Vilnius University Press

Contents lists available at Vilnius University Press

Teisė
2023, vol. 126, pp. 142–152

ISSN 1392-1274 eISSN 2424-6050
DOI: https://doi.org/10.15388/Teise.2023.126.10

The Influence of SARS-CoV-2 on the Polish Insolvency Law

Andrzej Torbus

https://orcid.org/0000-0003-3930-2658
dr. hab. prof. UŚ
Institute of Legal Sciences of the University of Silesia, Poland
E-mail: Andrzej.torbus@us.edu.pl

The impact of the covid-19 pandemic on the business environment created the risk of numerous insolvencies of entrepreneurs. The aim of this study is to discuss the impact of the COVID-19 pandemic on the Polish insolvency Law and to compare the solutions adopted in Poland with those in use in other countries.
Keywords: bankruptcy proceedings, insolvency, COVID-19, declaring bankruptcy, procedural deadlines, entrepreneur bankruptcy, restructuring.

SARS-CoV-2 įtaka Lenkijos nemokumo teisei

COVID-19 pandemijos poveikis verslo aplinkai sukėlė daugelio verslininkų nemokumo riziką. Šio tyrimo tikslas – aptarti COVID-19 pandemijos poveikį Lenkijos nemokumo teisei ir palyginti Lenkijoje priimtus sprendimus su kitose šalyse taikomais sprendimais.
Pagrindiniai žodžiai: nemokumo procedūros, nemokumas, COVID-19, nemokumo paskelbimas, procedūriniai terminai, verslininko nemokumas, restruktūrizavimas.

Introductory remarks

In Poland, as in other countries, there was fear of a serious economic collapse caused by the effects of the SARS-CoV-2 (COVID-19) virus*. The economic forecasts were not optimistic. It was expected that the number of insolvencies could increase in 2020 by nearly 70% compared to the previous year. It was also expected that Poland would experience negative phenomenon of the so-called 'shrinking of economy' by up to 4% (Coface Report: Bankruptcies and...). It is obvious that the wave of bankruptcies, reduced production, increased inventories, and the collapse of supply chains could have caused a permanent trend that would affect the economy in the following years.

In a normal economic and social situation, it is beneficial for the functioning of the economy to eliminate or rehabilitate insolvent entrepreneurs. Removal of insolvent enterprises from the market, with no chance of getting out of debt, is a positive phenomenon. Maintaining such entrepreneurs causes

* The article was created as part of the grant implemented by the University of Silesia *Impact of the COVID-19 pandemic on the justice system. Case study and suggested solutions* from the NAWA intervention grants program No. BPN / GIN / 2021/1/00006 / U / 00001 (number UN-2105-001).

Received: 12/07/2022. **Accepted:** 01/03/2023

an increase in payment gridlocks and dysfunction in the framework of multilateral cooperation (e.g. consortium agreements in the construction industry). It is obvious that the COVID crisis could have caused an economic collapse and, consequently, mass bankruptcy. It was noticeable that the coming economic crisis would affect entrepreneurs who, prior to the SARS-CoV-2 impact, had been operating without problems on the market, generating sufficient income. Bankruptcies without fault could be expected, especially in industries most susceptible to administrative restrictions on running a business.

In Poland, the system of regulation of insolvency or the threat of insolvency is regulated by two separate acts: the Bankruptcy Act of 2003[1] and the Restructuring Act of 2015[2]. For the sake of simplicity, I refer to both regulations as the Polish Law on Insolvency. The Polish Law on Insolvency did not provide for any instruments to protect entrepreneurs against a sudden deterioration in the conditions for running a business. It is therefore fully understandable that there was a need to introduce regulations to prevent uncontrolled bankruptcies. As in other countries, it was possible to observe the phenomenon of flexible legislative activity, introducing subsequent changes as an ad hoc reaction to the changing circumstances related to COVID-19.

It is aptly pointed out that legislative acts adopted in response to a virus crisis can be described as emergency law (Wessels, 2020, p. 1), which is not always consistent. The Polish Supreme Court pointed to the necessity of a purposeful interpretation, since the provisions were drafted hastily and ad hoc in the period of panic and chaos related to the appearance of an unknown virus and widespread fear of infection[3].

This study aims to discuss the key solutions adopted by the Polish legislator in the Insolvency Law. In order to clarify the purposefulness of specific solutions, the solutions adopted in Germany and Austria will be used for comparison. The scope of the research conducted did not include issues related to the functioning of courts in the pandemic era (delivery, remote meetings, taking evidence) and consumer bankruptcy. Legislative solutions, even if they are not currently in force, may be restored in the face of an unclear future, especially since the economic effects of possible recurrences of the SARS-CoV-2 virus and Russia's brutal attack on our eastern neighbor are still unknown.

1. Procedural deadlines

The Polish legislator introduced a special regulation in the field of procedural deadlines. Under art. 15zzs of the COVID-19 Act[4], during the period of an epidemic threat or state of an epidemic announced due to COVID-19, the running of "procedural and judicial deadlines" in court and enforcement proceedings did not start, and the commenced ones were suspended for this period[5]. The cited provision

[1] The Act of February 28, 2003 – Bankruptcy Law (Journal of Laws of 2020, item 1228, as amended) hereinafter as b.l.

[2] The Act of May 15, 2015, Restructuring Law, Journal of Laws 2021.1588, i.e. of 2021.08.30 (the act is in force from 01.01.2016) hereinafter as r.l.

[3] Decision of the Supreme Court of November 13, 2020, V CZ 60/20, LEX No. 3087077.

[4] The Act of 2 March 2020 on special solutions related to the prevention, counteraction and combating of COVID-19, other infectious diseases and the crisis situations caused by them (Journal of Laws of 2021, item 2095, as amended), hereinafter the COVID Act – 19. The provision of art. 15zzs of the COVID-19 Act introduced pursuant to Art. 1 point 14 of the Act of March 31, 2020 amending the Act on special solutions related to the prevention, prevention and combating of COVID-19, other infectious diseases and crisis situations caused by them and some other acts (Journal of Laws, item 568, as amended).

[5] The provision entered into force on March 31, 2020 and expired on May 24, 2020 pursuant to Art. 46 point 20 in connection with Art. 76 and art. 68 sec. 6 and 7 of the Act of May 14, 2020 amending certain acts in the field of protective measures in connection with the spread of the SARS-CoV-2 virus (Journal of Laws, item 875, as amended).

did not refer to the legal act regulating specific court proceedings. Both bankruptcy and restructuring proceedings are classified as types of civil proceedings, and thus the discussed regulation was directly applicable in these proceedings. The provision of Art. 15zzs of the COVID-19 Act applied directly to the procedural deadlines regulated by the provisions of the bankruptcy law (e.g. Art. 168 section 3 in the wording before 1.12.2021, Art.210 section 2 b.l.) or the provisions of the Code of Civil Procedure, which are applied by means of a specific reference (Art. 35, Art. 229 b.l.). The same is true in the case of restructuring proceedings, which are court proceedings. Directly from the provision of Art. 209 r.l. it follows that the provisions of the Code of Civil Procedure should be applied accordingly to restructuring proceedings.

Art. 15zzs sec. 4 of the COVID-19 Act in the version in force from 18/04/2020 to 16/05/2020 deserves special attention. On its basis, the court, under the discretionary power granted, could flexibly adjust the procedural deadline and its length to the situation in a specific bankruptcy proceeding. Robert Kulski aptly commented on this provision, stating that the court could set a procedural deadline for a party to perform an action or order a which will be longer than the one provided by provisions of generally applicable law, if required by the public interest or an important interest of the party (Kulski, 2020, p. 446–447). A party, a participant in the proceedings, were obliged to perform the activities within the prescribed period, under pain of the effects that the law binds with the expiry of the procedural deadline. The issuing of a court decision in this regard was not dependent on the prior request of an interested party (a participant in bankruptcy proceedings – a debtor, a creditor, or a receiver), but it could constitute an important indication, an impulse for the judicial act. Taking into account the fact that the bankruptcy proceedings should proceed without unnecessary delays, the provision of Art. 15zzs sec. 4 of the COVID-19 Act could be used to achieve the purpose of the procedure[6]. An example of the argument for the validity of the above thesis is the need to quickly examine a complaint against a court decision dismissing an application for approval of the so-called pre-pack[7] (Art. 56d sec. 2 b.l.). The rejection of the application means that the trustee in bankruptcy performs all activities necessary to manage the bankruptcy estate, including the sale of assets and the termination of contracts concluded by the bankrupt[8]. Submitting a complaint by the debtor against the court's decision appealable only after May 24, 2020 could cause a radical change in the company's situation.

The regulation on procedural time limits (statutory and court) discussed above had some drawbacks, which, however, does not change its purposefulness. Very important doubts were raised about relevant intertemporal rules for establishing the applicability of Art. 15zzs of the COVID-19 Act[9].

---

[6] The legislator noticed this aspect, but, unfortunately, after some time, introducing Art. 14a sec. 4 point 17a of the COVID-19 Act, under which the bankruptcy case was classified as urgent. This provision came into force after the repeal of Art. 15zzs of the COVID-19 Act, and thus had no effect on the exclusion of the suspension of the commencement or suspension of the course of trial deadlines. The provision expired at the end of September 4, 2020 (Kulski, 2020, p. 443).

[7] Polish Law provides for the possibility of selling all or part of the insolvent enterprise to the buyer indicated by the debtor. After approval of the application by the court and payment of the price by the buyer, continuation of the bankruptcy proceedings is unnecessary. The debtor's creditors are satisfied with the sum obtained from the sale. Such proceedings should be quick and efficient.

[8] Pursuant to Art. 61 b.l., all the assets of the bankrupt constitute the bankruptcy estate, including those components of the estate that make up the enterprise in terms of the object. There is no basis for excluding the bankruptcy trustee's obligation to manage the bankruptcy estate (Article 174 sec. 2 of the b.l.), only because the procedural deadline for appealing against the decision is open.

[9] According to the prevailing view in the doctrine, in the absence of a specific provision which provides for the effect of retraction, the provision of Art. 15zzs of the COVID-19 Act entered into force on March 31, 2020. Due to the reference to the state of epidemiological threat, the hypothesis of this provision considered the validity of interpreting the retro agit rule as at the date of announcement of this state (March 13, 2020) (Zob. Sawicki, 2020, p. 618). The Supreme

The rejection of the solution adopted in Germany, where no specific provisions regarding the impact of COVID-19 on the course of procedural deadlines have been introduced, should be assessed positively[10]. It was consistently recognized in the German doctrine that *in casu* the court should decide whether the situation of a party in a trial (a participant in bankruptcy proceedings) or his attorney resulting from pandemic conditions justifies the granting of an application for an extension of the procedural deadline or its reinstatement on the basis of relevant procedural provisions (extension of the deadline – § 224 section 2, § 225 ZPO,[11] reinstatement of the deadline – § 233 ZPO) (Rauscher, 2020, Rn. 26–27, 33–35). It seems, however, that the Polish solution allows to avoid discrepancies in the jurisprudence of common courts, and thus the uncertainty of decisions. Polish regulation is similar to that adopted in Austria. Pursuant to § 1 sec. 1 of Act 1. COVID-19-JuBG[12], there has been an interruption in the course of procedural (court, statutory) and instruction deadlines or the deadline has not started running, if its beginning was determined by an event that occurred between March 22 and April 30, 2020. In turn, to § 1 of Act 1. COVID-19-JuBG, separate rules were introduced for setting procedural deadlines for procedural and other activities in bankruptcy proceedings in connection with COVID-19. It was assumed that in bankruptcy proceedings the deadlines are calculated according to general principles, but their extension to 90 days could be ordered *ex officio* by the court and at the request of a participant in the proceedings or the trustee.

2. Moratorium on a debtor's bankruptcy petition

Pursuant to Art. 15zzra of the COVID-19 Act[13], a standard was introduced in the scope of exempting the debtor from the obligation to file for bankruptcy and the interruption of the deadline for its submission. The regulation of the moratorium on the submission of an application by the debtor adopted in Poland does not differ in essence from the legal acts adopted in other countries. In Germany, pursuant to § 1 of the COVInsAG Act, the obligation to file for bankruptcy (insolvency) for a specified period was suspended – initially until 30 September 2020, and then, after numerous changes, the suspension was finally extended until 31 April 2021. The suspension of the obligation to submit the application automatically resulted in the release from civil and criminal liability, the basis of which is the failure (delay) to perform the procedural action in question (Born, 2020, s. 522. See discussion of the normative grounds for liability for omission or late filing of a bankruptcy petition in the German Law: Obrzud, 2020, s. 22–23).

Pursuant to Art. 15zzra of the COVID-19 Act ,the release of the debtor from the obligation to file for bankruptcy depended on the fulfillment of two requirements. Firstly, the facts described in legal standards as 'state of insolvency' must have arisen due to COVID-19 during the period of the

Court, which adopts the retroactivity of the binding force of this provision on March 2, 2020, decided differently. Decision of the Supreme Court of November 13, 2020, V CZ 60/20.

[10] Pursuant to the German insolvency law – § 4 Insolvenzordnung of 5 October 1994 (BGBl. I S. 2866), hereinafter – InsO, the provisions of the German Code of Civil Procedure apply accordingly in insolvency proceedings, including procedural time limits (Andres, Leithaus, 2021, § 4, Rn. 1).

[11] German Code of Civil Procedure, Zivilprozessordnung of 30.01.1877) BGBl 2006 / I, p. 431), hereinafter – ZPO.

[12] Bundesgesetz betreffend Begleitmaßnahmen zu COVID-19 in der Justiz z 25.03.2020 r. (BGBl. I 16/2020), dalej – ustawa 1. COVID-19-JuBG.

[13] The provision was introduced to the COVID-19 Act as a result of its amendment pursuant to Art. 73 point 45 of the Act of 16 April 2020 on special support instruments in connection with the spread of the SARS-CoV-2 virus (Journal of Laws of 2021, item 737, as amended). This provision entered into force on April 13, 2020.

epidemic threat or the epidemic state announced due to COVID-19 (from March 14, 2020)[14]. Second, a necessary premise was a causal link between the state of insolvency and COVID-19. The legislator clearly indicated that the impact of the COVID crisis on the state of solvency could have occurred before the announcement of an epidemic threat or epidemic, while 'state of insolvency' within the meaning of Art. 21 sec.1 b.l. in connection with Art. 11 sec. 1–2 b.l. had to come into existence after the introduction of one of them. If the COVID-19 crisis caused insolvency before the declaration of an epidemic threat or epidemic, then one of the necessary grounds for the application of Art. 15zzra of the COVID-19 Act was missing[15].

The purpose of this regulation is obvious. Limiting the admissibility of filing a petition for bankruptcy was integrated with the simultaneous launch of public financial support programs for entrepreneurs[16].

Used by the legislator in the hypothesis of art. 15zzra of the COVID-19 Act, the terms 'grounds for declaration of bankruptcy', 'state of insolvency' directly relate to the provisions of the Bankruptcy Law Act concerning the grounds for bankruptcy and the obligation for the debtor to file for bankruptcy (Art. 11 sec. 1, Art. 21 sec. 1 b.l.). The obligation of the debtor to file a petition for bankruptcy due to insolvency results directly from Art. 21 sec. 1 b.l. in connection with Art. 11 sec. 1–2 b.l. Insolvency is manifested in the form of a loss of ability to meet due monetary obligations lasting more than three months (the so-called liquidity insolvency of Art.11 sec. 1 and 1a of the b.l.) or in the form of a surplus of liabilities over assets lasting more than 24 months (the so-called debt insolvency). Failure to submit an application is subject to civil sanctions (Article 21 sec. 3 b.l and Art. 299 § 1 and 2 c.c.c[17].), criminal (Article 586 c.c.c. Article 373 b.l.[18]) and tax sanctions (Article 116 (1) of the Tax Ordinance[19]).

When referring to the grounds for declaring bankruptcy, one should take a separate look at debt insolvency and liquidity insolvency. In the case of debt insolvency, it had to be shown that there was a surplus of liabilities over assets, which lasted longer than March 14, 2020 and was caused by the COVID crisis – 19. In view of the circumstances that the debt insolvency must last 24 months for a basis for bankruptcy to be established, rather, in special cases, the impact of COVID-19 caused the entrepreneur to lose income that prevented an equilibrium between liabilities and assets. However, in the case of liquidity insolvency, it is sufficient to prove that the COVID crisis resulted in the inability to pay current receivables, provided that the inability to settle debts for a period of 3 months occurred on March 14, 2020 at the earliest.

---

[14] The state of epidemic threat was announced on March 14, 2020 under § 1 of the Regulation of the Minister of Health of March 13, 2020 on the announcement of an epidemic threat in the territory of the Republic of Poland (Journal of Laws, item 433, as amended). Then, on March 20, 2020, the state of epidemic threat was canceled – § 1 of the Regulation of the Minister of Health of March 20, 2020 on recalling the state of epidemic threat in the territory of the Republic of Poland (Journal of Laws, item 490), and in its place was announced until further notice, the state of the epidemic – § 1 of the Regulation of the Minister of Health of March 20, 2020 on the declaration of an epidemic in the territory of the Republic of Poland (Journal of Laws, item 491, as amended) (Piłat, 2020, commentary to Article 15zzra, point 9).

[15] According to a different concept of Art. 15zzra of the COVID-19 Act also applies to entities that became insolvent during an epidemic threat or state of an epidemic or just before their announcement (Księżyk, 2020, commentary to Article 15zzra, point 1.7).

[16] The state aid granted in 2020 is estimated at a gigantic amount of almost PLN 170 billion (approximately EUR 44 billion). 86% of entrepreneurs took advantage of various forms of assistance (Dębkowska, Kłosiewicz-Gorecka, Szymańska, Ważniewski, Zybertowicz, 2021, p. 4–5).

[17] Act of September 15, 2000 – Code of Commercial Companies (Journal of Laws of 2020, item 1526, as amended), hereinafter – c.c.c.

[18] The prohibition of activity is considered to be a criminal sanction. Decision of the Supreme Court of 17/05/2019, IV CSK 75/18, LEX No. 2665361.

[19] Act of August 29, 1997 – Tax Ordinance (Journal of Laws of 2021, item 1540, as amended).

The doctrine indicates that the impact of COVID-19 on the debtor's situation could be indirect, although, according to one of the positions, it must be the sole factor shaping the grounds for the obligation to file for bankruptcy (Piłat, 2020 commentary to the Article 15zzra point 9). Pursuant to a different position, the debtor enjoyed a preferential moratorium on submitting the application, even if the state of insolvency was also influenced by circumstances other than just the covid crisis (Błaszczuk, 2020). The second position seems to be correct. Art. 15zzra of the COVID-19 Act shows that the insolvency must be related to the cause of COVID-19, however, regardless of whether the viral crisis had a major or only side, or even marginal impact on the state of assets or the ability to settle liabilities. In the discussed provision, there are no terms such as 'significant' or 'exclusive' impact on insolvency (Differently: Pabis, 2020, commentary to Article 299, nb 22). The legislator's will was to stop the expected wave of bankruptcy, even at the cost of unwritten consent to questionable behavior of debtors in the form of artificially creating a relationship between their solvency and COVID-19.

The intention of the Polish legislator was to copy the German solution. Our western neighbor a priori adopted the legal fiction of the impact of COVID-19 on the situation of the entrepreneur, making it radically difficult to refute the presumption of the link between the insolvency and the COVID crisis[20]. The assumption adopted by the German legislator was the actual elimination of the rebuttal of the presumption of the influence of Covid-19 on insolvency. In the justification of the COVInsAG Act, it was stated that, taking into account the purpose of the presumption, which is the effective relief of the entrepreneur from evidence and prognostic difficulties, a rebuttal may be considered only in cases where there is no doubt that the COVID-19 pandemic was not the cause of bankruptcy, and that the liquidation of insolvency could not be successful. It was emphasized that the person interested in rebutting the presumption should be faced with the highest standards of proof. Facts challenging the grounds for the presumption must be proved by the persons relating to the circumstances justifying the breach of the obligation to file for bankruptcy (trustee, creditor)[21].

Social and economic goals have determined the introduction of a façade verification mechanism for the alleged relationship between COVID-19 and solvency. Therefore, it is important from the point of view of the financial or criminal liability of the debtor to introduce a virtually irrefutable presumption of the legal impact of COVID-19 on the debtor's situation, except in obvious cases. In this respect, the 'honesty' of the Austrian legislator should be appreciated. There is no requirement in Austrian law to show a causal link between the deteriorating condition of assets and the COVID crisis. The moratorium applies to all entrepreneurs falling within the scope of application of § 69 sec. 1 IO regardless of the impact of COVID-19 on their economic situation[22]. A simple solution was adopted, resulting from the will of the legislator that in the period of the COVID crisis, the number of bankruptcies should be radically reduced, without the need for a façade control of examining its impact on the entrepreneur's solvency.

The moratorium on filing a petition for bankruptcy has not been linked to the suspension of the limitation period for civil law claims against debtors. According to the grammatical interpretation of Art. 15zzr sec. 1 point 2 of the COVID-19 Act[23], the break in the limitation period concerned only the

[20] J. Kruczalak-Jankowska points out directly about drawing inspiration from German solutions (Kruczalak-Jankowska, 2020, p. 14).

[21] Entwurf eines Gesetzes zur Abmilderung der Folgen der COVID-19-Pandemie im Zivil, Insolvenz- und Strafverfahrensrecht, Deutscher Bundestag, Drucksache 19/18110, 24.03.2020 r., p. 22.

[22] The basis for bankruptcy in the form of over-indebtedness applies to legal persons, partnerships of companies entered in the commercial register in which the partner bearing unlimited liability is not a natural person, property lands granted legal personality (§ 67 sec. 1 IO).

[23] Art. 15zzr was repealed on May 16, 2020 by Art. 46 point 20 of the Act of May 14, 2020 amending certain acts in the field of protective measures in connection with the spread of SARS-CoV-2 virus.

legal phenomenon of statute of limitation in the field of Administrative Law (Gołaczyński, 2020, p. 398 i n.). The lack of regulations regarding the Statute of Limitations on Civil Law claims somehow forced creditors to file for bankruptcy, as filing such an application interrupts the limitation period.

The Polish legislator did not decide to temporarily exclude the creditor's right to demand the declaration of bankruptcy of an insolvent debtor. Only in exceptional cases, the basis for dismissing the creditor's application is ascribing bad faith to him (Article 34 of the b.l.). Pursuant to Art. 34 b.l. a creditor's application made in bad faith shall be dismissed. A bad faith action by the creditor may be considered a situation where the creditor had knowledge of the debtor having obtained aid, but nevertheless decided to file for bankruptcy (Malmuk-Cieplak, 2021, p. 191).

3. Simplified restructuring procedure

Prima facie, it could seem that the Polish legislator adopted a half-way solution, since despite the introduction of a moratorium on filing a petition for bankruptcy by a debtor, there were no barriers to the submission of such a petition by creditors of insolvent debtors. Such an assessment, however, would be too superficial. A parallel, very effective legal instrument was introduced to torpedo creditors' bankruptcy petitions – a new type of restructuring procedure called 'simplified restructuring procedure' (hereinafter abbreviated as SRP)[24].

In Poland, the Restructuring Law Act has been in force since 1 January 2016 and regulates four restructuring proceedings. The purpose of each of these proceedings is to conclude an arrangement between the insolvent or threatened insolvency debtor and his creditors. None of these four procedures was adapted to the extraordinary situation of a sudden deterioration in the macroeconomic situation. The Polish legislator decided to make a radical choice in the form of introducing a new, crisis-adapted restructuring procedure. The intention of the legislator was not overly complicated. In the event that the entrepreneur did not qualify for financial support from public funds or, despite obtaining them, his economic situation did not improve, he could benefit from the protection resulting from the opening of the SRP.

At the outset, it should be noted that the legislator deliberately introduced very informal rules for opening the SRP. Moreover, in order to limit the casuistic control of debtors' applications, the requirement to prove that the insolvency or threat of insolvency is linked to COVID has been removed. An application to initiate a simplified restructuring procedure could be submitted by any entrepreneur, regardless of the organizational form of business (natural persons, capital companies, partnerships) (Adamus, 2020, Art. 15, nb. 7). The initiation of the procedure was very easy. The debtor first concluded an agreement with a licensed restructuring advisor (arrangement supervisor)[25], and then submitted an application without the intermediation of a court to announce the opening of proceedings in the official journal available online (Monitor Sądowy i Gospodarczy, in abbreviation MSiG), in which information about the opening of restructuring proceedings is published (Article 15 sec. 1 of the Shield 4.0 act).

[24] Articles 15–25 of the Act on interest rate subsidies for bank loans granted to entrepreneurs affected by COVID-19 and on simplified proceedings for approval of an arrangement in connection with the occurrence of COVID-19 (Journal of Laws 2020, item 1086). The provisions in the discussed scope allowed for the opening of the procedure from June 24, 2020 to November 31, 2021, hereinafter referred to as 'Shield 4.0 Act'.

[25] In Poland, there is a separately regulated profession of a licensed restructuring advisor. Act of June 15, 2007 on the license of restructuring advisor, Journal of Laws 2007, No. 2020, item 242 i.e. of 2020.02.14. The task of the restructuring advisor at SRP is to support the debtor in the course of the proceedings and to control his legal activities that go beyond ordinary management.

The restructuring advisor was solely obliged to inform the competent restructuring court about the fact of submitting the application (Article 15 sec. 4 of the Shield 4.0 Act). This event did not have any impact on the further course of the proceedings, as the court ex officio did not undertake any control or judicial supervision activities.

From the moment of the announcement in the MSIG about the submission of the application, the protection of the assets of the insolvent or threatened with insolvency debtor started[26]. Pursuant to subsequent provisions of the Act, after the opening of the SRP, it was impossible to initiate and conduct an execution by a court bailiff (Article 16 sec. 3 point 2 of the Shield 4.0 Act). On the other hand, the enforcement proceedings initiated before the opening of the UPR were suspended (Article 16 sec. 3 point 1 of the Shield 4.0 Act). The possibility of initiating a precautionary procedure or executing a freezing order was also excluded, regardless of whether the decision was issued before or after the opening of the SRP (Article 16 sec. 3 point 2 of the Shield 4.0 Act). Most importantly, with the opening of the SRP it was not possible to declare bankruptcy (Art. 9a b.l.) (Zimmerman, 2022, art. 9a, nb. 1). In order to encourage insolvent debtors to take advantage of the SRP, a regulation was introduced under which the opening of the SRP within the time appropriate for declaring bankruptcy (Art. 21 sec. 1 b.l.) released the debtor from financial liability specified in Art. 21 paragraph 1, 2 or 2a b.l., in Art. 299 § 1 c.c.c, Art. 116 § 1 of the Tax Ordinance (Adamus, 2020, commentary to Art. 25, nb 10–16).

Apart from the effective blocking of singular enforcement (court enforcement) and universal enforcement (liquidation bankruptcy), the debtor gained extraordinary protection by introducing a ban on satisfying claims covered *ex lege* in an arrangement that was to be concluded with creditors in the future (Article 16 sec. 3 point. 3 of the Shield 4.0 in connection with Art. 252 r.l.). This solution favored the debtor, who could allocate funds for current business activities, instead of debt repayment.

In order to eliminate the risk of breaking economic ties with the debtor, a ban was introduced to terminate contracts by the debtor's contractors, if their performance was necessary for the debtor's business and thus necessary for the conclusion and performance of the arrangement (Article 16 sec. 3 point. 3 of the Shield 4.0 in connection with Art. 252 r.l.)[27]. For example, the landlord of the insolvent debtor could not demand payment of the outstanding rent but was also deprived of the right to withdraw from the contract.

Finally, it is worth to mentioned the secured claims. In restructuring proceedings regulated in the Restructuring Law of 2016, such claims are not covered by the arrangement. This means that the debtor must satisfy these claims in full, or the creditor may claim satisfaction from the collateral. In practice, such a regulation protected the interests of the banking sector, as usually the granting of a loan was conditional on the establishment of tangible securities (mortgage, pledge, transfer of title to security). In view of the risk of bankruptcy of borrowers, already in the course of restructuring proceedings, banks initiated enforcement against the collateral, often depriving debtors of significant assets for running a business (Art. 216 sec. 1r.l.). Thanks to the solution adopted in the SRP, this threat to the functioning of the debtor's enterprise was removed.

From the point of view of counteracting bankruptcy, it should be noted that the initiation of this procedure made it possible to take out loans or credits, encumber assets with tangible securities or

[26] The debtor's creditor's powers have been significantly reduced. Under Art. 18 r.l., a creditor could file a motion with the court to set aside certain effects of the opening of proceedings if they resulted in detriment to creditors. Translated argumentation of the creditor's application: suspension of enforcement excludes the sale of a seasonal asset. According to the draft arrangement drawn up by the debtor, there will be a radical reduction of claims, thus the prohibition of enforcement eliminates fair satisfaction.

[27] The debtor was obliged to settle the receivables arising after the opening of the SRP on an ongoing basis.

other rights (Article 22 sec. 1 of the Shield 4.0 Act). In order to secure the interests of creditors, these activities required the consent of the restructuring advisor (Article 22 sec. 2 of the Shield 4.0 Act). At the same time, these activities could not be considered ineffective in relation to the bankruptcy estate or the estate if the information about them was included in the application for approval of the arrangement and the arrangement was validly approved by the court (Kruczalak-Jankowska, Witosz, 2021, s. 79 i n.). If the court finally refused to approve the arrangement, all these activities could be assessed as detrimental to the creditors in the subsequent bankruptcy proceedings (Art. 127 b.l.). The requirement to approve the arrangement did not significantly weaken the sense of the regulation in question. It is obvious that granting a loan, loan, establishing a mortgage during the SRP is risky and is based only on the forecast of an arrangement with creditors and approval of this arrangement by the court. Polish regulations on the challenge and ineffectiveness of the debtor's actions performed before the declaration of bankruptcy do not apply to a situation where the creditor grants a loan and at the same time it is required to establish a security (Art. 127 sec. 3 b.l.) (Chrapoński, 2021, p. 422–423).

The SRP proceedings should last no longer than four months from the date of opening the SRP to the date the debtor submits an application to the court for approval of the arrangement. In practice, it turned out that the courts, overloaded with numerous cases, delayed approval of the agreements, which obviously affected the efficiency of the proceedings.

The assessment of the SRP is not obvious. The introduction to the legal order of a new, *ad hoc* restructuring procedure, created to mitigate the economic effects of the SARS-CoV-2 virus, was to prevent bankruptcies of indebted entrepreneurs. In Poland, there is a noticeable decline in notices of bankruptcy of entrepreneurs (2019 – 574, 2020 – 507, 2021 – 373), but the UPR can boast a huge numerical success (1190 notices about the opening in 2021) (Coface Annual Report: Corporate Insolvencies...). However, many practitioners point out that the SRP has become a convenient instrument for avoiding bankruptcy by dishonest debtors.

Final remarks

The overall assessment of the solutions adopted by the Polish legislator is positive. The same or similar regulations have been adopted in other countries. In Austria and Poland, a regulation was introduced allowing the court *in casu* to adjust the deadline to an individual situation. It made sense to release the debtor from filing for bankruptcy if the state of insolvency was due to the economic consequences of COVID-19. The launch of comprehensive state aid programs made it possible to regain and maintain financial liquidity. Suffice it to point to the amazing indicator of a specific economic miracle of reducing the percentage of companies with a lack of financial liquidity from 19% at the beginning of the pandemic to 3–6% in the remaining quarters of 2020[28]. However, the extraordinary popularity of the simplified restructuring procedure, which was opened in place of filing a bankruptcy petition, should not immediately arouse laudatory moods in the face of the fact that there are no known data how many of them ended with an effectively made arrangement.

References

Adamus, R. (2020). *Uproszczone postępowanie restrukturyzacyjne. Art. 15–25 Tarczy 4.0. Komentarz*, Warszawa.
Andres, D., Leithau, R. (2021). [w:] Andres, D.; Leithaus, R.; Dahl, M. *Insolvenzordnung (InsO). Kommentar*, München.

[28] See discussion and analysis of individual types of aid for entrepreneurs in the time of the COVID crisis in the study: Dębkowska, Kłosiewicz-Gorecka, Szymańska, Ważniewski, Zybertowicz, 2021, p. 8 i n.

Błaszczuk, Ł. (2020). Wpływ epidemii wirusa SARS-CoV-2 na obowiązek zgłoszenia wniosku o ogłoszenie upadłości w czasie właściwym i odpowiedzialność za jego naruszenie. *e-Palestra* 20.05.2020 [online]. Available at: https://palestra.pl/pl/e-palestra/9/2020/wplyw-epidemii-wirusa-sars-cov-2-na-obowiazek-zgloszenia-wniosku-o-ogloszenie-upadlosci-w-czasie-wlasciwym-i-odpowiedzialnosc-za-jego-naruszenie

Born, M. (2020). Auswirkungen des COVID-19-Insolvenzaussetzungsgesetzes auf die Organhaftung im Zusammenhang mit der materiellen Insolvenz. *Neue Zeitschrift für Insolvenz- und Sanierungsrecht*, 14.

Dębkowska, K., Kłosiewicz-Gorecka, U., Szymańska, A., Ważniewski, P., Zybertowicz, K. (2021). *Tarcza Antykryzysowa. Koło ratunkowe dla firm i gospodarki ?* Warszawa.

Gołaczyński, J. (2020). Przedawnienie roszczeń majątkowych i terminy zawite w okresie po ogłoszeniu stanu epidemii związanej z COVID-19. *Monitor Prawniczy*, 8, http://doi.org/10.32027/MOP.20.8.2

Kruczalak-Jankowska, J. (2020). Czy postępowanie o zatwierdzenie układu może być efektywnym narzędziem restrukturyzacji w czasach pandemii COVID-19? *Przegląd Prawa Handlowego*, 6, 13–17.

Kruczalak-Jankowska, J., Witosz, A. J. (2021). Uproszczone postępowanie restrukturyzacyjne – uwagi wybrane. *Przegląd Sądowy*, 10, 76-94.

Księżyk, K. (2020) [w:] Tarcza antykryzysowa 1.0–4.0, ustawa o dodatku solidarnościowym i inne regulacje, jako szczególne rozwiązania w prawie pracy, prawie urzędniczym i prawie ubezpieczeń społecznych związane z COVID-19. *Komentarz.* red. K. W. Baran, LEX.

Kulski, R. (2020). Wpływ stanu zagrożenia epidemicznego lub stanu epidemii ogłoszonego z powodu COVID-19 na postępowanie cywilne. *Monitor Prawniczy*, 9, http://doi.org/10.32027/MOP.20.9.1

Malmuk-Cieplak, A. (2020) [w:] Prawo upadłościowe. *Komentarz.* red. A. J. Witosz, Warszawa.

Obrzud, R. (2020). Łagodzenie skutków pandemii wywołanej wirusem SARS-CoV-2 w obszarze prawa upadłościowego w świetle rozwiązań przyjętych przez ustawodawcę niemieckiego. *Przegląd Prawa Handlowego*, 12, 21–25.

Pabis, R. (2020) [w:] Bieniak, J., Bieniak, M.; Nita-Jagielski, G. i in. Kodeks spółek handlowych. *Komentarz*, Legalis.

Piłat, W. (2020) [w:] Ustawa o szczególnych rozwiązaniach związanych z zapobieganiem, przeciwdziałaniem i zwalczaniem COVID-19, innych chorób zakaźnych oraz wywołanych nimi sytuacji kryzysowych. *Komentarz.* red. K. Schmid, Legalis.

Rauscher, T. (2020) [w:] Durch die COVID-19-Situation verursachte Fragestellungen im Zivilprozessrecht. Beilage. *Münchener Kommentar zur Zivilprozessordnung mit Gerichtsverfassungsgesetz und Nebengesetzen. Band 1, §§ 1–354*, red. Rauscher, T., Krüger, W. München.

Sawicki, P. (2020). Wpływ ustawy o przeciwdziałaniu COVID-19 na terminy w prawie cywilnym. Monitor Prawniczy, 12, http://doi.org/10.32027/MOP.20.12.1

Wessels, B. (2020). Coping Collectively with the COVID-19 Crisis [in:] *International Insolvency. Response to COVID-19*. International Corporate Rescue.

Zimmerman, P. (2022). *Prawo upadłościowe. Komentarz.* Warszawa.

Coface Report: Bankruptcies and restructuring of companies in Poland in the first quarter of 2020. Report of April 9, 2020 [online]. Available at: https://www.coface.pl/Aktualnosci-i-media/Biuro-prasowe/Upadlosci-i-restruzacje-firm-w-Polsce-w-I-kwartale-2020-roku

Coface Annual Report: Corporate Insolvencies in Poland in 2021, January 10, 2022 [online]. Available at: https://www.coface.pl/Aktualnosci-i-media/Biuro-prasowe/Raport-Roczny-Coface Niewyplacalnosci-firm-w -Poland-w-2021-r

The Influence of SARS-CoV-2 on the Polish Insolvency Law

Andrzej Torbus
(University of Silesia)

S u m m a r y

The COVID-19 pandemic has greatly influenced the functioning of the entire modern world. One of the main effects of the pandemic was the collapse of supply chains and the impact on the activities of enterprises which, for example, due to the state of the epidemic, could not receive guests (restaurants and hotels). The impact of the COVID-19 pandemic on the business environment created the risk of numerous insolvencies of entrepreneurs. In response to this sudden situation, legislators of various countries introduced a number of solutions that directly and indirectly influenced the issue of entrepreneur insolvency. The aim of this study is to discuss the impact of the COVID-19 pandemic on Polish Insolvency Law and to compare the solutions adopted in Poland with those in use in other countries.

SARS-CoV-2 įtaka Lenkijos nemokumo teisei

Andrzej Torbus
(Silezijos universitetas)

S a n t r a u k a

COVID-19 pandemija padarė didelę įtaką viso šiuolaikinio pasaulio funkcionavimui. Vienas iš pagrindinių pandemijos padarinių buvo tiekimo grandinių žlugimas ir poveikis įmonių, kurios, pavyzdžiui, dėl epidemijos padėties negalėjo priimti svečių (restoranų ir viešbučių), veiklai. COVID-19 pandemijos poveikis verslo aplinkai sukėlė daugelio verslininkų nemokumo riziką. Reaguodami į šią staigią situaciją, įvairių šalių įstatymų leidėjai priėmė nemažai sprendimų, kurie tiesiogiai ir netiesiogiai paveikė verslininkų nemokumą. Šio tyrimo tikslas – aptarti COVID-19 pandemijos poveikį Lenkijos nemokumo teisei ir palyginti Lenkijoje priimtus sprendimus su kitose šalyse taikomais sprendimais.

Professor Andrzej Torbus is a mediator and a legal adviser. His research interests include civil proceedings, insolvency proceedings and mediation. He has participated in a research project „Arbitration and Mediation Centers – a pilot project“, co-financed by the EU.

Profesorius Andrzej Torbus yra mediatorius ir patarėjas teisės klausimais. Jo moksliniai interesai apima civilinį procesą, bankroto bylas ir mediaciją. Jis dalyvavo mokslinių tyrimų projekte „Arbitražo ir tarpininkavimo centrai – bandomasis projektas“, gavusiame dalinį ES finansavimą.