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THE PROTECTION OF EXECUTORY CONTRACTS IN RESTRUCTURING PROCEEDINGS

Master Thesis

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TABLE OF CONTENTS

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LIST OF ABREVATIONS

ECJ- European Court of Justice

EU- European Union

IMF- International Monetary Fund

IP- Intellectual Property

MSE- Micro and Small Enterprises

Model Law- The UNCITRAL Model Law on Cross-Border Insolvency

The Directive on Restructuring and Insolvency- The Directive

The UNICTRAL Legislative Guide- The United Nations Commission on International Trade Law (UNCITRAL) Legislative Guide on Insolvency Law

US- United States

INTRODUCTION

Relevance of final thesis. This thesis concerns the notion and protection of executory contracts in restructuring proceedings which is highly relevant in the field of corporate insolvency law and in the field of contract law. Protection of executory contract one the one hand, plays a significant role in restructuring proceedings aiming to rescue viable business, but on the other constitutes intervention into the contractual legal relations which requires certain justifications. The problem arises how to find the proper balance between these different legal interests?

An executory contract is a legal agreement between two or more parties in which certain or all the contractual obligations have not yet been fulfilled by one or more of the parties. In other words, it refers to a contract that is still in progress and has ongoing obligations that have not been fully performed. The term "executory" signifies that the contract is not yet executed or completed, and there are pending actions or performances that need to be conducted. These pending obligations may include delivering goods or services, making payments, or fulfilling certain conditions or promises stated in the contract. These contracts can include leases, supply agreements, and other types of ongoing business relationships that may be crucial to the debtor's operations.

During restructuring proceedings, the debtor may seek to maintain the executory contracts that are essentials for the continuation and the reorganization of its business. However, a counterparty to the executory contact may seek to modify or even terminate the executory contract because of the performance of the contract by the debtor is affected by the opening of insolvency proceedings. Such actions can have significant consequences for the debtor but also for another party to the contract, including financial losses and other negative impacts such as unsuccessful restructuring proceedings.

The protection of executory contracts in insolvency law raises serious problems with the major principles of contract law, such as the obligation to perform the contract (*pacta sund servanda*). Indeed, contract law govern agreements and enforceable promises between two or more parties and provides a framework for individuals and entities to enter into legally binding agreements, ensuring that the rights and obligations of each party are protected. However, while facing restructuring proceedings, the rights and obligations of the parties might not be always protected. When a party becomes pre-insolvent, insolvency laws often provide for a stay or suspension of contractual obligations and thus the insolvent party may be temporarily relieved from performing its contractual duties. This stay triggers a problem because in contract law the parties are required to fulfil their contractual obligations. Therefore, the rights of the counterparty to the executory to contract, to receive the money due for example, are suspended. Also, in case of

the restructuring proceeding turning into insolvency, the counterparty might not receive full compensation if the insolvency estate can't cover all debts.

Regarding the executory contracts, the pre-insolvent party may seek to reject or assume certain contracts as part of the restructuring proceedings. This can lead to conflicts with the rights and expectations of the other party under the contract. Contract law generally provides remedies for breach of contract, but insolvency laws may allow for the avoidance or termination of contracts in specific circumstances. Another core aspect of contract law is the freedom of contract, which allows parties to freely negotiate and agree upon the terms and conditions of their contract. This principle is based on the belief that individuals and businesses are best positioned to understand their own interests and make decisions accordingly. It supports autonomy, economic efficiency, and predictability in commercial transactions. This autonomy enables the parties to tailor their agreement to their specific needs and circumstances. Among the provisions that parties may agree upon is the right to terminate the contract, if one party becomes insolvent or is likely to become insolvent. This clause is particularly important in commercial agreements where the financial stability of the parties is crucial for the fulfillment of contractual obligations. By including an insolvency termination clause, parties can protect themselves from the risks associated with the other party's financial failure, thereby minimizing potential losses and maintaining the overall stability of their contractual relationship. This flexibility underscores the importance of freedom of contract in facilitating mutually beneficial agreements and providing mechanisms to address potential future uncertainties, such as pre-insolvency or insolvency.

Contract law is based on the principle that parties are free to negotiate and enter into agreements as they see fit, with minimal interference (the principle of freedom of contract)[1]. But insolvency law shifts the focus from individual contractual rights to the collective interests of all creditors. It aims to ensure an orderly and equitable distribution of the debtor's assets among creditors. Upon the initiation of restructuring proceedings, an automatic stay is imposed, halting all collection (enforcement) actions by individual creditors. It prevents a chaotic rush to seize the debtor's assets and ensures a coordinated resolution but creates a conflict with contract law as the creditors with contractual rights to immediate payment or enforcement (e.g., secured creditors) may find these rights temporarily suspended, potentially leading to financial losses or disruptions. Therefore, resolving conflicts between contract law and insolvency law often requires a careful balance of the rights and interests of the parties involved.

The protection of executory contracts in restructuring proceedings is an important legal problem that requires legal scientific analysis. The thesis focuses on various legal frameworks,

[1] Jill Poole, *Textbook on Contract Law*, 13th edition (Oxford University Press, 2016)

such as contract law and insolvency (restructuring) laws to analyse and determine the protection of the interests of every party to the executory contracts. It also examines the practical implications of these legal frameworks and propose potential solutions to improve the protection of the debtor but also the non-debtor parties in executory contracts during restructuring proceedings.

The relevance of this master thesis can also be found in the novelty of The Directive which was adopted in 2019 and should have been transposed into national laws of EU member states by July 2021. This thesis will, therefore, address recent developments and provides valuable insights into its implementation and impact in general in EU insolvency law and certain EU member states. However, there is still no relevant case law of the ECJ in this area.

The significance of this topic encompasses various other international frameworks and guidelines, such as The UNCITRAL Legislative Guide. The UNCITRAL Legislative Guide provides comprehensive recommendations to assist states in the establishment of an efficient and effective legal framework to address the financial difficulties of debtors[2]. The last part of the UNCITRAL Legislative Guide as adopted in 2021, concerning the MSE[3]. Also, the Model Law has been instrumental in providing a framework for countries to handle cross-border insolvency cases. It promotes cooperation between courts and insolvency practitioners across different jurisdictions, ensuring better management of multinational insolvency cases.

The difference between those frameworks, is that unlike the Directive, the UNCITRAL framework does not make an effort to harmonize bankruptcy law in a substantive way[4]. It provides solutions that are relevant in a number of small but meaningful ways[5].

Overall, this thesis on the protection of executory contracts in restructuring proceedings can contribute to the development of legal frameworks that balance the interests of both debtor and non-debtor parties during restructuring proceedings, ultimately promoting more efficient and fair corporate restructuring processes but also to the academic literature by examining the theoretical underpinnings and practical implications of the directive's provisions on the protection of executory contracts. It can offer critical analysis, identify gaps, and propose potential improvements or further research directions in this area.

Scientific researched problem. This thesis will explore the challenges involved in protecting executory contracts, such as the financial instability of the debtor, the non-performance, or the breach of the contract by on party but also the challenges related to international or cross-border proceedings. We will also analyse the notion of executory contracts and determine which

[2] United Nations, *UNCITRAL Legislative Guide on Insolvency Law*, https://uncitral.un.org/en/texts/insolvency/legislativeguides/insolvency_law
[3] Ibid.
[4] International Monetary Fund, *Orderly & Effective Insolvency Procedures Key Issues* (1999)
[5] Ibid

contracts falls under that notion and the problems faced with contract law, such as the right to terminate the contract or to amend it.

Therefore, the following question arise *how executory contracts should be protected in corporate restructuring proceedings to balance the interests of debtors and creditors and contribute to effective rescue of viable business*?

Novelty of final thesis. In a restructuring proceeding, the executory contracts can be very valuable as the debtor wants to keep continuing operating the business. However, they can also be burdensome, and the debtor may want to reject or modify them. The Directive on restructuring and insolvency entered in force in 2019 and regulate the protection of executory contract in restructuring proceedings. But as this is a very recent directive there is not yet relevant ECJ cases. Therefore, in such situation, the necessity for the additional research of the current problem seems to be useful. Indeed, the legal literature as addressed the question of the implementation of the Directive in the Member States legislations, such as the IMF Working Paper on *Restructuring and Insolvency in Europe: Policy Options in the Implementation of the EU Directive*[6]. However, the specific question relating to the protection of executory contracts to ensure effective restructuring proceedings while balancing the interests of the parties have not been addressed so far.

Level of analysis. The scope of the research encompasses an examination of the protection of the stakeholders when facing the restructuring proceedings of the debtor to an executory contract and the comparison of the EU Member-states' approach towards that specific protection.

The existing literature include the contributions of scientific researchers such as Gerard McCormack, who made a general analysis about the European Restructuring Directive[7], but also Professor Jason Chuah and Dr Eugenio Vaccari[8] and their work giving a global guide on executory contracts in insolvency law. In addition to that, there is also a research article about preventive restructuring framework offering a comparative view in five different countries of the European Union on the verge of the application of the Directive on restructuring and insolvency written by David Christoph Ehmke, Jennifer L.L. Gant, Gert-Jan Boon, Line Langkjaer and Emilie Ghio[9].

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[6] José Garrido, Chanda DeLong, Amira Rasekh, and Anjum Rosha, *Restructuring and Insolvency in Europe: Policy Options in the Implementation of the EU Directive* (May 2021)

[7] Gerard McCormack, *The European Restructuring Directive - a general analysis. Insolvency Intelligence* 2020, 33(1), 11-22.

[8] Professor Jason Chuah and Dr Eugenio Vaccari, *Executory Contracts in Insolvency Law: A Global Guide*, Elgar 2019.

[9] David Christoph Ehmke et al., *The European Union preventive restructuring framework: a hole in one?* (INSOL International and John Wiley & Sons, Ltd, 2019, 28) pages 1 to 26. DOI: 10.1002/iir.1344

The analysis of this thesis will be different than the previous works as it will draw attention to the application of the new Directive on restructuring and insolvency in different EU member States and the difference with a non-EU country. As well as the problems faced between the contract law and restructuring law regarding the executory contracts.

Significance of the final thesis. The analysis of the protection of executory contracts in restructuring proceedings and the application of the relevant rules of contract law is significant because it addresses a crucial aspect of business restructuring in the EU insolvency law. Protection of executory contracts provides a possibility for viable business to enhance chances of a successful reorganization and emerge from the restructuring process in a stronger position. However, it also raises a legal debate whether such protection is compatible with the fundamental principles of contract law, such as the freedom of contract.

Indeed, the protection of executory contracts can be crucial for rescuing business during negotiations for a restructuring plan which are key to the survival of the company (relations with suppliers, customers, landlords or employees), but also preserving the value of the company or its negotiating power during the restructuring process. It is also valuable for preserving employee morale and productivity, when the corporate seeks to survive. The protection of these executory contracts can be achieved through various measures such as renegotiation and modification of the contracts, adequate assurance of future performance by the debtor, priority treatment and court protection and approval.

Therefore, this research is to provide guidance to policymakers, practitioners, and other stakeholders on how to protect the interests of every party to executory contracts in the context of restructuring and insolvency proceedings.

Aim of the research. The aim of this research is to reveal and establish the relevance of executory contracts to effectiveness of restructuring proceedings and propose scientific solutions for the improvement of the interests of creditors and debtor when executory contracts are preserved.

Objective of research. The objectives of this research on the protection of executory contracts in restructuring proceedings in order to achieve the aim will be:

1. to assess the legal framework governing the protection of executory contracts in insolvency proceedings in the EU law and the chosen jurisdiction.
2. to identify the challenges faced by the stakeholders (including creditors, debtors, employees, and customers) that arise in protecting executory contracts in restructuring proceedings but also to evaluate the impact of protecting executory contracts on those stakeholders.

3. to analyse the major economical and operational difficulties encountered by the debtors and the counterparties in restructuring proceedings and propose the solutions to overcome them.

Research methodology. The current scientific research will employ multiple methods to answer the research problem of this thesis.

Firstly, the main method used will be data collection and analysis. This is necessary to study and analyse legal texts, case law, doctrine articles in the sector of executory contracts in restructuring proceedings.

Secondly, the research aims to make a comparative analysis of different approaches to regulating a particular issue. Therefore, a comparative method will be used to analyse and compare different jurisdictions within and outside the European Union to evaluate the effectiveness of their approach towards the protection of executory contracts. The laws and practices around restructuring proceedings vary significantly between jurisdictions. This comparative approach with the goal of identifying best practices and potential areas for improvement, examining how different legal systems approach the protection of executory contracts in restructuring, will be one very important method. This will involve examining laws, regulations, case law, and other relevant sources to assess how executory contracts are treated in practice and the impact of these treatment on the parties involved. The comparative approach will be focused on the following countries with specific reason:

- United States are selected because the executory contracts are coming from the Bankruptcy code which has played significant role in the development of restructuring law around the globe.
- Germany is chosen since this is one of the major economy markets in the European Union.
- France is selected because it is also a major economy market in the European Union and restructuring law of France establishes numerous mechanisms of rescue of business in insolvency law which have been influential to the development of insolvency law in other jurisdictions.

Finally, a coherent approach will be utilized to connect all the previously discussed methods. This approach will facilitate a comprehensive understanding of the problem under analysis and enable the formulation of practical solutions.

The structure of the master thesis. This master thesis consists in several parts:

In the first part of the master thesis, the aims and goals of the restructuring proceedings will be analysed. In the second part of the research, the notion of executory contracts and its need of protection when involved in restructuring proceedings are developed. Finally in the third chapter, the challenges faced by the debtors and the counterparties while facing

restructuring proceedings and confronted to executory contracts are analysed and certain solutions to the raised problems are provided.

Defence statements.

1. The key principles governing the protection of executory contracts are based on the presumption that such contracts provide valuable resource for the viability of distress business which should be preserved, if this is consistent with the best interests of the company and the creditors as a whole.
2. The protection of executory contracts is compatible with the principle of pacta sunt servanda, as both concepts uphold the integrity and enforceability of agreements. The legal system upholds this idea by safeguarding executory contracts, allowing parties to have confidence in the legally binding nature of their agreements and so encouraging stability and predictability in contractual relationships.

1. THE GOALS AND ORDER OF RESTRUCTURING PROCEEDINGS

Restructuring proceedings serve as vital mechanisms for companies to overcome financial distress while maintaining their operations and preserving value for stakeholders. Executory contracts, essential to business operations, often face uncertainty during restructuring. Thus, it is important to find a proper balance between the different legal interests.

Promotion of the goals of restructuring proceedings necessitates safeguarding executory contracts to preserve value, ensure continuity of operations, and maintain stakeholder confidence[10]. While challenges exist across jurisdictions, addressing these challenges through legal reforms and harmonization efforts can enhance the effectiveness of restructuring processes globally.

1.1. The Aims of Restructuring Proceedings

Restructuring proceedings encompass a range of legal processes designed to address financial distress and facilitate the resolution of debt-related issues. These proceedings vary depending on jurisdiction and the specific circumstances involved.

Within its article 2.1(1), the EU Directive on restructuring and insolvency, defines restructuring proceedings as:

> […] measures aimed at restructuring the debtor's business that include changing the composition, conditions or structure of a debtor's assets and liabilities or any other part of the debtor's capital structure, such as sales of assets or parts of the business and, where so provided under national law, the sale of the business as a going concern, as well as any necessary operational changes, or a combination of those elements[11].

In this definition, The Directive is indicating the main elements of restructuring. Those include changing the composition, conditions, or structure of assets and liabilities. Those elements refer to the possibility of the debtor to altering the mix of assets and liabilities. For example, converting short-term debt to long-term debt or swapping debt for equity. Conditions, involves modifying the terms attached to the debtor's obligations, such as extending repayment periods,

[10] Anne Epaulard, and Chloé Zapha, *Bankruptcy costs and the design of preventive restructuring procedures*. Journal of Economic Behavior & Organization, Volume 196, April 2022, pages 229-250. https://doi.org/10.1016/j.jebo.2022.02.001

[11] Official Journal of the European Union, *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 (Directive on restructuring and insolvency)*, June 26th, 2019. Article 2.1(1).

reducing interest rates, or altering covenants[12]. Concerning the changes in the structure, this entails more fundamental changes in how assets and liabilities are organized or prioritized, potentially including debt subordination or reorganization of asset holdings.

Another element of restructuring proceedings is the capital structure change. This includes altering any part of the debtor's capital structure beyond assets and liabilities. It can involve equity adjustments, such as issuing new shares or converting debt to equity[13].

The sale of assets or of parts of the business is another element included in this definition. The selling of specific assets or business units is made in order to raise cash, reduce debt, or improve the running of operations[14]. This can also refer to selling the entire business while it is still operational, as a strategy to preserve the value of the business by avoiding liquidation, thereby maintaining jobs and business continuity.

Finally, operational changes are adjustments to the way the business is being operated, which may be necessary to improve efficiency and profitability[15]. This can include, for example, restructuring management, changing business strategies, improving cost structures, or modifying business processes.

Often, effective restructuring proceedings involves a combination of several or all the above measures. For example, a debtor might renegotiate debt terms, sell off assets, and reorganize operations simultaneously to restore financial health[16].

The Directive emphasizes a holistic approach to restructuring, allowing flexibility to adapt measures according to the specific needs and circumstances of the debtor, with the aim of preventing insolvency and enabling the continuation of viable businesses[17].

In the US, restructuring proceedings are more referred as reorganizations, under Chapter 11 of the Bankruptcy code, but there is no clear definition of reorganization stipulated in the code[18]. However, reorganization proceedings can be defined as the following: in this form of restructuring, a debtor is granted the opportunity to continue operations while undertaking significant financial and operational changes. Typically overseen by a court-appointed trustee[19], reorganization involves collaboration between the debtor and creditors to devise a viable plan for restructuring debts and operations[20]. The aim is to restore financial stability and enable the entity to continue functioning.

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[12] Thomas Grano, *Control and Restructuring* (Oxford Studies in Theoretical Linguistics, 2015)
[13] Ibid.
[14] Ibid.
[15] Ibid.
[16] Ibid.
[17] Ibid.
[18] 11 U.S. Code Chapter 11 - REORGANIZATION
[19] Ibid. Section 1101 to section 1116
[20] 11 U.S. Code Chapter 11 - REORGANIZATION. Section 1121 to section 1129

Therefore, restructuring proceedings happen during the financial distress of the debtor. And gives him a chance to save its business with the creation of a restructuring plan to stagger the debts upon a certain timeline to recover[21].

On the other hand, insolvency denotes the inability of a debtor to fulfil financial obligations as they come due. In other words, it indicates an inability to pay debts as they come due or a situation where liabilities exceed assets[22]. Insolvency proceedings lead to liquidation, where assets are sold to repay debts. The proceeds from the sale of assets in liquidation are used to pay off creditors in a predetermined order of priority established by law[23].

Each of these restructuring mechanisms serves a distinct purpose and is utilized based on the specific needs and circumstances of the debtor and creditors. Whether through reorganization, or renegotiation, restructuring proceedings aim to mitigate financial distress and pave the way for a more stable financial future.

Restructuring proceedings are particularly relevant in contexts where systemic stability and the continuation of essential services or economic functions are at stake[24]. This relevance can outweigh the principle of freedom of contract in several ways. Indeed, restructuring can preserve business operations and jobs, thus maintaining economic activity and preventing larger economic fallout[25]. It also provides a mechanism to equitably distribute losses and obligations in situations where strict adherence to original terms would lead to undue hardship or inequitable outcomes[26].

Ensuring a balance between the principle of freedom of contract and the need for intervention involves several mechanisms, such as the legislative frameworks and judicial oversight, laws and regulations define the boundaries and conditions under which interventions can occur, providing clarity and predictability[27]. Courts play a critical role in reviewing and approving interventions, ensuring that any modifications are fair, justified, and proportionate[28].

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[21] William H. Beaver, Maria Correira and Maureen F. McNichols, *Financial Statement Analysis and the Prediction of Financial Distress* (Foundation and Trends in Accounting, vol 5, no 2, 2010) pp 99–173 http://dx.doi.org/10.1561/1400000018

[22] Horst Eidenmueller, *What is an Insolvency proceeding?* (University of Oxford, Law Working Paper n°335/2016, November 2017)

[23] Ibid.

[24] Paul M. Hirsch and Michaela De Sourcey, *Organizational Restructuring and its Consequences: Rhetorical and Structural* (Annual Review of Sociology, Volume 32, August 2006). Pages 171 to 189. Link: https://doi.org/10.1146/annurev.soc.32.061604.123146

[25] Anne Epaulard, and Chloé Zapha, *Bankruptcy costs and the design of preventive restructuring procedures*. Journal of Economic Behavior & Organization, Volume 196, April 2022, pages 229-250. https://doi.org/10.1016/j.jebo.2022.02.001

[26] Ibid.

[27] Betty Mensch, *Freedom of contract as Ideology* (Stanford Law Review, 1981)

[28] Ibid.

Intervention into the contract law is justified in certain circumstances to protect broader societal interests, ensure fairness, and prevent harm[29]. Interventions are often necessary to protect parties with significantly less bargaining power, such as consumers in consumer contracts or employees in employment agreements. Finally, economic stability is also another justification to intervene into contract. Interventions in these contracts might be justified to ensure that the expectations and dependencies built upon them are maintained, promoting economic stability and continuity[30]. Therefore, in restructuring proceedings, courts may intervene to either reject or assume executory contracts to maximize the value of the debtor's estate for the benefit of creditors[31].

Restructuring proceedings is often more relevant than strict adherence to the principle of freedom of contract because it aims to preserve business viability and protect broader economic interests. Indeed, restructuring allows financially distressed businesses to reorganize their obligations, ensuring they can continue operations and preserve jobs. By reorganizing debts and obligations, restructuring proceedings seeks to maximize the value of the business for all stakeholders, including creditors, employees, and shareholders.

In conclusion, restructuring proceedings are essential legal processes designed to address financial distress and resolve debt-related issues. These proceedings, which differ by jurisdiction, enable distressed businesses to reorganize their obligations and maintain viability, thus protecting broader economic interests. The EU Directive on restructuring and insolvency provides a comprehensive framework for such processes, allowing for flexibility in asset and liability management, capital restructuring, asset sales, and operational changes to prevent insolvency. Similarly, in the US, Chapter 11 of the Bankruptcy Code offers a structured approach for businesses to continue operations while implementing necessary financial and operational reforms under court supervision. Overall, restructuring proceedings mitigate financial distress, preserve business operations, and promote economic stability by ensuring that debtors can renegotiate terms and streamline operations for the benefit of all stakeholders.

The goal of restructuring proceedings is to increase the debtor’s chances of survival vis-à-vis its creditors and in the competitive environment. Unlike liquidation proceedings, restructuring proceedings do not serve to liquidate the debtor’s assets. They are characterized by a temporary suspension of the debtor's payment obligations and the competences of its management.

[29] Steven Shavell, *Contracts, Holdup and Legal Intervention* (Harvard Law school Discussion Paper, 2005) Link: http://www.law.harvard.edu/faculty/shavell/pdf/Holdup.pdf
[30] Ibid.
[31] Nicolaes W.A. Tollenaar, *The European Commission’s Proposal for a Directive on Preventive Restructuring Proceedings*, Insolvency Intelligence, Sweet & Maxwell, Volume 30, Number 5 (2017)

Corporate reorganization is considered to be an emergency procedure of which the end is the gradual reallocation of factors of production from less to more efficient uses[32].

The success of putting an insolvency and restructuring law into action depends on how well the parties can manage the many complicated tasks involved. These include keeping a struggling business running smoothly, protecting and making the most of its assets, both financial and non-financial, and making sure it stays valuable and able to keep operating[33]. At the end, it is about giving the struggling business the right reasons to come out of insolvency protection quickly and successfully, satisfying everyone from the law to the market to the various creditors involved[34].

The goals of restructuring proceedings are, among others, avoidance of bankruptcy liquidation, preservation of the continued existence of the debtor as an economic unit, continuation of business, and safeguarding jobs (employees, suppliers, service, and the value-generating advantages of going concern)[35].

The survival of the debtor can assure the satisfaction of the creditors' interests. Economic value-generating assets can be protected to the extent of the respective economic advantage and can be kept intact to the benefit of all the debtor's creditors[36].

The earlier the debtor decides to take action, the less dramatic the damage of possible financial difficulties will be[37]. Firstly, the financial resources are still available, and losses of value can be cushioned[38]. Secondly, more room for negotiation with creditors exists. Synergies are less critical; thus, a better restructuring result can be achieved[39]. Thirdly, the possibility of implementing a comprehensive restructuring plan increase. After such a step has been taken, a cheaper process will be started, the path of which has a chance of success[40].

The goals of a company's restructuring proceedings can be varied; however, it is widely recognized that companies look to go through a restructuring proceedings due to financial difficulties in an attempt to make the company viable and profitable once more. Therefore, the

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[32] *Restructuring across borders*, Corporate restructuring and insolvency procedures (Allen & Overy, March 2020)
[33] Frédéric Closset, Christoph Großmann, Christoph Kaserer and Daniel Urban, *Corporate restructuring and creditor power: Evidence from European insolvency law reforms* (Journal of Banking & Finance, Volume 149, April 2023) https://doi.org/10.1016/j.jbankfin.2022.106756
[34] Ibid.
[35] Anne Epaulard, and Chloé Zapha, *Bankruptcy costs and the design of preventive restructuring procedures*. Journal of Economic Behavior & Organization, Volume 196, April 2022, pages 229-250. https://doi.org/10.1016/j.jebo.2022.02.001
[36] Anne Epaulard, and Chloé Zapha, *Bankruptcy costs and the design of preventive restructuring procedures*. Journal of Economic Behavior & Organization, Volume 196, April 2022, pages 229-250. https://doi.org/10.1016/j.jebo.2022.02.001
[37] Carmen M. Reinhart, Vincent Reinhart and Kenneth Rogoff, *Dealing with Debt*, Journal of International Economics 96 (January 9th, 2014), pages 43-55. DOI: 10.1016/j.jinteco.2014.11.001.
[38] Ibid.
[39] Ibid.
[40] Ibid.

main goals of a restructuring for a company are typically financial stability, debt reduction, and business continuity[41].

When a restructuring plan fails or ends early due to inadequate legal protection for new financial arrangements, it often leads to the collapse of the entire reorganization effort. This goes against the values of preserving businesses that have potential and ensuring fairness for creditors. A successful reorganization system should give companies a better chance to survive in the long term and include measures for relieving debt[42]. Therefore, achieving "financial stability" is crucial, as the company aims to steer clear of more financial trouble and needs a plan that addresses past issues[43].

One main objective refers to the continuation of the debtor's business operations[44]. Each procedure sees this requirement as crucial. Business continuity is the process by which a business can continue to operate on a day-to-day basis. The ultimate goal is for the restructuring procedure to leave the business in a state where it has viable future prospects, particularly in the medium to long term. Ignoring it would lead to negative economic consequences for the company and its creditors, thus putting it in the worst case. The termination of business would not only result in losses for the creditors but is also related to significant disadvantages on the part of employees, customers, and eventually the reputation of the company.

The goal business continuity is focused around preserving the company and its jobs, as it is widely recognized that most job losses usually occur from a company going into insolvency and its trade and assets being sold off piecemeal[45].

Debt reduction is the second goal of restructuring proceedings. Debt reduction will be achieved through various methods[46]. Full cooperation between a company and its creditors throughout the conduct of a restructuring plan, and voluntary arrangements made between the company and part or all of its creditors.

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[41] Wayne F. Casclo, *Strategies for Responsible Restructuring*, (University of Colorado-Denver, October 2001)
[42] Vinicius Augusto Brunassi Silva and Richard Saito, *Corporate restructuring: empirical evidence on the approval of the reorganization plan*, RAUSP Management Journal 53 (2018) pages 49–62
[43] Ibid.
[44] Official Journal of the European Union, *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 (Directive on restructuring and insolvency)*, June 26th, 2019, Recital 2
[45] Official Journal of the European Union, *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 (Directive on restructuring and insolvency)*, June 26th, 2019, Recital 4
[46] Rebacca Lake and Daphne Foreman, *What is debt relief?* (Forbes Advisor, February 20th, 2024)

Both possibilities of restructuring reduce the likelihood that the debtor firm will again become insolvent. In the first case, it leaves the equity intact, provides some incentives for shareholders to continue to act in the interest of the debtor's firm rather than in their own interests by seeking to gain time because bankruptcy entails various litigation that providers of debt other than shareholders generally do not want to bear[47]. While at the same time, in the second case, they reduce the bankrupt firm's total obligations to the amount that the firm's projected future earnings may be able to service[48].

In conclusion, the goals of restructuring proceedings are multi-faceted, aiming primarily to enhance the debtor's chances of survival while also benefiting creditors and preserving economic stability. Successful restructuring requires effective coordination between all parties involved, including creditors, management, and stakeholders, along with legal protection for new financial arrangements. By prioritizing these goals and implementing comprehensive restructuring plans early on, struggling businesses can increase their likelihood of successful recovery and long-term viability. Ultimately, the success of restructuring efforts hinges on early action, comprehensive planning, and the ability to negotiate with creditors while considering the long-term viability of the business.

1.2. The Role of Court in Restructuring Proceedings

Restructuring proceedings are in most case court proceedings. The courts have an important role in the promotion of the restructuring proceedings.

The primary function of the court has been said to ensure a fair trial. It means that the focus of the court should be to ensure that there is a fair and transparent process whereby the interests of all creditors are considered. Looking from the perspective of protection of the right to a fair trial the court has to ensure that there are some rules or norms which guide the behaviour of the debtor and the creditors and there has to be a means of enforcement of these rules[49]. These rules could be in the form of law, or the consensual rules derived from the terms of a contract. While trying to protect the basic rights of the creditors as have been seen in the earlier part of the essay, protection of various statutory and consensual rights will happen automatically as

[47] Vinicius Augusto Brunassi Silva and Richard Saito, *Corporate restructuring: empirical evidence on the approval of the reorganization plan*, RAUSP Management Journal 53 (2018) pages 49–62
[48] Ibid.
[49] Deloitte legal, *A guide to pre-insolvency and insolvency proceedings across Europe* (July 2023) Link: https://www2.deloitte.com/content/dam/Deloitte/ch/Documents/legal/deloitte-ch-en-a-guide-to-pre-insolvency-and-insolvency-proceedings-across-Europe.pdf

enforcement of all these rights are actually the part of process protection[50]. This will ensure that there is least interference with just the protection of certain rights and will ensure that a value-enhancing restructuring is not stultified due to strict enforcement of individual rights.

In its endeavour to oversight a restructuring plan and at the same time maintaining the balance between all the creditors' interests, it is necessary that there should be constant review of every action taken by the debtor and the creditors[51]. In most legal systems, the courts perform the critical function of oversight of the restructuring process[52]. Given the importance of court's role, it is necessary that the court takes an initiative-taking role in the whole restructuring process. Experience has shown that requiring too much court intervention can stifle the implementation of value-enhancing restructurings, but too little oversight can lead to abuse that is detrimental to the collective creditors[53]. Thus, the design of a judicial oversight has to be such that it strikes a right balance between giving freedom to the debtors and the creditors to implement a restructuring plan and preventing any action which is prejudicial to the interests of any particular interest group of the creditors.

Although legislation has evolved significantly over recent years, especially as a result of the EU Regulation on insolvency proceedings of 2015 and The Directive on Restructuring and Insolvency of 2019. These changes aim to protect the interests of investors and creditors, increase market confidence, and promote the restructuring of companies in distress in a practical and efficient way. But behind some legislations, and while seeming to apply the European framework, there exists a vague or intricate insolvency and restructuring system which, many times, does not meet the main objectives of a system of this nature[54]. Furthermore, because of a jurisdiction's insolvency system, it is often difficult to assist the debtor in its financial restructuring to avoid the costly, time-consuming, and unpredictable process of liquidation[55].

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[50] Official Journal of the European Union, *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 (Directive on restructuring and insolvency)*, June 26th, 2019, Recital 50.

[51] Official Journal of the European Union, *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 (Directive on restructuring and insolvency)*, June 26th, 2019. Recital 65.

[52] Vinicius Augusto Brunassi Silva and Richard Saito, *Corporate restructuring: empirical evidence on the approval of the reorganization plan*, RAUSP Management Journal 53 (2018) pages 49–62

[53] Paul M. Hirsh and Michaela De Soucey, *Organizational Restructuring and its Consequences: Rhetorical and Structural*, ANNUAL REVIEW OF SOCIOLOGY Volume 32 (2006), pages 171-189

[54] Deloitte legal, *A guide to pre-insolvency and insolvency proceedings across Europe* (July 2023) Link: https://www2.deloitte.com/content/dam/Deloitte/ch/Documents/legal/deloitte-ch-en-a-guide-to-pre-insolvency-and-insolvency-proceedings-across-Europe.pdf

[55] Ibid.

The big challenge is to find rules of coordination between different jurisdictions in cross-border insolvency who will provide for the continuation of relations between an insolvent company, its controlling company, and its stakeholders through the insolvency of the debtor or through a quickly performed recourse in the form of restructuring proceedings.

In conclusion, the court's primary role in restructuring processes is to maintain the integrity of the process, ensuring fairness and transparency for all creditors. This involves setting and enforcing rules that govern debtor and creditor behavior, protecting creditors' rights without overly interfering in the restructuring itself. Effective judicial oversight strikes a balance between flexibility and protection, preventing harm to creditor interests while allowing restructuring plans to develop. Moreover, in cross-border insolvency cases, coordination between jurisdictions is crucial for effective proceedings and stability. A well-designed judicial framework is essential for facilitating successful restructurings while safeguarding all parties involved.

2. THE NOTION OF EXECUTORY CONTRACTS AND THE NEED OF PROTECTION OF THESE CONTRACTS IN RESTRUCTURING PROCEEDINGS

In this chapter, the notion and protection of executory contract will be analysed. Also, it focuses on the legal framework governing the protection of those contracts in insolvency proceedings.

Few different jurisdictions were chosen, namely, US, Germany and France. The US bankruptcy law was chosen due to Bankruptcy Code that codified the executory contracts. The developed bankruptcy law in the US is a model for many other jurisdictions. It offers a wealth of analysis and comparative material due to its thorough approach and extensive case law.

Germany has the largest economy in Europe, so its bankruptcy laws have a big impact on both European and international markets. Germany's commitment to updating bankruptcy laws and harmonizing with wider European standards is demonstrated by its adoption of the EU Directive on restructuring and insolvency[56]. Because of this, it is an essential jurisdiction to investigate how the Directive affects executory contracts.

Being also a major economy in Europe. Since France has also adopted the Directive, it is a crucial country to research the outcomes and real-world implications of these changes.

Examining the concept of executory contracts in various legal contexts aids in identifying optimal procedures and possible domains for modification[57]. International insolvency procedures can be made more efficient and uniform by having a better understanding of how these contracts are handled by various jurisdictions. The way executory contracts are handled has important legal and financial. Significant legal and financial ramifications for creditors, debtors, and other contractual parties arise from how executory contracts are handled. The balance that each jurisdiction strikes between these interests is clarified by comparative analysis.

2.1. The Notion of Executory Contracts in Restructuring Law

To fully grasp the significance of executory contracts, an understanding of what constitutes a contract is required.

Essentially, upon entering a contract, the parties acquire a bundle of rights and obligations. Often, albeit not always, the central component of such contracts is an exchange of promises i.e. a

[56] Dr Marco Wilhem, Dr Malte Richter and Tina Hoffmann, *German Insolvency Law* (Mayer Brown, June 2018)
[57] John A. E. Pottow, *A new approach to executory contracts* (University of Michigan Law School, 2018) Link: https://repository.law.umich.edu/articles/2006

bilateral contract[58]. A promise made by one party to another constitutes consideration for that promise as well as a conditional commitment to suffer a legal consequence[59]. An example would be a contract to sell and purchase an asset at a future date for an agreed price. The seller's obligation is to transfer the asset to the purchaser at the agreed time, and the purchaser's obligation is to pay the price to the seller at that time.

There are three types of contracts: unilateral, bilateral and multilateral. A bilateral contract is one in which both parties have a duty remaining to be performed[60]. This duty may be the payment of money or an act. Whichever the case, both parties to a bilateral contract will have an obligation. Multilateral contracts are contracts between three or more parties, where each party has obligations and rights towards the others involved. These types of contracts are commonly used in scenarios where multiple stakeholders need to collaborate and coordinate their efforts to achieve a common goal[61].

The primary elements of a contract include, first the offer and acceptance. One party must make an offer, and the other party must accept it. The offer must be clear, definite, and communicated to the offeree, who must accept it unequivocally[62]. In common law jurisdictions, consideration is also a primary element of a contract. Consideration is something of value exchanged between the parties. It can be a promise to perform a certain action or refrain from performing an action. This concept ensures that both parties have a stake in the agreement[63].

Then there is the intention to create legal relations. The parties must intend for their agreement to be legally binding. This is often presumed in commercial agreements but may need to be explicitly demonstrated in social or domestic arrangements[64].

Now, that a general definition of a contract is set, we can investigate the specific definition of what constitute an executory contract. Executory contracts play an important role in the debtor's ability to restructure effectively. These are contracts in which both of the party's terms of performance are unfulfilled.

Such contracts are particularly important in relation to restructuring proceedings. Indeed, the company in financial distress will want to complete contracts that are beneficial to its financial

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[58] Jack Beatson, Andrew Burrows and John Cartwright, *Anson's Law of Contracts (31st edition)*, Oxford University Press (15 May 2020), pages 39 to 129. https://doi.org/10.1093/he/9780198829973.001.0001
[59] Ibid.
[60] Melvin A. Eisenberg, *The theory of Contracts*, The Theory of Contract Law, new essays edited by Peter Benson (University of Toronto, October 2009), pages 206 to 264.
[61] Charles Fried, *Contract as Promise: A theory of Contractual Obligation* (2nd edition), Oxford University Press (21 May 2015). https://doi.org/10.1093/acprof:oso/9780190240158.001.0001
[62] T. M. Scanlon, *Promises and Contracts*, The Theory of Contract Law, new essays edited by Peter Benson (University of Toronto, October 2009), pages 86 to 117.
[63] T. M. Scanlon, *Promises and Contracts*, The Theory of Contract Law, new essays edited by Peter Benson (University of Toronto, October 2009), pages 86 to 117.
[64] Ibid.

situation. On the other, it will want to rescind those contracts that are onerous and uneconomical to perform.

One definition was proposed by Vern Countryman, who suggested that an executory contract is a "*contract that is so far unperformed that the failure of either party to complete the performance would constitute a material breach excusing the performance of the other*"[65]. This can range from supply contracts, distribution agreements to intellectual property licensing. Often these contracts are what allow the debtor to operate and are necessary for its survival. Unlike the past where businesses relied more on tangible assets, now the avoidance of a business failure often depends on its ability to protect and retain intangible assets.

A contract is executory in nature if, at the time of filing for a petition to bankruptcy, both party to the contract has not yet performed its obligation. This failure to perform would constitute a material breach of the contract, excusing the other party from having to further perform[66].

Whereas the US Bankruptcy code does not provide a definition of executory contracts, Article 2(1)(5) of the Directive establishes that what an executory contract is[67] :

> 'executory contract' means a contract between a debtor and one or more creditors under which the parties still have obligations to perform at the time the stay of individual enforcement actions is granted or applied'.

The definition is straightforward and easy to understand. It clearly identifies the two key elements of an executory contract, namely, the involvement of a debtor and creditors, and the existence of unperformed obligations by both parties.

However, the definition does not specify what types of obligations or performances are required to qualify as executory. This could lead to varying interpretations, especially in complex commercial arrangements where obligations might be contingent or conditional. The definition implies that any remaining obligation, no matter how minor or inconsequential, might render a contract executory. This definition also raises temporal ambiguity as a specific timeframe to consider the executory contract has not been defined. This can create uncertainty about which point in time should be considered for evaluating the contract's status. This might be problematic in fast-moving situations where the status of obligations could change rapidly.

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[65] Vern Countryman, *Executory contracts in bankruptcy: Part I*, Minesota Law Review, 1973

[66] Bloomberg Law, Practical Guidance, *Bankruptcy, Overview - Executory Contracts*. Link: https://www.bloomberglaw.com/external/document/X20FE8D8000000/bankruptcy-overview-executory-contracts

[67] Official Journal of the European Union, *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 (Directive on restructuring and insolvency)*, June 26th, 2019. Article 2(1)(5)

Moreover, different jurisdictions might have varying interpretations of what constitutes an obligation or performance, leading to inconsistencies in applying the definition across different legal systems within the EU.

Legal practitioners might face difficulties in uniformly interpreting and applying this definition without further judicial guidance or additional regulatory clarification. Ambiguities in what constitutes "obligations to perform" could lead to litigation or disputes, particularly in cross-border insolvency scenarios. From a practical standpoint, businesses and legal advisors would benefit from a more detailed explanation or examples of what types of contracts and obligations are intended to be covered. This would help ensure more consistent and predictable application.

Adding a clause or commentary that provides examples or a more detailed description of what types of obligations are included could enhance clarity. Also defining more precisely the relevant time for assessing the executory nature of the contract could help reduce ambiguities.

The definition is specifically tailored to insolvency situations where the stay of individual enforcement actions is relevant. This suggests that the obligations under the contract may be affected by the restructuring proceedings.

As the article 2(1)(5) of the Directive mentioned a stay of individual enforcement, an explanation of what it constitutes is required.

Indeed, when a company enters into a formal insolvency proceeding, the commencement of that proceeding will, in most jurisdictions, trigger an "automatic stay", also called a stay on individual enforcement, which will prevent the company and other parties to executory contracts from doing any of the sorts of things that might otherwise be available to them as a matter of contract or equity[68]. The principal purpose of the stay is to freeze the legal and economic positions prevailing immediately upon commencement of the restructuring proceedings for the benefit of all creditors.

During the stay on individual enforcement, the rights of the creditors to enforce their claims are suspended[69]. This obligation of the creditors is also indicated within the articles 7(4) and 7(5) of the Directive.

Indeed, article 7(4) of the Directive establishes that[70]:

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[68] Remigijus Jokubauskas, Marek Swierczynski and Audrone Balsiukiene, *A stay of individual enforcement actions as a basis for effective restructuring proceedings*, International Comparative Jurisprudence 2021 Volume 7 Issue 1

[69] Remigijus Jokubauskas, Marek Swierczynski and Audrone Balsiukiene, *A stay of individual enforcement actions as a basis for effective restructuring proceedings*, International Comparative Jurisprudence 2021 Volume 7 Issue 1

[70] Official Journal of the European Union, *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 (Directive on restructuring and insolvency)*, June 26th, 2019. Article 7(4)

> Member States shall provide for rules preventing creditors to which the stay applies from withholding performance or terminating, accelerating or, in any other way, modifying essential executory contracts to the detriment of the debtor.

And article 7(5), specify the reason when creditors are not allowed to exercise their right to enforce. Those include the following[71]:

> a) a request for the opening of preventive restructuring proceedings; (b) a request for a stay of individual enforcement actions; (c) the opening of preventive restructuring proceedings; or (d) the granting of a stay of individual enforcement actions as such.

In restructuring proceedings, there are several types of executory contracts that may be subject to assumption or rejection.

Executory contracts can be divided into two categories: essential executory contracts and non-essential executory contracts.

Essential executory contracts are those necessary for the continuation of the debtor's day-to-day business activities[72]. And the suspension or termination would lead to the cessation of the debtor's business operations. Those contracts include for example, utility services (electricity, water, internet), key supplier agreements, and critical service provider contracts. Non-essential executory contracts, while still binding and important, do not directly impact the ability of the business to continue its operations. Article 7(4) of the Directive specifically aims to protect essential executory contracts to ensure business continuity, whereas protections for non-essential executory contracts are optional for Member States[73].

Therefore, the distinction between executory and essential executory contracts is crucial in understanding the level of protection offered to debtors and the scope of creditors' rights under the Directive.

Supply contracts are often critical to the debtor's business, as they provide the necessary materials or goods to produce the debtor's products or services. They are considered as executory contracts as both the supplier and the purchaser have unperformed obligations. Supply contracts are often redacted with a termination clause upon the occurrence of an event connected to insolvency. Those clauses, known as ipso facto clauses, either automatically terminate the contract or gives the right to the supplier to end the supply agreements[74].

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[71] Ibid. Article 7(5)
[72] Ibid. Article 7(4)
[73] Ibid.
[74] SQUIRE PATTON BOGGS, Termination of supply contracts. (UK, December 2023) Link: https://media.squirepattonboggs.com/pdf/restructuring-and-insolvency/ipso-facto-and-termination-of-supply-contracts.pdf

However, in most jurisdictions, the use of ipso facto clauses is limited, especially in insolvency and restructuring proceedings. Indeed, one of the main statutory goals of the restructuring proceeding regime is to administer an insolvent company's property, business, and affairs in a way that "maximises the chances of the company, or as much as possible of its business, continuing in existence."[75] It is believed that exercising ipso facto rights, as contract termination clauses, would be in conflict with this goal.

Lease agreements are also necessary to the debtor's real estate needs, such as for office or manufacturing space. In a restructuring proceeding, the debtor may reject or assume these leases, depending on whether they are beneficial or burdensome to the debtor. However, landlords may be reluctant to allow the debtor to reject a lease if they believe that they will not be able to find another tenant to replace the debtor.

Lease agreements include real estate lease that involve the rental of real property, such as office space or retail space, which are necessary for the debtor in order to continue the activity and survive restructuring[76]. Loan agreements that involve the lending of money from one party to another party.

License of intellectual property is also an executory contract that specify the reciprocal obligations of the creator and the user. These documents provide a roadmap of the licensee's obligations and the permissions granted by the licensor[77]. These agreements establish the parameters for the licensee's use of the granted intellectual property, and the licensor is required to abstain from suing for authorized uses[78].

In conclusion, executory contracts, encompass various types, such as supply contracts, lease agreements, etc., which are vital for a debtor's operation and survival. The determination of whether to assume or reject executory contracts during restructuring depends on their benefit to the estate and the feasibility of performance. Establishing clear criteria for identifying and protecting such contracts is crucial for effective restructuring processes.

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[75] Noel McCoy, Laura Johns, *Ipso Facto Law Reform* (July 2018). Link: https://www.nortonrosefulbright.com/en-fr/knowledge/publications/6702e782/ipso-facto-law-reform

[76] Steven R. Grenadier, *An equilibrium analysis of real estate lease* (Stanford University, June 2002). Link: https://web.stanford.edu/~sgren/seminar/commercial-leasing.pdf

[77] Peter S. Menell and Suzanne Scotchmer, *Intellectual property law*, Handbook of Law and economics, Volume 2 edited by A. Mitchell Polinsky and Steven Shavell (2007), pages 1476 to 1555. DOI: 10.1016/S1574-0730(07)02019-1

[78] Peter S. Menell and Suzanne Scotchmer, *Intellectual property law*, Handbook of Law and economics, Volume 2 edited by A. Mitchell Polinsky and Steven Shavell (2007), pages 1476 to 1555. DOI: 10.1016/S1574-0730(07)02019-1

2.2. The Need for Protection of Executory Contracts in Restructuring Proceedings

In general, the treatment of executory contracts in restructuring proceedings will depend on a number of factors, including the type of proceeding, the nature of the contract, and the interests of the parties involved.

The protection of executory contracts can significantly impact the success of restructuring proceedings. Preserving critical contracts enhances the debtor's ability to maintain operations, preserve value, and avoid insolvency. Conversely, the failure to protect key contracts may disrupt business operations, erode value, and impede restructuring efforts.

Executory contracts are critical to the continued operation of a business, as they provide the goods and services necessary for the business to function[79]. Without the protection of these contracts, a company undergoing restructuring may find it difficult or impossible to continue operating. This can result in job losses, reduced economic activity, and negative impacts on stakeholders, including suppliers, customers, and creditors.

The protection of executory contracts can be achieved through various legal and strategic measures during restructuring process. Here are some common methods employed to protect executory contracts:

1. Assumption: a company can assume (i.e., continue) certain executory contracts. This allows the company to maintain its contractual relationships and fosters business continuity.

The debtor's choice to accept an executory contract needs to be approved by the bankruptcy court[80]. Many courts will use a business judgment test, which is based on whether a debtor can demonstrate that its decision is an exercise of sound business judgment, and that the assumption of the contract or lease will benefit the debtor's estate[81].

2. Rejection: alternatively, debtors may reject executory contracts while providing compensation to counterparties for losses incurred. This approach balances the debtor's need for flexibility with the protection of contractual rights. If the debtor refuses an executory contract, it's considered a breach on their part. Consequently, the other party to the contract retains a claim in the bankruptcy proceedings for damages resulting from the rejection[82].

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[79] Mark A. CODY, *Fifth Circuit: Bad Faith Does Not Overcome Deferential Business Judgment Standard Applied to Assumption or Rejection of Contracts in Bankruptcy*, Chicago, Newsletter January 2023

[80] John A.E. Pottow, *A new approach to executory contracts*, University of Michigan Law school, 2018 Link: https://repository.law.umich.edu/articles/2006

[81] John A.E. Pottow, *A new approach to executory contracts*, University of Michigan Law school, 2018 Link: https://repository.law.umich.edu/articles/2006

[82] ANDREW J. GALLO, *ASSUMPTION AND REJECTION OF MIDSTREAM CONTRACTS IN BANKRUPTCY*, Boston, June 10th, 2021

3. Assignment: After the assumption of a contract or lease, a debtor may later assign that contract to a third party, but only under specific circumstances[83]. Indeed, the non-debtor contract party must receive sufficient assurances from the debtor regarding the proposed assignee's performance in the future before the debtor can assign[84].

Moreover, certain executory contracts cannot be assigned, such as contracts that qualified as personal service contracts, partnership agreements[85]. Indeed, personal service contracts cannot be assigned to a third party due to the nature of the services that is unique and personal to the debtor. It goes the same for partnership agreements as the partners agreed to enter this partnership agreement with a very specific person and the assigned to a third party will breach this contract[86].

4. Renegotiation and modification: companies may also engage in negotiations with counterparties to modify the terms of executory contracts but only before the commencement of insolvency proceedings[87]. Renegotiation can be voluntary or facilitated through mediation or other alternative dispute resolution methods.

The effectiveness of these approaches varies depending on the specific circumstances of each case. Assumption and assignment offer seamless continuity but may burden the acquiring party with unfavourable contracts. Rejection with compensation provides flexibility but may lead to disputes over valuation and compensation terms. Negotiated settlements offer customization but require consensus among parties, which can be challenging to achieve.

Despite the importance of the protection of executory contracts, there are several issues that can arise during the restructuring process.

One of the primary issues with the protection of executory contracts is the lack of clarity surrounding the process. It can be difficult to determine which contracts are executory, and how they should be treated during the restructuring process. This can lead to confusion and delays and can make it difficult for companies to obtain the necessary financing and support to continue operating.

Another issue with the protection of executory contracts is the difficulty in renegotiating these contracts during the restructuring process. In many cases, these contracts may be uneconomical or unworkable for the company undergoing restructuring. However, renegotiating

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[83] John A.E. Pottow, *A new approach to executory contracts*, University of Michigan Law school, 2018. Link: https://repository.law.umich.edu/articles/2006

[84] Jesse M. Fried, *Executory contracts and performance decisions in Bankruptcy*, Duke Law Journal, Vol. 46:517, p. 525-530

[85] Reinhart, *Contracts That Cannot Be Assigned Under Section 365(C)(1) of the Bankruptcy Code: The List Is Expanding*, December 15th, 2014. Link: https://www.reinhartlaw.com/news-insights/contracts-that-cannot-be-assigned-under-section-365c1-of-the-bankruptcy-code-the-list-is-expanding

[86] Reginald W. Jackson, *ASSUMPTION AND ASSIGNMENT OF EXECUTORY CONTRACTS: PRESERVING THE VALUE OF NON-BURDENSOME CONTRACTS AND LEASES*, Colombia, p. 6-7

[87] Fabrice Robert-Tissot, *The Effects of a Reorganization on (Executory) Contracts: A Comparative Law and Policy Study [United States, France, Germany and Switzerland]*.

these contracts can be difficult, particularly if the other party is not willing to negotiate or if there are legal barriers to doing so.

There also may be legal hurdles to the protection of executory contracts, particularly if these contracts are subject to different legal systems or if they are governed by foreign law. This can make it difficult to ensure that these contracts are protected during the restructuring process.

To sum up, the treatment and protection of executory contracts are crucial factors for the success of the restructuring proceedings. Preservation of performance of these contracts is indispensable for maintaining business continuity and facilitating a successful emergence from financial distress. Various methods can be used to protect these contracts. Nonetheless, challenges may arise, potentially impeding the company's operations. Overall, careful consideration of these factors and tailored strategies are essential for effectively navigating the protection of executory contracts in restructuring proceedings.

2.3. The Legal Framework for Protecting Executory Contracts in Restructuring Proceedings

The key to preventing the termination of the contract upon the initiation of insolvency proceedings lies in the correct identification and categorization of the contract, and protection will only be given to the executory contracts.

The attainment of protection for executory contracts can be achieved through a variety of different processes. Those contracts may be safeguarded by their specific clauses, prevented from termination under laws or regulations, or indirectly saved by providing time to the debtor to perform them. In any case, protection for the contract will only be beneficial if it puts the non-defaulting party in a position which provides more value than that of claiming damages for breach of contract, and in order to do this, it is necessary that the forced termination or changes to the contract are avoided[88].

In many jurisdictions, such as the United States, Canada, and the European Union, there are specific rules and procedures that govern the treatment of executory contracts in restructuring proceedings. These rules often aim to strike a balance between the interests of the parties to the contract, the debtor, and other stakeholders in the proceeding.

2.3.1. Protection of Executory Contracts in Restructuring Proceedings in the US

[88] Aurelio Gurrea-Martinez, *Debtor-in-Possession Financing in Reorganisation Procedures: Regulatory Models and Proposals for Reform*, European Business Organization Law Review (2023) 24:555–582, 27.06.2023

In 1978, the United States Congress enacted the Bankruptcy Code. It is the statute that governs all modern bankruptcy law in the United States[89]. It is a federal law, and as a result, the laws and procedures are very similar from state to state.

In the United States, the treatment of executory contracts in restructuring proceedings is governed primarily by Title 11 of the Bankruptcy Code. Section 365(a) of the Bankruptcy Code grants the bankruptcy trustee or debtor-in-possession the authority to assume or reject executory contracts[90].

Chapter 11 establishes the court on reorganization which allows companies to continue operation while they restructure and wipe out a large portion of their debts. It is intended to save a business, at least in part, rather than liquidate it. The usual result of a Chapter 11 filing is that the debtor's assets are sold under the supervision of the court. Any residual proceeds from the sale (after paying the creditors) are returned to the debtor. The US bankruptcy law aims to strike a balance between preserving value for the bankruptcy estate and respecting the rights of counterparties to executory contracts. The ability to assume or reject contracts provides flexibility for debtors to restructure their affairs efficiently while minimizing disruption to ongoing business operations[91]. Subsection 365(i) of the US Bankruptcy Code has been added to clarify the rights of an intellectual property licensee when the licensor rejects an IP licensing agreement under subsection 365(a). This revision of the law has made after the judgement in Lubrizol Enterprises, Inc. v. Richmond Metal Finishers, Inc. 756[92]. Lubrizol Enterprises, Inc. v. Richmond Metal Finishers, Inc. (756 F.2d 1043 (4th Cir. 1985)) is a landmark case that had significant implications for intellectual property licensing in the context of bankruptcy.

In this case, Richmond Metal Finishers (RMF), a licensor of a patented metal coating process, filed for bankruptcy. Lubrizol Enterprises, the licensee, had a contract with RMF allowing it to use this process. When RMF sought to reject the executory contract under Section 365(a) of the Bankruptcy Code, the Fourth Circuit Court allowed the rejection, holding that Lubrizol could only seek damages for breach of contract rather than continue using the patented process[93]. The decision in Lubrizol created a significant concern among intellectual property licensees. If a debtor in bankruptcy could reject an intellectual property license, the licensee would lose the right to use

[89] Ronald J. MANN, *Bankruptcy and the U.S. Supreme Court*, Cambridge University Press, May 2017, p. 24-30
[90] U.S. Code, Title 11 BANKRUPCTY, §365. Link: https://www.law.cornell.edu/uscode/text/11/365
[91] Giacomo Rodano, Nicolas Serrano-Velarde and Emanuele Tarantino, *Bankruptcy Law and bank financing* (Università Bocconi, April 2015) + Michele J. White, *Chapter 14 Bankruptcy Law*, (Department of Economics, University of California, San Diego, 2007), DOI: 10.1016/S1574-0730(07)02014-2
[92] Lubrizol Enterprises, Inc., Appellee, v. Richmond Metal Finishers, Inc., Appellant.in Re Richmond Metal Finishers, Inc., Debtor, 756 F.2d 1043 (4th Cir. 1985)
[93] Lubrizol Enterprises, Inc., Appellee, v. Richmond Metal Finishers, Inc., Appellant.in Re Richmond Metal Finishers, Inc., Debtor, 756 F.2d 1043 (4th Cir. 1985)

the intellectual property, potentially disrupting businesses that relied heavily on such licenses[94]. The adverse effects of the Lubrizol decision led to legislative action.

In response, Congress enacted Subsection 365(n) of the U.S. Bankruptcy Code as part of the Intellectual Property Bankruptcy Protection Act of 1988[95]. This provision specifically addresses the rejection of intellectual property licenses in bankruptcy. Subsection 365(n) allows the licensee of intellectual property to retain its rights to the intellectual property, even if the debtor rejects the license agreement:

> (1)If the trustee rejects an executory contract under which the debtor is a licensor of a right to intellectual property, the licensee under such contract may elect— (A)to treat such contract as terminated by such rejection if such rejection by the trustee amounts to such a breach as would entitle the licensee to treat such contract as terminated by virtue of its own terms, applicable nonbankruptcy law, or an agreement made by the licensee with another entity; […].

This mitigates the harsh effects seen in the Lubrizol case. Therefore, licensees can choose to retain their rights to use the intellectual property as specified in the license agreement for the duration of the contract, including any extensions, effectively providing stability and predictability for businesses relying on such licenses.

If restructuring proceedings won't save the business, the goal changes to a Chapter 7 liquidation. However, the style of relief provided at Chapter 11 could theoretically be applied to individual contracts and leases (which the debtor can choose to assume or reject) with approval from the trustee or court[96].

In conclusion, in the USA, Chapter 11 provides mechanisms to protect executory contracts, such as assumption or rejection of the contract. But also, a protection of intellectual property licensees to avoid the disruption of businesses. However, challenges arise due to its complex and costly nature. Additionally, the ability of debtors to reject executory contracts under certain circumstances poses risks to contract counterparties[97].

2.3.2. The Protection of Executory Contracts in Restructuring Proceedings in France

[94] Ibid.
[95] U.S. Code, Title 11 BANKRUPCTY, §365. Link: https://www.law.cornell.edu/uscode/text/11/365
[96] A. BRIS, I. WELCH, and N. ZHU, *The Costs of Bankruptcy: Chapter 7 Liquidation versus Chapter 11 Reorganization*, THE JOURNAL OF FINANCE, VOL. LXI, NO. 3, JUNE 2006, p. 1258-1262
[97] US Department of Justice, *59. Executory Contracts in Bankruptcy -- Introduction, Threshold Issues*. Link: https://www.justice.gov/jm/civil-resource-manual-59-executory-contracts-bankruptcy

In France, the protection of executory contracts in restructuring proceedings is primarily governed by the Code de Commerce and the Code Civil. French law distinguishes between two types of contracts: essential and non-essential contracts. Essential contracts, which are necessary for the continuation of the debtor's activity, are subject to special protection. The court may authorize the debtor to continue performing essential contracts, provided that they contribute to the preservation of the business and the interests of creditors[98].

Non-essential contracts, on the other hand, may be terminated or renegotiated as part of the restructuring process. However, French law imposes certain procedural safeguards to ensure fairness and transparency in the treatment of executory contracts. Creditors must be informed of any proposed modifications or terminations, and they have the right to challenge such actions before the court[99].

Between 1985 and 2005, there have been three main attempts to facilitate business rescue and reorganisation by collective insolvency proceedings in France.

The first of these was introduced by the Law of January 25th, 1985, on the prevention and settlement of companies' difficulties, which attempted to modernise the existing *système monétaire* policy of pushing failing business into liquidation[100]. This experiment with *dépôt de bilan* triggered some initial interest from the business community, but ultimately failed to reverse the stigma attached to formal insolvency.

A revised version of *dépôt de bilan* was adopted by the 1994 reform to the previous law with the law of June 10th, 1994, on the prevention and settlement of companies' difficulties.

This second phase has been described as an *améloriation par le haut* or improvement from the top, it initially held the promise of better treatment for debtors. However, this promise remained elusive as the proposed reforms were never fully implemented. Consequently, many debtors were left disillusioned by the lack of protection afforded to them[101]. This second phase marks a pivotal shift in the landscape of insolvency law in France. Indeed, in response to these shortcomings, there has been a notable reorientation of insolvency law in France. The focus has shifted towards promoting business rescue and reorganization rather than mere liquidation. This shift underscores a broader recognition of the importance of preserving businesses and safeguarding jobs, aligning with contemporary economic priorities. As such, the reforms aim to

[98] S. Rowan "*THE NEW FRENCH LAW OF CONTRACT*" International & Comparative Law Quarterly, Volume 66, Issue 4, October 2017, pp. 805 – 831

[99] S. Rowan "*THE NEW FRENCH LAW OF CONTRACT*" International & Comparative Law Quarterly, Volume 66, Issue 4, October 2017, pp. 805 – 831

[100] Journal Officiel de la République Française, *Loi n° 85-98 du 25 janvier 1985 relative au redressement et à la liquidation judiciaires des entreprises*, January 25th, 1985.

[101] Journal Officiel de la République Française, *Loi n° 94-475 du 10 juin 1994 relative à la prévention et au traitement des difficultés des entreprises*, June 10th, 1994.

provide more robust mechanisms for debtors to navigate financial distress while fostering a more conducive environment for corporate rehabilitation and sustainability[102].

During the third attempt to facilitate business rescue and reorganisation in 2005, French legislators reformed the legislation governing insolvency law by adopting the law "*Sauvergarde des entreprises*" of July 26th, 2005[103]. This reform introduces a new proceeding *procedure de sauvegarde* aiming to provide effective mechanism to rescue viable business in financial distress.

Procedure de sauvegarde which includes protection of executory contracts aims to rescue companies facing financial difficulties but are not in a state of cessation of payment. The safeguard is conceived to help prevent the impetuous rush for a judicial liquidation when a company meets financial difficulties. The general objective is to save the company (*maintien de l'entreprise*) as a going concern by giving the company the opportunity to restructure play for an amicable understanding with its creditors[104].

This can offer the company a suitable resolution without having to resort to the *redressement judiciaire* and flexibility when choosing a privileged proceeding with contracts either through the restructured organization of debt or reduced in a specific agreement and prevent any such unsavory resolution beyond an amicable agreement with creditors[105].

After an "*observation*" phase, the debtor approaches the president of the tribunal and discusses the possibility of opening a "*Sauvegarde*" procedure.

The *phase d'observation* (observation phase) is triggered at the opening of restructuring proceedings or during insolvency, when the company is deemed unable to pay its debts as they come due, and its liabilities exceed its assets, leading to insolvency[106].

The primary goal of the observation phase is to assess the financial situation of the debtor and to explore possible solutions to save the company, preserve employment, and ensure the payment of creditors[107]. The observation phase typically lasts up to six months but can be extended by the court for a maximum of twelve months[108]. The court appoints an *administrateur judiciaire* (administrator) to oversee the company's operations. The administrator's task is to evaluate the

[102] M. Brouwer, *Reorganization in US and European Bankruptcy Law*, Amsterdam, October 2005,
[103] Journal Officel de la République Française, *LOI n° 2005-845 du 26 juillet 2005 de sauvegarde des entreprises (1)*, July 26th, 2005.
[104] Aurelien Bamdé, *La procédure de sauvegarde: genèse, finalité et positionnement dans le droit des entreprises en difficulté* (28.09.2017). Link: https://aurelienbamde.com/2017/09/28/la-procedure-de-sauvegarde-genese-finalite-et-positionnement-dans-le-droit-des-entreprises-en-difficulte/
[105] Ibid.
[106] Corinne Saint-Alary-Houin, Marie-Hélène Monsèrié-Bon and Corine Houin-Bressand, *Droit des entreprises en difficultés*, 13e édition (précis DOMAT, Droit Privé, Octobre 2022)
[107] Ibid.
[108] Isa Germain, *Le droit des entreprises en difficultés* (cours de droit)

company's situation, assist management, and prepare a report on the company's prospects for recovery[109].

At the end of the observation phase, several outcomes are possible, among them the adoption of a continuation plan to allow the company to continue operations, leading to restructuring proceedings (the *procedure de sauvegarde*) or the liquidation, if no viable restructuring plan is feasible[110].

The *procedure de sauvegarde* is a proactive legal mechanism initiated by a debtor who is not yet insolvent but anticipates imminent financial difficulties. The debtor voluntarily approaches the president of the tribunal (court) to request the opening of this procedure[111]. The company must demonstrate that it is experiencing difficulties it cannot overcome on its own, though it has not yet ceased payments. The goal of the *procedure de sauvegarde* is to provide the debtor with a legal framework to reorganize and stabilize its business while protecting it from creditor actions[112].

It aims to enable the continuation of business operations, preserve jobs, and facilitate the repayment of debts over time. Once the court approves the opening of the *procedure de sauvegarde*, it appoints an administrator to assist in the reorganization[113]. The company benefits from an automatic stay on all payments and enforcement actions by creditors, providing breathing room to develop a recovery plan. During this period, the debtor, with the administrator's help, prepares a *plan de sauvegarde* outlining measures for reorganization and debt repayment. The plan must be approved by the creditors and validated by the court[114].

If this is accepted, the judgment is formulated with a plan, the execution of which is staggered over a maximum period of 7 years with a possible *moratoire* of 18 months[115].

The object of this legislation is firstly to maintain the enterprise in its current form, thus conserving jobs, and secondly helping the company in question to rebalance its finances and, as a consequence, pay back its debts. This is done by offering some respite from its creditors so that legal action isn't taken against the company and allowing debts to be paid back in certain cases at a reduced rate. During the "*Sauvegarde*" proceedings, the debtor is still in full control over the enterprise. He can, however, be relieved of this position should he fail to fulfill the duties required of him, in which case an administrator will be appointed. At the end of the period provided by the

[109] Corinne Saint-Alary-Houin, Marie-Hélène Monsèrié-Bon and Corine Houin-Bressand, *Droit des entreprises en difficultés*, 13e édition (précis DOMAT, Droit Privé, Octobre 2022)
[110] Ibid.
[111] Ibid.
[112] Corinne Saint-Alary-Houin, Marie-Hélène Monsèrié-Bon and Corine Houin-Bressand, *Droit des entreprises en difficultés*, 13e édition (précis DOMAT, Droit Privé, Octobre 2022)
[113] Ibid.
[114] Ibid.
[115] Léa Dejoux, *Le surendettement dans le cadre des locations avec option d'achat*, (Bordeaux, 2022)

judgment, the tribunal will rule on the success of the procedure in protecting the enterprise in question[116].

Redressement judiciaire is a process very similar to Chapter 11 reorganization proceedings in the United States. Both *redressement judiciaire* and Chapter 11 serve to prevent the liquidation of financially distressed debtors by providing a debtor with a "breathing period" in which to reorganize its assets, affairs, and liabilities[117]. The latest improvement in restructuring proceedings is coming with the Directive. Even though, France opted for a one-year extension, the French law has incorporated the Directive through Ordinance No. 2021-1193, effective as of October 1, 2021. This ordinance not only introduces new mechanisms but also strengthens the existing French preventive restructuring framework[118].

To sum up, restructuring framework in France primarily relies on conciliation and safeguard proceedings established by the French Commercial Code. While these proceedings aim to preserve executory contracts, concerns exist regarding the limited protection afforded to contract counterparties[119]. The prioritization of preserving employment and business continuity may sometimes overshadow the interests of creditors[120].

2.3.3. The Protection of Executory Contracts During Restructuring Proceedings in Germany

In Germany, the protection of executory contracts in restructuring proceedings is governed primarily by the *Insolvenzordnung* (Insolvency Code). Similar to the United States, German insolvency law provides the insolvency administrator with the authority to assume or reject executory contracts. However, German law places greater emphasis on preserving the interests of both parties to the contract[121].

Under Section 103 of the Insolvency Code, the insolvency administrator may assume an executory contract if it is beneficial to the insolvency estate[122]:

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[116] Republique Française, *Procédure de sauvegarde d'une société*. Link: https://entreprendre.service-public.fr/vosdroits/F22311

[117] Republique Française, *Redressement judiciaire d'une société*. Link: https://entreprendre.service-public.fr/vosdroits/F37434

[118] Ibid.

[119] Emilie Ghio, *National report for France* (February 18th, 2019)

[120] Müge Adalet McGowan, Dan Andrews, *INSOLVENCY REGIMES AND PRODUCTIVITY GROWTH: A FRAMEWORK FOR ANALYSIS*, ECONOMICS DEPARTMENT WORKING PAPERS No. 1309 (July 01st, 2016)

[121] InsO § 270 Voraussetzungen, Kern, *Münchener kommentar zur Insolvenzordnung* (2020), https://beck-online.beck.de/Dokument?vpath=bibdata%2Fkomm%2Fmuekoinso_4_band3%2Finso%2Fcont%2Fmuekoinso.inso.p270.glc.gliv.gl1.htm&anchor=Y-400-W-MUEKOINSO-G-INSO-P-270-GL-C-IV-1

[122] Insolvenzordnung, Section 103 *Option to be exercised by insolvency administrator*. Link: https://www.gesetze-im-internet.de/englisch_inso/englisch_inso.html

> (1) If a mutual contract was not or not performed in full by the debtor and the other party on the date when the insolvency proceedings were opened, the insolvency administrator may perform such contract instead of the debtor and claim the other party's consideration. (2) If the administrator refuses to perform such contract, the other party is entitled to its claims for non-performance only as an insolvency creditor. If the other party requires the administrator to opt for performance or non-performance, the administrator is to state his or her intention to claim performance without negligent delay. If the administrator does not give this statement, it is no longer possible to insist on performance.

However, the counterparty is entitled to demand adequate assurance of future performance before consenting to the assumption. If the contract is rejected, the counterparty may claim damages for losses resulting from the breach.

Eigenverwaltung is a self-administration insolvency proceeding for firms also with the goal of facilitating financial and legal rehabilitation[123]. This is a new concept that was introduced to Germany in 2012. The basic idea is that the debtor's legal representative remains in control of the firm's assets and administration, under the supervision of a court-confirmed trustee[124]. The debtor and/or the trustee may seek to set aside onerous contracts through a declaratory action.

If the contract contains an executive power, then the action would result in a termination of the contract. Otherwise, the setting aside of the contract will take place through a formal process of judicial modification or a negotiation resulting in an agreed modification. This will be a far better result for debtors than a contractual avoidance as in this case; it would allow for the possibility of the contract being resumed at a later time[125].

The legislation on the executive function is not contained within the *Insolvenzverfahren* provisions; however, with the recent global economic downturn, the action has been used by many UK companies seeking to avoid the US Chapter 11 procedure. So, the action on executive functions would also be relevant to UK companies who are doing business in Germany[126].

Insolvenzverfahren is a German insolvency proceeding that has for objective, the collective, non-discriminatory satisfaction of creditors on a pro rata basis[127]. Although it is a relatively unfriendly debtor procedure with strict court supervision and requirements, the debtors

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[123] Anwalt.de, *Die Insolvenz in Eigenverwaltung: Anforderungen und Abwicklung*, Update 2021, September 30th, 2021. Link: https://www.anwalt.de/rechtstipps/die-insolvenz-in-eigenverwaltung-anforderungen-und-abwicklung-update-2021-193061.html

[124] Dr Alexandra Schulck-Amend, "*RESTRUCTURING AND INSOLVENCY LAW IN GERMANY*". Link: https://cms.law/en/int/expert-guides/cms-expert-guide-to-restructuring-and-insolvency-law/germany

[125] Anwalt.de, *Die Insolvenz in Eigenverwaltung: Anforderungen und Abwicklung*, Update 2021, September 30th, 2021. Link: https://www.anwalt.de/rechtstipps/die-insolvenz-in-eigenverwaltung-anforderungen-und-abwicklung-update-2021-193061.html

[126] Dr Alexandra Schulck-Amend, "*RESTRUCTURING AND INSOLVENCY LAW IN GERMANY*". Link: https://cms.law/en/int/expert-guides/cms-expert-guide-to-restructuring-and-insolvency-law/germany

[127] Dr Marco Wilhelm, Dr Malte Richter, Tina Hoffmann and Stepahnie Skoruppa, *German Insolvency Law – an overview.*, Mayer Brown

and creditors remain in control of the contract process and any decisions not involving the sale of assets must have consent from the respective parties[128].

Thus, it may have indirectly lessened the impact of those contracts deemed burdensome on the firm.

In conclusion, the rescue of business framework in insolvency law of Germany offers various restructuring options, including insolvency plan proceedings and protective shield proceedings. Despite mechanisms for protecting executory contracts, challenges persist regarding the uncertainty surrounding the treatment of contracts during insolvency[129].

2.4. Comparison of the Laws in the Chosen Jurisdictions

The laws on restructuring in France and Germany have a distinctive approach to protection of executory contracts, especially in comparison to the US. The primary difference we can raise is concerning the role of the insolvency practitioner.

Discussing the insolvency practitioner is essential because their decisions and actions shape the handling of executory contracts and the overall restructuring process. The insolvency practitioner's role in declaring contract performance or non-performance, managing the company's assets, and prioritizing creditor claims profoundly influences the outcomes for all parties involved in the restructuring proceedings.

In Germany, the difference with the US approach is that there is no provision enabling an insolvency partitioner to assume or reject a contract. Instead, German law enables an insolvency partitioner in an insolvency case to either declare that he will perform the contract and be personally liable for performing the duties of the contract or declare that he will not conduct the contract. This is set out in Section103, where the insolvency partitioner has the option to make a declaration within a fixed time limit as to the performance and performance of a contract[130].

If the insolvency practitioner does not act during this time, it is assumed that the insolvency practitioner has chosen not to execute the agreement. This affects the contract as it is deemed terminated by the declaring insolvency partitioner, there is no specific recuperation. In case an insolvency partitioner declares that he will perform the contract, there are provisions which

[128]Bundesministerium der Justiz, « *Insolvenzrecht* », March 19th, 2023. Link: https://www.bmj.de/DE/themen/wirtschaft_finanzen/schulden_insolvenz/insolvenzrecht/insolvenzrecht.html

[129] Horst Eidenmüller, *Contracting for a European Insolvency Regime*, Eur Bus Org Law Rev (2017). DOI 10.1007/s40804-017-0067-1

[130] Insolvenzordnung – InsO, Section 103. Link: https://www.gesetze-im-internet.de/englisch_inso/englisch_inso.html

enable the other party to demand security for the contractual obligation in case of future default by the insolvency partitioner, this is set out in Section101[131].

The ordinary procedure is for the court to appoint an insolvency practitioner to take over assist the debtor and creditors in the restructuring proceedings. The insolvency practitioner will then realize the assets, either by selling the business as a going concern or by breaking it up and selling the individual assets.

The costs of the insolvency practitioner and the proceedings are met from the sale proceeds and are given first priority over all other expenses. This procedure has been seen as unfavourable to debtors and the rescue culture promoted by the legislations in France and the US, as the interests of the creditors are placed above those of the company in question.

In order to counter the perceived prejudicial effect of the *Insolvenzordnung* towards debtors, an Insolvency Statute Amendment Act was introduced in 1999[132]. This was part of a wider-ranging reform of insolvency law which had the aim of fostering responsible risk-taking and removing the bankruptcy stigma in order to encourage a new start for ailing businesses[133].

The Eigenverwaltung Proceedings introduced by this Act are a means by which a company may conduct an administration and restructuring of its own affairs under the supervision of the insolvency court, with a view to rescuing the business. This takes place instead of the aforementioned standard procedure of administration by an insolvency practitioner.

Regarding the implementation of the Directive, Germany has transposed the Directive and Framework into its legal system through the enactment of a new law called the "Gesetz über den Stabilisierungs- und Restrukturierungsrahmen für Unternehmen" ("StaRUG"), which became effective on January 1, 2021[134]. Under this framework, the implementation of measures can be preceded by a process known as "restructuring moderation," which was not mandated by the Directive. This moderation process is entirely consensual, devoid of majority decisions or the imposition of a moratorium. The significant advantage of restructuring proceedings lies in its ability to render a restructuring agreement between the debtor and stakeholders "insolvency-proof". This means protection from insolvency clawback for the envisaged restructuring proceedings[135].

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[131] Insolvenzordnung – InsO, Section 101. Link: https://www.gesetze-im-internet.de/englisch_inso/englisch_inso.html

[132] Dr Andreas Remmert, *Introduction to German Insolvency Law* (International Company and Commercial Law Review, Sweet & Maxwell, London, 2002) pages 427 to 437. Link: https://insolvenzrecht.jura.uni-koeln.de/fileadmin/sites/insolvenzrecht/ieei/discussion_papers/german_insolvency.pdf

[133] Dr Marco Wilhelm, Dr Malte Richter, Tina Hoffmann and Stepahnie Skoruppa, *German Insolvency Law – an overview.*, Mayer Brown

[134] Bundesministerium der Justiz, Gesetz über den Stabilisierungs- und Restrukturierungsrahmen für Unternehmen. Link: https://www.gesetze-im-internet.de/starug/BJNR325610020.html

[135] Baker McKensie, EUROPEAN RESTRUCTURING SCHEMES, *Snapshot on the status of implementation of the EU Restructuring Directive in selected Member States and the new English scheme*, Update 2022

The protection of executory contracts in restructuring proceedings is a complex and important issue that requires careful consideration and balancing of the rights and interests of all stakeholders. While the EU directive provides a framework for this protection, there are still challenges that need to be addressed to ensure the effectiveness and fairness of the restructuring process.

In the United States, the development of bankruptcy laws in the 19th century provided a framework for addressing executory contracts within insolvency proceedings. Similarly, European legal systems evolved to recognize the significance of executory contracts in the context of business reorganizations.

The protection of executory contracts in restructuring proceedings is essential to maintain the equilibrium between debtor rehabilitation and creditor interests. Various legal provisions and judicial doctrines have been established to safeguard the rights of parties to executory contracts. For instance, in the United States, Section 365 of the Bankruptcy Code enables debtors to assume, assign, or reject executory contracts, subject to court approval. In France, the Sauvegarde and Redressement Judiciaire procedures under the French Commercial Code offer mechanisms for preserving executory contracts during restructuring.

To conclude, the following table provides a concise comparison of the insolvency frameworks of the US, France, and Germany across various aspects.

Aspect / Country	United States	France	Germany
Primary Legislation	Bankruptcy Code	Code de Commerce, Code Civil	Insolvenzordnung (Insolvency Code)
Treatment of Executory Contracts	Governed by Title 11 of the Bankruptcy Code	Distinguished between essential and non-essential contracts	Insolvency administrator may assume or reject contracts
Protection Mechanisms	Assumption or rejection of contracts under Section 365	Court authorization for essential contracts	Trustee's declaration of performance or non-performance
EU Directive Implementation	Non-Applicable	Incorporated via Ordinance No. 2021-1193	Transposed into law as the "Gesetz über den Stabilisierungs- und Restrukturierungsrahmen

			für Unternehmen" ("StaRUG")
Objective	Efficient restructuring while respecting party rights	Business preservation and debt repayment	Financial and legal rehabilitation of the debtor

In summary, each country has distinct approaches and objectives in handling restructuring proceedings and insolvency, shaped by their respective legal frameworks and priorities concerning the protection of the creditors or the debtors.

On one hand, the United States offers the most flexibility and control for debtors, allowing them to strategically assume or reject contracts to aid in restructuring proceedings. This approach is highly effective for debtor restructuring but includes safeguards to protect creditor interests. On the other hand, the German traditional approach is more creditor-centric, with the insolvency practitioner's decisions heavily influencing the outcome. However, reforms like the Eigenverwaltung Proceedings and StaRUG provide debtor-friendly options, enhancing the overall effectiveness of restructuring proceedings while maintaining creditor protections. Finally, France restructuring proceedings balances debtor and creditor interests through judicial oversight and mechanisms to preserve contracts, promoting business continuity and restructuring. The French system is effective in maintaining stability for the debtor's operations during restructuring and the creditors satisfaction.

3. THE ECONOMICAL AND OPERATIONAL DIFFICULTIES RELATED TO PROTECTION OF EXECTUORY CONTRACTS IN RESTRUCTURING PROCEEDINGS

This chapter focuses on the identification of the economical and operational difficulties faced by the relevant stakeholders (including debtors, counterparties, and employees) that arise in protection of executory contracts in restructuring proceedings. Additionally, this chapter will assess the impact of protection of executory contracts on the debtors, counterparties and employees. These difficulties include the financial distress of the debtor, its need to maintain the ongoing operation to preserve the value of the company. It also includes the necessity of the recovery of debts by the counterparties and disputes of the priority of claims that may arise among the creditors. Finally, the need of protection for the employees is assessed in order to face those economical and operational difficulties.

These difficulties were chosen due to their critical impact on both the debtor and the counterparties during restructuring proceedings situations.

The impact on the parties involved in restructuring proceedings are various according to the role the party has in the restructuring proceedings (debtor, creditor, shareholders or insolvency practitioner). Primarily, the purpose of restructuring proceedings is to create a better financial situation for a financially troubled debtor, but also find a proper balance between the interests of a debtor and the creditors[136]. However, the proceedings involved in the protection of the executory contract may sometimes have an adverse effect and be counter-productive in terms of the above objectives.

3.1. The Economical and Operational Difficulties Faced by the Debtor in Restructuring Proceedings

In restructuring proceedings, the party that encounters the most economic and operational is the debtor. Indeed, the financial difficulties leading to restructuring proceedings are the debtor's burden and challenges him to save the company. Debtor's objectives and responsibilities in a restructuring proceeding are to maintain the operation and preserve the value of the company. But also propose a plan, act within the framework of the business judgment rule and in good faith[137].

[136] Nicolaes W.A. Tollenaar, *The European Commission's Proposal for a Directive on Preventive Restructuring Proceedings*, Insolvency Intelligence, Sweet & Maxwell, Volume 30, Number 5 (2017) Link: https://ssrn.com/abstract=2978137

[137] Ibid.

3.1.1. Maintenance of the Business Operations and Preservation of the Value of the Company

The first and most considerable difficulty faced by the debtor is the ability to maintain its operations, preserve the value of the company in order for the restructuring proceedings to be effective.

Keeping operations running ensures that the company continues to generate revenue, which is essential for meeting ongoing financial obligations and funding the restructuring process itself[138]. A halt in operations could lead to a loss of customers and market share, making recovery more difficult. Moreover, effective restructuring aims to minimize disruptions to the business. By maintaining operations, the company can avoid the additional costs and complications associated with restarting or ramping up production and services after a halt[139]. Demonstrating operational stability and value preservation instills confidence in creditors, investors, and other stakeholders[140]. This confidence is critical for securing the necessary support and cooperation during the restructuring process.

Additionally, preserving the company's value means maintaining its assets, reputation, and relationships with customers, suppliers, and employees[141]. This is important because a significant decline in value can erode the company's ability to recover and meet its restructured obligations. It also, ensures that there is more to recover and distribute to creditors[142]. It increases the likelihood of a successful restructuring outcome where creditors are repaid to the greatest extent possible. Value is always maximized in a going-concern, and the aim in such an administration is to preserve and enhance the value of the current business or to transfer the business as a going-concern to new ownership[143].

Such value can be preserved throughout executory contracts. Executory contracts may contain favourable terms or important assets that contribute to a company's overall value. By protecting these contracts, a company can retain access to valuable resources, intellectual property,

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[138] Wayne F. Cascio, *Strategies for responsible restructuring* (University of Colorado-Denver, 18 October 2001) Link: https://web.archive.org/web/20041207224208id_/http://www.acsu.buffalo.edu:80/~mpavlick/case%203/Restructuring.pdf

[139] Peter Speight, *Business Continuity* (Journal of applied security research, Volume 6, 5 October 2011). Pages 529 to 554 Link: https://doi.org/10.1080/19361610.2011.604021

[140] Wayne F. Cascio, *Strategies for responsible restructuring* (University of Colorado-Denver, 18 October 2001) Link: https://web.archive.org/web/20041207224208id_/http://www.acsu.buffalo.edu:80/~mpavlick/case%203/Restructuring.pdf

[141] Irina Berzkalne and Elvira Zelgalve, Intellectual capital and company value (Contemporary Issues in Business, Management and Education, 2013) Link: DOI: 10.1016/j.sbspro.2013.12.934

[142] Ibid.

[143] Régis Blazy, Joël Petey, Laurent Weill, *Can Bankruptcy Codes Create Value? Evidence from Creditors' Recoveries in France, Germany, and the UK.* (Strasbourg, December 2009)

licenses, or other rights that are crucial for its operations[144]. Preserving these assets increases the company's chances of reorganizing successfully and emerging as a stronger, more competitive entity[145].

Financial strain is also a challenge faced by the debtor. The burden of continuing performance under executory contracts exacerbates the financial strain on debtors. Striking a balance between fulfilling contractual obligations and navigating financial constraints presents a daunting challenge[146]. The repercussions of this financial strain reverberate throughout the debtor's operations, amplifying the complexities of the restructuring process.

To sum up, the success of a restructuring process hinges on the debtor's ability to maintain operational stability and preserve its value. By keeping operations running, the company ensures revenue generation, retains customer trust, and minimizes disruptions. Preserving assets, reputation, and relationships further enhances the chances of a successful outcome. Despite financial strain and the burden of executory contracts, striking a balance is essential for navigating the complexities of restructuring. Overall, focusing on operational continuity and value preservation fosters confidence among stakeholders, crucial for securing support and achieving a successful restructuring outcome.

3.1.2. Implementation of the Restructuring Plan During Restructuring Proceedings While Protecting Executory Contracts

The debtor will be able to arrange debt restructuring, debt-for-equity swaps, asset sales, and business recapitalization through the use of a restructuring plan. The debtor must always evaluate the viability of the plan and whether the amount that will be returned to creditors will increase. But in order to develop an effective restructuring plan, it is crucial to act promptly. Restructuring plans drafted with sufficient time to enable organizational and financial restructuring are almost always the most successful.

This the reason why, in the Directive on restructuring and insolvency, the legislator suggests the trigger of early warning tools (developed by the Members States or private entities)[147].

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[144] Fabrice Robert-Tissot, *The Effects of a Reorganization on (Executory) Contracts: A Comparative Law and Policy Study [United States, France, Germany and Switzerland]*.

[145] Official Journal of the European Union, *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 (Directive on restructuring and insolvency)*, June 26th, 2019, Recital 41

[146] Horst Eidenmüller, *Contracting for a European Insolvency Regime*, European Business Organisation Law Review (2017). DOI 10.1007/s40804-017-0067-1

[147] Official Journal of the European Union, *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*

With those early warning tools, debtors can identify its financial problems and take the necessary action. The earlier, the more likely it is that it will be able to prevent an impending insolvency or, in the event that a business's viability is permanently compromised, the more organized and effective the liquidation process would be[148].

Strategic foresight plays a pivotal role in protection of the key contracts, enabling debtors to position themselves for long-term success. Retaining essential executory contracts not only safeguards immediate interests but also confers a competitive advantage in the post-restructuring landscape. This strategic manoeuvring positions debtors to emerge stronger and more resilient, poised to capitalize on future opportunities. Protection of the performance of executory contracts can indeed play a crucial role in enhancing a company's chances of a successful reorganization and emerging from the restructuring process in a stronger position[149].

Safeguarding executory contracts serves as a lifeline for preserving valuable business relationships. These contracts represent more than just legal obligations; they are conduits for trust and collaboration. Maintaining these relationships not only fosters goodwill but also lays the groundwork for future partnerships, bolstering the debtor's prospects for post-restructuring success.

Those contracts often involve relationships with key suppliers, customers, landlords, or employees. By protecting these contracts, a company can ensure that it maintains these vital relationships during the restructuring process. This continuity allows the company to continue operating and serving its customers, minimizing disruptions and preserving valuable business connections[150]. The preservation of critical contracts ensures uninterrupted operational continuity during the tumultuous period of restructuring. By shielding essential agreements from disruption, debtors can mitigate the adverse effects on their business operations[151]. This continuity is paramount for instilling confidence among stakeholders and maintaining momentum throughout the restructuring process.

Also, protecting executory contracts has the potential to augment the value of the debtor's assets. These contracts contribute to the intrinsic worth of the restructuring endeavour, enhancing its viability and attractiveness to stakeholders[152]. By safeguarding these assets, debtors fortify their position and pave the way for a more robust restructuring plan.

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disqualifications, and on measures to increase the efficiency of procedures concerning restructuring, insolvency and discharge of debt, and amending Directive (EU) 2017/1132 (Directive on restructuring and insolvency), June 26th, 2019. Recital 22

[148] Ibid.

[149] Ibid, Recital 41

[150] Mark Sharron, *ISO 22301 – The Business Continuity Management Standard, Simplified*. (December 2023)

[151] Official Journal of the European Union, *RECOMMENDATIONS COMMISSION RECOMMENDATION of 12 March 2014 on a new approach to business failure and insolvency* (2014/135/EU)

[152] Wayne F. Casclo, *Strategies for Responsible Restructuring*, (University of Colorado-Denver, October 2001)

If executory contracts are terminated or breached during the restructuring process, it can lead to significant disruption and costs. For instance, if a supplier contract is terminated, the company might struggle to find alternative suppliers, resulting in delays, increased expenses, and potential reputational damage. By protecting executory contracts, a company can avoid these disruptions, maintain stability, and minimize the financial burden associated with replacing or renegotiating contracts[153].

Indeed, the protection of executory contracts is in place from the commencement of the restructuring proceedings to the adoption of the restructuring plan[154]. Indeed, in the Article 6 of the Directive, a temporary stay of enforcement actions by creditors is provided to give the debtor the necessary breathing space to negotiate a restructuring plan. This period allows the debtor to assess the viability of contracts and negotiate terms with counterparties without the immediate threat of enforcement actions[155]. During the interim period, the debtor continues to operate and manage their business, making decisions about which contracts are essential for the restructuring process[156]. This period is crucial for assessing the viability of contracts and negotiating terms with counterparties.

In conclusion, the establishment and execution of a restructuring plan are pivotal for a debtor's successful reorganization. Timely action in formulating and implementing a viable restructuring strategy not only boosts return to creditors but also fosters long-term stability. Early intervention tools, as advocated by the Directive on restructuring and insolvency, empower debtors to address financial concerns proactively, thereby heightening the prospects of staving off insolvency or orchestrating an efficient liquidation if needed.

3.1.3. Negotiations with Counterparties to for Restructuring Plan

When a company demonstrates its commitment to honouring its contractual obligations, it builds credibility and goodwill with stakeholders, such as creditors or investors[157]. This can lead

[153] John A.E. Pottow, *A new approach to executory contracts*, (Michigan Law School, 2018)
[154] Official Journal of the European Union, *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 (Directive on restructuring and insolvency)*, June 26th, 2019, Article 6
[155] Ibid.
[156] Official Journal of the European Union, *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 (Directive on restructuring and insolvency)*, June 26th, 2019, Article 5
[157] Henryk DŹWIGOŁ, *MODELLING OF RESTRUCTURING PROCESS*, Seria: ORGANIZACJA I ZARZĄDZANIE z. 99 Nr kol. 1968, (2016)

to more favourable restructuring terms, increased support from creditors, and potentially attract new investments, ultimately improving the company's overall financial position.

Negotiating with counterparties is also a main challenge faced by debtors. Debtors find themselves in the arduous task of negotiating with counterparties to adapt contracts or secure concessions[158]. These negotiations, however, are seldom straightforward. Counterparties may exhibit resistance, leading to prolonged and often contentious deliberations. The intricacies of these negotiations can evaluate the patience and resources of debtors[159].

A second negotiating constraint for the debtor concerns the general availability of fresh funds necessary to continue to operate the business during a reorganization. Even after the commencement of restructuring proceedings, the business will continue to need fresh credit to operate, and potentially, to exit from its financial difficulties in such a way as to make the restructuring meaningful in economic terms[160]. The expectation of new credit has to be incorporated into the negotiating strategies of the debtor and its creditors[161].

In conclusion, the challenges faced by debtors in restructuring proceedings are multifaceted and demanding. From navigating financial instability to negotiating with counterparties and preserving executory contracts, debtors encounter a complex terrain that requires strategic foresight and meticulous planning. The burden of proposing a viable plan, and the need to secure fresh funds, but also balance ongoing contractual obligations with financial constraints adds layers of complexity to an already challenging process. By addressing these difficulties with diligence and foresight, debtors can maximize the value of restructuring proceedings and pave the way for a more resilient future.

3.2. Economical and Operational Difficulties Faced by the Counterparties in Restructuring Proceedings

Restructuring proceedings may cause also difficulties for the counterparties complex especially concerning the protection of executory contracts. Indeed, when faced with the debtor's

[158] Official Journal of the European Union, *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 (Directive on restructuring and insolvency)*, June 26th, 2019, Recital 10

[159] Ibid.

[160] Clifford Chance, *MENU DU JOUR – RESTRUCTURING AND INSOLVENCY OPTIONS IN FRANCE: SOMETHING FOR EVERYONE?* (March 2022)

[161] Jeanne M. Brett, *Culture and negotiation strategy*, Journal of Business & Industrial Marketing, Vol. 32 Issue: 4, DOI: 10.1108/JBIM-11-2015-0230 (2017)

restructuring proceedings, counterparties are not allowed to enforce any of their rights to recover the obligation due[162].

Understanding the ranking of creditors and the impact of protecting executory contracts on various stakeholders is essential in navigating these challenges effectively.

In the intricate landscape of financial restructuring, the classification of creditors into distinct tiers based on the precedence of their claims is a fundamental aspect. Across various jurisdictions, this hierarchical structure follows a consistent pattern, albeit with nuanced differences. Secured creditors, wielding mortgages or liens as collateral, often occupy the apex of this hierarchy, enjoying priority over their unsecured counterparts. Their elevated status stems from the tangible security they possess, which serves as a safeguard against default. This privilege grants secured creditors a formidable position in recouping their investments in the event of insolvency[163].

Furthermore, within certain legal frameworks, employees find themselves afforded preferential treatment. Enshrined in the ethos of protecting labour rights, some jurisdictions mandate that employees receive certain entitlements ahead of other creditors[164]. This provision seeks to shield workers from the adverse effects of corporate restructuring, ensuring they receive compensation and benefits owed to them. Such protective measures not only uphold the dignity of labour but also contribute to social stability by mitigating the economic repercussions of insolvency on employees and their families[165].

Conversely, shareholders, although pivotal stakeholders in the corporate ecosystem, often find themselves relegated to the lowest rung of the creditor hierarchy. Their investments, while crucial for capital formation and business growth, are inherently speculative and lack the security afforded to secured creditors[166]. As such, shareholders typically only receive distributions once all other creditor claims have been satisfied[167]. This relegation underscores the risk inherent in equity ownership and serves as a sobering reminder of the volatility inherent in the financial markets.

The purpose of the creditor ranking system is to treat affected parties in distinct classes according to national law's class formation criteria. This ensures that rights that are substantially

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[162] Official Journal of the European Union, *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 (Directive on restructuring and insolvency)*, June 26th, 2019. Article 7(5)

[163] Eugenio Vaccari, *Ranking of Creditors in Insolvency: An Empirical Debate on Optimal Harmonization Practices* (2016)

[164] Sergei A. Davydenko and Julian R. Franks, *Do bankruptcy codes matter? A study of defaults in France, Germany and the UK* (September 2016)

[165] Ibid.

[166] Vos, J. F. J. *Corporate social responsibility and the identification of stakeholders*. (2002).

[167] Vos, J. F. J. *Corporate social responsibility and the identification of stakeholders*. (2002).

similar are treated fairly and equitably. Therefore, restructuring plans can be implemented without unduly harming affected parties' rights. [168].

Navigating the labyrinthine terrain of restructuring proceedings poses a myriad of challenges for the counterparties to an executory contract, each fraught with its own complexities and nuances. Foremost among these challenges is the spectre of contract rejection or modification. Debtors, seeking respite from financial burdens, may opt to reject or modify executory contracts, thereby disrupting established business arrangements. For counterparties reliant on these contracts for their operations, such actions can pose existential threats, plunging them into a precarious financial predicament[169].

Moreover, restructuring processes are often mired in uncertainty and delay, casting a pall of ambiguity over the fate of creditors' claims and executory contracts[170]. This prolonged state of limbo exacerbates the anxieties of creditors, impeding their ability to formulate informed strategies and contingency plans. Negotiating amidst such uncertainty only serves to compound the challenges faced by creditors, as they grapple with competing interests and the imperative to safeguard their investments[171].

Inequitable treatment further complicates the landscape for counterparties, particularly when the protection of executory contracts results in perceived favouritism. Certain contracts may be accorded preferential treatment, eliciting ire and resentment among creditors whose rights are ostensibly subordinated for the benefit of others. This perceived injustice undermines trust and cohesion among creditors, eroding the collaborative spirit essential for navigating the turbulent waters of financial restructuring[172].

Furthermore, the intricate legal procedures inherent in restructuring proceedings pose formidable obstacles for creditors. Evaluating and contesting the assumption or rejection of executory contracts demand specialized legal expertise and resources, further burdening creditors

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[168] Official Journal of the European Union, *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 (Directive on restructuring and insolvency)*, June 26th, 2019, Recital 44

[169] Remigijus Jokubauskas, Marek Świerczyński and Audronė Balsiukiene, *A stay of individual enforcement actions as a basis for effective restructuring proceedings*, International Comparative Jurisprudence 2021 Volume 7 Issue 1

[170] Eugenio Vaccari, *Ranking of Creditors in Insolvency: An Empirical Debate on Optimal Harmonization Practices* (2016)

[171] Jaka Cepec and Peter Grajzl, *Creditors, Plan Confrmations, and Bankruptcy Reorganizations: Lessons from Slovenia*. (2021) https://doi.org/10.1007/s40804-021-00221-3

[172] Douglas G. Braid and Thomas H. Jackson, *Corporate Reorganizations and the Treatment of Diverse Ownership Interests: A Comment on Adequate Protection of Secured Creditors in Bankruptcy*, (Chicago Law School, 1984)

already grappling with the exigencies of the situation[173]. This ranking ensures the equality of all creditors, also called *pari passu*[174].

The counterparties are also part of the restructuring plan procedure as *debtors have the right to submit restructuring plans for adoption by the affected parties*[175]. And that also caused challenges and tension between the creditors as they may not agree with the repartition or with each other's. The adoption of a restructuring plan may be put to a vote through an official voting procedure or by agreement and consultation with the necessary number of affected parties[176]. Affected parties who were not included in the agreement may still be given the chance to participate in the restructuring plan, even if the vote results in an agreement with the necessary majority[177].

When faced with the debtor's restructuring proceedings, counterparties can find themselves with a lack of control over the process. Indeed, once it has initiated a restructuring proceeding, the court or the appointed administrator becomes the guardian of the decisions on the debtor's future and the methods of its financing[178]. Counterparties lose control over a restructuring process once it has been initiated. An argument against assigning control to creditors is that the common good is better served by decisions made in a democratic process, e.g. by the court at the request made by a majority of creditors, rather than resorting to the law of the jungle, where each creditor looks out solely for its own interests[179]. There is a strong argument in favor of assigning creditors significant powers of control, especially as the result of the functioning of creditors' bodies may be desirable ex post facto behavior and unanimous creditors' consent[180].

Another main difficulty faced by counterparties in restructuring proceedings is the disruption to business operations which is particularly significant when considering executory contracts, which typically cannot be discontinued without court approval. Customers, for example,

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[173] Ben Branch, *The costs of bankruptcy A review, International Review of Financial Analysis* (2002) pages 39 – 57
[174] Remigijus Jokubauskas, Marek Świerczyński and Audronė Balsiukiene, "*A stay of individual enforcement actions as a basis for effective restructuring proceedings*", International Comparative Jurisprudence 2021 Volume 7 Issue 1
[175] Official Journal of the European Union, *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 (Directive on restructuring and insolvency)*, June 26th, 2019, Article 9
[176] Ibid, recital 43.
[177] Official Journal of the European Union, *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 (Directive on restructuring and insolvency)*, June 26th, 2019, Rectial 43
[178] Jaka Cepec and Peter Grajzl, *Creditors, Plan Confrmations, and Bankruptcy Reorganizations: Lessons from Slovenia*. (2021) https://doi.org/10.1007/s40804-021-00221-3
[179] Kenneth M. Ayotte and Edward R. Morrison, *CREDITOR CONTROL AND CONFLICT IN CHAPTER 11*, Journal of legal Analysis, Volume 1, Number 2 (2009)
[180] Ibid.

would have to continue investing in assets and operations, essentially keeping the company afloat during the restructuring period, without legal certainty as to the continuation of the contract at the end of the process. In the case of international insolvencies, foreign enterprises or persons may have to deal with several hearings in different fora to accommodate the restructuring proceedings and comply with local applications[181].

The most difficult issue for all parties, the debtor, the creditor who has an ongoing executory contract with the debtor and the other creditors, is to forecast whether the debtor will be successful, and which executory contracts will be assumed or rejected[182]. The debtor and creditors would have divergent views in this regard, even if the debtor's reorganization plan would have been disclosed to the parties. A debtor may keep creditors' executory contracts in force for a period by manipulating the timing of assumption and may not properly inform the creditors of its proposals to assume or reject such contracts or other plan provisions[183]. Therefore, a creditor must make its individual decision in the absence of information about how other creditors in the same class will decide, and how the debtor intends to manipulate the decision-making process.

Another difficulty that can be raised is the complexity of negotiations. The negotiations are even more complex when the contract is a network, and some contracts depend on the negotiation of another contract[184]. There are many players involved in the negotiations for executory contracts. The presence of multiple parties increases the complexity of the negotiations and the difficulty of reaching an agreement[185]. The need for contract-by-contract negotiations increases the risk of opportunism, as any party can try to take advantage of a situation. Traditional bankruptcy law and the practice of using traditional reorganization bankruptcy may make a form of opportunism likely. In a traditional reorganization under Chapter 11 of US Bankruptcy Code, existing contracts are temporarily protected at the start of the proceedings without any adjustment[186]. This usually gives debtors controlling the proposal framework the ability to negotiate with each contracting counterparty individually and without modifying the existing

[181] Bob Wessels, Bruce A. Markwell and Jason J. Kilborn, *International Cooperation in Bankruptcy and Insolvency Matters*, (Oxford, 2009) page 167 - 174
[182] John A.E. Pottow, *A New Approach to Executory Contracts* (University of Michigan Law School, 2018)
[183] Vern Countryman, *Executory Contracts in Bankruptcy: Part II*, (University of Minnesota Law School, 1974), pages 115-117
[184] Erica J. Boothby, Gus Cooney, and Maurice E. Schweitzer, *Embracing Complexity: A Review of Negotiation Research*, (ANNUAL REVIEW OF PSYCHOLOGY Volume 74, 2023)
[185] *Legal considerations in corporate debt restructuring*, Faster Capital (Update 17.03.2024) Link: https://fastercapital.com/content/Legal-considerations-in-corporate-debt-restructuring.html#Legal-Considerations-for-Cross-Border-Debt-Restructuring
[186] Oscar Couwenberg and Stephen J. Lubben, *Good Old Chapter 11 in a Pre-Insolvency World* (North Carolina Journal of International Law, 2021)

contract[187]. Debtors in traditional reorganization bankruptcies can negotiate with 'divide-and-conquer' strategies.

The protection of executory contracts engenders a ripple effect that reverberates across the spectrum of creditors, each bearing the brunt of its consequences in varying degrees. Stakeholders, including suppliers, customers, and other business partners, also feel the impact of contract protection. Preserving these relationships fosters long-term viability, nurturing a symbiotic ecosystem where mutual trust and collaboration thrive.

Moreover, the pursuit of legal recourse entails significant costs for creditors, diverting resources that could otherwise be channelled towards debt recovery or investment initiatives. The burden of legal fees further compounds the financial strain faced by creditors, amplifying their anxieties and uncertainties[188]. To ensure that counterparties cooperate in the debtor's attempt to achieve a successful reorganization or to present a timely distribution, the bankruptcy provides rules that are designed to protect the legitimate expectations of creditors[189]. This is primarily done by cabining the debtor's autonomy in making decisions that affect the rights of counterparties in the hopes of eliminating waste and self-dealing on the part of the debtor. This goal of preventing dissipation of the estate is particularly relevant to the protection of executory contracts which are treated as an asset of the estate. Executory contract assumption has been characterized as a two-edged sword for it can be a device either for resuscitating an ailing agreement, or for the advantage of the estate[190]. This provision fails to serve the creditors in that it allows the automatic stay just discussed to issue and prevent the creditor from taking the same summary action to recover its interest in an agreement which was worth substantially more the cost of performance to the debtor[191].

Initiative-taking communication and collaboration among parties is very important to face the economical and operational difficulties encounter in restructuring proceedings. Initiative-taking communication and understanding among the parties involved in a transaction or contract

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[187] Rohan Pitchford and Mark L. J. Wright, *HOLDOUTS IN SOVEREIGN DEBT RESTRUCTURING: A THEORY OF NEGOTIATION IN A WEAK CONTRACTUAL ENVIRONMENT* (NATIONAL BUREAU OF ECONOMIC RESEARCH, CAMBRIDGE, 2012)

[188] KEE-HONG BAE and VIDHAN K. GOYAL, *Creditor Rights, Enforcement, and Bank Loans* (THE JOURNAL OF FINANCE, VOL. LXIV, NO. 2, APRIL 2009)

[189] Ibid.

[190] Anthony J. Casey, *The New Bargaining Theory of Corporate Bankruptcy and Chapter 11's Renegotiation Framework* (2019) https://ifrogs.org/PDF/CONF_2019/Casey_2019.pdf

[191] Official Journal of the European Union, *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 (Directive on restructuring and insolvency)*, June 26th, 2019, Article 2(4)

is often the key to protecting executory contracts or securing a suitable and cost-effective solution[192].

Therefore, it is essential that both debtors and counterparties adopt an open line of communication to ensure that each party's understanding of the contract and the other party's needs are clear. This will allow a party whose contract is at risk to provide an informed response and open negotiations with the debtor, thus increasing the chances of finding a solution that is satisfactory to both parties, including the preservation of the contract. In line with this, maintaining good records of the correspondence between the parties will also assist in preventing disputes as to what was agreed if subsequent legal action is taken. Finally, cooperation between the debtor and counterparties' legal representatives can help to quickly and efficiently resolve issues surrounding the contract with a view to avoiding contested litigation.

Each of these stakeholders has its own interests and sometimes its own representation, which reflects to varying degrees the complex mutual interconnections among them and varying degrees of overall satisfaction in terms of financial entitlements[193]. The interconnection of these interests varies depending on the type of creditor, the priority of the claims, and the extent and nature of recourse against a bankruptcy estate, as well as the preciseness and priority of liens that secure the financial interests of certain collateral-based creditors. Value-based creditors' rights have to give way to a value maximization focus that serves to achieve an overall increase in value. Value maximization may involve ensuring that an ongoing business remains viable, at least in the short term, by supporting its liquidity needs and value preservation in a restructuring[194].

Creditors in the in Chapter 11 proceedings operate within the context of a statutory framework that endeavors to promote fair and equitable treatment of creditors[195]. The legislative infrastructure of the proceedings either creates or encourages the development, within the procedural framework of the restructuring, collaborative relationships among competing creditors while simultaneously attempting to balance the need for collaboration with a recognition of the legitimate rights and business imperatives of the other stakeholders[196]. These stakeholders have overlapping and, at times, conflicting interests, and these relationships can be further complicated by the ongoing tension within the restructuring law community between securing priority for

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[192] Steve Walsh, Tim Hoyland and Emily Harte, *STRATEGY AND TACTICS TO LEAD A RESTRUCTURING IN UNCERTAIN TIMES Five ways to improve success*, Oliver Wyman. Link: https://www.oliverwyman.com/our-expertise/insights/2021/aug/strategy-and-tactics-to-lead-a-restructuring-in-uncertain-times.html

[193] Stanley D. Longhofer and Stephen R. Peters, *PROTECTION FOR WHOM? CREDITOR CONFLICT AND BANKRUPTCY* (June 2003)

[194] Michael C. Jensen, *Value Maximization, Stakeholder Theory, and the Corporate Objective Function* (March 29th, 2010) https://doi.org/10.1111/j.1745-6622.2010.00259.x

[195] Anaïs Alle, *Balancing Debtor and Creditors' Interests in Bankruptcy Reorganization Proceedings: Best Practices for the Procedural Design of Claims' Classification* (Harvard Law School, L.L.M. 2022)

[196] Anaïs Alle, *Balancing Debtor and Creditors' Interests in Bankruptcy Reorganization Proceedings: Best Practices for the Procedural Design of Claims' Classification* (Harvard Law School, L.L.M. 2022)

certain parties (especially for critical suppliers) and the general policy of maintaining the priority scheme[197].

Usually, in restructuring negotiations, the creditor is interested in at least having the debtor company engaged in the negotiation in order to increase the chances of success in obtaining the payment of the credit under less onerous conditions than the complete and immediate payment through the application of guarantees[198]. In addition, in the case of executory contracts, the interest is to build a relationship with the creditor and chart a strategy, obtaining satisfaction with the benefits of maintaining the relationship, thus avoiding an unnecessary and premature termination of the contract. Communication with executives of the debtor company, the debtor's lawyer, institutions, investors, creditors, and the court, through their legal representative, is fundamental for the best development of the case, and therefore it is important that the creditor is fully involved in the execution of this task[199]. For the progress of the negotiation, regular, updated, and confidential communication with its counsel is a must.

To conclude, navigating the complexities of restructuring proceedings presents significant economical and operational difficulties for the counterparties to an executory contract. These challenges range from the protection of executory contracts to the uncertainties surrounding ranking of creditors and legal procedures. The ranking of creditor rights, the treatment of executory contracts, and the loss of control over the restructuring process are key concerns. To address these difficulties, initiative-taking communication and collaboration among parties are essential.

3.3.The Difficulties Faced by the Employees in Restructuring Proceedings

As per the definition of what constitute an executory contract given by the Directive, an employment contract may fall under this category. Indeed, the employer continues to owe wages and benefits, and the employee continues to provide services. Therefore, both parties have ongoing obligations to each other. However, if the employment contract was to be considered as an executory contract, the same rule than with the supply agreement apply and the debtor or the insolvency practitioner might reject the employment contract.

From a practical perspective, treatment of employment contracts as executory would complicate the administration of employment relationships, particularly in the context of restructuring proceedings. Employees rely on the regular performance of their employers for their

[197] Mark R. DesJardine, Muhan Zhang and Wei Shi, *How Shareholders Impact Stakeholder Interests: A Review and Map for Future Research*, (Journal of Management, Volume 49, Issue 1, January 2023), pp. 400-429 https://doi.org/10.1177/01492063221126707
[198] Wayne F. Casclo, *Strategies for Responsible Restructuring*, (University of Colorado-Denver, October 2001)
[199] Wayne F. Casclo, *Strategies for Responsible Restructuring*, (University of Colorado-Denver, October 2001)

livelihood, and categorizing employment contracts as executory could jeopardize employees' job security and financial stability. Therefore, even if the employment contracts are not executory contracts, analszing the difficulties the employees encounter when their employer is facing restructuring proceedings is relevant.

Indeed, the relationship between the rules on protection of executory contracts and the ones governing employment relations revolves around ensuring that employees' rights and entitlements are safeguarded during periods of financial distress, such as restructuring proceedings. Employees may be important stakeholders in an economic enterprise since their collective efforts contribute to the efficient functioning of the company. The implementation of a restructuring program has a definite impact on the employees and makes them face varied difficulties.

Employees are essential for a company, and it is important for companies to realize that instead of completely ignoring employee concerns. They should have a dialogue with them and explain the reasons for the restructuring[200]. This approach would certainly help the companies to conduct the restructuring process smoothly. The employees in the organization often have practical experience and insights into the impact of their work, while management has a broader perspective on the organization's future. Finding the right sequence in decision-making processes is crucial[201]. Successful reorganization relies not only on management support but also on the support of all employees. Transparent decision making, providing direction, giving responsibility, showing real involvement in the organization's experiences, and engaging in open dialogue can help gain employee support.

Consultation and communication with employees are an important aspect of restructuring in many jurisdictions. Under the Directive on restructuring and insolvency, the employer is required to inform and consult with employees and their representatives regarding the intended changes[202]. However, this can be challenging when employees are uncertain about the extent of the changes and their impact.

When the restructuring of an employer commences, employees are faced with numerous employment issues. Implementing a proper restructuring plan is not only significant for the

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[200] Official Journal of the European Union, *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 (Directive on restructuring and insolvency)*, June 26th, 2019, Recital 10

[201] Ben Branch, *The costs of bankruptcy A review, International Review of Financial Analysis* (2002) pages 39 – 57

[202] Official Journal of the European Union, *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 (Directive on restructuring and insolvency)*, June 26th, 2019, Article 13

employer, but the employees are also dependent on it in order to survive[203]. When implementation does not occur in the right way, restructuring generally fails, which negatively impacts both the employer and the employees.

The EU has been increasingly vocal about the need to have a more balanced and impartial approach to business and employee rights during restructuring proceedings[204]. In France, the protection of employees' interests during restructuring proceedings is primarily governed by the Labor Code and specific regulations related to collective redundancies and business transfers[205]. One of the key features of French law is the requirement for employers to engage in a consultation process with employee representatives or labour unions before implementing any significant workforce changes[206]. This consultation process aims to explore alternatives to dismissals and mitigate the social impact of restructuring.

Moreover, French law imposes strict requirements on employers planning collective redundancies[207]. Companies with at least 50 employees are required to provide advance notice to both employees and labour authorities and engage in consultations with employee representatives[208]. Additionally, employers must offer social plans, including measures such as retraining programs or financial assistance, to mitigate the adverse effects of redundancies on affected employees[209].

Furthermore, in cases of business transfers, employees enjoy strong protections under French law. The Labor Code mandates the automatic transfer of employment contracts to the new employer, ensuring continuity of employment and preserving employees' rights and benefits[210].

Germany, similar to its French counterpart, also has a sophisticated system of individual labour law. The Betriebsverfassungsgesetz – BetrVG (Works Constitution Act) grants extensive rights to employee representatives, such as works councils, allowing them to participate in decisions affecting the workforce, including restructuring measures[211]. German law also provides for a variety of instruments to safeguard employees' interests during restructuring. For instance, in cases of collective redundancies, employers are required to notify and consult with works councils

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or labour unions[212]. Moreover, companies planning significant workforce reductions may be subject to mandatory negotiation of social plans aimed at mitigating the impact on affected employees. In the same manner as its neighbour, in cases of business transfers the law requires that employment contracts be automatically transferred to the new employer[213]. This ensures employment continuity and protects employees' rights and benefits.

Additionally, German law places a strong emphasis on job preservation and reintegration measures. Employers are encouraged to explore alternatives to dismissals, such as short-time work arrangements or vocational training programs, to minimize the need for redundancies[214].

In the United States, employees' protection in restructuring proceedings is primarily governed by federal and state labour laws, as well as bankruptcy regulations in cases of financial distress. Unlike France and Germany, the U.S. legal framework tends to prioritize the rights of employers and the principles of free market competition[215].

However, various federal laws, such as the Worker Adjustment and Retraining Notification (WARN) Act, impose certain obligations on employers conducting mass layoffs or plant closures due to restructuring proceedings[216]. The WARN Act requires covered employers to provide advance notice to affected employees and relevant government agencies, allowing them time to prepare for job loss and seek alternative employment opportunities[217].

In conclusion, employees are relevant stakeholders in any economic enterprise, contributing significantly to its efficient functioning. When a company undergoes restructuring, it directly impacts employees, presenting them with various challenges. However, effective communication and consultation with employees can significantly ease the restructuring process, ensuring smoother implementation and garnering employee support.

The differences in EU law such as French and German, and US legal systems highlight varying degrees of legal protection and support for employees during restructuring. In France and Germany, comprehensive legal frameworks provide extensive rights and protections for employees, including mandatory consultation processes, social plans, and job preservation measures. On the other hand, the United States tends to prioritize employer rights and free market

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competition, although federal laws such as the WARN Act do impose some obligations on employers regarding mass layoffs

CONCLUSIONS

1. Restructuring proceedings are designed to rescue viable business in financial distress and the rules on protection of executory contract are one of the mechanisms how to reach this goal. Restructuring proceedings are the essential mechanism for companies facing financial distress to navigate challenges while preserving value for stakeholders. The overarching goal is to facilitate sustainable financial recovery and maintain the continuity of business operations. This involves safeguarding executory contracts, preserving economic value-generating assets, and fostering cooperation among stakeholders. The objectives of restructuring proceedings encompass various aspects, including avoiding bankruptcy liquidation, preserving the debtor's existence as an economic unit, safeguarding jobs, and achieving debt reduction. Business continuity and financial stability are central goals, aiming to ensure the long-term viability of the company and its operations.

2. Executory contracts, essential for a debtor’s operation and survival, encompass various types of so contracts such as supply contracts, lease agreements, and intellectual property licenses and others. The decision to assume or reject these contracts during restructuring depends on their benefit to the possibilities of rescue of viable business. Establishment of clear criteria for identification and protection of such contracts is crucial for effective restructuring processes, namely the rescue of business.

3. The protection of executory contracts is vital for balancing debtor rehabilitation and creditor interests in restructuring proceedings. While legal frameworks vary across jurisdictions, they aim to preserve the value of contracts and facilitate successful reorganizations. Effective protection of executory contracts requires careful consideration and balancing of stakeholders' rights and interests.

4. The rules on the protection of executory contracts in the Directive are crucial for rescue of business in restructuring proceedings since it provides guidance on how executory contracts should be treated during the restructuring process. By providing rules and procedures for dealing with executory contracts, the Directive aims to enhance the efficiency and effectiveness of restructuring proceedings. But also aims to reduce uncertainty and promote the successful resolution of disputes, ultimately contributing to the overall efficiency and effectiveness of restructuring efforts.

5. The legal frameworks for protecting executory contracts in the chosen jurisdictions: the US, France, and Germany as similarities while focusing on different protection of the parties. In the US, the Bankruptcy Code governs the treatment of executory contracts, providing flexibility for debtors while respecting counterparties’ rights. In France, the Code de Commerce and reforms

of insolvency law created procedures like Sauvegarde and Redressement Judiciaire offering protection for the debtor. In Germany, the Insolvency Code grants administrators authority to assume contracts, with recent legislation like StaRUG enhancing restructuring frameworks.

6. The challenges surrounding the protection of executory contracts in restructuring proceedings are intricate and multifaceted, impacting various stakeholders such as debtors, creditors, and employees. Across jurisdictions like the USA, France, and Germany, different legal frameworks offer mechanisms to address challenges, such as the treatment and protection of executory contracts, yet complexities persist due to the balancing act required between preserving contracts, satisfying creditors, and ensuring post-restructuring success.

7. Protection of executory contracts creates challenges from the debtor and the counterparty to executive contract. For debtors, navigating financial instability, negotiating with counterparties, and preserving executory contracts while proposing a viable plan demand strategic foresight and meticulous planning. While legislation aims to ensure fair treatment and asset preservation, challenges persist in balancing the interests of all parties involved. Ultimately, achievement of these solutions that are both viable and cost-effective necessitates informed decision-making and strategic communication with legal counsel, ensuring the best possible outcomes while preserving the integrity of contracts in the complex landscape of restructuring proceedings.

While employees are not considered as counterparties to executory contract, they play a vital role in ensuring the efficiency of restructuring proceedings. A successful restructuring process depends on effective communication, consultation, and consideration of the rights and interests of the workforce. The bankruptcy law in the United States tends to prioritize the rights of employers more than the legal frameworks in countries like France and Germany, which offer extensive protections to employees. However, certain federal laws impose obligations on employers regarding employee support and notification during mass layoffs.

8. The protection of executory contracts and the *pacta sunt servanda* principle are essentially complementary, as both seek to maintain the validity and enforceability of agreements, Nevertheless, protection of executory contracts and defending interference in contractual relations, entails striking a balance between the recognition of specific situations where intervention is appropriate and the need for stability and predictability in contractual arrangements.

9. In cross-border insolvency cases, the coordination of the actions of rescue of business between jurisdictions is crucial for maintaining stability and facilitating effective restructuring proceedings. Establishment of the rules for collaboration and ensuring the continuation of relationships between insolvent entities and stakeholders are key challenges that need to be addressed for successful restructuring across borders.

RECOMMENDATIONS

1. The need for a harmonized framework on the treatment of executory contracts in the context of restructuring proceedings is both necessary and timely in the light of widely disparate national approaches. Such a framework should provide for an appropriate balance between the collective interest of creditors and the legitimate interest of the protecting party.

Through clearing up these unnecessary roadblocks with an international framework, particularly in cases involving emerging markets or countries which still do not regulate restructurings as thoroughly as they regulate liquidations, the development of international commerce would be stimulated, as credit would become cheaper and more available, increasing entrepreneurial opportunities worldwide. Preventing the downfall of companies due to a simple operational or legal differences would also bring concerning benefits to any domestic economy, especially in places with less developed judicial practices, where a company takes significantly longer, or has difficulty in restructuring, as in such places a bankruptcy lawsuit could lead to a reduction of sales, and a much bigger than necessary job loss for the company.

2. To confront the financial distress faced by debtors, advanced technological solutions emerge as a crucial strategy. One such solution that holds immense promise in restructuring proceedings and insolvency scenarios is Artificial Intelligence.

Indeed, the use of Artificial Intelligence to detect early financial distress could be very useful for debtor to start restructuring proceedings at an early stage to better rescue the business and avoid liquidation. Upon detecting early warning signals of financial distress, businesses can proactively initiate restructuring proceedings to mitigate risks and salvage the enterprise. AI-driven predictive analytics can provide valuable insights into the most viable restructuring strategies tailored to the specific circumstances of the company. Whether it involves renegotiating debt terms, divesting non-core assets, or implementing cost-saving measures, timely intervention facilitated by AI can significantly enhance the likelihood of a successful turnaround.

Furthermore, the adoption of Artificial Intelligence technologies also improves operational efficiency through resource allocation optimization and processes. In order to increase productivity and create a viable restructuring plan, automated algorithms can recognize inefficiencies in organizational workflows, suggest optimization techniques, and make resources reallocation easier.

ABSTRACT

This thesis focuses on the relationship between contract law and corporate insolvency law as it investigates the idea and protection of executory contracts within restructuring proceedings. However, preserving these agreements frequently necessitates taking legal action against established contract law tenets like the freedom of contract and the duty to perform. The study looks at how difficult it can be to keep debtor and creditor interests in balance, especially when there are disruptions brought on by insolvency.

The study suggests ways to improve the efficacy of restructuring proceedings by analysing the EU Directive on restructuring and insolvency, contrasting practices in various jurisdictions, and evaluating the impact on stakeholders. The goal of this study is to protect the rights of all parties involved in corporate restructuring while advancing the creation of legal frameworks that facilitate effective restructuring.

Keywords: restructuring proceedings, insolvency, debtor, creditor, employees, European Union, United States, France, Germany

SUMMARY

This thesis explores the protection of executory contracts within the framework of corporate restructuring proceedings, emphasizing its relevance in both corporate insolvency law and contract law.

Executory contracts, which are ongoing agreements with pending obligations, play a crucial role in the restructuring process aimed at rescuing viable businesses. However, this protection constitutes an intervention into existing contractual relationships, raising the question of how to balance the interests of debtors and creditors.

The research aims to establish the importance of executory contracts for effective restructuring proceedings and propose solutions to improve the protection of the interests of both creditors and debtors when these contracts are preserved.

The objectives of this thesis are to assess the legal framework governing the protection of executory contracts in insolvency proceedings within EU law and selected jurisdictions. Identify the challenges faced by stakeholders, including creditors, debtors, employees, and customers, in protecting executory contracts during restructuring proceedings. And analyse the economic and operational difficulties encountered by debtors and counterparties in restructuring proceedings and propose solutions to overcome them.

The primary findings of this thesis indicate that, while necessary for the survival and reorganization of struggling businesses, executory contracts necessitate a careful consideration of competing interests. Despite the absence of pertinent ECJ case law, the 2019 EU Directive on restructuring and insolvency is examined for its potential effects on the safeguarding of executory contracts. The thesis highlights the conflict between insolvency law and contract law, specifically with regard to the automatic stay on contractual obligations and counterparty rights. The thesis illustrates various strategies and best practices for handling executory contracts in restructuring by contrasting global frameworks such as the UNCITRAL Legislative Guide.

The thesis concludes that protecting executory contracts is vital for successful corporate restructuring, requiring a nuanced approach that balances the rights and obligations of all parties involved. It contributes to the academic literature by examining the recent EU Directive's provisions, identifying gaps, and proposing improvements to the current legal framework.

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