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MARI SCHIHALEJEV

Debtor-Related Creditors' Claims in Insolvency Proceedings

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School of Law, University of Tartu, Estonia

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TABLE OF CONTENTS

LIST OF ORIGINAL PUBLICATIONS

This dissertation is based on the following publications:

1. M. Schihalejev 'Formation of Creditor Groups in Reorganisation Proceedings: Does Estonia Need a Better Regulation?'. – Juridica International 2014/21, pp. 159–167.

2. M. Schihalejev 'Court Supervision of the Determination of the Votes at the First General Meeting of Creditors in Estonian Bankruptcy Law'. – Juridica International 2017/26, pp. 76–84.

3. M. Schihalejev 'Restrictions on the Participation of Debtor-related Creditors in Bankruptcy Proceedings: Is There a Need for a New Approach in Estonian Law?'. – International Comparative Jurisprudence 2018/4 (1), pp. 52–65.

ANALYTICAL COMPENDIUM TO A CUMULATIVE DISSERTATION

1. INTRODUCTION

1.1. The Essence of the Problem

Estonian insolvency law recognises two different types of proceedings for legal persons: reorganisation and bankruptcy proceedings. Reorganisation is regulated by the Reorganisation Act (RA)[1], and according to § 2 is mainly regarded as applying a set of measures in order for an enterprise to overcome economic difficulties and ensure its sustainable management. Bankruptcy proceedings are regulated by the Bankruptcy Act (BA)[2] and will be conducted if the debtor is insolvent. According to § 1 (2) of the BA, a debtor is insolvent if the debtor is no longer able to satisfy the creditors' claims and such inability is not temporary due to the debtor's financial situation. Although these proceedings are different by nature, the objective of both procedures is to satisfy the creditors' claims.

Pursuant to the objective of insolvency proceedings, the provisions of the law should be guided by the protection of the common rights and interests of creditors. It has been mentioned that insolvency regimes are primarily aimed at safeguarding the best interests of creditors.[3] The main objective of bankruptcy law is to ensure the protection of the creditors' interests.[4] Although reorganisation proceedings are carried out taking account of the interests of the debtor, the creditors' economic interests must not be harmed in reorganisation proceedings either.[5] Therefore, it has been concluded that the common interests of creditors in terms of insolvency proceedings mean the creditors' right to claim satisfaction to the highest possible extent.[6]

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1 Saneerimisseadus. – 04.12.2008. – RT I 2008, 53, 296; 26.06.2017, 35.

2 Pankrotiseadus. – 22.01.2003. – RT I 2003, 17, 95; 19.03.2019, 26.

3 G.-J. Boon. Harmonising European Insolvency Law: The Emerging Role of Stakeholders. – International Insolvency law Review 2018/27 (2) p. 160. R. Bork. Creditors' Committees: An Anglo-German Comparative Study. – International Insolvency Review 2012/21 (2), p. 128.

4 P. Varul. Selgitavaid märkusi pankrotiseadusele ['Clarifying Remarks on the Law of Bankruptcy']. – Juridica 1993/1, p. 6 (in Estonian). P. Varul. Selgitavaid märkusi pankrotiseadusele ['Elucidatory Notes on the Bankruptcy Law']. – Juridica 1994/1, p. 2 (in Estonian).

5 I. Niklus. Saneerimisseaduse eelnõust ['The Draft Reorganisation Act']. – Juridica 2008/6, p. 375 (in Estonian).

6 J. Sarra. From Subordination to Parity: An International Comparison of Equity Securities Law Claims in Insolvency Proceedings. – International Insolvency Review 2007/16 (3), p. 186.

Insolvency proceedings have been recognised as general collective proceedings.[7] Therefore, the general principle of insolvency proceedings – the principle of equal treatment of creditors – should apply.[8] However, it has been noted that nowadays the equality of creditors is understood primarily as procedural equality.[9] This means that all creditors should have equal opportunities to participate in insolvency proceedings, which means to file a claim, have the right to vote and satisfy the claim. Nevertheless, it has been recognised that not all creditors must be treated identically.[10] In Estonian insolvency law, deviations from the principle of equal treatment of creditors apply only to pledgees, giving priority to the satisfaction of their claims. In some countries, however, deviations from the principle are due to opposite reasons – the procedural rights of some creditors are restricted and these creditors are debtor-related creditors. It has been emphasised that the law must have an equal, fair and just outcome for all its subjects.[11] The problem regarding the participation of debtor-related creditors in insolvency proceedings in Estonia is that under the current legislation they are allowed to participate in the proceedings as any other creditor – without any restrictions. Yet, this does not mean that there are no problems. In fact, the participation of debtor-related creditors in insolvency proceedings has raised many questions and caused multiple problems in practice.

The main problem is that debtor-related creditors can influence and control the insolvency proceedings by voting in order to meet debtor's and their interests. Since the decisions taken by creditors are mostly matters of significant importance, the debtor may manipulate the votes through debtor-related creditors. Such persons may be, for example, members of the management board, shareholders, or members of the their family. When a majority of the votes in the proceedings is achieved through these creditors, decisions are taken in the interests of the debtor and of related persons, but not in the common interests of the creditors, which is, however, against the purpose of the proceedings. Moreover, such debtor-related creditors' claims which are the bases for the determination of the number of votes may even be ostensible, as it is easy for the debtor and their related creditors to formulate the claim in the needed amount. This means that the voting process is not legitimate.

However, if insolvency proceedings have been commenced – either reorganisation proceedings or the debtor has already been declared bankrupt –,

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[7] United Nations Commission on International Trade Law (UNCITRAL). Legislative Guide on Insolvency Law. New York: United Nations 2005, p. 6. Available at https://www.uncitral.org/pdf/english/texts/insolven/05-80722_Ebook.pdf (most recently accessed on 21.04.2019).

[8] P. Varul. Pankrotiseaduse uued parandusettepanekud ['New Proposals for Amendments to the Bankruptcy Act']. – Juridica 2008/6, p. 362 (in Estonian).

[9] T. Saarma. Pankrotimenetluse põhimõtted ['The Principles of Bankruptcy Law']. – Juridica 2008/6, p. 354 (in Estonian).

[10] UNCITRAL (see Note 7), p. 11.

[11] F. Deane, R. Mason. The UNCITRAL Model Law on Cross-Border Insolvency and the Rule of Law. – International Insolvency Review 2016/25 (2), p. 141.

the proceedings should be controlled by non-related creditors. In reorganistion proceedings, such situations must be prevented where debtor-related creditors can vote in such a way that their votes will play a decisive role in the acceptance of the reorganisation plan, because this may harm the common rights and interests of creditors. If the debtor has determined appropriate reorganisation measures to be implemented in the reorganisation plan in order for the enterprise to overcome economic difficulties, the chosen measures are already in the interests of the debtor and of their related persons. Therefore, non-related creditors should have decisive vote to decide whether the reorganisation plan and the measures chosen therein also serve their interests. Making an additional decision on the reorganisation measures chosen by debtor-related creditors is not necessary and is rather a tool of the debtor for ensuring the acceptance of the reorganisation plan and the continuation of the company's economic activities.

If the debtor is already been declared bankrupt and it is caused intentionally, trustee is required to file a claim for compensation for damage against the person liable. Therefore, the trustee needs to, *inter alia*, ascertain the real cause of the insolvency and whether it has been caused by any harmful transactions between the debtor and their related persons. If the debtor can control the bankruptcy proceedings through debtor-related creditors, it may be impossible to file such a claim for compensation for damage. This means that the common rights and interests of non-related creditors are not protected.

Moreover, shareholders may even file a loan claim, which is satisfied in the same ranking as other unsecured creditors' claims in bankruptcy proceedings. However, according to legal literature, the meaning of shareholders' loan claims is that additional capital is granted by a loan to the company by the shareholders, and such loan claims should usually be repayable when the claims of all other creditors have been covered.[12] The reason is that such a loan is actually a capital investment that can be repaid after the claims of all other creditors have been satisfied. This means that if a shareholder has filed loan claim instead of capital investment, the shareholder has been given an advantage when getting satisfaction for the claim in bankruptcy proceedings.

The question arises as to whether the current insolvency law follows the objective of insolvency proceedings when it allows debtor-related creditors to participate in insolvency proceedings. Therefore, it is necessary to consider whether it is imperative to restrict the participation rights of debtor-related creditors in Estonian insolvency proceedings. Presently a directive of the European Parliament and of the Council on preventive restructuring frameworks, second chance and measures to increase the efficiency of restructuring, insolvency and discharge procedures is being drawn up.[13] Several international

[12] A. Vutt. Subordination of Shareholder Loans in Estonian Law. – Juridica International 2008/15, p. 87.

[13] Proposal for a directive of the European Parliament and of the Council on preventive restructuring frameworks, second chance and measures to increase the efficiency of restruc-

organisations have provided guidance, too, in order to advise national authorities and legislative bodies on developing an efficient legal framework in relation to insolvency and company law. For example, the United Nations Commission on International Trade Law (UNCITRAL) has provided the "Legislative Guide on Insolvency Law"[14] and the World Bank has given guidelines in "Principles and Guidelines for Effective Insolvency and Creditor Rights System"[15]. Therefore, it is necessary to examine, whether Estonian insolvency law conforms to the European Parliament legislative resolution on the proposal for a directive of the European Parliament and of the Council on preventive restructuring frameworks, second chance and measures to increase the efficiency of restructuring, insolvency and discharge procedures and amending Directive 2012/30/EU and general guidance of different international organisations without providing any restrictions on debtor-related creditors participation.

In order to establish the circle of persons whose procedural rights should be restricted in insolvency proceedings, it is first necessary to define the term "debtor-related creditors". UNCITRAL has defined the term "related persons" and it is applicable in all aspects of insolvency proceedings. According to UNCITRAL, a related person is: 1) a person who is or has been in a position of control of the debtor; 2) a parent, subsidiary, partner or affiliate of the debtor.[16] This means that such related persons can also be considered as "debtor-related creditors".

Estonian insolvency law does not provide any general regulations specifying the general legal status of debtor-related creditors in the context of participating in insolvency proceedings. There is also no case law which addresses the participation of debtor-related creditors in insolvency proceedings. The BA only explains and uses the term "persons connected with debtor" in the context of recovery of transactions, as § 117 of the BA provides a list of persons who are deemed to be related to a debtor who is a natural or legal person. Moreover, the

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turing, insolvency and discharge procedures and amending Directive 2012/30/EU (COM/2016/0723 final – 2016/0359 (COD)). European Parliament legislative resolution of 28 March 2019 on the proposal for a directive of the European Parliament and of the Council on preventive restructuring frameworks, second chance and measures to increase the efficiency of restructuring, insolvency and discharge procedures and amending Directive 2012/30/EU (COM(2016)0723 – C8-0475/2016 – 2016/0359(COD)).

[14] UNCITRAL (see Note 7).

[15] The World Bank. Principles and Guidelines for Effective Insolvency Systems. The World Bank, April 2001. Available at http://siteresources.worldbank.org/GILD/PrinciplesAndGuidelines/20162797/Principles%20and%20Guidelines%20for%20Effective%20Insolvency%20and%20Creditor%20Rights%20Systems.pdf (most recently accessed on 19.04.2019). This document has been updated in 2016. – The World Bank. Principles for Effective Insolvency and Creditor/debtor Regimes. The World Bank 2016. Available at http://pubdocs.worldbank.org/en/919511468425523509/ICR-Principles-Insolvency-Creditor-Debtor-Regimes-2016.pdf (most recently accessed on 19.04.2019).

[16] UNCITRAL (see Note 7), pp. 6–7.

RA does not provide any regulations concerning the definition of debtor-related creditors in any aspects.

In accordance with § 117 (2) of the BA the following persons are deemed to be connected with a debtor who is a legal person: 1) the members of the management bodies, the liquidator, procurator and the person responsible for the accounting of the legal person; 2) the shareholders of the legal person who hold more than one-tenth of the votes determined by shares; 3) such partner or member of the legal person who is liable for the obligations of the debtor additionally with his or her assets; 4) the subsidiaries of the company and the members of the management bodies of the subsidiaries; 5) natural and legal persons who share significant economic interests with the debtor. In fact, the Supreme Court has stated that such economic interests must be such significant that it can be generally and objectively assumed that the debtor and the person connected with them act in favor of each other and against the interests of other creditors.[17]

Moreover, according to § 117 (2) p. 6 the persons connected with the persons specified in clauses 1)–4) of this subsection as specified in subsection (1) of this section are also deemed to be connected with a debtor who is a legal person. According to § 117 (1), members of the family are mainly the following persons: the spouses or former spouses if the marriage has been divorced one year before, persons who live or have lived in a shared household during the year, ascendants and descendants and their spouses, sisters and brothers and their descendants and spouses, ascendants, descendants, brothers and sisters of the debtor's spouse. Yet, this list is not exhaustive. According to § 117 (3) of the BA, the court may consider a person close to a debtor but not specified in subsection (1) or (2) to be connected with the debtor.

The list of persons connected with the debtor in the BA is based on the general definition given by UNCITRAL, which means that this list can also be considered as a list of debtor-related creditors in insolvency proceedings in general, not only in the context of recovery of transactions. Although the list in the BA is long, technical and detailed, it has been seen as justified in practice in the case of recovery of transactions. In fact, this provision takes into account that persons connected with the debtor are such persons who have a special and close relationship with the debtor and are in a position of control of the debtor or, conversely, the debtor is in a position of control of this person. Therefore, the circle of persons who should be considered as debtor-related creditors in this dissertation, is based on the above-mentioned list in accordance with § 117 (2) of the BA.

In fact, in Estonia, a thorough analysis of the problems related to the participation of debtor-related persons in insolvency proceedings has not been published and amendments to the law have not been introduced. There is only little legal literature on this topic and quite few legal approaches to this subject. Prof.

[17] The Supreme Court decision in case no 3-2-1-53-03 of 20 May 2003, para 23 (in Estonian). The Supreme Court decision in case no 3-2-1-43-07 of 09 May 2007, para 11 (in Estonian).

P. Varul has given many general opinions on Estonian bankruptcy law: several explanatory notes[18], general issues[19], proposals for amendments[20], and developments[21]. In some articles it has been merely mentioned that there are problems with the determination of number of votes[22], but the articles are not concerned with the issues of the participation of debtor-related creditors in insolvency proceedings nor introduce amendments to the law.

1.2. The Objective of the Research and Research Questions

The objective of the dissertation is to examine the hypothesis that Estonian insolvency law does not enable the protection of the common rights and interests of creditors when debtor-related creditors participate in insolvency proceedings, and therefore restrictions on the participation of debtor-related creditors should be imposed by law.

In order to achieve the objective of the dissertation, the author examines the following research questions:

1) Should Estonian law oblige reorganisation advisers and trustees to verify creditors' claims before the voting process in insolvency proceedings and if so, should verification be heightened for debtor-related creditors' claims?
2) Should the formation of separate creditor groups for debtor-related creditors be compulsory for voting purposes in reorganisation proceedings in Estonia?
3) Should the voting rights of debtor-related creditors' be restricted in bankruptcy proceedings in Estonia?
4) Should shareholders' loan claims be defined as subordinated claims in Estonian law and be satisfied after the claims of all other creditors have been satisfied?
5) Does the current regulation on the adjudication of disputes over the determined number of votes ensure quick and effective bankruptcy proceedings in Estonia, and if not, which legal measures should be implemented?

As a result of the research, the author will present proposals for amending the insolvency law where it is considered to be necessary. However, as the dissertation is based on three articles dealing with the main problems regarding the participation of debtor-related creditors, the purpose of the dissertation is not to

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[18] P. Varul 1993/1 (see Note 4) pp. 6–7. P. Varul. Selgitavaid märkusi pankrotiseadusele ['Explanatory Remarks on the Law of Bankruptcy']. – Juridica 1993/3, pp. 52–52. P. Varul 1994/1 (see Note 4), pp. 2–13.

[19] P. Varul. Pankrotiõiguse probleeme ['Issues Concerning Bankruptcy Law']. – Juridica 1999/8, pp. 376–380.

[20] P. Varul (see Note 8), pp. 359–368.

[21] P. Varul. Maksejõuetusõiguse areng Eestis ['Developments in Insolvency Law in Estonia']. – Juridica 2013/4, pp. 234–241. P. Varul. On the Development of Bankruptcy Law in Estonia. – Juridica International 1999/4, pp. 172–178.

[22] P. Varul 1993/3 (see Note 18), p. 52. P. Varul 1994/1 (see Note 4), p. 6.

provide a comprehensive analysis of an entirely new legislation, but to find solutions that would make the existing legislation better.

1.3. Methods

The dissertation is based on an analytical and comparative research method. The dissertation is mainly based on the analysis of Estonian insolvency law, but this is compared to the relevant regulations of other countries. Estonian insolvency law is mainly compared with German insolvency law, but in the case of specific problems the comparisons are also made to Latvian, Lithuanian and US law. Moreover, specifically the dissertation is concerned with bankruptcy law (regulated by the BA) and reorganisation law (regulated by the RA) of legal persons, but not the debt restructuring proceedings of natural persons (regulated by Debt Restructuring and Debt Protection Act[23]).

The German law, has set an important example for the creation of Estonian civil law as has been mentioned in Estonian legal literature.[24] As the German *Insolvenzordnung* (InsO)[25] has been the main model law of the Estonian BA, especially in the case of amendments[26], Estonian law has been mainly compared to German law. The problem is that the principles set out in German legislation are partially adopted into Estonian legislation. The problems with debtor-related creditors are compared with German law in order to analyse whether the regulations are rather similar or different. Moreover, due to a lack of original legal writings and analyses in Estonian insolvency law on this topic, the comparative method has been highly valuable to find better solutions for certain problems encountered in Estonian practice, especially because the necessary rules are not always laid down in Estonian legislation.

US law has been analysed to some extent, because Chapter 11 of the US Bankruptcy Code,[27] which prescribes the division of different creditors into separate groups, has served as an example to creating the RA as has been mentioned in explanatory notes to the RA.[28] Therefore, US law is analysed only in the context of dividing different creditors into separate groups in reorganisation proceedings.

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[23] Võlgade ümberkujundamise ja võlakaitse seadus. 17.11.2010. – RT I, 06.12.2010, 1; 31.01.2014, 8.

[24] P. Varul. Tsiviilõiguse üldosa [‘General Part of Civil Law’]. Juura 2012, p. 25 (in Estonian).

[25] *Insolvenzordnung* vom 5 Oktober 1994 (BGBI. I S. 2866). Available at https://www.gesetze-im-internet.de/inso/InsO.pdf.

[26] P. Varul (see Note 8), p. 359.

[27] US Bankruptcy Code. Chapter 11 – Bankruptcy. Available at https://www.law.cornell.edu/uscode/text/11 (most recently accessed on 19.04.2019).

[28] Saneerimisseaduse eelnõu seletuskiri [‘Explanatory Notes to the Reorganisation Act’], p. 30. Available at http://www.riigikogu.ee/?page=eelnou&op=ems2&emshelp=true&eid=401582&u=20130407192528 (most recently accessed on 19.04.2019) (in Estonian).

Latvian insolvency law[29] and Lithuanian enterprise restructuring law[30] have also been analysed only to some extent. The Baltic states can be regarded as a single market share, considering the smallness of these countries and similar business models in different fields across the countries. Therefore, it is necessary to examine how are the same problems with the participation of debtor-related creditors in insolvency proceedings solved in different parts of the same market share. The question is, whether the national regulations are rather similar or different. However, as Latvian and Lithuanian legal systems also lack comprehensive theoretical material, their regulations are only compared in general aspects that concern the participation of debtor-related creditors in insolvency proceedings.

The dissertation is based on three earlier published articles of the author. The dissertation consists of two parts: an analytical compendium and the published articles. The objective of the analytical compendium is to summarise the main problems and analyse them, but also present the author's opinions. Although the first article was published 5 years ago, Estonian insolvency law has not been amended during that time in relation to the participation of debtor-related creditors. Nevertheless, the topic has been discussed in Estonian insolvency law review[31] and company law review[32].

The dissertation is divided into four different parts according to the essence of the problems. The first part is about objectives of the voting rights of debtor-related creditors in insolvency proceedings. It deals with conflicts of interests between different types of creditors when voting in insolvency proceedings, and debtor-related creditors' abuse of voting rights in the proceedings. The second part is about restrictions on the voting rights of debtor-related creditors in reorganisation proceedings. This section deals with the basis for formation of creditor groups for voting purposes and verification of debtor-related creditors

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[29] *Maksātnespējas likums* (Insolvency Law). 26.07.2010; 124 (4216), 06.08.2010. Available at https://likumi.lv/ta/id/214590-maksatnespejas-likums (most recently accessed on 22.04.2019).

[30] *Lietuvos Respublikos įmonių restruktūrizavimo įstatymo pakeitimo įstatymas* (Law on Restructuring of Enterprises). 2010 m. liepos 2 d. Nr. XI-978. Available at https://e-seimas.lrs.lt/portal/legalAct/lt/TAD/TAIS.377908 (most recently accessed on 22.04.2019).

[31] Maksejõuetuse revisjoni lähteülesande projekt ['Insolvency revision project']. 2016. Available at https://www.just.ee/sites/www.just.ee/files/maksejouetusoiguse_revisjoni_lahteulesanne_loplik_13.06.2016.pdf (most recently accessed on 12.05.2019) (in Estonian). Pankrotiseaduse ja teiste seaduste muutmise seaduse eelnõu väljatöötamise kavatsus ['Intention of developing the draft act to amend the Bankruptcy Act and other acts']. 15.11.2018. Available at: https://www.just.ee/sites/www.just.ee/files/pankrotiseaduse_ja_teiste_seaduste_muutmise_seaduse_eelnou_valjatootamiskavatsus.pdf (most recently accessed on 12.05.2019) (in Estonian).

[32] Ühinguõiguse revisjoni lähteülesanne ['Terms of reference for the revision of company law']. 2016. Available at https://www.just.ee/sites/www.just.ee/files/uhinguoiguse_revisjoni_lahteulesanne_loplik_10.5.2016.pdf (most recently accessed on 12.05.2019) (in Estonian).

claims. The third part is about restrictions on the voting rights of debtor-related creditors in bankruptcy proceedings. This section involves the determination of number of votes of creditors before defending the claims. It also deals with the problems related to the court supervision of the determination of the number of votes to debtor-related creditors at the first general meeting of creditors in bankruptcy proceedings. The forth part is about the satisfaction of debtor-related creditors' claims in bankruptcy proceedings. Two main problems are analysed in this section: the general principles of satisfying debtor-related creditors' claims and satisfying subordinated loan claims in bankruptcy proceedings.

2. GENERAL OBJECTIVES OF RESTRICTIONS ON DEBTOR-RELATED CREDITORS IN INSOLVENCY PROCEEDINGS

2.1. Conflict of Interest In Voting Process

The purpose of the voting is to ensure that each of the creditors have the right to make a decision in the insolvency proceedings, whether it is in the best interests or not. It is common knowledge that any creditor who participates in the voting process in insolvency proceedings would like to influence the voting result in such a way that the decision to be taken would serve their own interests. The result of the voting on the specific issue is the common interest of all the creditors. Usually the common interest of creditors is the satisfaction of the claim as soon as possible and to the greatest extent as possible. Thus, the question arises as to whether debtor-related creditors have the same interests as those of the non-related creditors, which would guarantee the same purpose in the proceedings or they have other interests and objectives in the proceedings, which may influence the voting result.

The aim of the debtor and especially of shareholders is to ensure successful reorganisation proceedings with every possible measure, because then it is possible to continue the company's business activities in order to obtain money. Successful reorganisation means the acceptance of the reorganisation plan by creditors and in this case the plan is usually approved by the court, also. According to § 28 (1) of the RA if the creditors have accepted the reorganisation plan, it shall be submitted to the court for approval. On the other hand, pursuant to § 29 (1) of the RA when creditors have refused to accept the plan, the debtor may submit an application to the court for the approval, also. Although in practice it is unlikely that the court will approve the plan. Therefore, it is important for the debtor that the reorganisation plan is accepted by the creditors.

In reorganisation proceedings, in the case of the acceptance and approval of the reorganisation plan, the debtor has an opportunity to overcome the economic difficulties, restore their liquidity, improve its profitability and ensure sustainable management. Furthermore, there are many important consequences for the debtor in the case of the approval of the reorganisation plan: 1) during the term of validity of the reorganisation plan, statements of claim cannot be filed on the basis of the claims to which the reorganisation plan applies (§ 47 (1) of the RA); 2) a bailiff does not continue actions and enforcement proceedings in respect of claims to which the reorganisation plan applies (§ 47 (2) of the RA); 3) during the period of the validity of the reorganisation plan, bankruptcy petitions cannot be filed on the basis of the claims to which the reorganisation claim applies or which existed before the approval of the reorganisation plan

(§ 49 (1) of the RA).[33] Since the approval of the reorganisation plan has significant consequences for the debtor, the debtor may ensure the acceptance of the plan through debtor-related creditors, and manipulate the votes. As has been mentioned in legal literature, debtor-related creditors, especially shareholders, would therefore control the reorganisation process in order to ensure the acceptance of the reorganisation plan.[34] Bankruptcy proceedings, on the other hand, are generally liquidation proceedings. This means that the activities of an enterprise of the debtor are terminated and the legal persons will be dissolved, which is not in the interest of shareholders, because they lose financial resources.

In bankruptcy proceedings the different interests of different types of creditors are reflected in a situation when taking decisions about the ascertainment of causes of the debtor's insolvency and of the transactions that have been made by the debtor. According to § 55 (3) p. 1^1 of the BA the trustee has an obligation to ascertain the time and the causes of insolvency of the debtor. In addition, according to § 22 (5), § 132 (1) and § 162 (3) of the BA the trustee has to ascertain whether the insolvency is caused by an act with criminal elements, a grave error in management, or other circumstances. If the insolvency of the debtor is caused by an act with criminal elements, the trustee or the court file a notification thereof to the prosecutor or the police for deciding on the commencement of criminal proceedings pursuant to § 28 (1) and § 163 (5) of the BA. If the insolvency of the debtor is caused by a grave error in management, the trustee is required to file a claim for compensation for damage against the person liable for the error according to § 55 (3^3) and § 163 (5) of the BA. The purpose of identifying the causes of insolvency is to sanction a person who has knowingly caused insolvency of the company. The identification of such data is aimed to satisfy creditors' claims to a greater extent as well as prevent intentional damage to creditors in bankruptcy proceedings.[35]

However, debtor-related creditors generally do not wish it to be established whether the insolvency is caused by an act with criminal elements or a grave error in management. In proceedings controlled by the votes of debtor-related creditors, it is easier to ensure that the trustee does not establish that kind of information. In this case, debtor-related creditors can influence the trustee and avoid conducting an audit of accounts, which may reveal an act with criminal elements or a grave error in management. This means that claims are not filed against debtor-related persons and creditors will not receive any money from the claims. Moreover, in the case of the bases for the recovery of transactions pursuant to § 110 of the BA, debtor-related creditors can also ensure that no actions are brought before the court and the required deadlines are overrun.

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[33] However, such creditors whose claim is not covered by the plan but whose claim existed before the plan was adopted can still file an action to the court in order to satisfy the claim.

[34] J. Sarra (see Note 6), pp. 211.

[35] Kohtutäituri seaduse seletuskiri ['Explanatory Notes to the Bailiffs Act']. Available at https://www.riigikogu.ee/tegevus/eelnoud/eelnou/1b0d01ec-f7b5-2581-75d9-dda4dd01275a/Kohtutäituri%20seadus/ (most recently accessed on 20.05.2019) (in Estonian).

Although, according to § 83 (1) of the BA the revocation of a decision of a general meeting of creditors may be requested if the decision damages the common interests of the creditors and when the decision is made by the bankruptcy committee, in accordance to § 75 of the BA they may be liable for the damage caused. But any dispute requires additional resources from creditors, of which they are not interested, which means that even if the decision is contrary to their the common interest, it may remain in force.

In Estonian practice, there are cases where debtor-related creditors have taken control over bankruptcy proceedings by having the majority of the votes.[36] In fact, there has even been a case where debtor-related creditors obtained 100% of all claims, which means that they had 100% of the votes, and therefore gained control over the bankruptcy proceedings and the activities of the trustee.[37] As a result of this, the proceedings were abated in accordance with § 158 of the BA. In fact, even the meeting for the defence of claims was not held. Since the debtor did not have any bankruptcy estate, an audit of accounts was not conducted. No claims and court actions were filed against the persons liable. This bankruptcy case demonstrates clearly and unambiguously what may be the consequence if debtor-related creditors take control of the proceedings.

The question arises as to how such a situation can occur at all. The reason is that in accordance with the BA, debtor-related creditors may submit their claims to bankruptcy proceedings and creditors are not forbidden to assign their claims, including to debtor-related creditors. In fact, in the above-mentioned bankruptcy cases, if some of the debtor-related creditors' claims were based on loan claims, then others were based on claims acquired from other creditors. The purpose of acquiring claims from other creditors is to obtain as many votes as possible to gain control over the bankruptcy proceedings. Moreover, as is commonly known in Estonian practice, non-related creditors (except creditors with mortgage loans) often do not participate in the first general meeting of creditors, but debtor-related creditors do. Thus, debtor-related creditors can still take important decisions at the meeting and control the proceedings, even though they did not have an overwhelming majority of the votes.

Due to the above, debtor-related creditors have different interests in comparison with non-related creditors in the voting process of insolvency proceedings. The main conflict of interest results from the fact that their objective of the proceedings is different. Debtor-related creditors may have a malicious intent to take decisions in favour of the debtor and their related persons and thereby

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[36] See e.g. Proofs of claims of creditors and protocol of the meeting for the defence of claims in Estonian bankruptcy proceedings in civil case no 2-15-15226 of 31 March 2016 (in Estonian). Proofs of claims of creditors in Estonian bankruptcy proceedings in civil case no 2-14-61665 (in Estonian). Proofs of claims of creditors and protocol of the meeting for the defence of claims in Estonian bankruptcy proceedings in civil case no 2-16-7967 of 17 October 2016 (in Estonian).

[37] Proofs of claims of creditors in Estonian bankruptcy proceedings in civil case no 2-14-61665 (in Estonian).

control the procedure, which harms the common rights and interests of non-related creditors.

2.2. Abuse of Voting Rights by Debtor-Related Creditors

The principle of good faith has been expressly set out in the law and is prescribed in § 138 of the General Part of the Civil Code Act (GPCCA)[38] and in § 6 of the Law of Obligations Act (LOA)[39]. The principle of goof faith is one of the most fundamental principles of private law, acting as a general guide when the law is being applied. As it has been stated the principle applies to all sectors of civil law, including the exercise of procedural rights.[40] Moreover, the principle of good faith is recognised to be a constitutional principle.[41] Thus, the principle also applies to insolvency proceedings and the participants must be guided by it while exercising their procedural rights. The question arises as to whether the participation of debtor-related creditors is in compliance with the principle of good faith when they vote in the proceedings, i.e. exercise their procedural rights, and thereby gain control over the proceedings.

In civil law, the general principle of acting in good faith is prescribed in § 138 of the GPCCA; in accordance with subsection 1, rights shall be exercised and obligations shall be performed in good faith. The said principle applied to obligations is provided in § 6 of the LOA, which prescribes that obligees and obligors shall act in good faith in their relations with one another. This means that the principle prescribed in the LOA is a specific provision for the one prescribed in the GPCCA and sets out an additional term for the participants' behaviour in the case of obligations.[42] Moreover, the prohibition to cause harm to another person is also prescribed both in the GPCCA and in the LOA.

Although the principle of good faith is normative, the law does not provide the criteria for applying it nor lay down its content and legal consequences of violating it. This means that when applying the principle, one must be guided by general moral norms accepted in society, by honesty and interests, and this applies for both parties. It has been mentioned that one of the main purposes of the principle of good faith is that a right shall not be exercised in an unlawful

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38 Tsiviilseadustiku üldosa seadus. – 27.03.2002. – RT I 2002, 35, 216; 30.01.2018, 6.

39 Võlaõigusseadus. – 26.09.2001. – RT I 2001, 81, 487; 20.02.2019, 8.

40 P. Varul, I. Kull, V. Kõve, M. Käerdi (koost.). Tsiviilseadustiku üldosa seadus. Kommenteeritud väljaanne ['The General Part of Civil Code Act. Commented Edition']. Juura 2010. – GPCCA § 138/3.3. (in Estonian). P. Varul, I. Kull, V. Kõve, M. Käerdi, K. Sein (koost.). Võlaõigusseadus I. Kommenteeritud väljaanne ['Law of Obligations Act I. Commented Edition']. Juura 2016. – LOA § 6/3 (in Estonian).

41 I. Kull. Principle of Good Faith and Constitutional Values in Contractual Law. – Juridica International 2002/7, p. 142.

42 P. Varul, I. Kull, V. Kõve, M. Käerdi (koost.). Tsiviilseadustiku üldosa seadus. Kommenteeritud väljaanne (see Note 40), GPCCA § 138/3.3. P. Varul, I. Kull, V. Kõve, M. Käerdi, K. Sein (koost.). Võlaõigusseadus I. Kommenteeritud väljaanne (see Note 40), LOA § 6/4.1.6.1.

manner or with the objective to cause damage to another person.[43] The participants must behave in the spirit of goodwill, fairly and justly towards each other. The aim of the principle is to bring (economic) fairness and reasonableness into legal relationships between the parties.[44] In addition, the Supreme Court has noted that one of the functions of the principle of good faith is to prevent abuse of rights and the exercise of rights deriving from a contract or law is always considered an abuse of right when the rights are exercised contrary to the principle of good faith.[45] Moreover, as it has been accepted by the Supreme Court abuse of rights may even be due to contradictory behaviour.[46]

When exercising procedural rights in insolvency proceedings, one has to be guided by the general principle to act in good faith prescribed in the GPCCA, not by the principle prescribed in the LOA. The reason is that the principle of good faith set out in the LOA applies for behaviour in the case of obligations, and its subjects are the debtor and the creditor but not third parties, whose legitimate interests, however, may be harmed by the parties who exercise their rights.[47] Moreover, under the provision prescribed in § 200 (1) of the Code of Civil Procedure (CCP)[48], participants must act in good faith when exercising their procedural rights in civil cases. Although this is a specific provision for the principle prescribed in the GPCCA, the substance of the provision is guided by the general principle of good faith. Since insolvency proceedings are civil cases and the provisions of the CCP apply to bankruptcy proceedings (§ 3 (2) of the BA) as well as to reorganisation proceedings (§ 4 of the RA), the participants must follow both the GPCCA and the CCP.

According to § 200 (2) of the CCP, a court does not allow the participants in proceedings, their representatives or advisers to abuse their rights, delay proceedings or mislead the court. However, the principle to act in good faith in the proceedings is general, abstract and does not prescribe any prerequisites for the application of it as the principle prescribed in the GPCCA. This means that there are many different ways to breach this obligation. Nevertheless, when applying the principle of good faith, one has to be mainly guided by generally recognised values and moral standards. Thus, when exercising procedural rights in civil proceedings, any dishonest, immoral or otherwise unacceptable behaviour

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[43] P. Varul, I. Kull, V. Kõve, M. Käerdi (koost.). Tsiviilseadustiku üldosa seadus. Kommenteeritud väljaanne (see Note 40), GPCCA § 138/3.1., 3.3., 3.7.1. P. Varul, I. Kull, V. Kõve, M. Käerdi, K. Sein (koost.). Võlaõigusseadus I. Kommenteeritud väljaanne (see Note 40), LOA § 6/4.2.3.1.

[44] I. Kull (see Note 41), pp. 142–143.

[45] See e.g. The Supreme Court decision in civil case no 3-2-1-115-07 of 19. December 2007, para 14 (in Estonian). The Supreme Court decision in civil case no 3-2-1-102-07 of 7 November 2007, para 16 (in Estonian).

[46] The Supreme Court decision in civil case no 3-2-1-102-07 of 7 November 2007, para 16 (in Estonian).

[47] P. Varul, I. Kull, V. Kõve, M. Käerdi, K. Sein (koost.). Võlaõigusseadus I. Kommenteeritud väljaanne (see Note 40), LOA § 6/4.1.3.

[48] Tsiviilkohtumenetluse seadustik. – 20.04.2005. – RT I 2005, 26, 197; 19.03.2019, 22.

is against to the principle of good faith.[49] In addition, legal rules which regulate human behaviour should be based on one of the most important ideas of the law – on justice.[50]

Therefore, if the proceedings are controlled by debtor-related creditors who knowingly take decisions that damage the interests of other creditors, debtor-related creditors have abused their procedural rights. Although every creditor, even non-related creditors, may make decisions for their own benefit, but the decisions must not intentionally harm the interests of other creditors. Debtor-related creditors, especially shareholders, are usually interested in getting benefits for themselves for the purpose of withdrawing money from the proceedings.

In fact, according to proposals to amend § 24 (6) of the RA, the provision should establish that on the proposal of the reorganisation adviser, the court may restrict the voting rights of debtor-related creditors in reorganisation proceedings if the circumstances of a particular proceeding give reason to believe that debtor-related creditors have acquired the claim with the aim of influencing the voting results and using procedural rights in bad faith.[51] This would apply for the persons specified in § 117 of the BA who have a claim against the debtor. Nevertheless, the proposal is still related to discretion and does not provide a clear and strict policy on restricting debtor-related creditors' participation in reorganisation proceedings.

Although, there is no case law of the Supreme Court which concerns the participants' obligations to act in good faith in insolvency proceedings, the Supreme Court has adjudicated on the obligations of a participant in general civil proceedings.[52] In this Supreme Court case, the participant had destroyed evidence in bad faith. The Supreme Court stated that the court has an obligation to verify whether a participant in the proceedings acts in good faith in order to meet the objective set out in § 2 of the CCP. Moreover, pursuant to § 200 (1) of the CCP, a participant in proceedings is required to exercise their procedural rights in good faith. According to the opinion of the Supreme Court, if a participant has acted in bad faith in the proceedings, it is necessary to consider how it affects the process of submitting and evaluating evidence. In the said case, the Supreme Court stated that destroying evidence is a breach of the obligation to

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[49] V. Kõve, I. Järvekülg, J. Ots, M. Torga (koost.). Tsiviilkohtumenetluse seadustik I. Kommeteeritud väljaanne ['Code of Civil Procedure I. Commented Edition']. Juura 2017. – CCPC § 200/3.1.2. (in Estonian).

[50] R. Narits. Õiguse entsüklopeedia ['Law Encyclopaedia']. Juura 2004, p. 11 (in Estonian).

[51] A. Õunpuu. Saneerimisseaduse ja sellega seonduvalt teiste seaduste muutmise seaduse eelnõu ja seletuskiri ['The Draft of the Reorganisation Act and Related Acts and the Explanatory Memorandum']. Analysis 05.04.2014, pp. 5, 20. Available at https://www.just.ee/sites/www.just.ee/files/annemari_ounspuu_saneerimisseaduse_jt_seaduste_muutmise_seaduse_eelnou_ja_seletuskiri.pdf (most recently accessed on 22.04.2019) (in Estonian).

[52] The Supreme Court decision in civil case no 2-14-62992 of 2 November 2017, para 15 (in Estonian).

behave in good faith, because it reduces the counterparty's possibility of proof and thereby increases the said participant's probability of proof.

The principles established in this Supreme Court case could also be applied in insolvency proceedings, but in the opposite way. In the referred case the problem was that the participant destroyed evidence in bad faith, but in insolvency proceedings the problem is the creation – meaning falsification – of evidence in bad faith. In accordance with the law and the principles of this Supreme Court judgment, it can be concluded that the procedural rights of the participants are not exercised in good faith and the rights are abused when debtor-related creditors create evidence in order to control the insolvency proceedings.

Moreover, pursuant to § 328 (1) of the CCP, the statements made by a participant in the proceedings concerning the facts of the case must be true. The obligation to file truthful facts in the proceedings is imperative, absolute and one of the forms of exercising procedural rights in good faith. As has been mentioned in the legal literature, this provision refers to subjective truth, which means that a participant in the proceedings must not knowingly provide false information about the facts with the aim of influencing the court to make wrong conclusions about the circumstances.[53] Thus, debtor-related creditors must file legitimate proof of claims and submit true information about the facts in order to follow the principle of good faith. In practice, however, it is common that debtor-related creditors submit ostensible claims, knowingly provide false information about the circumstances, and therefore have procedural rights in insolvency proceedings.

As mentioned before, there is no Supreme Court's case law in Estonia on whether or not the participation of debtor-related creditors in insolvency proceedings is in compliance with the principle of good faith. This does not mean, that there have been no questions of the participation of debtor-related creditors under the principle of good faith. Tallinn District Court, upon resolving an appeal against Harju County Court's ruling[54] on a compromise proposal in bankruptcy proceedings, handled a case involving a situation where debtor-related creditors participated in the voting process according to § 183 of the BA. In this case, debtor-related creditors voted for the compromise proposal according to § 180 (3) of the BA. The county court found that the decision to approve the compromise proposal was void and contrary to the principle of good faith. The reason for it was the fact that the decision was largely based on the votes of debtor-related creditors, who were dependent on the debtor. Due to the ruling of the county court, decisions on matters of decisive importance cannot be made primarily with the votes of debtor-related creditors. This is in conflict with the principle of good faith and harms the common interests of non-related creditors.

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[53] V. Kõve, I. Järvekülg, J. Ots, M. Torga (koost.). Tsiviilkohtumenetluse seadustik II. Kommeteeritud väljaanne ['Code of Civil Procedure II. Commented Edition']. Juura 2017. – CCPC § 328/3.1.1.–3.1.2., 3.1.5. (in Estonian).

[54] Harju County Court ruling in civil case no 2-14-2165 of 26 December 2006 (in Estonian).

If debtor-related creditors have a majority of the votes, other creditors will not, in essence, have an opportunity to influence the decision in order to meet their interests. Tallinn District Court did not amend the county court's ruling and did not accept the appeal.[55] It can be concluded that such a court ruling is legitimate when applying § 430 (3) of the CCP. According to this provision a court shall refuse to approve a compromise if this is contrary to good morals or the law, if this violates a significant public interest or if the conditions of the compromise cannot be enforced.

Although the analysed ruling has not been made by the Supreme Court, but a district court, the principle therein could be a basis for a uniform voting practice in insolvency proceedings when debtor-related creditors have the majority of the votes and non-related creditors have no opportunity to influence the decisions. The court has stated clearly and unambiguously that the participation of debtor-related creditors in insolvency proceedings is contrary to the principle of good faith when their majority of the votes prevent other creditors from taking decisions.

Furthermore, the question of abusing participation rights by debtor-related creditors has been arisen in a bankruptcy case, in which a debtor-related creditor, who was the husband of a member of the management board and the shareholder of the debtor, filed their claim into the bankruptcy proceedings and submitted objections to almost all claims filed in the proceedings.[56] In fact, this is only one example of a widespread scheme in Estonian bankruptcy practice where debtor-related creditors abuse their procedural rights and submit unjustified objections to the creditors claims: although debtor-related creditors have a right to file a claim and submit objections to other creditors' claims, these procedural rights cannot be exercised in bad faith. In this situation, the court shall decide on the acceptance of the creditor's claim in accordance to § 106 (1) of the BA. In actual fact, the court should take into account that the debtor-related creditor submitted the objection merely in bad faith and abused their procedural rights. Debtor-related creditors may even make such objections that other claims will be excluded (or at least the amount of the claims will be reduced) and a majority vote is obtained or even control over the proceedings is gained.

The question arises as to what are the consequences in insolvency proceedings in the case of a breach of the obligation to act in good faith when the procedural rights are abused on the basis of ostensible claims. Neither § 200 nor § 328 of the CCP provides clear regulations on the circumstances wherein the obligations are violated. As it has been stated in the legal literature it is not possible to determine *a priori* what are the legal consequences in a case of a breach of the obligation to act in good faith.[57] Although it has been mentioned

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[55] Tallinn District Court ruling in civil case no 2-04-2165 of 26 March 2007 (in Estonian).

[56] Proofs of claims of creditors and protocol of the meeting for the defence of claims in Estonian bankruptcy proceedings in civil case no 2-16-12507.

[57] I. Kull. Hea usu põhimõte kaasaegses lepinguõiguses ['Principle of Good Faith in Modern Contract Law']. Dissertation. Tartu 2002, p. 13 (in Estonian).

that when the principle of exercising procedural rights in good faith is violated, the abused right can be revoked.[58] Moreover, when a participant files false information about the circumstances, the court does not take account of these circumstances and imposes a fine or orders detention in accordance with § 45 (4) of the CCP.[59] In fact, when it becomes evident in insolvency proceedings that a filed claim is ostensible, then § 89 of the GPCCA applies. According to § 89 (2) of the GPCCA, an ostensible transaction is void.

On the other hand, if a filed claim is not ostensible, but legitimate, for example on the basis of a usual contractual transaction, debtor-related creditors may also abuse the procedural rights of non-related creditors. Debtor-related creditors may intentionally harm the rights and interests of non-related creditors by taking such decisions in the proceedings which are beneficial only to them. In this case, § 86 (1) of the GPCCA applies. According to the said provision, a transaction which is contrary to good morals or public order is void. This means that when debtor-related creditors vote intentionally in such a way that harms the rights and interests of non-related creditors, this is against the principle of good faith and such creditors' votes are void in accordance with § 86 (1) of the GPCCA.

Under the current law, following the general principle of good faith can seem to be one of the solutions to the problem of how to prevent debtor-related creditors from gaining control over insolvency proceedings on the basis of ostensible or legitimate claims. If debtor-related creditors participate in the proceedings in order to harm the rights and interests of non-related creditors, their procedural rights cannot be taken into account. The voting rights of debtor-related creditors should be based on the justice and on the principle of good faith – a general principle of civil law – according to which participants in civil proceedings may not abuse their procedural rights.

Nevertheless, following the principle of good faith does not solve the problem that shareholders have the right to participate in insolvency proceedings on the basis of subordinated loan claims. Moreover, there is still no case law according to which the participation of debtor-related creditors in insolvency proceedings is against the principle of good faith if decisions are taken by a majority of the votes of debtor-related creditors, but the decisions are against the common interests of other creditors. Those decisions, even though when they harm the common interests of creditors, are often not contested because of the additional resources.

Due to the significantly different interests of different types of creditors and in order to prevent abuse of procedural rights in insolvency proceedings, such a solution must be found that will ensure the protection of the common rights and interests of non-related creditors when debtor-related creditors participate in insolvency proceedings in Estonia.

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[58] V. Kõve, I. Järvekülg, J. Ots, M. Torga (koost.) (see Note 49), CCPC § 200/3.1.3.2.

[59] V. Kõve, I. Järvekülg, J. Ots, M. Torga (koost.) (see Note 53), CCPC § 328/3.1.5.

3. RESTRICTIONS ON THE VOTING RIGHTS OF DEBTOR-RELATED CREDITORS IN REORGANISATION PROCEEDINGS

3.1. The Bases for the Formation of Creditor Groups

In Estonian reorganisation proceedings the voting procedure is governed by § 24 of the RA which prescribes two basic voting rules. Firstly, the number of votes is based on the amounts of the creditors' claims. According to § 24 (2) of the RA, the number of the creditor's votes is proportional to the amount of the creditor's principal claim. Secondly, pursuant to § 21 (2) and § 24 (4) of the RA, creditors with the same rights can be divided into separate groups. § 21 (2) of the RA only provides that a reorganisation plan may prescribe that the claims of creditors are satisfied by each creditor group separately. The phrasing of the provision seems to concern only the satisfaction of claims. However, according to § 24 (4) of the RA, if creditors are divided into separate groups, voting also takes place in different groups. The Supreme Court has also stated that it is not obligatory to form creditors groups in reorganisation proceedings.[60] This means that the result of the voting may depend on the formation of creditor groups. Yet, it is unclear in which circumstances should different creditor groups be formed and which creditors should be divided into separate groups. This means that according to the RA, there is an extensive right of discretion to form creditor groups in such a way as to ensure the acceptance of the reorganisation plan.

The RA does not even state the minimum requirements regarding the situations where creditors will be divided into different groups. § 21 (2) of the RA prescribes one, albeit unclear requirement for forming different creditor groups. According to this provision, creditors with the same rights form one group. Nevertheless, it is unclear what is meant by "the same rights". The law only prescribes that the bases and reasons for the formation of groups shall be set out in the reorganisation plan. In addition, there is no uniform case law that would show in which cases are separate groups of creditors justified, which creditors have different rights and who should therefore vote in a different group. The proposals to amend the RA merely set out that in the case of determining the similarity of rights, particular pledge or other right of the creditors' secured claim should be taken into account.[61] Thus, the proposals to amend the RA do not provide clear regulations stating which rights shall be divided into separate groups. However, it has been mentioned that creditor groups must be specified in clear terms.[62]

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[60] The Supreme Court ruling in case no 3-2-1-122-09 of 18 November 2009, para 18 (in Estonian).

[61] A. Õunpuu (see Note 51), pp. 4, 16.

[62] B. Wessels, S. Madaus. Business Rescue in Insolvency Law in Europe: Introducing the ELI Business Rescue Report. – International Insolvency Review 2018/27 (2), p. 268. The European Law Institute. Rescue of Business in Insolvency Law. European Law Institute

Despite the many problems in practice, case law has not provided clear solutions for the problem of forming creditor groups either. The Supreme Court has not given clear guidelines on the formation of creditor groups and has not specified what is meant by "the same rights" in § 21 (2) of the RA. The Supreme Court has only provided general rules and has claimed that if creditors with non-identical rights and interests are treated significantly differently in the reorganisation plan regardless of the nature of applied reorganisation measures, for example a different payment deadline or percentage of satisfaction of the claim, it also means, in essence, that creating groups is compulsory.[63] The Supreme Court has maintained this position five years later.[64] Thus, when interpreting "the same rights" provided in § 21 (2) of the RA, the Supreme Court has not been guided by the creditors' claims or their rights, but by the fact of how the creditors' claims will be satisfied according to the reorganisation plan in the future in comparison with the creditors in the same group. Although it has not been explicitly specified in the law what is meant by the same rights in § 21 (2) of the RA, the idea cannot be that these rights concern only the issue of how are the creditors' claims treated in reorganisation proceedings. Moreover, it has been prescribed in this provision that creditors with the same rights form one group. The objective of the provision should be that the creditors' rights regarding their claims are the same as the rights of other creditors in the same group, taking into account preferential rights, but also restrictions when this is justified. Therefore, when creditors have different rights, a different group should be formed for them, although the formation of different creditor groups can be a time-consuming and complex process.

The most substantial problem with the voting process in reorganisation proceedings is that the formation of different creditor groups is not obliged by the RA and there are no special provisions for debtor-related creditors. In fact, according to the Article 9 (3) of the European Parliament legislative resolution of 28 March 2019 on the proposal for a directive of the European Parliament and of the Council on preventive restructuring frameworks, second chance and measures to increase the efficiency of restructuring, insolvency and discharge procedures and amending Directive 2012/30/EU, which prescribes the procedure of the adoption of the restructuring plan, Member States may exclude from the right to vote any related party of the debtor or the debtor's business, with a conflict of interest under national law. This indicates that, despite the problems in practice, the directive will not oblige the debtor to restrict the voting rights of related creditors, but this is the discretion of each Member State.

2017, p. 28. Available at https://www.europeanlawinstitute.eu/fileadmin/user_upload/p_eli/Publications/Instrument_INSOLVENCY.pdf (most recently accessed on 20.05.2019).

[63] The Supreme Court ruling in case no 3-2-1-25-11 of 9 May 2011, para 40 (in Estonian).

[64] The Supreme Court ruling in case no 3-2-1-58-16 of 14 September 2016 (in Estonian). The Supreme Court ruling in case no 3-2-1-164-16 of 1 March 2017 (in Estonian).

In Estonian practice, the lack of voting rules has lead to a situation where non-related creditors do not participate in the voting process in reorganisation proceedings. The legitimacy of the voting process seems questionable and it appears unfair that debtor-related creditors can take decisions about important issues concerning the debtor and the proceedings. The consequence is that the reorganisation plan is not accepted by the creditors. Therefore, the debtor has to terminate their business activities and file a bankruptcy petition to the court. However, such consequences may be against the common interests of non-related creditors. As is generally known, the creditors' claims are satisfied to a greater extent in reorganisation proceedings than in bankruptcy proceedings. Therefore, the question is how should the determination of the number of votes to debtor-related creditors be regulated by law in order to ensure a legitimate voting process and the protection of the creditors' common interests in insolvency proceedings.

The problem is related to preparing the reorganisation plan, because different creditor groups are formed and the number of creditors' votes are determined by the same person. This, in turn, means, that the same person also verifies the creditors' claims which are the bases for determining the number of votes. According to § 16 (3) p 3 of the RA, the reorganisation adviser only assists the debtor during the preparation of the reorganisation plan. On the other hand, § 20 (1) of the RA prescribes that after the commencement of reorganisation proceedings the reorganisation adviser prepares a reorganisation plan in the name of the debtor. Thus, according to the provisions in the RA, it is unclear whether the reorganisation plan should be prepared by the debtor or by the adviser. It has been mentioned that the purpose of the law is that the adviser's main duties would be providing information, help, counsel and control.[65] The debtor has to prepare the reorganisation plan on their own, but has an opportunity to get help and counsel from the adviser.[66] This means that the debtor prepares the reorganisation plan and is able to determine the voting procedure in such a way which is useful for the acceptance of the plan, because the RA does not provide clear rules for the voting process. The reorganisation adviser is not clearly obliged by the law to verify the bases for the formation of creditor groups. However, debtor-related creditors cannot vote in a way that their votes are decisive for the approval of the reorganisation plan, as this harms the common rights and interests of other creditors.

Moreover, in case-law, the question has arisen of whether debtor-related creditors should vote in the same group with other creditors or not. Estonian court practice has not been uniform regarding the disputes concerning debtor-related creditors' participation in the voting process of reorganisation proceedings. In practice, there have been disputes which have arisen from the statements of non-related creditors, who claimed that they have not been treated

[65] Saneerimisseaduse eelnõu seletuskiri (see Note 28), pp. 22–23.
[66] I. Niklus (see Note 5), p. 371.

equally with debtor-related creditors in the reorganisation plan.[67] The positions of the courts have been different. In some civil cases the courts have been simply of the opinion that the RA does not distinguish between debtor-related creditors and other creditors.[68] Moreover, in some of these court rulings the situation has been have compared to bankruptcy law, claiming that the BA also does not distinguish between debtor-related creditors and other creditors.[69] On the other hand, in another case, the county court has stated that the creditors' relatedness to the debtor has no legal effect and unlike as in bankruptcy proceedings, relatedness does not mean that the violation of other creditors' rights should automatically be presumed.[70] Nevertheless, this statement cannot be accepted. The purpose of the formation of creditor groups in reorganisation proceedings is to treat creditors with the same rights equally, but debtor-related creditors may have different rights and interests from that of non-related creditors. In fact, in the given cases the courts have not sufficiently analysed the nature of debtor-related creditors nor examined whether and how their rights and interests differ from that of other creditors. This means that the bases for the formation of creditor groups have not been analysed sufficiently. The mere fact that the BA does not lay down any restrictions on the voting rights of debtor-related creditors cannot justify the matter that restrictions cannot be implemented in reorganisation proceedings.

In Estonian practice, there are only few cases where the court has claimed that a separate group should be formed for debtor-related creditors. Harju County Court found in its ruling that debtor-related creditors shall be divided into a different group.[71] The court analysed the principle of equal treatment of creditors and found that a situation where there are secured and unsecured creditors as well as debtor-related creditors, and they are not divided into different groups, even though the measures of debt transactions are different, is in contravention of the purpose of reorganisation, since the creditors have different rights. The court found that debtor-related creditors should belong to a separate group from other creditors and the votes of debtor-related persons cannot be the decisive factor in the transformation of other creditors' claims. The court noted that the purpose of creditor groups is to ensure that creditors with the same interests and rights are treated equally. Debtor-related persons clearly have the same interests that distinguish them from other creditors. Nevertheless, this court ruling only provides a general statement that debtor-related creditors have different rights and interests in comparison with non-

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[67] See e.g. The Supreme Court ruling in case no 3-2-1-122-09 of 18 November 2009 (in Estonian). Pärnu County Court ruling in case no 2-09-21196 (in Estonian). Harju County Court ruling in case no 2-09-12156 (in Estonian).

[68] The Supreme Court ruling in case no 3-2-1-122-09 of 18 November 2009 (in Estonian). Pärnu County Court ruling in case no 2-09-21196 (in Estonian).

[69] The Supreme Court ruling in case no 3-2-1-122-09 of 18 November 2009, para 18 (in Estonian).

[70] Ruling of Pärnu County Court 2-09-21196 (in Estonian).

[71] Harju County Court ruling in civil case no 2-09-12156 (in Estonian).

related creditors, but still does not indicate how the rights and interests of debtor-related creditors differ from that of other creditors.

Furthermore, the Supreme Court's ruling about the formation of different creditor groups has made dividing creditors into different groups even more incomprehensible and unclear.[72] The Civil Chamber has noted that when assessing the conditions for submitting a reorganisation plan unaccepted by the creditors to the court for approval, one should, at least by definition, take account of the creditors' types (and of the bases and extent of the claims) at the time of deciding on the acceptance of the reorganisation plan, i.e. not take account of future changes, *inter alia*, payment of debts and waiver of claims. It is still unclear what is meant by "taking account of the creditors' types". However, taking into account the principle from the RA and the opinion of the Supreme Court, which state that creditors with the same rights and of the same type form one group, it can be concluded that debtor-related creditors should be divided into a separate group from non-related creditors in the voting process of reorganisation proceedings.

Since a rule to form a separate group for debtor-related creditors' claims has not been explicitly laid down in the RA and the Supreme Court case law has not provided specific rules either, the principle is that the formation of groups is not compulsory. However, in practice, non-related creditors prefer having separate groups for debtor-related creditors in order to meet their interests. In fact, when forming groups, the debtor does not have to take account of only the interests of creditors, but also of the debtor's. It has been mentioned that nowadays the scope of the insolvency regime is changing, which means that in addition to the interests of creditors, the insolvency regime should also include the interests of the debtor and civil society.[73] The Supreme Court has also stated that in reorganisation proceedings the interests of the debtor are somewhat more important than the interests of the creditors.[74] According to this statement, an important requirement is that the creditors' interests cannot be seriously infringed and the treatment of the creditors' claims in reorganisation proceedings should be compared with their treatment in bankruptcy proceedings. Nevertheless, it has not been actually specified in this Supreme Court case in which cases could the creditors' interests be seriously infringed. However, according to the statement of the Supreme Court, the reason why the interests of the debtor should be more important comes from § 2 of the RA, according to which the objective of reorganisation is for an enterprise – to overcome economic difficulties, to restore its liquidity, improve its profitability and ensure its sustainable management. Yet, the common interests of creditors should be greatly taken into

[72] The Supreme Court ruling in civil case no 3-2-1-164-14 of 1 March 2016, para 19.2. (in Estonian).

[73] G.-J. Boon. Harmonising European Insolvency Law: The Emerging Role of Stakeholders. – International Insolvency law Review 2018/27 (2), p.160.

[74] The Supreme Court ruling in case no 3-2-1-122-09 of 18 November 2009, para 19 (in Estonian).

account, as the reorganisation plan should follow their rights and interests, too. Otherwise the reorganisation plan will not be accepted by the creditors. In addition, § 1 of the RA states clearly that the aim of reorganisation proceedings is to take account of the interests and protect the rights of creditors, too.

Unlike Estonian reorganisation law, other countries' legislation has made it compulsory to divide particular creditors into separate groups in the voting process. This is seen, for example, in German and US insolvency law. As has been said about the provisions prescribed in the RA, it has been mentioned in German legal literature that § 222 of the InsO, which regulates the formation of creditor groups, bears some resemblance to a central provision of the US reorganisation procedure governed by Chapter 11 of the Bankruptcy Code.[75]

In Germany, one of the most important provisions on the content of an insolvency plan and the insolvency plan procedure as a whole is § 222 of the InsO, which regulates the formation of different creditor groups and specifies the distinctions made between the creditors. Due to a group-related voting process, which is regulated by § 243 of the InsO, and because of the fact that in some cases there are no rules for the formation of groups, it has been noted that "skillful" group formation will regularly be a key factor in the prospects of success of a proposed plan.[76]

However, § 222 of the InsO has been one of the most heavily criticised provisions on the insolvency plan procedure right from the beginning. It has been feared that group-related voting process pursuant to § 243 of the InsO could be manipulated by a group-building strategy for the purpose of accepting the submitted plan.[77] This means that the legal formation of groups can be of particular strategic interest for the successful acceptance of the plan by the participants. This is always the case if such participants can be identified in advance whose voting behaviour for the adoption of the plan will tend to be negative or if they have made their voting behaviour dependent on special treatment. Sometimes the planner of creditor groups is faced with the decision to comply with the request for a special position or counteract it within the scope of legal options. In both cases there is a risk that the court will deny approving the insolvency plan or another party will appeal against the insolvency plan. As it has been recognised, even a subsequent revocation of the insolvency plan is not precluded.[78] Yet, it has been stated that the rules on and control of the groups are provided by the law in such a way that abusing group-related voting procedure can actually be avoided.[79]

Objections to group-related voting procedure have been raised not only on the basis of alleged risks of manipulation, but also with regard to restricting the

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[75] R. Stürner, H. Eidenmüller, H. Schoppmeyer. Münchener Kommentar zur Insolvenzordnung. Band 3. 3. Auflage. München, Verlag C.H. Beck 2014. – InsO § 222, Rn. 20.

[76] R. Stürner, H. Eidenmüller, H. Schoppmeyer (see Note 75), InsO § 222, Rn. 1–11.

[77] R. Stürner, H. Eidenmüller, H. Schoppmeyer (see Note 75), InsO § 222, Rn. 1–11.

[78] A. Fridgen, A. Geiwitz, B. Göpfert. BeckOK InsO mit InsVV und EuInsVO. 13. Edition. Stand: 28.01.2019. München, Verlag C.H. Beck 2019. – InsO § 222, Rn. 5.

[79] R. Stürner, H. Eidenmüller, H. Schoppmeyer (see Note 75), InsO § 222, Rn. 1–11.

principle of equal treatment, which is prescribed in § 226 (1) of the InsO.[80] It has been noted that forming different creditor groups means deviating from the general principles of insolvency law.[81] The principle of equal treatment according to § 226 (1) of the InsO must be taken into account by the planner of the reorganisation plan.[82] However, it has been also accepted that according to § 226 (1) of the InsO, the principle of equal treatment of creditors is necessary only within each group.[83] Therefore, § 222 (1) of the InsO prescribes which groups have to be formed with reference to the parties' different legal status in different creditors' groups, which ensures following the principle of equal treatment of creditors in the particular group. It has been concluded that forming different groups is obligatory in the case of parties with different legal status.[84] Optional group formation is set out in section 2, which makes it possible to take account of the creditors' different economic interests. Further differentiation, as has been stated, makes sense with regard to the equal treatment requirement of § 226 of the InsO if economic interests within a group differ significantly.[85] However, when forming different creditors groups, it must be taken into consideration that according to § 251 (1) p 2 of the InsO, no creditor may be put at a disadvantage by the plan in comparison with the situation without a plan.[86]

As mentioned above, according to § 222 (1) of the InsO, a clear distinction should be made between participants who have "differing legal status". This means that a distinction must be made between: 1) creditors entitled to separate satisfaction if their rights are encroached upon by the plan (§ 222 (1) p. 1, §§ 49–51 of the InsO; 2) non-lower-ranking creditors (§ 222 (1) p. 2, § 38 of the InsO); 3) each class of lower-ranking insolvency creditors, unless their claims are deemed to be waived pursuant to § 225 (§ 222 (1) p. 3, § 39 of the InsO); 4) persons with a participating interest in the debtor when their share rights or membership rights are included in the plan. In addition, according to § 222 (3) sentence 2 of the InsO, a separate group may be formed for persons who are slightly involved, provided they hold less than 1% or less than EUR 1,000.00 of the liable capital. This does not exclude that the creditors within these groups may have different legal statuses. Nevertheless, mixed groups of legal statuses referred to in section 1 are considered to be inadmissible.[87]

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[80] R. Stürner, H. Eidenmüller, H. Schoppmeyer (see Note 75), InsO § 222, Rn. 1–11.

[81] U. Foerste. Pankrotiõigus ['Bankruptcy Law']. Juura 2018, p. 195 (in Estonian).

[82] A. Fridgen, A. Geiwitz, B. Göpfert (see Note 78), InsO § 222, Rn. 6, 7.

[83] D. Andres, R. Leithaus, M. Dahl. Insolvenzordnung (InsO). Kommentar. 4. Auflage. München, Verlag C.H. Beck 2018. – InsO § 222, Rn. 16–18. R. J. de Weijs. Harmonisation of European Insolvency Law and the Need to Tackle Two Common Problems: Common Pool and Anticommons. – International Insolvency Review 2012/21 (2), p. 75.

[84] U. Foerste (see Note 81), p. 194. A. Fridgen, A. Geiwitz, B. Göpfert (see Note 78), InsO § 222, Rn. 1–7.

[85] D. Andres, R. Leithaus, M. Dahl (see Note 83), InsO § 222, Rn. 1, 2–6.

[86] E. Braun. Insolvenzordnung (InsO). InsO mit EuInsVO. Kommentar. 7. neu bearbeitete Auflage. München, Verlag C.H. Beck 2017. – InsO § 222, Rn. 1–3.

[87] E. Braun (see Note 86), InsO § 222, Rn. 4–5.

When forming different creditor groups for voting, the question arises as to whether group formation shall be rights-based or person-based. The principle provided in § 222 of the InsO, according to which it is compulsory to form separate creditor groups for particular creditors, is guided by the nature of the creditors' claims and is more rights-based than person-based. As has been mentioned, group formation is also more rights-based in practise.[88] For example, a particular person may be a holder of a segregation right, a creditor of a non-subordinated insolvency claim as well as a creditor of a subordinated insolvency claim. In this case, the respective rights of this person can be categorised into three different groups (see § 222 (1) sentence 2 p.-s 1 to 3). Yet, such a division raises the question of how many creditors have to be in one group. § 222 of the InsO consistently prescribes that "groups" have to be formed. This phrasing suggests that each group must contain more than one right or party. Nevertheless, it has been accepted that in certain circumstances a group for only one right (or one participant) can be formed when the right of this creditor differs from the rights of other creditors belonging to other groups.[89]

Although it is provided by the law which groups of creditors have to be formed based on the rights of creditors, § 222 (2) of the InsO stipulates an additional requirement: creditors in the same group must also have the same economic interests. While section 222 (2) sentence 1 of the InsO makes a decisive reference to the similarity of economic interests, it also clearly deviates from the legal position expressed in Chapter 11 of the US Bankruptcy Code. According to the classification provided in § 1122 (a) of the US Bankruptcy Code, only the substantial similarity of claims or certain interests is relevant. German law requires grouping according to different legal positions and at the same time allows grouping according to similar economic interests.[90] Pursuant to the US Bankruptcy Code, a claim may be placed in a particular group only if the claim or interest is substantially similar to other claims or interests in the same group. Therefore, it has been asked whether the claim is substantially similar to other claims in the relevant group.[91] However, this is based on the same interests of the creditors, not their same rights. This means that according to US insolvency law, the division of a claim into a separate group depends on the nature of the claim.

According to German legislation, an optional group formation is possible if the insolvency creditors therein have similar economic interests, and thus differ from other group members.[92] Anyone who presents a plan can assign participants with the same legal status but different economic interests to different groups. Nevertheless, it has been accepted that this is not compulsory, even in

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[88] D. Andres, R. Leithaus, M. Dahl (see Note 83), InsO § 222 Rn. 2–6.

[89] R. Stürner, H. Eidenmüller, H. Schoppmeyer (see Note 75), InsO § 222, Rn. 31.

[90] R. Stürner, H. Eidenmüller, H. Schoppmeyer (see Note 75), InsO § 222, Rn. 83–101.

[91] Bankruptcy Code, Rules and Official Forms, 1992: Law School Edition. West Publishing Co. 1992, p. 328.

[92] D. Andres, R. Leithaus, M. Dahl (see Note 83), InsO § 222, Rn. 6a–11.

the case of participants with very different economic interests.[93] In practice, it is very unlikely that all economic interests of two or more parties are identical. The deciding factor must therefore be whether the main insolvency-related economic interests of two or more parties to be grouped are identical.[94]

Reference to similar economic interests of individual or several interested parties may in individual cases come from their (special) relationship with the debtor. This should apply, as has been recognised, for example to longstanding business partners of the debtor, to creditors who are at the same time in a shareholder position or affiliated with the debtor under corporate law, or to relatives of the debtor, who are simultaneously in a creditor position, of course, but also to creditors with whom a corresponding business partnership does not exist.[95] Thus, according to this statement, it is set out in German legislation that when the creditors have a special relationship with the debtor, this may also mean different interests in comparison with non-related creditors, which may be a basis for forming a separate creditor group.

In Germany, the task of forming the creditor groups has been given to the planner of the reorganisation plan.[96] The planner is the person who also decides whether the same economic interests give a reason for forming another different creditor group.[97] The reorganisation plan is, in turn, carried out by the debtor or the trustee.[98] However, it has been noted that the trustee is the planner of creditor groups.[99] The planner must first assess how the rights of individual creditors are affected by the plan. Nevertheless, it has been recognised that the assumptions can be based on strategic considerations. The limits are finally regulated in § 222 and there cannot be a general prohibition of abusing the law.[100] Yet, it is discussed in legal literature whether the formation of groups on the basis of different economic interests may manipulate the voting process. In order to avoid the manipulation, groups must be at least appropriately defined.[101] In the interests of verifiability, the criteria of the separation must be indicated in the plan according to § 222 (2) of the InsO.

As regards shareholders' voting rights in German reorganisation proceedings, they can participate in the reorganisation proceedings in two different ways: 1) participating as lower-ranking insolvency creditors (§ 222 (1) p. 3); 2) participating as persons whose share rights or membership rights are included in the plan (§ 222 (1) p. 4). In both cases, these debtor-related creditors are divided into separate creditor groups from non-related creditors.

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93 E. Braun (see Note 86), InsO § 222, Rn. 6–9.
94 R. Stürner, H. Eidenmüller, H. Schoppmeyer (see Note 75), InsO § 222, Rn. 83–101.
95 R. Stürner, H. Eidenmüller, H. Schoppmeyer (see Note 75), InsO § 222, Rn. 83–101.
96 A. Fridgen, A. Geiwitz, B. Göpfert (see Note 78), InsO § 222, Rn. 8–10a.
97 U. Foerste (see Note 81), p. 195.
98 D. Andres, R. Leithaus, M. Dahl (see Note 83), InsO § 222, Rn. 13–15.
99 A. Fridgen, A. Geiwitz, B. Göpfert (see Note 78), InsO § 222, Rn. 6, 7.
100 A. Fridgen, A. Geiwitz, B. Göpfert (see Note 78), InsO § 222, Rn. 8–10a.
101 R. Stürner, H. Eidenmüller, H. Schoppmeyer (see Note 75), InsO § 222, Rn. 8.

However, it has been mentioned that in Germany a group of lower-ranking creditors will be formed only in the case of exceptional circumstances.[102] This enables to find suitable solutions for subordinated creditors, which are adapted to the circumstances of each individual case.[103] According to § 225 of the InsO, the claims of lower-ranking insolvency creditors are usually deemed waived, unless the insolvency plan provides otherwise. Subordinated insolvency creditors participate in the proceedings only when subordinated claims have been requested by the insolvency court in accordance with § 174 (3). This is – exceptionally – the case only when the bankruptcy estate is sufficient to fully satisfy all claims of all creditors or when non-subordinated insolvency creditors waive part of their claims in favour of subordinated creditors. It has been mentioned that the provision is therefore hardly relevant to practice.[104] This means that loans, which are usually granted by debtor-related persons and given for the purpose of equity capital contribution, will be deemed waived. In this case, no group is to be formed for them, and therefore the creditors are not involved in the voting process.[105] The principle is that subordinated insolvency creditors generally receive nothing because of incomplete satisfaction of the claims of insolvency creditors in proceedings. Furthermore, subordinated insolvency creditors are usually not preferred in comparison with standard insolvency proceedings. Therefore, inclusion of subordinated loan claims in the plan carries the risk that the insolvency creditors object to the insolvency plan pursuant to § 251 (2) of the InsO. § 225 of the InsO contains a rule of interpretation, so that special explanations in the insolvency plan are dispensable.

If a group of lower-ranking creditors is formed, it has been noted that a single group shall be formed for each rank class specified in § 39 (1) of the InsO in accordance with section 1 sentence 2 point 3.[106] Moreover, § 243 and § 237 of the InsO will apply. According to § 243 of the InsO, each group of concerned parties with voting rights vote on the insolvency plan separately. § 237 of the InsO provides a regulation on the voting rights of the insolvency creditors. Pursuant to § 237 (1) of the InsO, section 77, subsection 1, first sentence, as well as subsections 2 and 3 no. 1 apply *mutatis mutandis* to the voting rights of the insolvency creditors while voting on the insolvency plan. This means that the second sentence of § 77 (1) of the InsO does not apply and lower-ranking creditors have voting rights in reorganisation proceedings if their claims are impaired by the plan. If the group is not formed, subordinated insolvency creditors are protected by § 250 and § 251 of the InsO.

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[102] D. Andres, R. Leithaus, M. Dahl (see Note 83), InsO § 225, Rn. 1–4.

[103] H. Hirte, H. Vallander. Insolvenzordnung (InsO). Kommentar. Band 1. 15. Auflage. München, Verlag Franz Vahlen 2019. – InsO § 225, Rn. 1–4.

[104] J. Nerlich, V. Römermann. Insolvenzordnung (InsO). Kommentar. 37. Ergänzungslieferung. Stand: Oktober 2018. München, Verlag C.H. Beck 2018. – InsO § 246, Rn. 1–8.

[105] K. Schmidt. Insolvenzordnung. InsO mit EuInsVO. 19. Auflage. München, Verlag C.H. Beck 2016. – InsO § 225, Rn. 1–3.

[106] K. Schmidt (see Note 105), InsO § 222, Rn. 9.

The special clause for the consent of lower-ranking insolvency creditors with regard to the prohibition of obstructing the acceptance of the insolvency plan results from § 246 of the InsO. As has been noted in legal literature, it is relevant only in practically rare cases, contrary to the principle of § 225 (1) of the InsO.[107] § 246 of the InsO prescribes regulations on the consent of lower-ranking creditors in insolvency proceedings: 1) the consent of the groups ranking behind § 39 (1) p. 3 of the InsO shall be deemed to have been given if none of the insolvency creditors receives an advantage under the plan compared with the creditors forming such groups; 2) if none of the creditors forming a group votes at all, the consent of this group shall be deemed to have been given.

The provision relates to claims for the debtor's gratuitous performance of a consideration (§ 39 (1) p. 4 of the InsO), claims for the return of a shareholder loan or equivalent claims (§ 39 (1) p. 5 of the InsO), and claims with a contractually agreed subordination (§ 39 (2) of the InsO). The approval of these groups is deemed granted if no creditor is treated preferentially in the plan in comparison with other creditors in these groups. This is, on the one hand, based on the proportionate satisfaction of non-subordinated insolvency creditors and, on the other hand, of subordinated debtors of § 39 (1) p.-s 4 and 5 and section 2 of the InsO. If subordinated creditors receive at least the same percentage of their claims as non-subordinated insolvency creditors, the approval of these groups is deemed to have been granted.[108] This means that subordinated creditors cannot vote in the proceedings if they are treated in the same way as other insolvency creditors.[109]

Furthermore, § 246 p. 2 of the InsO prevents a group of creditors' non-participation in the vote from leading to a situation where the required majorities within the meaning of § 244 of the InsO are not achieved, because the group is regarded as a non-affirmative group, and thus the approval of all groups or the majority of the groups is missing. Especially in the case of claims described in § 39 (1) p. 5 of the InsO (repayment of a shareholder loan), the group will usually be small, possibly consisting of only one shareholder. If this shareholder has not taken part in the vote because of disinterest, it has been noted that it would prevent or delay confirmation of the plan.[110] The legislator has taken account of the fact that it would be problematic to grant subordinated insolvency creditors an equal say in the insolvency plan, and thus has enabled to block even unanimous decisions of the main creditors, although a satisfaction of their demands is not to be expected. Therefore, § 246 of the InsO enables (fictitious) approval of the insolvency plan by subordinated insolvency creditors as a consequence of the economic worthlessness of subordinated claims, so that

[107] J. Nerlich, V. Römermann (see Note 104), InsO § 246, Rn. 1–8.
[108] J. Nerlich, V. Römermann (see Note 104), InsO § 246, Rn. 1–8.
[109] E. Braun (see Note 86), InsO § 246, Rn. 1–3.
[110] J. Nerlich, V. Römermann (see Note 104), InsO § 246, Rn. 1–8.

their participation in the voting is unnecessary despite the formal right to vote. In this way, voting should be facilitated.[111]

It has been mentioned that another and a more usual way for shareholders to participate in reorganisation proceedings is the situation where their share rights or membership rights are included in the reorganisation plan according to § 225a of the InsO.[112] Pursuant to § 225a (2) of the InsO, the plan may provide that the creditors' claims may be converted into share rights or membership rights of the debtor. In this case, § 238a and § 246a of the InsO apply. The voting rights of the debtor's shareholders are determined solely by their participating interest in the debtor's subscribed capital or assets. The voting rights of an individual member, as it has been accepted, is calculated by the nominal amount of their cooperative share.[113] However, if none of the members of a group of shareholders has voted at all, the consent of the group is deemed to have been given. Thus, the legislator has enabled again the approval of the plan in the case where shareholders have not participated in the voting process.

Therefore, a comparison of Estonian and German reorganisation law indicates that the most substantial differences lie in the principle of creditor group formation and in the regulation concerning the voting rights of shareholders with subordinated loan claims. In the RA, it is only provided that creditors with the same rights shall form one group, but the debtor is not obliged to form different creditor groups in the voting process. Since the reorganisation plan is made and creditor groups for voting purposes are formed by the debtor, the creditor groups may be formed in such a way that is in favour of the debtor and their related creditors. Therefore, the votes may be manipulated in order to ensure the acceptance of the reorganisation plan, which may be against the common interests of non-related creditors. In fact, it may be deviated from the principle of protecting the interests of creditors in the formation of creditor groups, but these interests must not be significantly harmed.

Moreover, the RA does not have any restricting regulations on the voting rights of debtor-related creditors. This means that all debtor-related creditors, including shareholders with subordinated loan claims, can participate in the voting process. Furthermore, there is also no uniform court practice or Supreme-Court case law about voting in reorganisation proceedings that would solve the problems in practise. Therefore, the voting process is not clear and appears to be unlawful with regard to non-related creditors, which means that they do not participate in the voting process and reorganisation plans are not accepted.

In German reorganisation proceedings, the law provides clear rules for the formation of different creditor groups. A clear list of different types of creditors who should vote separately from other creditors has been set out in the law. Creditors in the same group shall have the same rights and, preferably, the same interests. Moreover, these creditor groups are verified by the trustee. The InsO

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[111] R. Stürner, H. Eidenmüller, H. Schoppmeyer (see Note 75). - InsO § 246, Rn. 1–27.
[112] D. Andres, R. Leithaus, M. Dahl (see Note 83), InsO § 222, Rn. 2–6.
[113] A. Fridgen, A. Geiwitz, B. Göpfert (see Note 78), InsO § 238a, Rn. 3–5.

does not stipulate clearly that debtor-related creditors shall vote in a separate group, but since the principle is that creditors in the same group shall have the same interests and debtor-related creditors may have different interests compared to non-related creditors, it must be concluded that debtor-related creditors shall vote in a separate group. Special regulations are prescribed for shareholders with subordinated loan claims who are treated as lower-ranking creditors and vote in a separate group from other creditors. The main starting point of the regulation comes from the fact that they have different rights and interests in comparison with non-related creditors. Moreover, shareholders' subordinated loan claims shall be satisfied after the claims of all other creditors are covered, which is another reason for restricting the voting rights in reorganisation proceedings. When shareholders abstain from voting when accepting the reorganisation plan, the law prescribes another special regulation to not prohibit the acceptance of the plan. In fact, according to the InsO, shareholders with subordinated loan claims can participate in the proceedings only in exceptional circumstances when the court has made a special request.

3.2. Verification of Debtor-Related Creditors' Claims

The current RA does not oblige the debtor to form a separate group for debtor-related creditors for voting purposes and the question arises as to whether legitimate voting can be ensured by other means. In order to ensure a legitimate voting process and avoid abusing the right to vote, it has been noted that certain formalities must be followed and the verifiability must be ensured, taking account of the balanced interests of the various participants involved in the proceedings.[114] According to § 24 (2) of the RA the number of the votes of each creditor is proportional to the amount of the principal claim which has been ascertained. This means that before determining the number of votes it shall be verified whether the creditor's claim is legitimate and justified, which may be a measure to ensure legitimate voting process. Thus, the question arises as to whether the current RA provides a clear obligation to verify creditors' claims, which would ensure a legitimate voting process in reorganisation proceedings and the protection of the common rights and interests of non-related creditors. Another question is whether a specific verification process should be required for debtor-related creditors' claims, because they may submit ostensible claims in cooperation with the debtor in order to obtain the majority of the votes.

According to § 16 (3) p. 6 of the RA, the reorganisation adviser has to assess whether the claim to be transformed is certified and lawful, which is, in fact, the basis for the determination of the number of votes. According to § 16 (3) p. 7 of the RA, if necessary, the adviser also requests evidence regarding the claim to be transformed from the debtor and obligees. When verifying the creditors' claims, the reorganisation adviser is actually guided by the data provided by the

[114] I. Niklus (see Note 5), p. 374.

debtor. A list of debts as at the date of submission of a reorganisation application is appended to the reorganisation petition. Pursuant to § 7 (3) of the RA, the list of debts states the names and details of the creditors and the amount of the principal claim and the collateral claim, but does not include proving documents of the claim.

The phrasings of § 16 (3) p. 6 and p. 7 of the RA are unclear and incomprehensible. § 16 (3) p. 6 of the RA requires the adviser to assess whether the claim is certified and lawful, but § 16 (3) p. 7 of the RA only states that if necessary, the adviser requests evidence regarding the creditor's claim from the debtor or creditor. The question arises as to how the adviser can assess the existence and legality of the creditors' claims without verifying the proving documents of the claim. Since advisers are not expressly obliged by the law to verify the proving documents of the claim, the existence and legitimacy of the creditors' claims may not be verified. However, it has been mentioned that the process of verifying the claims conducted by a reorganisation adviser should be similar to the process of verifying the claims for the defence of claims in bankruptcy proceedings.[115] The current RA does not provide such clear rules for the verification process of the claims as does the BA for the defence of claims. Because of unclear rules the verification of claims in reorganisation proceedings does not correspond to the process of defending claims under the BA.

Moreover, because of the unclear obligations of the adviser, the liability of the adviser is also unclear, although the liability of the reorganisation advisers seems to be the first solution to the problem of how to prevent debtor-related creditors from participating in the proceedings on the basis of ostensible claims. Pursuant to § 17 (1) of the RA, a reorganisation adviser is liable for a breach of their obligation. A reorganisation adviser who has wrongfully caused damage to the debtor by violating the obligations shall compensate for the damage. However, because of unclear regulations concerning the obligations of the adviser with the regard to verifying creditors' claims, the liability of the adviser is questionable. In particular, as regards § 16 (3) p. 6 of the RA in conjunction with § 16 (3) p. 7 of the RA, the question arises as to how can the adviser be liable for a breach of obligation when the obligations are not clearly set out in the law. It remains unclear whether the adviser shall assess the existence and legality of the creditors' claims with the proving documents of the claim or not. This means that the adviser may even not be liable when the creditors' claims are not verified in reorganisation proceedings. In fact, in Estonia there is no case law of the Supreme Court concerning the liability of reorganisation advisers.

Therefore, without clear requirements to verify the existence and justification of creditors' claims, debtor-related creditors may submit claims without fearing that the claims and their bases will be thoroughly verified by the adviser. This, in turn, means that the debtor will be able to manipulate the votes and submit ostensible claims in order to ensure that the reorganisation plan will

[115] I. Niklus (see Note 5), pp. 373–374.

be accepted. However, if it becomes evident that unclear or even ostensible claims have been submitted to the proceedings, it will have significant consequences.

According to § 16 (3) p. 6 of the RA, the adviser has to inform the court of a claim which actually does not exist, the amount of which is unclear or the lawfulness or certification of which cannot be determined. In the light of this, it must be asked, how the adviser can be aware of an unclear claim if there is no clear obligation to identify them. Yet, the vagueness of a claim leads to the proceedings being terminated by the court. Pursuant to § 43 (1) of the RA, the court terminates the reorganisation proceedings if it becomes evident that a claim against the debtor the transformation of which is requested by a reorganisation plan actually does not exist, the amount of the claim is unclear or the reorganisation adviser cannot determine the lawfulness or certification of the claim. The purpose of this provision is to prevent the situation where unclear claims are included in the reorganisation plan. In addition to unclear claims, the reorganisation adviser's inability to verify the claims may also be the basis for terminating the proceedings. As has been stated, the main idea of the law in this case is that unwillingness to submit evidence for the claim is one indication of the possible inaccuracy of the claim.[116] Moreover, according to the proposals to amend the RA, the reorganisation adviser would have an opportunity to make a proposal to the court to restrict the voting rights of debtor-related creditors in the proceedings, for example when the claim has been acquired with the aim of influencing the voting results and using procedural rights in bad faith.[117] In spite of that, no proposals have been made that the RA should explicitly provide that the adviser as an impartial body is obliged to verify the legitimacy of the creditors' claims.

In fact, the legislator's initial idea was that if the reorganisation plan is revoked and the debtor is declared bankrupt within the following three months, the transformed claims of all creditors are deemed to be defended in the bankruptcy proceedings. [118] The justification for the regulation was that when the debtor and creditor have reached an agreement to transform the claim, the debtor has also accepted the existence of the creditor's claim; when an agreement has not been reached, the creditor has no obligation to participate in the reorganisation proceedings. It has been noted that after all, reorganisation is about voluntary agreements between the debtor and their creditors.[119] Moreover, in accordance with the legislator's idea, automatic acceptance of the claim in further bankruptcy proceedings should ensure additional motivation of the creditor to participate in accepting the reorganisation plan. It was admitted that reorganisation proceedings could become one of the measures of withdrawing

[116] Saneerimisseaduse eelnõu seletuskiri (see Note 28), p. 42.
[117] A. Õunpuu (see Note 51), pp. 5, 20.
[118] Saneerimisseaduse eelnõu seletuskiri (see Note 28), p. 47.
[119] S. Madaus. Reconsidering the Shareholder's Role in Corporate Reorganisations under Insolvency Law. – International Insolvency Review 2013/22 (2), p. 107.

money from further bankruptcy proceedings by means of ostensible claims, but considered that such a risk would be reduced by the reorganisation adviser's obligation to verify the legality of the claim and by terminating the reorganisation proceedings in the event of an unclear claim.[120] However, because of the comments to the draft of the RA, the legislator decided to waive the principle of automatic acceptance of the claim and not contradict the principle followed in bankruptcy proceedings to verify whether the filed claims are justified.[121] Moreover, it was stated that such automatic acceptance of the claim in further bankruptcy proceedings might have meant cooperation between the creditors and the debtor exercised in bad faith, which would harm the interests of other creditors.[122]

Despite the fact that automatic acceptance of the claim in further bankruptcy proceedings did not come into effect, it should be laid down that the reorganisation adviser is required to verify the proving documents while assessing the existence and lawfulness of the creditors' claims. This would reduce the possibility of ostensible claims being filed by debtor-related creditors, and also ensure the protection of the rights and interests of non-related creditors by establishing whether the submitted claims are legitimate. Nevertheless, it must be noted that the verification of claims by a reorganisation adviser does not solve the problem when debtor-related creditors participate in the proceedings with legitimate claims, for example shareholders with subordinated loan claims, and start to influence the insolvency proceedings.

As a matter of fact, the court shall verify whether the common rights and interests are ensured in the process of approval of reorganisation plan, especially in the voting process. It has to be verified in a case when the creditors have accepted the reorganisation plan and also in a case when the creditors have refused to accept the plan, but the debtor has submitted an application for the approval of the plan to the court. According to § 28 (2) p. 5 of the RA upon approval, the court shall verify whether the rights of the creditors have not been violated upon voting. Pursuant to § 28 (5) p. 1 of the RA the court refuses to approve the plan and terminates the proceedings if, upon such verification it becomes evident that violation of a requirement arising from the RA has significantly influenced the voting results. In addition, according to § 30 (1) p. 3 of the RA when creditors have refused to accept the reorganisation plan and the debtor has submitted an application to the court for the approval of the plan as the requirements are also met pursuant to § 29 (1) of the RA, then the court shall verify, *inter alia*, if, the plan complies with the requirements provided for in § 21 of the RA, which prescribes the voting process. Although according to the provisions, the court is obliged to ensure the interests of the creditors when approving the reorganisation plan, it has not yet solved the problems that have arisen in practice. The reason is that there is no clear regulation in the law to

[120] Saneerimisseaduse eelnõu seletuskiri (see Note 28), p. 42.
[121] Saneerimisseaduse eelnõu seletuskiri (see Note 28), p. 59.
[122] I. Niklus (see Note 5), p. 376.

oblige the debtor to divide the creditors with different rights and interests into separate groups for the voting purposes and therefore, the court has not strictly verified whether the interests of the creditors are harmed in the process of the acceptance of the plan, especially in the case when the plan is accepted by creditors, who may be, in fact, debtor-related creditors. Article 9 (5) of the European Parliament legislative resolution of 28 March 2019 on the proposal for a directive of the European Parliament and of the Council on preventive restructuring frameworks, second chance and measures to increase the efficiency of restructuring, insolvency and discharge procedures and amending Directive 2012/30/EU also prescribes only general obligation that voting rights and the formation of groups shall be examined by a judicial or administrative authority when a request for confirmation of the reorganisation plan is submitted. Member States may require that the examination and the confirmation of the voting rights and formation of groups will take place at an earlier stage.

Due to the above, the RA does not enable the protection of the common interests and rights of creditors when debtor-related creditors participate in reorganisation proceedings. Moreover, the current law does not provide solutions to the problems regarding the participation of debtor-related creditors in practise. Therefore, Estonian insolvency law should provide rules for restrictions on the voting rights of debtor-related creditors in reorganisation proceedings in order to prevent the situation where that debtor-related creditors have decisive voting rights in the acceptance of the reorganisation plan. The RA should prescribe that the formation of debtor-related creditor groups is compulsory. This group should also include shareholders with subordinated loan claims.

4. RESTRICTIONS ON THE VOTING RIGHTS OF DEBTOR-RELATED CREDITORS IN BANKRUPTCY PROCEEDINGS

4.1. Determination of the Number of Votes of Creditors before the Defence of Claims

All creditors can submit their claims in bankruptcy proceedings according to § 93 (1) of the BA. The provision prescribes in general that all creditors are required to notify the trustee of all their claims against the debtor which arose before the declaration of bankruptcy, regardless of the basis or due dates for fulfilment of the claims. Furthermore, when a claim has been submitted, it gives the creditor the right to vote. The voting process in Estonian bankruptcy proceedings is also related to the amount of the creditor's claim like in reorganisation proceedings. The basis for determining the number of votes is prescribed in § 82 (1) of the BA, which simply provides that the number of votes of each creditor is proportional to the amount of the creditor's claim at the general meeting of creditors. This means that a legitimate voting process can be ensured by legitimate claims, and therefore the trustee shall verify the creditors' claims in order to ensure legitimate bankruptcy proceedings. The question is, whether the BA provides clear rules for the claim verification process in order to ensure a legitimate voting process in bankruptcy proceedings.

In fact, there are no problems in bankruptcy proceedings when the determination of the number of votes takes place after the meeting for the defence of claims. In this case, the trustee has verified whether all of the creditors' claims are justified or not pursuant to § 100 (1) of the BA. However, it has been mentioned that in practice, there are a lot of problems with determining the number of votes before the meeting for the defence of claims, because the creditors' claims are not clear yet.[123] In fact, the main problems have arisen at the first general meeting of creditors, where the most important decisions are adopted. According to § 78 (2) of the BA the creditors elect the bankruptcy committee, decide on the approval of the trustee and continuation of the debtor's activities. Although pursuant to § 74 (3) of the BA persons connected with the debtor, who are listed in § 117 of the BA, cannot be members of the bankruptcy committee, debtor-related creditors may choose suitable members of the bankruptcy committee. This means that debtor-related creditors can influence the course of the proceedings through decisions taken at the general meeting of creditors and through decisions taken by the bankruptcy committee.

When determining the number of votes to creditors, the trustee has to follow § 82 (3) of the BA, which prescribes that until the defence of claims, the number of the votes of each creditor is determined on the basis of the documents, which must be filed to the trustee not later than three working days before the

[123] P. Varul 1994/1 (see Note 4), p. 6. P. Varul 1993/3 (see Note 18), p. 52.

general meeting. This means that the provision regulating the bases for the determination of the number of votes is rather formal and does not take into account whether the claim can actually and legally exist. The provision only refers to formal data and documents which shall be submitted to the trustee within the specified time. Thus, when the formal requirements set out in provisions § 82 (3) and § 94 (1)–(2) of the BA are met, the trustee has to determine the votes to the creditor.

The trustee has to verify the creditors' claims when determining the number of votes, but there are no strict rules laid down in the law on how thoroughly a claim must be verified before the meeting for the defence of claims. Thus, the main problems arising in the voting process in bankruptcy proceedings are caused by the fact that the law does not provide any regulations which specify how the claims shall be verified by the trustee before the meeting for the defence of claims. Moreover, Harju County Court has claimed that the trustee should apply stricter requirements for verification of debtor-related creditors' claims, especially when the transaction, which is the basis of the claim, is made by one and the same person.[124] However, this principle has not been uniformly implemented in proceedings.

When verifying the creditors' claims, the trustee must follow the general obligation, which is provided in § 55 (2) of the BA. According to this provision, the trustee shall perform the obligations with the diligence expected from an accurate and honest trustee and take into consideration the interests of all the creditors and the debtor. This means that the trustee must ensure that the voting rights of debtor-related creditors are legitimate; moreover, the trustee must ensure that debtor-related creditors do not abuse their participation and voting rights in insolvency proceedings. According to § 63 (1) of the BA, a trustee who violates the obligations and thereby wrongfully causes damage to the debtor, a creditor or a person who may claim performance of a consolidated obligation shall compensate for the damage. Yet, the liability of the trustees is questionable, because the BA does not prescribe a clear obligation to verify the substance of the claims before defending the claims in proceedings.

In addition to the trustees' unclear obligation to verify claims before the defence of claims in bankruptcy proceedings, it should be noted that the BA does not provide any rules for voting in different creditor groups nor specify any restrictions on participating in the voting process. This means that all the creditors have equal voting rights at a meeting. These creditors are pledgees, creditors whose claim is filed within the specified term, creditors whose claim is not filed within the specified term, and also debtor-related creditors.

As the Estonian BA has not provided any regulations on debtor-related creditors' participation in the voting process, there are no Supreme Court rulings about debtor-related creditors' participation in bankruptcy proceedings. This does not mean that there is no practice at all. As a matter of fact, there are cases in bankruptcy proceedings which involve the participation of debtor-related

[124] Harju County Court ruling in case no 2-13-32716 of 5 December 2013.

creditors. In these civil cases, debtor-related creditors filed their claims in the bankruptcy proceedings and had the right to vote pursuant to § 82 of the BA.[125] It is not a comprehensive Estonian case law collection, but the cases indicate the main problems arising when debtor-related creditors participate in bankruptcy proceedings, and also demonstrates that many debtor-related creditors participate in the proceedings.

Furthermore, in the above-mentioned cases, debtor-related creditors' claims were mainly based on loan claims, which are, in fact, subordinated loan claims by nature. Moreover, the cases demonstrated that the practice of the trustees is not uniform. Sometimes an objection to the debtor-related creditors' loan claims has been filed and at other times it has not. In fact, even a single trustee's practice has not been uniform. It seems that because of the lack of regulations on the participation of debtor-related creditors in bankruptcy proceedings, the objection to the claims of debtor-related creditors depends on who has control over the process of the proceedings: the debtor or the creditors. However, even if the trustee has filed an objection to the claim of debtor-related creditors, all parties have reached a compromise. Thus, no judicial decision has been made about the disputes over the votes in the described bankruptcy cases. Furthermore, when the claims of debtor-related creditors have been accepted by the trustee or other creditors, debtor-related creditors usually had the majority of the votes. This means that they have had control over the bankruptcy proceedings.

Despite the lack of restrictions on the participation rights of debtor-related creditors in Estonian bankruptcy proceedings, it is contemplated in Estonian company law review as well as in insolvency law review whether it is necessary to restrict the voting rights of debtor-related creditors. It has been noted in insolvency law review that it would be appropriate to restrict the voting rights of all debtor-related creditors at the general meeting of creditors. It has also been stated that restrictions on the voting rights should also apply to such creditors whose claim is acquired from debtor-related creditors during one year before the declaration of bankruptcy. On the other hand, it has been suggested that restrictions should apply until the claim is accepted at the meeting of the defence of claims.[126] The proposed amendment in the intention of developing

[125] See e.g. Harju County Court ruling in civil case no 2-13-32716 of 5 November 2013 (in Estonian). Tallinn Circuit Court ruling in civil case no 2-07-40620 of 31 May 2011 (in Estonian). Proofs of claims of creditors and protocol of the meeting for the defence of claims in Estonian bankruptcy proceedings in civil case no 2-15-15226 of 31 March 2016 (in Estonian). Proofs of claims of creditors in Estonian bankruptcy proceedings in civil case no 2-14-61665 (in Estonian). Proofs of claims of creditors and protocol of the meeting for the defence of claims in Estonian bankruptcy proceedings in civil case no 2-15-19333 of 12 July 2016 (in Estonian). Proofs of claims of creditors and protocol of the meeting for the defence of claims in Estonian bankruptcy proceedings in civil case no 2-16-7967 of 17 October 2016 (in Estonian). Proofs of claims of creditors and protocol of the meeting for the defence of claims in Estonian bankruptcy proceedings in civil case no 2-13-17637 of 14 February 2014 (in Estonian).

[126] K. Kerstna-Vaks. Maksejõuetuse revisjon ['Review of the Insolvency Law']. 2018, pp. 50, 52. Available at https://www.just.ee/sites/www.just.ee/files/kersti_kerstna-

the draft act to amend the BA and other acts is to restrict the voting rights of debtor-related persons in a situation where the claim of the debtor's shareholder is a loan claim and it is subordinated to other creditors' unsecured claims. As a result of the restriction, those debtor-related creditors would not have the right to vote at the general meeting of creditors.[127] It has been stated in company law review that the law should restrict the voting rights of such creditors in bankruptcy proceedings whose claim is based on a subordinated loan, and the German law should be regarded as model law.[128]

German insolvency law provides regulations and specific rules on the voting rights of debtor-related creditors in bankruptcy proceedings, in particular for shareholders with subordinated loan claims, who are recognised as lower-ranking creditors according to § 39 (1) p. 5 of the InsO. The InsO sets out an automatic subordination of loans which are provided by shareholders who own more than 10% of the shares or who are members of the debtors' management bodies. However, as in reorganisation proceedings, lower-ranking creditors can submit their claims in bankruptcy proceedings only in exceptional circumstances. In this case, a special request for that is made by the court in accordance with § 174 (3) of the InsO.

When the court has made a request that lower-ranking creditors can submit their claims in the bankruptcy proceedings, the question arises as to whether they have the right to vote. The general provision regulating the determination of the number of votes to creditors and specifying which creditors have the right to vote is § 77 of the InsO. In fact, § 77 (1) of the InsO prescribes that lower-ranking creditors have no voting rights. This means that insolvency creditors are entitled to vote according to § 38 of the InsO, but subordinated creditors are not entitled to vote according to § 77 (1) p. 2 and § 39 of the InsO.[129] According to § 39 (4) exceptions are claims of a shareholder who holds 10% or less of the company's registered capital, unless the shareholder is a managing director, or if a creditor acquired shares of the company for restructuring purposes after the company has become illiquid or over-indebted. These shareholders are entitled to vote and participate in the bankruptcy proceedings.

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vaks_analuus-kontseptsioon.pdf (most recently accessed on 19.04.2019) (in Estonian). The author has made a proposal in the article "Court Supervision of the Determination of the Votes at the First General Meeting of Creditors in Estonian Bankruptcy Law" that the BA should prescribe that the voting rights of debtor-related creditors shall be restricted in bankruptcy proceedings. In Estonian insolvency law review it has been clearly consented to this proposal by referring to the author's opinion expressed in the article in the document "Maksejõuetuse revisjon".

[127] Pankrotiseaduse ja teiste seaduste muutmise seaduse eelnõu väljatöötamise kavatsus (see Note 31), p. 45.

[128] Ühinguõiguse revisjon ['Review of the Commercial Law']. Tallinn 2018, pp. 776–777, 794. Available at https://www.just.ee/sites/www.just.ee/files/uhinguoiguse_revisjoni_analuus-kontseptsioon.pdf (most recently accessed on 19.04.2019) (in Estonian).

[129] A. Fridgen, A. Geiwitz, B. Göpfert (see Note 78), InsO § 77, Rn. 1.

It has been recognised that the reason for restricting the voting rights of subordinated creditors in German bankruptcy law is the lack of economic value.[130] Creditors who are only subordinated to the remaining insolvency claims in the proceedings (§ 39 of the InsO), and therefore do not regularly represent any economic value may participate in the meeting and thus be able to inform themselves of the progress of the proceedings, but have no voting rights. The situation is different when they act as representatives of the persons who are entitled to vote. In this case, it has been accepted that they are given the right to vote by the person they represent.[131] Moreover, it has been noted in legal literature that shareholders are at the bottom of the hierarchy of satisfying the claims in bankruptcy proceedings according to § 39 (1) p. 5 of the InsO, and therefore should not be entitled to vote in the proceedings.[132]

Latvian insolvency law also provides regulations on the participation of debtor-related creditors in bankruptcy proceedings. The law prescribes that such creditors who are regarded as interested persons cannot vote at the creditors' meeting. Pursuant to § 87 (5) of the Latvian Insolvency Law, creditors who are recognised as interested persons in accordance with § 72, and persons who have acquired the right to make a claim against the debtor from interested persons within one year prior to the proclamation of insolvency proceedings of a legal person have no right to vote at the creditors' meeting. Similar to § 117 of the Estonian BA, Latvian insolvency law specifies who are interested persons in relation to a debtor. Pursuant to § 72 (2) of the Latvian Insolvency Law, persons are recognised as interested persons in relation to a debtor if they have been in this status for the preceding five years prior to the day of the proclamation of the insolvency proceedings of the debtor. According to § 72 (1), interested persons are the participants (shareholders) of a debtor or members of a partnership, members of an administrative body; a proctor or person with commercial power of attorney; a person who is married to or is in relation or affinity to the second degree with the founder, participant (shareholder) of the debtor, or member of a partnership or member of an administrative body; or a creditor who is in one group of companies with the debtor. When comparing Estonian and Latvian bankruptcy proceedings, it can thus be seen that Latvia has provided restrictions for debtor-related creditors, which ensures the protection of the common rights and interests of non-related creditors.

Furthermore, § 22 (6) of the Lithuanian Law on Restructuring of Enterprises prescribes that the owner (owners) of the enterprise in bankruptcy and bankrupt enterprise or his (their) authorised representative, the trustee and the authorised representative of the municipality wherein the immovable property of the enterprise in bankruptcy and the bankrupt enterprise is located have the right to attend the meetings of creditors. However, only creditors are entitled to vote.

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[130] K. Schmidt (see Note 105), InsO § 77, Rn. 1–5.

[131] R. Stürner, H. Eidenmüller, H. Schoppmeyer. Münchener Kommentar zur Inslvenzordnung. Band 1. 4. Auflage. München, Verlag C.H. Beck 2019. – InsO § 77, Rn. 2–6.

[132] J. Sarra (see Note 6), p. 198.

Thus, it can be concluded that the persons mentioned in the provision, including owners as shareholders, are not considered to be creditors and cannot participate in the voting process in bankruptcy proceedings. It has been also mentioned in legal literature that the participation rights of the debtor are restricted in Lithuanian bankruptcy proceedings.[133] Even though the above-mentioned provision is unclear and raises some questions (e.g. when debtor-related creditors file a claim, are they considered as creditors and therefore allowed to vote) it can be concluded that in comparison with the legislation of other Baltic states, Estonia is rather unique, because it has not prescribed any restrictions on debtor-related creditors' voting rights in bankruptcy proceedings.

In the light of the examples from other countries, especially from Germany that has long-standing practice in insolvency proceedings, Estonian insolvency law is rather unique, as it does not provide regulations and rules on the participation of debtor-related creditors, especially shareholders with subordinated loan claims. As all debtor-related creditors actually vote in the same way as other ordinary creditors, although, their rights and interests in proceedings are significantly different. Moreover, the claims are not verified, whether these actually and legally exist, which may mean that ostensible claims of debtor-related creditors are basis of the determined number of votes. In order to enable the protection of the common rights and interests of non-related creditors, when debtor-related creditors participate in the bankruptcy proceedings, it should be considered, whether it could be ensured by the court supervision.

4.2. Court Supervision of the Determination of the Votes to Debtor-Related Creditors

4.2.1. The Scope of Court Supervision of the Determination of the Votes to Debtor-Related Creditors at the First General Meeting of Creditors

The court is one of the bodies in bankruptcy proceedings and its function is, on the one hand, to ensure the lawfulness of the proceedings and, on the other hand, to resolve disputes relating to the proceedings. The general duties of the court are set out in the BA. According to § 84 of the BA, courts exercise supervision over the lawfulness of bankruptcy proceedings and perform other duties provided by law. A uniform list of the duties of the court has not been set out in the law, but can be inferred from individual provisions in the BA. The main principle has been recognised that the court makes decisions on issues where the interests of the debtor and the creditor are in conflict and an impartial decision-maker is needed.[134] Thus, one of the duties of the courts is to adjudicate

[133] R. Norkus, S. Kavalné. Leedu maksejõuetusõigus: ajalugu, areng ja õigusreformi põhilised probleemid ['Lithuanian Insolvency Law: History, Development and the Key Issues of the Legal Reform']. – Juridica 2011/3, p. 229 (in Estonian).

[134] P. Varul 1994/1 (see Note 4), pp. 5–6 (in Estonian).

on the disputes over the determination of the number of votes at the general meeting of creditors. This means, in turn, that court supervision should be one of the measures to ensure a legitimate voting process in bankruptcy proceedings in compliance with the protection of the rights and interests of creditors, in particular if the proceedings involve debtor-related creditors. The question is whether the current legislation in relation to court supervision in the case of disputes over the determination of the number of votes to creditors protects the creditors' common interests.

Estonian legislation regarding court supervision of the determination of the number of creditors' votes has been continually amended. However, the principle that the general meeting is chaired by the trustee pursuant to § 80 (1) of the BA, has remained unamended. The scope of court supervision of the determination of the number of creditors' votes has been amended three times. This means that the Estonian BA has laid down three different procedures for court supervision of the determination of the number of votes at the first general meeting of creditors: 1) the votes were determined only by the trustee; 2) the votes determined by the trustee were approved by the court; 3) under the current law, the votes are again determined by the trustee.

In 1992–2003, according to § 26 (4) of the BA 1992[135], the number of votes to creditors was determined only by the trustee if there were no disputes over the votes. However, when a dispute arose, the votes were determined by the general meeting of creditors pursuant to § 26 (5) of the BA 1992. The main objective of that was that the workload of the court should be as small as possible. The reasons for this were recognised to be conceptual, but also pragmatic: 1) important issues will be resolved at the general meeting of creditors, not in court; 2) because of the various reforms that took place during the period of drafting the BA, the workload of the courts was already heavy.[136] Thus, it was attempted to resolve disputes over the determination of the number of votes firstly by extrajudicial proceedings.

Nevertheless, the decision of the general meeting about the votes could still be appealed to the court and in this case, the court intervened in the process of determining the number of votes. According to § 27^1 (3) of the BA 1992, if the creditor or trustee did not agree with the decision of the general meeting about the determination of the number of the creditors' votes, the creditor or trustee could appeal the decision of the general meeting to the court. If the court claimed that the decision of the general meeting on the number of votes was not justified, the court could declare that decision invalid and determine the number of votes to the creditors. However, the decision of the court could lead to the cancellation of the decisions taken by the general meeting of creditors. If the number of the creditors' votes determined by the court differed from the number of votes determined at the general meeting to such an extent that would have resulted in a different decision of the general meeting, the court could

[135] Pankrotiseadus. – RT I 1992, 31, 403.
[136] P. Varul 1994/1 (see Note 4), pp. 5–6.

declare the decision of the general meeting invalid at the request of the creditor or trustee according to § 27[1] (3) of the BA 1992. Yet, it was considered problematic that the trustee alone determined the number of votes to the creditors without the court. It was stated that the procedure of determining the number of votes of creditors is such an important issue that the judge should also attend the general meeting of creditors when the votes are being determined, since the determination of the number of votes establishes the power relations between the creditors.[137] Moreover, disputes over the determination of the number of votes of creditors were time-consuming and complex. Thus, provisions on court supervision of the determination of the number of creditors' votes were amended in the BA.

In 2004–2009, according to § 82 (4) of the BA 2004[138] the number of votes was determined by the trustee and pursuant to § 82 (5) of the BA approved by the court. Thus, the court intervened in both cases: 1) when a dispute arose and; 2) when there was no dispute and the determined number of votes had to be approved. Pursuant to § 82 (4) of the BA 2004, if a creditor participating in a general meeting did not consent to the number of the votes assigned by the trustee, the number of the votes was determined by a ruling of the judge participating in the general meeting. An appeal could be filed against such a ruling. In the case of a dispute, the court verified the basis of the determined number of votes and stated whether the determined number of votes was justified or not.

However, according to § 82 (5) of the BA 2004, when there were no disputes, court approval for the number of votes determined by the trustee was rather a formality, because in practice, the court did not verify the basis of the determined number of votes (the proof of claim). Yet, the Supreme Court has concluded that in both cases – in the case of disputes and in the case of giving approval for the determined number of votes – the court should have verified the documents on the basis of which the number of votes was determined to the creditor.[139] Because of the formality of approving the determined number of votes, the regulations on the scope of court supervision of the determination of the number of votes were amended again.

Since 2010, the number of votes is again determined by the trustee as it was in the period of 1992–2003. According to § 82 (3) of the BA the court resolves only disputes over the determination of the number of votes. Pursuant to § 82 (4) of the BA, if the creditor participating in a general meeting has not consented to the number of the votes assigned by the trustee, the number of votes will be determined by a ruling of the judge participating in the general meeting.

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[137] IX Riigikogu stenogramm. VIII istungijärk. 15. Pankrotiseaduse eelnõu (1085 SE) esimene lugemine ['Report of the proceedings of the IX Riigikogu. VIII session. 15. The first reading of the bill of the Bankruptcy Act']. Available at http://stenogrammid.riigikogu.ee/et/200212041300 (most recently accessed on 19.04.2019) (in Estonian).

[138] Pankrotiseadus. – RT I 2003, 17, 95; 2009, 11, 67.

[139] The Supreme Court ruling in civil case no 3-2-1-42-05 of 21 April 2005, para 14 (in Estonian).

The court may deny the right to vote, determine the number of votes in total or in a partial amount. This time the objective of the amendments to the BA was to prescribe a simple procedure, which, in turn, should have ensured smooth proceedings.[140] However, proceedings are still not smooth because of unclear and insufficient regulation.

One of the main problems regarding supervision of the determination of the number of votes of creditors is that even the court cannot ensure the protection of the creditors' common interests in the case of debtor-related creditors' participation because of the lack of regulations. The problem arises from the fact that the BA does not provide any rules stating which disputes should be considered as an issue of the determination of the number of votes (§ 82 (4) of the BA) and which should be considered as an issue of the acceptance of claims (§ 106 of the BA). Thus, it is difficult to identify the boundary between disputes over the determination of the votes and disputes over the acceptance of the claim. Since there is no general and clear rules of claim verification and it has not been prescribed how the claims must the verified before the voting process, when the claims have not been defended yet, the scope of court supervision is also unclear. The question is how thoroughly the court must verify the justification of the claim in order to ensure the legality of bankruptcy proceedings: does the court have to verify only the formal elements of the proof of claim in accordance with § 94 (1)–(2) of the BA or does the determination of the votes also involve resolving substantive disputes.

The Supreme Court has only stated that in the procedure of determining the number of votes, such disputes that are by nature disputes over the acceptance of claims by nature cannot be resolved, for example the question of the expiry of the claims.[141] However, according to another statement from the same Supreme Court ruling, in disputes over the determination of the number of votes, such disputes can be resolved which result from formal defiencies or from claims, which clearly cannot be satisfied on the basis of legal justification.

On the one hand, the statement of the Supreme Court should be concurred with in order to ensure compliance with the principles of speed and efficiency in bankruptcy proceedings. On the other hand, since the adoption of this Supreme Court ruling, the number of disputes over the determination of the votes has decreased. This, in turn, indicates that the trustees do not determine the votes only in exceptional circumstances and usually determine the votes to all participating creditors at the first general meeting, thus avoiding disputes because of fearing that a dispute may be substantive, not about the determination of the number of votes. However, such practice of the trustees may harm the common rights and interests of the creditors, because the bases of the number of votes may not be legitimate.

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[140] P. Varul 2013/4 (see Note 21), p. 235.

[141] The Supreme Court ruling in civil case no 3-2-1-144-11 of 10 January 2012, para 14 (in Estonian).

This means, in turn, that debtor-related creditors may participate in the voting process of bankruptcy proceedings even though their claims might be ostensible. However, according to the statement of the Supreme Court, the procedure for verifying whether a claim is ostensible or not is a substantive dispute and does not belong to the disputes over the determination of the number of votes. This means that debtor-related creditors with ostensible claims can vote, take important decisions and thereby affect further proceedings, because a dispute over an ostensible claim can only be adjudicated when the trustee decides to conduct a meeting for the defence of claims. As there are no regulations in the BA on debtor-related creditors' participation, court supervision cannot ensure the legality of the voting procedure either.

Even if the claims of debtor-related creditors are legitimate (for example shareholders with subordinated loan claims), the court cannot prevent the participation of these creditors because of the lack of regulations in the BA, although their participation might not be in accordance with the common interests of other creditors because of their different rights and interests.

The scope of court supervision in German insolvency law is quite minimal. The court is intervened in the process of determining the votes only in the case of a dispute. If the trustee and all creditors have consented to the determined votes, the court does not intervene. According to § 77 (2) of the InsO, a dispute over the determination of the creditors' votes can be resolved in two stages: 1) the trustee and attending creditors with voting rights agree at the general meeting of creditors that the creditor with a disputed claim has the right to vote; 2) if the parties have not reached an agreement, the decision of the insolvency court shall prevail.

When resolving a dispute over the determination of the votes, the court in Germany may reject the voting rights, determine it in full or limit it to a partial amount.[142] The insolvency court verifies whether the registered claim can actually and legally exist.[143] The proof of claim of a creditor must contain at least a conclusive statement of the circumstances from which the creditor derives its claim, the reason for the claim and who was or is the claimant. If these conditions are fulfilled, the court must exercise its discretion, taking into account all relevant factors. In fact, its has been suggested that the court shall apply the principle of *in dubio pro creditore*.[144]

When comparing court supervision of the determination of the number of creditors' votes in Estonian bankruptcy law with that of German bankruptcy law, it can be seen that the current German provisions are similar to Estonian provisions from the period of 1992–2003. Under both regulations, the trustee and attending creditors with voting rights decide at the general meeting of creditors in the case of a dispute whether a creditor has the right to vote or not. However, the Estonian provision was considered to be problematic. In

[142] A. Fridgen, A. Geiwitz, B. Göpfert (see Note 78), InsO § 77, Rn. 8.
[143] D. Andres, R. Leithaus, M. Dahl (see Note 83), InsO §§ 76, 77, Rn. 7.
[144] A. Fridgen, A. Geiwitz, B. Göpfert (see Note 78), InsO § 77, Rn. 8.

accordance with the current BA, creditors cannot take any final decisions concerning the voting rights of other creditors and in bankruptcy proceedings, the court is the body which decides on the determination of the number of votes in the case of a dispute. As there are many problems concerning debtor-related creditors' participation in Estonian bankruptcy proceedings, the current law is reasonable regarding court involvement in the case of a dispute over the determined votes. Otherwise, when debtor-related creditors would decide on the number of votes of non-related creditors, they would have another possibility to affect the proceedings and take important decisions by means of manipulating the voting rights of non-related creditors. In Germany, however, there are no problems concerning the participation of shareholders with subordinated loan claims, because they are considered as lower-ranking creditors and cannot vote in bankruptcy proceedings pursuant to § 77 (1) of the InsO. This provision applies even in the case when a shareholder as a lower-ranking creditor has an exceptional right to submit the claim to the bankruptcy proceedings pursuant to § 174 (3) of the InsO.

Yet, court supervision pursuant to the current BA and the case law of the Supreme Court does not ensure a legitimate voting procedure and the protection of the common interests of creditors, while debtor-related creditors participate in the proceedings. The question remains as to whether the obligation to verify the creditors' claims before the voting process, when the claims have not been defended yet, can ensure the protection of the creditors' common rights and interests, or are there still other problems with court supervision, so that other legal measures should be also provided.

4.2.2. Implementation of the Principles of Speed and Efficiency in Disputes over the Determination of the Number of Votes

Bankruptcy proceedings and disputes therein must be resolved in accordance with the general principles of civil procedures as the provisions in the CCP apply also to bankruptcy proceedings according to § 3 (2) of the BA. One of the main principles of civil proceedings is that the court should ensure adjudication of the disputes within a reasonable time pursuant to § 2 of the CCP. However, the law does not prescribe any rules stating what is meant by "reasonable time" and specifying the time frame for resolving different disputes. UNCITRAL has instructed that insolvency proceedings should be resolved in a quick and efficient manner in order to ensure minimal costs and maximise the bankruptcy assets.[145] This means that disputes over the determination of the number of votes at the first general meeting of creditors should also be adjudicated on within a reasonable time in compliance with the principles of speed and efficiency.

Despite the obligation to follow the principles of speed and efficiency, resolving disputes over the determination of the number of votes in Estonian

[145] UNCITRAL (see Note 7), p. 12.

bankruptcy proceedings takes a long time. In fact, according to the statement of the Supreme Court, resolving a dispute should only mean verifying the formal circumstances of the claim, not determining the substantive and legal aspects of it.[146] Verification of the formal requirements of the creditors' claims should not be time-consuming. Debtor-related creditors are often interested in having long-term disputes. As they have the right to vote in bankruptcy proceedings, they may object in bad faith to the voting rights of different non-related creditors. This may be done with the aim of gaining control over the proceedings or with the intention to prolong the procedures in such a way that important deadlines – for example for recovery or other types of actions – expire. Therefore, the question arises as to which legal measures would ensure compliance with the principles of speed and efficiency when adjudicating on the disputes over the determination of the number of votes in bankruptcy proceedings, which, in turn, would protect the common interests of creditors.

The first solution to the problem of how to ensure the implementation of the principles of speed and efficiency in resolving disputes over the determination of the number of votes in bankruptcy proceedings is to prescribe explicitly in the BA the time by which a dispute must be resolved in the court. § 82 (4) of the current BA does not specify when should the court ruling on the determination of the number of votes be made. The provision only prescribes that the judge participating in the first general meeting of creditors will determine the number of the votes in the case of a dispute. This, however, has lead to a situation where county court judges implement § 82 (4) of the BA differently. It is common knowledge that in Estonian practice, judges adjudicate on the disputes over the determination of the votes in the following ways: 1) some judges take a break at the meeting and determine the votes immediately; 2) other judges determine the votes at the follow-up meeting, which may take place in the same week or even a few months later. There is no official statistics on it, but in practice votes are mostly determined at follow-up meetings.

There have been various bankruptcy proceedings where disputes over the determination of the number of votes have arisen. Some examples have demonstrated how long can disputes over the determination of the votes at the first general meeting in Estonian practice be. In civil case 2-13-13251, the court ruling on the determination of the votes entered into force about four months after the general meeting was held.[147] Furthermore, in civil case 2-15-13938, the dispute over the determination of the votes lasted about four months and the meeting was continued three months later when the court ruling on the determi-

[146] The Supreme Court ruling in civil case no 3-2-1-144-11 of 10 January 2012, para 14 (in Estonian).

[147] The meeting was held on 04.02.2014 and the creditors did not agree with the number of assigned votes. Harju County Court made a ruling on 20.02.2014, which was appealed to Tallinn District Court that issued a ruling on 10.05.2014. The ruling was appealed to the Supreme Court and the county court ruling entered into force on 10.06.2014.

nation of the votes entered into force.[148] Moreover, in civil case 2-13-32716, the determination of the creditors' votes took about five months.[149] In civil case 2-10-59818, the whole process of determining the votes lasted almost one year.[150] According to the cases presented above, disputes over the determination of the number of votes are unreasonably long, which may harm the rights and interests of the creditors.

The problem with prolonged disputes over the determination of the votes is that the meeting is generally not continued before the votes are determined and such decisions are also not adopted which should be made at the first general meeting of creditors. This means that proceedings are suspended until the votes are clear and determined by the court. Yet, the main objective of bankruptcy proceedings is to satisfy the creditors' claims out of the assets of the debtor as quickly as possible and to the maximum extent. The bankruptcy committee, who may give various consents concerning the activities of the debtor or make decisions about the bankruptcy proceedings, cannot be elected, which is within the competence of the first general meeting of creditors in accordance with § 77 p. 1 of the BA. In consequence, the entire bankruptcy proceedings are suspended, which is not in the common interests of the creditors.

When the judge is participating in the general meeting of creditors in accordance with § 82 (4) of the BA, this actually means that disputes over the determination of the number of the creditors' votes are adjudicated on at the same meeting (if necessary, only a break is taken at the meeting). This means that the first general meeting of creditors can continue and important decisions can be adopted, which ensures, in turn, that the whole bankruptcy proceedings can continue. Moreover, this may also prevent the emergence of disputes over the determination of the number of votes, which result from the objections made in bad faith by debtor-related creditors. The judge can eliminate the objections made in bad faith by making a ruling at the same meeting and the proceedings can continue.

As judges have misinterpreted the provision, the BA should specify the term of adjudicating on the dispute and of making a ruling on the determination of the number of the creditors' votes in bankruptcy proceedings. In Estonian insol-

[148] The meeting was held on 24.11.2015 and 11.12.2015. The creditors did not agree with the number of assigned votes. The county court made a ruling on 18.12.2015, which was appealed. However, the court did not refuse to accept the appeal on 17.02.2016, which meant that the court ruling on the determination of the votes entered into force on 12.03.2016.

[149] The meeting was held on 23.10.2013. The creditors did not agree with the number of assigned votes. Harju County Court made a ruling on 05.11.2013, which was appealed to Tallinn District Court that issued a ruling on 31.03.2014.

[150] The meeting was held on 02.02.2011. The creditors did not agree with the number of assigned votes. Harju County Court made a ruling on 02.03.2011 and it was appealed to Tallinn District Court that issued a ruling on 28.06.2011. The ruling was appealed, again, to the Supreme Court that made a ruling in civil case 3-2-1-144-11 on 10.12.2012, and the case was sent back to the county court for a new hearing.

vency law review, it has been consented to the author's suggestion and pointed out that the law should prescribe clearly that the judge participating in the general meeting of creditors must resolve the dispute over the determination of the votes at the same meeting. It has been accepted that the ruling may be made no later than the next working day only in the case of exceptional circumstances.[151] The aim of the proposal for the amendments is to speed up the procedure for the determination of the number of votes to ensure the rights of creditors.[152] By analogy, § 384 (1) of the CCP has set out a term for adjudicating on the application for securing an action. According to this provision, the court must adjudicate on the application by making a ruling no later than on the next working day following the submission of the application. Moreover, the law should also prescribe – as an analogy with the case of securing an action as prescribed in § 390 (2) of the CCP – that filing an appeal against a ruling on the determination of the votes does not suspend the enforcement of the ruling. This means that even if an appeal is filed against the court ruling on the determined votes, it does not influence the enforcement of the ruling and does not suspend the general meeting of creditors and the adoption of decisions.

Another solution could be that the hearing of bankruptcy matters shall be in the competence of specialised insolvency judges, as another legal measure to ensure the implementation of the principles of speed and efficiency. However, the question arises as to whether it is also necessary to create special insolvency courts or not. Many decisions to be taken by the judges require quick response, specific knowledge and experience, which justifies assigning such decisions to specialised courts or chambers.[153] Insolvency courts could also ensure a uniform practice of adjudicating on the disputes over the determination of the number of votes at the first general meeting of creditors in bankruptcy proceedings. This, in turn, would reduce the number of disputes over the determined number of votes, because the requirements for the proof of claim would have become clear in order to obtain votes at the general meeting.

Pursuant to § 4 (1) of the BA, hearing of Estonian bankruptcy matters is within the competence of county courts. This means that Estonia has no specialised insolvency courts or any specific requirements for the judges who adjudicate on the disputes of insolvency cases. In practice, there are certain judges in a few bigger county courts (for example in Tallinn and Tartu) who adjudicate on insolvency cases, but also resolve other civil law cases. However, it has been

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[151] The author has made a proposal in the article "Court Supervision of the Determination of the Votes at the First General Meeting of Creditors in Estonian Bankruptcy Law" that the BA should prescribe clearly that the judge participating in the general meeting of creditors must resolve the dispute over the determination of the votes at the same meeting. In Estonian insolvency law review, it has been clearly consented to the author's proposal by referring to the author's opinion expressed in "Maksejõuetuse revisjon". – K. Kerstna-Vaks (see Note 126), pp. 48, 52.

[152] Pankrotiseaduse ja teiste seaduste muutmise seaduse eelnõu väljatöötamise kavatsus (see Note 31), pp. 53, 55.

[153] B. Wessels, S. Madaus (see Note 62), pp. 257–258.

consented in Estonian insolvency law review that bankruptcy cases should be adjudicated on by specialised judges.[154] The aim of the proposal for the amendment is to make the bankruptcy proceedings quicker and more efficient.[155]

Moreover, several different international organisations are also of the opinion that insolvency courts ensure effective bankruptcy proceedings. The has repeatedly pointed out that insolvency proceedings should be overseen by an independent court. The World Bank justifies the need for specialised courts by stating that insolvency proceedings require specific expertise of the judges (for example knowledge about complex financial and business issues).[156] Furthermore, the World Bank also states that insolvency courts could ensure a uniform practice for resolving disputes, which would be adjudicated on quickly and effectively. UNCITRAL has also pointed out the importance of insolvency courts. In a similar way as the World Bank, UNCITRAL is of the opinion that through specialised courts difficult insolvency issues are adjudicated on quickly and effectively by judges with specific knowledge and experience.[157] The European Law Institute also recommends handling insolvency cases in specialised courts or chambers by qualified judges.[158]

Considering the smallness of Estonia, it would be unreasonable to create insolvency courts, but the insolvency cases should be overseen by judges who are specialised in insolvency law. In addition, the objective of the creation of insolvency courts is still the same – insolvency cases should be in the competence of judges who have specific knowledge and experience, which ensures that insolvency cases are overseen quickly and effectively.

In Germany, insolvency cases are overseen by a specific department and by judges who are specialised in insolvency law. Insolvency cases are overseen by the local court (*Amtsgericht*) in whose district a regional court (*Landgericht*) is located; the local court has exclusive jurisdiction of insolvency proceedings as the insolvency court for the district of such a regional court in accordance to § 2 (1) of the InsO. In fact, it has been pointed out in legal literature that nearness to district court is intentional, because of the bigger library and because the district court is also a court of appeal.[159] Furthermore, according to § 76 (1) of the InsO, the general meeting of creditors is chaired by the insolvency court, mainly by the senior judicial officer (*Rechtspfleger*).[160] Such a procedure enables to adjudicate on the disputes over the determined number of votes at the same meeting of creditors. Due to these provisions insolvency proceedings are overseen quickly and effectively, which means that disputes

[154] K. Kerstna-Vaks (see Note 126), p. 62.
[155] Pankrotiseaduse ja teiste seaduste muutmise seaduse eelnõu väljatöötamise kavatsus (see Note 31), pp. 58, 60.
[156] The World Bank 2001 (see Note 15), pp. 56–57. The World Bank 2016 (see Note 15), p. 29.
[157] UNCITRAL (see Note 7), pp. 33–35.
[158] The European Law Institute (see Note 62), pp. 21–22.
[159] U. Foerste (see Note 81), p. 18.
[160] U. Foerste (see Note 81), p. 30.

over the determined number of votes are also adjudicated on by following the principles of speed and efficiency.

Moreover, the principle of having no right to appeal against a court ruling on the determined number of votes in bankruptcy proceedings refers also refers to the implementation of the principles of speed and efficiency. A court ruling on the determined number of votes is final. According to § 6 (1) of the InsO, decisions of insolvency courts are subject to an appellate remedy only in the cases where the Statute provides for an immediate appeal. However, § 77 of the InsO does not provide any possibilities for an appeal concerning the determined number of votes. The insolvency court may modify its decision only at the request of the trustee or of a creditor attending the creditors' general meeting pursuant to § 77 (2) of the InsO. This applies only until the voting process begins at the meeting, but in both cases – when votes are determined by a judge or by a senior judicial officer.

After voting at the meeting, the decisions of the insolvency court about the determined number of votes can only be changed when the senior judicial officer has determined the votes and the voting rights would affect the outcome of the voting. According to § 18 (3) of the *Rechtspflegergesetz* **(**RPflG)[161], if the decision of the senior judicial officer on the granting of the right to vote in accordance with § 77 of the InsO has affected the outcome of a ballot, the judge may redefine the voting rights and order the ballot to be repeated when requested by a creditor or by the trustee, but the request may only be filed until the end of the hearing at which the ballot takes place. Moreover, the request is justified if the facts underlying the first decision have changed and this would lead to a different decision of the insolvency court. In fact, when the decision on the determined votes will be made by the judge, the judge should make such a decision as soon as possible, but when the judge is not available, the meeting may be adjourned, but only for a short time.[162]

The question arises as to what are the justifications for the impossibility to appeal against court decisions on the determined number of votes, which essentially means the immunity of these decisions. Furthermore, the impossibility to appeal against such decisions may also imply a conflict with the Constitution. However, the main reason for the impossibility to appeal is to speed up bankruptcy proceedings. Moreover, an absolute impossibility to appeal does not apply, because in accordance with § 77 (2) of the InsO, a court decision on the determined number of votes could be amended, especially if new facts have appeared. In fact, it has been accepted that the legal protection must not always be provided by a higher court instance.[163]

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[161] Rechtspflegergesetz in der Fassung der Bekanntmachung vom 14. April 2013 (BGBl. I S. 778, 2014 I S. 46). Available at http://www.gesetze-im-internet.de/rpflg_1969/RPflG.pdf (most recently accessed on 22.04.2019).

[162] R. Stürner, H. Eidenmüller, H. Schoppmeyer (see Note 131), InsO § 77, Rn. 19–30.

[163] R. Stürner, H. Eidenmüller, H. Schoppmeyer (see Note 131), InsO § 77, Rn. 19–30.

When comparing Estonian and German bankruptcy law on the supervision of the determination of the number of votes at the first general meeting of creditors, the main difference is that German law has ensured resolving disputes in compliance with the principles of speed and efficiency. This results from when and how are disputes over the determined number of votes resolved. Firstly, under German insolvency law the creditors' general meeting is chaired by the insolvency court, mainly by the senior judicial officer (§ 76 (1) of the InsO), but in Estonia the general meeting is chaired by the trustee (§ 80 (1) of the BA). Thus, in Germany disputes over the determination of the number of votes are adjudicated on quickly – at the same creditors' meeting in insolvency courts by specialised judges. Moreover, insolvency courts ensure a uniform practice regarding which proofs of claims shall be the basis for determining the votes to creditors. This reduces the number of disputes over the determined number of votes. In conclusion, it can be said that the regulation of German insolvency law on the adjudication of the disputes over the determined number of votes in bankruptcy proceedings serves to ensure procedural economy and resolve disputes within a reasonable time in order to protect the common interest of creditors. In fact, it is even not possible to appeal against the court decision on the determined number of votes to the district court.

To sum up, it can be said that the current Estonian law does not provide solutions to the problems regarding the participation of debtor-related creditors in bankruptcy proceedings. The BA should prohibit all debtor-related creditors from voting in bankruptcy proceedings. In fact, the regulation about restrictions on subordinated loan claims should be based on German law, according to which subordinated creditors cannot vote in the proceedings, as their claims should be satisfied only after all other claims of other creditors have been satisfied. If it would be imposed by the law that debtor-related creditors are prohibited from voting and provide the term that the disputes over the determined number of votes would be resolved at the same meeting, it is not necessary that the insolvency cases are overseen by specialised judges or debtor-related creditors' claims are subject to heightened verification process before voting in bankruptcy proceedings. Those provisions would ensure the protection of the common rights and interests of creditors while debtor-related creditors participate in bankruptcy proceedings. However, in addition to the need to restrict the voting rights of debtor-related creditors in bankruptcy proceedings, the question arises, whether the law protects the common rights and interests of non-related creditors, when shareholders with loan claims participate in the satisfaction of claims in bankruptcy proceedings.

5. SATISFACTION OF DEBTOR-RELATED CREDITORS' CLAIMS IN BANKRUPTCY PROCEEDINGS

5.1. Principles of Satisfaction of Debtor-Related Creditors' Claims in Bankruptcy Proceedings

The principle of equal treatment of creditors applies to the case of determining the number of votes in insolvency proceedings as well as to the case of satisfying the claims. The principle of equal treatment of creditors is also known as *pari passu*, which applies in particular in the case of asset distribution to creditors in all insolvency proceedings.[164] In fact, *pari passu* is recognised as the most fundamental principle in bankruptcy proceedings and specifically means satisfying the creditors' claims equally.[165] UNCITRAL has also given instructions that "similarly ranked claims are paid *pari passu*".[166]

However, the principle of *pari passu* has been recognised to be an absolute rule only until the legislator has decided to deviate from it.[167] In fact, Prof. Goode has stated that in some situations exceptions from the principle of *pari passu* should be allowed.[168] The exceptions are known as true exceptions and false exceptions. False exceptions apply to creditors' claims that are secured by an asset, but the owner is not the debtor or the creditor has priority rights for the asset. The principle is that the asset does not have to be distributed equally among all creditors, because not all creditors have a preferential right for this asset. This includes, for example, pledgees whose claim is secured by a pledge.[169] True exceptions apply to lower-ranking creditors. This means that not all creditors who have filed a claim in the insolvency proceedings have to be treated identically; only these creditors whose claim will be satisfied in the same group have to be treated in the same way.[170] The main principle is that equal creditors with equal rights must be treated equally.[171] Nevertheless, devia-

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[164] R. Calnan. Proprietary Rights and Insolvency. Oxford 2010, p. 3.

[165] P. R. Wood. The Bankruptcy Ladder of Priorities. – Business Law International 2013/14 (2), p. 209.

[166] UNCITRAL (see Note 7), p. 276.

[167] R. Olivares-Caminal. Creditor Equality, Secured Transactions, and Systematic Risk: A Complex Trilemma. – Law and Contemporary Problems 2018/81 (1), p. 107.

[168] R. Goode. Goode on Principles of Corporate Insolvency Law. Sweet & Maxwell 2011, pp. 246–247.

[169] The principle of false exception comes from the law of England, according to which the asset which is secured by a pledge does not belong to the bankruptcy estate. In Estonian bankruptcy law, an asset which is secured by a pledge belongs to the bankruptcy estate. Thus, such claims which are secured by a pledge may be considered as true exceptions. – A. Kasak. Võlausaldajate võrdse kohtlemise põhimõttest kõrvalekaldumine pankrotimenetluses ['Deviations from the Principle of Equal Treatment of Creditors in Insolvency Proceedings']. Master's thesis. Tartu 2010, pp. 16–17.

[170] U. Foerste (see Note 81), p. 6.

[171] A. Kasak. Special Treatment of the Floating Charge in Insolvency Proceedings. – Juridica International 2015/23, p. 70.

tions from the principle of equal treatment of creditors do not mean that only the priorities of certain creditors (e.g. pledgees) must be taken into account. Deviations from the principle also include restrictions on the rights of a certain group of creditors in insolvency proceedings. Special treatment of creditors must be based on exceptional circumstances, herein the relationships between the creditors, i.e. whether they are different from other creditors or not.[172] The reasons to deviate from the principle may be different. Deviations can be due to various historical, political and pragmatic factors, but the main reason is to ensure legal certainty, legitimate expectation and profitability of the debtor's activities.[173]

The principle of equal treatment and deviations from it apply to Estonian bankruptcy proceedings, but only partially. According to the BA, creditors' claims in bankruptcy proceedings are satisfied in three different rankings, but according to § 153 (2) of the BA only pledgees have preferential right for the satisfaction of the claim to the extent of the money received from the sale of the pledged object. Pursuant to § 153 (1) of the BA, creditors' claims are satisfied in the following rankings: 1) accepted claims secured by a pledge, to the extent provided in subsection (2) of the section; 2) other accepted claims which were filed within the specified term; 3) other claims which were not filed within the specified term but were accepted. The principle behind the satisfaction of the ranked claims is that claims of a lower ranking are satisfied after claims of the preceding ranking have been satisfied in full, but if the estate is not sufficient for satisfying all the claims of the same ranking, the claims are satisfied in proportion to the sizes of the claims in accordance to § 153 (5)–(6) of the BA.

However, no regulations on the satisfaction of debtor-related creditors' claims are provided in the BA. This means that deviations, according to which some group of creditors' rights might be restricted, are not taken into account. Under the current BA, debtor-related creditors, including shareholders with subordinated loan claims, are not regarded as lower-ranking creditors, and receive the claim on an equal basis with other non-related creditors pursuant to § 153 (1) p. 2 of the BA. Therefore, the question arises as to whether the claims of debtor-related creditors should be paid after the claims of all other creditors are satisfied in order to ensure legal certainty and legitimate expectation, which would ensure the protection of the common rights and interests of non-related creditors.

Before the satisfaction of the claims, a meeting for the defence of claims has to be held as prescribed in § 100 of the BA. The purpose of the meeting is to verify whether the filed claims are justified. In fact, identifying creditors' claims is one of the main obligations of trustees as it has been stated by the Supreme Court.[174] Pursuant to § 103 (2) of the BA, a claim, its ranking and the

[172] M. Brinkmann. The Position of Secured Creditors in Insolvency. – European Company and Financial Law Review 2008/5, p. 251.
[173] A. Kasak (see Note 169), p. 16 (in Estonian).
[174] The Supreme Court ruling in civil case no 2-15-17822 of 26 October 2018, para 14.1.

right of security securing the claim are deemed to be accepted if neither the trustee nor any of the creditors objects thereto at the meeting for the defence of claims, or if the trustee or the creditor who filed an objection waives the objection at the meeting for the defence of claims. The trustee is required to object to a claim or a right of security at the meeting for the defence of claims if there is basis for the objection. It has been mentioned that the clear obligation to file objections to the creditors' claims has two main objectives: 1) the trustee is required to verify whether the claims are justified in order to not harm the rights and interests of other creditors (§ 101 (1) of the BA); 2) the trustee who violates the clear obligation to file an objection to the claim if the need arises may be liable to compensate for the damage (§ 63 of the BA).[175] There have actually been only a few court rulings in the case law of the Supreme Court in which the Supreme Court adjudicates on the liability of the trustee. It should be noted that all the cases are not direct actions against the trustee; a claim for the compensation of damage against the trustee is the object of action only in some of the cases. Moreover, only one Supreme Court case concerns the possible claim for the compensation of damage against the trustee in respect of the trustee's non-objection to the creditors' claims. The Supreme Court has stated that the trustee is obliged to submit an objection to unjustified claims pursuant to § 101 (1) of the BA.[176] The court also found that when the trustee does not object to an unjustified claim, the trustee may be required to compensate for the damage caused to the debtor or other creditors. Unlike in the voting process, where there is no clear obligation to verify the claims, there is a clear obligation to verify the justification of the claims in the case of satisfying claims, so that a breach of this obligation by the trustee may mean that the trustee has liability. By the verification of the creditors' claims it would also be possible to exclude ostensible claims of debtor-related creditors before the satisfaction of claims in the proceedings.

If debtor-related creditors' claims are based on a usual contractual transaction and the justification for it has been verified by the trustee, the right to participate in bankruptcy proceedings and receive the claim might be justified. In Estonian business environment, it is common that one person has several companies and some of the usual contractual transactions are made between these companies. In this case, it would be unjustified to restrict the rights in bankruptcy proceedings, according to which the claim would be satisfied only after all other creditors' claims have been satisfied. However, the creditors' relation to the debtor should be noted in the proof of claim, which would refer that this claim is of a specific type and is subject to increased control. Even UNCITRAL has recommended that debtor-related creditors' claims should be

[175] P. Varul. Nõuetest pankrotimenetluses ['Claims in Bankruptcy Proceedings']. – Juridica 2004/2, p. 98 (in Estonian).

[176] The Supreme Court decision in civil case no 3-2-1-124-14 of 10 December 2014, para 27 (in Estonian).

subject to special verification.[177] This means that the trustee should verify the proof of and justification for the claim, and also ascertain the true nature of the legal relationship.

German bankruptcy law takes account of deviations from the principle of equal treatment of creditors by giving priorities to some creditor groups, but restricting the participation of others. Provisions covering creditors with a right to separate satisfaction, who have preferential right for the satisfaction of the claim are prescribed in §§ 49–51 of the InsO (for example pledgees). They have a right for satisfaction from certain objects and are entitled to separate satisfaction. This group's ranking is similar to the one set out in § 153 (1) p. 1 of the BA. The definition of other insolvency creditors is provided in § 38 of the InsO. In practice, this creditor group is usually the largest and these creditors are entitled to satisfy their claim before lower-ranking insolvency creditors. The claims of this creditor group are similar to the ones set out in § 153 (1) p. 2 of the BA.

Lower-ranking insolvency creditors are covered in § 39 of the InsO. Their claims are satisfied ranking below the claims of other insolvency creditors. Lower-ranking claims are, for example, subordinated loan claims according to § 39 (1) p. 5 of the InsO. However, pursuant to § 174 (3) of the InsO, lower-ranking creditors file their claims merely in exceptional circumstances, only if specifically requested by the insolvency court to do so. Yet, the InsO does not regard other debtor-related creditors as lower-ranking creditors. This means that out of the group of debtor-related creditors only the rights of such shareholders whose claim is based on a subordinated loan are restricted, and these creditors can receive their claim after other insolvency creditors' claims have been satisfied. The claims of all other debtor-related creditors are satisfied in the same ranking as the ones of ordinary insolvency creditors (§ 38 of the InsO).

Thus, on the basis of the principle that the trustees in bankruptcy are obliged to verify the existence and justification of the creditors' claims before defending claims, and of the principle of *pari passu*, it is not justified that the claims of debtor-related creditors should be automatically ranked in such a way that these claims will be satisfied only after all other creditors' claims are satisfied. The trustee can exclude ostensible claims at the defence meeting and thereby ensure legal certainty and legitimate expectation, which will ensure the protection of the common rights and interests of non-related creditors even a situation when debtor-related creditors participate in the bankruptcy proceedings. However, it must be asked how shareholder loan claims should be satisfied in bankruptcy proceedings.

[177] UNCITRAL (see Note 7), p. 262.

5.2. Satisfaction of Subordinated Loan Claims in Bankruptcy Proceedings

If a company is in economic difficulties and the capital is not in compliance with the requirements of the law (pursuant to § 171 (2) p. 1 and § 176[178] of the Commercial Code (CC)[179], a private limited company's net assets, which means total assets minus total obligations shown under liabilities on a balance sheet, are less than one-half of the share capital or less than the amount of share capital specified in § 136 of the CC or other minimum amount of share capital provided by law), it is necessary to decide on the measures to be taken to maintain the company's share capital. § 176[180] of the CC sets out the following possibilities: 1) a reduction or increase of the share capital; 2) implementation of other measures; 3) dissolution, merger, division or transformation of the private limited company; 4) submission of a bankruptcy petition to the court.

The possible decisions of the shareholders essentially mean that it shall be decided whether to go out of business by liquidation procedure as in bankruptcy proceedings or find additional sources with the aim to continue business activities. In the latter case, there are two different options: make a contribution to the company's share capital or grant a shareholder loan to the company. Although as it has been stated, in both cases the investment is made by the same persons – shareholders –, the legal situation in bankruptcy proceedings is different.[181] In the case of making a contribution to the share capital, returning the share capital to the shareholder is prohibited during the continuation of the company's commercial activities. The capital contribution rules would have no purpose if the capital contribution could be immediately withdrawn by the shareholders.[182] In fact, the objective of capital maintenance rules is to protect the creditors and provide them priority over shareholders.[183] This means that payments of equity capital cannot be made before the claims of all other creditors are satisfied in bankruptcy proceedings.

However, it has been noted that when shareholders have granted a loan to the company, the loan claim can be treated as a usual unsecured creditor claim.[184] In practice, granting a loan is actually a more common measure to overcome economic difficulties because of the hope of recovering at least a part of the

[178] Provisions on a public limited company are prescribed in § 292 (1) p. 1 and § 301 of the CC.
[179] Äriseadustik. – 15.02.1995. – RT I 1995, 26, 355; 28.02.2019, 10.
[180] Provisions on a public limited company are prescribed in § 301 of the CC.
[181] A. Cahn. Equitable Subordination of Shareholder Loans? – European Business Organization Law Review 2006/7 (1), p. 288. A. Vutt. Legal capital rules as a measure for creditor shareholder protection. Dissertation. Tartu Ülikooli Kirjastus 2011, p. 31.
[182] K. Saare, U. Volens, A. Vutt, M. Vutt. Ühinguõigus ['Commercial Law']. Juura 2015, pp. 278, 280 (in Estonian).
[183] A. Cahn. Intra-Group Loans under German Law. – European Company Law 2010/7 (2), p. 44.
[184] A. Vutt. Allutatud laenud ja nende kajastamine finantsaruannetes. Maksumaksja 2008/3, p. 1 (in Estonian).

investment in the case of insolvency.[185] Yet, granting such a shareholder loan when the company is in economic difficulties raises the question as to how to treat such a loan when the company becomes insolvent – as a usual unsecured loan or as a subordinated loan. One the one hand, it has been stated that the claims of shareholders are not different from the claims of other creditors against the debtor.[186] On the other hand, it has been also noted that in the case of shareholder loans, a shareholder is recognised to be a "dual stakeholder" – both a creditor and an equity holder.[187]

Estonian insolvency law and company law do not define the term "subordinated loan" nor regulate how subordinated loans should be treated in bankruptcy proceedings.[188] In fact, there are also no Supreme Court cases concerning the participation rights of shareholders in bankruptcy proceedings when the claim is based on a loan given to a company. Therefore, it should be firstly ascertained what are the instructions of international organisations, who have provided general guidelines for insolvency proceedings. The World Bank has not given specific instructions on the treatment of subordinated loan claims, but has made reference to the principle that the shareholders of the debtor cannot usually receive any payment before the claims of other creditors have been fully satisfied.[189] UNCITRAL, on the other hand, has suggested that insolvency law should specify that some of the debtor-related creditors' claims may be subordinated if this is justified, which means that the voting rights may be restricted and the claims may be satisfied after the satisfaction of other ordinary unsecured claims.[190]

Subordination is a current issue in the Estonian law – not only in Estonian bankruptcy law, but also in company law. In fact, the problem of subordination has been recognised in Estonian law already in 2008.[191] Despite the proposals for amending both laws – insolvency law and company law, subordination has not yet been included in the law. Nowadays the problem of subordination has been recognised again in Estonian insolvency and company law review. It has been pointed out in Estonian insolvency law review that loans granted by shareholders to the company shall automatically become subordinated loans by the

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185 A. Cahn (see Note 181), p. 288.

186 R. Gengatharen. *Sons of Gwalia*: Defrauded Shareholders' Claim in Insolvency. – International Insolvency Review 2008/17 (1), p. 8.

187 J. Bigus, S. Häfele. Shareholder Loans and Earnings Smoothing – Empirical Findings from German Private Firms. – European Accounting Review 2018/27 (1), p. 38.

188 According to the draft of the RA, the term "subordinated obligation" should be used. Using the new term in reorganisation proceedings is justified in the following way: the term is widely used and means an obligation which is recovered after the claims of all other creditors are satisfied. – A. Õunpuu (see Note 51), p. 23. However, it is not proposed to define the term "subordinated obligation" in the RA nor in the BA. To provide a clear definiton explaining which claims are subordinated, the insolvency law should be amended systematically.

189 The World Bank 2001 (see Note 15), p. 25.

190 UNCITRAL (see Note 7), pp. 262, 266, 274, 276.

191 A. Vutt (see Note 184).

declaration of the company's bankruptcy.[192] The aim of the proposal for the amendment is to reduce the unfair influence of the debtor-related creditors in bankruptcy proceedings.[193] Furthermore, it has been proposed in Estonian company law review to use German law as an example of regulating subordinated loans in insolvency proceedings.[194]

German insolvency law serves as a good example, because it has provided clear regulations on the participation of shareholders with subordinated loan claims. The InsO uses the term *Nachrangige Insolvenzgläubiger* as "lower-ranking creditors". § 39 (1) of the InsO specifies who are lower-ranking creditors and which claims are subordinated. According to § 39 (1) p 5, subordinated claims are claims for restitution of a loan replacing equity capital or claims resulting from legal transactions corresponding in economic terms to such a loan (general claims for the repayment of shareholder loans). Such subordination is recognised as simple subordination.[195]

The InsO prescribes an automatic subordination of loans provided by shareholders who own more than 10% of the shares or who are members of the debtors' management bodies. There are also two exceptions from subordination, the objective of which, as has been noticed, is to protect the minority shareholders and promote reorganisation of distressed companies.[196] In fact, first exceptions are claims of a shareholder who holds 10% or less of the company's registered capital, unless the shareholder is a managing director, and it protects the rights of the shareholders who hold a small number of shares. Thus, the shareholders must have significant influence on the management of the company when subordination applies. The second exceptions are claims of a creditor who has acquired shares of the company for restructuring purposes after the company has become illiquid or over-indebted, and it serves the purpose of rescue attempts and is for outside investors.[197] It applies in a situation where a company is acquired at a time of insolvency, and the purpose is to reorganise the company.[198]

Despite the clear provision on subordination provided in the law, the German Federal Court has still dealt with the definition of subordination and taken a hard line on establishing in which cases subordination should apply. It has been claimed that even loans given by an affiliated company, which is

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[192] K. Madisson. Pankrotiseaduse osaline kontseptsioon. Maksejõuetusinstituut ja üldsätted ['Partial Concept of Bankruptcy Law. Insolvency Institute and General Provisions']. 2017, p. 20. Available at https://www.just.ee/sites/www.just.ee/files/karin_madisson_analuus-kontseptsioon.pdf (most recently accessed on 19.04.2019) (in Estonian).

[193] Pankrotiseaduse ja teiste seaduste muutmise seaduse eelnõu väljatöötamise kavatsus (see Note 31), p. 44.

[194] Ühinguõiguse revisjon (see Note 128), p. 794.

[195] O.-F. Graf Kerssenbrock. Shareholders' Subordination Agreements in Light of German Commercial Law. – Insolvency Law and Tax Law 2010/38 (10), p. 511.

[196] H. Tschaunder, C. Ede. Shareholder loans under German insolvency law. – Financier Worldwide Magazine. March 2014.

[197] D. A. Verse. Shareholder Loans in Corporate Insolvency – A New Approach to an Old Problem. – German Law Journal 2008/09 (09), p. 1113.

[198] U. Foerste (see Note 81), p. 136.

controlled by the shareholder, have to be treated as shareholder loans. This means that the lender and the company are directly or indirectly linked through a joint owner (a shareholder). Subordination also applies if the lender is an indirect shareholder of the company, but is able to exert a dominating influence on the direct shareholder. Thus, it has been noted that subordination cannot be avoided just by using another company as a lender if the shareholder also controls that other company.[199] This means that in Germany subordination applies to all legal transactions which are comparable to shareholder loans in economic terms – subordination applies basically in all situations where a shareholder gives credit to their company in any form.[200]

However, German insolvency law has not always included provisions on subordinated loan claims. The concept of subordinated loans was changed in 2008 in the context of fundamental changes concerning share capital. In fact, shareholder loans were the most important issue of the whole GmbH reform.[201] Until 1st November 2008, it was laid down in §§ 32a, 32b of the earlier *Gesetz betreffend die Gesellschaften mit beschränkter Haftung* (GmbHG) that a loan granted by a shareholder is considered as "substitute for equity". The loan was considered to be subordinated only if it was granted during or before the crisis of the company (*Krise der Gesellschaft*) and the shareholder did not withdraw the loan at the beginning of the crisis.[202] This criterion applied in a situation when the company was either insolvent or at least unworthy of credit.[203] This means that a shareholder loan could not be claimed back if it was granted at a time when the shareholder should have contributed to the capital. This loan claim was considered to be subordinated and could not be repaid until the capital was fully paid up.[204] In other cases, shareholder loans were treated in the same way as loans granted by a third party, which meant that GmbH was obliged to return the loan in full or in full on the basis of the distribution ratio in the case of bankruptcy.

Nevertheless, §§ 32a, 32b of the GmbHG[205] have been declared invalid. The provisions were considered to be inefficient, because shareholders should have provided capital to GmbH or liquidated the company properly.[206] Otherwise the situation would be unfair, as the shareholders continued the business activities of the company despite the poor financial situation. Yet, the shareholders did

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[199] H. Tschaunder, C. Ede (see Note 196).
[200] H. Tschaunder, C. Ede (see Note 196).
[201] D. A. Verse. (see Note 197), p. 1110.
[202] D. A. Verse (see Note 197), p. 1111.
[203] M. Gelter, J. Roth. Subordination of Shareholder Loans from a Legal and Economic Perspective. Discussion Paper No 13. Harvard Law School 2007/2, p. 40.
[204] M. Gelter. The subordination of shareholder loans in bankruptcy. – International Review of Law and Economics 2006/26, p. 480.
[205] *Gesetz betreffend die Gesellschaften mit beschränkter Haftung* vom 17. Juli 2017 (BGBI. I S. 2446). Available at https://www.gesetze-im-internet.de/gmbhg/BJNR004770892.html.
[206] M. Beurskens, U. Noack. The Reform of German Private Limited Company: Is the GmbH Ready for the 21st Century? German Law Journal 2008/09 (09) pp. 1087–1088.

not provide any capital. Furthermore, in the case of bankruptcy, they would be equal to all other creditors.[207] The rights and interests of these other creditors may have been harmed, because the company continued its business activities despite having problems with solvency. In this case, the shareholders do not deserve any additional legal protection, because they have breached an obligation to protect the company's legal capital, and the aim is to protect the creditors' rights and interests.

Hence, the reform bill of the GmbH – Law for the Modernization of the GmbH and to Combat its Abuse (MoMiG)[208] – came into force in Germany on 1 November 2008. The current rules no longer differentiate between an equity substituting shareholder loans and other shareholder loans. Subordination applies automatically to all shareholder loans, which follows from Spanish law. The main practical consequence of the approach is that it is easier to apply it than the previous law, because it is no longer necessary to determine the period of granting a shareholder loan – whether the loan was given during the crisis of the company or not.[209] It is well known that in practice the main difficulty in bankruptcy proceedings is determining exactly when the company's insolvency became evident.

Pursuant to the current approach, if a shareholder gives a loan to a company, it will no longer be deemed as a loan from a third party. Instead, this obligation of the company is subordinated to other creditors.[210] In fact, according to § 135 of the InsO, the transaction may be contested which, in consideration of a partner's claim to restitution of his loan replacing equity capital within the meaning of section 39 subsection (1) no. 5 or in consideration of an equivalent claim, provided a security (p. 1) or provided satisfaction (p. 2). Pursuant to § 135 (1) p.-s 1–2 of the InsO, the transaction which provided a security could be contested if this transaction was made during the last ten years prior to the request to initiate insolvency proceedings or subsequent to such request, and the transaction which provided satisfaction could be contested if this transaction was made during the last year prior to the request to initiate insolvency proceedings or subsequent to such request.

However, it has been a controversial issue and it has been debated whether it is a question of insolvency law or company law. In addition to ensuring compliance with the principle of the protection of creditors' rights and interests, the objective of prescribing provisions on subordination in bankruptcy law, and not in company law, is that subordination applies to all entities with limited liability. Furthermore, it has been mentioned that subordination also applies to foreign companies if their center of business is in this particular company where

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[207] U. Foerste (see Note 81), p. 136.

[208] Gesetz zur Modernisierung des GmbH-Rechts und zur Bekämpfung von Missbräuchen vom 23. October 2008 BGBI. I S. 2026. Available at http://www.bgbl.de/xaver/bgbl/start.xav?startbk=Bundesanzeiger_BGBl&jumpTo=bgbl108s2026.pdf (most recently accessed on 22.04.2019).

[209] D. A. Verse (see note 197), pp. 1112, 1113–1114. A. Cahn, (see Note 183), p. 48.

[210] M. Beurskens, U. Noack (see Note 206), p. 1088.

subordination applies.[211] This means that if Estonia lays down a provision on subordination similar to that of in Germany and the center of business of foreign companies is in Estonia, the principle of subordination applies also to these foreign companies, not only to national companies.

Despite numerous arguments in favour of subordination, there are still opinions against it, which explain why subordination should not be the basis for restricting participation in bankruptcy proceedings, especially when a loan was granted in a situation where the company was not in crisis. The main reason is that shareholders are no longer taking risks related to the company.[212] This can mean that shareholders do not grant loans even for such projects which have positive economic value (*ex ante* efficient). It is opined that if each loan granted by shareholders is not automatically subordinated and it is forbidden to withdraw the loan during a certain period prior to the insolvency, then this will suffice. In the case of non-automatic subordination, shareholders receive at least a part of the loan, which means that there is strong incentive for shareholders to avoid taking excessive risks that could harm the creditors' rights and interests. Otherwise the loan becomes subordinated to the claims of other creditors. However, commercial activities involve risk-taking, which means that in addition to earning profit, the practice of commercial activities can also involve losing an investment.

Another argument against the subordination of shareholder loan claims is that in order to prevent the subordination of such a loan, the debtor may migrate their centre of main interest to another country with the aim of obtaining a different ranking. For example, a German company's centre of main interest is migrated to England, because there are no special rankings and rules on the subordination of shareholder loans in England.[213] However, even the Cork Committee has stated that English law is defective, because it does not have rules on the subordination of shareholder loan claims.[214] In fact, migration with the aim of bettering some creditors' position due to a different ranking is recognised to be against basic insolvency law and would also be considered an abuse of EU law. In this case, English court should give effect to the principle that it is prohibited to abuse EU law. Furthermore, it has been stated that English legislators should take a critical look at their insolvency law, especially at the ranking of shareholder loan claims.[215]

When comparing the previous and current German legislation governing shareholder loans to a company, it can be seen that the current legislation, which stipulates automatic subordination in bankruptcy proceedings is clear, comprehensible and, moreover, based on the principle of the protection of non-

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[211] M. Beurskens, U. Noack (see Note 206), p. 1088.

[212] D. A. Verse (see Note 197), pp. 1115–1116. A. Cahn (see Note 181), pp. 288, 294.

[213] R. J. de Weijs, M. S. Breeman. Comi-migration: use or abuse of European insolvency law? – European Company and Financial Law Review 2015/11 (4), p. 524.

[214] R. J. de Weijs. Towards an Objective European Rule on Transaction Avoidance in Insolvencies. – International Insolvency Review 2011/20 (3), p. 237. R. J. de Weijs, M. S. Breeman (see Note 213), p. 526.

[215] R. J. de Weijs, M. S. Breeman (see Note 213), pp. 524–525.

related creditors' rights and interests. The main reason for automatic subordination is that if a company has economic difficulties, it is the responsibility of the shareholders to ensure that the share capital is in compliance with the requirements provided by the law. There are no rational reasons for why the legal consequences in bankruptcy proceedings should be different if a shareholder makes a contribution to the share capital or gives the company a loan. Shareholders should not have an advantage when they have given a loan to the company. The objective in both cases is to bring financial resources to the company. If the company becomes insolvent and a shareholder has given a loan, this loan should be recovered after the claims of all other creditors are satisfied. Moreover, losing an investment is a natural risk related to commercial activities. The current German rules on subordination, which, in turn, form a basis for restricting shareholders' participation rights in bankruptcy proceedings, should be used as an example for amending Estonian insolvency law.

Due to the above, the law does not enable the protection of common rights and interests of creditors while shareholders with loan claims participate in the bankruptcy proceedings. Firstly, the type of debtor-related creditors' claim must be verified in the proceedings. The true nature of the claim would become the basis on which the creditor is entitled to receive the claim.[216] If the claim is based on a usual contractual transaction, the claim will be satisfied in the same ranking as other insolvency creditors' claims. In this case, compliance with the principle of equal treatment of creditors is ensured, because the claim will be satisfied in the same ranking as other similar claims.

On the other hand, if the legal relationship is based on a shareholder loan claim, this should be subordinated and be satisfied after other creditors' claims. This means that the "subordinated loan" should also be defined in the insolvency law. Therefore, the Estonian BA should provide a definition of subordinated loan claims, according to which shareholder loan claims are claims for the restitution of a loan replacing equity capital or claims resulting from legal transactions corresponding in economic terms to such a loan. The principle of subordination should also apply to transactions with third parties, who may not be related to the debtor, but the transaction corresponds to the definition of a subordinated loan. In order to ensure the implementation of this principle, the law should also prescribe that if such a claim is assigned to a third party for a certain period of time (for example during one year before the debtor's insolvency becomes evident), this creditor should also be treated as a creditor with subordinated claim.

Moreover, the BA should prescribe an addition ranking of claims for subordinated loan claims or provide that those claims will be satisfied from the assets which remain after payments out of the bankruptcy estate have been made and the claims of the creditors have been satisfied in full pursuant to § 156 of the BA. Those principles of shareholder loan claims would ensure the protection of common rights and interests of creditors, while shareholders as debtor-related creditors participate in the bankruptcy proceedings with loan claims.

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[216] J. Sarra (see Note 6), p. 198.

CONCLUSIONS

On the basis of the analysis provided above and articles published earlier, it can be concluded that the rules of current Estonian insolvency law do not enable to protect the common rights and interests of creditors, when debtor-related creditors participate in insolvency proceedings. There are no rules on voting or even on the treatment of shareholder loan claims in bankruptcy proceedings. Yet, restrictions on the participation of debtor-related creditors in Estonian insolvency proceedings are justified in order to protect the common rights and interests of creditors. The reason is that different types of creditors have significantly different rights and interests, which may influence the voting results and further course of the proceedings, and thereby harm the common rights and interests of non-related creditors. Moreover, when debtor-related creditors have gained control of the proceedings with their votes, this is against the principle of good faith. The author is of the opinion that the law should be much stricter. Since current insolvency law is in many aspects incomplete, the RA and the BA should be amended. The law should impose rules about restrictions on the participation of debtor-related creditors in order to ensure the protection of the common rights and interests of creditors. In fact, appropriate regulations from German law should be introduced into Estonian law.

a) Reorganisation advisers' and trustees' obligation to verify debtor-related creditors' claims before the voting process in insolvency proceedings in Estonia

All debtor-related creditors, including shareholders with loan claims, can participate in the voting process in Estonian insolvency proceedings, as there are no restrictions on their voting rights. A creditor obtains the right to participate in the voting process if the formal requirements of their claim, which are provided in the law, are met. Both reorganisation and bankruptcy law do not prescribe clear and strict rules stating that a claim must be verified – whether it can actually and legally exist – before determining the number of votes to creditors. Therefore, debtor-related creditors can manipulate the votes and even participate in the voting process with ostensible claims prepared in cooperation with the debtor.

The situation cannot be solved by holding reorganisation advisers and trustees liable for breaching an obligation to verify debtor-related creditors' claims, as they are not clearly obliged by the law to verify the existence and justification of the claims before determining the votes. Thus, because of the lack of regulations governing the voting rights of debtor-related creditors in insolvency proceedings, the voting process may not be legitimate. Therefore, the protection of the common rights and interests of creditors is not ensured.

In bankruptcy proceedings, legitimate voting is not ensured by court supervision either. When the court is adjudicating on disputes over the determined

number of votes, especially over debtor-related creditors' votes in which case there is a risk that a claim may be ostensible through collusion with the debtor, verification of the claim is only formal. It does not include verifying the substance of the claim and whether the claim can actually and legally exist.

Therefore, it should be prescribed in the RA and the BA that the existence and justification of the creditors' claims should be verified before voting, and heightened verification should be applied to debtor-related creditors' claims. By verifying the claims it would be possible to exclude ostensible claims and ensure a legitimate voting process in the proceedings. On the other hand, if restrictions on the participation of debtor-related creditors in insolvency proceedings will be imposed by law, the common rights and interests of creditors will be protected, and therefore it is not necessary to lay down the rule that obliges to verify debtor-related creditors' claims before voting prior to defending claims.

b) Compulsory formation of separate creditor groups for debtor-related creditors for voting purposes in reorganisation proceedings in Estonia

In reorganisation proceedings, debtor-related creditors' only interest is to ensure that the reorganisation plan is accepted by the creditors. Since the formation of different creditor groups for voting purposes is not prescribed by the law, the debtor may form the groups in such a way that the acceptance of the reorganisation plan is ensured by the votes of debtor-related creditors. Moreover, since the reorganisation measures, which are chosen and determined by the debtor in the reorganisation plan in order for the enterprise to overcome economic difficulties, already serve the interests of the debtor and of related persons, they may not be in the interests of non-related creditors. Thus, the voting process should enable to take account of the interests of non-related creditors when deciding on the acceptance of the reorganisation plan in the proceedings.

Therefore, Estonian insolvency law should provide rules on restricting the voting rights of debtor-related creditors in reorganisation proceedings in order to ensure the protection of the common rights and interests of non-related creditors. It should be prescribed in the RA that the formation of debtor-related creditor groups is compulsory. This group should also include shareholders with subordinated loan claims.

c) Restrictions on debtor-related creditors' voting rights in bankruptcy proceedings in Estonia

In bankruptcy proceedings, the debtor and their related creditors have different interests in comparison with non-related creditors. The aim of the debtor and their related persons is to avoid submitting claims for compensation for damage against the persons liable (for example when the debtor's insolvency has been

caused intentionally by damaging the economic situation or by doing transactions with related persons). The claims for compensation to be submitted can be avoided through the votes of debtor-related creditors. However, this is not in the common interests of non-related creditors, as they are not able to receive additional financial resources.

Therefore, Estonian insolvency law should provide rules on restricting the voting rights of debtor-related creditors in insolvency proceedings in order to ensure the protection of the common rights and interests of non-related creditors. The BA should prohibit the voting rights of all debtor-related creditors in bankruptcy proceedings, including shareholders with subordinated loan claims.

d) Definition and satisfaction of shareholders' loan claims as subordinated claims in bankruptcy proceedings in Estonia

All claims of debtor-related creditors, including shareholders' loan claims, are satisfied in the same ranking as any other unsecured claims of non-related creditors that are filed within the specified term. According to the current insolvency law, there are no rules on shareholder loan claims, but the rights of shareholders with loan claims differ from the ones of other (unrelated) creditors. Shareholders are obliged to ensure that the share capital corresponds to the requirements of the law in order to satisfy the creditors' claims. However, if the company suffers from economic difficulties and the equity capital does not correspond to the requirements of the law, it is, in essence, the shareholders' decision whether to liquidate the company in bankruptcy proceedings or to find additional resources to continue business activities. If they decide to continue business activities, another decision will be taken by shareholders, i.e. whether to grant a loan to the company or make a contribution to the share capital. The shareholders' contribution to the share capital cannot be repaid in bankruptcy proceedings before the claims of all other creditors have been covered in order to ensure its purpose, but the loan claim can be satisfied in the same ranking as the claims of other unsecured creditors in insolvency proceedings. Thus, it is preferred to grant the company a loan.

The objective in both cases – in the case of a loan granted by shareholders and in the case of a contribution to the share capital – is the same. The aim is to bring additional resources to the company. This means that it is not justified to provide an advantage for a shareholder in a situation where the loan claim has been filed to the proceedings, but the purpose of it is investing in the capital. In fact, if a shareholder has not been able to fulfil their obligations and provide share capital as laid down in the law, they do not need additional protection in bankruptcy proceedings, but non-related creditors do.

However, the special regulation is not justified when satisfying the claims of another type of debtor-related creditors and the object of transaction is not similar to the nature of a subordinated loan, but is a usual contractual transaction.

Usual transactions between related persons should be allowed in order to ensure a well-functioning business environment.

Therefore, the BA should provide rules for restricting the satisfaction of subordinated loan claims in bankruptcy proceedings in order to ensure the protection of the common rights and interests of non-related creditors.

1) The BA should provide a definition of shareholder loan claims according to which these are claims for the restitution of a loan replacing equity capital or claims resulting from legal transactions corresponding in economic terms to such a loan. The principle of subordination should also apply to transactions with third parties, who may not be related to the debtor, but the transaction corresponds to the definition of a subordinated loan. In order to ensure the implementation of this principle, it should be also prescribed in the law that if such a claim is assigned to a third party for a certain period of time (for example during one year before the debtor's insolvency becomes evident), this creditor should also be treated as a creditor with a subordinated claim.
2) It should be prescribed in the BA that subordinated loan claims will be satisfied after the claims of all other creditors are satisfied. The BA should prescribe an additional ranking of claims for subordinated loan claims or provide that these claims will be satisfied from the assets which remain after payments out of the bankruptcy estate have been made and the claims of the creditors have been satisfied in full pursuant to § 156 of the BA.

In fact, it is justified to provide a special regulation on the satisfaction of subordinated loan claims in bankruptcy law, because then it is also possible to apply the rules to all foreign companies whose center of business is in Estonia.

e) Adjudication of disputes over the determined number of votes in accordance with the principle of speed and efficiency in bankruptcy proceedings in Estonia

One of the objectives of court supervision in bankruptcy proceedings is to ensure a quick and effective adjudication of disputes. This means that disputes over the determination of the number of votes at the first general meeting of creditors should also be adjudicated on quickly and effectively, but in reality, it takes a long time. The problem is that judges misinterpret the BA and do not resolve disputes over the determined number of votes at the same general meeting of creditors. At that time the general meeting is suspended, which means that the entire bankruptcy procedure is suspended – important decisions are not taken until the dispute is resolved. Moreover, this may serve the interests of debtor-related creditors if they have objected to a creditor's number of votes in bad faith in order to delay the proceedings.

Therefore, Estonian bankruptcy law should provide clear regulations on court supervision at the first general meeting of creditors in bankruptcy

proceedings in order to ensure the protection of the rights and interests of non-related creditors. It should be prescribed in the BA that in the case of a dispute over the determined number of votes at the first general meeting of creditors in bankruptcy proceedings, the dispute will be resolved and the votes will be determined at the same general meeting by the judge participating in the meeting (in the county court). The judge may determine the number of votes on the next working day only in exceptional circumstances.

If it would be prescribed in the law that debtor-related creditors are prohibited from voting and disputes over the determined number of votes will be resolved at the same meeting, it would not be necessary to lay down (from the aspects of disputes over the determined number of votes) that insolvency cases are overseen by specialised judges or debtor-related creditors' claims are subject to a heightened verification process in the case of disputes over the determined number of votes. These provisions would ensure the protection of the common rights and interests of creditors when debtor-related creditors participate in bankruptcy proceedings.

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ABBREVIATIONS

BA	Pankrotiseadus (Bankruptcy Act)
CC	Äriseadustik (Commercial Code)
CCPC	Tsiviilkohtumenetluse seadustik (Civil Court Proceedings Code)
GmbHG	Gesetz betreffend die Gesellschaften mit beschränkter Haftung
GPCCA	Tsiviilseadustiku üldosa seadus (General Part of Civil Code Act)
InsO	Insolvenzordnung
LOA	Võlaõigusseadus (Law of Obligations Act)
MoMiG	Gesetz zur Modernisierung des GmbH-Rechts und zur Bekämpfung von Missbräuchen
RA	Saneerimisseadus (Reorganisation Act)
RPflG	Rechtspflegergesetz

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SUMMARY IN ESTONIAN

Võlgnikuga seotud võlausaldajate nõuded maksejõuetusmenetlustes

Eesti maksejõuetusõigus sätestab juriidilisest isikust võlgnikele kahte erinevat menetlust: saneerimis- ja pankrotimenetlus. Saneerimismenetlus tähendab erinevate abinõude rakendamist, et ületada ettevõttel tekkinud makseraskused ning tagada jätkusuutlik majandustegevus. Pankrotimenetlus viiakse läbi juhul, kui võlgniku makseraskused ei ole enam ajutised ja on muutunud püsivalt maksejõuetuks. Kuigi nende menetluste olemus on erinev, siis mõlema menetluse eesmärgiks on rahuldada võlausaldajate nõudeid. Maksejõuetusmenetluste eesmärgist lähtuvalt on võlausaldajatel ühine huvi saada enda nõue rahuldatud võimalikult suures ulatuses. Selleks esitavad kõik võlausaldajad võlgniku vastu oleva nõude menetlusse, mis annab neile omakorda õiguse vastu võtta otsuseid hääletamise teel ning saada osa nõuete rahuldamisest.

Maksejõuetusmenetlustes on lubatud osaleda ka võlgnikuga seotud võlausaldajatel, kelleks võivad näiteks olla osanik, juhatuse liige kui ka nende abikaasa või muu perekonnaliige. Eesti maksejõuetusõigus ei ole võlgnikuga seotud võlausaldajatele kehtestanud mingisuguseid piiranguid, mis tähendab, et nad saavad menetluses osaleda nagu iga teine võlausaldaja. Asjaolu, et Eesti maksejõuetusõiguses puuduvad igasugused piirangud võlgnikuga seotud võlausaldajate menetluses osalemise kohta, ei tähenda, et ka praktikas probleemid puuduvad. Tegelikkuses on võlgnikuga seotud võlausaldajate osalemine nii saneerimis- kui pankrotimenetlustes põhjustanud mitmesuguseid probleeme ja tekitanud erinevaid küsimusi.

Peamine probleem, mis seondub võlgnikuga seotud võlausaldajate osalemisega maksejõuetusmenetlustes, on see, et nad võivad mõjutada ja kontrollida menetlust ning selle käiku. Kuna maksejõuetusmenetlustes võtavad võlausaldajad otsused vastu hääletamise teel, mis on enamasti määrava tähtsusega, võib võlgnik manipuleerida häältega endaga seotud võlausaldajate kaudu. Kui nõue tagab neile menetlustes häälteenamuse, võetakse vastu otsuseid, mis on võlgniku ja temaga seotud isikute huvides, kuid mitte võlausaldajate üldistes huvides, mis tähendab vastuolu menetluste eesmärgiga. Veel enam, need nõuded, mille alusel hääled määratakse, võivad olla näilikud, kuna võlgnikul ja temaga seotud võlausaldajatel on kerge kujundada vajaliku suurusega nõue, mistõttu hääletusprotsess ei ole õiguspärane.

Kui võlgniku suhtes on algatatud kas saneerimismenetlus või on juba välja kuulutatud pankrot, peavad need menetlused olema kontrollitavad sõltumatute ja mitteseotud võlausaldajate poolt. Saneerimismenetlustes tuleb välistada olukord, kus seotud võlausaldajad saavad hääletada selliselt, et nende hääled on otsustavad saneerimiskava kinnitamisel, kuna sellega võib kahjustada mitteseotud võlausaldajate huve. Saneerimiskava kinnitamine peaks olema just mitteseotud võlausaldajate otsustada, kas see lähtub nende huvidest. Saneerimiskava vastuvõtmine hääletamise teel võlgnikuga seotud võlausaldajate poolt tähendab sisuliselt teistkordset õigust otsustada abinõude sobilikkuse üle ning

on praktikas saanud pigem vahendiks, mille abil saab võlgnik tagada saneerimiskava vastuvõtmise ja edasise majandustegevuse jätkamise.

Kui võlgnik on muutunud püsivalt maksejõuetuks, võib see olla tahtlikult põhjustatud, mis tähendab, et pankrotihaldur peaks esitama pankroti põhjustanud isikute vastu kahjuhüvitise nõude. Pankrotihalduril tuleb välja selgitada, mis on maksejõuetuse tekkimise põhjus ning kas selle võis põhjustada mõni kahjulik tehing võlgniku ja temaga seotud isikute vahel. Kui võlgnik saab seotud võlausaldajate kaudu pankrotimenetlust kontrollida, võib sellise nõude esitamine osutuda võimatuks. See tähendab, et ühtegi alust kahjunõude esitamiseks ei tuvastata ning hüvitis jääb saamata, mis kahjustab mitteseotud võlausaldajate huve. Veel enam, osanik või aktsionär võib esitada laenu nõude menetlusse ning see rahuldatakse teiste pandiga tagamata võlausaldajatega samas järgus. Selline osaniku või aktsionäri laenu nõue peaks üldiste seisukohtade järgi olema rahuldatud pärast kõikide teiste võlausaldajate nõuete tasumist. Põhjuseks on see, et osaniku või aktsionäri laenu sisuks on kapitali investeering, mille saab tagastada osanikule või aktsionärile alles pärast kõikide teiste võlausaldajate nõuete rahuldamist. See tähendab, et kui osanik või aktsionär esitab menetlusse laenu nõude, mille sisuks on tegelikkuses investeering, on osanik või aktsionär pankrotimenetluses nõude rahuldamise korral eelisseisus. Osanik või aktsionär ei peaks saama nõude rahuldamisel pankrotimenetluses eelisõigust vastavalt sellele, kuidas nõude alus on määratletud, vaid vastavalt nõude tegelikule olemusele.

Töö eesmärgiks on analüüsida hüpoteesi, et Eesti maksejõuetusõiguse reeglid ei taga võlausaldajate ühiste õiguste ja huvide kaitset, kui võlgnikuga seotud võlausaldajad osalevad maksejõuetusmenetlustes, mistõttu peaks seaduses kehtestama piirangud võlgnikuga seotud võlausaldajate menetlusõiguste kohta.

Töö eesmärgi saavutamiseks uurib autor alljärgnevaid uurimisküsimusi:

1) Kas Eesti õigus peaks kehtestama saneerimisnõustajale ja pankrotihalldurile seadusest tuleneva kohustuse kontrollida võlausaldajate nõudeid enne häälte määramist maksejõuetusmenetlustes, kui jah, siis kas võlgnikuga seotud võlausaldajate nõuetele peaks kohaldama kõrgendatud kontrollikohustust?
2) Kas võlgnikuga seotud võlausaldajatele eraldi rühma moodustamine hääletamise eesmärgil peaks Eesti saneerimismenetlustes olema kohustuslik?
3) Kas võlgnikuga seotud võlausaldajate hääleõigust peaks Eesti pankrotimenetlustes piirama?
4) Kas osaniku või aktsionäri laenu nõuded peaksid olema Eesti õiguses defineeritud kui allutatud laenu nõuded ning kas need peaks olema rahuldatud pärast kõikide teiste võlausaldajate nõuete rahuldamist?
5) Kas kehtiv regulatsioon häälte määramise vaidluse lahendamisel kohtus tagab Eestis kiire ja efektiivse pankrotimenetluse, kui ei, siis milliseid seaduslikke abinõusid peaks rakendama?

Doktoritöö põhineb kolmel õigusteaduslikul artiklil ning need on piiritletud töö uurimisküsimusega. Töö eesmärgiks ei ole teha ettepanekuid suuremahuliste muudatuste tegemiseks, vaid üksikküsimuste osas, pakkudes ettepanekuid probleemide lahendamiseks seaduste täiendamist. Artiklid, millele doktoritöö põhineb:

1. 'Formation of Creditor Groups in Reorganisation Proceedings: Does Estonia Need a Better Regulation?'.[217]
2. 'Court Supervision of the Determination of the Votes at the First General Meeting of Creditors in Estonian Bankruptcy Law'.[218]
3. 'Restrictions on the Participation of Debtor-related Creditors in Bankruptcy Proceedings: Is There a Need for a New Approach in Estonian Law?'.[219]

Esimeses artiklis keskendutakse saneerimismenetlusele ning analüüsitakse erinevate võlausaldajate rühmade moodustamise vajalikkuse kohustuslikkust, et tagada saneerimiskava vastuvõtmisel õiguspärane hääletusprotsess ning seeläbi võlausaldajate ühiste õiguste ja huvide kaitse. Teine artikkel käsitleb kohtu järelevalvega seonduvaid probleeme pankrotimenetluses häälte määramise vaidlustes, mis tekivad võlausaldajate esimesel üldkoosolekul. Nimetatud artiklis analüüsitakse, kuidas tagada kiire ja efektiivne häälte määramise vaidluste lahendamine, mis vastaks võlausaldajate ühiste õiguste ja huvide kaitse põhimõttele. Kolmandas artiklis käsitletakse võlgnikuga seotud võlausaldajate osalemisõiguste piirangute kehtestamise vajalikkust pankrotimenetluses, et tagada võlausaldajate ühiste õiguste ja huvide kaitse.

Autor on kasutanud väitekirjas peamiselt analüütilist ja võrdlevat uurimismeetodit. Eesti maksejõuetusõigust võrreldakse peamiselt Saksa õigusega, kuid kohati analüüsitakse ka Läti, Leedu ja USA vastavaid regulatsioone. Saksa õigus on valitud seetõttu, et see on olnud Eesti tsiviilõiguse, sh maksejõuetusõiguse peamiseks eeskujuks. Siiski tuleb märkida, et Saksa õigus on üle võetud osaliselt, mistõttu tuleb võrrelda, kas Eesti ja Saksa õigus on pigem sarnased või erinevad. Läti, Leedu ja USA õigust võrreldakse Eesti õigusega mõne üksiku probleemi puhul. USA õigust analüüsitakse võlausaldajate rühmade moodustamise aspektist, kuna Eesti saneerimisseaduses sätestatud rühmitamise idee pärineb just USA-st. Läti ja Leedu õigust võrreldakse üldiste probleemide käsitlemisel, et välja selgitada, kuidas on sama probleem lahendatud sisuliselt sama turuosa erinevates paikades. Lisaks tuleb märkida, et sarnaselt Eesti õigusele ei ole ka nendes riikides kõikide töös käsitletud aspektide kohta kõikehõlmavat teoreetilist materjali.

Alljärgnevalt esitab autor kokkuvõtte töös analüüsitud probleemidest ja nende lahendustest.

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[217] *Juridica International* Vol. 21 (2014), pp. 159-167.
[218] *Juridica International* Vol. 26 (2017), pp. 76-84.
[219] *International Comparative Jurisprudence* Vol. 4/1 (2018), pp. 52-65.

Doktoritöös esitatud analüüsi ja varem avaldatud artiklite põhjal võib järeldada, et kehtiv Eesti maksejõuetusõigus ei taga võlausaldajate ühiste õiguste ja huvide kaitset, kui võlgnikuga seotud võlausaldajad osalevad maksejõuetusmenetlustes, kuna puuduvad igasugused reegleid nende osalemise kohta. Tagamaks võlausaldajate ühiste õiguste ja huvide kaitse tuleks Eesti maksejõuetusmenetlustes kehtestada piirangud võlgnikuga seotud võlausaldajate osalemise kohta. Põhjuseks on see, et erinevat liiki võlausaldajatel on oluliselt erinevad õigused ja huvid, mis võivad mõjutada hääletamistulemusi ja edasist menetluse käiku, mis aga kahjustab mitteseotud võlausaldajate ühiseid õigusi ja huve. Kui võlgnikuga seotud võlausaldajad on saavutanud häälteenamuse ja seeläbi kontrolli menetluse ja selles vastuvõetavate otsuse üle, on sellise menetlusõiguse teostamine ka hea usu põhimõtte vastane. Kuna praegune maksejõuetusõigus on võlgnikuga seotud võlausaldajate osalemise osas puudulik, tuleks nii pankrotikui saneerimisseadust täiendada asjakohaste sätetega. Seadusega tuleks kehtestada piirangud võlgnikuga seotud võlausaldajate osalemise kohta maksejõuetusmenetlustes, et tagada võlausaldajate ühiste õiguste ja huvide kaitse. Selliste sätete kehtestamisel tuleks eeskuju võtta asjakohastest Saksamaa regulatsioonidest.

1) Võlgnikuga seotud võlausaldajate nõuete kontrollimise kohustus saneerimisnõustaja ja pankrotihalduri poolt enne häälte määramist Eesti maksejõuetusmenetluses

Kõik võlgnikuga seotud võlausaldajad saavad osaleda maksejõuetusmenetluses ning vastu võtta otsuseid hääletamise teel. Kuna häälte määramise aluseks on menetlusse esitatud nõudeavaldus, tuleks enne võlausaldajale häälte määramist õiguspärase hääletamise tagamiseks kontrollida, kas ka nõue on õiguspärane. Saneerimisnõustaja ega pankrotihaldur ei kontrolli enne häälte määramist nõude sisulist põhjendatust ja tõendatust, vaid lähtuvad häälte määramisel nõudeavalduse formaalsetest tingimustest. Saneerimis- ega pankrotiseadus ei sätesta selgeid reegleid võlausaldajate nõuete kontrollimise kohta enne häälte määramist. Seega võib tekkida olukord, kus võlgnik manipuleerib hääleõigusega endaga seotud võlausaldajate kaudu ning esitab menetlusse näiliku nõude.

Praktikas tekkinud probleeme näilike nõuete osas ei lahenda ka saneerimisnõustaja ja pankrotihalduri vastutus, väites, et kuivõrd nad ei ole täitnud enda seadusest tulenevat kohustust kontrollida esitatud nõudeid ega ole taganud õiguspärast hääletamist, vastutavad nad kohustuse rikkumise eest. Saneerimisnõustaja ega pankrotihaldur ei saa vastutada sätestamata kohustuse rikkumise eest. Pankrotimenetluses ei taga ka kohtu järelevalve hääletamise õiguspärasust, kuna kui tekib vaidlus häälte määramise üle, lähtub kohus vaidluse lahendamisel samuti nõude formaalsetest tingimustest ega kontrolli, mis on nõude sisu ja kas nõue on põhjendatud ning tõendatud.

Seetõttu tuleks nii saneerimis- kui ka pankrotiseadust täiendada ja kehtestada reeglid, et nii saneerimisnõustaja kui ka pankrotihaldur peaksid enne häälte

määramist kontrollima võlausaldajate nõuete olemasolu ja põhjendatust ning võlgnikuga seotud võlausaldajate nõuete suhtes tuleks kohaldada kõrgendatud kontrollimehhanismi. Seeläbi saab välistada võlgnikuga seotud võlausaldajate poolt esitatavad näilikud nõuded ja tagada õiguspärase hääletamisprotsessi. Teisest küljest, kui seaduses kehtestatakse piirangud, et võlgnikuga seotud võlausaldaja ei saa maksejõuetusmenetlustes hääletada, kaitseb see võlausaldajate ühiseid õigusi ja huve, mistõttu ei oleks vaja kehtestada võlgnikuga seotud võlausaldajate nõuete suhtes kohaldatavat kõrgendatud kontrollimise kohustust enne häälte määramist.

2) Võlausaldajate rühmade moodustamise kohustuslikkus võlgnikuga seotud võlausaldajatele hääletamise eesmärgil Eesti saneerimismenetluses

Saneerimismenetluses on võlgniku ja temaga seotud võlausaldajate ainus huvi tagada, et võlausaldajad võtavad vastu saneerimiskava, kuna edukas saneerimismenetlus tagab võimaluse jätkata ettevõtte majandustegevusega. Kuna saneerimisseadus ei kohusta võlgnikku moodustama eraldi rühmasid võlausaldajate jaoks hääletamise eesmärgil, võib võlgnik moodustada rühmad selliselt, et tagada saneerimiskava vastuvõtmine endaga seotud võlausaldajate häälte abil. Pealegi, kuna abinõud saneerimiskavas, mille võlgnik on määranud ettevõte majandusraskuste ületamiseks, on valitud võlgniku ja temaga seotud võlausaldajate huvides, ei pruugi need abinõud olla mitteseotud võlausaldajate huvides. Seega peaks hääletamine tagama, et saneerimiskava vastuvõtmisel võetakse arvesse just mitteseotud võlausaldajate huve.

Seetõttu peaks Eesti maksejõuetusseaduses kehtestama reeglid, mis piiravad võlgnike võlausaldajate hääleõigust saneerimismenetluses, et tagada mitteseotud võlausaldajate ühiste õiguste ja huvide kaitse. Saneerimisseadus peaks kehtestama regulatsiooni, mille kohaselt võlgnikuga seotud võlausaldajatele on eraldi rühma moodustamine kohustuslik. See rühm peaks hõlmama ka allutatud laenu nõudeid.

3) Võlgniku seotud võlausaldajate hääleõiguse piiramine Eesti pankrotimenetluses

Pankrotimenetluses on võlgniku ja temaga seotud võlausaldajate huvid ja eesmärgid erinevad võrreldes mitteseotud võlausaldajatega. Võlgniku ja temaga seotud isikute eesmärk on vältida kahjunõuete esitamist kahju tekitanud isikute vastu (nt kui võlgniku maksejõuetus on tahtlikult põhjustatud või et on tehtud võlgniku majandustegevust kahjustav tehing seotud isikutega). Võlgnikuga seotud võlausaldajate häälte abil on võimalik vältida selliste kahjunõuete esitamist, mis ei ole vastavuses mitteseotud võlausaldajate ühiste huvidega, kuna täiendavad rahalised vahendid jäävad saamata.

Seetõttu peaks Eesti maksejõuetusseaduses kehtestama reeglid, mis piiravad võlgnikuga seotud võlausaldajate hääleõigust pankrotimenetluses, et tagada mitteseotud võlausaldajate ühiste õiguste ja huvide kaitse. Pankrotiseaduses peaks kehtestama regulatsiooni, mis keelab kõikidel võlgnikuga seotud võlausaldajatel hääletamise. See peaks hõlmama ka isikuid, kelle nõude aluseks on allutatud laen.

4) Osanike või aktsionäri laenunõuete määratlemine ja rahuldamine allutatud laenu nõuetena Eesti pankrotimenetluses

Kõikide võlgnikuga seotud võlausaldajate nõuded, sh osanike või aktsionäri laenu nõuded, rahuldatakse samas järgus teiste tähtaegselt esitatud pandiga tagamata võlausaldajate nõuetega. Kehtivas maksejõuetusõiguses puuduvad igasugused reeglid selliste nõuete kohta. Osanike või aktsionäri laenu nõudeid tuleks aga defineerida allutatud laenu nõuetena ning need peaksid saama rahuldatud alles pärast kõikide teiste võlausaldajate nõuete tasumist. Nimelt on osanikud või aktsionärid kohustatud tagama, et ühingu kapital vastaks seaduses sätestatud nõuetele. Kui ettevõttel tekivad makseraskused ja ühingu kapital ei vasta seaduses sätestatud tingimustele, tuleb osanikel või aktsionäridel teha otsus, kas ettevõte likvideerida pankrotimenetluses või leida täiendavad ressursid majandustegevuse jätkamiseks. Kui otsustatakse majandustegevusega jätkata, tuleb neil võtta vastu järgminegi otsus, kas anda ettevõttele laenu või teha kapitali sissemakse. Kuna kapitali sissemakseid ei saa pankrotimenetluses tagasi maksta enne, kui kõikide teiste võlausaldajate nõuded on rahuldatud, kuid laenunõue rahuldatakse samas järjekorras teiste pandiga tagamata võlausaldajate nõuetega, antakse ettevõttele pigem laenu. Mõlemal juhul on aga eesmärk sama. See tähendab, et osanik või aktsionär saab eelisõiguse maksejõuetusmenetlustes nõude rahuldamisel, kui esitab menetlusse laenu nõude, kuigi selle eesmärgiks on olnud kapitali investeering.

Seetõttu peaks Eesti maksejõuetusseaduses sätestama reeglid, mis piiravad võlgniku osanike või aktsionäride laenu nõuete rahuldamist pankrotimenetluses, et tagada mitteseotud võlausaldajate ühiste õiguste ja huvide kaitse.

a) Pankrotiseaduses peaks defineerima, et allutatud laenu nõueteks on osanike või aktsionäride laenu tagasinõuded või nõuded õigustoimingutest, mis vastavad sellisele laenule majanduslikus mõttes. Allutatuse põhimõtet tuleks kohaldada ka tehingute suhtes kolmandate isikutega, kes ei pruugi küll olla võlgnikuga seotud, kuid tehingu olemus vastab allutatud laenu määratlusele. Selle põhimõtte rakendamise tagamiseks tuleks seadusega kehtestada, et kui laenu nõue on loovutatud kolmandale isikule teatud aja jooksul (näiteks ühe aasta jooksul enne võlgniku maksejõuetuse ilmnemist), peaks seda võlausaldajat kohtlema ka kui allutatud laenu nõudega võlausaldajat.

b) Pankrotiseadus peaks kehtestama, et allutatud laenu nõuded rahuldatakse pärast kõigi teiste võlausaldajate nõuete rahuldamist pankrotimenetluses. Pankrotiseaduses peaks kehtestama allutatud laenu nõuete rahuldamiseks eraldi järgu

või sätestama, et need nõuded rahuldatakse varadest, mis jäävad järele pärast pankrotivara väljamaksmist ja võlausaldajate nõuete rahuldamist (PankrS § 156 alusel).

Võlgnikuga seotud võlausaldaja nõuete rahuldamisel ei ole vajalik kehtestada erireegleid, kui tehingu olemuseks ei ole allutatud laenu nõue, vaid selle sisuks on mõni muu lepinguline tehing. Toimiva ärikeskkonna tagamiseks tuleks lubada tavapärasete tehingute tegemist seotud isikute vahel.

Lisaks tuleb märkida, et allutatud laenu nõuete regulatsioon on põhjendatud kehtestada just pankrotiseaduses, kuna sel juhul on võimalik kohaldada allutatusega seotud reegleid ka kõikidele välismaistele äriühingutele, kelle põhihuvide kese on Eestis.

5) Häälte määramise vaidluste lahendamine kohtus lähtudes kiiruse ja efektiivsuse põhimõttest Eesti pankrotimenetluses

Üheks kohtu järelevalve eesmärgiks pankrotimenetluses on tagada vaidluste kiire ja efektiivne lahendamine. See tähendab, et võlausaldajate esimesel üldkoosolekul tekkinud häälte arvu puudutavad vaidlused tuleks lahendada kiiresti ja efektiivselt, kuid sellised vaidlused praktikas on ajakulukad. Peamine probleem on selles, et kohtunikud tõlgendavad pankrotiseaduse sätteid erinevalt selle eesmärgist ega lahenda häälte määramise vaidlusi samal võlausaldajate üldkoosolekul. Vaidluse lahendamise ajal on aga võlausaldajate üldkoosoleku läbiviimine peatatud, mis tähendab, et sisuliselt kogu pankrotimenetlus on peatatud - olulisi otsuseid ei võeta vastu enne vaidluse lahendamist ja võlausaldajale häälte määramist. Selline pikaajaline protsess võib aga toimuda just võlgniku ja temaga seotud isikute huvides, et venitada menetlusega erinevate tähtaegade möödumise eesmärgil, mistõttu esitavad võlgnikuga seotud võlausaldajad pahatahtlikke vastuväiteid mitteseotud võlausaldajate häälte arvule.

Seetõttu peaks Eesti maksejõuetusseaduses sätestama reeglid, et võlausaldajate üldkoosolekul tekkinud häälte määramise vaidluse lahendab kohus samal üldkoosolekul (maakohtus). Kohtunik võib määrata häälte arvu järgmisel tööpäeval ainult erandjuhtudel.

Kui seadusega on ette nähtud, et võlgnikuga seotud võlausaldajatel on keelatud pankrotimenetluses hääletada ja on sätestatud tähtaeg, millise aja jooksul tuleb häälte määramisega seotud vaidlused lahendada, ei ole täiendavalt vajalik, et maksejõuetusmenetlusi menetlevad selleks spetsialiseerunud kohtunikud või et häälte määramise vaidluse puhul kohaldatakse võlgnikuga seotud võlausaldajate nõuete suhtes kõrgendatud kontrollikohustust, kuna kehtestatavad põhimõtted tagavad võlausaldajate ühiste õiguste ja huvide kaitse, kui võlgnikuga seotud võlausaldajad osalevad pankrotimenetlustes.

PUBLICATIONS

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Publications:

1. 'Formation of Creditor Groups in Reorganisation Proceedings: Does Estonia Need a Better Regulation?'. – Juridica International 2014/21, pp. 159–167.
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2011–2013	Tartu Ülikool, õigusteaduskond, õigusteaduse magister
2008–2011	Tartu Ülikool, õigusteaduskond, sotsiaalteaduste bakalaureus
1996–2008	Rapla Vesiroosi Gümnaasium (hõbemedal), keskharidus

Ametikäik

01.09.2017–31.08.2019	Tartu Ülikool, sotsiaalteaduste valdkond, õigusteaduskond, tsiviilõiguse nooremteadur (0,75)
2015–2017	Tartu Ülikool, õigusteaduskond, õppeülesande täitja
01.09.2018–05.10.2018	FIE Sirje Tael – Pankrotihaldur ja Tartu kohtutäitur Sirje Tael abi (kohtutäituri abi alates 01.03.2013) (0,25)
2011–31.08.2017	FIE Sirje Tael – Pankrotihaldur ja Tartu kohtutäitur Sirje Tael abi (kohtutäituri abi alates 01.03.2013) (1,00)
2009–2011	OÜ Volenter – pankrotihaldur Sirje Tael assistent (1,00)

Publikatsioonid:

1. ‘Formation of Creditor Groups in Reorganisation Proceedings: Does Estonia Need a Better Regulation?’. – Juridica International 2014/21, pp. 159–167.
2. ‘Court Supervision of the Determination of the Votes at the First General Meeting of Creditors in Estonian Bankruptcy Law’. – Juridica International 2017/26, pp. 76–84.
3. ‘Restrictions on the Participation of Debtor-related Creditors in Bankruptcy Proceedings: Is There a Need for a New Approach in Estonian Law?’. – International Comparative Jurisprudence 2018/4 (1), pp. 52–65.

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