CLEARY GOTTLIEB

Insolvency Pre-pack Transactions in Poland

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Introduction

On 1 January 2016, the Polish insolvency and restructuring legislation was significantly revamped. The primary goal of the reform was to modernise the legal framework dealing with insolvency and restructuring of distressed businesses by making it more efficient and debtor-friendly. As part of the new legislation, a special "prepared liquidation" procedure was introduced allowing for a pre-packaged sale of an insolvent debtor's assets. So-called pre-pack sales have been successfully used for some time in other jurisdictions, notably Western European countries and the United States. Recognising the benefits of pre-pack sales, the Polish government decided to regulate this special kind of transaction in the Polish Insolvency Law (the "**Insolvency Law**").

Drawing on the experience from the first four years, the Polish government amended some of the original pre-pack rules on 24 March 2020 to make the procedure more transparent and competitive and to address some of the flaws and loopholes that have been identified in the original legislation.

This article sets forth a brief overview of the relevant rules of the Insolvency Law related to pre-pack sales and presents the key practical issues that parties (debtors, their shareholders and investors) should keep in mind when considering a pre-pack transaction in Poland.

Key Characteristics of a Pre-pack Sale

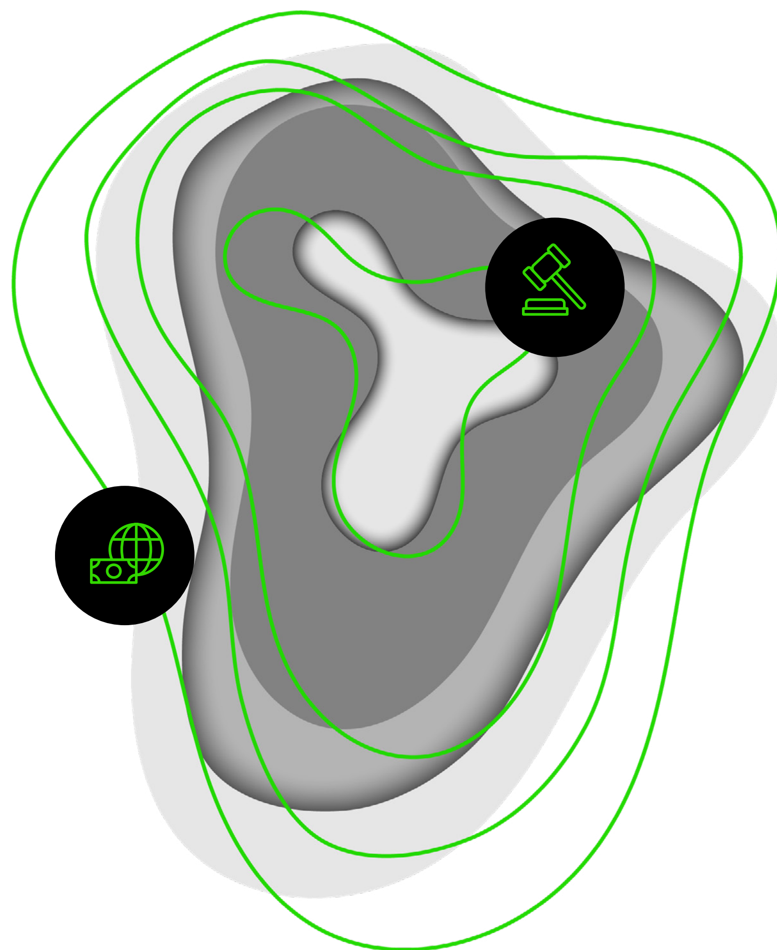
Key Features of Polish Pre-pack Sales:

- Specific distressed M&A transaction
- Asset deal only (shares in the insolvent debtor company are not sold)
- Requires prior consent of an insolvency court
- Sale agreement concluded between a buyer and an insolvency administrator
- Buyer not liable for the debts of an insolvent debtor
- Pre-existing security instruments on the acquired assets expire
- Buyer acquires by virtue of law all concessions, permits, licences or reliefs related to the acquired business

As in other jurisdictions that use pre-pack rules, the Polish pre-pack procedure is based on the assumption that the sale of an insolvent debtor's assets at the outset of an insolvency is usually much more beneficial for creditors than a sale completed after a lengthy insolvency procedure. Practice shows that typically the quicker a given business or assets are sold in insolvency, the higher the probability of preserving the value of that business or assets. This usually translates into a higher price paid by an investor which, in turn, increases the recovery rate for creditors. From an investor's point of view, the main benefit of a pre-pack sale is the possibility to buy "clean" assets with all the advantages of a bankruptcy sale, meaning no liability for any private-law and public-law debts related to the business sold and expiry of all pre-existing security instruments (e.g. liens, mortgages, etc.). Such a transaction also allows the business sold to be kept in continued operation (retaining qualified employees, maintaining the production in progress and commercial relationships with customers and suppliers, etc.) and, thus, creates a higher value for the investor from this perspective as well.

The pre-pack sale is designed under the Insolvency Law as an expedited and pre-arranged method of selling the assets of an insolvent debtor in the framework of insolvency proceedings. It requires the formal opening of insolvency proceedings for the debtor and the approval of the insolvency court. Once the pre-pack is sanctioned, the sale agreement is concluded between the insolvency administrator as the seller (representing the insolvency estate) and the investor as the buyer. The insolvent debtor itself (or its shareholders) is not a party to the transaction. This follows from the fact that the pre-pack sale is carried out after the opening of insolvency proceedings, when the debtor already has been stripped of its right to manage its business. However, the transaction itself and all its essential terms, including the price, are pre-arranged by the parties (the debtor and the buyer) before the insolvency petition is filed. Once the transaction's terms are sanctioned by the court, the insolvency administrator completes the transaction on those terms by entering into the sale agreement with the buyer.

Pre-pack Process



Who Can Initiate the Pre-pack Sale?

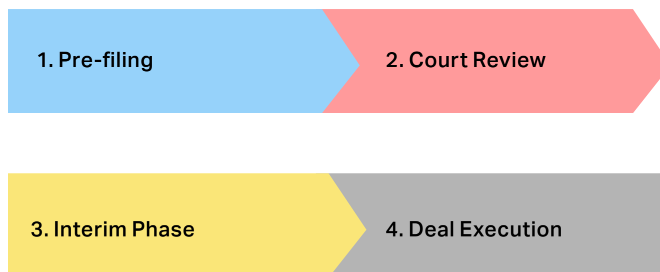
The pre-pack is not a standalone procedure and it requires filing the insolvency petition to the insolvency court which has jurisdiction over the debtor. Under the Insolvency Law an insolvency petition can be filed by the debtor (a voluntary petition) or by any of its creditors (an involuntary petition). Therefore, not only the debtor but also its creditors can propose the pre-pack sale of the debtor's business or assets in the insolvency petition. The pre-pack petition can be included in an insolvency filing or can be lodged in a separate document after the insolvency petition has been submitted to the court. In the latter case, the pre-pack petition must be filed before the court rules on the opening of insolvency proceedings for the debtor. Pre-pack transactions may not be proposed after insolvency proceedings have been opened. Both the decision on the opening of insolvency proceedings and the approval of the pre-pack sale are delivered by the court in the same ruling.

In the vast majority of cases it is the debtor (often supported by its controlling shareholders) that kicks off the pre-pack process, identifies an investor willing to buy out its business (assets), negotiates key terms of the transaction with the buyer and, ultimately, files the insolvency petition to the court asking for the approval of the pre-pack sale on the terms agreed with the buyer. Most of the time, creditors either lack an interest in organising the pre-pack transaction on their own or simply are not in a position to carry out the pre-pack transaction without the debtor's involvement. For instance, creditors usually do not have proper access to the debtor's legal, business and financial documents, so for this reason alone they are not able to organise a proper due diligence process for investors or arrange for a mandatory evaluation of the debtor's assets. As a result, hostile creditor-driven pre-pack transactions are extremely uncommon (so far, we have seen only one such transaction, which was carried out in rather specific circumstances).

On the other hand, if there are creditors willing to support the pre-pack sale and cooperate with the debtor and the buyer in this regard (e.g. financial creditors holding secured claims over the debtor's assets), engaging these creditors in the process is highly recommended. Their support may be helpful to secure the court's approval for the pre-pack sale or minimise the risk of challenge by the creditors after the court has approved a pre-pack. However, the approval of the pre-pack sale is not contingent upon the creditors' support. The debtor is not required to seek the support or consent of its creditors to submit the pre-pack petition. The only exception is when one or more of the debtor's assets are encumbered with a registered pledge and the pledgee is entitled to take over the ownership of the collateral or to sell it by itself. In such a situation, the pledgee's consent must be obtained and attached to the pre-pack petition, unless (i) the petitioner (debtor) proves that pre-pack sale of the collateral as part of the whole of the debtor's

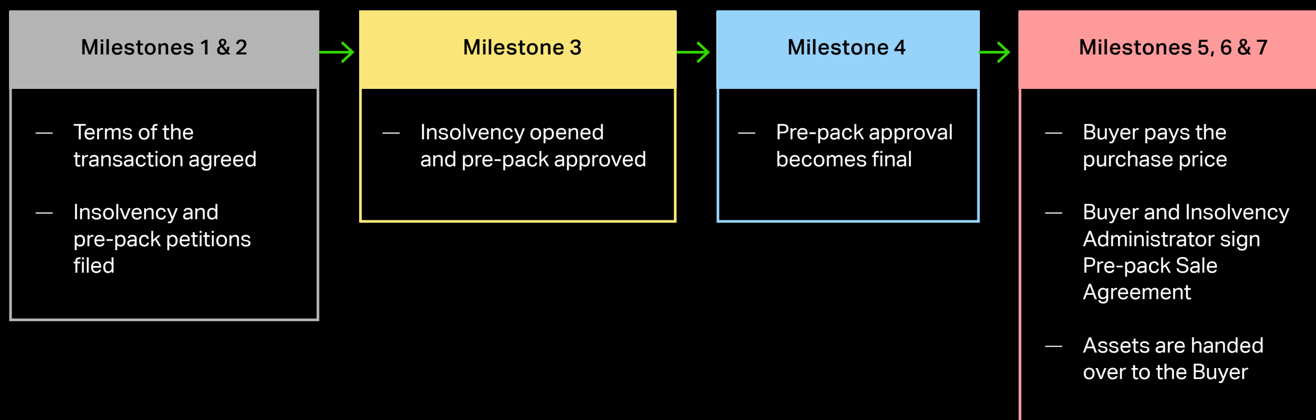
business is more beneficial to the general body of creditors (i.e. leads to a higher price for the whole business), or (ii) the collateral is excluded from the sale.

In terms of process, the pre-pack transaction may be split into four phases: (i) a pre-filing phase culminating with filing the insolvency and pre-pack petition(s); (ii) a court review phase starting with the insolvency filing and lasting until the pre-pack is approved by the court; (iii) an interim phase between the opening of insolvency proceedings and the court's pre-pack approval order becoming final (non-appealable); and (iv) the final deal-execution phase when the pre-pack sale agreement is concluded (and the transaction is closed at the same time).



Within each of these phases there are important legal or business issues that the parties must properly consider and address. Simply put, each phase creates certain challenges of its own. We discuss the most important of these issues in more detail below. The following events reflect the key milestones of each pre-pack transaction:

Key Milestones of Each Pre-pack Transaction



Pre-filing Issues (First Phase)

Although each phase discussed in this article is vital to the execution of a pre-pack, the pre-filing phase might be considered the most important. This is the period when the debtor's management (and potentially its shareholders) identifies the looming (or already present) insolvency and starts looking for an investor willing to take over the debtor's business or at least some of its assets. Once a business decision is reached to sell the debtor's business (assets) through the insolvency pre-pack transaction, all essential deal parameters should be agreed by the debtor and the investor. In particular, the following issues should be worked out before the insolvency and pre-pack petition can be filed: (i) what assets are to be sold (e.g. an entire business, a specific business line, etc.); (ii) who is the buyer; (iii) what is the price to be offered for the assets; and (iv) what is the value of the assets sold. Moreover, it is highly recommended that the debtor and the buyer also agree on some rules, at least rudimentary ones, for their cooperation during the whole process. We discuss all these issues in more detail in the next sections of this article.

The reason why the issues listed in points (i) – (iv) above must be agreed before a request to approve the pre-pack sale is lodged to the court is quite straightforward. The Insolvency Law requires that the pre-pack petition states detailed terms of the proposed sale at least by specifying the scope of assets sold, the identity of the buyer and the price to be paid for the assets. To show that the price offered meets the legal criteria, the value of the assets should be estimated in the form of a valuation report prepared by a court-certified expert appointed by parties (debtor and the buyer). The valuation report must be lodged to the court along with the pre-pack petition. Once the petition is filed, the court verifies if there are grounds to open insolvency proceeding for the debtor (whether the debtor is insolvent) and if the proposed transaction (on the terms proposed in the petition and supported with a valuation report) should be approved. However, the parties[1] can amend the original terms of the transaction until the court delivers its decision.

Formally, the pre-pack petition is lodged to the court only by the debtor; the buyer is not a party to the debtor's insolvency proceeding and does not have a right to propose the pre-pack sale on its own (the buyer's management does not "sign" the pre-pack petition). Moreover, the Insolvency Law itself does not require the debtor and the buyer to enter into any agreement or other arrangement to confirm the terms of the pre-pack sale. However, parties usually want to (and normally should) confirm at least key terms of the contemplated transaction and set forth rules for their cooperation during the pre-pack procedure in some form. They have the liberty to choose the legal arrangement they deem best fits their needs (these might range from more general term sheets or memoranda of understanding to more detailed legal instruments). Parties may potentially stop at entering into a non-binding term sheet. Nevertheless, particularly in the case of more significant transactions, parties may want to consider using an arrangement creating legally binding commitments. For instance, the debtor may insist on the investor expressly committing to support the pre-pack petition during the insolvency procedure and to close the transaction to reduce the risk of its failure. On the other hand, where the transaction concerns the sale of the debtor's operating business (sale of assets as a going concern), the buyer may want to have some control and influence over the way the debtor (and its controlling shareholders) runs the business in the period until the opening of insolvency proceedings to minimise the risk that the value of the business is destroyed.

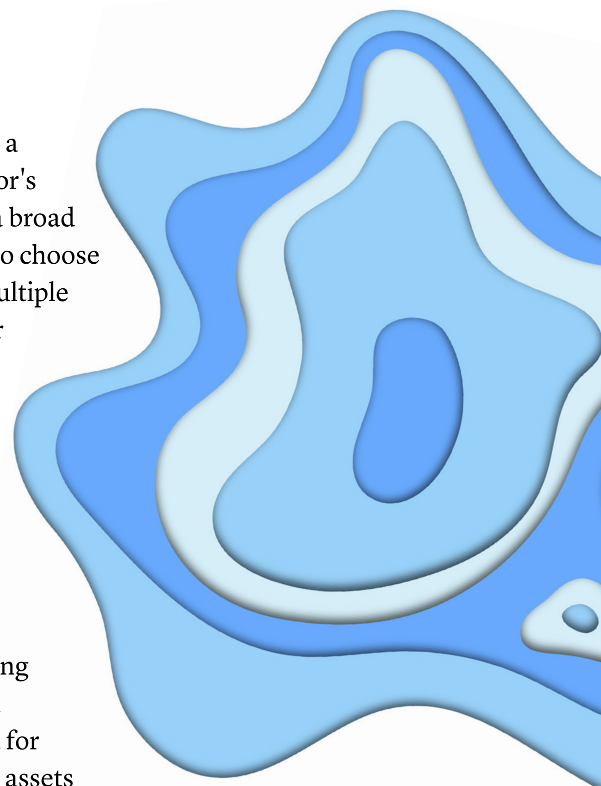
Then, the buyer may be interested in entering into a more comprehensive pre-pack support agreement that would constitute a broader legal framework for the cooperation between the parties and the operation of the debtor's business. Depending on the circumstances of each case, such an agreement may refer to issues like: (i) the preparation of the pre-pack petition and support of it by the parties throughout the pre-pack procedure; (ii) the interim period covenants of the debtor; (iii) the intragroup relations on which the debtor's business relies; or (iv) situations in which the buyer may be free to walk away from the transaction. To increase deal certainty, the controlling shareholders of the (insolvent) debtor and the buyer could also become parties to the agreement (this may be particularly relevant for the debtor-side, as the buyer will usually use a SPV for this type of a transaction). It should be borne in mind, however, that any arrangement agreed by the parties is not binding on the insolvency administrator that takes over the debtor's assets upon the opening of insolvency proceedings Thus, any commitments made by the debtor towards the buyer (e.g. regarding the operation of the business) will not apply to the insolvency administrator in the interim (third) phase.

Assets

The Insolvency Law specifically regulates what assets can be sold in the pre-pack transaction. These are (i) an entire business ("enterprise") of the debtor, (ii) a separate line of business ("an organised part of enterprise") of the debtor, or (iii) assets constituting a "significant part of the debtor's business". Non-essential or peripheral assets cannot be sold through the pre-pack transaction.

However, even if an entire business or a separate line of business is sold, certain categories of assets such as cash, funds on bank accounts and receivables are usually excluded from the scope of the transaction. Moreover, in such a case parties may want to further exclude from the sale all variable components (assets) of the debtor's business, e.g. inventory, work in progress, etc. This is because in the pre-pack transaction the price offered and ultimately paid by the buyer must be a fixed amount and parties are not allowed to introduce any price adjustment mechanisms in the sale agreement.

Buyer



When it comes to a buyer of the debtor's assets, there are a broad range of entities to choose from: single or multiple buyers (i.e. two or more investors buying different assets, for instance different lines of the debtor's business), local or international companies, existing entities or special vehicles used just for this purpose. The assets may be sold to one of the debtor's creditors, in which case a part of the price may even return to the creditor-turned-investor. The pre-pack sale may also be structured as a management buy-out if a debtor's management have third-party financing.

Finally, the Insolvency Law permits the buyer to be a party which is related to the insolvent debtor (for example, an affiliated company). However, if this is the case, the pre-pack procedure will become more troublesome and lengthier, and may potentially face opposition from creditors (and potentially even the court) if questions are raised as to the bona fide intentions of the parties and the legitimacy of the transaction. Moreover, if the buyer is related to the debtor, the law imposes stricter requirements as to the price (discussed below).

In case of unrelated parties, a court is required to approve the proposed pre-pack when the price offered is higher than the difference between (i) the theoretical bankruptcy price and (ii) the saved bankruptcy costs, which represents the special "pre-pack discount" allowing an investor to buy out the assets below their full market value.

Price

The most important aspect of the pre-pack petition is the price which, if it meets legal requirements, determines the court's approval of the pre-pack sale. The price needs to be fixed, meaning that the sale agreement should not provide for any contractual price adjustment mechanism and, once the price offered is sanctioned by the court, it may no longer be changed (subject to a statutory mechanism as described below). If the prospective buyer is unrelated to the debtor, the court verifies the proposed price based on the valuation report ordered by the parties and attached to the petition and the report of the court-appointed supervisor (both described below in detail). In case of unrelated parties, a court is required to approve the proposed pre-pack when the price offered is higher than the difference between (i) the theoretical bankruptcy price[2] and (ii) the saved bankruptcy costs[3], which represents the special "pre-pack discount" allowing an investor to buy out the assets below their full market value. If the price criterion is met, and other general statutory requirements are satisfied as well, the court will sanction the proposed pre-pack transaction. In addition, the Insolvency Law provides that the court *may* (i.e. has discretion to) approve the transaction, if the price offered is insignificantly below the price threshold and the sale is justified by an important public interest or allows the debtor's business to be preserved as a going concern. This specific rule is highly controversial, however, and we have not heard of it actually being applied in any case so far.

If the prospective buyer is "related" to a debtor, the transaction may still be approved, but in such a case the court will appoint its own expert to prepare an "independent" valuation of the assets. The court will approve the pre-pack for the related-party buyer only if the price offered is not lower than the value of the assets estimated by the court-appointed expert. In such a case the special pre-pack discount mentioned above is not available.

One of the amendments to the Insolvency Law that came into effect on 24 March 2020 introduced a mandatory deposit amounting to 10% of the offered price. This amendment provides that 10% of the price must be paid by the prospective buyer to a court's account at the time the pre-pack petition is filed. This deposit is then kept on the court's account to ensure that the buyer enters into the sale agreement once the transaction is approved by the court. If the pre-pack is successfully approved, the deposit is transferred to the insolvency administrator and considered as part of the price (the remaining part is paid after the transaction is approved but before the signing of the sale agreement). If the court refuses to approve the transaction or the prospective buyer decides to withdraw its interest in the transaction before it is approved, the security deposit is returned. However, if the pre-pack is approved but the buyer refuses to enter into the sale agreement with the insolvency administrator without a legitimate reason, the security deposit will be forfeited.

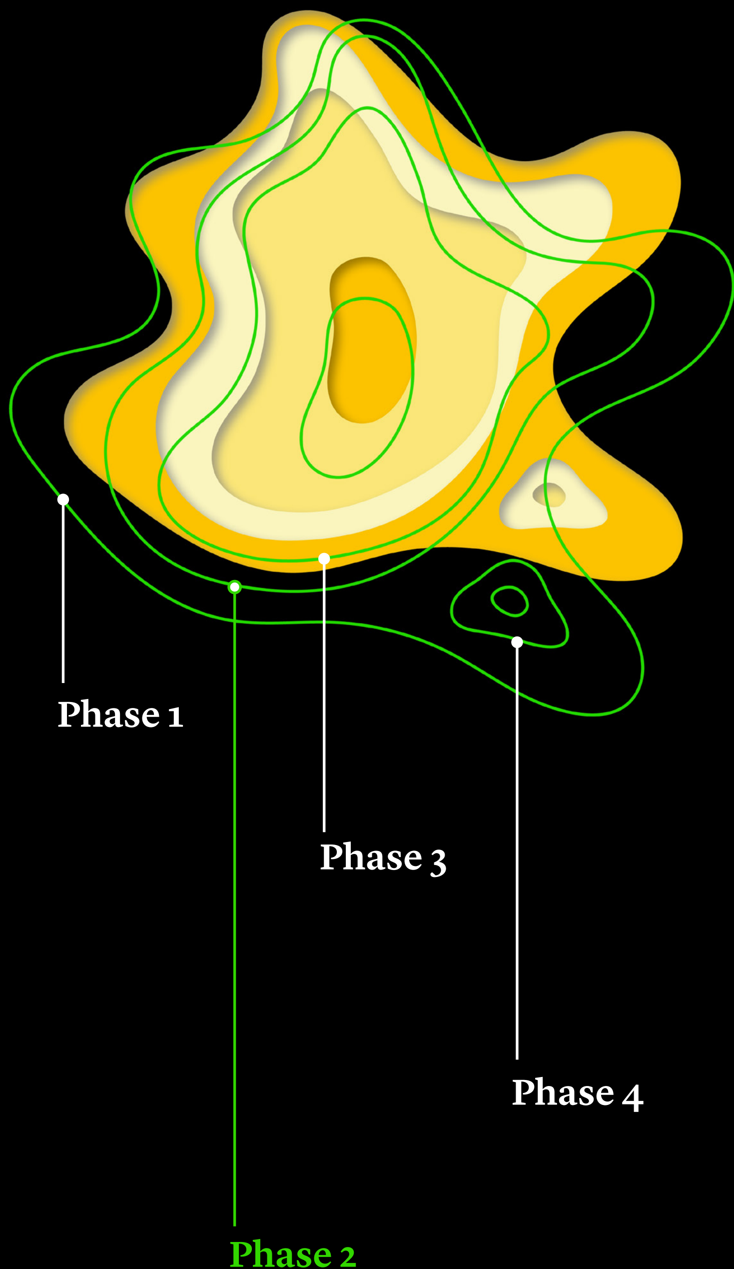
The government had two goals in introducing this new rule: first, to enhance transactional security, and second, to prevent bad faith actors from filing fictitious offers or counter-offers at the court review phase. The main flaws of this regulation are the fact that the deposit may only be in cash (there are legislative plans to allow bank or insurance guarantees in order to provide more flexibility for investors) and that the Insolvency Law provides for the fixed percentage of the deposit (10%) in each case no matter the value of the transaction.

Value of the Assets Sold

Equally important in addition to price is a valuation of the assets to be prepared in advance (before the petition is lodged) by a court-certified valuation expert chosen by the parties (preferably a reputable expert with experience in valuations for the purpose of pre-pack sales). A "court-certified" expert means that the author of the valuation must be enrolled on an official list of experts that could be heard as expert witnesses in court proceedings in Poland. Such lists are kept by district courts *(sądy okręgowe)* in Poland. A valuation prepared by a professional not enrolled on such a list and, therefore, not recognised as "court-certified" will be considered inadmissible and in such a situation the whole pre-pack petition will be dismissed on formal grounds. The main purpose of the valuation is to verify if the price offered for the assets meets the criteria under the Insolvency Law and to show that the court should (is required to) approve the pre-pack. The result of the valuation is used as a benchmark to see if the price offered by the buyer meets the legal threshold. The Insolvency Law does not define which valuation method(s) should be used and the choice largely depends on the circumstances of each case and the type of assets sold. In the case of an operating business the valuation should show the going concern value, for example based on the discounted cash flow model, but in a given case the asset-based valuation method (e.g. adjusted net asset value) may be appropriate as well. Regardless of the valuation method(s), it is generally assumed that the pre-pack sale is a forced-sale and, thus, the result of the valuation is usually subject to additional forced-sale discount decreasing the final value of the assets for the pre-pack sale purpose.

If a buyer is a "related" entity, as mentioned before, a court will appoint an additional expert to prepare a second "independent" valuation of the assets and will only approve the transaction if the price offered is not lower than the value of those assets estimated by the court-appointed expert.

Except for the "related" entity case, the court cannot order any external valuation to evaluate the assets on its own and may only verify the correctness of the valuation arranged for by the parties based on its experience and the report of the court-appointed supervisor (for details see below). If the valuation report prepared for the parties and attached to the pre-pack petition is complete, meets legal requirements as to its content and is not obviously flawed, the court must not disregard it.



Draft Sale Agreement

Under the Insolvency Law, the debtor and the buyer are allowed to prepare a draft sale agreement and lodge it to the court in the pre-pack petition and ask the court to also approve the draft agreement. If the courtapproves the transaction and the draft agreement, the draft is then generally binding on the insolvency administrator and cannot be amended at a later stage. At first glance, this seems to be an interesting option. However, as the Insolvency Law does not contain any rules allowing parties (the buyer and the insolvency administrator) to divert from the wording of the approved draft agreement, even in relation to non-material aspects or clauses of the agreement, it may prove to be an inflexible solution and even lead to a potential deadlock in case certain changes to the draft sale agreement, already approved by the court, are desired by the parties or become necessary. A much better solution, in particular in the context of a sale concerning the debtor's business as a going concern, where it also may be difficult to "predict" all desirable clauses of the sale agreement at the time the pre-pack petition is filed, may be to specify all material terms and conditions of the transaction (provisions of the future sale agreement) in the pre-pack petition itself.

Court Review (Second) Phase

This phase lasts between the filing of the pre-pack petition and the date the insolvency proceedings are opened and the pre-pack petition is approved by the court. During this phase the business is run and managed by the debtor, but under the supervision of the court-appointed supervisor (insolvency practitioner). The debtor is required to obtain the supervisor's consent for all actions and transactions exceeding the ordinary course of business. The supervisor will also give its opinion on the proposed pre-pack and prepare its report on the financial position of the debtor, its assets and their value and expected costs of insolvency proceedings. To some extent this report will be used by the court to verify the pre-pack petition and its compliance with the Insolvency Law.

The newly adopted rules introduced two significant changes to the court review phase intended to increase

the transparency and competitiveness of the pre-pack process. First, the court must officially announce the pre-pack petition to the public and deliver copies of the petition to all secured creditors who consequently have a right to express their opinion thereon.

Secondly, and more importantly, the amended rules expressly provide that third-party investors (other than the buyer) can lodge competing bids. For instance, such a competing bid may be endorsed by creditors dissatisfied with the transaction (price) put forth by the buyer proposed by the debtor. The original Insolvency Law pre-pack rules did not specify what the court should do in such a situation. Currently, if two or more bidders compete for the same assets, a mandatory auction must be held to choose the best (highest) offer. The sale agreement is then concluded with the winning bidder.

The second court-review phase may take approximately two to four months depending on the circumstances of a given case, in particular whether an auction is necessary and if creditors actively challenge the petition. This legal timeframe is undoubtedly the weak point of the pre-pack procedure.

Approving the Pre-pack and Opening Insolvency Proceedings (Third Phase)

The third phase begins with the court's order approving the pre-pack (and opening insolvency proceedings). For this to happen, the court reviews the petition and the terms of the sale (including the price), but it cannot modify the terms of the proposed sale on its own, e.g. increase or decrease the price offered. In principle, the court may either approve or reject the pre-pack petition. Legally, the price is the most important criterion that the court should rely on while reviewing the petition.

If the price criterion is met, and other general statutory requirements are satisfied, the court should sanction the proposed pre-pack transaction.

The approval of the pre-pack is simultaneous with the opening of insolvency proceedings. Once the insolvency is opened, all the debtor's assets (business) are handed over to the insolvency administrator who will manage them and run the business until the sale is completed. The court's decision approving the pre-pack may be challenged by a debtor or any creditor within two weeks from its publication. If the court dismissed the pre-pack petition, both the debtor and the prospective buyer may challenge the decision during the same timeframe. Once the court's decision approving the pre-pack becomes final (non-challengeable), the pre-pack sale agreement may be finalised. The insolvency administrator is required to conclude the sale agreement with the buyer, on the terms approved by the court in its decision, within 30 days following the date when the court certifies that the decision has become final (unless a different timeframe is specified in the decision itself).

Within the aforementioned 30-day timeframe provided for the signing of the agreement, both the insolvency administrator and the buyer may ask a court to modify the terms and conditions of the approved sale (e.g. to increase or decrease the price), or even to annul the pre-pack transaction altogether, if this is justified in light of new circumstances (previously unknown) or changed circumstances of the case affecting the value of the assets. The above mechanism could be used as a statutory price adjustment mechanism in case the value of the assets (business) significantly diverts from the value assumed at the dates the pre-pack petition is filed and approved by the court.

Executing the Pre-pack Transaction (Fourth Phase)

Once a court's approval of the pre-pack becomes final (from that moment the validity of the court's decision approving the pre-pack may no longer be challenged), the buyer may execute the sale agreement with the insolvency administrator. However, before the agreement can be signed, the buyer is required to pay the full price to the insolvency administrator (either on the signing day or before). The escrow accounts which are typically used in M&A transactions (to the extent the buyer or a third party remains the account holder) cannot be used for the pre-pack sale, as the funds need to be paid directly to the insolvency estate. On the other hand, even though the Insolvency Law is not entirely clear in this respect, one could potentially consider using the so-called fiduciary accounts, which are a special type of bank accounts within the meaning of the Polish Banking Law, to secure the buyer against the risk resulting from paying the entire price before signing the agreement. In such a case, the buyer will authorize the insolvency administrator (in a form of a separate agreement) to open a fiduciary account with a bank pre-agreed by both parties. On this basis, the insolvency administrator and the bank enter into a fiduciary account agreement. The insolvency administrator (not the buyer) will be the account holder but the bank account agreement will specify the conditions of releasing the funds (i.e. the price paid by the buyer) to the insolvency administrator. The bank will only release the price if the sale agreement is signed by the parties within a specified period of time. If the agreement is not signed, the bank will be required to transfer the funds back to the buyer. Hence, the fiduciary accounts serve the same business purpose as typical escrow accounts but, contrary to escrow accounts, are explicitly regulated in the Polish Banking Law and are not purely a contractual construct. The bank's intermediary functions are specifically provided for in the law itself. Further, as the insolvency administrator will always be the account holder, one can claim that the requirement of paying the price "to the insolvency estate" is met in such a case.

Unlike the sale agreement in a standard M&A transaction, the pre-pack sale agreement is rather simple.

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There are hardly any representations or warranties, limitation language and, as mentioned above, a contractual price adjustment mechanism is not allowed. There is usually little substance to negotiate with an insolvency administrator, as the terms of the transaction are already approved by the court and the buyer acquires the assets free of any liabilities or encumbrances (with minor exceptions). The sale agreement needs to reflect the exact terms approved by a court. The administrator is not allowed to divert from the terms sanctioned by the court (this is also true for the buyer).

Generally in pre-pack transactions, the signing of the agreement is also the closing of a transaction as there will be no interim period between those two events. The legal title is transferred on the date of the conclusion of the agreement (price being paid ahead of signing). If any regulatory (e.g. antimonopoly) clearance is required, it should be obtained prior to the signing. In theory, it is permissible to conclude a conditional sale agreement (in such case the closing will happen sometime after the signing), but in such an instance the price still needs to be paid in advance (before signing the conditional agreement), so it may not be attractive from the business perspective.

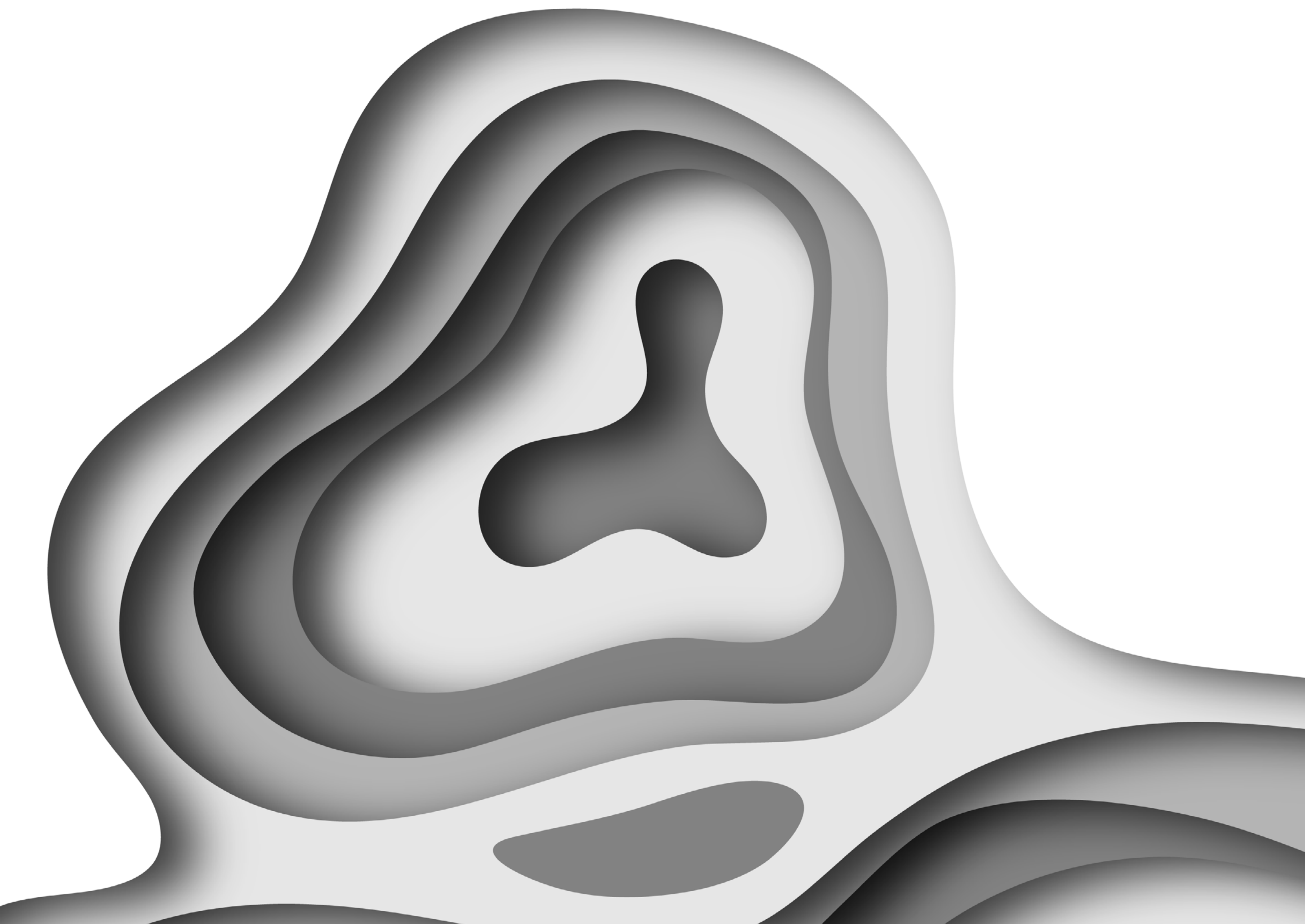
Upon signing the sale agreement, the insolvency administrator will hand over the assets to the buyer. The assets are acquired by the investor free of all pre-existing security instruments (e.g. mortgages, liens) and any encumbrances (with some minor exceptions concerning some statutory easements) and the buyer is not liable for any debts of an insolvent debtor. The Insolvency Law provides an alternative option to hand over the assets before the conclusion of the sale agreement, but this is hardly ever used as it exposes the buyer to higher risk and requires the payment of the full price on the day the pre-pack petition is filed.

Under the Insolvency Law licences, permits and concessions granted to the debtor and related to its business (acquired by the buyer) should be automatically transferred to the buyer, with few exceptions. The same applies to employment contracts concerning employees of the debtor's business. On the other hand, commercial contracts are not transferred based on the pre-pack sale agreement to the buyer. To continue those business arrangements, the buyer needs to either obtain a third party's consent for the assignment or enter into new agreements with the debtor's business partners. Some of the contracts will even expire by virtue of law upon the mere opening of insolvency proceedings. Thus, in the pre-filing (first) phase, the buyer may want to conduct a due diligence review to verify what contracts will expire and if it wants to take over any commercial agreements after the closing.

Summary

The introduction of pre-pack transactions into the Polish insolvency law significantly amended the investment landscape for distressed investors in Poland. According to the most recent data, between 2016 and 2019 parties filed 127 pre-pack petitions to insolvency courts. Approximately two-thirds of the proposed transactions were approved. Clearly, the new rules allowing parties to execute pre-pack transactions filled certain gaps in the Polish insolvency framework. The new procedure can be used by investors to acquire viable business operations of a distressed debtor without the assumption of the burden of its excessive debt.

However, despite clear advantages and generally positive feedback from the insolvency community in Poland, a successful pre-pack sale is not an easy ride. A pre-pack sale is a very specific M&A transaction that is highly formalised and regulated by the Insolvency Law. Thus, investors should bear in mind that the Insolvency Law imposes certain limitations and restrictions that would normally not be applicable in a regular M&A transaction. However, with preparation and commitment, parties should be able to overcome the challenges and successfully close the transaction.



Weronika Kapica, Attorney at Law, Schoenherr Poland Weronika is part of the banking & finance practice in Schoenherr's Warsaw office. With four years of professional experience her practice covers banking & finance,capital markets, insolvency & restructuring and M&A transactions. She advises banks, medium-size and large corporations, and private equity and venture capital firms, and has participated in various cross-border loan transactions, including project and acquisition finance transactions, secured and unsecured lending (structuring and drafting loan and security documentation), bridge loans and bonds. She has also advised on insolvency and restructuring matters regarding Polish entities.

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1. Formally, only the debtor has the right to amend the terms of the proposed sale, as the buyer is not considered as a party to insolvency proceedings.
2. Theoretical bankruptcy price – a price that could have been potentially achieved if the debtor's assets or business had been sold in "regular" bankruptcy proceedings. This price is usually established on the basis of the valuation report attached to the pre-pack petition.
3. Saved bankruptcy costs – the amount of costs related to such theoretical sale made in "regular" bankruptcy proceedings (e.g. costs of valuation, costs of sale, costs related to the management of the estate by the insolvency administrator in the course of regular bankruptcy proceedings).

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