Recent changes to the Greek Bankruptcy Code  
Aiming at efficiency and expediency

The current insolvency regime in Greece regulated by L. 3588/2007 (the “Greek Bankruptcy Code” or the “GBC”) had already undergone a number of revisions; these were mainly to adapt throughout the nearly ten-year life of the GBC to the constantly changing needs, dictated by the financial circumstances, and to address issues arisen from its application in practice.

The latest revision (L. 4446/2016 - the “new Law”), which has come into effect since the beginning of the year, contains significant amendments, simplifying pre-insolvency restructuring proceedings, on the one hand, and, streamlining ordinary bankruptcy (liquidation) proceedings, on the other.

The new Law is influenced by insolvency regimes of other European countries and follows the principles of the European Commission Recommendation of 12.3.2014 on a new approach to business failure and insolvency.

The revisions are one of the pillars of recent legislative interventions for the efficient handling of business non-performing loans (“NPLs”).

Consolidation of pre-insolvency proceedings

The previous regime

The pre-bankruptcy regime consisted of three different types of proceedings, namely (i) the (ordinary) “Rehabilitation Procedure”, which was concluded in two stages (formal opening of the procedure with a Court decision - ratification by the Court of the rehabilitation agreement between the debtor and its creditors) (ii) the “Pre-Pack Rehabilitation Procedure” with direct ratification by the Court of a rehabilitation agreement, which was concluded between the debtor and its creditors through private confidential negotiations and (iii) the “Special Liquidation Procedure”, also described as liquidation (of the business) “as a going concern”.

In practice, only the first two procedures were pursued, with the Pre-Pack procedure gaining momentum over the last few years; the Rehabilitation Procedure concluded in two stages following a formal opening by the Court was criticized as a device often abusively followed by certain debtors without a true restructuring intent, in order to merely obtain protection from creditors and stall bankruptcy.
The simplified "Pre-Pack Rehabilitation Procedure"

The new Law aims at enhancing restructuring proceedings through the limitation of judicial intervention and the clarification of the financial status of the debtor in a short term. It has consolidated all the three different types of pre-insolvency proceedings in one, namely the -already successful in practice- Pre-Pack Rehabilitation Procedure, which is in similar lines as the pre-pack arrangements used in the U.S. or UK legislations.

The main elements of the Pre-Pack Rehabilitation Procedure are the conclusion of an agreement between the debtor and a certain percentage of its creditors (60% of the total claims including 40% of secured claims) (the "Rehabilitation Agreement") and the subsequent ratification from the Court of such agreement.

The "creditor-driven" rehabilitation

The new Law provides the possibility for creditors (representing the certain 60-40 majority percentages discussed above) to conclude a Rehabilitation Agreement without the participation of the debtor and submit the same to the Court for ratification. This new option significantly widens the scope of pre-bankruptcy proceedings and allows creditors to take conduct of the restructuring attempts in cases where bankruptcy can be avoided and the business preserved.

This creditor-driven procedure is subject to certain conditions. Namely, at the time of the conclusion of the Rehabilitation Agreement, the debtor must have already reached the state of the "Cessation of Payments". Creditors along with the application for ratification of the agreement reached, must submit a petition for the declaration of the debtor in bankruptcy.

Further, the Court may ratify the agreement only if the debtor consents to its terms. Such consent is presumed if the debtor has not intervened against the ratification until the hearing of the ratification application. The intervention of the debtor does not necessarily preclude the ratification of the Rehabilitation Agreement if the Court concludes, based mainly on the opinion of the financial expert submitted with the application, that the legal and financial state of the debtor shall not be worse-off.

The debtor may be ordered by the Court to facilitate proceedings by providing the necessary documents for submission of the ratification application. Failure of the debtor to provide the assistance as ordered shall render the persons involved liable for the crime of non-compliance with a decision of the Court.

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1 Meaning that the debtor is “unable to fulfill its due and payable obligations in a general and permanent manner”. This is a basic concept running through Greek bankruptcy law and is ad hoc ascertained at the discretion of the Court on the basis of certain criteria developed by jurisprudence.
Handling reluctant shareholders

In case the debtor is in a state of Cessation of Payments and the Court considers probable that in case of liquidation the shareholders will not be reimbursed by the proceeds of liquidation, the Court may appoint a special representative. He shall be entrusted with the power to exercise the standing and voting rights of those shareholders of the debtor, who do not co-operate for making decisions required for the fulfillment of the terms of the Rehabilitation Agreement.

Preventive measures

From the filing of the Rehabilitation Agreement for ratification until the issuance of the decision of the Court, individual and collective enforcement measures are automatically stayed. The stay may not normally exceed four (4) months and may be extended, following application, for as long as the decision for ratification remains pending.

Other (additional) preventive measures may also be ordered by the Court following a relevant petition for the period as of submission of the ratification application until the issuance of the Court decision on the ratification of the Rehabilitation Agreement.

To facilitate out-of-court negotiations for the conclusion of the Rehabilitation Agreement, the new Law provides also for the granting of preventive measures, even before the submission of the ratification application; in such a case, apart from the usual procedural conditions for taking provisional measures, a written statement is required signed by creditors representing twenty percent (20%) of the total debts.

Amendments of the Rehabilitation Agreement

The new Law provides for the possibility of amending the Rehabilitation Agreement with a new agreement between the contracting parties. This possibility may only be tried once. The new agreement is ratified by the Court, on the conditions that the amendments (i) concern the time and way of repayment of the debts or the type of the benefits of each party, (ii) do not affect the repayment terms of non-contracting creditors and do not worsen their position and (iii) the principles of collective satisfaction and equal treatment of creditors are not impaired.

The results of the ratification

An important issue differently regulated under the revised GBC, is the treatment of existing obligations of guarantors and co-debtors. The general rule is that these now follow the treatment of the obligations of the primary debtor and are adjusted to the same amounts, unless the respective creditor does not consent.

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2 "Emergency or imminent risk": these are provided in the Greek Code of Civil Procedure.
In order to raise ambiguities arisen in the past, the new Law explicitly clarified that any debts towards the State and Social Security Organizations are considered “settled”, provided that the debtor complies with the terms of the Rehabilitation Agreement\(^3\).

**Nullification of the Rehabilitation Agreement**

Under the previous regime, in case of non-compliance of the debtor with the Rehabilitation Agreement, creditors were able to take enforcement measures and terminate or withdraw from the agreement, without a specific formal procedure.

The new GBC provides for the possibility of a debtor to ask for the nullification of the Rehabilitation Agreement in the event that: (i) it was revealed post-ratification that the agreement was the product of malice of the debtor or collusion of the latter with a creditor or a third-party or (ii) non-compliance with the terms of the agreement is so material that it is predicted with certainty that the debtor’s business may not be rehabilitated.

In case of nullification, creditors are automatically released from their commitments under the Rehabilitation Agreement and their legal position and claims are reinstated as they were before ratification.

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\(^3\) e.g. payment of debts as adjusted.

**Abolishment of special liquidation – survival of the special administration procedure**

In the place of the Special Liquidation Procedure, which has only rarely been used in practice and was finally abolished with the new Law, the legislator has opted to retain the “Special Administration Procedure”.

The Special Administration Procedure is in essence a procedure of liquidation of over-indebted businesses as “going concerns”, during which a special administrator is appointed in order to sell either the totality or individual sectors or assets of the business.

The Special Administration application may be filed with the Court by creditors representing at least forty percent (40%) of the total claims against the debtor, including at least one credit institution/debtor. The hearing is scheduled within two (2) months and a special administrator is appointed by the Court. The liquidation process must be completed within a twelve-month period.

The special administrator publicizes an invitation for the conduct of the public auction(s) for the sale of the totality, or individual sectors or assets, of the business, setting the date(s) for the submission of binding bids. Following conclusion of the submission process, the special administrator proceeds to the unsealing of the bids and draws a report on the highest bidder. The report is notified to all bidders and submitted to the Court for approval.
Following the publication of the above decision of the Court, the special administrator invites the buyer(s) to sign a contract for the purchase of the business (or particular assets or units thereof). If the price is timely paid, the special administrator draws an act of receipt which is attached to the purchase contract.

Streamlining of (ordinary) bankruptcy

Bankruptcy provisions have been amended less radically, compared to the pre-insolvency chapter of the GBC.

Reference is made to the most significant changes introduced with the new Law, which are expected to improve a number of inefficiencies of the past regime.

Filing by the debtor earlier, before insolvency is present or imminent

In order for a debtor to be declared bankrupt, it should be unable to fulfill its due and payable obligations in a general and permanent manner ("Cessation of Payments"). When it is the debtor himself who files for bankruptcy, the “threatened inability” to fulfill its obligations constitutes sufficient basis for filing. The revised GBC adds also the simple “probability of insolvency” as a ground for the declaration in bankruptcy, for the cases where the debtor simultaneously submits a reorganization plan proposal (see below).

This aims at giving the chance to debtors to initiate the relevant proceedings at an early stage before they are already found deeper into insolvency, when financial conditions may prove irreversible. Combined with the reorganization plan, the purpose is to enhance the options of transferring the troubled business as a “going concern” in the interest of both creditors and the debtor as well as prospective buyers.

Financial statements

In any case in which the debtor requests the declaration of bankruptcy, it has to submit along with the bankruptcy application its financial statements, for the last financial year available, as well as a certificate by the competent tax authority confirming its due obligations towards the State. This amendment is in similar lines with the requirements for submitting an application for the ratification of a Rehabilitation Agreement and will serve the Court to determine the actual financial state of the debtor.

Sufficiency of the debtor's estate to cover the bankruptcy expenses

In order for bankruptcy to be declared it has to be justifiably considered probable that the debtor's estate will be sufficient to cover the costs of the procedure. The objective is to avoid

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4 See Recital 16 of the Preamble of the European Commission Recommendation of 12.3.2014 on a new approach to business failure and insolvency.
proceedings which are initiated but cannot be completed due to lack of the necessary financial means.

The Insolvency Professionals

According to the new Law and Presidential Decree no. 133/2016, the powers of the syndic (trustee), the special representative in rehabilitation as well as those of the special administrator of L. 4307/2014 shall be exercised by legal entities and individuals holding the relevant license, who are registered in the Registry of Insolvency Professionals, as soon as the same is ready for operation.

Cutting down on procedures and formalities.

With the decision declaring bankruptcy, the Court appoints the reporting judge and the syndic (trustee) of bankruptcy and orders the sealing of the bankruptcy estate. Notably, to avoid undue delays, the new GBC empowers the reporting judge with various competences, which were previously lying with the Court.

Moreover, several procedures which were deemed inflexible and were rarely, if ever, used in practice are abolished from the new bankruptcy regime.

In the same framework, the committee of creditors is abolished as a bankruptcy institution, since in many cases in practice it was proven burdensome and ineffective.

Civil liability of Directors

The provisions concerning liability of directors have seldom been applied in practice and the new Law attempts to bring more clarity in the relevant legal framework. Amendments were effected in both the legal bases of liability of directors, i.e.: (i) the culpable delay in filing for bankruptcy and (ii) the liability for causing the Cessation of Payments due to gross negligence or malice.

An important change is the quantification of the damages sustained in both above instances: (i) the damage that may be compensated due to delay in filing for bankruptcy consists in the decrease of the amount the creditors would have collected in bankruptcy proceedings, were it not for the delay, while (ii) for claims on the basis of the liability for causing the cessation of payments, the possibility is open for creditors to pursue "any damages caused".

In an effort to reinforce the dissuasive character of such above liability, claims of this latter category only (liability under (ii) above), may henceforth be exercised directly by creditors without the necessary initiative of the syndic and hence, without the declaration of bankruptcy as a prerequisite.

A time-limit of three (3) years is set for claims of this latter category (the time-limit is ten (10) years in cases where the damages are caused due to malice).
Post-bankruptcy changes

Bankruptcy is concluded either through:

(a) liquidation of the bankrupt entity and payment of its creditors (the syndic proceeds to the liquidation of the debtor’s assets and distributes its proceeds to creditors either by selling the business as a whole or its individual components, separately or in groups); or

(b) approval of a reorganization plan (rarely used in practice)

The new Law provides for amendments in both proceedings, of which some important ones are briefly described below.

The liquidation

The most significant amendments in the liquidation stage concern the distribution of the liquidation proceeds to creditors.

Enhancing the privilege of “new money”

As previously, the new Law recognizes the first-class ranking privilege of claims for “new money” injected or goods or services provided to ensure the continuation of the business by virtue of a formal restructuring (rehabilitation or reorganization plan). The privilege is reinforced, since it is no longer required that the rehabilitation agreement or the reorganization plan is finally ratified by the Court; the position of interim lenders and suppliers is thus safeguarded irrespective of the outcome of the restructuring efforts. Moreover in terms of satisfaction, this first-class privilege is treated as a pre-deducted claim in case such claims concur with unsecured claims.

The reorganization plan

In an attempt to make the procedure more expedient, the new Law abolishes the judicial pre-approval of the reorganization plan. Further, the time-period within which the plan may be submitted is shortened to three (3) months from bankruptcy declaration.

The “Creditor-driven” reorganization plan

As with rehabilitation, creditors representing at least sixty percent (60%) of the total claims and forty percent (40%) of secured claims, may submit a reorganization plan along with the bankruptcy application without the debtor’s participation, but only in case the debtor is already in Cessation of Payments. Again, the consent of the debtor to the reorganization plan is necessary in order for creditors to vote for its approval. For reluctant debtors and shareholders of the debtor/entity, the same rules are applicable as in the rehabilitation procedure (see above).

Lastly, as with amendments to the bankruptcy (liquidation) procedure, the new Law also amends the reorganization plan so that many
procedural steps do not anymore need the intervention of the Court (e.g. for awarding of the business to the highest bidder), but lie within the exclusive competence of the reporting judge.

*Providing a “second chance” to debtors*

The new Law aiming at providing a “second chance” to bankrupt debtors has revised the GBC provisions relating to restitution.

Namely, the new Law provides for the full discharge from its debts of a debtor who has not acted in bad faith and has been declared excusable (*syggnostos*) by the Court. The discharge may be requested by the debtor after the lapse of a period of two (2) years as of the declaration of bankruptcy or upon the completion of bankruptcy proceedings (whatever happens first).

The debtor may not be discharged from debts created due to an unlawful act committed due to intention or gross negligence. In case bankruptcy is completed through the ratification of a reorganization plan, the debtor is automatically discharged, except if the plan provides otherwise. The above discharge of the debtor may be effected only once, unless the new discharge is due to a reorganization plan.

*Overall, the revisions seem to be a plausible effort to confine problematic points and lift inefficiencies, reinforcing at the same time procedures which were tested and proved successful through the practical implementation of the GBC all the previous years of its application.*
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