What is next?

There is no doubt that this Reform has been a major step forward in improving the Spanish insolvency framework after several years of application in courts. In fact, most of the amendments were recommended by a committee of insolvency experts created for this purpose. Although it has been welcomed by judges, insolvency practitioners and investors, it would be desirable to introduce additional amendments to facilitate the sale of distressed assets, to extend the out-of-court refinancing to loans secured by mortgages/pledges and to creditors other than financial entities, and to promote the financing of distressed companies before resorting to liquidation. All of the above would help to strengthen and to further develop a true distressed debt and asset market in Spain.

The introduction of consumer bankruptcy proceedings in the Greek legal order: Law 3869/2010

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Introduction

Consumer bankruptcy proceedings have been recently introduced in the Greek legal order, through Law 3869/2010.[1] Traditionally, consumer debtors were not eligible for insolvency and reorganisation proceedings, given that the Greek insolvency code ('IC') applies only to merchant debtors, meaning legal or natural entities having a commercial activity. Nevertheless, the current socioeconomic conditions and the overall odious financial environment has dictated the need for the adoption of a new institution to redress this.[2]

The extrajudicial attempt for settlement

Consumer bankruptcy proceedings are divided into three phases, each presenting its own challenges. The first stage is the extrajudicial attempt for settlement, where the debtor is required to make an attempt to reach an agreement with its creditors. In cases were parties reach a settlement, this becomes an enforcement order, after ratification from the competent court.

However, the success of the extrajudicial stage in filtering cases that could be resolved without resorting to formal court proceedings is questionable. For example, up until recently, parties in certain civil proceedings were required by statute to attempt an extrajudicial settlement otherwise the hearing of the case was declared inadmissible. Unfortunately, the settlement attempt was frequently viewed as a formality and rarely yielded results.

Admittedly out-of-court workouts are similarly not yet rooted in the mentality of domestic debtors and creditors alike. However, this is gradually changing. The start came with the reform of the Greek insolvency code in 2007, which introduced a pre-insolvency procedure purporting, inter alia, to reduce the stigma attached to formal insolvency proceedings. Moreover, the code was further amended in 2011 incorporating pre-pack proceedings in the IC.

The adoption and implementation of these provisos along with the overall financial environment that dictates prompt and cost effective solutions will arguably highlight the benefits of out-of-court settlements, always on the premise that credit institutions, the main creditors in consumer bankruptcies, will support the extrajudicial route.

Petition for the regulation and discharge of the debtor's obligations

In the event that the out-of-court approach does not flourish, the debtor can then file an application for the opening of court proceedings within six months following the failed extrajudicial attempt. The jurisdiction of the court for the inception of proceedings is established on the basis of the debtor's domicile or place of habitual residence.

The scope of consumer bankruptcy proceedings encompasses natural persons who are unable to fulfill their pecuniary obligations, as they become due, in a permanent manner. The debtor's inability to satisfy its obligations in the above manner must not be attributed to malicious intent. The law expressly provides that the burden of establishing malice lies with creditors, which in practice will prove a cumbersome task to say the least.

The debtor files, together with the application, a list of all its assets and income as well as the income of any spouse. This is accompanied by a list of all creditors and their claims. A detailed plan for the regulation of the debtor's obligations is also required. Nevertheless, certain obligations are expressly excluded from the scope of the said proceedings.

For instance, obligations assumed one year prior to the filing of an application for the inception of proceedings, as well as those arising by way of tort conducted with malicious intent, do not fall within the ambit of Law 3869/2010. The same applies for administrative fines and monetary penalties as well as taxes and social security contributions.

The purpose of these exclusions is to avoid abuse of the proceedings, especially for debtors aiming to be relieved of their tax obligations and of fines imposed. At some stage, the legislator was contemplating the idea of including taxes owed by the debtor. However, it is no surprise that these were omitted from the scope of the proceedings given the government's efforts to increase public income.

Upon the filing of an application, a hearing is set within a period of six months. This may seem a prolonged period that overlooks the urgent nature of matters and negates the purpose of the proceedings, although this is not necessarily the case.

The judicial settlement attempt

The law provides that during the period between the filing of the petition and the hearing, the debtor and creditors enter a second stage of negotiations, this time for a judicial settlement upon the specific and detailed plan filed by the debtor. Creditors are invited to provide their comments on the plan and to state whether they concur or not. This takes place within a strict deadline of two months from the filing of the debtor's application for the commencement of proceedings.

Upon the expiration of the said deadline, the debtor is afforded 15 days to produce an amended plan, taking into consideration the comments submitted. The law allows creditors 20 days to state their position in relation to the amended plan. If all creditors included in the list of creditors submitted with the petition to the court agree, or do not object, to the proposed judicial settlement, the latter is considered concluded. In that case, the plan is ratified by the court and the debtor's application for the settlement and discharge of its debts is automatically considered recalled.

Understandably, it will be difficult in practice for the debtor to secure the consensus of all its creditors. However, the law does not deviate from its position that a unanimous decision is required for the acceptance of the settlement. Instead, it is provided that in cases were a specific percentage of creditors consents to the plan, then the court can step in following a petition of the debtor or creditor and provide its consent in the place of a creditor abusively opposing the settlement. For this to happen, creditors representing more than half of the debtor's obligations, including all secured *in rem* creditors and creditors representing half of any possible labour claims, must agree, or not object, to the settlement. In order for the court to provide its consent it must first examine whether the grounds on which the creditor opposes the settlement are founded or not.

Nevertheless, the court is precluded from providing its consent in the place of an opposing creditor when such creditor is treated differently from the remaining creditors; or in cases where the implementation of the plan would mean that the creditor opposing would be in a worse economic position than the one he/she would have been in were the debtor to be discharged of its debts; or finally when a claim is disputed either by the debtor or a creditor.

This stage is far more structured than the extrajudicial settlement attempt, providing for strict deadlines and consequences for non compliance. For example, in cases of any unsecured claims, which although is included in the list submitted to court is not included in the plan served to the creditor holding that claim and who nevertheless did not express its position on the proposed plan within the prescribed deadline, then the said claim is considered to be erased. At the same time, a creditor who does not provide comments on the plan or does not expressly object to it within the prescribed time, is deemed to consent to the plan. The above shows the importance for all involved parties to participate in the procedure and to fully explore the potential of a judicial settlement.

The judicial regulation of obligations

The final stage of the procedure, which the debtor enters in the event creditors are objecting to the plan and the court cannot substitute consent for reasons described above, purports to judicially regulate the debtor's obligations. In practice this means that in cases where the debtor's assets do not suffice, then the court taking into account the income of the debtor and that of a spouse, if applicable, determines an amount that the debtor will be obliged to pay to its creditors on a monthly basis for a period of four years. The court also has the power to readjust the amount payable at a later time, for example in cases where there is a change in the debtor's income, assets, etc.

With this in mind, the debtor is required to provide for the satisfaction of its creditors, half of the value of all assets coming to its possession, either by *donatio mortis causas* or by way of inheritance during that four year period.

Discharge of debts

The judicial regulation of the debtor's obligations does not automatically mean the discharge of the remaining amounts. For this to take place, after the period of installments described above, the debtor must have complied in full with the terms of the judicial regulation of its obligations. Following that, the debtor then applies to the court for a discharge. The court examines whether the debtor has proceeded to the payment of the specified installments and if it is convinced that this has been fulfilled, the debtor's discharge takes effect. It must be noted that the debtor may only be discharged of their debts once.

The protection of the debtor's main residence

The court has the power to order the liquidation of the debtor's assets, if this is deemed necessary for the satisfaction of its obligations. Nevertheless, special protection is afforded to the debtor's main residence, for which the debtor may apply to the court so as to have it excluded from liquidation. Nevertheless, this comes with qualifications.

First, the value of the property in question must not exceed the applicable tax free limit for a main residence, increased by 50 per cent. Secondly, the debtor must provide for the satisfaction of the creditors' claims an amount up to 85 per cent of the value of the said property. This amount will be paid in installments, within a period coinciding to the duration of the agreements granting credit to the debtor. This is usually the term of the loan that the debtor has taken for the acquisition of the property. In any case, the period of installments cannot exceed 20 years. A grace period may also be given to the debtor. Thirdly, creditors holding security over the said property are satisfied in priority. Finally, the debtor will be obliged to pay the said amount corresponding to the 85 per cent of the value of its residence, on top of the four year installments described above.

Concluding remarks

Understandably, debtors have been very keen to take advantage of the provisions of Law 3869/2010. However, the same cannot be said for creditors, the support of which is crucial if the law is to operate efficiently and promptly, especially in the current financial environment. In any case, and despite the fact that Law 3869/2010 is not free of problematic provisions, the general feeling is that the introduction of consumer bankruptcy proceedings is a step in the right direction.

Notes

1 Law 3869/2010 (*State Gazette* 130/A/3 August 2010).

2 Consumer bankruptcy proceedings are distinguished from insolvency and reorganisation proceedings under the IC. Consumer bankruptcy is not available to debtor's having a commercial capacity. This is true even for a merchant's personal debts, acquired outside the context of its commercial activity. In other words, a merchant is entirely excluded from the scope of the said legislation, irrespectively of the nature of the debt.