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The Social and Economic Role of Banks in Restructuring Processes in Lithuania

1. Introduction

The Law on Insolvency of Enterprises of the Republic of Lithuania (hereinafter 'Enterprise Insolvency Law' or 'EIL') establishes the rules governing corporate insolvency proceedings. The EIL, adopted in 2019, codified the relevant corporate insolvency rules into a single legal act. It repealed the previous laws on insolvency proceedings, namely the Law on Bankruptcy of Enterprises of the Republic of Lithuania and the Law on Restructuring of Enterprises of the Republic of Lithuania. The main objective behind the adoption of the EIL was to increase the effectiveness of corporate insolvency proceedings and improve the conditions for more efficient restructuring processes. Additionally, the new insolvency law introduces mechanisms allowing for the conversion of bankruptcy (liquidation) proceedings into restructuring proceedings where an enterprise's viability improves and there is a reasonable prospect that the business may be rescued.

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Creditors play a crucial role in bankruptcy and restructuring proceedings under the EIL. Essentially, all creditors whose claims arose prior to the opening of insolvency proceedings have the right to lodge their claims and exercise the rights established under the EIL. The EIL provides for both individual and collective creditors' rights. Collective rights may be exercised through the creditors' meeting and/or committee. For restructuring proceedings, creditors are divided into two classes: the class of secured creditors and all other creditors. Since, in most cases, banks' (credit institutions') claims are secured by collateral, they act as secured creditors, making their role vital in the confirmation of a restructuring plan. Additionally, although the general rule is that only a debtor has the right to apply for the initiation of restructuring proceedings, a creditor whose claim exceeds a certain threshold established by law also has the right to seek the opening of such proceedings. As a result, secured creditors may play a decisive role in determining which insolvency proceedings should be initiated against a debtor.

Banks (credit institutions) acting as creditors in restructuring and insolvency proceedings may play a significant social and economic role. Not only do banks have the right to seek the initiation of restructuring proceedings, but they may also conclude agreements facilitating the restoration of solvency and viability of a company (work-out agreements). Furthermore, if restructuring proceedings are initiated, banks may contribute to the application of preventive restructuring tools, such as the continuation of essential executory contracts and the provision of interim or new financing. Since banks often act as secured creditors and form a separate class for voting on a restructuring plan, their position is particularly important in determining how restructuring proceedings should be conducted.

This article examines the role of banks (credit institutions) in restructuring proceedings under the EIL. It consists of three parts: first, it presents the main elements of restructuring proceedings in Lithuania; second, it analyses the role of creditors in restructuring proceedings; and third, it discusses the position of banks (credit institutions) as secured creditors in restructuring proceedings. Additionally, the article focuses on the relevant provisions of the EIL and case law and examines the implementation

of Directive (EU) 2019/1023 on restructuring and insolvency[1] into Lithuanian insolvency law. The implementation of the Directive into national law has introduced preventive restructuring mechanisms aimed at increasing the effectiveness of restructuring proceedings. Banks, as creditors in restructuring proceedings, may play a crucial role in ensuring the proper functioning of these mechanisms.

2. Overview of restructuring proceedings in Lithuania

Under the EIL, two court insolvency proceedings are available for companies experiencing insolvency (imminent insolvency) issues. When a company becomes insolvent, bankruptcy (liquidation) proceedings must be initiated. The assessment of insolvency involves both liquidity and balance sheet tests. Under the EIL, insolvency is defined as a state in which an enterprise is unable to fulfil its financial obligations on time, or where its obligations exceed the value of its assets (Article 2(7) EIL). When a company becomes insolvent, the manager of the company is obliged to apply for the initiation of bankruptcy proceedings. However, while the company's manager has the right to apply for restructuring proceedings, there is no legal obligation to do so.

The main purpose of such insolvency proceedings is to accumulate and realise the debtor's assets and maximise creditors' returns. All of the debtor's creditors have the right to apply for the initiation of bankruptcy proceedings (Article 9 EIL). However, not all creditors have the right to seek the initiation of restructuring proceedings. Only creditors holding claims that have already fallen due and that exceed a certain amount (10 minimum monthly wages) have the right to apply for restructuring proceedings (Article 4(2) EIL).

The first law regulating restructuring proceedings, the Law on Restructuring of Enterprises of the Republic of Lithuania, was introduced in Lithuania

[1] Directive (EU) 2019/1023 of the European Parliament and of the Council of 20 June 2019 on preventive restructuring frameworks, on discharge of debt and disqualifications, and on measures to increase the efficiency of procedures concerning restructuring, insolvency and discharge of debt, and amending Directive (EU) 2017/1132; [2019] OJ L172/18, (hereinafter 'the Restructuring Directive' or 'the Directive').

in 2001. Since the adoption of this law on restructuring proceedings until 2024, a total of 606 restructuring cases have been opened. However, only 76 restructuring cases have been successful, meaning that the restructuring plan was implemented, while 458 restructuring cases have been terminated. Thus, only a small majority of all restructuring cases have properly served their purpose and allowed viable businesses to be rescued. This raises the question of why the number of successful restructuring cases remains low and why restructuring proceedings are not effective. One of the main aims of the insolvency law reform in 2019 in Lithuania was to improve the conditions for and access to restructuring proceedings. Further development of national law was linked to the implementation of the Directive, which provides early restructuring mechanisms.

The statistics of corporate insolvency cases in Lithuania in recent years show that corporate bankruptcy remains the main insolvency procedure. However, an even more pressing issue appears to be the small number of successful restructuring cases where a restructuring plan is implemented:

	2018	2019	2020	2021	2022	2023
Bankruptcy cases	2,091	1,609	790	808	1,193	1,018
Restructuring case	27	33	29	9	21	34
Successful restructuring cases	6	6	7	9	2	5

The statistics of corporate insolvency proceedings in Lithuania show that even with the adoption of the EIL and the implementation of the Directive, the number of restructuring cases remains low in comparison to bankruptcy proceedings. Such low numbers of restructuring proceedings may be attributed to various reasons, such as late filing, unwillingness to reveal financial problems in public, and mistrust in the insolvency system. The low number of successful restructuring cases may be linked to the misapplication or non-application of restructuring tools that would otherwise allow the rescue of a viable company. In such cases, the position of creditors may

play an important role, since the application of business rescue measures may depend significantly on creditors' decisions, such as the protection of essential executory contracts, the provision of additional financing, assistance to the debtor related to the satisfaction of claims, and support for the restructuring plan. The role of banks acting as secured creditors may be particularly significant in determining the chances of successful restructuring and the application of rescue mechanisms.

Restructuring is possible for enterprises that are not yet insolvent but may face insolvency in the foreseeable future while remaining viable. Viability of the business is the main criterion that the court has to assess when deciding whether an enterprise may be rescued and whether restructuring proceedings should be opened. Viability is defined as the state of an enterprise in which it pursues business activities that allow it to perform its obligations in the future (Article 2(6) EIL). Under the relevant case law, the viability of a company is assessed using various applicable criteria. Namely, the court has to assess: (1) the reasons for insolvency, (2) the economic activities of an enterprise and their prospects, (3) foreseeable income, (4) the peculiarities of labour relations, and (5) the performance of essential obligations.[2] A restructuring case is opened when all cumulative conditions are met: (i) an enterprise encounters financial difficulties, (ii) it is viable, and (iii) it is not subject to liquidation proceedings (Article 21(1) EIL). In contrast, a bankruptcy case is opened when an enterprise is insolvent and no restructuring case is opened (Article 21(2) EIL).

The determination of business viability is a crucial aspect of the possibility of restructuring and business rescue. The mechanisms of restructuring include various actions necessary for carrying out business activities. The mechanisms of restructuring actions aimed at reviving the company and increasing its competitiveness may involve changing the type of economic activity of companies, improving work organisation, modernising production, selling the company's assets or part of them, acquiring the assets of other companies through mergers or divisions, changing the size and performance deadlines of the company's obligations to creditors, and implementing other

[2] Judgment of the Court of Appeal of Lithuania of 16 March 2023 in civil case e2-295-407/2023.

technical, economic, and organisational measures.[3] Thus, it is accepted in the relevant case law that restructuring mechanisms may involve various business-related changes that should improve the company's business conditions and competitiveness in the market.

With the adoption of the EIL, restructuring has been established as the primary tool for addressing the insolvency problems of a company. The need to preserve a company operating in the market and still able to function essentially independently when its financial difficulties are not of an obviously permanent nature is socially more significant than liquidation, because in the case of the company's rescue, both the company and its employees and other creditors may receive greater benefits. The company will continue to function as a business entity in the future, jobs will be preserved, the state will receive income in the form of taxes, and creditors, especially those of the last order, will have greater opportunities to obtain satisfaction of their claims during the restructuring process than in the case of liquidation, when the company's assets are sold for liquidation value and the last-order creditors' ability to recover debts is often very minimal.[4]

Both bankruptcy and restructuring proceedings are court proceedings, except for one out-of-court bankruptcy procedure where the creditors' meeting acts as a court. The EIL also establishes a mandatory pre-trial dispute settlement procedure before a claim for the opening of insolvency proceedings may be filed with the court (Articles 8 and 9 EIL). The main goal of this procedure is to encourage the debtor and creditors to conclude an agreement that would allow the debtor's solvency to be restored with the assistance of the creditors. All applicants, including the debtor and creditors, must comply with the requirements related to the pre-trial dispute settlement procedure. Thus, irrespective of which insolvency proceedings may be opened, an applicant must first use this pre-trial dispute settlement procedure and only thereafter is entitled to request the court to open insolvency proceedings.

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3 Judgment of the Court of Appeal of Lithuania of 30 May 2024 in civil case e2-387-934/2024.

4 Judgment of the Court of Appeal of Lithuania of 28 July 2022 in civil case e2-822-910/2022.

Restructuring proceedings are always court proceedings. If the court opens restructuring proceedings, the manager of the company remains in power (debtor in possession), although an insolvency practitioner may be appointed. The manager of the company must prepare the restructuring plan within four months after the opening of restructuring proceedings in court, although this period may be extended for additional two months. The overall period within which the restructuring plan must be prepared and submitted to the court is six months (Article 110 EIL). Before the restructuring plan is submitted to the court, it must be approved by the company shareholders (Article 106 EIL) and creditors (Article 107 EIL). The restructuring plan must then be confirmed by the court (Article 111(1) EIL). The EIL also establishes the cramdown procedure (Article 111^1 EIL). The implementation period of the restructuring plan is four years, but it may be extended for one additional year (Article 105 EIL).

Restructuring proceedings are regarded as the primary tool for addressing insolvency problems while maintaining the viability of a company. Restructuring proceedings are always court proceedings and may only be opened if the company is viable. Additionally, a debtor (company) or creditors must use the work-out procedure, which aims to encourage the debtor and creditors to conclude agreements that would allow the debtor's viability to be restored.

3. The role of creditors in the restructuring proceedings

Creditors are participants in restructuring proceedings. In restructuring proceedings, creditors' active participation may play a crucial role in ensuring the effective rescue of the business.

Creditors' involvement in the rescue of a debtor begins even before formal restructuring proceedings commence in court. Certain creditors have the right to request the opening of restructuring proceedings. If a creditor's claim has already fallen due and the amount of the claim exceeds ten minimum monthly wages, the creditor has the right to demand the opening of restructuring proceedings. Thus, if creditors believe that the debtor's business activities may be rescued, they may request the initiation of pre-trial

insolvency proceedings (work-out) and subsequently submit a claim to open restructuring proceedings in court. Although creditors rarely exercise this right in practice and the need for business rescue should primarily originate from the debtor company, the fact that creditors also have the right to seek the opening of restructuring proceedings demonstrates that bankruptcy is not the only available instrument for addressing the insolvency problems of a counterparty.

If an enterprise seeks to initiate formal restructuring proceedings in court, the manager of the enterprise must inform all creditors within a period of 15 to 30 days, allowing creditors to provide any assistance that could help restore the solvency and viability of the enterprise. Assistance to the company should be provided under an agreement on assistance, which is defined as any agreement between an enterprise and creditors that directly creates, modifies, or terminates civil rights and/or obligations arising from creditors' assistance in overcoming the enterprise's financial difficulties (Article 10(1) EIL). In most cases, such an agreement would involve modifying the performance of creditors' financial obligations to the debtor, such as postponement or reduction of payments, new financial assistance, or other measures. Article 2(18) EIL establishes that assistance to overcome financial difficulties of a legal entity includes assistance provided by creditors to help the entity overcome financial difficulties, including the postponement of a deadline for fulfilling an obligation, the waiver of an obligation or part of it, or the replacement of an obligation with another obligation.

The aim of such assistance to the debtor is to provide financial support that enables the debtor to continue business activities. In most cases, such assistance involves modifying claims against the debtor. Additionally, agreements on assistance must be clear, concrete, and provide real support to the debtor to facilitate the restoration of solvency.[5]

In pre-trial insolvency proceedings, creditors are not obligated to conclude an agreement on assistance with the debtor but may be motivated to do so if there are reasonable prospects that the debtor may be able

[5] Judgment of the Court of Appeal of Lithuania of 15 September 2020 in civil case e2-1478-407/2020.

to pursue economically beneficial business activities and later repay the debts to creditors. In essence, such an agreement on assistance resembles workouts, which are commonly regarded as contractual rather than insolvency law solutions to debt problems.

Under the EIL, creditors as participants in insolvency (restructuring) proceedings have certain rights and duties. The EIL establishes creditors' individual rights (Article 43) and collective rights (Article 44) in insolvency proceedings. The duties of creditors are not specifically outlined in the EIL; however, general duties in civil proceedings, such as the prohibition of abuse of rights, are also applicable to creditors. The exercise of collective creditors' rights is particularly significant in restructuring proceedings. In these proceedings, each creditor has individual rights, which may be exercised independently without coordination with other creditors, and collective rights, which are exercised collectively in creditors' meetings or committees. The creditors' meeting has the authority to decide how insolvency proceedings should be handled.

Creditors vote on the restructuring plan. The implementation period of the restructuring plan may not exceed four years (Article 105(1) EIL), but it may be extended by one additional year (Article 105(4) EIL). The restructuring plan must be approved by shareholders and creditors. Creditors are divided into two classes: (i) creditors whose claims are secured by a lien and (ii) other creditors. All creditors in the same class have equal rights in similar circumstances (Article 108 EIL). Only affected creditors vote on the restructuring plan. The restructuring plan is deemed approved if, in each class, the majority of creditors representing more than half of all affected creditors in that class vote in favour of the plan. Thus, not all creditors of the legal entity under restructuring, as approved by the court, have the right to vote, but only the creditors affected by the restructuring plan, as specified in the plan. However, when calculating the voting results, the sum of the claims of all creditors approved by the court in the relevant creditor class is taken into account. To ensure an efficient and effective restructuring process and to protect the interests of both the legal entity being restructured and all of its creditors (both those affected by the restructuring plan and those not affected), it is particularly important to properly define which creditors are recognised as affected by the

restructuring plan according to the provisions of the EIL and to clarify which entities are entitled to vote on the approval or rejection of the draft restructuring plan.[6]

Thus, creditors have the right to demand the opening of restructuring proceedings and to make critical decisions regarding the rescue of a company. Most importantly, creditors are divided into two classes, both of which must vote on the approval of the restructuring plan.

4. Position and role of banks in restructuring proceedings

The EIL does not establish any special rules regulating the participation of banks (credit institutions) in restructuring proceedings. Banks, like other creditors, have the same rights and duties. However, the peculiarities of banks as creditors derive from their status and claims against a debtor. Banks may be among the major creditors in restructuring proceedings, meaning they hold the largest claims and can significantly influence decision-making in creditors' meetings (committees). Since banks often hold the majority of claims, they also hold the majority of votes in creditors' meetings (committees), allowing them to significantly impact decisions.

Additionally, banks frequently act as secured creditors, meaning they hold certain property rights over assets constituting the insolvency estate (collateral). The company's assets pledged to the bank may be particularly important for the possibilities of rescuing the company. Decisions regarding how such pledged assets should be treated play a crucial role in determining whether the debtor can continue business activities.

Moreover, banks are often likely providers of additional financing for a debtor, which is essential for maintaining business activities. Such additional financing may be critical for the continuation of business operations after restructuring proceedings are initiated or for the proper implementation of rescue mechanisms established in the restructuring plan.[7]

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6 Judgment of the Court of Appeal of Lithuania of 11 July 2024 in civil case e2-533-798/2024.

7 Judgment of the Court of Appeal of Lithuania of 21 April 2020 in case 2-724-585/2020.

In some cases, banks and debtors may conclude agreements that include specific rules on the termination of financial agreements (such as lease agreements) and the satisfaction of creditors' claims. However, even though such agreements are lawful under civil law, their implementation between the parties changes in the event of an insolvency (bankruptcy) case. If an insolvency (bankruptcy) case is opened against a debtor, the fulfilment of obligations and the submission of claims are regulated by the EIL.[8] Thus, all creditors' claims in restructuring proceedings are satisfied under the EIL.

In the liquidation of a legal entity, claims of the holders of pledged property are satisfied first from the pledged property. The claims of the following creditors are satisfied in the first instance: claims of creditors who provided new and/or interim financing that is not secured by a pledge and/or mortgage, arising from the failure of the legal entity to repay the loans within the terms stipulated in the contracts (Article 94(1) EIL). The same ranking of creditors is applied in restructuring proceedings (Article 113(1) EIL).

One of the key elements of effective restructuring, introduced in the EIL following the implementation of the Restructuring Directive, is the protection of essential executory contracts. Article 102^1(1) EIL establishes that until the court order approving the restructuring plan takes effect, creditors of a legal entity cannot: (1) terminate essential contracts or change their terms to the detriment of the legal entity; (2) terminate contracts that are not classified as essential contracts or change their terms to the detriment of the legal entity solely because the court has made a decision to accept a statement on the filing of a restructuring case or because a restructuring case has been filed against the legal entity. Under Article 102^1(2) EIL, this protection applies to contracts concluded before the opening of the restructuring case and whose term of performance has not expired. Loan (credit) contracts concluded between a debtor company and a bank may be one of the main sources of financing for a company's activities. The preservation of such contracts in restructuring proceedings is particularly important to maintaining the company's viability.

[8] Judgment of the Court of Appeal of Lithuania of 26 September 2023 in case e2-914-933/2023.

Another crucial factor for the effectiveness of restructuring proceedings is additional financing, which may be required for a company to cover financial costs and taxes related to the continuation of business activities after the opening of restructuring proceedings and later to meet the expenses associated with the implementation of the restructuring plan. It is likely that credit institutions (banks) will provide such additional financing in restructuring proceedings. In line with the Restructuring Directive, the EIL establishes two types of additional financing: interim and new financing.

The EIL defines both concepts of additional financing in restructuring proceedings. Interim financing is defined as additional funding provided to an enterprise by new or existing creditors, which is reasonable and immediately necessary to enable the enterprise to continue its activities, maintain viability, or prevent a reduction in its value before the restructuring plan is confirmed (Article 2(20) EIL). New financing is defined as additional funding confirmed in the restructuring plan and provided by current or new creditors, allowing the company to address its financial difficulties (Article 2(15) EIL). Both definitions of additional financing closely align with the concepts delineated in the Restructuring Directive. If interim financing is to be provided, the restructuring plan must include information about interim financing, such as the amount and conditions of potential loans (credits), the means of their performance, and other sources of financing before the approval of the restructuring plan (Article 17(3)(4) EIL).

The EIL provides certain protections for transactions involving interim or new financing. It stipulates that transactions under which new and/or interim financing was provided to an enterprise cannot be declared void unless they were concluded in violation of the law or through fraud (Article 64(3) EIL). Additionally, a creditor who has provided new or interim financing cannot be subject to civil, administrative, or criminal liability on the basis that such financing causes negative consequences for the interests of all creditors (Article 102^2(2) EIL).

Transactions that are reasonable and necessary for the approval or implementation of the restructuring plan approved by the court cannot be declared invalid solely on the grounds that they cause negative consequences for all creditors, except where they were concluded in violation of the law or through fraud (Article 102^2(3) EIL). The transactions referred to in part 3 of

this article relate to the costs of preparing the restructuring plan, consultation during the preparation of the plan, payment of wages to employees of the legal entity, and other settlements necessary for the normal economic and commercial activities of the legal entity (Article 102^2(4) EIL).

The role of banks as creditors in restructuring proceedings is particularly relevant to ensuring the effectiveness of restructuring. Under the EIL, banks not only have the potential to provide additional financing for a company but may also play a significant role in the confirmation of the restructuring plan.

5. Conclusion

Restructuring is one of the insolvency proceedings established under the EIL. It is a collective insolvency mechanism that includes all creditors affected by the restructuring plan. Nevertheless, restructuring remains infrequently used in Lithuania. Banks may play a key role in facilitating the rescue of viable businesses. Since banks often act as secured creditors and may hold the majority of votes in creditors' meetings (committees), their position on the prospects of a company's business operations is particularly significant. The new preventive restructuring mechanisms introduced by the Directive may encourage banks to maintain loan (credit) contracts concluded with a company that enters restructuring proceedings and to provide interim or new financing.

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