

# EU sanctions against Russia and their effects on the bankruptcies of EU-based enterprises

Wednesday, 26<sup>th</sup> of April, 2023, 16:00 – 18:00 CEST

Conference on European Restructuring and Insolvency Law

|               |   |
|---------------|---|
| 16:00 – 16:05 | Welcome address   |
|               | Prof. Bob Wessels   |
| 16:05 – 16:25 | Introduction and legislative framework  |
|               | Prof. Anna Hrycaj<br>Prof. Christoph Paulus   |
| 16:25 – 16:45 | Polish bankruptcy case of GoSport   |
|               | Dr Bartosz Sierakowski  |
| 16:45 – 17:05 | EU bankruptcy cases provoked by anti-Russia sanctions   |
|               | Dr Patryk Filipiak  |
| 17:05 – 17:15 | Execution of sanctions and bankruptcy laws of EU-members states: problems, challenges and recommendations |
|               | Dr Patryk Filipiak<br>Prof. Anna Hrycaj   |
| 17:15 – 18:00 | Discussion  |



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# INSTITUTE FOR BANKRUPTCY, RESTRUCTURING LAW & INSOLVENCY RESEARCH





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# EU SANCTIONS AGAINST RUSSIA FOLLOWING THE INVASION OF UKRAINE – INTERNATIONAL AND NATIONAL APPROACH

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Law and Insolvency Research



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# SANCTIONS

Russia's aggression against Ukraine has been met with an unprecedented level of sanctions by a number of countries.



# LEGAL NATURE OF SANCTIONS



- These sanctions are autonomous.
- They are individual or collective (as in the case of the EU) initiatives of states.
- This approach was a consequence of the UN Security Council's failure to adopt a resolution declaring the Russian armed attack an act of aggression and ordering states to apply appropriate sanctions.



# LEGAL NATURE OF SANCTIONS



- Measures adopted by the Security Council on the basis of Chapter VII of the Charter of the United Nations are mandatory (in the event of a conflict with treaty obligations, they enjoy priority)
- As a result, the adoption of sanctions by the Security Council allows states, in principle, to implement them, even if this would conflict with their other obligations – international or national.
- In the absence of a resolution of the Security Council, autonomous sanctions of states or international organizations may be confronted with specific international and national obligations of states.



# PACKAGES OF SANCTIONS



- The first package of sanctions of February 23, 2022 was adopted in response to Russia's recognition of the so-called the Donetsk and Luhansk republics as states.
- Formally, these measures were adopted not as new, autonomous legal acts, but as amendments to legal acts in force since 2014.
- The EU adopted subsequent sanctions immediately after the Russian armed attack (first on February 25, 2022 (the so-called second package) and on 28 February and March 2, 2022 (the so-called third package).





## ACT of April 13, 2022 on specific solutions to counteract the support of aggression against Ukraine and to protect national security



# 5<sup>TH</sup> OF AUGUST 2022



ACT of August 5, 2022  
amending the Act on Special Solutions to Counteract  
Support for Aggression in Ukraine and to Protect National  
Security and the Act on the National Revenue  
Administration



# TYPES OF SANCTIONS



## Art. 1

In order to counteract the support of the aggression of the Russian Federation against Ukraine, which began on February 24, 2022, against persons and entities entered on the list referred to in Art. 2, apply:

**(reference to EU regulations)**



# COUNCIL REGULATION (EC) NO 765/2006 OF 18 MAY 2006 CONCERNING RESTRICTIVE MEASURES AGAINST PRESIDENT LUKASHENKO AND CERTAIN OFFICIALS OF BELARUS



- Article 2
- 1. All funds and economic resources belonging to, owned, held or controlled by President Lukashenko as well as those belonging to owned, held or controlled by certain other officials of Belarus who are responsible for the violations of international electoral standards in the Presidential elections in Belarus on 19 March 2006 and the crackdown on civil society and democratic opposition, and those natural or legal persons, entities or bodies associated with them, as listed in Annex I **shall be frozen**.
- 2. No funds or economic resources shall be made available, directly or indirectly, to or for the benefit of the natural or legal persons, entities or bodies listed in Annex I.
- 3. The participation, knowingly and intentionally, in activities the object or effect of which is, directly or indirectly, to circumvent the measures referred to in paragraphs 1 and 2 shall be prohibited.



# COUNCIL REGULATION (EU) NO 269/2014 OF 17 MARCH 2014 CONCERNING RESTRICTIVE MEASURES IN RESPECT OF ACTIONS UNDERMINING OR THREATENING THE TERRITORIAL INTEGRITY, SOVEREIGNTY AND INDEPENDENCE OF UKRAINE



- Article 2
- 1. All funds and economic resources belonging to, owned, held or controlled by any natural persons or natural or legal persons, entities or bodies associated with them as listed in Annex I **shall be frozen.**
- 2. No funds or economic resources shall be made available, directly or indirectly, to or for the benefit of natural persons or natural or legal persons, entities or bodies associated with them listed in Annex I.



# POLISH LAW BEFORE AMENDMENTS



- **The freezing of funds**
- No further regulation
- What should happen to the company with frozen assets?
- **The only consequence = the insolvency proceedings**



# IN THE EVENT OF APPLYING THE MEASURE REFERRED TO IN ART. 1 POINT 1 OR 2...

Temporary compulsory administration  
is established by a decision of the Minister of  
Economy.



not necessarily an insolvency  
practitioner

Freezing of funds

a temporary  
compulsory  
administration may  
be established

when it is necessary  
to ensure the  
functioning of the  
economic entity  
running a business

to take over for the State  
Treasury the ownership  
of funds, funds or  
economic resources

# TO ENSURE THE FUNCTIONING OF THE ECONOMIC ENTITY RUNNING A BUSINESS....



## Article 6a.

1. In the event of applying the measure referred to in Art. 1 point 1 or 2, a temporary compulsory administration may be established, hereinafter referred to as „the administration", in order to dispose of funds, funds or economic resources within the meaning of regulation 765/2006 or regulation 269/2014, when it is necessary **to ensure the functioning of the economic entity running a business in the territory of the Republic of Poland in order to:**

- 1) maintaining jobs in this enterprise or
- 2) maintaining the provision of public utility services or other tasks of a public nature within the scope of activity of this enterprise, or
- 3) protection of the economic interest of the state.





# RUNNING A BUSINESS ...



## 11. The administrator:

- 1) ensures the continuity of business activity of the business entity,
- 2) manages the enterprise, in particular with the right to adopt resolutions and decisions on all matters reserved for the authorities and bodies of the economic entity passes to the manager, including representing the economic entity,
- 3) exercises the powers of a person or entity entered on the list for which the management board has been established, in particular, exercises the rights attached to shares belonging to such a person or entity,
- 4) takes the measures necessary to prevent the use of funds or economic resources under its administration in order to directly or indirectly support aggression, violations or other activities referred to in Art. 3 sec. 2

**- until all financial resources, funds or economic resources covered by the management are sold.**



15. During the period for which the administrator was established, funds or economic resources may be disposed of by the administrator acting on behalf of and for the benefit of the person or entity for whom the administrator has been established, on the basis of the power of attorney granted.

**A power of attorney is not required to make a sale as part of ordinary management activities.**



# WHAT NEXT?



16. If, during the period for which the administrator was established, there will be no disposal of all financial resources, funds or economic resources, the District Court for the capital city of Warsaw orders the disposal of these funds or economic resources by the administrator.

The person or entity against whom the administrator has been established is a participant in the proceedings.



# TO TAKE THE OWNERSHIP OF FUNDS, FUNDS OR ECONOMIC RESOURCES ...



Article 6b.

1. In the case of applying the measure referred to in Art. 1 point 1 or 2, the administrator may be established **to take over for the State Treasury the ownership of funds or economic resources** belonging to a person or entity entered on the list hereinafter referred to as "acquisition of ownership",

if it is necessary to protect an important public interest, protect the economic interest of the state or to ensure state security.



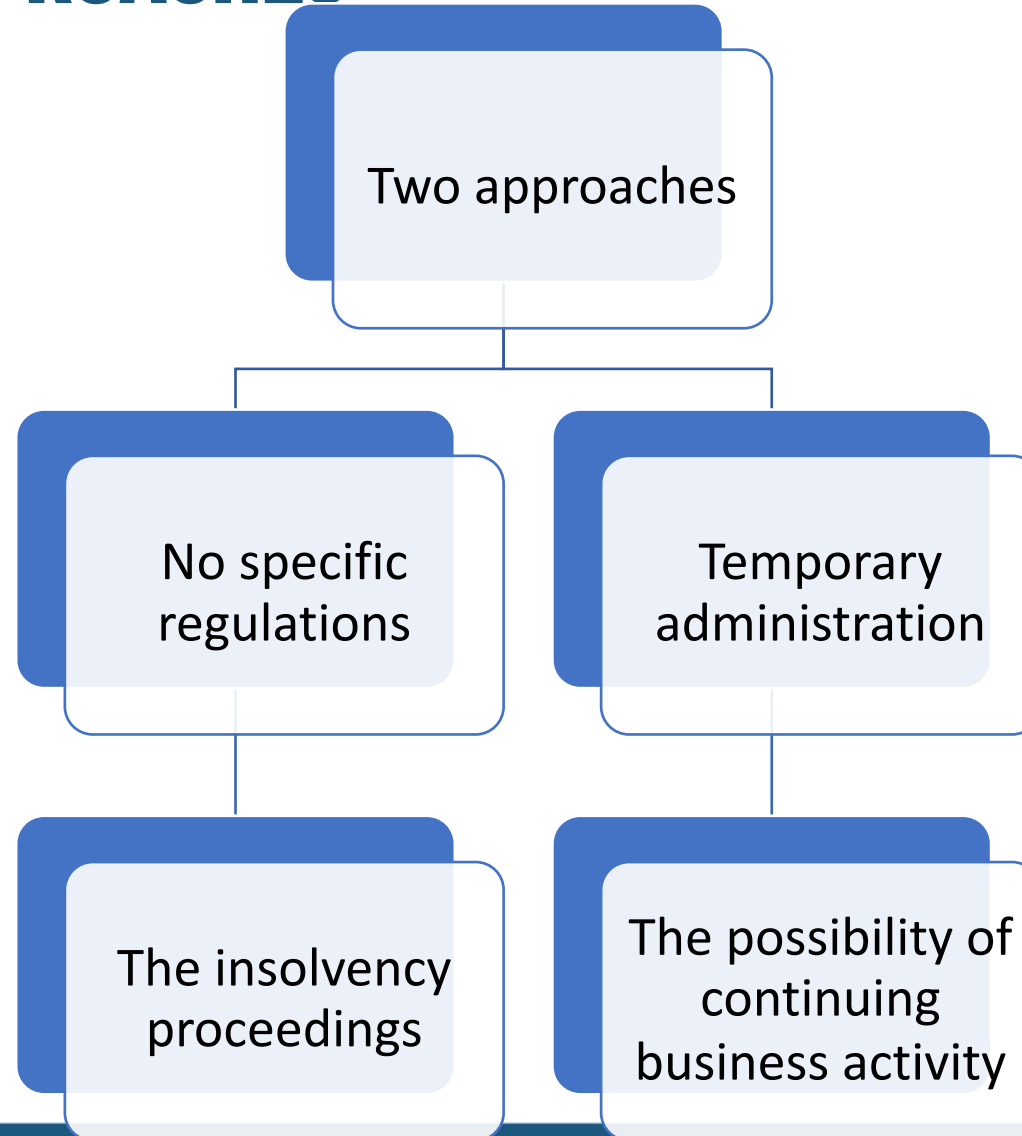
# WHAT NEXT?



4. The ownership is taken over with compensation **corresponding to the market value** of the funds or economic resources subject to the takeover, on the date of the decision determining the amount of compensation.
5. The ownership is taken over by a decision of the minister competent for economy, issued in the period for which the administrator was established.



# TWO DIFFERENT APPROACHES





# THANK YOU FOR YOUR ATTENTION





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dr Bartosz Sierakowski

Deputy Director of Institute for Bankruptcy,  
Restructuring Law & Insolvency Research





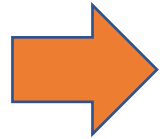
# When sanction regulations meet bankruptcy law



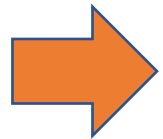
## Polish bankruptcy case of Go Sport



# LEGAL BACKGROUND & PRELIMINARY THESES



Go Sport had been declared bankrupt before the ACT of August 5, 2022 (the amendment) came into force.



**Sanctions killed a thriving enterprise.**

**The main "victims" of the imposition of sanctions are:**

- a) the laid-off employees of Go Sport
- b) the creditors of Go Sport (mostly suppliers of services and goods)



# BACKGROUND AND TIMELINE



 Go Sport operated in the retail sector of sporting goods throughout Poland for more than 20 years in 25 traditional shops and an online shop.

 At the time the sanctions were imposed, the Company:

- had approximately 500 employees (mainly Poles and Ukrainians)
- was a widely recognized, nationwide brand

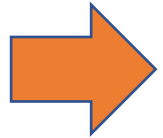


# BACKGROUND AND TIMELINE



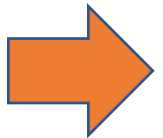
# MAIN LEGAL PROBLEMS

## - STATUS OF FROZEN ASSETS



**Are frozen assets part of the bankruptcy estate?**

If the answer is "yes",



**Can the trustee sell such assets? Can the trustee spend money included in the bankruptcy estate (*frozen funds*) to cover the costs of the bankruptcy proceedings?**



# BANKRUPTCY ORDER – GUIDELINES



- ❖ neither the trustee nor the judge-commissioner has full independence in conducting the bankruptcy proceedings;
- ❖ the consent of the state administration body (in Poland - consent of the Head of National Revenue Administration) is required:
  - ✓ for every action of the trustee, including incurring liabilities and covering the costs of bankruptcy proceedings,
  - ✓ for the sale (liquidation) of single assets or the entire enterprise;
  - ✓ for the payment of funds from the bankruptcy estate in the execution of the distribution plans.



# BANKRUPTCY ORDER – CONCLUSION

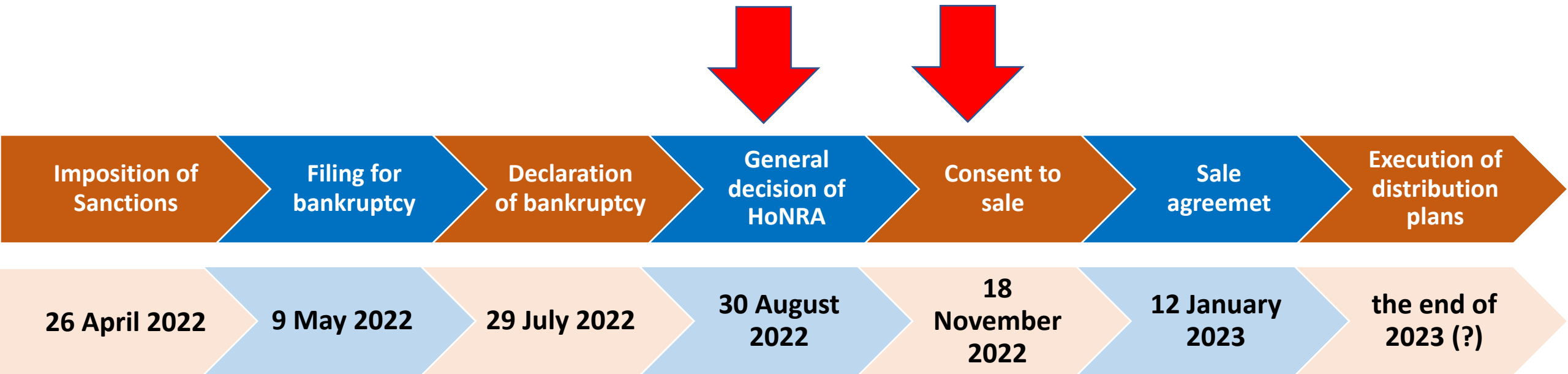


In the reasons for the bankruptcy order, the Court stated as follows:

***After the declaration of bankruptcy, the trustee and the judge-commissioner will have to work out a course of action that will allow the decision to impose sanctions on the debtor to be respected and will enable the objectives of the imposed sanctions to be achieved.***



# IMPORTANT DECISIONS OF HoNRA





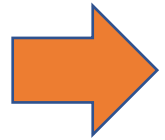
# IMPORTANT DECISIONS OF HoNRA

The Head of NRA, at the request of the trustee, issued an administrative decision. By virtue of this decision, the Head of NRA agreed to provide GO Sport with economic resources in the form of necessary services related to the bankruptcy proceedings under the condition, however, that all legal and factual activities related to the provision of the above economic resources be carried out by the trustee.

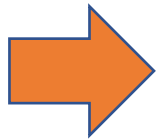
The Head of the NRA prohibited the trustee from making sales of Go Sport's assets. The trustee should have had a separate approval for the sale.



# MAIN LEGAL PROBLEMS



**Legal status of frozen assets**



**Problem of donations concluded before the filing of bankruptcy petition**



# DONATION FOR UKRAINIANS



Donation

Imposition of  
Sanctions

Filing for  
bankruptcy

Declaration of  
bankruptcy

February 2022

26 April 2022

9 May 2022

29 July 2022



# DONATION *VS* ARTICLE 127 OF THE PBL



Gratuitous acts in law performed by the bankrupt within one year prior to the filing of a bankruptcy petition, whereby the bankrupt disposed of his assets, shall be of no effect with respect to the bankruptcy estate (creditors).



# DONATION *VS* ARTICLE 127 OF THE PBL

**Should the trustee bring action to declare the donation agreement concluded between Go Sport and the charity supporting aid to Ukraine ineffective?**





# Thank you for your attention



## COUNCIL REGULATION (EU) No 269/2014 of 17 March 2014

### Article 11

1. **No claims** in connection with any contract or transaction the performance of which has been affected, directly or indirectly, in whole or in part, by the measures imposed under this Regulation, including claims for indemnity or any other claim of this type, such as a claim for compensation or a claim under a guarantee, particularly a claim for extension or payment of a bond, guarantee or indemnity, particularly a financial guarantee or financial indemnity, of whatever form, **shall be satisfied**, if they are made by:

(a) designated natural or legal persons, entities or bodies listed in Annex I;

(b) any natural or legal person, entity or body acting through or on behalf of one of the persons, entities or bodies referred to in point (a).

2. In any proceedings for the enforcement of a claim, **the onus of proving that satisfying the claim is not prohibited by paragraph 1 shall be on the natural or legal person, entity or body seeking the enforcement of that claim.**

3. This Article is without prejudice to the right of natural or legal persons, entities or bodies referred to in paragraph 1 to judicial review of the legality of the non-performance of contractual obligations in accordance with this Regulation.



# EU bankruptcy cases provoked by anti-Russia sanctions

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- Amsterdam Trade Bank NV (ATB) - owned by ALFA-BANK JSC (the largest private bank in Russia) - on the sanctions list in the US as of early April 2022. An **asset freeze that prohibited European individuals and companies from providing finance to ATB**.
- Microsoft ceased providing access to data resources (email accounts and accounting data) – other US based IT service providers planned the same move.
- **ATB filed for bankruptcy in the Netherlands** which was granted to it by the Amsterdam court on 22 April 2022.
- **Microsoft refused to cooperate** with court administrators (IP).
- The Amsterdam court issued a **preliminary relief where it held it unlikely that granting access to the IPs was in conflict with the spirit of the sanctions rules**. The judge ruled also that there was **an urgent interest of the IPs to have information** available and the administrative route would take too long to adequately protect creditors rights.
- The court **ordered Microsoft to grant the IPs access** to the cloud environment and prohibited it from destroying the cloud and the data contained in it – all under penalty of €10 million per day or per violation for non-compliance with the judicial order, up to a maximum of €100 million.

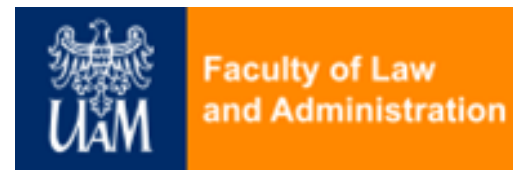
- **Nostrum Oil & Gas plc (“Nostrum”)** was the English holding company of an oil and gas group operating on fields in Kazakhstan.
- Nostrum became financially over-leveraged and needed restructuring under British scheme of arrangement regime. **The insolvency was not caused by sanctions.**
- Nostrum sought an order confirming a scheme of arrangement. However, as **some of the creditors were the subject of sanctions** in the UK, EU, the US and Guernsey.
- The court deciding **they should not vote** (sanctions regime), wanted to be sure these creditors were **respectfully protected**.
- The scheme prevented the distribution of consideration to any sanctioned creditors.
- The Court was satisfied that **this did not put the sanctioned creditors at any greater disadvantage than they already faced under the relevant sanctions regulations.**

- Fortenova is a Croatian food conglomerate, annual revenue of more than EUR 5 billion, employing more than 47,000, head office in Amsterdam.
- Sberbank (on sanction lists since 2014), through SBK Art, holded appr. 42% of the depositary receipts (*certificaten*) in the Dutch foundation (*stichting*) Fortenova Group STAK Stichting (owner of Fortenova).
- SBK was rejected to attend and vote on the general meeting of holders of depositary receipts. SBK went to court to be granted access.
- In Oct 2022 the shares of SBK was sold to Mr Saif Alketbi (UAE). Later in 2022 – SBK itself was put on the EU sanctions list.
- **The District Court of Amsterdam on 6 Sep 2022 ruled that the Russian state bank (via SBK) may not be refused to attend a meeting of holders of depositary receipts and that freezing of certificates may not cause freezing of voting rights.**
- Fortenova appealed and on 29 Dec 2022 the Court of Appeal in Amsterdam dismissed the 1<sup>st</sup> instance judgment stating that Sberbank (SBK), has no voting rights and cannot attend the meetings.
- The judgment clarifies that the **voting rights are explicitly considered to be an intangible economic resource** and have to be frozen, i.e. their exercise must be prevented. It applies the **EC's instruction from Nov 2022** (the shareholders of sanctioned companies cannot exercise their direct or indirect voting rights).

## Petropavlovsk Plc (in administration) [2022] EWHC 2097 (Ch)



- Petropavlovsk Plc was the British holding company of a Russian gold mining group. It became insolvent due to the UK sanctions regime.
- The administrators decided that it was in the best interests of creditors to sell the assets.
- The proposed buyer was a Russian company (not subject to UK sanctions, but unclear).
- The administrators applied for a court's permission to proceed with the sale.
- The Court was not certain whether the proposed sale would not breach the UK sanctions regime, **as it had not heard any arguments from the Office of Financial Sanctions Implementation ("OFSI")**.
- The Court found that **the risk of the sale breaching the UK sanctions regime was not so high** as to make it inappropriate for the administrators to proceed – **and therefore issued the consent for the sale**.



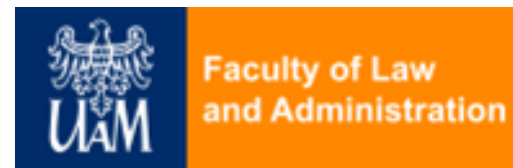
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Prof. Anna Hrycaj, Lazarski University in Warsaw

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Conference on European Restructuring and Insolvency Law

- Is the way insolvency law reacts on the sanctions issue proper?
- Should it provide for extraordinary instruments blocking the obligation to file for bankruptcy?
- How the law should protect the viable businesses from the consequences of sanctions?
- Should sanctions' regulations supersede/derogate the insolvency law?
- What are the ultimate goals of the sanctions and how to achieve them in bankruptcy proceedings?
- How to ensure the right to a fair trial and a proper judicial protection for the expropriated persons or entities with their frozen assets?



# Thank you for your attention!

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