Studia Iuridica 98
ISSN 0137-4346; e-ISSN 2544-3135

DOI: https://doi.org/10.31338/2544-3135.si.2023-98.12

Carsten Schirrmacher
Philipps University of Marburg, Germany
e-mail: Carsten.Schirrmacher@recht.uni-giessen.de
ORCID: 0000-0002-1554-898X

CREDITORS' SATISFACTION, FAIR DISTRIBUTION, OR AVOIDING THE STRUGGLE FOR SURVIVAL – WHICH PUBLIC INTERESTS IS CORPORATE INSOLVENCY LAW SUPPOSED TO SERVE?

Abstract

For a long time, insolvency proceedings were understood as a special civil law procedure with the aim of maximizing creditor satisfaction. To the extent that public interests played a role in this, it was a matter of giving preferential treatment to particular groups of creditors. This was expected to contribute to the realization of sociopolitical values.

For good reasons, such values are receiving less and less consideration in insolvency law. Instead, it has been recognized that proper structuring of the legal relationship between the debtor company and its creditors is likely to minimize macroeconomic damage in the public interest. This has led to a substantial change in the objectives of insolvency law, which – especially thanks to the Restructuring Directive (2019/1023/EU) – has arrived in all European legal systems. This article traces the paradigm shift and shows, using the example of German and Polish insolvency law, that despite having its foundations in European law, it has not yet been fully internalized in the legal systems of all Member States.

KEYWORDS

insolvency and restructuring, Restructuring Directive, privileged creditors, macroeconomic efficiency

SŁOWA KLUCZOWE

upadłość i restrukturyzacja, dyrektywa restrukturyzacyjna, uprzywilejowani wierzyciele, efektywność makroekonomiczna

1. INTRODUCTION

The insolvency laws of almost all continental European countries have undergone considerable reform in recent decades. The main reason is a changing conception of the issues that corporate insolvency law is designed to serve. It was traditionally conceived as a mechanism for maximum creditor satisfaction through the enforcement of debtor's liability.[1] The foundation in the history of ideas is the ancient Roman bankruptcy procedure.[2] In contrast, hardly any weight was attached to the issues of a debtor company (or its shareholders). According to the traditional view, they had failed economically and were therefore not worthy of further participation in the market. A broader public purpose of corporate insolvency law was also seen in this context. It used to serve as a vehicle for market consolidation by excluding economically failed entrepreneurs.[3] However, the assumption that the insolvency of a company indicates that it cannot operate profitably and should therefore be excluded from the market has proven to be also unfounded.

Indeed, a company may also get into financial trouble after not optimally using its resources due to poor management or it may collapse under the interest burden of debt previously taken although operating profits are now being generated. Moreover, exogenous factors such as the coronavirus pandemic, the Russian war of aggression in Ukraine, and the subsequent inflation have recently put basi-

---

[1] On German law, amongst others, German Federal Court of Justice, Judgement of 20 February 2003, IX ZR 81/02. The situation used to be similar under Czech law, cf. C. Zezulková Vitková, O. Zezulka, *Preventive Restructuring*, in: N. Grmelová (ed.), Perspectives of Law in Business and Finance, 2023, pp. 65-66.

[2] For an overview of insolvency proceedings in ancient Roman law see R. Obenchain, *Roman Law of Bankruptcy*, Notre Dame Law Review 1928, No. 4, pp. 180 *et seq*.

[3] From a German perspective, C. Paulus, *Die „Aufgabe" des Insolvenzrechts*, Zeitschrift für Restrukturierung und Insolvenz 2021, No. 2, pp. 45-46.

cally healthy companies into financial distress.[4] Finally, excluding such companies from the market activity is harmful, especially, if this is accompanied by the dismantling of their previously coordinated entrepreneurial units.

This realization is the starting point of a paradigm shift that has now reached the insolvency laws of all Member States, especially thanks to the assistance of the European legislator. The focus is no longer solely on the maximum creditor satisfaction, if necessary, at the expense of breaking up the debtor company. Instead, the public interest in avoiding macroeconomic damage has found its way into insolvency law.[5] Insolvency law hence no longer primarily regulates the legal relationships between a company in crisis and its creditors. It has become a matter that takes a business crisis as an opportunity to enable macroeconomically useful restructuring of ailing companies[6] (*infra* 2.). Furthermore, a question arises as to whether insolvency law is also a suitable vehicle to enforce sociopolitical ideas of a 'fair' distribution of debtors' assets (*infra* 3.).

2. THE PUBLIC INTEREST IN REDUCING MACROECONOMIC DAMAGE THROUGH INSOLVENCY LAW

The first objective in shaping insolvency law is, therefore, to minimize macroeconomic costs. A distinction must be made here. The losses from the previous entrepreneurial activity that got the company into difficulties have already been incurred; they cannot be reversed but only distributed in restructuring or insolvency proceedings. However, insolvency law can help to avoid the destruction of further assets.

2.1 THE PUBLIC INTEREST IN AVOIDING STRUGGLES FOR SURVIVAL

In this sense, it is the function of insolvency law to avoid an intense struggle for the survival of a distressed company. Here, managers and shareholders[7] desperately try to avert insolvency. This is, in fact, harmful in many regards.

---

[4] A. J. Casey, *Chapter 11's Renegotiation Framework and the Purpose of Corporate Bankruptcy*, Columbia Law Review 2020, No. 7, p. 1738; C. Cavallini, M. Gaboardi, *Towards a Transnational Model of Bankruptcy Law*, UC Davis Business Law Journal 2023, No. 1, pp. 78-79.

[5] Cf. recital 16 to the Restructuring Directive.

[6] For an overview on the recent development in European legislation and its backgrounds cf. C. Cavallini, M. Gaboardi, *supra* note 5, pp. 65 *et seq*.

[7] For the sake of simplicity, it shall be assumed here that the shareholders are willing and able to determine the course of the company in which they hold an interest.

Firstly, the shareholders of ailing companies have an incentive to make economically damaging investment decisions. Since their shares are worthless or almost worthless anyway, they will not lose much, even in the case of high losses of the company; rather, the losses will be charged to its creditors, whose insolvency dividend will decrease. If, on the other hand, profits are made, the shareholders will benefit from them in full because they can be distributed or (if left in the company) lead to an increase in the value of the shares.[8]

As a result, taking almost any entrepreneurial risk becomes worthwhile for the shareholders, because even if there is little likelihood of making a profit, they can possibly avoid insolvency and obtain the profit, whereas the (much more likely) losses resulting from taking that risk no longer have any influence on their financial position. Even investments that very likely lead to the destruction of values become worthwhile from the shareholders' perspective.[9] To put it bluntly, it may be favorable from their point of view to use the remaining liquid assets in the casino. Fittingly, such excessively risky investment behavior in the perspective of insolvency is broadly referred to as 'gambling for resurrection'.[10]

Secondly, the damage resulting from the fact that new creditors repeatedly try to access the assets of an insolvent company is considerable. If the liquid assets are not sufficient to satisfy a creditor, the company is forced to convert production means, i.e., the foundations of its continued economic existence, into money. If the company does not do this itself, individual creditors can compulsorily bring about this conversion into cash in the course of individual enforcement. As a result, a cohesive productive unit is torn apart and it becomes increasingly unlikely that revenues can be generated from the continued entrepreneurial activity, which could be satisfactory for the remaining creditors.[11]

The creditors are hence caught in the so-called 'prisoner's dilemma'. From the point of view of the creditors as a whole, it seems optimal to refrain from accessing the debtor company's assets so that the company remains intact and can later yield a profit or at least be liquidated as a coordinated unit. From an individual creditor's point of view, however, immediate access to the debtor's assets is advisable, because otherwise other creditors could get faster access to them. In order to achieve the optimal result, all creditors must, therefore, agree to behave optimally in the interest of the entire group of creditors and to refrain from individual

[8] M. C. Jensen, W. H: Meckling, *Theory of the firm: Managerial behavior, agency costs and ownership structure,* Journal of Financial Economics 1976, No. 4, pp. 334 *et seq.*

[9] For an in-depth theoretical substantiation cf. A. Rivera, *Dynamic Moral Hazard and Risk-Shifting Incentives in a Leveraged Firm*, Journal of Financial and Quantitative Analysis 2020, No. 4, pp. 1333 *et seq.*

[10] Cf. J.-P. Décamps, A., Faure-Grimaud, *Bankruptcy Costs, Ex Post Renegotiation and Gambling for Resurrection*, Finance 2000, No. 2, pp. 71 *et seq.*

[11] Fundamentally D. G. Baird, T. H. Jackson, *Cases, Problems and Materials on Bankruptcy*, Boston 1985, pp. 31 *et seq.*

compulsory enforcement measures.[12] In order to reach this agreement, however, they need a forum to coordinate their interests, which a debtor in his struggle for survival cannot offer them.

Thirdly, in the struggle for the survival of the debtor company, individual (major) creditors gain a superior position, which they can exploit to the detriment of the debtor company and the other creditors. Thus, by threatening to otherwise proceed to individual enforcement and thereby make the debtor company extinct, they can induce the debtor to grant him special advantages. Practice has shown that the subsequent securing *in rem* of already existing (unsecured) significant loans plays a role here.[13]

An economically sound company would hardly agree to such disadvantageous transactions. However, if this is the only way to avoid immediate collapse, its shareholders will give in. After all, they thereby preserve the possibility of later dividend payouts in the (unlikely) event of rescue through their own efforts. They do not have to consider the (much more likely) case of imminent failure. In this case, all the company's assets will be lost to the creditors anyway. It is then irrelevant from the shareholders' point of view how much of these assets will each creditor then receive. This illustrates the fourth problem. For the shareholders of an ailing company, there is no longer any incentive to ensure a distribution of its assets that is in line with the market or perceived as 'fair' from any point of view.

2.2. THE PUBLIC INTEREST IN MAINTAINING COORDINATED ECONOMIC UNITS

The fact that the decomposition of coordinated productive units can be macroeconomically harmful has already been mentioned in connection with the struggle for survival. There, the decomposition was an undesirable consequence of the efforts of the debtor company to survive the permanent claims by individual creditors on its own. In contrast, state regulation of the legal relationship of insolvent enterprises is only justified if it succeeds in keeping at least potentially profitable coordinated productive units alive. In this case, insolvency law also has a desirable market-ordering effect. Only those enterprises are excluded from

[12] This fundamental finding by T. H. Jackson, *Bankruptcy, Non-Bankruptcy Entitlements, and the Creditors' Bargain*, Yale Law Journal 1985, No. 5, p. 862, remains prevalent until now., cf. L. Ponoroff, *The Resiliency of the Equality of Creditors Ethos in Bankruptcy*, American Bankruptcy Institute Law Review 2022, No. 1, p. 26-27 (with further evidence in fn. 185 and 190).

[13] The German Federal Court of Justice (BGH) gave detailed reasons for the immoral nature of such arrangements in two early decisions – BGH, Judgements of 5 January 1955, IV ZR 154/54 and of 24 November 1964, V ZR 169/62 – the substance of which has not since been doubted. Cf. most recently Saarbrücken Higher Regional Court (OLG Saarbrücken), Judgement of 13 October 2021, 5 U 20/21.

market activity that cannot be operated profitably.[14] The resources tied up in such companies can then be used for more profitable businesses.

2.3. SHIFT OF PARADIGMS AS A LEGISLATIVE REACTION

A progressive corporate insolvency law must therefore, firstly, provide an economically more favorable alternative to entering the struggle for survival and, secondly, offer the parties involved sufficient incentives to go through this procedure.[15] Thus, if the law wants to avoid the break-up of productive units, it must, at least temporarily, prevent measures of individual compulsory enforcement. During this time, creditors must be given the opportunity to gain an overview of the situation at the debtor company and, on this basis, coordinate their interests in order to escape the 'prisoner's dilemma'.[16]

These findings are not new and have always been applied in the 'classic' insolvency proceedings.[17] However, in terms of avoiding social costs, these mechanisms are only effective if as many ailing companies as possible make use of them. To this end, the law must set incentives for such companies that discourage them from entering the struggle for survival.[18]

The traditional method of making the struggle unattractive relies on deterrence by stating the delayed filing of insolvency a criminal offence. Added to this is personal liability for those responsible for the delay.[19] However, this approach in itself is insufficient for both practical and theoretical reasons. Only a very small proportion of cases of delayed filing of insolvency are actually prosecuted; the number of unreported cases is high and proving the delay is extremely difficult in practice, even in retrospect.[20] From a theoretical point of view, the threat of punishment for the delayed filing of insolvency is insufficient because it does not by far cover all cases in which an ailing company enters the struggle for survival. Firstly, natural persons as company owners are not obliged to file for

---

[14] H. Eidenmüller, *What Can Restructuring Laws Do?*, European Business Organization Law Review 2023, No. 2, p. 247.

[15] R.C. Picker, *Voluntary Petitions and the Creditors' Bargain*, University of Cincinnati Law Review 1992/1993, pp. 519 *et seq.* (with the conclusion on p. 540).

[16] H. Eidenmüller, *What is an Insolvency Proceeding?,* American Bankruptcy Law Journal 2018, No. 1, pp. 67-68.

[17] H. Eidenmüller, *ibid,* pp. 56 *et seq.*

[18] H. Eidenmüller, *Reformperspektiven im Restrukturierungsrecht*, Zeitschrift für Wirtschaftsrecht (ZIP) 2010, No. 14, p. 652.

[19] Under German law, this liability arises from § 823 para. 2 BGB (Civil Code) and § 15a InsO (Insolvency Code). Internationally, according to British terminology, it is often referred to as 'wrongful trading'.

[20] H. C. Hirt, *The Wrongful Trading Remedy in UK Law: Classification, Application and Practical Significance*, European Company and Financial Law Review, 2004, pp. 102 *et seq.* (on the liability due to wrongful trading).

insolvency, and secondly, it only takes effect as soon as the inability to pay or a qualified form of over-indebtedness has occurred.[21] However, the struggle for survival often begins earlier, for instance, if the debtor company is still liquid but will no longer be so in the foreseeable future.

If the threat of criminal and liability law consequences is obviously not particularly deterrent and hardly discourages shareholders of the distressed companies from entering the struggle for survival,[22] positive incentives are needed to generate the macroeconomically desirable behavior. In any case, the initiation of 'classic' insolvency proceedings does not appear to be attractive to the debtor company's shareholders. First of all, they lose the power to determine the business policy and they do not have any influence on the proceedings. Their company might even be closed down and they will lose their shares without compensation.[23] Moreover, their reputation as entrepreneurs is at risk of being damaged once their economic failure becomes public knowledge.[24]

In relation to such prospects, entering the struggle for survival seems perfectly rational to the shareholders of an ailing company. A progressive insolvency law must, therefore, offer better prospects to shareholders who refrain from the struggle. Optimally, they retain control over business policy and have the prospect of still holding (at least a partial) stake in their company after an agreement on the restructuring of debts has been reached with creditors. Such an agreement can include, for example, deferrals or a moderate debt waiver and it can only be reached with all creditors together. Then, within the creditors' collective, not every single creditor may have the power to derail the entire agreement. Such a power would invite the use of it to pursue undeserved special advantages. For example, insignificant creditors, in particular, could threaten to derail the settlement if their claims were not fully satisfied immediately.[25] What is necessary, but also sufficient, is a majority-supported formation of will within the collective of creditors.[26]

Many of these insights are most likely already known to Polish readers, especially as the Polish legislator recognized the aforementioned necessities and, on

---

[21] Under German law, cf. §§ 15a, 16, 18 InsO, under Polish law Art. 21 para. 1, Art. 11 Prawo Upadłościowe.

[22] For empirical evidence see H.-J. Kirstein, *Ausführungen zur real existierenden Situation bei Eröffnungs- und Befriedigungsquoten in Insolvenzverfahren*, Zeitschrift für das gesamte Insolvenz- und Sanierungsrecht (ZInsO) 2006, p. 966 *et seq.* and H.-J. Kirstein, *Der früh beginnende und lang anhaltende Todeskampf juristischer Personen – Ein Erfahrungsbericht aus der Praxis*, ZInsO 2008, pp. 131 *et seq.* (both on the situation in Germany).

[23] L. A. Weiss, *Bankruptcy resolution. Direct costs and violation of priority of claims*, Journal of Financial Economics 1990, No. 2, pp. 288-289.

[24] E. Moustaira, *International Insolvency Law*, 2019, pp. 2 *et seq.*

[25] H. Eidenmüller, *supra* note 19, p. 659.

[26] Recital 47 to the Restructuring Directive. On alternative approaches to a solution cf. H. Eidenmüller, *supra* note 17, p. 68.

this basis, created an insolvency law in 2015 that included a fundamental paradigm shift[27] and was subsequently rightly described as one of the most progressive on the European continent.[28]

In order to avoid social costs, four restructuring procedures were introduced simultaneously, all of which were intended to offer the shareholders of a debtor company better options than entering the struggle for survival. These were regulated in a separate act outside the Insolvency Code,[29] mainly for psychological reasons. No shareholder should worry about being branded as a failing entrepreneur because of recourse to proceedings according to an insolvency-related act.[30] Restructuring proceedings are initiated at the request of a debtor company that need not yet be insolvent (Art. 6 para. 1 Prawo Restrukturyzacyjne), the debtor can retain the power of disposal and is supervised only by a trustee, and finally the creditors' meeting decides on a settlement with the debtor by a (qualified) majority (Art. 119 para. 1 Prawo Restrukturyzacyjne). Moreover, the restructuring filing takes priority over the insolvency filing according to Article 9a Prawo Upadłościowe, so that it is mandatory to first discuss the possibilities of preserving productive units before proceeding to liquidate the assets and distribute the revenues to the creditors.

2.4 THE IMPLEMENTATION OF THE PARADIGM SHIFT

All these requirements are now also met by the Restructuring Directive, which forces national legislators to implement the paradigm shift already anticipated by Polish law in 2015 and also in their less progressive insolvency law systems – for example, in the German one. However, it is interesting to look at the extent to which the readjustment of the public interest in avoiding social costs influences (or does not yet sufficiently influence) the answers to individual legal questions.

The legal treatment of the so-called 'pressure filings' is an illustrative example of the following situation. Here, a (usually rather insignificant) creditor, who initially could not obtain satisfaction from the debtor company, files for insolvency although he is not primarily interested in actually initiating the debtor's insolvency but rather in getting the debtor company to make payments in order to ward off insolvency proceedings.[31]

[27] Polish Journal of Laws: Dz.U. 2015, item 978.

[28] M. Tallen, P. Kuglarz, *(Vor-)insolvenzliche Sanierungsverfahren – Ein Vergleich zwischen dem polnischen und dem deutschen Recht*, Osteuroparecht 2016, No. 2, p. 239.

[29] The new act is called 'prawo restrukturyzacyjne' (Prawo Restrukturyzacyjne), in distinction to 'prawo upadłościowe' (Prawo Upadłościowe).

[30] Sejm, printed matter No. 2824 of 9 October 2014, p. 278.

[31] The German term for this is *Druckantrag*. For a detailed description of this phenomenon in German law cf. D. Wegener, § 14 para. 73-75 (in:) W. Uhlenbruck, H. Hirte (eds.), *Insolvenzordnung*, 15th ed., Munich 2019.

Under the traditional approach, the creditors' petition is a necessary means to force out of the market distressed companies whose shareholders fail to file for insolvency. Individual creditors are thereby given the power to herald the 'civil death' of failed entrepreneurs. If one proceeds from this understanding, 'pressure filings' are undesirable because the filing creditor exploits its power for purposes unrelated to the proceedings. This understanding is still followed by German insolvency law, on which the aforementioned shift of paradigms was merely imposed from the outside as part of the implementation of the Restructuring Directive.

The fact that the traditional assumption still prevails in the treatment of pressure filings in German law can also be seen from the fact that under German law a creditor can withdraw his insolvency petition as long as the insolvency proceedings have not yet been opened by the court.[32] If the debtor satisfies the filing creditor in full, the prevailing opinion in German case law even assumes that the interest of the filing creditor in the continuation of the insolvency proceedings has thereby ceased and that they may therefore not be continued at all.[33] As a result, many creditors withdraw their insolvency petitions as soon as they have received a payment from the debtor company. In such cases, insolvency proceedings are not opened; rather, the debtor company can continue their struggle for survival.[34]

Polish law, which coherently focuses on the avoidance of economic damage caused by the struggle for survival, is much more advanced in this respect. Here, the creditor filing is not regarded as necessary but undesirable, but rather as a welcome means of early initiation of orderly proceedings on ailing debtor companies, which prevents or at least shortens the struggle for survival. Therefore, the insolvency court may declare the withdrawal of a creditor filing inadmissible if this results in disadvantaging other creditors (namely because of the continuation of the struggle for survival) according to Article 29a para. 1 Prawo Upadłościowe. Systematically, this welcome approach is rounded off by Article 9a Prawo Upadłościowe. According to this, even the pressure filing does not necessarily lead to the opening of insolvency proceedings. If the pressure filing opens the eyes of the shareholders and they now recognize that the economic viability of their company is at risk, they may themselves seek restructuring and file a corresponding petition. Such a filing must then be given priority over the creditor's insolvency filing as long as insolvency proceedings are not yet opened and may result in the shareholders restructuring their ailing company on their

---

[32] German Federal Court of Justice (BGH), Judgement of 11 November 2004, IX ZB 258/03; German Federal Court of Justice (BGH), Judgement of 24 September 2020, IX ZB 71/19.

[33] Göttingen District Court (AG Göttingen), Judgement of 9 January 2018, 74 IN 210/17; Leipzig District Court (AG Leipzig), Judgement of 5 September 2017, 403 IN 1109/17.

[34] The fact that some rulings on pressure filings appear incoherent seems to be recognized only slowly in the German academic discussion, as by G. Pape, § 13 para. 226 *et seq.* (in:) B. Kübler *et al.* (ed.), *Kommentar zur Insolvenzordnung*, 95th edition, Cologne 2021.

own, in consultation with the creditors. The pressure filing, therefore, does not necessarily lead to the breakup of the debtor company; due to Article 29a para. 1 Prawo Upadłościowe, its shareholders are rather left with options to save their business idea at an early stage and to the benefit of all sides.

3. THE PUBLIC INTEREST IN AN ACCEPTABLE DISTRIBUTION OF THE DEBTOR'S ASSETS

If, on the other hand, the exclusion of a structurally unprofitable enterprise from market activity appears inevitable, it is the task of insolvency law to distribute the losses accumulated by the failed enterprise. In the public interest, this distribution must meet with the highest possible acceptance by those affected.[35] In this sense, equal treatment of all creditors is particularly obvious. It finds its normative justification in the consideration that equality is the simplest principle of justice.[36]

This raises the question of whether deviations from the principle of equal distribution of debtors' assets in favor of particular creditor groups by granting them absolute liquidation preferences are a suitable means of enforcing political concepts of justice in the public interest. Such approaches, with varying degrees of specificity, have long existed in most jurisdictions; however, they have been cut back in recent decades.[37]

The remaining categories of cases that cover preferential treatment of certain creditor groups in insolvency proceedings are based on the consideration that social hardship should be avoided[38] and are intended to express a special socio-

[35] V. Finch, *The Measures of Insolvency Law*, Oxford Journal of Legal Studies 1997, No. 2, pp. 228-229.

[36] This assumption, which was fundamentally substantiated, e. g., by E. Chemerinsky*, In Defense of Equality: A Reply to Professor Westen*, Michigan Law Review 1983, No. 3, pp. 579 *et seq*., has yet recently been challenged by D. A. Skeel Jr., *The Empty Idea of "Equality of Creditors"*, University of Pennsylvania Law Review 2018, No 3, pp. 741-742.

[37] For example, as part of the reform of Polish insolvency law in 2015, numerous privileges for specific creditor groups were abolished. Similar changes were already made in German insolvency law in 1994.

[38] This purpose is served by the first-ranking classification of employee claims according to Art. 342 para. 1 fig. 1 Prawo Upadłościowe. Under German law, employees in insolvency are no longer given preferential treatment.

political appreciation for certain groups.[39] Moreover, in some constellations, the state grants public entities the right to preferential satisfaction.[40]

In the first two constellations, a question arises as to whether it makes sense to burden the other creditors with the costs of pursuing welfare and sociopolitical goals. Even from a normative point of view, this seems doubtful. After all, the appreciation of farmers – if one considers it politically desirable – is a task for society as a whole, so that it stands to reason that it should also be financed by society as a whole through taxes, and not by creditors already battered by the debtor's insolvency. In the case of privileges based on social policy, for example, in favor of employees, there is the additional factor that they are far less targeted than measures under social law. The funds accruing to privileged employees from the insolvency estate do not necessarily have to be sufficient to cover their living expenses, while on the other hand, particularly well-off employees could also enjoy benefits (at the expense of the other creditors) even though they are not needy at all. Only social legislation can achieve the desirable accuracy of targeting (exclusively) affected employees with the benefits necessary to maintain their living expenses.[41]

This leaves the direct preferential treatment of public bodies, in particular, the social security funds. This is explained by the fact that it is specifically these institutions that need funds to later cushion the social impacts of insolvency.[42] Here, too, the other creditors (via the social security funds) are called upon instead of the general public to finance the socially desirable consequences. Finally, the detour via the social security fund prevents every employee from enjoying preferential treatment without further differentiation depending on social neediness.

4. CONCLUSION

According to its original conception, corporate insolvency was designed primarily for the state-supervised settlement of civil law relations between a debtor

[39] This purpose is served by the first-ranking classification of farmers' claims under Art. 342 para. 1 fig. 1 Prawo Upadłościowe. Those multi-purpose approaches in insolvency law have also been justified by the consideration that employees, due to their lack of flexibility and diversification, hardly have any means to make provisions against the insolvency of their employer, cf. Z. Yu, *An Analysis of the Multiple Aims of Insolvency Law: From the Internal and External Perspectives*, Law & Economy 2022, No. 5, p. 34; V. Finch, D. Milman, *Corporate Insolvency Law*, 3rd ed., Cambridge 2017, p. 519.

[40] For this reason, overdue social security contributions for the last three years are satisfied as a priority under Polish law (Art. 342 para. 1 fig. 1 Prawo Upadłościowe).

[41] For this reason, even advocates of a multi-purpose approach doubt the need to privilege employees when they are effectively protected by social legislation measures, cf. V. Finch, D. Milman, *Corporate Insolvency Law*, 3rd ed., Cambridge 2017, p. 523.

[42] Sejm, printed matter No. 2824 of 9 October 2014, p. 308.

and its creditors. The focus was on the maximum satisfaction of creditors from the debtor's assets, which were likely to be decomposed and liquidated for this purpose. To the extent that public interests played a role in this process, it was a matter of giving preferential treatment to specific groups of creditors in order to thereby contribute to the realization of sociopolitical goals.

In the meantime, a change has occurred. While sociopolitical values are, for good reasons, given less consideration in insolvency law, it has been recognized that proper structuring of the legal relationship between the debtor company and its creditors is likely to minimize macroeconomic damage in the public interest. Such damage is particularly likely to occur if ailing companies refrain from filing for insolvency and thereby accept the decomposition of their productive units.

Legislators were subsequently faced with the challenge of motivating debtor companies to participate in measures that make macroeconomic sense – in particular, to make early use of insolvency and restructuring mechanisms. This objective has now been incorporated into European law in the form of the Restructuring Directive. In the course of its implementation, less progressive insolvency law systems, such as the German one, have been supplemented. However, this is not the end of the story. It will still take some time for German practitioners to internalize the replacement of this cornerstone of insolvency law and to find consistent answers to specific legal questions in line with the new concept of public interest in insolvency law.

In contrast, the Polish legislator had already implemented the aforementioned paradigm shift in 2015. It not only supplemented the existing insolvency law but also created a coherent legal framework that facilitates consistent answers to individual legal questions. The legal treatment of pressure filings provides an apt illustration of this case. Anyway, all this is probably also due to the fact that the Polish legislature endeavored on its own initiative to create a coherent overall system and not merely to implement European law.

REFERENCES

Baird D. G., Jackson T. H., *Cases, Problems and Materials on Bankruptcy*, Boston 1985

Casey A. J., Chapter 11's *Renegotiation Framework and the Purpose of Corporate Bankruptcy*, Columbia Law Review 2020 (Vol. 120), No. 7

Cavallini C., Gaboardi M., *Towards a Transnational Model of Bankruptcy Law*, UC Davis Business Law Journal 2023 (Vol. 23), No. 1

Chemerinsky E., *In Defense of Equality: A Reply to Professor Westen*, Michigan Law Review 1983 (Vol. 81), No. 3

Décamps, J.-P., Faure-Grimaud, A., *Bankruptcy Costs, Ex Post Renegotiation and Gambling for Resurrection*, Finance 2000 (Vol. 21), No. 2

Eidenmüller H., *Reformperspektiven im Restrukturierungsrecht*, Zeitschrift für Wirtschaftsrecht (ZIP) 2010 (Vol. 26), No. 14

Eidenmüller H., *What is an Insolvency Proceeding?*, American Bankruptcy Law Journal 2018, Vol. 92, No. 1

Eidenmüller H., *What Can Restructuring Laws Do?*, European Business Organization Law Review 2023 (Vol. 24), No. 2

Finch V., *The Measures of Insolvency Law*, Oxford Journal of Legal Studies 1997 (Vol. 17), No. 2

Finch V., Milman D., *Corporate Insolvency Law*, 3rd ed., Cambridge 2017

Hirt H. C., *The Wrongful Trading Remedy in UK Law: Classification, Application and Practical Significance*, European Company and Financial Law Review 2004 (Vol. 1), No. 1

Jackson T. H., *Bankruptcy, Non-Bankruptcy Entitlements, and the Creditors' Bargain*, Yale Law Journal 1982 (Vol. 91), No. 5

Jensen M. C., Meckling W. H., *Theory of the firm: Managerial behavior, agency costs and ownership structure*, Journal of Financial Economics 1976 (Vol. 5), No. 4

Kirstein H.-J., *Ausführungen zur real existierenden Situation bei Eröffnungs- und Befriedigungsquoten in Insolvenzverfahren,* Zeitschrift für das gesamte Insolvenz- und Sanierungsrecht (ZInsO) 2006 (Vol. 9), No. 18

Kirstein H.-J., *Der früh beginnende und lang anhaltende Todeskampf juristischer Personen – Ein Erfahrungsbericht aus der Praxis*, Zeitschrift für das gesamte Insolvenz- und Sanierungsrecht (ZInsO) 2008 (Vol. 11), No. 3

Moustaira E., *International Insolvency Law*, Athens 2019

Obenchain R. *Roman Law of Bankruptcy*, Notre Dame Law Review 1928 (Vol. 3), No. 4

Ooghe H., de Prijcker S., *Failure processes and causes of company bankruptcy: A typology*, Management Decision 2008 (Vol. 46), No. 2

Pape G., InsO § 13 (in:) Kübler B., Prütting H., Bork R., Jacoby F. (eds.), *Kommentar zur Insolvenzordnung*, 95th ed., Cologne 2023

Paulus C., *Die „Aufgabe" des Insolvenzrechts*, Zeitschrift für Restrukturierung und Insolvenz (ZRI) 2022 (Vol. 3), No. 2

Picker R. C., *Voluntary Petitions and the Creditors' Bargain*, University of Cincinnati Law Review 1992/1993 (Vol. 61)

Ponoroff L., *The Resiliency of the Equality of Creditors Ethos in Bankruptcy*, American Bankruptcy Institute Law Review 2022 (Vol. 30), No. 1

Rivera A., *Dynamic Moral Hazard and Risk-Shifting Incentives in a Leveraged Firm*, Journal of Financial and Quantitative Analysis 2020 (Vol. 55), No. 4

Skeel Jr. D. A., *The Empty Idea of "Equality of Creditors"*, University of Pennsylvania Law Review 2018 (Vol. 161), No. 3

Tallen M., Kuglarz P., *(Vor-)insolvenzliche Sanierungsverfahren – Ein Vergleich zwischen dem polnischen und dem deutschen Recht*, Osteuroparecht 2016 (Vol. 62), No. 2

Wegener D., § 14 (in:) W. Uhlenbruck, H. Hirte (eds.), *Insolvenzordnung*, 15th ed., Munich 2019

Weiss L. A., *Bankruptcy resolution. Direct costs and violation of priority of claims*, Journal of Financial Economics 1990 (Vol. 27), No. 2

Yu Z., *An Analysis of the Multiple Aims of Insolvency Law: From the Internal and External Perspectives*, Law & Economy 2022 (Vol. 1), No. 5

Zezulková Vitková C., Zezulka O., *Preventive Restructuring: Business Viability in Impending Insolvency*, (in:) N. Grmelová (ed.), Perspectives of Law in Business and Finance, Prague 2023

Case Law

Judgement of the German Federal Court of Justice (BGH) of 5 January 1955, IV ZR 154/54

Judgement of the German Federal Court of Justice (BGH) of 24 November 1964, V ZR 169/62

Judgement of the German Federal Court of Justice (BGH) of 20 February 2003, IX ZR 81/02

Judgement of the German Federal Court of Justice (BGH) of 11 November 2004, IX ZB 258/03

Judgement of German Federal Court of Justice (BGH) of 24 September 2020, IX ZB 71/19

Judgement of Saarbrücken Higher Regional Court (OLG Saarbrücken) of 13 October 2021, 5 U 20/21

Judgement of Göttingen District Court (AG Göttingen) of 9 January 2018, 74 IN 210/17

Judgement of Leipzig District Court (AG Leipzig) of 5 September 2017, 403 IN 1109/17

Other Sources

Sejm, printed matter No. 2824 of 9 October 2014