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SIGITAS BARAKAUSKAS

JUDICIAL PROCEDURES OF COMPANY RESCUE: COMPARATIVE ASPECTS

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Scientific supervisor:

Prof. Habil. Dr. Valentinas Mikelėnas (Vilnius University, Social Sciences, Law – 01 S).

The doctoral dissertation is defended at the Law Research Council of Vilnius University.

Chairman – Prof. Habil. Dr. Vytautas Nekrošius (Vilnius University, Social Sciences, Law – 01 S).

Members of the Council:

Prof. Dr. Jevgenij Machovenko (Vilnius University, Social Sciences, Law – 01 S);

Doc. Dr. Daiva Petrylaitė (Vilnius University, Social Sciences, Law – 01 S);

Doc. Dr. Vigita Vėbraitė (Vilnius University, Social Sciences, Law – 01 S);

Prof. Dr. Paul Varul (Tartu University, Social Sciences, Law – 01 S).

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Address: Saulėtekio av. 9, LT-10222, Vilnius, Lithuania.

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Nariai:
prof. dr. Jevgenij Machovenko (Vilniaus universitetas, socialiniai mokslai, teisė – 01 S);
doc. dr. Daiva Petrylaitė (Vilniaus universitetas, socialiniai mokslai, teisė – 01 S);
doc. dr. Vigita Vėbraitė (Vilniaus universitetas, socialiniai mokslai, teisė – 01 S);
prof. dr. Paul Varul (Tartu universitetas, socialiniai mokslai, teisė – 01 S).

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PROBLEM AND RELEVANCE OF THE RESEARCH

The importance of legal regulation on company rescue[1] as well as the fact that viable companies[2] experiencing temporary difficulties should be eligible to use company rescue procedures in all legal systems[3] have been recognised for a number of years. Difficulties of a company or even its insolvency should be considered as a part of normal economic development and an opportunity for a new start[4]. Therefore, if a viable company encounters temporary difficulties, the first thing is to consider the rescue possibilities of such a company and it is only after that point that the question of liquidation should be raised. However, viable companies experiencing temporary difficulties may be wound-up unfoundedly due to imperfectness of legal regulation (due to legal regulation that does not suit the realities of the present) without an attempt to rescue such companies and to overcome temporary difficulties faced by these companies or with an unsuccessful attempt to do that merely because there are no proper conditions ensured in particular countries.

Around 9 percent of all companies, for one reason or another, voluntarily exit from the market or are forced out of the market each year in the European Union. Less than half of all companies manage to survive longer than 5 years[5]. In 2012 insolvency procedures were initiated even to around 250,000 companies in the European Union while in the United States of America to around 40,000 companies, i.e. the aforesaid

[1] OMAR, Paul J. The Internationalisation of Insolvency Law: an Anglo-French Comparison. *The International Lawyer*, 2005, vol. 39, no. 1, p. 107.

[2] In this research, a viable company is understood as a company experiencing difficulties that may be overcome and whose long-term viability and competitiveness may be restored with the help of certain rescue procedure. In other words, a viable company is considered to be a company whose problems can be solved (rather than a company whose problem-solving is postponed only to maintain *status quo* and to postpone the inevitable, i.e. liquidation of such a company) by implementing necessary rescue measures in order to ensure success for further operations of a distressed company in a long-term perspective.

[3] European Commission. *Best Project on Restructuring, Bankruptcy and a Fresh Start* [interactive]. Brussels: Enterprise Directorate – General, 2003 [accessed on 1st March, 2015], p. 7. Available at: <http://www.pedz.uni-mannheim.de/daten/edz-h/gdb/03/best-report-en.pdf>.

[4] European Commission. *Overcoming the Stigma of Business Failure – For a Second Chance Policy: Implementing the Lisbon Partnership for Growth and Jobs* [interactive]. Brussels: Commission of the European Communities, 2007 [accessed on 1st March, 2015], p. 3. Available at: <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52007DC0584&from=EN>.

[5] Eurostat. *Business Demography Statistics* [interactive; accessed on 1st March, 2015]. Available at: <http://epp.eurostat.ec.europa.eu/statistics_explained/index.php/Business_demography_statistics>.

procedure is initiated almost to 800 companies each day[6]. Within the European Union alone, each year 1.7 million employees lost their jobs because of insolvency[7]. All this statistical data is giving serious cause for concern and consideration whether the right balance between company rescue and winding-up procedures is really ensured; whether legal regulation of company rescue needs to be improved in order to facilitate the survival of distressed companies.

The emphasis must lie on the fact that the proper regulation on company rescue became especially important in the face of the global economic crisis, which has hardly struck many economic operators[8]. All members of the European Union, including Lithuania, have been significantly affected by the recession; an unemployment rate has become the highest over the last decade[9]. As a result of these reasons, improvement of the aforesaid legal regulation has become a priority issue because by saving of viable companies experiencing temporary difficulties a contribution is made to solving problems caused by the global economic crisis. Many adverse effects resulting from compulsory winding-up of companies would be avoided, if distressed viable companies had more favourable conditions to stay on the market[10]. Over the recent years, the European Union has recognised once again that every legal system should create proper conditions for viable companies to overcome temporary difficulties and to stay on the market and at the same time it should provide the necessary protection for creditors' interests (i.e. to ensure the balance between different interests during company rescue procedures). And what is more important, it was pointed out that it is necessary to create such business environment (including legal regulation of company rescue) that would

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[6] Creditreform Economic Research Unit. *Insolvencies in Europe 2012/13* [interactive]. Neuss: Creditreform Economic Research Unit, 2013 [accessed on 1st March, 2015], p. 2, 16, 17. Available at: <http://www.creditreform .com/fileadmin/user_upload/CR-International/local_documents/Analysen/Corporate_Insolvencies_12_13.pdf>.

[7] European Commission. *Impact Assessment: Accompanying the Document Revision of Regulation (EC) No 1346/2000 on Insolvency Proceedings*: *Commission Staff Working Document* [interactive]. Strasbourg: European Commission, 2012 [accessed on 1st March, 2015], p. 17. Available at: <http://ec.europa.eu/justice/civil/files/insol vency-ia_en.pdf>.

[8] Roland Berger Strategy Consultants. *International Restructuring Study 2009: The Financial and Economic Crisis – Impact and Opportunities* [interactive]. Düsseldorf: Roland Berger Strategy Consultants, 2009 [accessed on 1st March, 2015], p. 16. Available at: <https://www.roland berger.com/media/pdf/Roland_Berger_Restructuring _Internl_E_20090929.pdf>; Organisation for Economic Co-operation and Development. *Responding to the Economic Crisis: Fostering Industrial Restructuring and Renewal* [interactive]. Paris: OECD, 2009 [accessed on 1st March, 2015], p. 11-12. Available at: <http://www.oecd.org /sti/ind/43387209.pdf>.

[9] European Monitoring Centre on Change. European Restructuring Monitor Quaterly [interactive]. Eurofound: Dublin, 2009, issue 4, winter [accessed on 1st March, 2015], p. 3. Available at: <http://eurofound.europa.eu/sites/ default/files/ef_publication/field_ef_document/ef1011en.pdf>.

[10] European Commission *supra*, note 4, p. 5.

encourage companies to take reasonable risk since such behaviour serves the interests of business operators as well as the interests of all society[11].

The proper legal regulation of company rescue is of crucial importance since wealth of a country as well as wealth of society and its every member depends on it. If persons concerned fail to reach an agreement on rescue of a viable company experiencing temporary difficulties through negotiations between themselves (or if there is no such possibility), then these persons should always have the right to use statutory rescue procedures that would help them to solve disagreements and that would ensure business continuity of a viable company (when it is justified). This is one of the main ideas on which the European Union has based its new approach to failure and insolvency of companies[12]. It is assumed that national legislation that regulates company rescue procedures should encourage viable companies experiencing temporary difficulties to make every effort to stay on the market through timely implementation of necessary rescue measures designed to overcome difficult times of such a company. It should be noted that countries are more and more inclined to support this idea and are reforming the valid legal regulation of company rescue with the aim of prioritising company or business rescue instead of compulsory winding-up of distressed companies[13].

Nevertheless, certain aspects of legal regulation still remain inappropriate in many countries and they not only do not facilitate the rescue of viable companies but also sometimes even create unjustified barriers to it. All of the above-mentioned reveal the problem of this research that the creation of proper regulation for company rescue is a complex process (for example, even the implementation of fundamental reforms on the valid legal regulation of company rescue with a view to promote company rescue by some countries in the recent years failed to create friendly conditions in these countries for rescue of viable companies facing with temporary difficulties). In certain countries, including Lithuania, there is an absolute need to reform the valid legal regulation of

[11] Experts nominated by EU Member States, Candidate/Accession Countries and EFTA/EEA countries. *A Second Chance for Entrepreneurs: Prevention of Bankruptcy, Simplification of Bankruptcy Procedures and Support for a Fresh Start* [interactive]. Brussels: European Commission, 2011 [accessed on 1st March, 2015], p. 5. Available at: <http://ec.europa.eu/enterprise/policies/ sme/business-environment/files/second_chance_final_report_en.pdf>.

[12] European Commission. *A New European Approach to Business Failure and Insolvency* [interactive]. Strasbourg: European Commission, 2012 [accessed on 1st March, 2015], p. 3. Available at: <http://ec.europa.eu/justice/civil/ files/insolvency-comm_en.pdf>.

[13] European Commission *supra*, note 4, p. 8; BRIDGE, Catherine. Insolvency – a Second Chance? Why Modern Insolvency Laws Seek to Promote Business Rescue [interactive]. London: EBRD, 2013 [accessed on 1st March, 2015], p. 29. Available at: <http://www.ebrd.com/downloads/research/ law/lit13ee.pdf>.

company rescue if the aim is to create conditions necessary for rescue of viable companies and at the same time to avoid unjustified costs that would be incurred due to winding-up of such companies. Whether viable companies experiencing temporary difficulties are eligible to be rescued, in other words, whether rescue possibility is only theoretical one or it can be implemented in practice, largely depends on the aforesaid regulation.

A comparative analysis of legal regulation valid in different jurisdictions is extremely important when a reform of national legal regulation is to be introduced or when an appropriateness of this regulation is to be evaluated (in order to identify its deficiencies). Such analysis should be a part of and basis for all legislative reforms since not only many lessons can be learned by studying foreign countries' best practice but also regulatory shortcomings can be avoided when creating or improving national legal regulation. Therefore, exchange of legal ideas should be encouraged when national legal regulation is to be created or existing regulation is to be improved[14]. Such exchange undoubtedly has impact on legislative process. Legislators are often inclined to transplant (adapt) various legal rules from other jurisdictions[15] (legal systems are being developed in such a way for thousands of years[16]). Thus, comparative law data is necessary for proper implementation of this kind of reforms along with any other legislative reforms. Such data is essential for each legislator that pursues quality (the importance of comparative law, as an additional legislative measure, raises no doubts)[17]. However, at the same time, conclusions drawn from a comparative analysis should be used reasonably and responsibly when valid national legal regulation is being evaluated or improved. Each time consideration must be given to the fact that certain regulation peculiarities in particular countries may be determined by many different factors (social, political, economic, etc.) that are not typical to other jurisdictions[18]. Nevertheless, this does not decrease the significance or relevance of this research since, as it has been already mentioned, the improvement of national legal regulation on company rescue

[14] KAHN-FREUND, Otto. On Uses and Misuses of Comparative Law. *The Modern Law Review*, 1974, vol. 37, no. 1, p. 27.
[15] XANTHAKI, Helen. Legal Transplants in Legislation: Defusing the Trap. *International & Comparative Law Quarterly*, 2008, vol. 57, no. 3, p. 659.
[16] GILLESPIE, John Stanley. *Transplanting Commercial Law Reform*. 1st edition. Aldershot: Ashgate, 2006, p. 3.
[17] ZWEIGERT, Konrad; ir HEINZ, Kotz. *Lyginamosios teisės įvadas*. 1st edition. Vilnius: Eugrimas, 2001, p. 28-29.
[18] KAHN-FREUND *supra*, note 14, p. 7.

always requires thoughtful consideration of best practice of foreign countries (in other words, the attempt to find the answer to the question what legal regulation *hit et nunc* is the best).

In summary, the relevance of this research is defined by: (i) the significance of legal institute being studied as well as growing perception of the importance of company rescue; (ii) inappropriate regulation of legal institute being studied in many countries, including Lithuania, as well as the harm caused by such regulation both to stakeholders and to economy in general; and (iii) normative character of this research (this research focuses not only on the analysis of legal regulation valid in particular jurisdictions but also provides suggestions for its improvement). Furthermore, these aspects substantiate the problem of this research: (i) complexity of company rescue phenomenon itself; (ii) difficulties arising during company rescue procedures because of this complexity (most often these difficulties arise due to reconciliation of the different stakeholders' interests since these procedures have impact on the rights of many subjects and the viewpoint of these subjects on company rescue usually diverge significantly); and (iii) complexity of creation of proper legal regulation.

OBJECT OF THE RESEARCH AND ITS LIMITS

The object of this research is legal regulation of judicial procedures for company rescue in the United States of America, Great Britain, Germany, France, Estonia, Latvia and Lithuania. First of all, it should be noted that the object of this research is only judicial rescue procedures that can be used for company rescue (in contrast to business rescue) by every subject that has legal personality in addition to certain characteristics described in this thesis. Secondly, not all aspects of these procedures are compared but only those that are the most problematic or that have relatively the biggest impact on rescue of viable companies i.e. prerequisites for commencement of judicial procedures for company rescue; main legal consequences of substantive nature resulting from judicial procedures for company rescue; and decision-making on company rescue during this procedure. Thirdly, the comparison of legal regulation on judicial procedures for company rescue mainly focuses on issues of substantive law (because these issues have

greater importance[19] for rescuing viable companies) whereas procedural law is analysed only if it is necessary to disclose advantages and disadvantages of substantive law or when such analysis is important for this research (for example, after evaluating how important particular norms of procedural law are for company rescue possibilities). Finally, efficiency of legal regulation is evaluated not on *ex ante* or *ex post* basis but only on *interim* basis, i.e. only during these procedures[20] (hence, it is evaluated whether proper conditions are ensured for rescuing viable companies during rescue procedures, whether valid legal regulation does not establish unjustified restrictions, etc.).

The above-mentioned countries as the object of comparative analysis have been chosen according to the following selection criteria: (i) belonging to different legal traditions (belonging to American common law tradition, English common law tradition and Civil law traditions: Roman-Germanic and Napoleonic[21]), considering the recommendations given by comparative law experts[22]; (ii) level of protection for interests of creditors (countries where legal regulation is debtor-friendly as well as countries where legal regulation is creditor-friendly are included in the scope of this research)[23]; (iii) economic power and development level since legal regulation in developing countries is still based on the outdated approach to insolvency and company rescue[24] (country whose gross domestic product is the biggest in the world and 3 countries whose gross domestic product is the biggest in the European Union are included in the scope of this research)[25]; (iv) geographical and historical circumstances (criterion of neighbourhood with Lithuania and criterion of shared history with

[19] Greater importance is understood as the fact that certain legal rules can completely prevent rescue of viable companies (i.e. as the fact that such legal norms can make company rescue in general impossible rather than only more complicated).
[20] SUCCURRO, Marianna. Bankruptcy Systems and Economic Performance Across Countries: Some Empirical Evidence. *European Journal of Law & Economics,* 2012, vol. 33, no. 1, p. 111.
[21] WOOD, Philip R. *Principles of International Insolvency*. 2nd edition. London: Sweet and Maxwell, 2007, 1st map – Global Jurisdictions.
[22] ZWEIGERT *supra,* note 17, p. 50.
[23] STOLOWY, Nicole. Transparency and Prevention for Corporate Bankruptcy: a US-France Comparison. *Journal of Business Law*, 2009, vol. 6, p. 525; FRANKEN, Sefa. Creditor- and Debtor-Oriented Corporate Bankruptcy Regimes Revisited. *European Business Organization Law Review*, 2004, vol. 5, no. 4, p. 650-651; KRISHNAMURTI, Chandrashekar; ir VISHWANATH, S. R. *Mergers, Acquisitions and Corporate Restructuring*. 1st edition. London: SAGE Publications Ltd., 2008, p. 344.
[24] BLAZY, Regis; CHOPARD, Bertrand; ir FIMAYER, Agnes. Bankruptcy Law: a Mechanism of Governance for Financially Distressed Firms. *European Journal of Law & Economics*, 2008, vol. 25, no. 3, p. 260.
[25] The World Bank. *GDP (current US$)* [interactive; accessed on 1st March, 2015]. Available at: <http://data.worldbank.org/indicator/NY.GDP.MKTP.CD>.

Lithuania); (v) valid legal regulation compliance with international standards[26]; and (vi) fundamental changes of legal regulation in recent years.

AIM OF THE RESEARCH

The aim of this research is to present the best practice of legal regulation on judicial procedures for company rescue established in the jurisdictions that are being studied and to develop certain framework for regulation of these procedures that could serve as a point of reference when the issue of how to improve legal regulation of judicial procedures for company rescue is being addressed in order to create more friendly conditions for rescue of viable companies.

OBJECTIVES OF THE RESEARCH

In order to achieve the set aim the following objectives are being pursued:

1. To analyse the legal regulation on prerequisites for commencement of judicial procedures for company rescue established in the jurisdictions that are being studied (advantages and disadvantages of such regulation).
2. To formulate certain recommendations that could serve as a point of reference when the issue of how to improve legal regulation on prerequisites for commencement of judicial procedures for company rescue is being addressed.
3. To analyse the legal regulation on legal consequences of substantive nature that are caused by judicial procedures for company rescue established in the jurisdictions that are being studied (advantages and disadvantages of such regulation).
4. To formulate certain recommendations that could serve as a point of reference when the issue of how to improve legal regulation on legal consequences of substantive nature that are caused by judicial procedures for company rescue is being addressed.
5. To analyse the legal regulation of decision-making on company rescue during judicial procedures for company rescue established in the jurisdictions that are being studied (advantages and disadvantages of such regulation).

[26] The World Bank. *Economy Rankings* [interactive; accessed on 1st March, 2015]. Available at: <http://www.doing business.org/rankings>.

6. To formulate certain recommendations that could serve as a point of reference when the issue of how to improve legal regulation of decision-making on company rescue during judicial procedures for company rescue is being addressed.

EXPLORATION OF THE RESEARCH PROBLEM, NOVELTY AND PRACTICAL SIGNIFICANCE OF THE RESEARCH

It is only recently that the topic of company rescue has attracted more attention (in fact, only over the last decade) when the important role of company rescue procedures in supporting companies that are viable but experiencing temporary difficulties, assisting them to overcome these difficulties and helping them to stay on the market has been acknowledged[27]. However, such greater interest was shown only in foreign countries but not in Lithuania. It should be noted that greater interest in the topic of company rescue in Lithuania did not come on the scene even after that when national legal regulation of company rescue that had been valid for many years was thoroughly reformed over a last few years (a new version of Law on Restructuring of Enterprises was adopted as well as the changes of Law on Bankruptcy of Enterprises created more friendly conditions for company rescue during insolvency proceedings).

Over the last decade[28] only a few scientific articles have been written and published in Lithuania on the topic of company rescue. In 2007 an article called "Opportunities of Amicable Settlement in Insolvency Proceedings" was published by V. Mikuckienė[29] (opportunities of amicable settlement in insolvency proceedings were also analysed by V. Mikuckienė in her thesis "Peculiarities of Investigation of Bankruptcy Cases in

[27] PARRY, Rebecca. Introduction. From BROC, Katarzyna Gromek; ir PARRY, Rebecca. *Corporate Rescue: An Overview of Recent Developments.* Netherlands, 2006, p. 1.

[28] The following studies of prior years may be mentioned: the research and study carried out by the National Association of Business Administrators (refer to the research "Conception of Insolvency and Analysis of its Legal Regulation" published in 2006 and the study "Company Restructuring Processes. Factors Hindering Company Rescue" published in 2004) and articles (or papers) published by Č. Purlys who tries to look at certain issues from an economic perspective (refer to the articles "Enterprise's Rehabilitation Costs and Efficiency" published in 2005, "Management of Enterprise Rehabilitation System and its Improvement" published in 2003, "Management of Enterprise's Rehabilitation Processes" published in 2003, "Enterprise's insolvency: Conception and Means of Liquidation" published in 2003, "Creation of the Enterprise Bankruptcy Prevention System in Lithuania" published in 2001, and "Principles for Creation of the Enterprise Bankruptcy Prevention System" published in 2001. The significance of all these studies has definitely decreased as so many years have passed after they were published. In the meanwhile, the approach to company rescue and insolvency has changed dramatically as well as economic situation has changed, what is more, particular countries have reformed legal regulation of company rescue more than once after taking into consideration the realities and demands of the present, etc.

[29] MIKUCKIENĖ, Vilija. Taikos sutarties sudarymo galimybės bankroto procese. *Jurisprudencija*, 2007, no. 5(95).

Court"[30]); in 2010 an article called "Related Creditors in the Procedure of Corporate Restructuring" was published by P. Miliauskas[31]; in 2011-2014 articles called "The New Version of the Law on Restructuring of Enterprises: Strengths and Weaknesses of the Changed Legal Regulation"[32], "Formal Rescue Procedures of Insolvent Companies: Experience of Lithuania and Foreign Countries"[33], "The Importance of Economic Analysis of Law to Legislation: an Example of the Legal Regulation Reform in Lithuania Concerning Company Rescue"[34] and "Influence of Judicial Procedures of Company Rescue on Contractual Relationship: Importance in Preserving Contracts"[35] were published by S. Barakauskas. Each of the above-mentioned articles analyses only one chosen aspect of legal regulation on company rescue since the scope of these articles is limited and it is, therefore, not possible to take an integrated approach to all fundamental shortcomings of this legal institute as well as to possible solutions to certain problems. Furthermore, the scope of the research in these articles is much narrower than the scope of the research in this thesis. Overall, it is possible to state that in Lithuania no scientific researches of wider scope on the topic of company rescue have been carried out in the recent years. This may be illustrated by the latest study on the topic of company insolvency published in Lithuania that is 2 monographs written in 2009 and 2011: "Bankruptcy Law: First Book"[36] and "Bankruptcy Law: Second Book"[37]. Unfortunately, it should be emphasised that even such a comprehensive study of national legal regulation that consists of several books does not sufficiently addresses the question of company rescue during insolvency proceedings (the issue of amicable settlement during insolvency proceedings is analysed only in 1 page). Therefore, the aim of this research is to fill the mentioned gap in scientific studies that at the present exists

[30] MIKUCKIENĖ, Vilija. *Bankroto bylų nagrinėjimo teisme ypatumai*: doctoral disseration. Vilnius: Mykolo Romerio University, 2007, p. 158-168.
[31] MILIAUSKAS, Paulius. Susiję kreditoriai restruktūrizavimo procese. *Justitia,* 2010, vol. 74, no. 2.
[32] BARAKAUSKAS, Sigitas. Nauja Lietuvos Respublikos įmonių restruktūrizavimo įstatymo redakcija: pasikeitusio teisinio reguliavimo pranašumai ir trūkumai. *Justitia,* 2011, vol. 75, no. 1.
[33] BARAKAUSKAS, Sigitas. Nemokių įmonių gaivinimo formalios procedūros: Lietuvos ir užsienio valstybių patirtis. *Teisė,* 2013, 89 t.
[34] BARAKAUSKAS, Sigitas. The Importance of Economic Analysis of Law to Legislation: an Example of the Legal Regulation Reform in Lithuania Concerning Company Rescue. Iš Vilnius University, *Integrating Social Sciences Into Legal Research*, Vilnius, 2014.
[35] BARAKAUSKAS, Sigitas. Įmonių gaivinimo teisminių procedūrų įtaka sutartiniams santykiams: sutarčių išsaugojimo svarba. *Teisė,* 2015, 96 t.
[36] KAVALNĖ, Salvija, *et al. Bankroto teisė: pirmoji knyga.* 1st edition. Vilnius: Justitia, 2009.
[37] KAVALNĖ, Salvija; ir NORKUS, Rimvydas. *Bankroto teisė: antroji knyga.* 1st edition. Vilnius: Justitia, 2011.

in Lithuania as well as to encourage other researches to focus more on the analysis of this complex but very important legal institute.

Over the last decade, foreign researchers have published quite a few monographs and comprehensive studies on or related to the topic of company rescue. For example, some of monographs that have been published in the recent years on the analysis of legal regulation on company rescue established in one or two jurisdictions may be mentioned: "Corporate Rescue Law – an Anglo-American Perspective"[38], "Rescuing Companies in England and Germany"[39], "Principles of Corporate Insolvency Law"[40], "The Law of Insolvency"[41], "Restrukturierung, Sanierung, Insolvenz"[42], "Corporate Insolvency Law: Perspectives and Principles"[43], "Ginsberg and Martin on Bankruptcy"[44], etc. In addition, the following comparative studies that cover much higher number of jurisdictions may be mentioned (several of them also analyse legal regulation existing in Lithuania but these studies are mainly of descriptive character): "Principles of International Insolvency"[45], "A Global View of Business Insolvency Systems"[46], "World Insolvency Systems: a Comparative Study"[47], "Commencement of Insolvency Proceedings"[48], "Treatment of Contracts in Insolvency"[49], "The Restructuring Review"[50], "Restructuring & Insolvency in 46 Jurisdictions Worldwide"[51], "The International Insolvency Review"[52], etc.

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[38] MCCORMACK, Gerard. *Corporate Rescue Law – an Anglo-American Perspective.* 1st edition. Cheltenham: Edward Elgar, 2008.
[39] BORK, Reinhard. *Rescuing Companies in England and Germany*. 1st edition. Oxford: Oxford University Press, 2012.
[40] GOODE, Roy. *Principles of Corporate Insolvency Law*. 4th edition. London: Sweet and Maxwell, 2011.
[41] FLETCHER, Ian F. *The Law of Insolvency*. 4th edition. London: Sweet & Maxwell, 2009.
[42] BUTH, Andrea K., *et al. Restrukturierung, Sanierung, Insolvenz*. 4th edition. München: C. H. Beck oHG, 2014.
[43] FINCH, Vanessa. *Corporate Insolvency Law: Perspectives and Principles.* 2nd edition. Cambridge: Cambridge University Press, 2009.
[44] GINSBERG, Robert E.; MARTIN, Robert D.; ir KELLEY, Susan V. *Ginsberg and Martin on Bankruptcy*. 5th edition. New York: Wolters & Business Kluwer Law, 2014.
[45] WOOD *supra*, note 21.
[46] WESTBROOK, Jay Lawrence, *et. al. A Global View of Business Insolvency Systems*. 1st edition. Leiden: Martinus Nijhoff Publishers, 2010.
[47] FONSECA LOBO, Otto Eduardo, *et. al*. *World Insolvency Systems: a Comparative Study*. 1st edition. Toronto: Thomson Reuters, 2009
[48] FABER, Dennis, *et al. Commencement of Insolvency Proceedings.* 1st edition. Oxford: Oxford University Press, 2012.
[49] FABER, Dennis, *et al. Treatment of Contracts in Insolvency*. 1st edition. Oxford: Oxford University Press, 2013.
[50] MALLON, Christopher, *et. al. The Restructuring Review*. 7th edition. London: Law Business Research Ltd., 2014.
[51] LEONARD, Bruce, *et. al*. *Restructuring & Insolvency in 46 jurisdictions worldwide*. 8th edition. London: Law Business Research Ltd., 2014.
[52] BERNSTEIN, Donald S., *et. al. The International Insolvency Review.* 1st edition. London: Law Business Research Ltd., 2013.

All the above-mentioned studies of foreign researchers differ from this research. First of all, neither of these studies aims to create more favourable legal regulation for rescue of viable companies (to be precise, neither of these studies tries to look at legal regulation of company rescue from the perspective of saving viable companies experiencing temporary difficulties). Secondly, neither of these studies provides detailed comparative analysis of legal regulation on company rescue established in certain jurisdictions with the aim of revealing the best practice. Thirdly, all the aforesaid studies are mainly of descriptive character rather than of normative character (i.e. they analyse the current state and sometimes shortcomings of regulation but there is no intention to formulate a certain framework that could serve as a point of reference when the issue of how to improve legal regulation is being addressed in order to create more friendly conditions for rescue of viable companies experiencing temporary difficulties). Fourthly, studies of a wider scope (i.e. studies that are not only of descriptive character) carried out in the recent years do not cover legal regulation of company rescue established in Lithuania (thus, these studies do not allow to evaluate the appropriateness of legal regulation valid in Lithuania, for instance, whether it requires improvements even after the implementation of the major legislative reform, etc.). Fifthly, almost all[53] the above-mentioned studies do not focus only on the most problematic aspects of legal regulation on judicial rescue procedures which relatively have the biggest impact on rescue of viable companies, i.e. they do not try to limit their scope in such a way (thus, instead of providing a thorough analysis of the most problematic issues these studies cover higher number of jurisdictions). All of these peculiarities in addition to a lack of studies on company rescue in Lithuania substantiate the scientific novelty of this research, i.e. that the issues raised in this research receive too little attention from scholars of jurisprudence.

It should be underlined that this research bears not only theoretical but also practical significance. Whether viable companies faced with temporary difficulties are ensured of necessary conditions so that they could stay on the market and whether these companies are encouraged to timely implement certain measures that are essential for

[53] Except for volumes of Oxford International and Comparative Insolvency Law Series "Commencement of Insolvency Proceedings" and "Treatment of Contracts in Insolvency" (refer to FABER *supra*, note 48-49); however, these studies cover only a small portion of the issues that are being analysed in this research.

overcoming the crises of such companies depend on legal regulation of company rescue. The defective legal regulation of company rescue can prevent rescue even of viable companies (or can make such rescue more complicated). It is merely because of defective legal regulation that some viable companies experiencing temporary difficulties may be forced to leave the market. As a result, unjustified costs may be incurred that could be avoided if legal regulation of company rescue was reformed and more friendly conditions for rescue of viable companies were created. The aim of this research is to facilitate the implementation of such a legislative reform by revealing the best practice of judicial procedures for company rescue in the analysed jurisdictions and by formulating certain recommendations for improvement of legal regulation[54]. It needs to be pointed out that in order to ensure the reliability of results of this research (realizing that law in books may differ considerably from law in action[55]) this research focuses not only on national laws of particular countries but also on both certain studies of scholars of jurisprudence and case law that allow a better understanding of actual content of legal norms.

METHODOLOGY OF THE RESEARCH

In order to achieve the aim and objectives set in this thesis the following research methods have been used (these are only the main research methods, other normative or descriptive methods may also have been used):

1. *Comparative Method.* This is one of the main methods used in the research. This method helps to get familiar with legal regulation of company rescue valid in the jurisdictions that are being studied, to define the advantages and disadvantages of such regulation (descriptive nature of this method) as well as to reveal the best

[54] It should be noted that particular international institutions have already established certain frameworks for improving legal regulation but this happened 10 or even more years ago. During this period, the approach to company rescue and insolvency changed dramatically; therefore, the practical significance (applicability) of these frameworks have decreased substantially (refer to studies "Orderly & Effective Insolvency Procedures" published by International Monetary Fund in 1999; "Principles and Guidelines for Effective Insolvency and Creditor Rights Systems" published by World Bank in 2001; "Legislative Guide on Insolvency law" published by UNCITRAL in 2005). However, the frameworks that have been reviewed in the recent years do not pay sufficient attention to the issue of company rescue as well as they have a more general scope than this research does (refer to study "Principles for Effective Insolvency and Creditor Rights Systems" published by World Bank in 2011).

[55] REITZ, John C. How to Do Comparative Law. *The American Journal Of Comparative Law*, 1998, vol. 46, no 4, p. 629.

practice and to formulate certain recommendations (analytical nature of this method). With the help of this method, not only national laws of particular countries are examined but also certain case law is analysed. The application of the comparative method in this study enables to present the genesis of company rescue procedures, how attitude towards distressed companies changed during different periods of time in history (diachronical comparison); and, moreover, after the evaluation of the most problematic aspects of legal regulation on company rescue established in different jurisdictions (or aspects which relatively have the greatest impact on rescue of viable companies) (synchronical comparison), ensures the proper conditions to formulate certain recommendations and to reveal shortcomings of regulation valid in specific countries, as well as allows a more detailed examination of the content of the legal institute that is being studied.

2. *Abstraction Method (Generalising Abstraction and Insulating Abstraction).* This method is used in order to distance from non-essential aspects of legal regulation on judicial procedures of company rescue (from non-essential aspects of the phenomenon that is being studied) and to concentrate on such aspects that make the biggest impact on rescue of viable companies. The application of the abstraction method determines the structure of the main part of this thesis, i.e. by applying this method the essential aspects of legal regulation on judicial procedures of company rescue that are being analysed in the main part are distinguished. Furthermore, this method is used to provide the definition of company rescue, to present the features of judicial rescue procedures, to show their relation to other solutions for tackling the problems of distressed companies and, finally, to select the procedures that are included in this research, i.e. procedures whose legal regulation later is being analysed in detail.
3. *Systematic Analysis Method.* All research is based on this method. The single aspects of judicial procedures for company rescue are analysed both as components of a unit (related among themselves as well as to such a unit) and as a unit itself (i.e. judicial procedure for company rescue). For example, not only the role of single components but also the role of all of them, all together, is analysed when examining how legal regulation of company rescue achieves particular objectives (for example, how it distinguishes viable companies from non-viable ones, etc.). Such method of analysis

ensures that legal regulation valid in the jurisdictions that are being studied is more thoroughly examined during this research because not only the input of single stages within certain rescue procedures into the solution of particular problem is evaluated but also the input of all procedure, i.e. of all stages as a whole, is evaluated. Moreover, better conditions to carry out the research as well as better conditions to identify main peculiarities of the object that is being studied are ensured when the rescue procedure is divided into certain segments. In addition, this method is applied to interpret legal regulation valid in different jurisdictions as the systemic nature of law determines the necessity to use the systematic analysis method.

4. *Logical Analysis Method.* This method is used in order to reveal the best practice of legal regulation of judicial procedures for company rescue established in the jurisdictions that are being studied as well as to provide certain recommendations for the improvement of valid legal regulation of judicial procedures for company rescue and, eventually, to draw conclusions of this research.
5. *Document Analysis Method.* This method is employed to collect particular data that is necessary for performing this research (taking into consideration that the main sources of this research are national laws of the jurisdictions that are being studied as well as case law and various other documents).
6. *Historical Method.* This method is used in order to reveal the development of legal regulation of company rescue as well as in order to show certain shortcomings of the former legal regulation when performing more detailed analysis and in order to explain the causes of the specific peculiarities of legal regulation in the jurisdictions that are being studied.
7. *Linguistic Method.* This method helps to explain the meaning of various terms (for example, a company, rescue, insolvency, etc.) whose identical perception is necessary to make the comparative analysis possible. Furthermore, this method plays an important role in analyzing sources of this research (laws, court decisions, etc.) as well as terms used in these sources.

SOURCES OF THE RESEARCH

All sources of this research could be divided into the following 4 main groups: (i) legal acts; (ii) jurisprudence; (iii) case law; and (iv) other sources.

Legal Acts. This group of sources includes legal acts which regulate certain judicial procedures for company rescue (i.e. procedures that are covered by this research) established in the jurisdictions that are being studied. These are Companies Act[56] and Insolvency Act[57] in Great Britain; Bankruptcy Code[58] in the United States of America; Insolvenzordnung[59] in Germany; Code de Commerce[60] in France; Reorganisation Act[61] and Bankruptcy Act[62] in Estonia; Insolvency Law[63] in Latvia; Law on Bankruptcy of Enterprises[64] and Law on Restructuring of Enterprises[65] in Lithuania. Furthermore, this group of sources also covers all other legal acts that are related to the analysed topic, i.e. judicial procedures of company rescue.

Jurisprudence. The analysis of the jurisprudence of foreign countries is essential for a better understanding of the actual content of national legal rules, i.e. how these rules are understood, interpreted and applied in certain countries. Therefore, comparative studies of descriptive nature, which cover most of the jurisdictions that are being studied, are taken into account when analyzing legal regulation valid in these jurisdictions. For example, "World Insolvency Systems: a Comparative Study"[66], "The International

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[56] Companies Act 2006 [interactive; accessed on 1st March, 2015]. Available at: <http://www.legislation.gov.uk/ukpga/2006/46/contents>.
[57] Insolvency Act 1986 [interactive; accessed on 1st March, 2015]. Available at: <http://www.legislation.gov.uk/ukpga/1986/45/contents>
[58] Bankruptcy Code [interactive; accessed on 1st March, 2015]. Available at: <http://www.gpo.gov/fdsys/pkg/USCODE-2011-title11/pdf/US CODE-2011-title11.pdf>.
[59] Insolvenzordnung [interactive; accessed on 1st March, 2015]. Available at: <http://www.g esetze-im-internet.de /inso/index.html>.
[60] Code de commerce [interactive; accessed on 1st March, 2015]. Available at: <http://www.legifrance.gouv.fr/affichCode.do?cidTexte=LEGITEXT000005634379>.
[61] Reorganisation Act [interactive]. 2008 [accessed on 1st March, 2015]. Available at: <http://www.legaltext.ee /et/andmebaas/tekst.asp?loc=text&dok=XXXX005K3&keel=en&pg=1&ptyyp=RT&tyyp=X&query=saneerimisseadus>.
[62] Bankruptcy Act [interactive]. 2003 [accessed on 1st March, 2015]. Available at: <https://www.riigiteataja.ee /en/tolge/pdf/511072014018>.
[63] Insolvency Law [interactive]. 2010 [accessed on 1st March, 2015]. Available at: <www.mna.gov.lv/download /540>.
[64] Lietuvos Respublikos įmonių bankroto įstatymas (with amendments). *Valstybės žinios*, 2001, nr. 31-1010.
[65] Lietuvos Respublikos įmonių restruktūrizavimo įstatymas (with amendments). *Valstybės žinios*, 2010, nr. 86-4529.
[66] FONSECA LOBO *supra*, note 47.

Insolvency Review"[67], "The Restructuring Review"[68], "Commencement of Insolvency Proceedings"[69], "Treatment of Contracts in Insolvency"[70], etc. Moreover, other scientific researches, which analyse legal regulation established in one or in a few jurisdictions that are being studied, serve as a basis for this research (these studies show peculiarities of legal regulation valid in certain jurisdictions in more detail than the above-mentioned studies). For example, "Corporate Rescue Law – an Anglo-American Perspective"[71], "Rescuing Companies in England and Germany"[72], "Principles of Corporate Insolvency Law"[73], "Corporate Insolvency Law: Perspectives and Principles"[74], etc. This thesis is based not only on the above-mentioned studies but also on other surveys of scholars of jurisprudence (for example, on various scientific articles, etc.) that are important for all this research as well as for analysing any specific aspect of legal regulation of particular judicial rescue procedure. The following scholars, whose publications are relatively most often used, could be singled out: D. G. Baird, R. K. Rasmussen, V. Finch, G. Mccormack, D. Milman, P. J. Omar, C. G. Paulus, D. A. Skeel, E. Warren, J. L. Westbrook, M. J. White, R. Blazy (i.e. the thesis is based on 3 or more publications of these scholars).

Case Law. Case law is used as often as possible (basically always when such a necessity arises) when the analysis of legal regulation aims to describe, with the greatest possible accuracy, how particular legal rules are interpreted and applied in certain countries; how terms that are used in legal acts should be understood; how conditions essential for company rescue contained in national laws should be interpreted, etc. It is necessary to emphasize that this research is based on decisions made by courts of all instances (i.e. not only on decisions of the supreme courts) in order to reduce the possible gap between that what is called law in books and that what is called law in action to the greatest possible extent in the study (in other words, to ensure that all issues being addressed are explored as extensively and deeply as possible).

[67] BERNSTEIN *supra*, note 52.
[68] MALLON *supra*, note 50.
[69] FABER *supra*, note 48.
[70] FABER *supra*, note 49.
[71] MCCORMACK *supra*, note 38.
[72] BORK *supra*, note 39.
[73] GOODE *supra*, note 40.
[74] FINCH *supra*, note 43.

Other Sources. This group includes all sources that do not belong to any of the above-mentioned group of sources (for example, guidelines, surveys, explanatory notes, various data of empirical studies, etc.).

STRUCTURE OF THE DISSERTATION

The structure of this thesis is determined by the subject matter and the objectives set in this research. In addition to the introduction and conclusions, this thesis consists of two separate parts.

The first part of the research is conceptual one and dedicated to the concept of company rescue. The first part aims at forming the proper basis for further analysis. This part presents definition of company rescue, reviews the development of legal regulation of company rescue (both in general and in specific countries) as well as explains the intended purpose of company rescue proceedings and specifies the position of judicial procedures for company rescue in the whole system of rescue proceedings. It is only after discussion of these conceptual questions that it possible to carry out closer analysis of legal regulation related to judicial procedures of company rescue in the jurisdictions that are being studied.

The second part is the main part of the thesis. This part presents the comparative analysis of judicial procedures for company rescue being studied in the thesis. Taking into account the particularities of judicial rescue procedures, this part is divided into three sections. The first section analyses the fundamental regulatory aspects of initial stage in the rescue procedure (i.e. initiation of the procedure stage) that have relatively the most significant influence on rescue of viable companies. The section evaluates regulation of prerequisites for the initiation of judicial rescue procedures as well as advantages and disadvantages of such regulation. The recommendations for improving the regulation of these prerequisites conclude this section. The second section examines the main legal consequences of substantive nature resulting from judicial procedures for company rescue (i.e. legal consequences caused by initiation of the procedure). It also analysis the impact that judicial procedures of company rescue make on company management. This section is concluded with recommendations for improving certain aspects of analyzed regulation. The third section is dedicated to analyze the regulation of

the most important stage in judicial procedures for company rescue (i.e. stage of decision-making on company rescue). In this section analysis of both the stage of drafting a plan for company rescue and the stage of approving such plan is presented. This section, as the previous ones, is concluded with recommendations that can serve as a basis for improving legal regulation of the stage when a decision on company rescue is being made. It should be emphasized that in order to increase the practical application of this research as well as to ensure that other researchers doing various researches on company rescue are able to use material collected during the research, this thesis is not limited to the analysis of the subject-matter but also presents a short review of regulations related to the analyzed questions in various jurisdictions. Therefore, not only the analysed aspects of regulation that exists in various countries of this research are revealed but also greater clarity of how one or another issue is addressed in a certain country is achieved.

STATEMENTS OF THE DISSERTATION TO BE DEFENDED

1. Difficulties that a company faces (in particular, their nature) and changes in the structure of company capital that are determined by these difficulties (even insolvency of a company) should not *per se* prevent company recue when the aim is to create favourable conditions for viable companies experiencing temporary difficulties to be saved.
2. Legal regulation of judicial procedures for company rescue existing in most jurisdictions that are analyzed in this research do not create proper conditions for viable companies experiencing temporary difficulties to overcome these difficulties by means of judicial rescue procedures in order to stay on the market.
3. The new version of Law on Restructuring of Enterprises of the Republic of Lithuania, which even though aimed at creating proper conditions for companies experiencing certain difficulties to make use of benefits offered by restructuring, basically have failed to create such conditions because even viable companies may have to withdraw from the market due to shortcomings of the legal regulation without being able to use this procedure of company rescue or due to failure of such an attempt because of imperfections of the existing regulation.

MAIN SUGGESTIONS OF THE RESEARCH

Main Suggestions Concerning the Regulation of Prerequisites for the Commencement of Judicial Procedures for Company Rescue

The legal regulation of prerequisites for the commencement of judicial procedures for company rescue should: (i) ensure the timely commencement of the procedure so that judicial procedures for company rescue are started neither too early, nor too late; (ii) enable the initial differentiation between viable and non-viable companies to the extent possible (i.e. already in the initial stage companies to be rescued should be distinguished from the companies to be liquidated); (iii) prevent possible abuse of judicial rescue procedures to the extent possible (i.e. ensure that these procedures are to be used only for their intended purpose); (iv) create adequate conditions for viable companies experiencing temporary difficulties to take advantage of judicial rescue procedures in order to cope with difficulties they are facing and to stay on the market (i.e. no unreasonable constrains should be imposed on viable company's eligibility to use judicial rescue procedures). Considering all above mentioned, the following is recommend when establishing the regulation of prerequisites for the commencement of judicial procedures for company rescue:

1. Make sure that adequate conditions to properly evaluate all circumstances related to rescue of a certain company are ensured when considering commencement of a particular procedure (i.e. ensure that circumstances which are relevant to the subject matter are evaluated as a whole without any unreasonable constrains).
2. Not to impose any absolute restrictions that could in some cases preclude the possibility of rescuing even viable companies. To give greater discretion to court that rules on the commencement of the procedure so that court could take into account the exceptional circumstances of an individual case. Always to allow stakeholders to justify grounds on which a particular company that is experiencing difficulties should be given a second chance, i.e. to prove that rescue of such company is reasonable and justified.
3. To establish that judicial rescue procedure can be commenced not only when a company have been already experiencing difficulties but also when there are signs of

difficulties that such a company is not likely to overcome in the future (in addition to this, the occurrence of difficulties should not be *ex ante* associated with any time limits).

4. To establish specific conditions of substantive nature necessary for commencement of judicial rescue procedures as this is the only way to justify restrictions determined by such procedures as well as costs incurred by stakeholders due to company rescue; furthermore, this allows to reduce the potential risk related to the abuse of these procedures (in other words, to ensure that the decision to commence procedure does not depend solely on the will of the subject that wishes to initiate this procedure).
5. To grant the right to initiate the judicial rescue procedure not only to a company to be rescued but also to other interested parties including creditors of such a company (however, prerequisites of substantive and procedural nature to commence rescue procedures may differ depending on whether a company itself, its creditors or other interested parties intend to initiate particular procedure).

Main Suggestions Concerning Regulation on Legal Consequences of Substantive Nature Resulting from Judicial Procedures for Company Rescue

The regulation on legal consequences of substantive nature resulting from judicial procedures for company rescue should: (i) provide competent management of a company being rescued; (ii) bring a company being rescued necessary relief from hostile actions of creditors and other parties; (iii) create conditions for financing activities of a company being rescued; as well as (iv) ensure continuity of contracts that are important for further activity of such a company, thus, ensuring continuity of essential contractual relations. In the view of that when regulating legal consequences of substantive nature resulting from judicial procedures for company rescue:

(i) The following is recommended in order to provide competent management of a company being rescued:

1. To establish that authority possessed by the current management of a company being rescued should be overtaken not always but only in specific cases where interests of other subjects or company rescue itself is under threat (management by a specialist

should not be the main form of management when rescuing company, in other words, the practitioner in possession should be an exception rather than a rule).

2. To ensure that insolvency of a company does not *per se* create some harsher restrictions on the competence of the current management of a company being rescued when there is no threat to interests of other subjects or company rescue itself in case such management remains in office (insolvency reflects the seriousness of the situation for company experiencing difficulties but does not *per se* prove that the current management of such a company cannot remain in office).
3. To establish an appropriate supervision (control) of a company being rescued and its management: to establish that the activities of a company being rescued is monitored (monitoring by creditors alone is not always sufficient; therefore, it is recommended to appoint a specialist to perform this function) and to impose certain restrictions on the competence of current management (management should not be given the same freedom of their activities that they have had before commencement of the rescue procedure; however, no absolute restrictions on the competence related to daily activities of a company being rescued should be introduced).

(ii) The following is recommended in order to bring a company being rescued necessary relief from hostile actions of creditors and other parties:

1. To establish a moratorium that would be imposed during every judicial procedure for company rescue (i.e. to suspend temporally the execution of obligations and rights).
2. To ensure the timely start of the moratorium so that moratorium would be enforced as early as possible (the period from the initiation of a particular rescue procedure to the moment of imposing the moratorium should be as short as possible or, indeed preferably, such period should not exist at all).
3. To prevent creditors and other subjects from taking any actions that could cause harm to a company to be rescued or aggravate its situation during rescue procedure in any way (any kind of settlement of creditors' claims as well as any other creditors' or other subjects' behaviour that poses or could pose threat to company rescue or its success should be restricted as long as moratorium is in place).
4. To ensure adequate rights protection for creditors and other subjects whose rights are restricted by moratorium (the imposed moratorium should not deny rights of these subjects or reduce significance of these rights, in addition, the moratorium should

restrict only certain rights and only to the extent that is essential for guaranteeing the success of company rescue).

(iii) The following is recommended in order to create proper conditions for financing activities of a company being rescued:

1. To give viable company being rescued the real chance to use external financing for funding its activities in order to stay on the market (the mere fact that viable company does not have internal sources necessary for funding its activities during rescue procedure should not become an obstacle to rescue of such a company).
2. To grant viable company being rescued the right of asset-based borrowing during rescue procedure (however, this right should not be unrestricted (unlimited), the necessity of such transaction should always be *ex ante* assessed not only by existing management but also by an impartial third party).
3. To grant viable company being rescued the right to borrow funds during rescue procedure (provided that exceptional circumstances exist) by guaranteeing creditors' new claims superior or even super-priority status (this right should be granted if there is no other way to ensure funding for the activities of such a company; furthermore, this right should not be unrestricted (unlimited)).

(iv) The following is recommended in order to ensure continuity of contracts that are important for further activities of a company being rescued:

1. To impose general comprehensive prohibition of *ipso facto* clauses (i.e. the moratorium imposed during rescue procedure should restrict the contrahents' right to terminate the executory contracts that are concluded with a company being rescued merely due to the change in financial status of such a company or an attempt to rescue such a company); however, at the same time to grant company being rescued the right to terminate early concluded executory contracts if further execution of such contracts could have negative impact on company rescue.
2. To circumscribe the right of a contracting party to terminate the executory contract that is concluded with a company being rescued due to a breach committed by a company being rescued before the commencement of rescue procedure (except for cases where the nature of a breach and other circumstances related to a breach justify termination of the contractual relationships).

3. To provide adequate protection for creditors' new claims that occurred during rescue procedure (it should be guaranteed that a company being rescued will settle properly for services, goods, etc., received during rescue procedure even if company rescue results in failure).

Main Suggestions Concerning Regulation of Decision-making on Company Rescue

The stage of decision making on company rescue is one of the main stages of judicial procedures for company rescue. This stage should solve the main problems that may arise in the case of work-out, i.e. problems that sometimes make the work-out ineffective and even prevent rescue of viable companies (for example, coordination problem, free rider problem, hold-out problem, or problem resulting from the conflict of interests between group members and separate groups). The regulation on judicial procedures for company rescue concerning decision-making on company rescue should not unreasonably restrict the possibility to rescue a company; however, it should always ensure the proper balance of different interests (the adequate protection of creditors' rights, etc.).

Considering all above mentioned, the following is recommended when establishing regulation on the phase of rescue plan preparation:

1. To set the deadline for drafting the rescue plan if a certain judicial rescue procedure imposes any restrictions on the rights of creditors and other subjects (it would be necessary to establish only a minimum period that could be extended by court, if needed).
2. To grant a company to be rescued the right to draft a rescue plan (this right should be granted exclusively to the company to be rescued for a limited period of time; after the expiry of such period the right to draft a rescue plan should be also granted to other stakeholders who are going to actually participate in the process of decision-making on company rescue, or to an impartial third party).
3. Not to limit the rescue measures that can be included in the rescue plan (the law should only provide for an exemplary list of such measures; moreover, single subjects or group of subjects should not be able to make unreasonable influence on the implementation of any such measure or to prevent the implementation of these

measures, when implementation of certain measures even does not violate their rights).

4. To oblige a party responsible for producing a rescue plan to provide subjects making decision on company rescue with all the necessary information so that these subjects could properly evaluate the presented rescue plan and possibilities to rescue the company (in other words, so that they could make informed decision on company rescue).

Considering all above mentioned, the following is recommended when establishing regulation on the phase of rescue plan approval:

1. To grant the right to participate in the process of decision-making on company rescue not to all subjects one or another way related to a company to be rescued but only to those whose claims will be affected by rescue plan and whose claims are not considered to be worthless in economic terms at the moment when the rescue plan is being approved.
2. To ensure that votes (claims) of subjects, who did not participate in the process of decision-making on company rescue even though they had such right, are not taken into account when deciding whether the rescue plan is approved by the necessary majority of subjects (in other words, only votes (claims) of subjects who actually participated in the process of decision-making should be considered).
3. To establish that every decision on company rescue should be made by majority of votes and by voting in groups (this majority should be not too large so that it would not become an unreasonable obstacle to rescue viable companies but at the same time not too small so that it would not create conditions for an attempt to rescue a company when a significant part of the creditors do not believe in viability of the company to be rescued and success of such rescue at all).
4. To provide for an approval of the rescue plan even against the will of single subject group or groups that were present and voted (in such case a court when taking decision on an approval of rescue plan should ensure that due to an approval of such plan certain subject group that did not accept the rescue plan and all members of such a group do not find themselves in a position that is worse than they would be in case the rescue plan is not approved at all, moreover, it should ensure that an attempt to rescue company does not have negative impact on these subjects and does not

unfairly discriminate any group that did not accept the rescue plan but whose members still are affected by it).

5. To establish that rescue plan becomes binding only after it is approved by a court (a court should not only ensure legality within rescue procedure but also should contribute to the proper differentiation of viable companies from non-viable ones by assessing the feasibility of rescue plan while deciding on an approval of such plan).

CONCLUSIONS

The conducted research has confirmed the statements of the dissertation to be defended:

1. It was concluded that difficulties that a company faces (i.e. both financial and economic difficulties) and any changes in the structure of company capital that are determined by these difficulties (even insolvency of a company) are not *per se* considered to be such circumstances that distinguish the companies to be rescued from the companies to be liquidated since it is not possible to determine whether a company is viable or non-viable one by taking into consideration only these circumstances; these circumstances only demonstrate the seriousness of the situation that developed in a particular company and (while taking into account many other circumstances) make it possible to anticipate whether the crisis of such a company may be overcome with the help of judicial rescue procedure. If the differentiation between the companies to be rescued and the companies to be liquidated was based only on these circumstances, then not always favourable conditions for saving viable companies experiencing temporary difficulties would be created.
2. It was established that in order to create proper conditions for saving viable companies experiencing temporary difficulties, the role of the subjects participating in judicial procedures for company rescue should be reviewed as to its substance in most jurisdictions that are being studied: (i) in some of these jurisdictions more discretion should be conferred on the courts both in the initiation stage and further stages of judicial procedures for company rescue; there should be no unreasonable restrictions established in laws that might circumscribe the freedom of decision of a court (a court should be able to take into account all circumstances that are important for a certain issue while making a decision); (ii) in a part of these jurisdictions

creditors should be given greater power during such procedures, i.e. creditors should have more influence over the beginning of this procedure as well as over its end (creditors should be able to behave in socially responsible manner and, therefore, should have the right to initiate a judicial rescue procedure in case a debtor is experiencing temporary difficulties; however, creditors should not become hostages of a company being rescued or its shareholders during such procedures); and (iii) in most of these jurisdictions the influence of a company being rescued or its shareholders should be more limited in some cases, i.e. the will of such subjects should not always be decisive during company rescue procedure (sometimes the final decision on company rescue should be adopted by other subjects: creditors of a company being rescued and a court).

3. It was determined that in Lithuania rescue of viable companies experiencing temporary difficulties may result in failure (or even it may not be possible to rescue such companies in some cases) due to shortcomings of legal regulation or opportunistic subjects' actions that may be possible because of imperfections of the existing legal regulation. Therefore, the new version of Law on Restructuring of Enterprises of the Republic of Lithuania should be further improved: (i) first of all, absolute restrictions established in the law as well as the term within which certain difficulties should occur as prerequisites for the initiation of a rescue procedure should be repealed (thus, creating proper conditions to promptly take required actions as soon as this becomes necessary to tackle the crisis of a company); (ii) secondly, a prohibition of *ipso facto* clauses should be imposed (thus, ensuring the continuity of contracts that are essential for the further activities of a company being rescued during a rescue procedure); (iii) thirdly, the right to borrow funds by guaranteeing creditors' new claims a certain priority status should be granted to a company being rescued (thus, ensuring external financing for the further activities of a company being rescued when internal financing is not sufficient); (iv) finally, it should be possible to approve rescue plan even against the will of a single subject group that is present and votes; while, account is not to be taken of votes by such members who do not participate in the vote or whose rights will not be affected by the rescue plan (thus, shielding the process of decision-making on company rescue from any unreasonable influence).

AUTHOR'S PUBLICATIONS RELATED TO THE SUBJECT OF THE DISSERTATION

1. BARAKAUSKAS, Sigitas. Nauja Lietuvos Respublikos įmonių restruktūrizavimo įstatymo redakcija: pasikeitusio teisinio reguliavimo pranašumai ir trūkumai. *Justitia,* 2011, vol. 75, no. 1, p. 32–43.
2. BARAKAUSKAS, Sigitas. Nemokių įmonių gaivinimo formalios procedūros: Lietuvos ir užsienio valstybių patirtis. *Teisė,* 2013, 89 t., p. 119–135.
3. BARAKAUSKAS, Sigitas. The Importance of Economic Analysis of Law to Legislation: an Example of the Legal Regulation Reform in Lithuania Concerning Company Rescue. Iš Vilnius University, *Integrating Social Sciences Into Legal Research*, Vilnius, 2014, p. 55–62.
4. BARAKAUSKAS, Sigitas. Įmonių gaivinimo teisminių procedūrų įtaka sutartiniams santykiams: sutarčių išsaugojimo svarba. *Teisė,* 2015, 96 t., p. 96–111.

ANNOUNCEMENTS IN INTERNATIONAL SCIENTIFIC CONFERENCES ON THE THEME OF DISSERTATION

The author participated in the international conference of PhD students and young researchers "Integrating Social Sciences Into Legal Research" and presented a paper "The Importance of Economic Analysis of Law to Legislation: an Example of the Legal Regulation Reform in Lithuania Concerning Company Rescue" (the conference was held on 10-11th April, 2014 in Vilnius, Lithuania, at Vilnius University Faculty of Law).

INFORMATION ABOUT THE AUTHOR

Education:

1993-2005	Secondary education, Kelmė Aukuras secondary school
2005-2010	Master of Law degree, Vilnius University Faculty of Law
2011-2015	PhD candidate in Social Sciences (Law), Department of Private Law of Vilnius University Faculty of Law

Internships and work experience:

19/11/2007-19/12/2007	Intern, M. Pūko, L. Kovaitės-Simaitienės and partners' law firm
21/01/2008-21/03/2008	Intern, M. Pūko, L. Kovaitės-Simaitienės and partners' law firm
09/02/2009-31/12/2010	Lawyer, M. Pūko, L. Kovaitės-Simaitienės and partners' law firm
03/01/2011-12/12/2013	Advocate's assistant, M. Pūko, L. Kovaitės-Simaitienės and partners' law firm
01/09/2011-31/12/2011	Supervisor of research papers, Department of Private Law of Vilnius University Faculty of Law
01/01/2012-30/06/2012	Lecturer of seminars on subject Civil Law (General Part), Department of Private Law of Vilnius University Faculty of Law
01/09/2012-31/12/2012	Supervisor of research papers as well as lecturer of seminars on subject Civil Law (Property Law), Department of Private Law of Vilnius University Faculty of Law
01/01/2013-30/06/2013	Lecturer of seminars on subject Civil Law (Law of Obligations I/II), Department of Private Law of Vilnius University Faculty of Law
01/09/2013-31/12/2013	Supervisor of research papers as well as lecturer of seminars on subject Civil Law (General Part), Department of Private Law of Vilnius University Faculty of Law

13/12/2013-present	Advocate, M. Pūko, L. Kovaitės-Simaitienės and partners' law firm
01/09/2014-31/12/2014	Lecturer of seminars on subject Civil Law (General Part), Department of Private Law of Vilnius University Faculty of Law

Research interests:

Company law, contract law, insolvency law and economic analysis of law.

ĮMONIŲ GAIVINIMO TEISMINĖS PROCEDŪROS: LYGINAMIEJI ASPEKTAI (REZIUMĖ)

Tyrimo problematika ir aktualumas. Jau ne vienerius metus pripažįstama įmonių gaivinimo teisinio reglamentavimo svarba[1] bei tai, kad visos teisinės sistemos turėtų suteikti su laikinais sunkumais susidūrusioms perspektyvioms įmonėms[2] galimybę pasinaudoti gaivinimo procedūromis[3]. Suinteresuotiems asmenims nepavykus tarpusavio derybų būdu pasiekti susitarimo dėl su laikinais sunkumais susidūrusios perspektyvios įmonės išsaugojimo (arba nesant tokios galimybės), visuomet turėtų būti sudarytos sąlygos pasinaudoti teisės aktų numatytomis gaivinimo procedūromis, kurios padėtų išspręsti tarp šalių kilusius nesutarimus bei užtikrintų perspektyvios įmonės veiklos tęstinumą (kai tai yra pateisinama). Tačiau dėl galiojančio teisinio reglamentavimo netobulumo (neatitikimo šių dienų realijų) su laikinais sunkumais susidūrusios perspektyvios įmonės gali būti visiškai nepagrįstai likviduojamos, net nebandant tokių įmonių gaivinti ir taip įveikti įmonę užklupusias laikinas problemas arba bandant tai daryti, bet nesėkmingai, nes paprasčiausiai konkrečioje valstybėje tam nėra sudaryta tinkamų sąlygų. Atitinkamose valstybėse, įskaitant ir Lietuvoje, šiuo metu egzistuoja neabejotinas poreikis reformuoti galiojantį įmonių gaivinimo teisinį reglamentavimą, jeigu norima sudaryti reikiamas sąlygas perspektyvioms įmonėms išsaugoti ir išvengti dėl tokių įmonių likvidavimo patiriamų nepagrįstų kaštų. Nuo minėto reglamentavimo tinkamumo priklauso, ar su laikinais sunkumais susidūrusios perspektyvios įmonės galės būti išsaugotos, kitaip tariant, ar gaivinimo galimybė bus tik teorinė, ar ji galės būti įgyvendinta ir praktiškai.

Šio tyrimo aktualumą iš esmės lemia kelios pagrindinės priežastys: (i) paties tyrinėjamo teisės instituto svarba, taip pat ir didėjantis įmonių gaivinimo svarbos

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[1] OMAR, Paul J. The Internationalisation of Insolvency Law: an Anglo-French Comparison. *The International Lawyer*, 2005, vol. 39, no. 1, p. 107.

[2] Šiame darbe perspektyvia yra laikoma tokia su sunkumais susidūrusi įmonė, kurios sunkumai gali būti įveikti ir ilgalaikis gyvybingumas bei konkurencingumas gali būti atkurti, pasitelkus atitinkamą gaivinimo procedūrą. Kitaip tariant, perspektyvia yra laikoma tokia su sunkumais susidūrusi įmonė, kurios problemos gali būti išspręstos (bet ne atidėtas šių problemų sprendimas, išlaikant *status quo* bei tiesiog kuriam laikui atidedant tai, kas yra neišvengiama, t. y. įmonės likvidavimą), įgyvendinus reikiamas gaivinimo priemones, tokiu būdu užtikrinant sėkmingą su sunkumais susidūrusios įmonės tolimesnį veiklos vykdymą ilgalaikėje perspektyvoje.

[3] Europos Komisija. *Best Project on Restructuring, Bankruptcy and a Fresh Start* [interaktyvus]. Brussels: Enterprise Directorate – General, 2003 [žiūrėta 2015 m. kovo 1 d.], p. 7. Prieiga per internetą: <http://www.pedz.uni-mannheim.de/daten/edz-h/gdb/03/best-report-en.pdf>.

suvokimas; (ii) netinkamas tyrinėjamo teisės instituto reglamentavimas daugelyje valstybių bei tokio reglamentavimo daroma žala tiek įmonės gaivinimu suinteresuotiems asmenims, tiek apskritai ekonomikai; bei (iii) normatyvinis tyrimo pobūdis (šio tyrimo metu siekiama ne tik išanalizuoti atskirose jurisdikcijose įtvirtintą reglamentavimą, bet ir pateikti įžvalgas dėl galiojančio reglamentavimo tobulinimo). O šio tyrimo problematiką sąlygoja: (i) paties įmonių gaivinimo reiškinio sudėtingumas; (ii) dėl to kylantys sunkumai įmonių gaivinimo procedūrų metu (dažniausiai dėl skirtingų interesų suderinamumo, nes ši procedūra veikia daugelio subjektų teises, kurių požiūris į įmonės gaivinimą paprastai gerokai skiriasi); bei (iii) tinkamo reglamentavimo sukūrimo komplikuotumas.

Tyrimo objektas (jo ribos). Šio tyrimo objektas – įmonių gaivinimo teisminių procedūrų teisinis reglamentavimas, įtvirtintas Jungtinėse Amerikos Valstijose, Didžiojoje Britanijoje, Vokietijoje, Prancūzijoje, Estijoje, Latvijoje bei Lietuvoje. Visų pirma, akcentuotina, kad šio tyrimo objektas yra tik teisminės gaivinimo procedūros, kurios gali būti pasitelkiamos įmonėms gaivinti, be to, tik jeigu jomis gali pasinaudoti kiekvienas juridinio asmens statusą turintis vienetas, kuriam yra būdingi tam tikri darbe apibūdinti požymiai. Antra, lyginami ne visi minėtų procedūrų aspektai, bet tik tie, kurie problemiškiausi ar kurių įtaka perspektyvioms įmonėms gaivinti, galima sąlyginai teigti, yra didžiausia, t. y. būtinosios sąlygos įmonių gaivinimo teisminėms procedūroms pradėti, įmonių gaivinimo teisminių procedūrų sukeliamos pagrindinės materialaus pobūdžio teisinės pasekmės bei sprendimo dėl įmonės gaivinimo priėmimas šių procedūrų metu. Trečia, pagrindinis dėmesys, lyginant skirtingose valstybėse įtvirtintų įmonių gaivinimo teisminių procedūrų teisinį reglamentavimą, skiriamas materialinių teisės normų analizei (dėl didesnės šių teisės normų svarbos[4] perspektyvioms įmonėms gaivinti), procesines teisės normas paliečiant, tik jeigu to reikia materialinių teisės normų pranašumams ir trūkumams atskleisti ar kai šių normų analizė yra svarbi atliekamam tyrimui (pavyzdžiui, įvertinus konkrečių procesinių teisės normų išskirtinę svarbą įmonės gaivinimo galimybėms). Ketvirta, vertinamas ne *ex ante* ar *ex post* galiojančio reglamentavimo efektyvumas, bet tik *interim*, t. y. tik šių procedūrų metu[5] (vertinama tai,

[4] Kaip didesnę svarbą suprantant tai, kad atitinkamos teisės normos gali apskritai užkirsti kelią perspektyvioms įmonėms gaivinti (t. y. padaryti tokių įmonių gaivinimą ne sudėtingesnį, bet apskritai neįmanomą).
[5] SUCCURRO, Marianna. Bankruptcy Systems and Economic Performance Across Countries: Some Empirical Evidence. *European Journal of Law & Economics,* 2012, vol. 33, no. 1, p. 111.

ar tyrinėjamų gaivinimo procedūrų metu yra sudaromos tinkamos sąlygos perspektyvioms įmonėms gaivinti, ar galiojantis teisinis reglamentavimas neįtvirtina nepagrįstų suvaržymų ir pan.).

Tyrimo tikslas. Šio tyrimo tikslas – išgryninti darbe tyrinėjamose jurisdikcijose galiojančio įmonių gaivinimo teisminių procedūrų teisinio reglamentavimo gerąją patirtį ir suformuoti tam tikras šių procedūrų reglamentavimo gaires, kuriomis būtų galima vadovautis, sprendžiant įmonių gaivinimo teisminių procedūrų teisinio reglamentavimo tobulinimo klausimą, siekiant sudaryti palankesnes sąlygas perspektyvioms įmonėms gaivinti.

Tyrimo uždaviniai. Norint įgyvendinti išsikeltą tikslą, darbe yra siekiama įvykdyti šiuos uždavinius: (i) išanalizuoti tyrinėjamose jurisdikcijose įtvirtintų būtinųjų sąlygų įmonių gaivinimo teisminėms procedūroms pradėti reglamentavimą (tokio reglamentavimo pranašumus ir trūkumus); (ii) suformuoti konkrečias rekomendacijas, į kurias būtų galima atsižvelgti, sprendžiant būtinųjų sąlygų įmonių gaivinimo teisminėms procedūroms pradėti reglamentavimo tobulinimo klausimą; (iii) išanalizuoti tyrinėjamose jurisdikcijose įtvirtintų įmonių gaivinimo teisminių procedūrų sukeliamų materialaus pobūdžio teisinių pasekmių reglamentavimą (tokio reglamentavimo pranašumus ir trūkumus); (iv) suformuoti konkrečias rekomendacijas, į kurias būtų galima atsižvelgti, sprendžiant įmonių gaivinimo teisminių procedūrų sukeliamų materialaus pobūdžio teisinių pasekmių reglamentavimo tobulinimo klausimą; (v) išanalizuoti tyrinėjamose jurisdikcijose įtvirtinto sprendimo dėl įmonės gaivinimo priėmimo įmonių gaivinimo teisminių procedūrų metu reglamentavimą (tokio reglamentavimo pranašumus ir trūkumus); (vi) suformuoti konkrečias rekomendacijas, į kurias būtų galima atsižvelgti, svarstant sprendimo dėl įmonės gaivinimo priėmimo įmonių gaivinimo teisminių procedūrų metu reglamentavimo tobulinimo klausimą.

Disertacijos tema atliktų tyrimų apžvalga, atliekamo tyrimo naujumas bei praktinė reikšmė. Įmonių gaivinimo tematika pasaulyje labiau susidomėta visai neseniai, iš esmės tik pastarąjį dešimtmetį, kai galiausiai buvo suvokta įmonių gaivinimo procedūrų reikšmė, padedant perspektyvioms, bet su laikinais sunkumais susidūrusioms įmonėms įveikti užklupusius sunkumus bei išlikti rinkoje. Tačiau tokia susidomėjimo banga, deja, atsirado tik užsienio valstybėse, bet ne Lietuvoje. Per paskutinį dešimtmetį įmonių gaivinimo tematika Lietuvoje buvo parašyta ir išspausdinta vos keletas mokslinių

straipsnių. Visuose šiuose straipsniuose dėl jų apimties ribotumo yra nagrinėjamas tik koks nors vienas iš įmonių gaivinimo teisinio reglamentavimo aspektų, bet ne kompleksiškai žvelgiama į visas esmines šio teisės instituto reglamentavimo problemas bei galimus tokių problemų sprendimo būdus. Atliekamu tyrimu siekiama bent jau iš dalies užpildyti šiuo metu Lietuvoje egzistuojančią minėtą mokslinių tyrimų spragą bei paskatinti kitus tyrėjus skirti daugiau dėmesio sudėtingo, bet kartu ir labai reikšmingo teisės instituto analizei. Užsienio autorių per paskutinį dešimtmetį įmonių gaivinimo tematika (ar su ja susijusių) parašytų monografijų bei atliktų išsamesnių mokslinių tyrimų būtų galima nurodyti ne vieną. Tačiau nė vieno iš jų (skirtingai nei šio tyrimo) pagrindinis tikslas nėra siejamas su perspektyvioms įmonėms gaivinti palankesnio teisinio reglamentavimo sukūrimu (tiksliau tariant, nė viename iš jų į įmonių gaivinimo teisinį reglamentavimą nėra bandoma žvelgti grynai iš perspektyvios įmonės išsaugojimo prizmės). Antra, daugelis jų net nepateikia išsamesnės tyrinėjamose jurisdikcijose įtvirtinto įmonių gaivinimo teisinio reglamentavimo lyginamosios analizės, siekiant išgryninti gerąją patirtį. Trečia, tokie tyrimai paprastai yra deskriptyvaus, bet ne normatyvinio pobūdžio (t. y. analizuojama esama būklė, kartais reglamentavimo trūkumai, bet nėra stengiamasi suformuoti kokių nors gairių, kuriomis būtų galima vadovautis, norint sukurti kuo geresnes sąlygas su laikinais sunkumais susidūrusioms perspektyvioms įmonėms gaivinti). Ketvirta, į išsamesnių (t. y. ne tik apžvalginio pobūdžio) pastaruoju metu atliktų tyrimų aprėptį nepatenka Lietuvoje galiojančio įmonių gaivinimo teisinio reglamentavimo analizė (taigi, susipažinus su šiais tyrimais nėra galima įvertinti Lietuvoje galiojančio teisinio reglamentavimo tinkamumo, ar jis nėra tobulintinas net ir po įgyvendintos didžiulės reformos). Penkta, beveik visų išsamesnių tyrimų metu nėra siekiama apsiriboti tik teisminių gaivinimo procedūrų teisinio reglamentavimo esminių aspektų analize, kurių įtaka perspektyvioms įmonėms gaivinti sąlyginai yra didžiausia (taigi, šiuose darbuose esminiai probleminiai klausimai nėra išsamiai analizuojami, apžvelgiant didesnį skirtingų jurisdikcijų skaičių, o jeigu tyrimas ir apima didesnį jurisdikcijų skaičių, tai tokiu atveju dėl to nukenčia tyrimo gilumas). Visi šie atliekamo tyrimo ypatumai, lyginant jį su kitų autorių darbais, be to, įmonių gaivinimo tematika atliktų tyrimų stoka Lietuvoje, manytina, pagrindžia atliekamo tyrimo mokslinį naujumą, tai, kad šio darbo keliami klausimai teisės doktrinoje yra menkai išnagrinėti.

Pabrėžtina, kad atliekamas tyrimas turi ne tik teorinę, bet ir praktinę reikšmę. Nuo įmonių gaivinimo teisinio reglamentavimo priklauso, ar perspektyvioms, tačiau su laikinais sunkumais susidūrusioms įmonėms bus sudarytos reikiamos sąlygos išlikti rinkoje bei ar tokios įmonės bus skatinamos laiku imtis atitinkamų priemonių, būtinų įmonės krizinei situacijai įveikti. Ydingas įmonių gaivinimo teisinis reglamentavimas gali užkirsti kelią net ir perspektyvioms įmonėms gaivinti (arba padaryti tokį gaivinimą daug sudėtingesnį), todėl dalis tokių su laikinais sunkumais susidūrusių įmonių gali būti priverstos pasitraukti iš rinkos. O tai, gali nulemti nepagrįstų kaštų patyrimą, kurių būtų galima išvengti, reformavus įmonių gaivinimo teisinį reglamentavimą bei sudarius palankesnes sąlygas perspektyvioms įmonėms išsaugoti. Šiuo tyrimu yra siekiama sudaryti geresnes sąlygas tokiai teisinio reglamentavimo reformai įgyvendinti, išgryninant tyrinėjamose jurisdikcijose įtvirtinto įmonių gaivinimo teisminių procedūrų teisinio reglamentavimo gerąją patirtį bei pateikiant konkrečias teisinio reglamentavimo tobulinimo rekomendacijas.

Tyrimo metodologija. Siekiant įgyvendinti šiame darbe išsikeltą tikslą, taip pat įvykdyti numatytus uždavinius, tyrimui atlikti yra pasitelkti šie tyrimo metodai (tai yra tik pagrindiniai tyrimo metodai, be jų gali būti pasitelkiami ir kiti bendro ir specialaus teisinio mokslinio pažinimo metodai): (i) lyginimo metodas (šio metodo naudojimas leidžia pažinti tyrinėjamose jurisdikcijose įtvirtintą reglamentavimą, nustatyti jo panašumus bei skirtumus); (ii) abstrakcijos metodas (apibendrinamoji bei izoliuojančioji abstrakcija) (šis metodas naudojamas siekiant atsiriboti nuo neesminių teisminių gaivinimo procedūrų, kaip nagrinėjamo reiškinio, teisinio reglamentavimo aspektų, be to, pateikiant įmonės gaivinimo termino apibrėžtį, atskleidžiant teisminių gaivinimo procedūrų bruožus, jų santykį su kitais su sunkumais susidūrusių įmonių problemų sprendimo būdais, o galiausiai atrenkant į atliekamo tyrimo aprėptį patenkančias procedūras); (iii) sisteminės analizės metodas (visas tyrimas pagrįstas šiuo metodu, kadangi atskiri įmonių gaivinimo teisminių procedūrų aspektai yra analizuojami tiek kaip tam tikros visumos komponentai, susiję tarp savęs ir su šia visuma, tiek ir kaip ši visuma, be to, sisteminė teisės prigimtis lemia šio metodo naudojimo poreikį); (iv) loginės analizės metodas (pasitelkus šį metodą išgryninama geroji praktika, suformuojamos konkrečias rekomendacijas dėl galiojančio reglamentavimo tobulinimo, pateikiamos tyrimo išvadas); (v) dokumentų analizės metodas (šis metodas naudojamas

surinkti tyrimui atlikti reikiamus duomenis); (vi) istorinis metodas (šio metodo naudojimas padeda atskleisti įmonių gaivinimo teisinio reglamentavimo raidą, leidžia parodyti anksčiau galiojusio reglamentavimo trūkumus); (vii) lingvistinis metodas (pasitelkus šį metodą yra atskleidžiama įvairių terminų reikšmė, be to, šis metodas naudojamas analizuojant tyrimo šaltinius, juose vartojamus terminus).

Tyrimo šaltiniai. Visus atliekant šį tyrimą naudojamus šaltinius būtų galima suskirstyti į šias 4 pagrindines grupes: (i) teisės norminius aktus (tai visose šiame darbe tyrinėjamose jurisdikcijose atitinkamas įmonių gaivinimo teismines procedūras, kurios patenka į šio tyrimo aprėptį, reglamentuojantys teisės aktai); (ii) teisės doktriną (pasitelkiamos deskriptyvaus pobūdžio lyginamosios studijos, į kurių tyrimo aprėptį patenka tyrinėjamos jurisdikcijos, taip pat yra remiamasi kitais moksliniais tyrimais, kuriuose analizuojamas vienoje ar keliose tyrinėjamose jurisdikcijose galiojantis teisinis reglamentavimas, įvairiais straipsniais bei kitais teisės doktrinos atstovų darbais, kurie yra aktualūs visai nagrinėjamai temai ar analizuojant konkretų teisminių gaivinimo procedūrų reglamentavimo aspektą); (iii) teismų praktiką (atliekant tyrimą yra remiamasi visų grandžių formuojama teismų praktika, norint užtikrinti, kad atliekant tyrimą galimas atotrūkis tarp to, kas yra vadinama įstatymų teise, ir to, kas – realiąja teise, būtų kuo mažesnis); bei (iv) kitus šaltinius (visi kiti tyrimo šaltiniai, kurie nepatenka į nė vieną iš anksčiau minėtų grupių, pavyzdžiui, rekomendacijos, apžvalgos, aiškinamieji raštai, įvairių empirinių tyrimų medžiaga ir pan.).

Darbo struktūra. Darbo struktūrą lemia tyrimo tematika bei išsikelti tyrimo uždaviniai. Be įžangos ir išvadų darbą sudaro dvi atskiros dalys. Pirmoji darbo dalis yra koncepcinė, skirta įmonių gaivinimo sampratai. Šioje darbo dalyje siekiama sudaryti tinkamą teorinį pagrindą tolimesniam tyrimui atlikti. Joje yra pateikiama įmonių gaivinimo apibrėžtis, apžvelgiama įmonių gaivinimo teisinio reglamentavimo raida (tiek bendrai, tiek šiame darbe tyrinėjamose jurisdikcijose), be to, atskleidžiama įmonių gaivinimo procedūrų paskirtis bei teisminių gaivinimo procedūrų vieta visoje gaivinimo procedūrų sistemoje. Antroji darbo dalis yra pagrindinė. Ji skirta tyrinėjamų įmonių gaivinimo teisminių procedūrų lyginamajai analizei. Atsižvelgus į teisminių gaivinimo procedūrų specifiką, ši dalis yra padalinta į tris skyrius. Pirmasis skyrius skirtas išanalizuoti esminius pradinės gaivinimo procedūros stadijos (procedūros inicijavimo) reglamentavimo aspektus, kurių daroma įtaka perspektyvių įmonių gaivinimui sąlyginai

yra didžiausia. Antrasis skyrius skirtas ištirti įmonių gaivinimo teisminių procedūrų sukeliamas pagrindines materialaus pobūdžio teisines pasekmes (procedūros inicijavimo sukeliamas teisines pasekmes). Trečiasis skyrius skirtas svarbiausios įmonių gaivinimo teisminių procedūrų stadijos (sprendimo dėl įmonės gaivinimo priėmimo) reglamentavimo analizei. Atkreiptinas dėmesys į tai, kad siekiant tyrimui suteikti kuo didesnį praktinį pritaikomumą, be to, ir norint sudaryti sąlygas atlikto tyrimo medžiaga remtis kitiems tyrėjams, vykdantiems įvairius tyrimus, susijusius su įmonių gaivinimu, darbe nėra apsiribojama tik nagrinėjamų klausimų analize, bet ir glaustai pateikiama šių klausimų reglamentavimo apžvalga tyrinėjamose jurisdikcijose.

Ginamieji disertacijos teiginiai:

1. Įmonės sunkumai (konkrečiai jų pobūdis) ir šių sunkumų nulemtas įmonės kapitalo struktūros pokytis (net ir įmonės nemokumas) *per se* neturėtų užkirsti kelio įmonei gaivinti, jeigu yra norima sudaryti palankias sąlygas perspektyvioms, tačiau tik su tam tikrais laikinais sunkumais susidūrusioms įmonėms išsaugoti.
2. Daugelyje šiame darbe tyrinėjamų jurisdikcijų įtvirtintas įmonių gaivinimo teisminių procedūrų teisinis reglamentavimas nesudaro tinkamų sąlygų perspektyvioms, tačiau tik su tam tikrais laikinais sunkumais susidūrusioms įmonėms šiuos sunkumus įveikti, pasitelkus teismines gaivinimo procedūras, bei išlikti rinkoje.
3. Nauja Lietuvos Respublikos įmonių restruktūrizavimo įstatymo redakcija, nors ir siekė sudaryti tinkamas sąlygas tam tikrų sunkumų turinčioms įmonėms pasinaudoti restruktūrizavimo teikiamomis galimybėmis, tokių sąlygų iš esmės nesudarė, nes dėl netinkamo teisinio reglamentavimo net ir perspektyvios įmonės gali būti priverstos pasitraukti iš rinkos, negalėdamos pasinaudoti šia įmonių gaivinimo procedūra ar tokiam bandymui nepavykus vien dėl galiojančio reglamentavimo netobulumo.

Pagrindiniai tyrimo pasiūlymai-įžvalgos. Įmonių gaivinimo teisminių procedūrų pradėjimo būtinųjų sąlygų teisinis reglamentavimas turėtų: (i) užtikrinti savalaikę procedūros pradžią, kad įmonių gaivinimo teisminės procedūros nebūtų pradėtos nei per anksti, nei per vėlai; (ii) atlikti, kiek tai įmanoma, pirminį perspektyvių bei neperspektyvių įmonių atribojimą (t. y. jau pradinėje procedūros stadijoje atskirti gaivintinas įmones nuo tų, kurios turėtų būti tiesiog likviduotos); (iii) užkirsti kelią, kiek tai įmanoma, galimam piktnaudžiavimui teisminėmis gaivinimo procedūromis (t. y. užtikrinti, kad šios procedūros būtų naudojamos tik pagal paskirtį); (iv) sudaryti

tinkamas sąlygas perspektyvioms, tačiau su laikinais sunkumais susidūrusioms įmonėms pasinaudoti teisminėmis gaivinimo procedūromis, siekiant įveikti užklupusius sunkumus bei išlikti rinkoje (t. y. nepagrįstai nesuvaržyti perspektyvių įmonių galimybės pasinaudoti teisminėmis gaivinimo procedūromis).

Įmonių gaivinimo teisminių procedūrų sukeliamų materialaus pobūdžio teisinių pasekmių reglamentavimas turėtų būti toks, kad: (i) užtikrintų kompetentingą gaivinamos įmonės valdymą; (ii) suteiktų gaivinamai įmonei reikiamą atokvėpį nuo priešiškų kreditorių bei kitų asmenų veiksmų; taip pat (iii) sudarytų sąlygas užtikrinti gaivinamos įmonės veiklos finansavimą bei (iv) išsaugoti tolimesnei tokios įmonės veiklai svarbias sutartis, užtikrinti esminių sutartinių santykių tęstinumą.

Įmonių gaivinimo teisminių procedūrų reglamentavimas, susijęs su sprendimo dėl įmonės gaivinimo priėmimu, turėtų būti toks, kad: (i) padėtų išspręsti pagrindines sutartinio gaivinimo atveju galinčias kilti problemas, kurios sutartinį gaivinimą kartais daro neefektyvų bei užkerta kelią net ir perspektyvioms įmonėms išsaugoti (t. y. koordinavimo problema, pasinaudojimo problema, susilaikymo problema bei interesų konfliktų tarp grupės narių ir skirtingų grupių problema); (ii) nepagrįstai nesuvaržytų įmonės gaivinimo galimybių; (iii) visuomet užtikrintų tinkamą skirtingų interesų pusiausvyrą (adekvačią kreditorių teisių apsaugą ir pan.).

Išvados. Atliekant šį tyrimą, įgyvendinus išsikeltus tyrimo uždavinius, buvo patvirtinti ginamieji teiginiai:

1. Prieita prie išvados, kad įmonę užklupusių sunkumų pobūdis (t. y. tiek finansiniai, tiek ir ekonominiai sunkumai) bei bet koks tokių sunkumų nulemtas įmonės kapitalo struktūros pokytis (netgi nemokumas), nėra *per se* tos aplinkybės, į kurias atsižvelgus būtų galima atriboti gaivintinas įmones nuo likviduotinų, nes vien iš šių aplinkybių nėra galima nuspręsti, ar su sunkumais susidūrusi įmonė yra perspektyvi, jos leidžia tik suvokti tokioje įmonėje susidariusios situacijos rimtumą bei bandyti numatyti, tačiau būtinai kartu įvertinus ir daugelį kitų aplinkybių, ar tokios įmonės krizinis laikotarpis gali būti įveiktas, pasitelkus įmonės gaivinimo teisminę procedūrą. Tuo atveju, jeigu gaivintinų bei likviduotinų įmonių atribojimas būtų atliekamas remiantis vien minėtomis aplinkybėmis, tai ne visuomet būtų sudarytos palankios sąlygos su laikinais sunkumais susidūrusioms perspektyvioms įmonėms išsaugoti.

2. Nustatyta, kad, norint sudaryti tinkamas sąlygas perspektyvioms, tačiau su tam tikrais laikinais sunkumais susidūrusioms įmonėms gaivinti, daugelyje tyrinėjamų jurisdikcijų turėtų būti iš esmės peržiūrėtas įmonių gaivinimo teisminėse procedūrose dalyvaujančių subjektų vaidmuo: (i) kai kuriose iš šių jurisdikcijų teismui turėtų būti suteikta daugiau diskrecijos tiek įmonių gaivinimo teisminės procedūros iniciavimo, tiek ir vėlesnėse procedūros stadijose, įstatyme neturėtų būti įtvirtinta nepagrįstų suvaržymų, ribojančių teismo sprendimo laisvę (teismui turėtų būti sudaryta galimybė, priimant sprendimus, tinkamai įvertinti visas sprendžiamam klausimui svarbias aplinkybes); (ii) dalyje šių jurisdikcijų kreditoriams taip pat turėtų būti suteikta daugiau galios tokių procedūrų metu, turėtų būti sudaryta galimybė daryti didesnę įtaką tiek proceso pradžiai, tiek ir baigčiai (kreditoriai, skolininkei įmonei susidūrus su laikinais sunkumais, turėtų galėti elgtis socialiai atsakingai ir turėtų galėti inicijuoti teisminę gaivinimo procedūrą, tačiau tokios procedūros metu taip pat neturėtų patys jau tapti gaivinamos įmonės ar jos dalyvių įkaitais); o (iii) daugelyje šių jurisdikcijų gaivinamos įmonės ar jos dalyvių įtaka, priešingai, kartais kaip tik turėtų būti kur kas labiau apribota, minėtų subjektų valia įmonės gaivinimo procedūros metu ne visuomet turėtų būti lemiama (kartais galutinį sprendimą dėl tolimesnio gaivinamos įmonės likimo turėtų priimti kiti subjektai – gaivinamos įmonės kreditoriai ir teismas).
3. Prieita prie išvados, kad Lietuvoje su laikinais sunkumais susidūrusių perspektyvių įmonių gaivinimas gali būti nesėkmingas (ar net negalimas) tiek dėl paties reglamentavimo ydingumo, tiek dėl oportunistinių asmenų veiksmų, kuriems atsirasti leidžia galiojančio reglamentavimo netobulumas. Dėl to, nauja Lietuvos Respublikos įmonių restruktūrizavimo įstatymo redakcija turėtų būti toliau tobulinama: (i) visų pirma, atsisakant įstatyme įtvirtintų absoliutaus pobūdžio ribojimų bei konkretaus termino, per kurį turi atsirasti tam tikri sunkumai, kaip būtinųjų sąlygų gaivinimo procedūrai pradėti (taip sudarant sąlygas nedelsiant imtis reikiamų veiksmų įmonės kriziniam laikotarpiui įveikti, kai tai tik tampa būtina); (ii) antra, įtvirtinant *ipso facto* nuostatų draudimą (tokiu būdu užtikrinant gaivinamos įmonės veiklai svarbių sutartinių santykių tęstinumą gaivinimo procedūros metu); (iii) trečia, suteikiant gaivinamai įmonei galimybę skolintis, naujiems kreditorių reikalavimams pripažįstant atitinkamą prioritetinį statusą (taip užtikrinant gaivinamos įmonės

veiklos finansavimą išoriniais ištekliais, kai vidinių išteklių tam nepakanka); (iv) galiausiai, numatant įmonės gaivinimo plano patvirtinimo galimybę net ir prieš pavienių balsavime dalyvavusių subjektų grupių valią, į balsavime nedalyvavusių subjektų bei į tų subjektų, kurių reikalavimams gaivinimo planas neturės realios įtakos, valią apskritai neatsižvelgiant (tokiu būdu apsisaugant nuo nepagrįstos įtakos darymo sprendimo dėl įmonės gaivinimo priėmimui).

AUTORIAUS MOKSLINIŲ PUBLIKACIJŲ DISERTACIJOS TEMA SĄRAŠAS

1. BARAKAUSKAS, Sigitas. Nauja Lietuvos Respublikos įmonių restruktūrizavimo įstatymo redakcija: pasikeitusio teisinio reguliavimo pranašumai ir trūkumai. *Justitia,* 2011, vol. 75, no. 1, p. 32–43.
2. BARAKAUSKAS, Sigitas. Nemokių įmonių gaivinimo formalios procedūros: Lietuvos ir užsienio valstybių patirtis. *Teisė,* 2013, 89 t., p. 119–135.
3. BARAKAUSKAS, Sigitas. The Importance of Economic Analysis of Law to Legislation: an Example of the Legal Regulation Reform in Lithuania Concerning Company Rescue. Iš Vilnius University, *Integrating Social Sciences Into Legal Research*, Vilnius, 2014, p. 55–62.
4. BARAKAUSKAS, Sigitas. Įmonių gaivinimo teisminių procedūrų įtaka sutartiniams santykiams: sutarčių išsaugojimo svarba. *Teisė,* 2015, 96 t., p. 96–111.

AUTORIAUS PRANEŠIMAI, PRISTATYTI TARPTAUTINĖSE MOKSLINĖSE KONFERENCIJOSE

Autorius dalyvavo doktorantūros studentų bei jaunųjų tyrėjų tarptautinėje konferencijoje „Socialinių mokslų integravimas teisiniuose tyrimuose“, kurioje skaitė savo pranešimą tema „The Importance of Economic Analysis of Law to Legislation: an Example of the Legal Regulation Reform in Lithuania Concerning Company Rescue“ (konferencija vyko 2014 m. balandžio 10 d. ir 11 d. Vilniaus universitete, Teisės fakultete, Vilniuje, Lietuvoje).

INFORMACIJA APIE AUTORIŲ

Išsilavinimas:

1993–2005	Vidurinis išsilavinimas, Kelmės „Aukuro“ vidurinė mokykla
2005–2010	Teisės magistro laipsnis, Vilniaus universiteto Teisės fakultetas
2011–2015	Doktorantūros studijos (socialiniai mokslai, teisė), Vilniaus universiteto Teisės fakulteto Privatinės teisės katedra

Praktika ir darbo patirtis:

2007-11-19–2007-12-19	Praktika, M. Pūko, L. Kovaitės-Simaitienės ir partnerių advokatų kontora
2008-01-21–2008-03-21	Praktika, M. Pūko, L. Kovaitės-Simaitienės ir partnerių advokatų kontora
2009-02-09–2010-12-31	Teisininkas, M. Pūko, L. Kovaitės-Simaitienės ir partnerių advokatų kontora
2011-01-03–2013-12-12	Advokato padėjėjas, M. Pūko, L. Kovaitės-Simaitienės ir partnerių advokatų kontora
2011-09-01–2011-12-31	Vadovavimas studentų rašto darbams, Vilniaus universiteto Teisės fakulteto Privatinės teisės katedra
2012-01-01–2012-06-30	Civilinės teisės (bendrosios dalies) seminarų vedimas, Vilniaus universiteto Teisės fakulteto Privatinės teisės katedra
2012-09-01–2012-12-31	Vadovavimas studentų rašto darbams ir civilinės teisės (daiktinės teisės) seminarų vedimas, Vilniaus universiteto Teisės fakulteto Privatinės teisės katedra
2013-01-01–2013-06-30	Civilinės teisės (prievolių teisė I/II) seminarų vedimas, Vilniaus universiteto Teisės fakulteto Privatinės teisės katedra
2013-09-01–2013-12-31	Vadovavimas studentų rašto darbams ir civilinės teisės (bendrosios dalies) seminarų vedimas, Vilniaus universiteto Teisės fakulteto Privatinės teisės katedra

2013-12-13–iki dabar	Advokatas, M. Pūko, L. Kovaitės-Simaitienės ir partnerių advokatų kontora
2014-09-01–2014-12-31	Civilinės teisės (bendrosios dalies) seminarų vedimas, Vilniaus universiteto Teisės fakulteto Privatinės teisės katedra

Mokslinių interesų sritys:

Įmonių teisė, sutarčių teisė, nemokumo teisė, ekonominė teisės analizė.