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DIRECTIONS OF CHANGE IN THE REGULATION  
OF THE NOTION OF INSOLVENCY  
UNDER THE POLISH BANKRUPTCY LAW

INTRODUCTION

For centuries, insolvency has presented a major social and economic problem. As early as in antiquity, attempts were made to reduce its negative effects. The Hammurabi Code permitted the possibility of cancelling debts<sup>1</sup>. At the time of Emperor Justinian, *distractio bonarum* was the only type of general enforcement. Additionally to the legislative and the formulary systems, the possibility of enforcement against a specific thing was introduced.<sup>2</sup>

The article seeks primarily to outline the optimal regulatory model of the notion of insolvency. Our complementary and, at the same time, corollary aim is to perpetuate the idea that the nature of the regulation not only affects the protection of the debtor's undertaking but it also affects the status of creditors and the entire system of law. We can start with a crucial premise that the current legal system regulating the concept of insolvency still favours, albeit to a lesser extent, the possibility of putting a debtor's undertaking out of business. Unpremeditated bankruptcy proceedings, frequently instituted by secured or competing creditors may negatively impact the social and economic environment, for example contribute to the Treasury losing its revenues, put the debtor's employees out of work, excessively reduce

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<sup>1</sup> *Kodeks Hammurabiego*, trans. M. Stępień (Warszawa: Wydawnictwo Alfa, 1996), 36–37.

<sup>2</sup> W. WOŁODKIEWICZ, *Europa i prawo rzymskie. Szkice z historii europejskiej kultury prawnej* (Warszawa: Wolters Kluwer, 2009), 574–75.

the satisfaction of non-preferential creditors in terms of division of the bankrupt estate.

At present, the definition of the concept of insolvency has a great deal of practical relevance. Insolvency implies different meanings, but it is always linked to poor financial health. This notion denotes “a situation in which a person or undertaking is unable to repay its debts.”<sup>3</sup> In financial and economic terms, this is “a state in which the debtor’s assets are not sufficient to discharge all of the debtor’s obligations.”<sup>4</sup> [The Polish term] *niewypłacalność* [insolvency] entails related concepts: *bankructwo* and *upadłość*. *Bankructwo* is “an economic and financial situation of an entity making it unable to discharge its liabilities.”<sup>5</sup> *Bankructwo* denotes “insolvency or suspension of payments to creditors.”<sup>6</sup> *Upadłość* is “the legal situation of a debtor (a merchant, company, or cooperative) who cannot meet his obligations; he is insolvent.”<sup>7</sup>

The concept of insolvency is commonly used by the Polish Civil Code and other normative acts.<sup>8</sup> It transpires from its Article 527, for example, that a state of insolvency arises when all of a debtor’s assets are insufficient to satisfy all claims.<sup>9</sup> A reference to insolvency is also made by the Polish Commercial Companies Code. Pursuant to its Article 83: “In the case of the insolvency of one of the partners, the share of that partner in the shortfall shall be divided among the remaining partners in the same proportion.”<sup>10</sup> The term “insolvency” used in the act on the protection of workers’ claims has a specific meaning. Pursuant to Article 3 of this law, for example, insolvency occurs if liquidation bankruptcy or bankruptcy with debt settlement is declared, or the mode of the proceedings has been changed from arrangement to liquidation, dismissing the motion for the employer’s declaration of

<sup>3</sup> J. BLACK, *Słownik ekonomii*, (Warszawa: Państwowe Wydawnictwo Naukowe, 2008), 269–70.

<sup>4</sup> A. CZAPRACKA, “Wpływ kultury organizacyjnej modelu postępowania na przystępność, użyteczność procedur upadłościowych,” in *Ocena efektywności procedur upadłościowych wobec przedsiębiorców*, ed. K. Babiarz-Mikulska and S. Morawska (Warszawa: Difin, 2012), 136.

<sup>5</sup> B. OLZACKA and R. PAŁCZYŃSKA-GOŚCINIAK, *Leksykon zarządzania finansami* (Gdańsk: ODDK, 1998), 43.

<sup>6</sup> J. TOKARSKI, *Słownik wyrazów obcych* (Warszawa: Państwowe Wydawnictwo Naukowe, 1980), 68.

<sup>7</sup> E. SOBOL, *Nowy słownik języka polskiego* (Warszawa: Państwowe Wydawnictwo Naukowe, 2002), 1084.

<sup>8</sup> S. GURGUL, *Prawo upadłościowe i naprawcze* (Warszawa: Wydawnictwo C.H. Beck, 2011), 54.

<sup>9</sup> Act of 23 April 1964—The Civil Code, Journal of Laws of 2016, item 459.

<sup>10</sup> Act of 15 September 2000—The Commercial Companies Code, Journal of Laws of 2015, item 1578.

bankruptcy.<sup>11</sup> Also the Act on the National Court Register makes reference to the concept of insolvency in Article 55, which is related to the declaration and dismissal of bankruptcy, as well as to the debtor's obligation to disclose his assets in accordance with the provisions of the Code of Civil Procedure on enforcement proceedings.<sup>12</sup>

The pre-war legislator distinguished the following prerequisites for insolvency: cessation of debt repayment and excess indebtedness (Article 5 of the pre-war bankruptcy law).<sup>13</sup> Under the existing bankruptcy and reorganization law,<sup>14</sup> two conditions for insolvency were distinguished: default and excess indebtedness (Article 11 of the Bankruptcy and Reorganisation Law). In the current legal regulation, there are two analogous conditions for insolvency, namely the debtor's default on matured liabilities and excess indebtedness (Article 11 of the new bankruptcy law).<sup>15</sup>

## 1. THE IDEA OF INSOLVENCY UNDER THE PRE-WAR BANKRUPTCY LAW

### 1.1 Cessation of debt repayment

The actual origins of the current bankruptcy law can be traced back to the thirteenth century in the statutes of Italian cities. The notion of bankruptcy was identified as a merchant's default resulting from his insolvency.<sup>16</sup> The regulations concerning the buyer's bankruptcy were incorporated by the French Commercial Code. Merchant bankruptcies were divided into simple and fraudulent ones.<sup>17</sup> The German legislator regulated the bankruptcy of

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<sup>11</sup> Act of 13 July 2006 on the protection of worker's claims in the event of their employer's insolvency, Journal of Laws No. 158, item 1121—the original version of the law.

<sup>12</sup> Act of 20 August 1997 on the National Court Register, Journal of Laws of 2016, item 687.

<sup>13</sup> Ordinance of the President of the Republic of Poland of 24 October 1934—The Bankruptcy Law, Journal of Laws No. 93, item 834 [hereinafter referred to as Pre-War Bankruptcy Law or PBL].

<sup>14</sup> Act of 28 February 2003—The Bankruptcy and Reorganisation Law, Journal of Laws No. 60, item 535 as amended—the version in force until amended on January 1, 2016 [hereinafter abbreviated as BRL].

<sup>15</sup> Act of 28 February 2003—The Bankruptcy Law, Journal of Laws of 2016, item 2171. As of January 1, 2016 the title of the act was changed to Prawo upadłościowe [The Bankruptcy Law] pursuant to Article 428 point 1 of the Act of 15 May 2015—The Restructuring Law, Journal of Laws No. item 978 [hereinafter referred to as the New Bankruptcy Law or NBL].

<sup>16</sup> F. ZEDLER, *Prawo upadłościowe i naprawcze w zarysie* (Kraków: Zakamycze, 2004), 23–25.

<sup>17</sup> J. NAMITKIEWICZ, *Kodeks handlowy obowiązujący b. Królestwie Polskim* (Warszawa: Wydawnictwo F. Hoesicka, 1927), 110.

legal entities in the Konkursordnung and the Austrian legislator did so in its own bankruptcy law.<sup>18</sup> As a result of the work of the Codification Commission, the Polish bankruptcy law and the act on reorganisation proceedings were announced in an ordinance of October 24, 1934.<sup>19</sup> The Polish insolvency law was largely based on the German and Austrian laws.<sup>20</sup>

In cases when a debtor could no longer discharge his liabilities towards all the creditors, it was necessary to recover the debt under the bankruptcy law.<sup>21</sup> The objective of the institution of bankruptcy was to satisfy all creditors of the debtor equally. Such a situation made it impossible to satisfy only some creditors at the expense of the others.<sup>22</sup> Essentially, the goal of the pre-war bankruptcy law was to keep a bankrupt undertaking alive. Nevertheless, the chief goal of insolvency proceedings was to ensure that creditors could be satisfied as much as possible with the debtor's assets.<sup>23</sup>

According to the pre-war bankruptcy law, the basis of a declaration of bankruptcy was cessation of debt repayment. In a situation where a debtor could pay a liability but would not do it in bad faith or due to his rejection of a claim or for any other reason not connected with the inability to pay, there was no need to declare bankruptcy. The standard manner of satisfaction by way of proceedings and enforcement was sufficient.<sup>24</sup> Taking the failure to repay one's debts as a precondition for declaring bankruptcy made it possible to avoid examination of the debtor's assets in every case.<sup>25</sup>

The inability to satisfy creditors was not the same as stopping the payment of debts. It was possible that the debtor was unable to repay debts only temporarily.<sup>26</sup>

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<sup>18</sup> R. LEWANDOWSKI, and P. WOŁOWSKI, *Prawo upadłościowe i naprawcze* (Warszawa: Wydawnictwo C.H. Beck, 2011), 18–21.

<sup>19</sup> D. MAKIŁA, *Historia prawa w Polsce* (Warszawa: Powszechne Wydawnictwo Naukowe, 2008), 490.

<sup>20</sup> Z. Fenichel, "Uwagi do projektu ustawy upadłościowej," *Polski Proces Cywilny* 13 (1934): 400; S. GURGUL, *Prawo upadłościowe i układowe. Komentarz* (Warszawa: Wydawnictwo C.H. Beck, 2002), page VI.

<sup>21</sup> J. KORZONEK, *Prawo upadłościowe i prawo o postępowaniu układowym* (Kraków: Wydawnictwo Księgarni Powszechnej, 1935), 2.

<sup>22</sup> M. ALLERHAND, *Prawo upadłościowe. Komentarz* (Bielsko-Biała: Wydawnictwo "Park," 1991), 11.

<sup>23</sup> J.S. PETRANIUK, "Upadłość i jej podstawy w prawie upadłościowym i naprawczym," *Przeгляд Prawa Handlowego* 12 (2003): 17–18.

<sup>24</sup> KORZONEK, *Prawo upadłościowe*, 4–5.

<sup>25</sup> PETRANIUK, *Upadłość i jej podstawy*, 18–19.

<sup>26</sup> ALLERHAND, *Prawo upadłościowe*, 28.

The lack of correlation between the cessation of debt repayment and insolvency could be manifested in a declaration of non-payment or a behaviour demonstrating a lack of desire to pay.<sup>27</sup> As the Supreme Court stated in its decision of 29 February 1936, “the basis for declaring bankruptcy is essentially the debtor’s insolvency manifested in his ceasing to repay debts, but it cannot be treated as such when the debtor does not compensate for a certain, even a considerable, unpaid liability deeming it undue.”<sup>28</sup>

It was pointed out that cessation of debt repayment should be identified with a permanent failure.<sup>29</sup> The cause of bankruptcy was “in principle, due to the entity’s permanent insolvency.”<sup>30</sup> The permanent feature was related to the current economic situation of the debtor, where resources were lacking to settle liabilities towards creditors in future.<sup>31</sup> In its decision of January 31, 2002, the Supreme Court reasoned that “the basis for declaring bankruptcy of an entrepreneur being a natural person is a permanent cessation of debt repayment (Article 1 § 1 of the Bankruptcy Law), regardless of the reason for the debtor’s conduct.”<sup>32</sup>

A short-term suspension of debt repayment did not demonstrate that there was any reason to declare bankruptcy. Temporary difficulties might be due to overall economic relations and a number of factors, such as riots, banks withholding credit, the bankruptcy of the main recipient, etc.<sup>33</sup> Short-term non-payment of the debts was not classified as “stopping paying debts.”<sup>34</sup> If the event of suspension of payments or cessation of debt repayment, the resulting factual situation is determined by the court, which will take into account a range of circumstances, the major factor being the economic situation and behaviour of the debtor.<sup>35</sup> In its decision of November 9, 1995, the Supreme Court assumed that “suspending the repayment of debts whose

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<sup>27</sup> Z. ŚWIEBODA, *Komentarz do prawa upadłościowego i prawa o postępowaniu układowym* (Warszawa: Wydawnictwo Prawnicze LexisNexis, 1996), 10.

<sup>28</sup> B. KURZEPA, “Ogłoszenie upadłości,” in *Prawo upadłościowe. Komentarz, orzecznictwo*, by M. Allerhand and B. Kurzepa (Bielsko-Biała, Studio “STO,” 1999), 33; Decision of the Supreme Court of 29 February 1936, file ref. no. C.II. 2907/35, ZOSN of 1936, book 9, item 366.

<sup>29</sup> K. PIASECKI, *Ustawa prawo upadłościowe i naprawcze. Komentarz* (Warszawa: Dom Wydawczy ABC, 2004), 11.

<sup>30</sup> J. SOBKOWSKI, “Istota i znaczenie upadłości w polskim systemie prawnym,” *Ruch Prawniczy, Ekonomiczny i Socjologiczny* 3 (1974): 246.

<sup>31</sup> F. ZEDLER, *Prawo upadłościowe i układowe* (Toruń: TNOIK, 1999), 64.

<sup>32</sup> P. BIELSKI, *Prawo upadłościowe i naprawcze a prawo upadłościowe* (Gdańsk: ODiDK, 2004), 14; Decision of the Supreme Court of 31 January 2002, file ref. no. IV CKN 659/00.

<sup>33</sup> ALLERHAND, *Prawo upadłościowe*, 32–33.

<sup>34</sup> PIASECKI, *Ustawa prawo upadłościowe*, 23.

<sup>35</sup> KORZONEK, *Prawo upadłościowe*, 4–5.

duration cannot be predicted, and likewise a suspended repayment caused by difficulties that are not likely to disappear any time soon is tantamount to cessation of debt repayment.”<sup>36</sup>

To sum up, with respect to the concept of insolvency, the pre-war law on bankruptcy permitted one to maintain relative balance and proportion between the interests of the creditors and his own interest—for the sake of public interest. Importantly, the court analysed the petition for bankruptcy by examining all facts of the case, with particular emphasis on the entity’s economic situation. The functional interpretation also implied a regard for the socio-economic consequences. We should deem as appropriate the restriction of the basis for declaring bankruptcy to cases where the suspension of debt repayment equalled with the cessation of debt repayment.<sup>37</sup>

## 1.2 Excess indebtedness

The second reason for declaring bankruptcy was excess indebtedness according to the inter-war legislator. The case in point was a situation in which the debtor’s assets were not sufficient to satisfy the creditors.<sup>38</sup> This criterion was known, among others, in the German Bankruptcy Act. In its decision of February 3, 1933, the Supreme Court stated that “the advantage of the passive state over the active state of the debtor’s assets may exist very often in bankruptcy cases (§ 68 of the Konkursordnung) and it does not by itself constitute an impediment to bankruptcy proceedings (§ 73 of the Konkursordnung).”<sup>39</sup>

The introduction of the condition of excess indebtedness, that is a passive state surplus over the active state, was justified by the argument that “the enterprise is not based on the personal work of the owner, who is committed to its maintenance and who does his utmost to ensure that the enterprise is not wound up, but it relies solely on capital.”<sup>40</sup> It was also stressed that the declaration of bankruptcy prevents enforcement which would satisfy only

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<sup>36</sup> B. JASINKIEWICZ, “Komentarz do art. 2,” in *Prawo upadłościowe i układowe. Komentarz, wzory pism*, by Roman KOWALKOWSKI, Zbigniew KOZMA, Andrzej LEWANDOWSKI et al. (Gdańsk: ODiDK, 2001), 28; Decision of the Supreme Court of 9 November 1995, file ref. no. I CRN 174/95, unpublished.

<sup>37</sup> KORZONEK, *Prawo upadłościowe*, 7.

<sup>38</sup> Ibid.

<sup>39</sup> The Bankruptcy Act of 10 February 1877 (Konkursordnung), Reich Law Gazette No. 10, p. 351; BIELSKI, *Prawo upadłościowe*, 15–16; Decision of the Supreme Court of 3 February 1933, file ref. no. II CR 14/33, OSNC of 1933, No. 2, item 78.

<sup>40</sup> ALLERHAND, *Prawo upadłościowe*, 30.

some creditors.<sup>41</sup> In the case when all creditors have no chance of full satisfaction, it was advisable to satisfy them evenly and partially by way of general enforcement.<sup>42</sup> Excess indebtedness was determined by the real value, not by balance sheet totals. Determining whether there was a surplus of liabilities over the assets required a separate insolvency balance sheet to be made, which would take into account the actual values, including hidden reserves.<sup>43</sup> The determination of the debt balance was based on the consideration of all the debtor's claims and liabilities, whether they were due or not, contingent or unconditional. It does not matter whether the creditors have postponed the deadline for repayment or not.<sup>44</sup> The consent of creditors to the debtor's delayed payment, contrary to the condition of "cessation of debt repayment," does not entail a limitation to a declaration of bankruptcy.<sup>45</sup> The state of excess indebtedness was not the same as cessation of debt repayment. An entity could pay its liabilities even if the liabilities exceeded its assets. The reverse was also possible, that is the impossibility to settle debts even though there was no indication of excess indebtedness.<sup>46</sup>

In conclusion, we may reasonably argue that the state of over-indebtedness was not tantamount to cessation of debt repayment. This indication was the basis for declaring bankruptcy even if liabilities were settled. At the same time, the court's analysis of the debtor's economic health in the context of his cessation to pay debts largely eliminated the weakening of the debtor's repair function. When assessing excess indebtedness, the reference to contingent liabilities was questionable.<sup>47</sup> Attention was also drawn to the need to narrow down the criterion of insolvency with respect to legal persons, where the state of over-indebtedness under the bankruptcy law included liabilities which were not yet due.<sup>48</sup>

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<sup>41</sup> Ibid.

<sup>42</sup> SOBKOWSKI, *Istota i znaczenie*, 246–47.

<sup>43</sup> ALLERHAND, *Prawo upadłościowe*, 31.

<sup>44</sup> KORZONEK, *Prawo upadłościowe*, 8.

<sup>45</sup> GURGUL, *Prawo upadłościowe*, 2002, 33.

<sup>46</sup> K. KRUCZALAK, *Prawo handlowe* (Gdańsk: Gdańska Grupa Promocyjna "TITI Holding," 1992), 76–77.

<sup>47</sup> P. ZIMMERMANN, *Prawo upadłościowe i naprawcze. Komentarz* (Warszawa: Wydawnictwo C.H. Beck, 2012), 23.

<sup>48</sup> F. Zoll, "O projekcie nowego Prawa upadłościowego," *Przegląd Legislacyjny* 3 (2001): 14–15.

## 2. THE NOTION OF INSOLVENCY UNDER THE BANKRUPTCY AND REORGANISATION LAW

### 2.1 Enforcement of due liabilities

The drafters<sup>49</sup> of the bankruptcy and reorganisation law stated that in the conceptual sphere, the existing legal acts concerning insolvency, for example “cessation to pay debts,” are not in keeping with the current legal system. The definitions of insolvency have been further clarified in comparison with the pre-war insolvency law.<sup>50</sup> According to the definition of legal “insolvency” provided in Article 11 BRL, a debtor is deemed to be insolvent:

- 1) if he fails to perform his matured monetary liabilities
- 2) being a legal person or an organizational unit without legal personality, having legal capacity granted by a separate act, if its liabilities exceed the value of its assets, even if it takes care of its liabilities on an ongoing basis.

These two criteria are not mutually dependent. To declare insolvency, either is sufficient.<sup>51</sup> Still under the pre-war bankruptcy law, in its decision of December 19, 2002, the Supreme Court argued the following: “The two reasons for declaring bankruptcy are of independent nature, which means that a debtor having considerable assets will be considered bankrupt if he has permanently ceased to pay debts.”<sup>52</sup>

The definition of “insolvency” stems from German law.<sup>53</sup> Under the German act, insolvency may be defined as “a state in which, owing to financial difficulties, due liabilities are not being met on a permanent basis.”<sup>54</sup> Insolvency occurs when a debtor is unable to meet his monetary obligations on a permanent basis for whatever reason.<sup>55</sup> This permanent character is seen in a situation when the debtor is currently in default and will not do so in the

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<sup>49</sup> “Uzasadnienie projektu Prawo upadłościowe Komisji Kodyfikacyjnej Prawa Cywilnego z dnia 20 stycznia 2001 r.,” *Przegląd Legislacyjny* 2 (2001): 170–71.

<sup>50</sup> ZOLL, *O projekcie*, 14–15.

<sup>51</sup> LEWANDOWSKI and WOŁOWSKI, *Prawo upadłościowe*, 76.

<sup>52</sup> R. ADAMUS, “Komentarz do art. 11,” in *Prawo upadłościowe i naprawcze. Komentarz*, ed. A. Witosz (Warszawa: Wydawnictwo LexisNexis, 2010), 66; Decision of the Supreme Court of 19 December 2002, file ref. V CKN/01, *Biuletyn SN* 11 (2003): 11.

<sup>53</sup> German Insolvency Law of 5 October 1994 (Insolvenzordnung), Part 9, Section 3, §§ 311–13, *Journal of Laws (BGBl)* of 1994; GURGUL, *Prawo upadłościowe*, 55; M.A. ZIELIŃSKI, “Ochrona wierzycieli w prawie insolwencyjnym RFN,” in *Niemieckie prawo insolwencyjne*, ed. J. Brol (Warszawa: Instytut Wymiaru Sprawiedliwości, 1996), 45.

<sup>54</sup> E. MARSZAŁKOWSKA-KRZEŚ and I. GIL, *Postępowanie w sprawach upadłościowych i reje- strowych* (Warszawa: Wolters Kluwer, 2011), 32.

<sup>55</sup> PIASECKI, *Ustawa prawo upadłościowe*, 35–36.



future for lack of necessary assets.<sup>56</sup> The Voivodeship Administrative Court in Szczecin, in its judgement of March 17, 2010, stated that: “the amount of outstanding obligations has no influence on a declaration of insolvency.” Therefore, any default causes the debtor to become insolvent, regardless of its nature. For a declaration of bankruptcy, the reasons for the debtor’s insolvency are irrelevant.<sup>57</sup> Even the amount of the debtor’s outstanding obligations is irrelevant.<sup>58</sup>

The concept of insolvency implies that failure to pay ones liabilities for the second time gives rise to insolvency.<sup>59</sup> Sometimes a more flexible interpretation of insolvency was used.<sup>60</sup> The Bankruptcy and Reorganisation Law provided for the possibility of dismissing a petition for bankruptcy pursuant to Article 12 of this act. The purpose of this provision was to curb the practice of declaring bankruptcy in the case of a minor outstanding liability or a relatively minor default.<sup>61</sup>

To sum up, under bankruptcy and reorganisation legislation there was a risk that an entrepreneur who had merely short-term liquidity issues might be declared insolvent.<sup>62</sup> There were valid concerns that an economic operator who was a very good economic condition might turn out to be insolvent even

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<sup>56</sup> K. FLAGA-GIERUSZYŃSKA, *Prawo upadłościowe i naprawcze* (Warszawa: Wydawnictwo C.H. Beck, 2009), 30.

<sup>57</sup> W. PODEL and M. OLSZEWSKA, *Upadłość w praktyce* (Warszawa: Difin, 2012), 41; Judgement of the Voivodeship Court of Appeal in Szczecin of 17 March 2010, file ref. no. III CZP 14/10, accessed January 8, 2018, [www.orzeczenia.nsa.gov.pl](http://www.orzeczenia.nsa.gov.pl).

<sup>58</sup> R. ADAMUS, “Komentarz do art. 11,” 65–66; Judgement of the Supreme Administrative Court of 12 July 2017, file ref. no. I FSK 429/17, CBOSA, accessed December 15, 2017, [www.orzeczenia.nsa.gov.pl](http://www.orzeczenia.nsa.gov.pl); Judgement of the Voivodeship Court of Appeal in Lublin of 29 January 2008, file ref. no. I SA/Lu 717/07, Lex Polonica no. 1937181.

<sup>59</sup> ZIMMERMANN, *Prawo upadłościowe* (2012), 20.

<sup>60</sup> M. PIETRUSZYŃSKA and P. ZIMMERMANN, “Trwałość zaprzestania spłaty długów a stan niewypłacalności—powrót do źródła,” *Przegląd Prawa Handlowego* 2 (2013), 50; Judgement of the Supreme Court of 19 January 2011, file ref. no. V CSK 211/10; Judgement of the Supreme Court of 13 April 2011, file ref. no. V CSK 320/10; Judgement of the Supreme Court of 13 May 2011, file ref. no. V CSK 352/10; Judgement of the Supreme Court of 6 July 2011, file ref. no. II UK 352/10, LEX no. 989129; Judgement of the Supreme Court of 2 October 2013, file ref. no. II UK 66/13; Judgement of the Supreme Administrative Court of 2 July 2014, file ref. no. I FSK 1127/13, CBOSA, accessed December 15, 2017, [www.orzeczenia.nsa.gov.pl](http://www.orzeczenia.nsa.gov.pl).

<sup>61</sup> F. ZEDLER, “Komentarz do art. 10,” in *Prawo upadłościowe i naprawcze. Komentarz*, by A. JAKUBECKI and F. ZEDLER (Krakow: Zakamycze, 2006), 44.

<sup>62</sup> D. ZIENKIEWICZ, “Wątpliwości praktyczne wyłonione na tle stosowania nowego Prawa upadłościowego i naprawczego”. *Prawo upadłościowe i naprawcze po roku obowiązywania*, *Monitor Prawniczy* 21 (2004), 968.

in the case of even the least debts.<sup>63</sup> The legislator focused merely on the protection of creditors' well-being, without taking into account micro and macro-economic factors, which contribute to insolvency.<sup>64</sup> Article 12 of the Bankruptcy and Reorganisation Law did not sufficiently mitigate the effects of the strict definition of insolvency.

## 2.2 Excess indebtedness

In the bankruptcy law, in accordance with Article 1 § 2, the state of over-indebtedness concerned also liabilities which were not yet due.<sup>65</sup> The key factor was the majority of liabilities, even those not due, relative to the debtor's total assets.<sup>66</sup> There was no indication of excess indebtedness to enable a declaration of bankruptcy when the balance sheet total of the debtor's assets was lower than its real value.<sup>67</sup> As stated by the Voivodeship Administrative Court in Bydgoszcz in its decision of July 14, 2009, "Article 11 para. 2 BRL cannot be interpreted solely on the basis of the balance sheet which organises the entrepreneur's assets according to their sources of financing."<sup>68</sup>

It should be noted that when the proportion between the value of the debtor's assets and his liabilities is examined, the book value of the assets should not be taken into consideration. The priority issue is the safety of creditors, which can only be estimated in terms of the real value of the debtor's assets. If a debtor settles his due liabilities in a timely manner, there are no prerequisites for an assessment of the assets in terms of their liquidation. The valuation of the debtor's assets could correspond with an assumption of continued operation.<sup>69</sup> It is also useful to quote the position of the Supreme Court in its judgement of April 28, 2006, in which it was argued that "conducting business at a loss is not the same as keeping it excessively

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<sup>63</sup> O. KOWALEWSKI and R.T. KWAŚNICKI, "Tysiące 'ustawowych bankrutów'—uwagi na tle PrUpadNaprdnośnie terminu 'niewypłacalność'," *Monitor Prawniczy* 20 (2007), 1136.

<sup>64</sup> S. MORAWSKA, "Aspekty ekonomiczne efektywności procedur upadłościowych wobec przedsiębiorców," in *Ocena efektywności procedur upadłościowych wobec przedsiębiorców—aspekty prawne, ekonomiczne i organizacyjne*, by K. BABIARZ-MIKULSKA and A. CZAPRACKA (Warszawa: Difin, 2012), 98–99.

<sup>65</sup> ZOLL, *O projekcie*, 14–15.

<sup>66</sup> LEWANDOWSKI and WOŁOWSKI, *Prawo upadłościowe*, 77.

<sup>67</sup> PODEL and OLSZEWSKA, *Postępowanie w sprawach*, 35.

<sup>68</sup> PODEL and OLSZEWSKA, *Upadłość w praktyce*, 41; Judgement of the Voivodeship Court of Appeal of 14 July 2009, file ref. no. I SA/Bd 301/09, accessed December 18, [www.orzeczenia.nsa.gov.pl](http://www.orzeczenia.nsa.gov.pl).

<sup>69</sup> ZIMMERMANN, *Prawo upadłościowe* (2012), 23.

indebted if the losses are covered by the company's assets. Bankruptcy cannot be justified by a means of a mechanical comparison of the balance sheet totals without looking at the asset structure, especially when the assets are mostly short-term bank loans, typical of modern-day businesses."<sup>70</sup>

A position was presented that when the debt level is assessed, all liabilities and claims of the debtor (due or not, contingent or unconditional) should be considered.<sup>71</sup> On the other hand, there is no reason for adding contingent or disputed liabilities, which are recognized in the balance sheet as provisions. There is lack of certainty about the value of such commitments and whether they will ever exist.<sup>72</sup> In its decision of April 1, 2003, the Supreme Court expressed the view that claims cannot be qualified as the debtor's assets. The term "assets," used in Article 13 BRL, refers to assets interpreted under substantive law, which can be redeemed without major problems.<sup>73</sup> Similarly, in the context of reasons for bankruptcy it is hard to validate a different treatment of certain liabilities, for example disputed or contingent ones, as opposed to the debtor's receivables. In both cases, there is uncertainty as to whether they will be obtained.

In conclusion, the criterion of excess indebtedness was overly restrictive as it did not see flexibility necessary in economic relations, disregarding the fact that a number of companies, due to aspects such as the nature of their business had insignificant assets at their disposal. The criterion that was in force contributed to the emergence of far too many insolvent entities meeting the criteria justifying filing for bankruptcy.

### 3. THE NOTION OF INSOLVENCY IN THE NEW BANKRUPTCY LAW

#### 3.1 Enforcement of due liabilities

The legislator assumed that failure to pay one's obligations may be due to various reasons, for example the contestable nature of liabilities, sloppiness in running the business, temporary loss of liquidity, illness, etc. Under such circumstances, non-payment only cannot justify the opening of bankruptcy

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<sup>70</sup> ADAMUS, *Komentarz do art. 11, 71*; Judgement of the Supreme Court of 28 April 2006, file ref. no. CSK 39/06, Lex Polonica no. 2059688.

<sup>71</sup> MARSZAŁKOWSKA-KRZEŚ and GIL, *Postępowanie w sprawach*, 35.

<sup>72</sup> ZIMMERMANN, *Prawo upadłościowe* (2012), 23.

<sup>73</sup> Decision of the Supreme Court of 1 April 2003, file ref. no. II CK 484/02, OSP of 2004, no. 3, item 38.

proceedings. It was assumed that consequences of a potential trial before a common court would be a sufficient sanction against a debtor.<sup>74</sup>

With respect to the liquidity criterion, the legislator made reference to the lost ability to perform one's due obligations. The crucial determination whether a debtor is capable of paying his liabilities should be correlated with an assessment of the financial situation of the undertaking. It is recommended to employ various indicators of financial capacity.<sup>75</sup> An entrepreneur's insolvency is not always correlated with the assessment of the debtor's financial standing.<sup>76</sup> No one may be considered insolvent in a situation when psychophysical, technical or other reasons which are unrelated to the non-economic sphere come into play.<sup>77</sup>

A significant change is the addition of Article 11 para. 1a NBL, whereby "a debtor is deemed to have lost his ability to meet his due obligations in cash when the default in settling his monetary liabilities exceeds three months." After exceeding that time limit, in accordance with the burden of proof, the debtor is obliged to prove that he has the means to settle his due liabilities.<sup>78</sup> The debtor's argument against his compromised capacity to perform obligations may be an agreement he has reached with the creditors or that other parties have provided real security for the payment.<sup>79</sup> The presumption of insolvency may be undermined in the case of a partial settlement of obligations or indication of funds which the debtor is or soon will be in possession.<sup>80</sup> Using objective facts to justify the claim that the company had a real opportunity—within a foreseeable, short period of time—to obtain funds to repay its debts would justify suspension of the application

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<sup>74</sup> Recommendations of the Justice Minister's Team for the amendment of the bankruptcy law, Warszawa, December 10, 2012, 31–32; accessed January 10, 2018, [www.ms.gov.pl/restrukturyzacja-i-upadlosc](http://www.ms.gov.pl/restrukturyzacja-i-upadlosc) [henceforth quoted as: *Recommendations*].

<sup>75</sup> *Ibid.*, 32–33.

<sup>76</sup> Justification for the Government's bill on Restructuring Law, Sejm Paper (7th term), No. 2428, 2428 [henceforth quoted as *Justification*].

<sup>77</sup> P. FILIPIAK, "Podstawy ogłoszenia upadłości," in *Prawo restrukturyzacyjne i upadłościowe*, ed. A. Hrycaj, A. Jakubecki, and A. Witosz, vol. 6 of *System prawa handlowego* (Warszawa: Wydawnictwo C.H. Beck, 2016), 701–2.

<sup>78</sup> K. OSAJDA, "Uwagi o pojęciu niewypłacalności w świetle nowelizacji prawa upadłościowego," *Przegląd Prawa Handlowego* 1 (2016): 11–12.

<sup>79</sup> A.J. WITOSZ, "Komentarz do art. 11," in *Prawo upadłościowe. Komentarz*, A.J. Witosz (Warszawa: Wolters Kluwer, 2017), 84–87.

<sup>80</sup> K. OPLUSTIL, "Obowiązek złożenia wniosku o ogłoszenie upadłości oraz odpowiedzialność za jego niezłożenie w świetle znówelizowanego prawa upadłościowego (cz. I)," *Przegląd Prawa Handlowego* 2 (2016): 6–7.

for bankruptcy.<sup>81</sup> On the other hand, it should be noted that waiting for due monetary assets, given excessive uncertainty, cannot be an effective defence against declaring the entrepreneur insolvent.<sup>82</sup>

Currently, the focus of bankruptcy law is again on its debt-recovery role, which is correlated with joint recovery of claims from the debtor. However, the restructuring law currently in force focuses on actions aimed at improving the financial situation of the company and the debtor himself.<sup>83</sup> On the other hand, however, the legislator retained the option of concluding an agreement under the new bankruptcy law, while maintaining the mechanisms reducing the lengthiness of proceedings (Article 266a–266f NBL). Insolvency proceedings should not be limited mainly to the liquidation option, but should focus more on the interest of the debtor. Despite economic problems, the entrepreneur is still an employer and still pays taxes and other public levies, which is in the interest of the whole economy.<sup>84</sup>

The isolation of the restructuring law generally, in principle, gives rise to an objective interpretation with a potential to strengthen the instruments designed to keep economic operators in business. From the axiological perspective, the basic values in a particular domain influence interpretations of specific provisions.<sup>85</sup> A more flexible understanding of the concept of insolvency is supported by important economic, social, legal and moral considerations. The legislator indicated that the survival of an enterprise is in many cases more advantageous for creditors and it saves jobs.<sup>86</sup>

When the bankruptcy and reorganisation law was operative, it was pointed out that creditors might harass the debtor and seek to deprive him of his trust.<sup>87</sup> In practice, it is not uncommon for creditors to file petitions for bankruptcy in order to coerce the debtor to discharge his obligations. This practice was detrimental to the other creditors.<sup>88</sup> Undoubtedly, conflicts of interest among creditors do occur. In practice, some creditors, that is

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<sup>81</sup> See also Judgement of the Voivodeship Court of Appeal in Gliwice 22 June 2016, file ref. no. III SA/GI 1864/15, LEX no. 2098664.

<sup>82</sup> P. ZIMMERMANN, *Prawo upadłościowe. Prawo restrukturyzacyjne. Komentarz* (Warszawa: Wydawnictwo C.H. Beck, 2016), 28.

<sup>83</sup> A.J. WITOSZ, “Komentarz do art. 1,” in *Prawo upadłościowe. Komentarz*, 40–41.

<sup>84</sup> A. MACHOWSKA, “Geneza reformy postępowań, założenia nowelizacji i jej główne cele,” in *Prawo restrukturyzacyjne i upadłościowe. Zagadnienia praktyczne*, ed. A. Machowska (Warszawa: Wolters Kluwer, 2016), 28–33.

<sup>85</sup> GURGUL, *Prawo upadłościowe* (2011), 18–19.

<sup>86</sup> *Justification*, 8.

<sup>87</sup> GURGUL, *Prawo upadłościowe* (2011), 151–52.

<sup>88</sup> *Justification*, 69.

employees as entities dependent on the debtor's continuous operation, will be in favour of keeping the company running, while on the other hand it cannot be ruled out that competitors will undertake measures to destroy the debtor's undertaking.<sup>89</sup> In terms of the outcome, it seems optimal to refer to the majority of defaulted liabilities. *De lege ferenda* (Article 11 para. 1 NBL),<sup>90</sup> "the debtor is insolvent if he has become incapable of delivering a substantial part of his outstanding obligations." One drawback of this proposal is the ambiguity of the term "substantial part." However, it is essential to limit the restrictive interpretation of the notion of insolvency to at least two claims against on two or more creditors. The court should perform an individualised and objective assessment of whether there is any indication of incapacity to discharge the obligations.

In summary, the introduced changes only partially correlate with the pre-war bankruptcy law. Similarly, it is emphasised that a debtor's default may be due to a variety of reasons, such as disputes or temporary issues. Just like in the pre-war law, emphasis is laid on verification of the economic situation of a debtor. However, the current reference to at least two claims against two creditors is still questionable. We could reasonably claim that in exceptional cases (e.g. local labour market situation or impact on individual sectors) the court<sup>91</sup> should have the possibility to dismiss an application for bankruptcy.<sup>92</sup>

### 3.2 Excess indebtedness

The legislator postulated that the statutory debt criterion should be retained. Maintenance of a long-term surplus in the sum of liabilities over the total selling value was deemed detrimental to the entrepreneur and his environment.<sup>93</sup> The occurrence of a surplus may be caused by the financing of debt from loans granted by shareholders. Such a situation may lead to a loss of liquidity, especially in the long run. At the same time, it is emphasised that, under standard conditions, an entity should be able to cover its liabilities

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<sup>89</sup> D. ZIENKIEWICZ, "Komentarz do art. 2," in *Prawo upadłościowe i naprawcze. Komentarz*, ed. Dorota Zienkiewicz (Warszawa: Wydawnictwo C.H. Beck, 2006), 18–19.

<sup>90</sup> It is proposed to make analogous reference to the non-performance of a considerable part of the outstanding obligations under Article 11 para. 1a NBL.

<sup>91</sup> MORAWSKA, *Aspekty ekonomiczne*, 100–101.

<sup>92</sup> E. MAĆZYŃSKA and S. MORAWSKA, "Kierunki zmian w prawie upadłościowym i naprawczym w Polsce," in *Efektywność procedur upadłościowych. Bankructwa przedsiębiorstw katharsis i nowa szansa*, by Elżbieta MAĆZYŃSKA and Sylwia MORAWSKA (Warszawa: Oficyna Wydawnicza SGH 2015), 199.

<sup>93</sup> *Justification*, 65–66.

from the liquidated assets at any time, which corresponds to the protection of the creditors.<sup>94</sup>

As regards the comparison of the value of assets with the amount of liabilities, in the event of bankruptcy the assets are liquidated at their selling value.<sup>95</sup> The value of the debtor's assets is not recognised as the assets not included in the bankrupt estate.<sup>96</sup> Within the meaning of Article 11 para. 2 NBL, all pecuniary liabilities, including matured and non-matured ones, those included in the balance sheet as well as off-balance-sheet liabilities should be taken into account.<sup>97</sup> Future obligations, including those under a condition precedent and those towards a partner or a shareholder are excluded pursuant to Article 11 para. 4 NBL.<sup>98</sup>

The introduction of the possibility of a surplus of liabilities over assets within a period of up to 24 months is an element reducing the rigour of determining the state of insolvency. Such a situation may result from a well thought-out development strategy of an economic participant of trade relations. Also, the specific nature of services or construction works sometimes requires a temporary surplus of liabilities over the value of assets. What is more, shareholders may recapitalise their company after receiving a financial statement for a full fiscal year. The 24-month time limit prevents creditors from filing premature bankruptcy petitions if they achieve a temporary state in which the liabilities prevail over the assets, while at the same time paying their liabilities on an ongoing basis.<sup>99</sup>

The legislator assumed that the period of two full years with a surplus of liabilities over assets shows that the debtor should be subject to the regime of the bankruptcy act.<sup>100</sup> It is argued that a debtor may attempt to rebut the presumption of insolvency by demonstrating that the market value of his assets is higher than the balance-sheet value.<sup>101</sup> It is indicated that incidental, recurring periods of a short-term surplus of liabilities over assets should not interrupt the 24-month calculation period considering the protection of the creditors.<sup>102</sup>

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<sup>94</sup> *Recommendations*, 35.

<sup>95</sup> P. JANDA, *Prawo upadłościowe. Komentarz* (Warszawa: Wolters Kluwer, 2017), 75.

<sup>96</sup> WITOSZ, "Komentarz do art. 11," 89.

<sup>97</sup> FILIPIAK, *Podstawy ogłoszenia*, 701–2.

<sup>98</sup> WITOSZ, "Komentarz do art. 11," 89.

<sup>99</sup> ZIMMERMANN, *Prawo upadłościowe* (2016), 35–36.

<sup>100</sup> *Uzasadnienie projektu rządowego*, 65–66.

<sup>101</sup> FILIPIAK, *Podstawy ogłoszenia*, 702–3.

<sup>102</sup> JANDA, *Prawo upadłościowe*, 74.

To sum up, the argumentation employed by the legislator with respect to the relaxation of the criterion of excess indebtedness—in comparison with the criterion used in the bankruptcy and reorganisation law—is convincing. Simultaneously, sometimes a dispute arises about the continuity or interruption of the 24-month calculation period. It seems that the occurrence of a temporary surplus of assets over liabilities should result in a recalculation of the 24-month period. This is supported not only by the literal interpretation of Article 11 para. 5 NBL but also by the current objective interpretation intended to increase protection of the debtor's undertaking from liquidation. Frequently though, failure to declare bankruptcy irrationally may benefit a significant number of creditors, including in particular employees, business partners, and subcontractors. In the pre-war bankruptcy law, keeping a company running played a major role. It enabled the granting of reliefs and/or deferral of debt repayment.<sup>103</sup>

#### CONCLUSION

The presented article looks at the evolution of the notion of insolvency in the Polish legal system since the inter-war period. Our evaluation, done in outline, of three concepts of the legal regulation at hand was mainly intended to propose an optimal model. In the context of the notion of insolvency, the pre-war insolvency law made reference to the actual cessation of debt repayment. The criterion of impossibility to repay debts was mandatory. It was also accepted that an entrepreneur would not be declared insolvent if he did not pay his debts because he considered them to be undue. It was fundamental that cessation of debt repayment was considered in the context of a long-lasting situation. The interwar legislation also introduced another criterion in the form of over-indebtedness, that is a dominance of the passive state over the active state. However, under the bankruptcy and reorganisation law, reference was made to the prerequisite for non-performance of matured monetary obligations. The amount of the defaulted obligations was not relevant to declaration of insolvency. The reasons for the debtor's insolvency were irrelevant, too. As a general rule, failure to settle the second liability in turn caused insolvency. At the same time, the legislator retained the second condition of insolvency, that is the state of excess indebtedness, within the framework of bankruptcy and reorganisation law. Under the current bank-

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<sup>103</sup> ALLERHAND, *Prawo upadłościowe*, 21–22.



ruptcy law, the legislator retains the liquidity criterion, making reference to the ability to discharge matured obligations. However, it is essential to introduce a presumption that a debtor is no longer able to meet his obligations when a delay in meeting its obligations in cash exceeds three months, which is in line with the permanent character of the concept of insolvency. It is important to enable a debtor to rebut the presumption of insolvency. At the same time, the introduction of the possibility of having a surplus of liabilities over assets for a period of up to 24 months means that the rigour of the over-indebtedness condition has been relaxed.

The pre-war bankruptcy law allowed courts to decide in a flexible manner on the consequences of the cessation to pay debts. There was also an indication of over-indebtedness, which was the basis for declaring bankruptcy even if the liabilities were settled. Under the bankruptcy and reorganisation laws, the concept of insolvency is indeed very strict and refers in fact to the failure to settle the second liability towards at least two creditors. In addition, the second premise of over-indebtedness was maintained. Under the current bankruptcy law, the legislator has made the concept of insolvency more flexible by introducing, in particular, the idea of permanence of the presumption of insolvency and allowing the possibility of a temporary period of permissible surplus of liabilities in relation to assets. We may put forward a preliminary proposition that—despite a number of positive developments—the current insolvency regime does not adequately protect the debtor's business. It is difficult to agree with a literal interpretation referring in principle to default on at least two claims against two creditors. This strictly rigorous approach to a temporary surplus of the passive state over the active state is also questionable. The question of the concept of insolvency requires in-depth research in order to protect the interests of the debtor, creditors, as well as the interaction between creditors. The problem arises as to whether the recent change in the criteria for insolvency is adequately tuned to other legal provisions, or whether, in real life, it will turn out to be only a weak directive contingent on the "bad will" of some of the creditors seeking, even in spite of the economic sense, liquidation of the debtor's company. The legislator should comprehensively examine the assumptions and regulations of the new bankruptcy law, especially the question of interpreting the criteria for non-performance of pecuniary obligations.

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DIRECTIONS OF CHANGE IN THE REGULATION OF THE NOTION OF INSOLVENCY  
UNDER THE POLISH BANKRUPTCY LAW

SUMMARY

The study outlines three concepts of legal regulation of the concept of insolvency based on the pre-war bankruptcy law, the bankruptcy and reorganization law and the new bankruptcy law in force today. The aim is to capture the overall direction of the optimal model of regulation. The concept of insolvency, which determines the possibility of opening bankruptcy proceedings, is of key importance here. Bankruptcy, which typically entails stigmatisation of an undertaking to a lesser or greater degree, has a negative impact on its social and economic environment. A declaration of bankruptcy is, albeit imperfect, an alternative to a singular enforcement, which leads to the satisfaction of one creditor at the expense of the others. The legal regulation of insolvency should weigh up

the interests of the debtor and his creditors. The new “philosophy” of understanding the notion of insolvency can be partly reconciled with the achievements of the pre-war bankruptcy law. At the same time, the legislator should be open to new solutions, which are in step with the practice of law enforcement.

**Key words:** cessation of debt repayment; presumption of insolvency; satisfaction of matured liabilities; excess indebtedness.

*Translated by Tomasz Pałkowski*



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