

DIRECTORS' DUTIES – CRISIS MANAGEMENT CHECKLIST – POLAND

WHAT DUTY?	WHAT DOES IT MEAN?	WHEN DOES IT APPLY?
<p>MAINTENANCE OF SOLVENCY</p> <p>MANAGEMENT OF BUSINESS RISKS</p>	<ul style="list-style-type: none"> • best efforts to preserve company's liquidity and sound financial structure • duty to manage and continuously assess credit risk, market risk, operational risk and liquidity risk • specific duty to take known crises into account for liquidity management purposes <ul style="list-style-type: none"> ◦ CAVEAT: <i>liquidity support via shareholder loans if a company is in "crisis" may entail equitable subordination of such loans resulting in repayment ban during "crisis" and/or subordinated status in potential subsequent insolvency</i> • if the balance sheet shows a loss in excess of the sum total of the supplementary (<i>kapitał zapasowy</i>) and reserve capital (<i>kapitały rezerwowe</i>) and half of the share capital, the management must call a shareholders' meeting to adopt a resolution on whether or not the company should continue to exist 	<p>Pre-crisis and post-crisis</p> <p>Enhanced scrutiny in respect of known crises</p>
<p>CAPITAL INCREASE AND ADDITIONAL SHAREHOLDER PAYMENTS</p>	<ul style="list-style-type: none"> • management may consider requesting shareholders to perform a capital increase (not an obligation strictly speaking) • management may consider requesting additional payments (<i>dopłaty</i>) by shareholders (not an obligation strictly speaking) 	<p>Pre-crisis</p>
<p>SUSPENSION OF NON-ESSENTIAL PAYMENTS</p> <p>PROHIBITION OF UNEQUAL TREATMENT OF CREDITORS</p>	<ul style="list-style-type: none"> • payments should be limited (not an express obligation but advisable to avoid liability on the basis of unequal treatment of creditors and claw-back in bankruptcy) to include: <ul style="list-style-type: none"> ◦ employment-related expenses such as wages and related social contributions, severance payments etc. ◦ regular operating expenses (electricity, water etc.) ◦ regular/scheduled payments to suppliers ◦ tax liabilities • provided that such continued payments aim at preserving the business operations (the value of the business) • general prohibition of unequal treatment of creditors • transactions resulting in preferential treatment of certain creditors and/or reduction of value of company's assets may be challenged/subject to claw-back in hypothetical subsequent insolvency proceedings 	<p>Onset of Insolvency * ("T")</p>
<p>FILING FOR BANKRUPTCY</p>	<ul style="list-style-type: none"> • if company becomes insolvent, management must file for bankruptcy • alternatively, management may arrange for the opening of restructuring proceedings 	<p>T + 30 days OR</p> <p>C-19 END ** + 30 days</p>

* **ONSET OF INSOLVENCY:** Deemed to have occurred when the debtor becomes insolvent. Under Polish law, a company is insolvent if it is either (A) **unable to pay its overdue debts** – presumed if the delay in the relevant payments **exceeds three months**; or (B) **over-indebted** – meaning that the debtor company's **monetary obligations** (excluding future liabilities and liabilities towards affiliates) **exceed the value of its assets** and if this state of over-indebtedness **continues for an uninterrupted period of at least 24 months + 1 day**.

** **C-19 END** means end of the state of epidemic or the state of epidemiological emergency (the state of epidemic has been pending in Poland since 20 March 2020). **IMPORTANT: prolonged deadline** applies **only** to companies who **became insolvent as a result of COVID-19** (Polish law provides for a (rebuttable) **presumption** that insolvency occurring during the state of epidemic or the state of epidemiological emergency, results from COVID-19).

RESTRUCTURING TOOLBOX – CRISIS MANAGEMENT CHECKLIST – POLAND

WHAT TOOL?	WHAT DOES IT DO?	WHAT IS REQUIRED?
OUT-OF-COURT RESTRUCTURING	<ul style="list-style-type: none"> arrangement between company and its creditors (typically financial creditors) where: <ul style="list-style-type: none"> creditors agree to postpone due date and enforcement of payment claims for limited period of time such that terms of restructuring can be agreed ("stand-still") <i>and</i> if negotiations are successful, creditors and company enter into a restructuring agreement freedom of contract: <ul style="list-style-type: none"> parties are free to shape contents of standstill/restructuring agreements <i>but</i> all affected parties (company and relevant creditors) must agree to stand-still and restructuring agreement 	Consent by all affected creditors
COURT-SPONSORED RESTRUCTURING (GENERALITIES)	<ul style="list-style-type: none"> Polish law provides four types of court-sponsored restructuring proceedings, differing in scope of protection for the debtor and restructuring instruments may be initiated by company being insolvent or threatened with insolvency If approved by requisite % of affected creditors, the terms of the proposed arrangement (typically, extension of maturity and/or reduction of debt claims) will be compulsory for all affected creditors ('cram-down') restructuring options cover maturity extension, haircut, instalments, conversion of receivables into shares, collateral release arrangement approved by creditors needs to be approved by court 	<ul style="list-style-type: none"> Motion by company (or creditor in rehabilitation proceedings) with competent court Formal admission of (threatened) insolvency
ARRANGEMENT APPROVAL PROCEEDINGS	<ul style="list-style-type: none"> proceedings may be opened if the amount of disputed claims* against the company does not exceed 15% of the total amount of all claims key features: <ul style="list-style-type: none"> company remains in possession (=management remains in control) of business very flexible and move quickly (company collects the votes from creditors on arrangement by itself, without court involvement) no enforcement holiday/stand-still applies with respect to the company 	<ul style="list-style-type: none"> Agreement with supervisor Collection of votes from creditors on arrangement Approval of arrangement by court
ACCELERATED ARRANGEMENT PROCEEDINGS	<ul style="list-style-type: none"> proceedings may be opened if the amount of the disputed claims against the company does not exceed 15% of the total amount of all claims key features: <ul style="list-style-type: none"> company remains in possession of business, but approval for activities outside ordinary course of business is required enforcement holiday/stand-still applies with respect to the affected claims 	<ul style="list-style-type: none"> Filing of application Formal opening of restructuring proceedings Appointment of supervisor
ARRANGEMENT PROCEEDINGS	<ul style="list-style-type: none"> proceedings may be opened if the amount of the disputed claims against the company exceeds 15% of the total amount of all claims key features: <ul style="list-style-type: none"> company remains in possession of business, but approval for activities outside ordinary course of business is required enforcement holiday/stand-still applies with respect to the affected claims 	<ul style="list-style-type: none"> Filing of application Formal opening of restructuring proceedings Appointment of supervisor
REHABILITATION PROCEEDINGS	<ul style="list-style-type: none"> legal tool aimed at deep economic restructuring, proceedings may be opened irrespective of the amount of the disputed claims against the company key features: <ul style="list-style-type: none"> the company is deprived of right to manage its business and the administrator is appointed (but the debtor may apply to court to retain control with management – "debtor-in-possession mode") wider variety of remedial options in comparison to proceedings 1-3 above (e.g. employee redundancies) enforcement holiday/stand-still with respect to all claims (including secured claims, e.g. mortgage, pledges) right to terminate disadvantageous agreements by administrator 	<ul style="list-style-type: none"> Filing of application Formal opening of restructuring proceedings Appointment of administrator

* **Disputed claims: debt claims alleged** to be owed by the company to (third party) **creditors** but which are disputed by the company either in **amount** or **basis**. A list of claims (setting out the quantum of disputed claims) is prepared as a prerequisite for opening of any of the restructuring proceedings.

Legal notice: the above summary, prepared by Schoenherr Attorneys at Law, is for informational purposes only and does not constitute legal advice which should be sought in relation to specific situations. In case of questions, please contact d.radwanski@schoenherr.eu / m.antczak@schoenherr.eu / w.kapica@schoenherr.eu