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Greece**

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# A New Pre-Bankruptcy Procedure for Greece

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## Introduction

On September 15, 2011, a wide-ranging amendment of the Greek Bankruptcy Code (GBC) brought very extensive changes to the pre-bankruptcy tools available in Greece. In particular, the proceeding known as “conciliation” was replaced by a new proceeding that may be translated as “rehabilitation”,<sup>1</sup> offering a number of new options and solutions while also addressing some of the weaknesses that plagued conciliation.

Rescue legislation reform seems to be a global tendency, as may be evidenced by similar efforts in the United Kingdom, Germany, France and Italy. Given the precarious condition of Greek public finances and its tremendous impact on the private sector and the financial institutions, the latest Greek reform effort must be seen as very timely. As will be discussed below in greater detail, the post-2007 conciliation proceeding, the only rescue process then available (outside purely consensual efforts without any judicial support), proved inadequate to the task. Given its consensual basis and lack of a cram-down feature on non-consenting creditors, it encouraged free-riders. In addition, the fact that conciliation was seen as requiring the appointment of a mediator under any circumstances meant that debtor and creditors were not able to swiftly bring to ratification agreements reached prior to such appointment resulting in significant time waste. Moreover, the involvement of experts in the process (in connection with the proof of viability), the impact of the plan on creditors and the relative merits of the plan as opposed to bankruptcy liquidation were not specifically dealt with in the statute, thereby creating significant uncertainty, especially in view of the fact that Greece lacks specialised bankruptcy courts. In most cases, a conciliation petition by the debtor was seen as an admission of insolvency and an effort to forestall creditors from exercising their legal rights, and not as a path to possible recovery.

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<sup>1</sup> Εξυγίωση, in Greek.

The discussion that follows will touch on how the new legislation has addressed these perceived defects of the conciliation proceeding, while also pointing out possible weaknesses of the revamped regime. We consider these matters as much as possible in their practical context; for instance, attention is paid to how the overfull dockets of the courts make the process of getting to a ratified restructuring agreement much longer than most distressed debtors are likely to survive.

## Background of rescue legislation in Greece

Until the year 1990, Greek law lacked any kind of pre-insolvency proceeding to assist restructuring efforts. However, the 1980s saw many large enterprises fail and become state wards (an agency was formed for the orderly liquidation of failed enterprises but, in fact, significant public funds were spent to keep them afloat).<sup>2</sup> In 1990, legislation was introduced to allow for three different pre-bankruptcy proceedings: court ratification of restructuring agreements which would be binding on non-consenting creditors if agreed to by the debtor and the majority of creditors (at least 60 per cent of all creditors and 40 per cent of secured creditors); the appointment of a mediator to facilitate restructuring negotiations between the debtor and its creditors; and the appointment of a special liquidator to sell the debtor's business as a going concern. These proceedings were primarily intended for the state-controlled troubled enterprises and had limited success in that context; however, gradually the cram-down agreement started being used more broadly by private debtors and their creditors and obtained a degree of popularity. As that proceeding (known as the art.44 proceeding) increased in frequency of use, concerns emerged regarding the potential for abuse of its provisions by the banks and the debtor to the detriment of smaller mostly trade creditors. One of the points on which the proceedings encountered significant difficulties was on ensuring that the counterparties truly represented the requisite minimum percentages of creditors and secured creditors.

In 2007, the Greek Parliament voted in the first Greek Bankruptcy Code.<sup>3</sup> It was touted as representing a shift in policy, being strongly pro-debtor as compared to the strong pro-creditor bias of the statutes it replaced, and emphasising rescue over liquidation. The latter claim has proved to be unjustified. The 2007 Code introduced two rescue proceedings: First, a version of the French conciliation process involving the appointment of a mediator and the ratification of a restructuring agreement by court if adopted by a majority of creditors (more than 50 per cent) which renders the debtor immune to individual enforcement action by all other creditors for a period of two years (temporarily extended to four years) and protection from collective actions for six months (temporarily extended to one year). Significantly,

<sup>2</sup> Some of those public interventions were reviewed in terms of their compliance with the principles of European company law by the European Court of Justice (inter alia, in the following judgments: *Karellas v Organismos Anasykrotiseos Epicheiriseon AE* (C-19/90) [1991] E.C.R. I-2691, [1993] 2 C.M.L.R. 865; *Pafitis v Trapeza Kentrikis Ellados AE* (C-441/93) [1996] E.C.R. I-1347, [1996] 2 C.M.L.R. 551; and *Kefalas v Greece* (C-367/96) [1998] E.C.R. I-2843, [1999] 2 C.M.L.R. 144), which held that the Second Directive precludes the relevant national legislation which allowed an increase in capital to be decided upon by administrative measure, without any resolution being passed by the general meeting.

<sup>3</sup> The four basic treatises on Greek bankruptcy law are the following: Kotsiris, *Bankruptcy Law*, 8th edn (2011); Perakis, *Bankruptcy Law* (2010); Psychomanis, *Bankruptcy Law*, 4th edn (2011); and Spyridakis, *Bankruptcy Law* (2008). For an overview in English see Perakis, "The new Greek Bankruptcy Code: How close to the InsO?" in *Festschrift für K. Hopt* (2010), pp.3251 et seq.

this conciliation process (known as the art.99 process), abolished in 2011, lacks cram-down effect. This is due to the consensual nature of the agreement, which is also the case under French law. Thus non-consenting creditors maintain their claims unaffected (indeed that is one of the tests for ratification of the restructuring agreement, that it have no adverse impact on non-consenting creditors). Secondly, the 2007 Code set an alternative route to restructuring (Chapter 7 proceeding) that involves cram-down on minority creditors but is only available if the debtor files for bankruptcy, and that prerequisite (as well as the significant procedural and substantive requirements of that application) has made that option unpopular, since the submission of an application for bankruptcy in most cases will trigger the termination of critical agreements, may affect the validity of administrative permits and licences and, generally, will prejudice the debtor's ability to maintain itself as a going concern.

Practice has shown that the conciliation process has been employed most frequently by debtors to secure a preliminary order prohibiting creditors from enforcing their claims. Of the 5,000+ applications that were at various stages of development in the Greek courts at the time when conciliation was abolished, the vast majority are thought not to be bona fide restructuring efforts but bids by debtors to obtain a procedural advantage in their negotiations with creditors, or to gain time or even, in some cases, to put assets beyond the reach of creditors. In fact, fewer than 20 applications have reached the final stage of the ratification of the conciliation agreement.

Finally, the massive recourse to the conciliation process should be seen as evidence that the Greek rescue legislation, at least prior to its latest overhaul, was defective, in that it readily lent itself to procedural abuse. Rescue mechanisms in other countries, such as CVAs in the United Kingdom or "sauvegarde" in France, represent less than 5 per cent of bankruptcy procedures; that is to say, bankruptcy law remains mainly a means of liquidation, while in Greece the respective percentage is approximately 50 per cent. The precise message of that statistical finding is unclear, but it may suggest that, in Greece, bankruptcy liquidation is avoided by interested parties while pre-insolvency proceedings are employed to put bankruptcy off, as opposed to seeking to rescue or restructure the troubled debtor.

## Key elements of the amendments

Articles 99 et seq., more precisely Chapter 6 of the GBC, as amended by Law 4013/2011<sup>4</sup>, effective September 15, 2011,<sup>5</sup> governs the procedure for arriving at restructuring agreements that are capable of ratification by court, the requirements for opening such proceeding and for ratification of an agreement, the appointment of mediators and experts as well as, in the case of "special liquidation", which brings back to life a pre-insolvency tool that was abolished by the GBC in 2007, the appointment of a "special liquidator" or administrator of the business as a going

<sup>4</sup> Apart from Kotsiris, *Bankruptcy Law* (2011) and Phychomanis, *Bankruptcy Law* (2011), recently published Greek literature on the amended law includes Avgitidis, *Rehabilitation of Enterprises* (2011) and A. Rokas, *Pre-bankruptcy Proceedings: International Trends and the New Chapter 6 of the GBC* (2011).

<sup>5</sup> The transitional provisions of the new law allow petitioners in opened conciliation proceedings an election between completing the proceeding under the now defunct conciliation rules and the new rehabilitation rules. See Law 4013/2011 art.14.

concern for the purpose of a structured disposition of the business as a whole or in parts. Unlike the rest of the procedures in Chapter 6, “special liquidation” does not revolve around a restructuring agreement and its ratification and, in structural terms, differs significantly from the rest of the chapter.

### *Financial condition of enterprises entering the procedure*

As is the case for most pre-bankruptcy procedures, the procedure can only be opened if the court is convinced that the enterprise is in a state of financial weakness. The amended statute provides that the debtor must be facing “a current or an imminent inability of discharging its due and payable pecuniary obligations in a general manner”. Proof of that inability is accomplished through cash flow projections of the debtor.

The latest amendment has therefore made art.99 available only to those debtors that are either in a state of cessation of payments already or readily confronted with that prospect. The earlier draft entitled debtors confronted with “serious economic problems” to commence such proceeding, but at the final legislative deliberations that admittedly vague concept was considered as a facilitator of the abuse of process that has already been noted. While the concern is worthy, the new stricter requirement must be considered a regressive step as it makes the possibility of reaching a restructuring agreement in time and without great loss of value a very remote prospect. It is also clearly at odds with the international trend<sup>6</sup> that has been pushing the availability of rescue tools increasingly away from the point of insolvency. It is obvious that legislators failed to consider at all the practical aspects of restructuring efforts and the extraordinary delays in the judicial appointment and ratification process. Indeed, it would seem all but impossible for a company that is at the point (or in the vicinity) of bankruptcy to successfully restructure under an art.99 proceeding since it will take at least five months for its application to be heard and at least one more month for the decision to be issued<sup>7</sup> and if the decision involves that commencement of negotiations, a ratified agreement should not be expected (merely by reference to the time required to set hearing dates and obtain decisions for the opening of the proceeding, the ratification decisions as well as any extensions that may be required) before a full 12 months after the original application. Since in most (if not all) cases, during that time it will be impossible to obtain any financing, other than shareholder funding, and most debtors on the brink of insolvency have already used up that source of funds,

<sup>6</sup> For example, after the 2008 amendment of the French “sauvegarde” proceeding, debtors are not required to demonstrate that the difficulties they are facing are deemed to cause cash flow insolvency, which was in fact difficult to prove. Similarly, US bankruptcy is prepared to accept the decision of the parties, who have superior information about the finances and the likely future of the business and who will not often expend resources to dispute the appropriateness of the filing. See Elizabeth Warren, “Bankruptcy Policymaking in an Imperfect World” (1993) 92 Mich. L. Rev. 336, reprinted in Charles J. Tabb, *Bankruptcy Anthology* (2002), p.678. Generally, theory requires easy access to the rescue process. See Asian Development Bank, “Law and Policy Reform at the Asian Development Bank” (April 2000) *Special Report: Insolvency Law Reform in the Asian and Pacific Region* 17, cited in Mike Falke, “Insolvency law reform in Transition Economies”, p.37, <http://siteresources.worldbank.org/GILD/Resources/InsolvencyLawReforminTransitionEconomies.pdf> [Accessed February 24, 2011].

<sup>7</sup> After the opening of the proceedings, the parties should submit the agreement for ratification within four months. Upon request of the debtor, the chairman of the court may extend this period for another month. Exceptionally, the procedure may even last for seven months, if a 60% majority of the creditors agrees to this extension. One should bear in mind that petitions also require hearings and the issuance of decisions and that thereby the actual time of the proceeding may be extended substantially.

it will be that rare debtor that will demonstrate sufficient stamina to see the process to its end.

The revised law adds a further possibility, which is rather unusual. Enterprises that have ceased payments may still apply to enter pre-bankruptcy procedure provided that they also file a bankruptcy petition at the same time; thereafter the debtor's petition, as well as any bankruptcy petitions put forward by creditors are suspended during the pre-bankruptcy procedures. This combined proceeding is a slight variation on that of art.108 of the GBC (in Chapter 7 of that Code that deals with all aspects of the bankruptcy reorganisation proceeding), which provides for the submission of a bankruptcy application together with a reorganisation plan. Since the combined application under art.99 has the advantage that negotiation of the restructuring plan does not involve a bankruptcy declaration (which may trigger various undesirable consequences for the debtor's continuing operation) it must be considered a practical improvement, at least as far as the debtor is concerned. Seen from the perspective of the creditors, especially the secured creditors, it may be a retrogressive step, as it will tend to burden a debtor that has few prospects of viability with additional debt, much of it enjoying statutory preference and being satisfied ahead of secured and other non-preferred creditors. Needless to say, it seems to render the Chapter 7 post-bankruptcy proceeding entirely superfluous.

### *The main paths to rescue under the revised statute*

The revised Chapter 6 (Rehabilitation) sets up a process for addressing looming bankruptcy through negotiated restructuring that is far more ambitious than the conciliation proceeding it replaces and can be seen to open up several paths towards rescue. The first path is for the debtor to obtain ratification of a restructuring agreement that has been agreed with the requisite qualified majority without judicial assistance or protection (art.106b). The judicial intervention is limited to the ratification of this agreement. So, a debtor that finds itself sliding towards insolvency could quickly negotiate a restructuring agreement and present it to court for ratification. This may be the most promising solution made available under the revised statute, even though, in practice parties should expect that not less than a full six months will be required, given current conditions, for an existing agreement to receive ratification by court and the various privileges and protections that ratification entails. Pending ratification, parties may reasonably expect to receive provisional protection by a standstill order, although that is a matter of discretion for the court.

The second path is to submit an application for the opening of negotiations with creditors. There are several options available down that path. The applicant may seek the appointment of a mediator to facilitate negotiations while also the court, at its own initiative, may appoint a mediator.<sup>8</sup> In addition, negotiations may be done with the creditors as a group, through a committee formed for that purpose, or on a bilateral basis between the debtor and such creditors as may satisfy the qualified majority requirements. It is unlikely that debtors that are in a hurry to

<sup>8</sup> Furthermore, the court may appoint a nominee, upon request of the debtor or a creditor. The nominee's powers may even include the administration of (some of) the debtor's assets, as if he/she were a bankruptcy liquidator. In this case, all conditions of art.1(1), of the EC Regulation on insolvency proceedings (1346/2000) would be fulfilled, so that the Chapter 6 proceeding would fall within the scope of the Regulation.

complete a negotiation will engage a court-appointed mediator; it is also unlikely, in most cases, that they will seek to convene a creditor committee as that will probably bring to the fore competing interests among the creditors and delay the conclusion of negotiations (on the assumption that the time required for the completion of a negotiation is directly proportionate to the number of participants).

### *Requirements for the opening of proceedings*

By “opening” we refer first to the opening of court-endorsed restructuring negotiations. In addition to the submission of an application including information on the debtor and financial statements, the debtor must submit an expert report accompanied by a list of the debtor’s assets and creditors, making special mention of its secured creditors. The expert is also required to opine on the financial situation of the debtor, market conditions, the viability of the enterprise and whether the restructuring of the debtor shall adversely affect the satisfaction of the debtors collectively. For legal persons, the statute specifies that the expert must be either a banking institution or an auditor (individual or firm).

The burden which the statute imposes on the expert is great. Here comes an insolvent (or nearly insolvent) debtor which seeks to start negotiations with its creditors, hence the shape of any potential agreement must be very sketchy and purely hypothetical. Nevertheless, the expert is required to take a view on the viability of such restructured enterprise and the impact of such hypothetical agreement on the interests of creditors. One may reasonably expect that expert opinions will be either heavily qualified or that some less than scrupulous auditors will identify a business opportunity in providing applicants with optimistic estimates of future outcomes. One can also reasonably expect that disgruntled creditors (who must be called to the hearing on the application) are likely to treat the expert opinions as a focal point of the challenge of the application. This is underlined by the statutory direction to the court to accept an application for the opening of negotiations only if an agreement is possible, there are reasonable expectations that the restructuring will be successful and that the satisfaction of creditors as a collectivity<sup>9</sup> shall not be adversely affected.

On the basis of the above, it can reasonably be expected that an application that lacks significant support by creditors is likely to be rejected. One should not conclude on that basis that applications will be discouraged; debtors in distress may still be attracted by the possibility of obtaining a preliminary order preventing all individual enforcement actions, not least as a means for putting pressure on its creditors. Given that the hearing on the application and the issuance of the decision may follow the original application (and the preliminary order) by not less than five to six months (and possibly longer given the propensity of Greek courts to grant adjournments), the utility of an application that has few chances of success may still appear significant to a desperate debtor.

<sup>9</sup> This doctrine is mainly meant to protect non-consenting creditors, since it ensures that they will not receive less than they would through liquidation proceedings. At this early stage, however, the court can rarely assess the prospects of an agreement that has not yet been drafted. Thus the “collective satisfaction” concept will mainly apply within the framework of the judicial ratification of the restructuring agreement, except perhaps in those cases where it is manifest that under any agreement (as broadly outlined by the debtor in its application) at least one type of creditors will be in a worse position than under liquidation. See “Ratification of the agreement” below.

*Preliminary measures*

The grant of a preliminary moratorium order lies at the heart of pre-insolvency practice in Greece. The chairman of the court that receives the application to open art.99 proceedings is empowered to issue a preliminary order at any time after the date of the application and until the closure of the proceeding. This order prohibits in whole or in part individual enforcement actions against the debtor's property. The injunction applies to claims created until the date of the application, but the issuing judge can in special cases extend the effect of the injunction to later claims. The statute provides also that the judge can order any additional measure that may be necessary to avoid the diminution of the value of the debtor's property, to the detriment of its creditors, while it also expressly states that an automatic consequence of the issue of a preliminary order prohibiting individual enforcement actions is that debtor is not permitted to dispose of its real estate, equipment and fittings.

The statute also provides that where there is a serious business or social reason, the injunction may be extended to also cover guarantors or other co-obligors of the debtor. There is no suggestion as to what may qualify as a serious social or business reason for such extension of the protection (but application to companies within the same group that are interdependent from a business perspective may be an obvious example).

The main contribution of the amendment to provisional measures is the prohibition of transfer of the debtor's real property and facilities. This addition is clearly inspired by several cases where the debtor while enjoying protection from individual enforcement actions quickly proceeded to dispose of substantial assets. In the authors' view, the addition is well intentioned but it is articulated in a rigid manner and therefore may create significant problems. Suppose a nearly insolvent or insolvent entity which is in the process of reaching and/or ratifying an agreement, and which has no access to third-party financing, generates insufficient funds from its own operations and is unlikely to have access to shareholder financing. Asset disposal may be its only hope for cash generation pending the completion and ratification of a restructuring agreement. Simply to prohibit asset disposal without regard to adequacy of consideration and impact on its prospects of survival may be an additional obstacle to the rescue and revival of the troubled debtor. Accordingly, it would have been more appropriate for the issue of asset disposal to be set as one of the issues that need to be addressed by the judge issuing the preliminary order and for guidance to be provided to the judge to prohibit such dispositions on a provisional basis to the extent that they would not be required in order to keep the entity afloat and subject to receiving fair market value for any such disposed assets.<sup>10</sup>

<sup>10</sup> This alternative seems to have been adopted by the US Bankruptcy Code: under §363, the trustee (or debtor in possession) may enter into transactions "in the ordinary course of business", while he/she is not permitted to enter extraordinary transactions without giving notice to creditors. In this case, he/she should justify the transaction to the court, explaining why it serves the best interests of the estate. Under relevant case law the judge takes into consideration a number of factors, among them that the proposed transaction, for example a sale, should not dictate some of the terms of any future reorganisation plan. Nevertheless, in some cases, most notably in the case of Chrysler, §363 may facilitate the selling of all of the company's assets to a shell company, thereby circumventing the provisions of Chapter 11.



### *Content of the agreement*

Greek courts, like other civil law courts, are happy to be guided by the statute even when formally granted with broad discretion to decide certain matters. This may explain why art.106e, which provides that a restructuring agreement may have as its object any variation of the assets and liabilities of the debtor, nevertheless proceeds to set out in particular a list of such variations:

- changes to the terms of debtor liabilities, such as extension of time, events of default, interest rate, replacement of interest payment by the right to participate in enterprise profits, conversion of debts into bonds, whether or not convertible into issuer equity, or the subordination of current creditors in favor of new creditors;
- debt-for-equity swap, in combination or not with a reduction of the debtor's share capital;
- agreements between creditors and equity holders as to creditor priority, management matters, agreements as to the transfer of stock such as rights of first refusal;
- write-offs or write-downs of claims;
- partial disposition of debtor assets;
- the appointment of a third party to operate the debtor's business (including a lease of the business facilities and assets);
- the transfer of the business in whole or in parts to a third party (including a company to which creditors have contributed their claims);
- the suspension of individual enforcement actions against the debtor for a certain period after the agreement's ratification (which cannot bind non-consenting creditors for more than six months);
- the appointment of a person to supervise the implementation of the terms of the ratified agreement, and the designation of its powers and authority in that capacity.

The non-performance by the debtor of the terms of the agreement does not cause its termination, but the parties have been granted the option to specify the failure to comply as an event of default (which enables creditors at their discretion to terminate the agreement). The agreement may also include other conditions (precedent or subsequent) such as the prior termination of outstanding agreements that are considered adverse to the interests of the debtor; the maximum time frame for the satisfaction of any such prior conditions may not exceed six months. The statute also includes the clarification that an agreement that is submitted for ratification may still operate (among its signatories) even prior to such ratification, if so stated.

Last but not least, the agreement has to be accompanied by a business plan, determining the steps and goals of the enterprise for the near future. As this plan is formally a part of the overall agreement, the consent of the majority of creditors may reasonably be expected, in most cases, to operate as a protection against overstated or unrealistic assumptions or projections.

### *Ratification of the agreement*

An agreement can be filed for ratification by the debtor, any creditor or the mediator (if one has been appointed). It must be accompanied by an expert report (the expert must be a bank or an auditor or audit firm). The report must express an opinion on whether the agreement has been duly signed by the counterparties and they represent the requisite majority or the creditors' committee (if one has been convened),<sup>11</sup> on whether the agreement shall render the debtor viable, on whether it adversely affects the collective satisfaction of creditors, whether the agreement treats creditors of the same rank equally or whether any divergence from such equal treatment is necessary for serious business or social reason or whether the affected creditor consents to such treatment and, finally, on whether upon the performance of the agreement the debtor shall remain or not in cessation of payments.

In brief, the expert opinion is required to address all issues of substance that will determine the outcome of the court's deliberation on the ratification application; therefore, it needs to be very well substantiated, clear as to its views and not overstated. At the same time, it can be seen plainly that the burden placed on the expert is very significant and it may be difficult for responsible and risk adverse auditors and banks to discharge that responsibility, especially given the lack of relevant insolvency practice and experience.

Special mention may need to be made to the "collective satisfaction" doctrine<sup>12</sup>: that is, the requirement that the agreement not put any creditors in a worse position than they would have in a bankruptcy liquidation (or compulsory enforcement). Greek law, especially since the onset of the current crisis, has given certain types of creditors significant preference over all others. In particular, employees, the tax office and pension funds are entitled to have their claims satisfied from the proceeds of realisation of securities or from the liquidation of assets in bankruptcy in priority to all other creditors, including those creditors secured by the realised assets. In effect, these types of creditors can, in most cases, expect to be satisfied to a very substantial extent. An agreement which anticipates a significant reduction in the amount of employee, tax and pension fund claims must be expected to have great difficulty in receiving ratification.

### *Consequences of ratification*

The old, pre-amendment, Chapter 6 was centered on an agreement binding only on its counterparties that was protected by a moratorium as to all other parties for a period of two or four years after ratification (the longer period was to have applied provisionally until the end of 2014). The current law anticipates such moratorium only to the extent provided in the agreement and up to a maximum duration as to

<sup>11</sup> Under art.105§2, the scope of "creditor" is wide as it includes those that have a due and payable claim as well as those whose claims have not yet matured as well as conditional claims (e.g. under a guarantee that has not been called). The extent to which this over-inclusive definition may cause problems in practice is not yet clear.

<sup>12</sup> In the US, this doctrine is known as the best interests test. So, §1129(a)(7) of the Bankruptcy Code protects dissenters in an "impaired" class of creditors, who can allege that under the plan they will not receive a distribution at least equal to the present value of what would have been received had the debtor been liquidated under Chapter 7. Thus, if a class is not impaired (for example if the plan reinstates the maturity of the respective claims), §1129(a)(7) does not apply for dissenting creditors. On the contrary, the Greek law does not provide for classes; therefore this doctrine is extremely wide, since it can be used as a weapon to attack plans by all dissenting creditors.

non-consenting parties of six months. Moreover, the amended law does not provide for the suspension of collective enforcement measures, including filing for bankruptcy, for a specified period.

However, the major import of the amendments as to impact of ratification of the agreement is that it allows a qualified majority (60 per cent of all creditors including 40 per cent of all secured creditors) to cram down on non-consenting creditors. In other words, an agreement rendering the debtor viable, treating all creditors of the same type equally and not putting any non-consenting creditor in a worse position that it would have been in a bankruptcy liquidation of the debtor, is binding on all creditors, whether consenting or not.

There are two other provisions regarding the effect of ratification that are also worth noting. The first concerns the impact of ratification on third-party guarantors. The law states that unless the agreement provides otherwise (or to the extent the law so requires) the ratification of the restructuring agreement has no impact on third-party securities, whether personal or in rem (the latter includes mortgage prenotation, a right granted by judicial order to register a mortgage on real estate effective as of the date on which the order is issued upon the default of the prime obligor). The same applies to co-obligors, meaning that their obligations to the creditors are not in any way affected by the restructuring agreement and any reduction or change to the obligations of the debtor whom the agreement concerns. This is broadly consistent with the provision in art.125(4) GBC concerning bankruptcy reorganisation agreements, which provides that creditors have the discretion to withhold consent to the reduction of the creditors' claims against third-party guarantors or securities provided by third parties.

Another significant provision, which was a last minute amendment, benefits debtor managers who face criminal sanction for not executing certain mandatory payments (specifically, taxes and pension fund contributions)<sup>13</sup> or the issuance of cheques not honoured owing to insufficient funds.<sup>14</sup> This latter point may require some clarification, as one of the peculiar features of Greek commerce is that trade payments are made to a significant degree by means of post-dated cheques (operating as commercial paper). Post-dated cheques have become popular because they do not require stamp duty and non-payment entails a quasi-objective criminal liability of the person signing the cheque on the debtor's behalf. Accordingly, when a debtor reaches the state when it qualifies for Chapter 6 relief, it is likely to have many unpaid cheques and the issue of its officers' liability for such non-payment becomes a matter of serious concern for those individuals. The revised statute creates a new strong incentive to reach a ratified agreement by absolving such persons from criminal sanctions upon ratification.

Finally, as before, ratification renders any persons supplying financing (including the provision of supplies on credit but expressly excluding new equity contributions) to the debtor in connection with the ratified agreement with super seniority in terms of its satisfaction in the event the plan fails and the debtor is taken into bankruptcy liquidation.

<sup>13</sup> Interestingly, this provision does not bar the punishability of debtors who do not execute payments of employees (non-payment of employees also consists a criminal act).

<sup>14</sup> Article 106h§3 GBC, as amended by Law 4013/2011.

Needless to say, any asset dispositions made in accordance with the ratified agreement are wholly exempt from revocation or set aside in the event of subsequent bankruptcy of the debtor (even if they fall within the suspicious period). Therefore the ratified plan provides third parties with complete comfort as to the lawfulness and finality of any transactions with the debtor in implementation of the ratified agreement.

### *“Special liquidation” as an additional procedure*

As noted previously, “special liquidation” has significantly different features from the other reorganisation solutions within Chapter 6, as revised. Not only does it apply exclusively to medium and large enterprises, but it also does not require the cooperation of the debtor.

In particular, resort to “special liquidation” involves the satisfaction of certain additional quantitative prerequisites. Specifically, art.106ia provides that in order for the creditors to seek to place a debtor under “special liquidation” it must satisfy at least two of the three following criteria: the value of its balance sheet assets must be at least equal to €2.5 million, its net turnover must be at least €5 million and it must have employed on average during the relevant financial year at least 50 persons.

What’s more, the application is made by one or more creditors (without the participation of the debtor). However, the debtor can trump this application by submitting its own application for restructuring negotiations, while if such a proceeding is already underway, the application for “special liquidation” shall be suspended pending the completion of that proceeding. One can easily envisage exciting court hearings over that clash of options.

An application for submission to “special liquidation” shall be considered if accompanied by a declaration of a bank or an investment services firm that there is an interested solvent investor who is interested in acquiring the debtor’s assets as a whole, that there is a qualified person willing to accept appointment as “special liquidator” and that the cost of the “special liquidation” can be covered by funds that are made available for that purpose. Assuming that those requirements are satisfied and that there is no application pending for a restructuring negotiation under other Chapter 6 pre-insolvency provisions, the court will approve the application and appoint the “special liquidator” if persuaded that such will improve the possibilities of maintaining the business as a going concern and preserve employment without putting any creditor in a worse position that it would have been in the event of bankruptcy liquidation.

The “special liquidator” is then required to inventory the assets of the enterprise and conduct a public auction of the whole of those assets or of parts of them that constitute operating divisions of such whole. The statute sets out the process in detail and requires that the “special liquidation” be completed and the assets sold off within 12 months (which, however, the court can extend for an additional six months).

## Final remarks

The new rehabilitation proceeding represents a clear improvement over the previous conciliation proceeding. For example, since the qualified majority of creditors can impose the terms of the plan on other non-consenting creditors, it deals directly with the collective action problem (i.e. each creditor acting in manner to cause other creditors to bear the costs of accepting a plan, but without that creditor bearing the sacrifices of the arrangement).

Moreover, the new law evidences a far clearer view of the function of the expert in the procedure as well as the type of solutions that may be adopted by the parties. Another important positive development is the ability now given to debtor and creditors to present a restructuring agreement for ratification without first going through the time-consuming process of appointment of a mediator.

However, the new rehabilitation procedure has very serious obstacles to overcome in order to make a significant contribution to rescuing enterprises, saving jobs and maximising value for the distressed debtor's stakeholders. First, the access requirements are unnecessarily draconian, as a company which is on the verge or at bankruptcy maybe too far gone to be rescued. Secondly, the whole process is overly dependent on the slow-moving Greek judicial system. While authorising a pre-pack sale in the United Kingdom (or ratifying a pre-pack plan in the United States) may require weeks or even days,<sup>15</sup> a pre-pack that is part of the restructuring of a Greek debtor will require many months and a number of contested hearings, given the Greek procedural requirements. One may also have reservations regarding the ability of non-expert courts to parse conflicting expert contentions on issues such as liquidation valuation of the debtor's business (and the respective recovery of the various creditor groupings) and business viability (what would qualify as legitimate assumptions for that assessment).

There are also certain important issues that have not yet been addressed. Rescue is seen as relating to a single legal person as opposed to a grouping of tied interests. This is not merely an issue of coming to terms with business groups (a thorny matter in many jurisdictions as well as internationally) but also with the debtor's guarantors. For most of the small and medium enterprises in Greece (i.e. the vast majority of business entities), principal shareholders are usually expected to guarantee banking loans and credits and to provide security in support of such guarantee. Since the rescue agreement will only cover the guarantors with the creditors' consent, the former will in most cases maintain their original exposure to the latter. This must surely be seen as taking away from the attraction of a negotiated settlement towards recovery.

Last but not least, the success of a rescue proceeding will depend on there being a residue of trust and good faith among the debtor, its shareholders, its employees and other similarly situated stakeholders and its creditors. Nevertheless, in the eyes of these stakeholders, especially of banks and suppliers, all pre-bankruptcy proceedings, whether they bear the name "Article 44" or "Article 99", are first and foremost a signal of impending default by their counterparty. Thus, suppliers will cease to deliver goods (unless they are immediately paid at full) or denounce

<sup>15</sup> This explains why some major companies, especially in Germany, resort to forum shopping and seek alternative routes in the UK; see Paulus, "Das englische Scheme of Arrangement — ein neues Angebot auf dem europäischen Markt für außergerichtliche Restrukturierungen" (2011) 32 *Zeitschrift für Wirtschaftsrecht* 1077.

existing agreements, while banks review financing conditions. This natural tendency is encouraged by the fact that, as noted, pre-insolvency procedures are used first and foremost as a delaying tactic and very infrequently as a framework for good faith negotiations. While these are primarily cultural problems and not products of regulatory deficiencies, the adoption of a new legislative framework can only be a partial solution. Nevertheless, the new statute includes not only sets of rules but also guidance on solutions and the inputs by the various practitioners that are required for a successful restructuring. Those less formal elements of the new legislation, such as the list of possible types of restructuring agreements and the required elements of the specialised services of the financial experts, may prove to be the most lasting contributions of the revamped Chapter 6 GBC.