



the global voice of
the legal profession®

International Litigation News

Publication of the International Bar Association Legal Practice Division

MAY 2018



Electronic auctions: Greece enters the digital age

Enforcement in times of crisis

It is generally accepted that any efficient credit system requires a predictable, transparent and affordable enforcement procedure for creditor claims, secured and unsecured, outside of insolvency.¹ In the case of Greece, the reform of the legal framework for enforcement has been considered an essential step in tackling the problem of Non-Performing Loans (NPLs), which presents one of the biggest challenges for the Greek economy.² In fact, since the beginning of the debt crisis in 2009, the Greek banking system has suffered heavily under the ever growing burden of NPLs. Greece currently features the highest NPL ratio in Europe, with NPLs corresponding to roughly 45 per cent of the country's GDP and amounting to €100bn.³ in total value. Nevertheless, even though NPL resolution has been identified as a number one priority, there has been only minimal progress so far; it is characteristic that between June 2016 and June 2017, the NPL rate decreased by a mere 0.6 per cent (compared to 24.6 per cent for Italy and 11 per cent for Cyprus and Portugal) recording the lowest rate of decrease in the EU.⁴

Under these conditions, the adequacy of the legal framework for enforcement has been put to a strenuous test. In general, any creditor, whether secured or unsecured, can initiate enforcement proceedings by seizing the debtor's (encumbered or unencumbered) assets and being satisfied by the liquidation proceeds resulting from the public auction of those assets, which is conducted by the competent public official (notary public).⁵ Nevertheless, foreclosure proceedings have long suffered from a number of legal and practical deficiencies. For instance, the law required a series of notifications, many of which had to be published in the daily press and thus ran the danger of going unnoticed by interested parties. Various third parties (most notably secured creditors) also needed to be individually notified, which made the procedure overly cumbersome and expensive. In addition to that, the system of sealed first-price bids and the statutory stipulation that, physical auctions could only be held once a

week (on Wednesdays) failed to maximise returns. More importantly however, the need for physical presence encouraged abusive practices and more recently auctions were routinely called off due to the presence of activists, who were opposed to satisfaction of the banks' claims at the expense of ordinary homeowners.

The soundness of the legal framework for enforcement has also been negatively affected by a number of initiatives that have sought to impose statutory moratoriums on enforcement, often presented as signs of political goodwill. For instance, between July 2010 and the end of 2013, debtors were afforded horizontal protection against foreclosures by banks for claims not exceeding €200k, which effectively blurred the line between unable and unwilling defaulters. In addition to that, between January and December 2014, foreclosures against primary residences of debtors were prohibited, albeit not horizontally but upon satisfaction of certain requirements. The above measures (and their repeated time extension), while having some socio-economic justification, not only placed significant pressure on the Greek banking system, by essentially precluding banks from obtaining any meaningful return on their distressed assets,⁶ but also contributed to moral hazard and encouraged debtors to default on their obligations, a phenomenon commonly described as strategic default. These features can explain the relatively low rate of auctions during recent years.⁷

The new framework for electronic auctions

As a response to the above problems, Greece recently decided to amend the legal and regulatory framework for enforcement proceedings, through the introduction of electronic auctions (e-auctions).⁸ E-auctions are envisaged as a means to expedite the resolution of NPLs, by providing a speedy and cost-efficient procedure for banks to realise their collateral (most importantly real estate). While first introduced as an elective option of

the enforcing creditor, as of 21 February 2018 e-auctions are the only method by which all asset classes (meaning tangible assets) will be liquidated, including movables, immovables, ships and aircraft.

The new procedure is now conducted exclusively on a newly introduced digital platform, called the 'Electronic Auction System' (EAS). The procedure takes place under the auspices of a certified notary public, who is designated by the enforcing creditor and has the leading role in running and concluding the e-auction. As regards the pre-auction stage, the public notary is responsible for publishing all relevant information, including, among others, the announcement of the auction, the description of the assets to be auctioned, the date and exact time on which the auction will take place as well as the starting price on www.eauction.gr, the web-portal of the EAS. As regards access to the electronic system, general information about the auction and the relevant assets (including a brief description and the starting price) is accessible to everyone. However, in order to submit a bid, one must also complete a certification process and register personal data, which gives enhanced access to the system. The debtor can observe the course of the electronic procedure and is afforded limited access using a special passcode he/she receives.

The most important innovation, however, is the new system for the submission of bids. More specifically, bidders can, freely and constantly, without any limitation, submit consecutive open tenders during the bidding process, which are registered in the system, until the expiration of the time limit of the auction. Thus, the system of sealed first-price closed bids, which very often resulted in no winning bid, is replaced by consecutive open bids. The highest bidder is announced electronically to the participants by the appointed notary, who also drafts an electronic report concerning the award of the assets to the successful bidder. This report also serves as proof of the outcome of the procedure and as the legal title for the transfer of assets to the winning bidder.

Advantages and possible problems of the new procedure

The introduction of e-auctions brings the Greek legal framework into the digital age and is characterised by a number of

significant advantages. In general, the new procedure is faster and less costly, as it requires fewer notifications and all relevant information is now subject to greater online publicity and thus more easily accessible to the public. This is expected to lead to an increased interest from possible bidders and contribute to value maximisation. In addition, as e-auctions require no physical presence of any of the parties involved, this allows bidders to retain their anonymity and avoid confrontations. Furthermore, the system of consecutive open bids allows no abusive participation by fictitious bidders⁹ and, consequently, creates a more competitive environment, thereby favouring the debtor's interests. Finally, e-auctions will be susceptible to significantly less nullities, as the now simpler, fewer and automated steps of the procedure leave little margin for procedural violations, which were common in the past and often resulted in the judicial nullification and re-run of the process. In general, the new system is envisaged to result in a more secured and solid enforcement procedure, the results of which will be far less possible to be reversed after the fact.¹⁰

The new system, due to the nature of the procedure as strictly electronic, may give rise to some concerns, as regards the technical adequacy of the EAS and the impact of potential system errors to the successful conclusion of the process. Nevertheless, in case of a system shut down during the course of the procedure, the law expressly allows for a rescheduling of the auction following a petition by the enforcing creditor. Moreover, issues may arise as regards the consistency of the e-auction process with the remaining provisions of the Code of Civil Procedure, most notably the provisions for the jurisdiction of the courts as well as the deadlines for filing the application for annulment by the debtor. For instance, jurisdiction in enforcement disputes is generally determined by reference to the place of enforcement. However, the fact that the electronic part of the procedure retains no apparent connection with any single place, combined with the enforcing creditor's option to appoint a notary public from literally everywhere on the Greek territory to conduct the e-auction, complicates the situation, as regards the identification of the competent court. Last but not least, there is the issue of the lack of any similar electronic means of asset liquidation in collective proceedings, most noticeably the Greek Insolvency Code. This 'regulatory anomaly' may lead to competition

between collective and individual procedures and to possible instances of ‘procedure shopping’ by creditors.¹¹

A look into the future

Since the reform is still in its infancy, the full impact of the new procedure has yet to be determined. The first eight e-auctions took place on 29 November 2017, when the new procedure was still optional, but there were limited registrations until the end of 2017. Since the introduction of mandatory e-auctions, however, the pace has picked up and almost 900 auctions were scheduled to be conducted just in March 2018 (primarily involving real estate). Furthermore, over 2,500 auctions, which have been registered on www.eauction.gr, are expected to take place until October 2018. These numbers still fall short of the targets agreed between Greece and its international lenders, who are aiming at 100,000 to 150,000 auctions until the end of 2021, an objective that is considered maximalist by many. However, the first signs allow for modestly optimistic predictions, as the increased number of scheduled e-auctions in the first months of 2018 is higher than originally projected,¹² a view shared by the representatives of the four Greek systemic banks, who consider e-auctions as a useful weapon against strategic defaulters.

More importantly, however, the new electronic procedure opens up new and exciting prospects for the further digitalisation of the judicial system in Greece. For instance, the potential use of modern innovations, such as Distributed Ledger Technology (DLT), can enable the conclusion of transactions on the e-auction platform in a faster, more transparent and incorruptible way. Furthermore, in the case of immovable property, the full development and digitalisation of a uniform land registry around DLT may enable the automatic transfer of title once the auction procedure is finalised, through the application of smart contracts, thereby eliminating the time lapse between conclusion of the auction and settlement of the transaction on public records. While it is still early to make predictions as regards the efficiency of the system and the potential room for further improvements, it would be fair to say that the Greek legal order has finally entered the digital age.

Notes

- 1 This principle is reflected in the *World Bank Principles for Effective Insolvency and Creditor/Debtor Regimes* and especially principles A6, A7 and A8.
- 2 This has also been advocated by the IMF, *A Strategy for Resolving Europe's Problem Loans* (International Monetary Fund Staff Discussion Note, September 2015, SDN/15/19, p 28). For a review of some recent reform initiatives in the field of insolvency law in Greece see Sakkas YG, Bazinas YG, *Back to square one, International Financial Law Review (IFLR)* (December 2016/January 2017, p 61).
- 3 Data from the Bank of Greece.
- 4 European Commission Progress Report on the reduction of non-performing loans (NPLs), January 2018, available online at https://ec.europa.eu/info/publications/180118-non-performing-loans-progress-report_en.
- 5 Art 904-1056 Code of Civil Procedure.
- 6 In reality, the costs of such measures have been borne by the taxpayers that have been forced to ‘bail out’ the banking system in two recapitalisation cycles (in 2010 and 2013), only to see their holdings completely diminished as a result of the third wave of recapitalisations in 2015. See Sakkas Y and Bazinas Y, *Creditor Participation in the Recapitalisation of the Greek Banking System (in two parts)* (The Banking Law Journal, March–April 2016).
- 7 According to media source, auctions of real estate have dropped from 52,000 per year in 2009 to merely 4,800 per year in 2016, while the total value of foreclosed real estate has decreased from €2bn to €1bn. This figure also includes auctions enforced by the Tax Authority, which was not subject to the statutory moratorium, suggesting that auctions by banks are significantly fewer.
- 8 E-auctions were introduced by virtue of Law 4512/2018 (State Gazette A, 5/17.1.2018). In fact, the Supplemental Memorandum of Understanding between Greece and the European Commission provides that the authorities will implement a three-year strategic plan for the improvement of the functioning of the judicial system, including the implementation of electronic auctions, full text available at https://ec.europa.eu/info/files/supplemental-memorandum-understanding-greece-5-july-2017_en.
- 9 In fact, the system of e-auctions provides important safeguards against delays by offering the enforcing creditor the option to seek and appoint a notary, situated outside the region, where the attachment of the assets to be auctioned took place, if the one who has local jurisdiction is prevented from fulfilling his duties. This choice was absent in the former regulation and this legal vacuum often gave the opportunity for collusions between notaries and debtors against the enforcer creditor's interests.
- 10 This is combined with the new shortened timelines for the filing of the annulment application of Article 933 of the Greek Civil Procedure Code, which constitutes the debtor's main defensive weapon against enforcement proceedings.
- 11 Debtors (ie, traders) cannot engage in procedure shopping, as they are obliged by law to file an application for insolvency within 30 days as of the date of the cessation of payments. Art 5 s2 Greek Insolvency Code, Law 3588/2007, State Gazette (SG) A 153/10.7.2007, a full English translation of the Greek Insolvency Code is available at www.bazinas.com.
- 12 The European Central Bank has advocated for the completion of 600 to 700 e-auctions during the first months of 2018, a number which was estimated to be staggered over the year to reach 10,000 e-auctions in the last three months of 2018. This averages to about 1,400 e-auctions per month and a sum of 16,800 e-auctions for 2018 alone.