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The Rescue Ethos of the New Greek Insolvency Code: Between the Scylla and Charybdis of Anachronism and Modern Nomothetical Principles

BY CONSTANTINOS N. KLISSOURAS AND YIANNIS G. SAKKAS | ANAGNOSTOPOULOS BAZINAS

The reform of Greek insolvency legislation could not have been better timed. A new insolvency code (Law 3588/2007 (the IC), SG A 153/10.7.2007) was introduced in 2007, two years before the current economic crisis peaked, affording just enough time to courts and to all insolvency actors to come to terms with the new law and for basic case law to develop and provide a degree of legal certainty in the face of the horde of challenges raised by the current economic environment.

Reform was, of course, not brought about by inspired foresight of the legislature, but rather by the pressing need for an efficient and effective insolvency regime identified in analyses and reform recommendations originating in the leading international fora and organisations, such as the World Bank and UNCITRAL, in lieu of the antiquated law previously in force, for the most part a remnant of the Napoleonic *Code de Commerce* of 1807.

A lot of ink has already been shed debating whether the new law meets modern tests of efficiency and effectiveness, and in significant measure the answer is affected by the overall speed, cost and efficiency of the court process in general. On balance, it is probably accurate to say that notwithstanding the extraordinary burden on court dockets occasioned by the crisis, the new law provides reasonable and efficient solutions to most of the usual issues raised by insolvencies, large and small.

In the words of the legislative committee, the spirit of the new law is one of minimum departure from established insolvency law principles, but with due regard for efficiency, salvage of going concern value, and speedy conduct of proceedings. The rescue ethos of the new law is embodied in two types of workout proceedings, provided in articles 99 ff and 107 ff respectively.

"Insolvency mediation" (articles 99 ff) is structured as a pre-opening proceeding available to debtors not technically insolvent, i.e., debtors who have not ceased payments in a general and permanent way, but with a current or projected financial distress (Article 100 (1) IC). The IC does not expressly define the threshold of such projected distress, since that would run foul of the principle of economic freedom and the business judgement rule, but case law has usefully focused on financial weakness indicators such as a negative balance sheet, excessive short term borrowing, the termination of credit lines from parent companies, the existence of fire sales or other disposals for the satisfaction of short term liabilities, contraction trends discernible from order books, and similar tests, which have tended to focus in a pragmatic manner on the particulars of each debtor, market and case.

Article 99 proceedings seek to address the debtor's financial distress through the negotiation of a voluntary workout with individual creditors. A mediator is appointed by the court with the mission of assisting in the negotiations with creditors, analysing workout options and formulating a restructuring plan, and opining to the court (together with a court appointed auditor) on the plan's viability. Subject to the approval of the debtor and a simple majority of creditors, the plan is ratified by the court and, while not affecting the quality of the claims of dissenting and non-participating creditors, it results in a stay of action against the debtor for a period of up to two years.

Although the legislature draws from the experience of other jurisdictions which have similar regimes like the company voluntary arrangement of the UK or the French *procédure de conciliation*, it unfortunately fails to fully exploit the idea of "pre-packaged" workouts. Article 99 proceedings, in line with various pieces of previous legislation, still require the appointment and substantive involvement of the mediator, which has proven to be an unnecessary and time consuming exercise in the many cases where the debtor may have already agreed with its key creditors, the consensus of which would be enough to fulfil the simple majority threshold for the approval of the workout before is entered in the court for ratification. This increases the time required from filing to ratification, in which time, the debtor may have progressed from a projected financial distress to a *de facto* inability to satisfy debts and the proposed arrangement would be rejected by the court given the prerequisite of solvency.

A "restructuring plan" (articles 107 ff) is essentially a debtor-creditor arrangement of contractual nature subject to judicial review by the insolvency court. The proposed restructuring plan may provide for any measure of a restructuring nature, financial, operational or other, including going concern sale of the debtor or the debtor's business, simple and complex refinancing, leases and concessions, piecemeal asset sales, and, in general, whatever satisfies the statutory creditor majority that sufficient value will be generated to satisfy their claims in whole or in part, i.e., as such claims are modified (in respect of their amounts, maturities or other characteristics) under the plan. Subject to the acceptance of the statutory majorities of 60% of all claims, at least 40% of which must be secured creditors, the plan is submitted to court for ratification, upon which the plan is binding *erga omnes*, including dissenters and non-participating creditors.

The rescue ethos of the IC is, importantly, marked by the recognition, for the first time in Greece, and contrary to previous law, of super-priority ranking status for claims arising under post-petition funding, as well as with the tight time limits adopted (although presently not always complied with) for all procedural acts and stages of the insolvency.

The IC also attempts to relieve court dockets from some of the ultimately inefficient burden, by rules preventing the opening of insolvency proceedings for debtors, whose assets are manifestly insufficient to fund procedural costs (Article 6 (2), IC), as well rules for "fast-tracking" small insolvencies (Article 162, IC).

Well timed and pivotal for domestic business law, the reform, and its restructuring principles and mechanisms in particular, have also started to prove instrumental to the efficient operation in Greece of European insolvency legislation. Experienced practitioners know the horrors of labouring to *export* – translate, interpret and explain – old Greek insolvency law as the *lex concursus* to be applied by foreign courts and arbitral tribunals. The IC is fast becoming a good ambassador of state for the quality of modern Greek insolvency law. This acquires particular significance in view of the relatively recent EU enlargement, which did away with a lot of borderlines in the Balkans and rendered transactions between Greece and the new EU entrants intra-community trade. It is estimated that the stock of Greek capital in the Balkans is over €7 billion, making Greece the largest investing country in the region; efficient and effective Greek restructuring laws are, therefore, fast becoming indispensable for defending its going concern value.

Greek insolvency legislation has never been more in line with current trends of international insolvency law. The introduction of insolvency mediation, the adoption of the debtor in possession principles, the regulation of first day orders and other conservatory relief, the *mot-a-mot* use of the wording of the key jurisdictional notion of the centre of main interest as used in the EIR and the UNCITRAL Model Law, are few examples of the effort made to provide a modern legislative framework to ensure the efficient and effective rescue of corporate entities in financial distress. While wishful of signs of upturn in the current cycle, the legal and business community avails today of a much more powerful arsenal to rescue value and reduce the impact of the cycle on business and society.

Constantinos N. Klissouras is a Partner and Yiannis G. Sakkas is a Lawyer at Anagnostopoulos Bazinas.

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