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FINANCIAL RESTRUCTURING OF THE COMPANY'S LIABILITY BY INSOLVENCY PROCEEDINGS

Summary. Bankruptcy in practice does not always lead to the liquidation of a company. Sometimes it may be the only available option for an effective restructure of a company which is in a difficult economic situation. This paper mainly focuses on the analysis of the options for restructuring a company's financial liabilities on the basis of the current Bankruptcy and Restructuring Law and also on assessing their effectiveness, taking into account proposed changes of law.

Keywords: enterprise, restructuring, liabilities, bankruptcy

MOŻLIWOŚĆ RESTRUKTURYZACJI ZOBOWIĄZAŃ FINANSOWYCH PRZEDSIĘBIORSTWA W DRODZE POSTĘPOWANIA UPADŁOŚCIOWEGO

Streszczenie. Postępowanie upadłościowe nie zawsze w praktyce prowadzi do likwidacji przedsiębiorstwa. Niejednokrotnie może być jedyną dostępną możliwością skutecznej restrukturyzacji przedsiębiorstwa znajdującego się w trudnej sytuacji ekonomicznej. W opracowaniu skoncentrowano się przede wszystkim na analizie możliwości restrukturyzacji zobowiązań finansowych przedsiębiorstwa na gruncie aktualnie obowiązującego Prawa upadłościowego i naprawczego, przy jednoczesnej ocenie ich skuteczności, z uwzględnieniem proponowanych zmian.

Słowa kluczowe: przedsiębiorstwo, restrukturyzacja, zobowiązania, upadłość

1. Introduction

In times of permanent economic change, restructuring is a special circumstance that generates the need for autonomous action which redirects the company, and this circumstance is based on changes in its environment[1]. Thus, restructuring may be an effective management tool serving the development of the company and building its market competitiveness. In practice, restructuring is seen as a process of the adaptation of enterprises to market conditions, covering a whole range and composite of measures to improve the management of the enterprise, undertaken either to repair (so-called repair restructuring) or to develop (the so-called development restructuring)[2]. As a multidimensional process, restructuring can affect all areas of a company and may take, for example, the form of: organizational restructuring, restructuring the scale of operation, or financial restructuring[3]. Financial restructuring focuses, among other things, on legal instruments for planning and financial management in order to increase the financial capacity or to restore financial liquidity[4]. One of the possible ways to restructure financial liabilities of a company is the insolvency and restructuring proceeding.

The continuous crisis makes delayed payments of financial commitments one of the most fundamental problems associated with running a business. The lack of regulation for financial claims leads in turn to a state of insolvency which, according to Art. 10 of the Act of 28 February 2003 on Bankruptcy and Restructuring, is a fundamental prerequisite for bankruptcy[5].

According to a recent report of Euler Hermes, Europe and particularly the Eurozone is experiencing a significant increase in the number of bankruptcies. The bankruptcy rate within the Euro area amounted to 16% in 2012 and amounts to 21% in 2013. An important fact is that the increase in the number of bankruptcies covers all three main sectors: manufacturing, construction and services[6]. A similar situation exists on the Polish market. Since the

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[1] Lichtarski J.: O potrzebie i kierunkach rekonstrukcji systemu zarządzania w procesie restrukturyzacji przedsiębiorstwa, [w:] Jaki A., Kaczmarek J., Rojek T. (red.): Restrukturyzacja. Teoria i praktyka w obliczu nowych wyzwań. Księga pamiątkowa dla uczczenia Jubileuszu 45-lecia pracy naukowo-dydaktycznej prof. zw. dr hab. Ryszarda Borowieckiego. Uniwersytet Ekonomiczny, Kraków 2011, s. 27.

[2] Dźwigoł H.: Zarządzanie przedsiębiorstwem w warunkach XXI wieku. Politechnika Śląska, Gliwice 2013, s. 142.

[3] Borowiecki R.: Restrukturyzacja jako narzędzie strategii zarządzania we współczesnym przedsiębiorstwie. Dynamika zarządzania organizacjami. Paradygmaty-Metody-Zastosowania. Księga pamiątkowa wydana z okazji 50-lecia pracy naukowej prof. Jerzego Rokity. Akademia Ekonomiczna, Katowice 2007, s. 253.

[4] Suszyński C.: Restrukturyzacja, konsolidacja, globalizacja przedsiębiorstw. PWE, Warszawa 2003, s. 138.

[5] Ustawa z dnia 28 lutego 2003 r. Prawo upadłościowe i naprawcze, DzU z 2009 r., nr 175, poz. 1361.

[6] Raport Euler Hermes: Upadłość przedsiębiorstw – czym się różni obecny kryzys od sytuacji z 2009 r., www.eulerhermes.pl/mediacenter/news/List/NewDocuments/130701_EM_upadlosc_czerwiec_2013_pdf.

beginning of June 2013 Polish courts declared bankruptcy of 483 companies, (for the same period in 2012, it was 472 companies) of which manufacturers ranked first, followed by service companies and then construction companies. Bankruptcy however, contrary to popular opinion, does not always have to end with a final liquidation of the company[7]. On the contrary, it may entail the effective restructuring of its liabilities. The current Bankruptcy and Restructuring Law specifies the terms and conditions which the restructuring of the bankrupt's liabilities should be subject to. Restructuring in this case is an opportunity to rebuild the company and to return it to the competitive market.

2. The basic premises of bankruptcy proceedings

The main premises of bankruptcy proceedings are primarily insolvency, with assets sufficient to cover the costs of the proceedings and the so-called ability for bankruptcy.

The basis of bankruptcy is insolvency. In the light of Art. 11 of the above mentioned Act, the debtor is considered insolvent if it does not perform its due liabilities. If the debtor is a legal person or an organizational unit without legal personality, it shall be deemed to be insolvent if its liabilities exceed the value of its assets, even if the company settles its obligations. An application for a declaration of bankruptcy can be made by the debtor himself and/or his creditor or creditors. In practice, creditors submit an application for bankruptcy in order to motivate the debtor to pay. They need to take into account the fact that when the court declares the bankruptcy they can no longer withdraw the application, and if the debt does not belong to the privileged ones, (such as compensation of employees, social security charges, bills receivables) the settlement of their claims will occur at a later stage.

In accordance with Art. 12, the court may dismiss a bankruptcy petition if the delay in the performance of obligations does not exceed three months, and the amount of default does not exceed 10% of the assets of the debtor company. However, this solution cannot be applied if such failure is permanent, or if it (the rejection of an application) may harm creditors. The court also has the ability to initiate, at the request of the debtor, reorganization proceedings. The current definition of insolvency should be evaluated critically, mainly because it has too broad of a scope. To demonstrate this point and shed some light on this issue, one may consider the fact that a debtor failing to fulfill its financial obligations alone is grounds for bankruptcy, irrespective of the size of the debtor, and irrespective of the fact that his liabilities may be covered by the value of its property. According to established case-law in practice, the maturity of the obligations is a condition in which the creditor has a legal

[7] Raport Coface nt. upadłości firm w Polsce w I kwartale 2013 roku. Warszawa, 2 kwietnia 2013, www.coface.pl.

opportunity to request meeting its claims. It is also important to note that the legal definition of insolvency refers to the state in which the debtor has failed to pay at least two financial obligations which, after all, in practice can be due to various reasons (inability to pay due to circumstances not attributable to actual insolvency, etc.) and should not automatically lead to the elimination of the debtor's business transactions as a result of bankruptcy proceedings. A sufficient legal instrument in this case seems to be the ability to pursue claims in civil law[8].

The sine qua non (indispensable and essential) condition for the opening of bankruptcy proceedings is to have the debtor's assets sufficient to cover the costs of the proceedings. The court is entitled to reject a proposal if the debtor's property is burdened by collateral (mortgage, lien, pledge, tax lien) and that other assets are not sufficient to cover the costs of the proceedings. These rules do not apply in a situation when it is probable that the burden of debtors' assets are void under the provisions of the Act or if they were made to defraud or when it is probable that the debtor has made other unsuccessful legal action under the provisions of the Act which divested itself of assets sufficient to cover the costs of the proceedings. At this point it is worth noting that the theoretical classification in practice is questionable because the debtor is always required to file for bankruptcy irrespective of the assessment of his property from the point of view of costs. In addition, the means of carrying out the bankruptcy are not part of the concept of insolvency.

Another fundamental term for bankruptcy is the concept of bankruptcy capacity. The ability of bankruptcy is defined as an attribute for guiding proceedings. Moreover, the concept presupposes the existence of the legal capacity as a civil law entity, and in the subjectivity of debt, and in terms of the assets comprising the assets. The ability of bankruptcy in the first place has entrepreneurs as well as limited liability companies and joint stock companies, and non-commercial and commercial partnership partners who bear the responsibility for the liabilities of the partnership without limitation for all of its assets and the partners of a partnership (Article 5). Entities which cannot declare bankruptcy – those which are not subject to bankruptcy capacity legislation are: the State Treasury, local government units, independent public health care institutions and legal entities established by law, unless the law provides otherwise, and created in the performance of an obligation imposed by law, natural persons engaged in farming and in educational institutions (Article 6).

Satisfaction of the creditor in the liquidation is followed by payment of the amount that the creditor receives from the liquidated company, i.e. the amount paid by the trustee against claims which the creditor is entitled to from the debtor. However, in the arrangement

[8] Ustawa z dnia 23 kwietnia 1964 r. Kodeks Cywilny, DzU nr 16, poz. 93 ze zm., Uzasadnienie judykatur Sądu Najwyższego z dnia 12 lutego 1991 r., III CRN 500/90, OSNCP 1992, nr 7-8, poz.137.

procedure, all the benefits which are received by a creditor of the arrangement are defined in this way and therefore not only cash, but also the shares of the bankrupt, or the individual components of its assets. Preferential claims are satisfied first: the cost of bankruptcy proceedings, payment for work, taxes and other governmental duties and social security contributions, retirement, disability, and sickness. In bankruptcy liquidation no creditor of lower priority category will receive its debts unless all creditors a higher category are satisfied in full[9].

3. The statutory options for financial obligations restructuring

On the basis of the current bankruptcy law, an entrepreneur has several significant opportunities to restructure its financial obligations. The Act provides for insolvency proceedings to occur in one of two forms: bankruptcy by liquidation of the debtor and the bankruptcy with the possibility of an arrangement. The choice of procedure should be defined in court. It is worth noting that Article. 14 establishes the principle of the primacy of the bankruptcy proceedings with an arrangement stating that if it is probable that the creditors will be satisfied to a greater degree with an arrangement than they would be satisfied after the bankruptcy proceedings involving realizing the assets of the debtor, the debtor's bankruptcy is announced with the possibility of the arrangement. The above procedure does not apply if the debtor's past behavior does not guarantee that the arrangement will be made. However, according to Art. 15, a bankruptcy involving liquidation of the assets of the debtor shall be published only if there are no grounds for bankruptcy with the possibility of an arrangement.

The least likely is restructuring under liquidation. Bankruptcy liquidation seeks to sell the assets of the insolvent businesses and satisfy the claims of creditors from the sale proceeds. In the case of a liquidation bankruptcy, a trustee is appointed who shall be obliged to take the property of the bankrupt, manage and protect it from damage, injury, etc., and proceed to its liquidation. A liquidation bankruptcy, which follows the preparation of the inventory and accounts, shall be made by the sale of the bankrupt company as a whole or an organized part, the sale of real estate and movable property, the recovery of debts from debtors of the bankrupt and the execution of its other property rights belonging to the bankrupt, or by their disposal. The legislature provides opportunities for the restructuring of the bankrupt mainly by the possibility of changing the mode of bankruptcy. This possibility exists in principle throughout the investigation but for obvious reasons it would be best to use it before the sale of the bankrupt estate by the trustee. The request for a change of mode can be made by the

[9] Kowalewska A.: Regulacje prawne w obszarze prawa upadłościowego i naprawczego, [w:] II szansa dla Przedsiębiorców. Raport z badań. Polska Agencja Rozwoju Przedsiębiorczości, Warszawa 2011, s. 55.

bankrupt who, despite the appointment of a liquidator, does not cease to be a party of the proceedings. Significant is the fact that even if the bankruptcy is carried through liquidation, it does not necessarily mean the end of existence the company. In accordance with Art. 316, a trustee must sell the bankrupt's enterprise as a whole. The purchaser buys the whole company including its business, and the purpose of the transaction is very often, in practice, to continue the business of the bankrupt. A much better chance for restructuring occurs under bankruptcy with an arrangement. Bankruptcy arrangement aims to continue operations and to conclude an arrangement with creditors on restructuring liabilities. If the court has declared bankruptcy with the possibility of an arrangement, and the arrangement proposals have not been made, the bankrupt should report this within a month. Along with the proposals, the bankrupt should also provide a cash flow statement for the last twelve months if he was obliged to keep records to enable the preparation of an account. In the same period, proposals can be submitted by the court supervisor or manager. Proposals should describe the restructuring of liabilities of the bankrupt in particular by:

- Postponement of implementation of commitments.
- Rescheduling of the debt in installments.
- Reducing the amount of the debt.
- Conversion of debts into shares.
- Amend, replace or repeal legislation which provides specific claims.

The Act does not exclude the possibility of merging several proposals of arrangement (called a package of proposals). In practice this is usually a decrease in total debt and at the same time a distribution of their repayment in installments, a delay in the execution of commitments to the establishment or modification of rights securing performance of the proposed arrangement[10]. The rule is that the terms for the restructuring of liabilities of the bankrupt should be the same for all creditors (or creditors included in the same group if the judge-commissioner decided that the vote on the system will be carried out in groups of creditors). The exception to this rule is the creditor's consent to the terms which are less favorable or to grant more favorable conditions for small debts to creditors or creditors who have given or have to give credit necessary to implement the arrangement (Article 279). Proposals for restructuring should include justification which consists of:

- A description of the business and its economic and financial, legal and organizational situation.
- Analysis of the market sector in which the company operates taking into account the market position of competitors.

[10] Witosz A.: Prawo upadłościowe i naprawcze. Komentarz. LexisNexis, Warszawa 2010, s. 501.

- Methods and sources of funding of the arrangement, including revenue and expenditure provided for in the performance of the system.
- An analysis of the level and structure of risk.
- Persons responsible for the execution of the agreement.
- An assessment of alternative restructuring of liabilities.
- The system for safeguarding the rights and interests of the creditors during the time of the arrangement performance (Article 280).

At present, the practice of the Polish market shows the predominance of bankruptcy with liquidation. In the first quarter of 2013 the Polish courts conducted a total of 211 bankruptcy proceedings. Bankruptcy liquidation accounted for 170 cases, and bankruptcy with arrangement accounted for 41 cases[11].

Another completely distinct possibility is a restructuring in the way of resolution which basically is a non-judicial proceeding. The primary objective of the rehabilitation is to restructure the trader's commitments, who is at risk of insolvency, and to restore the company's ability to operate in the market. With rehabilitation and debt reduction, the entrepreneur can perform its obligations (there is a reasonable exception when they do not pay: the amount of default does not exceed 10% of the carrying amount of the company, but by a prudent assessment of the economic situation, it is clear that it will soon become insolvent (Article 492)).

The entrepreneur threatened with insolvency initiates corrective actions by submitting the statement of initiation in the commercial court. The statement should include information about the debtor, description of the circumstances justifying the application using those facts and a statement that none of the cases of exemption can take place (for example a trader has previously led the reorganization proceedings within the time of two years). With the initiation of recovery proceedings, the execution of the trader's commitments and the payment of interest due on those obligations are suspended. From the point of view of the debtor this solution should be assessed positively. As a result of the subsequent acceptance and approval of the arrangement, the interest shall be redeemed. The positive effects of the initiation of recovery proceedings is also the ability to continue operating the business by the debtor and the prohibition of a foreclosure.

In the later stages of the rehabilitation, the entrepreneur prepares a recovery plan which includes the documents required to initiate appropriate insolvency proceedings on its financial situation. Then the arrangement is a subject to a vote by the creditors. If approved by the creditors, the arrangement must be then approved by the bankruptcy court. The approved

[11] Raport Coface, op.cit.

recovery arrangement has the same effect as the agreement carried out in bankruptcy proceedings.

Unfortunately, the recovery law is not very popular and is certainly not perceived as an attractive opportunity to restructure. The main reason for this is the fact that the current regulations prevent the implementation of recovery proceedings against the entrepreneur, who is suffering from financial problems, despite the fact that its overall financial condition indicates a good chance to protect it from bankruptcy. The implementation of the recovery plan is in fact impossible if the entrepreneur "missed" the right time to take action for restructuring, and the first signs of insolvency have occurred. The legislature realized this problem and an amendment of the Act of April 2009 extended the range of entities that may be subject to recovery proceedings. There was introduced the possibility which allowed the initiation of recovery proceedings in all cases when the court may dismiss the application for a declaration of bankruptcy because the debt is not significant in terms of the amount or the duration of the state of insolvency. The level of insolvency which justifies the dismissal of the bankruptcy petition, and thus opens the way to recovery proceedings initiated against the debtor is now referred to in Art. 12 Paragraph 1. The court may dismiss a bankruptcy petition if the delay in making payments does not exceed three months, and the sum of default does not exceed 10% of the carrying amount of the debtor's business. Dismissing the bankruptcy, the court may authorize the recovery proceedings[12].

The disadvantage of the reorganization proceedings are the costs associated with salaries of the court supervisor, who is appointed by the court at the commencement of the proceedings. These costs are borne by the entrepreneur. Another drawback is the time limit. Small and medium-sized enterprises have three (other entrepreneurs four) months to make an arrangement under the penalty of the discontinuance of proceedings.

4. Restructuring instead of liquidation – the main assumptions of the amendment

A critical assessment of the current Law on Bankruptcy and Reorganization, in the context of the ongoing economic crisis, was the impetus to start works to improve it. In December of the year, the Recommendations of the Minister of Justice for the amendment to the bankruptcy and reorganization law were announced. The main idea behind the proposed changes is a postulate: “restructuring rather than liquidation," according to which the use of the bankruptcy procedure should take place only after an ineffective use of the

[12] Kowalewska A.: op.cit., s. 58.

process of restructuring[13]. The Recommendation's authors point out that the state should guarantee the legal instruments to make the restructuring quick, effective and adjusted to the needs of entrepreneurs together with the postulate to make it less formal. The public awareness needs to be changed within the approach to the issue of bankruptcy, especially in the current economic slowdown and the economic problems faced by entrepreneurs. Due to the proposed changes in the restructuring proceedings, the title of the current law was transformed to "Bankruptcy and Restructuring," which most fully reflects the axiological and teleological assumptions of the Act.

An important change concerns the definition of the entrepreneur's insolvency. The basic premise of the recognition that the debtor is insolvent is the existing lack of regulation concerning financial liabilities lasting more than three months. The loss of the ability to pay liabilities should result from the assessment of the financial condition of the debtor's company. This means that this state should have a certain stability (liquidity condition). An additional criterion for proving insolvency is a condition in which the sum of liabilities exceeds the total value of the debtor's assets. The period in which the entrepreneur is required to file for bankruptcy will be extended from 14 – as it is now – up to 30 days. This will allow the company to collect the necessary documents needed to file for bankruptcy and to take a more rational and prudent decision on the rescue procedure[14].

There is a plan to introduce four restructuring procedures of varying degrees of severity depending on the financial status of the entrepreneur and the structure of the creditors. In addition to the current judicial arrangements which are subject to slight modification, the intention is to introduce two new ones. An arrangement with the request of the debtor (entered by the debtor) and creditors and then approved by the court, as well as an arrangement with the debtor's request made on the initial meeting of creditors. An arrangement with the request of the debtor, entered by the debtor, and creditors is a subject to approval by the court and covers situations in which the debtor prepares proposals for reorganization, chooses restructuring advisor – the trustee who prepares the financial statements, and contacts the creditors and negotiates the scope of the agreement with them. The court has the power to control the proposed system. The debtor is not considered to be the bankrupt until the opening of the proceedings. The debtor may also, in certain circumstances, obtain protection from its creditors' executions. The second proposal is dedicated to debtors and creditors, which depends on the conclusion of a quick and informalised arrangement under the control of the court: the court-appointed overseer examines the financial situation of the entrepreneur. This capability reduces the personal

[13] Rekomendacje Zespołu Ministra Sprawiedliwości ds. nowelizacji Prawa upadłościowego i naprawczego. Ministerstwo Sprawiedliwości, Warszawa, 10 grudnia 2012, s. 26.
[14] Ibidem, s. 31.

conduct of the debtor with an emphasis on broader responsibilities of the court, who in this instance is named his supervisor. These two new modes of restructuring procedures allow businesses to benefit from a flexible restructuring which maintains its own management of the company. If the trader does not take up the restructuring in proper time or his behavior will deepen his poor financial situation, the company will face losing its executive management, and a temporary court supervisor or trustee will be established[15].

The recovery proceedings proposals includes one of the two options. The first possibility for the debtor to file an application for suspension of all executions in the period necessary to increase revenue and reduce the cost of business, or to searching for an investor during this time period. The second possibility is to derogate from certain contracts or to make employment adjustments, taking into account the constraints of employment law and the situation enterprise's funding[16].

The amendments concern the informalisation of the process by introducing the possibility to lodge claims via internet. The changes also apply to the cancellation of the obligation for submitting documents to prove the existence of the claim.

Currently, we are now in a time of inter-ministerial consultations and public consultations. The scheduled date of the entry of the Act into force is 2014.

5. Summary

Restructuring of liabilities through bankruptcy is a real chance to rebuild the company. It is a long-term solution, requiring from the bankrupt the rational implementation of the action plan primarily to reduce labor costs and consequently to guarantee the cash flows to ensure repayment and progressive development of the bankrupt enterprise. However, the majority of Polish entrepreneurs have negative associations with the term bankruptcy. The reasons for this are undoubtedly complex. In the first place there is the need of legal proceedings which are usually associated with publicity, and thus often harms the entrepreneur's reputation. On the other hand, Polish entrepreneurs have a negligible level of knowledge in the field of bankruptcy law which results in practice with the delayed submission of bankruptcy – which occurs at a moment when the economic situation of the company is critical. This in turn determines the capabilities to take advantage of the insolvency proceedings, often including the inability to use restructuring solutions. Furthermore, the persistence of the economic crisis over the last several years has lead to

[15] Płoch J., Gieronim M., Groble B.: Upadłość, czyli szansa na nowy start. „Na Wokandzie", No. 16, 2/2013, www.nawokandzie.ms.gov.pl/numer16/wokanda-16/upadlosc-czyli-szansa-na -nowy-start.html, s. 1.

[16] Rekomendacje…, op.cit., s. 68.

a critical evaluation of the existing legal instruments in the field of bankruptcy proceedings. However, this applies mainly to repair and composition proceedings, which are a relatively small proportion of the total number of insolvency proceedings. The provisions governing the reorganization, which give the businesses opportunities for proper restructuring, are not used effectively. The proposed amendments in bankruptcy and restructuring law allow for a chance to increase the opportunities for effective restructuring of the financial liabilities of the entrepreneur. However, in practice, how well these ammandments are applied and used will be determined by case-specific details.

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