting the debtor’s application without payment of fees; Court challenging the constitutionality of the privilege regime to establish priority payment to individuals qualified as *vulnerable*. Among others