The Insolvency Review

Fourth Edition

Editor
Donald S Bernstein

Law Business Research

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EDITOR'S PREFACE

This fourth edition of *The Insolvency Review* once again offers an in-depth review of market conditions and insolvency case developments in key countries around the world. As always, a debt of gratitude is owed to the outstanding professionals in geographically diverse locales who have contributed to this book. Their contributions reflect diverse viewpoints and approaches, which in turn reflect the diversity of their respective national commercial cultures and laws.

The preface to a previous edition of this book touched upon the challenges faced by large multinational enterprises attempting to restructure under these diverse and potentially conflicting insolvency regimes. These challenges have traditionally been particularly acute in large corporate insolvencies because neither UNCITRAL's Model Law on Cross-Border Insolvency nor other enactments, such as the European Union's Regulation on Insolvency,[1] have provided the tools necessary for consolidated administration of insolvencies involving multiple legal entities in a corporate group, with operations, assets and stakeholders under different corporate umbrellas in different jurisdictions. Insolvent corporate groups have therefore often been obliged to cobble together consensual restructurings with local stakeholders in key jurisdictions or to initiate separate plenary insolvency proceedings for individual companies under multiple local insolvency regimes (as illustrated in the cases of *Nortel* and *Lehman Brothers*, among others), with added costs, disbursed control, legal conflicts and inconsistent judgments.

When we last addressed this issue in these pages, UNCITRAL's Working Group V was continuing its work on cross-border insolvency of multinational enterprise groups,[2] and the

1 Council Regulation (EC) No. 1346/2000 of 29 May 2000 on insolvency proceedings, 2000 O.J. (L 160) 1, available at http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2000:160:0001:0018:en:PDF.

2 See United Nations Commission on International Trade Law, Report of Working Group V (Insolvency Law) on the Work of its Forty-Fifth Session (New York, 21–25 April 2014), U.N. Doc. A/CN.9/803 (May 6, 2014), available at https://documents-dds-ny.un.org/doc/UNDOC/GEN/V14/028/64/PDF/V1402864.pdf?OpenElement.

European Commission was likewise considering amending the European Union Regulation on Insolvency to better encompass enterprise groups.[3] Publication of the 2016 edition of this book provides an occasion to mark the progress made in these efforts over the last two years.

On 20 May 2015, the European Parliament and Counsel published the Recast Regulation on Insolvency 2015/848, which will apply to insolvency proceedings initiated after 26 June 2017.[4] The Recast Regulation acknowledges the fact that it would not be practical to introduce an insolvency regime with 'universal scope' throughout the European Union in light of the diversity of local insolvency laws.[5] Chapter V of the Recast does, however, specifically address insolvency proceedings of members of a group of companies in different jurisdictions. Section 1 of Chapter V (Articles 56–60) addresses 'cooperation and communication' between such proceedings, while section 2 (Articles 61–77) creates a new concept of a 'group coordination proceeding' under the auspices of a 'coordinator'.

Section 1 generally provides that insolvency practitioners (which are defined broadly in the Recast Regulation and include, e.g., liquidators, administrators and trustees) appointed in group members' proceedings and courts presiding over such proceedings 'shall' cooperate with one another so long as cooperation is not incompatible with the rules applicable to such proceedings and does not entail any conflict of interest.[6] In addition, Article 60 of the Recast Regulation grants an insolvency practitioner appointed in the insolvency proceeding of one member of a corporate group the power to be heard in the proceedings of any other member and the power to seek a stay with respect to the realisation on assets in such other proceeding in certain circumstances if such a stay, among other things, is necessary to implement a restructuring plan and is in the best interest of creditors in the proceedings in which the stay is requested.[7]

Section 2 sets forth a framework for voluntary, court-supervised 'group coordination proceedings'.[8] Group coordination proceedings may be requested before any court having jurisdiction over any group member,[9] and the details of the coordination plan would be proposed by the insolvency practitioner appointed to act as 'coordinator'.[10] The coordinator has a number of rights, including the right to participate in proceedings opened in respect of any group member, the right to mediate disputes between members, the right to present the group coordination plan to parties in interest, the right to request information from insolvency practitioners appointed in any member's proceedings, and the right to seek a stay of up to six months in the proceedings of any group member if necessary to implement

3 See European Commission, Proposal for a Regulation of the European Parliament and of the Counsel Amending Council Regulation (EC) No 1346/2000 on Insolvency Proceedings (2012), available at www.europarl.europa.eu/meetdocs/2009_2014/documents/com/com_com%282012%290744_/com_com%282012%290744_en.pdf.

4 Regulation (EU) No. 2015/848 of 20 May 2015 on insolvency proceedings (recast), 2015 O.J. (L 141), available at http://eur-lex.europa.eu/eli/reg/2015/848/oj.

5 Id. at Rec. 22.

6 Id. at Articles 56-58.

7 Id. at Article 60.

8 Id. at Articles 61-72.

9 Id. at Article 61.

10 Id. at Article 72.

a plan that benefits creditors in that proceeding.[11] Participation in the group coordination proceedings is voluntary, though insolvency practitioners appointed to act in respect of each member 'shall' consider the coordinator's recommendations.[12]

In addition to the provisions addressing corporate groups in Chapter V, the Recast Regulation also recognises that '[s]econdary insolvency proceedings may also hamper the efficient administration of the insolvency estate'.[13] Accordingly, the Recast Regulation confers upon the insolvency practitioner in main insolvency proceedings the possibility of distributing to local creditors what they would have received had secondary local proceedings been initiated and empowers courts to refuse to initiate secondary proceedings if these so-called 'synthetic' or 'virtual' proceedings are proposed.[14] These provisions may help facilitate synthetic group restructurings of the sort employed in the *Collins & Aikman* case.[15]

UNCITRAL Working Group V, meanwhile, has continued to develop an addendum to the Model Law to facilitate the effective treatment of cross-border insolvencies of multinational enterprise groups. The Working Group has identified eight key principles of a regime to address insolvency in the context of enterprise groups, which themselves are subject to two fundamental underpinning principles. Those foundational principles are, first, that the jurisdiction of the courts in the state in which the centre of main interest (COMI) of an enterprise group member is located will remain unaffected by a group insolvency solution, and, second, the eight identified principles do not replace or interfere with any process or procedure required by the jurisdiction in which the COMI of a group member is located in respect of that group member's participation in a group insolvency solution.[16] Against that backdrop, the eight key principles can be summarised as follows:[17]

a There is no obligation to commence insolvency proceedings for individual members of an enterprise group.

b When a group enterprise solution is proposed, that solution will require coordination between group members and may be developed through a coordinating proceeding.

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11 Id.

12 Id. at 70.

13 Id. at Recital 41.

14 Id. at Recital 42; Article 36.

15 *In re Collins & Aikman Europe S.A.*, [2006] EW HC (CH) 1343. Indeed, the European Commission specifically referenced the Collins & Aikman case in its proposal for what became the Recast. See Proposal for a Regulation of the European Parliament and of the Counsel Amending Council Regulation (EC) No. 1346/2000 on Insolvency Proceedings (2012), *supra* note 3, at 7.

16 See United Nations Commission on International Trade Law, Report of Working Group V (Insolvency Law) on the Work of its Forty-Eighth Session (Vienna, 14–18 December 2015), U.N. Doc. A/CN.9/864 (8 January 2016), available at https://documents-dds-ny.un.org/doc/UNDOC/GEN/V16/000/83/PDF/V1600083.pdf?OpenElement.

17 United Nations Commission on International Trade Law, Facilitating the Cross-Border Insolvency of Multinational Enterprise Groups: Key Principles, U.N. Doc. A/CN.9/WG.V/WP.133 (28 September 2015), available at https://documents-dds-ny.un.org/doc/UNDOC/LTD/V15/068/39/PDF/V1506839.pdf?OpenElement.

c Group members might designate one member's proceeding to function as the coordinating proceeding, the role of which would be procedural. A proviso might be that such proceeding take place in a state that is the COMI of at least one group member that is a necessary and integral part of the enterprise group solution.

d The court located in the COMI of a group member participating in a group insolvency solution can authorise the insolvency representative appointed in proceedings taking place in the COMI to seek (1) to participate in a planning proceeding taking place in another jurisdiction and (2) recognition by the court of the proceeding in the COMI jurisdiction.

e Participation in the coordination process for group members whose COMI is located outside of the jurisdiction of the coordinating proceeding is voluntary. For members whose COMI is located in the same jurisdiction as the coordinating proceeding, the recommendations of part three of the Legislative Guide on Insolvency Law with respect to joint application and procedural coordination could apply.

f Creditors and stakeholders of group members participating in a group solution would vote in their own jurisdictions on the treatment they are to receive according to applicable domestic law.

g Following approval of a group reorganisation plan by creditors and stakeholders, each COMI court would have jurisdiction to implement the plan in accordance with domestic law.

h The insolvency representative appointed in the coordinating proceeding should have a right of access to the proceedings in each COMI court to be heard on issues related to implementation of the group reorganisation plan.

These eight principles are largely consistent with the Recast Regulation's approach to resolution of enterprise groups within the European Union. Like the Recast Regulation, the UNCITRAL proposal contemplates a voluntary coordination framework that allows for a group solution (including, by not requiring proceedings for all members, a 'synthetic' solution) and allows representatives of the group members' proceedings to participate in the proceedings of other members to facilitate such a solution, but one that ultimately does not attempt to alter the substantive insolvency law in individual jurisdictions. Notably, in commentary to the second principle, the Working Group allows that another approach to coordination between member insolvencies is the approach taken in the Recast Regulation.[18]

The Recast Regulation will have just come into effect when the next edition of this book is published, and there has been no indication regarding when Working Group V will be in a position to put forward final proposals, whether along the lines described above or otherwise. It therefore remains to be seen how these measures will function in practice, and also whether the voluntary nature of the proposed regimes will limit their utility. It is also possible that there will be resistance in some jurisdictions to ceding sovereignty over local insolvency law even to the limited degree contemplated by the Recast Regulation and the Working Group V principles.

I, once again, want to thank each of the contributors to this book for their efforts to make *The Insolvency Review* a valuable resource. As each of our authors, both old and new, knows, this book is a significant undertaking because of the current coverage of developments

18 Id.

we seek to provide. As in prior years, my hope is that this year's volume will help all of us, authors and readers alike, reflect on the larger picture, keeping our eye on likely, as well as necessary developments, both on the near and distant horizons.

Donald S Bernstein
Davis Polk & Wardwell LLP
New York
October 2016

Chapter 10

GREECE

Athanasia G Tsene[1]

I INSOLVENCY LAW, POLICY AND PROCEDURE

i Statutory framework and substantive law

Greek legislation and regulation pertaining to insolvency

A new bankruptcy code was enacted by Law 3588/2007 (effective as of 10 July 2007) (the Bankruptcy Code), amending and replacing older provisions on insolvency (both in connection with winding up and rehabilitation). The Bankruptcy Code amended and replaced older provisions. Law 3858/2010 effected certain amendments to the Bankruptcy Code, with a focus on a conciliation agreement (or settlement agreement) and the restructuring plan (the Intermediate Amendments). The Intermediate Amendments relating to conciliation agreements did not prove successful in practice. Law 4013/2011 (effective as of 15 September 2011) replaced Chapter 6 of the Bankruptcy Code resulting in the conciliation agreement being replaced by the rehabilitation agreement, and further introduced a new proceeding, special liquidation (the New Provisions). Law 4336/2015 (effective as of 19 August 2015) amended and replaced several provisions of the Bankruptcy Code, with respect to the rehabilitation agreement and special liquidation, and also with respect to the ranking of creditors (the Latest Amendment).

The Bankruptcy Code, the Intermediate Amendments, the New Provisions and the Latest Amendment each include transitory provisions concerning insolvency proceedings opened before the entry into force of the Bankruptcy Code, the Intermediate Amendments, the New Provisions or the Latest Amendment respectively. The Greek chapter in this publication is limited to the insolvency proceedings currently available under the Bankruptcy Code, as amended and in force following its amendment by the Latest Amendment.

The Bankruptcy Code only applies to business undertakings, which include sole traders, partnerships, companies and unincorporated legal entities that pursue a financial

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purpose. Other laws specifically regulate the winding up and reorganisation of certain regulated entities (such as credit and financial institutions, briefly referred to in Section I.vi, *infra*).

In addition, Law 4307/2014 regulates certain pre-insolvency proceedings that are available for:

a the settlement of debts of small businesses and professionals, in each case for business loans; and

b the extraordinary debt settlement and special administration of businesses qualifying as merchants under the Bankruptcy Code.

No analysis is included on these proceedings as they are mostly relevant to small businesses and professionals and domestic transactions. Furthermore, with respect to individuals, Law 3869/2010 (as amended and in force) applies to over-indebted individual debtors and provides for separate proceedings, intended to partially discharge and restructure indebtedness arising from non-business bank loans and credit; no analysis is included on these proceedings in the Greek chapter of this publication.

Distributional priorities

The Bankruptcy Code, the Code of Civil Procedure and the Code for the Collection of Public Revenues include specific provisions on the priority of claims of creditors and distinguish between: (1) claims with a general privilege (a general privilege applies by operation of law and concerns, among others, claims on account of VAT and other taxes, claims of public law entities, claims of employees and social security funds and, under the Bankruptcy Code, also concerns credit facilities granted as rescue funding after the opening of insolvency proceedings); (2) claims with a special privilege (which include those of secured creditors); and (3) unsecured claims.

The opening of insolvency proceedings does not affect the priority ranking of validly created security (claims of item (2) above) and secured creditors (as opposed to unsecured creditors) can initiate individual enforcement proceedings for their secured claim following the opening of insolvency proceedings against the debtor (provided that, depending on the type and stage of the insolvency proceedings, a stay may be imposed in accordance with the Bankruptcy Code).

The distinction between claims with a general privilege, claims with a special privilege and unsecured claims is critical in the context of distribution of the proceeds of liquidation of the assets over which security has been created. Claims with a general or special privilege are satisfied in priority over unsecured claims.

As Greek law now stands, if claims with a general privilege co-exist with claims with a special privilege, claims with a general privilege are entitled to up to one-third of the proceeds of liquidation, provided that certain claims with a general privilege (claims on account of VAT and claims of employees and social security funds) have absolute priority over all other claims without being restricted to one third of the proceeds of liquidation. Unsecured claims will only be satisfied *pro rata* out of any remainder of the proceeds of liquidation of the insolvency estate, following satisfaction of all claims with a general or special privilege.

However, following the amendment of the provisions of the Code of Civil Procedure by Law 4335/2015 and the enactment of the Latest Amendment (Law 4336/2015) on the ranking of creditors in enforcement and insolvency proceedings, the currently applicable absolute priority of the above generally privileged claims will not apply for enforcement

proceedings initiated after 1 January 2016 and bankruptcies declared after 1 January 2016. This will benefit secured creditors and unsecured creditors (the latter will also be entitled to a specific percentage of the enforcement proceeds, depending on whether generally privileged claims and secured claims co-exist with unsecured claims or not).

Vulnerable transactions

Vulnerability of transactions is determined by reference to the date of 'cessation of payments', which is set by the bankruptcy court in its judgment declaring bankruptcy in respect of an insolvent debtor in accordance with the Bankruptcy Code. Cessation of payments means evidenced general and permanent inability of a debtor to pay its debts as they fall due. The date of cessation of payments so set by the court cannot fall earlier than two years prior to the date of the issue of the judgment declaring bankruptcy.

Under Article 42 of the Bankruptcy Code, certain acts carried out by the debtor during the suspect period (which is the period commencing on the date of cessation of payments and ending on the date of the declaration of bankruptcy by the court) are subject to compulsory rescission by the bankruptcy officer. These acts include:

a any acts of the insolvent debtor carried out without consideration being received in return and that have the effect of reducing the value of the debtor's estate and any contracts entered into by the debtor for which the debtor received disproportionate consideration;

b any payment of debts that are not yet due and payable;

c any repayment of due and payable debts not made by payment in cash or in the pre-agreed manner; and

d any security interest created over the debtor's assets to secure a pre-existing debt where the debtor had not pre-agreed to grant such a security interest (with the exception only of mortgages, pre-notations of mortgage and pledges created in favour of banks to secure credit and loan agreements or already existing obligations).

In addition, under Articles 43 and 47 of the Bankruptcy Code, certain acts carried out by the debtor during the suspect period, which are not subject to compulsory rescission as above, may be subject to rescission by the bankruptcy officer. Acts subject to challenge in this manner include:

a any payment of debts that are due and payable, or any transaction entered into by the debtor for consideration, if the relevant party or creditor (as the case may be) was aware of the cessation of payments and such a payment or transaction is detrimental to the other creditors; and

b payment of bills of exchange or promissory notes, if the issuer of the bill of exchange was aware, on the date of issue of the bill, that the payer of the bill had ceased to make payments as they fell due, or if the first endorser of the promissory note was aware of the cessation of payments of the issuer of the promissory note.

Exceptionally, certain transactions may be vulnerable even if concluded earlier than the set date of cessation of payments. Under Article 44 of the Bankruptcy Code, acts of the debtor concluded within a period of five years immediately prior to the declaration of bankruptcy, where the debtor intended the act to operate to the detriment of its creditors in general or to benefit certain creditors to the detriment of other creditors, are subject to rescission, if the relevant party was, at the time of the act, aware of the debtor's intention.

Protection against rescission in certain circumstances

The Bankruptcy Code further provides for protection against rescission in certain circumstances. Under Article 45 of the Bankruptcy Code, no rescission is available in respect of:

a acts falling within the scope of the debtor's business or of professional activities that are concluded in ordinary circumstances and in the ordinary course of the debtor's trade;

b acts of the debtor expressly excluded by law from the scope of application of the provisions on rescission during the suspect period;

c where a restructuring plan is cancelled because of a failure to implement the plan, acts of the debtor carried out during the implementation stage of the restructuring plan (as defined in the Bankruptcy Code); and

d payments or deliveries by the debtor made in return for consideration of equal value.

Further protection may be available under Article 46 of the Bankruptcy Code (in addition to the protection accorded by other laws transposing into Greek law EU Directives on settlement and payment systems and financial collateral), which provides that:

a in relation to a settlement made or security provided in connection with a transaction in securities on an exchange, the rules regulating that exchange will determine whether such a settlement or provision of security is valid or subject to rescission;

b the provisions that apply to a financial collateral arrangement determine whether the relevant financial collateral arrangement is valid or whether it is subject to rescission; and

c the rules regulating a payment or settlement system or a money market determine whether set-off rights exercised in connection with relevant payments or transactions have been validly exercised or are subject to rescission.

ii Policy

With respect to the treatment of businesses in financial difficulties, the tendency (on the part of both the creditors and the debtors) is to make efforts to keep failing businesses operating.

Partly because of the fact that the Bankruptcy Code was recently enacted and, as a result, insufficient market or court precedent could not provide safe guidance to all parties concerned, partly because of inefficiencies of the Greek court system and partly because of the lack of specialised insolvency practitioners, the rehabilitation proceedings initially available under the Bankruptcy Code (before the enactment of the Intermediate Amendments, the New Provisions and the Latest Amendment) have often been used by debtors as a means of delaying creditors and not in a genuine effort to rehabilitate their failing businesses.

Therefore, creditors (especially banks) have so far tended to prefer to consider restructuring arrangements with debtors in financial difficulties well before an actual need to commence any insolvency proceedings under the Bankruptcy Code. These restructuring arrangements mostly concern the restructuring of existing financial indebtedness and may also provide for new funding (whether by existing lenders or shareholders or new investors) or business restructuring measures.

iii Insolvency procedures

Under the Bankruptcy Code (as amended by the New Provisions), the following insolvency proceedings are currently available for debtors meeting the insolvency criteria of the Bankruptcy Code after the entry into force of the New Provisions:

a bankruptcy, which is regulated by Articles 1–98 of the Bankruptcy Code (except for the simplified bankruptcy proceedings in respect of small debtors (where the value of the bankruptcy estate does not exceed €100,000), which are regulated by Articles 162–163 of the Bankruptcy Code);

b a rehabilitation agreement under the Bankruptcy Code (Articles 99–106(ι)) following the appointment of a mediator; the aim is to achieve a rehabilitation agreement between a debtor (where there is evidence of the actual or foreseeable inability of the debtor to pay its debts as they fall due) and its creditors;

c a restructuring plan under the Bankruptcy Code (Articles 107–131) following its approval by the court and the creditors; and

d special liquidation under the new Article 106(ια) of the Bankruptcy Code.

Bankruptcy and special liquidation are liquidation proceedings; note, however, that special liquidation is primarily intended to transfer the assets of an undertaking as a whole (and may therefore manage to preserve the business but not the insolvent entity). Rehabilitation agreements (also available pre-bankruptcy in the case of a foreseeable inability to pay debts as they fall due) and restructuring plans (only available after declaration of bankruptcy) are rehabilitation proceedings.

The Bankruptcy Code provides that various steps of the proceedings need to be concluded within specified periods; however, the actual time frame for the proceedings may be longer than what could be expected based on the letter of the law. Based on limited market precedent on successful rehabilitation proceedings, conclusion and ratification of a rehabilitation agreement can be concluded within eight months to one year. Bankruptcy has so far been primarily used for small or relatively small businesses (usually without prospects of rehabilitation) and completion of the proceedings by liquidation can take five years (if the proceedings are not prematurely terminated for lack of funds); there is insufficient precedent on restructuring plans to provide guidance as to whether the strict deadlines provided for under the Bankruptcy Code could be complied with in practice. Special liquidation was not initially available under the Bankruptcy Code (it was introduced at a later stage) and the provisions on special liquidation were very recently amended by the Latest Amendment; actual completion of special liquidation proceedings depends on the time required in each case for the preparation by the liquidator of the assets inventory. However, the rehabilitation agreement, restructuring plan and special liquidation may prove useful in proceedings where there is a workable plan for the business or the assets (as the case may be) and readily available funding by new investors with the agreement of the creditors, in which case these proceedings could operate almost as a 'pre-pack' process. The Latest Amendment includes provisions intended to make these proceedings more expedient and efficient, including by setting stricter timeframes for completion of various stages of these proceedings, by simplifying the special liquidation provisions and by strengthening documentary and expert evidence requirements in connection with the rehabilitation prospects.

With respect to ancillary proceedings in Greece, the provisions of EU Regulation (EC) No. 1346/2000 (the Insolvency Regulation) and of the United Nations Commission on International Trade Law (UNCITRAL) Model Law on Cross-Border Insolvency of 1997 (the UNCITRAL Convention) are relevant.

Under the Insolvency Regulation, all the above proceedings are available in Greece for insolvent debtors having the centre of their main interests (within the meaning of the Insolvency Regulation) in Greece. Council Implementing Regulation No. 663/2014 was adopted in June 2014, replacing Annexes A, B and C of the Insolvency Regulation. This regulation amended the Greek Annex entries so that bankruptcy (including a restructuring plan under the Bankruptcy Code and the simplified bankruptcy proceedings for small debtors) and special liquidation are listed in Annex A and can, therefore, be main proceedings for the purpose of the Regulation. Rehabilitation proceedings are listed in Annex A of Regulation (EU) 848/2015 of the European Parliament and of the Council of 20 May 2015 (the Recast Regulation) and will, therefore, be available as main proceedings from 26 June 2017. Where main proceedings have been initiated in another EU country in respect of a debtor having the centre of its main interests in that other EU country, ancillary proceedings are available in Greece under the Bankruptcy Code if that debtor has an establishment in Greece (within the meaning of 'establishment' under the Insolvency Regulation). Very limited court precedent is currently publicly available on ancillary proceedings in Greece in connection with an establishment in Greece of a debtor having the centre of its main interests in another EU country.

The UNCITRAL Convention, which applies to non-EU states, was ratified by Law 3858/2010 and may prove very helpful for the purposes of recognition by the Greek courts of insolvency proceedings commenced in another jurisdiction, with a view to protecting assets of the insolvency estate located in Greece.

iv Starting proceedings

Rehabilitation agreement

The rehabilitation agreement proceedings (Articles 99–106 of the Bankruptcy Code) are available on the application of the debtor, provided that there is evidence of an actual or foreseeable financial inability on the part of the debtor to pay its debts as they fall due in a general manner, or evidence that the debtor will become insolvent unless rehabilitated. The court may also sustain the debtor's application if it assesses that the debtor is already in cessation of payments, provided that the debtor, at the same time, files for bankruptcy and also files an expert report.

The Bankruptcy Code (as amended by the New Provisions) allows flexibility as to how a rehabilitation agreement will be reached, by enabling the parties either to:

a open a formal rehabilitation process to reach a rehabilitation agreement, which must be approved at a creditors' meeting and ratified by the court; or

b reach a private rehabilitation agreement without the prior opening of formal rehabilitation proceedings; the rehabilitation agreement can then be ratified by the court provided certain criteria are met.

Where the parties opt for a formal rehabilitation, the debtor's application must be supported by an expert report (otherwise the application is inadmissible) on the debtor's financial condition (including a list of the debtor's assets and creditors, secured and unsecured), restructuring prospects and whether the debtor's restructuring may inflict detriment on

creditors' collective recoveries, and the court must be convinced that an agreement with creditors is likely to be reached. This is intended to protect creditors against an abuse of the process where the debtor is not reasonably capable of being restructured: the expert report must confirm that the creditors' recoveries would not be higher if they enforced their security (if any) or the debtor was subject to bankruptcy proceedings. Eligible experts are banking institutions, certified auditors and auditing firms. There is no general obligation for the debtor to inform third parties of an application for a rehabilitation agreement.

The court may, or if requested by the debtor, must, appoint a mediator, whose task is to assist the debtor and its creditors in reaching a rehabilitation agreement. For these purposes the mediator may request from the debtor, the state, credit and financial institutions and pension funds all financial information relating to the debtor. In addition to the mediator, the court (if so requested by the debtor or any creditor) may also appoint an administrator specifically responsible for certain managerial acts specified by the court with a view to preserving the debtor's assets, ensuring protection with regard to certain transactions and monitoring the rehabilitation process.

There are no particular restrictions on what may be included in a rehabilitation agreement, other than the agreement cannot be against the law. Matters commonly covered may include amendments of the financial terms of the creditors' claims, the conversion of debt into equity, intercreditor arrangements (including by designation of new or different classes of senior and subordinated debt), a reduction of the amount of the creditors' claims, a sale of assets of the debtor, the assignment of the administration of the debtor's business to a third party, the transfer of the business or part of the business of the debtor to a third party or to a company established by the creditors, a stay of individual creditor enforcement for a specified period following ratification of the agreement (such a stay is not binding on dissenting creditors beyond three months), the appointment of a person to monitor compliance with the terms of the rehabilitation agreement or additional payments to be made by the debtor if the debtor's financial condition improves.

The rehabilitation agreement may also include termination provisions and may also provide that a breach of its terms operates as a resolutory condition cancelling the rehabilitation agreement. It may also include conditions precedent with respect to all or any of its terms, in which case there must be a long-stop date within which any such condition precedent must be satisfied (but not later than six months from the date of ratification by the court of the rehabilitation agreement).

The rehabilitation agreement is entered into as a private agreement unless the obligations contemplated therein require the parties to enter into a notarial deed. The New Provisions provide court protection seeking to remedy unreasonable delays or objections on the part of the shareholders of the insolvent debtor by appointing a special representative authorised to exercise their voting rights, to efficiently enable the debtor and the creditors to implement a restructuring scheme, namely when the debtor's net asset position is negative.

Where a formal process is opened, the rehabilitation agreement must be approved at a creditors' meeting by a quorum of: (1) 50 per cent (by value) of all creditor claims; and (2) a majority of 60 per cent (by value) of claims of creditors being present or represented at the meeting (including at least 40 per cent (by value) of the claims of secured creditors being present or represented). Where a private rehabilitation agreement has been reached without the prior opening of a formal process and ratification by the court is sought, the required

majority is at least 60 per cent of all creditor claims including at least 40 per cent of the secured claims. For quorum and majority purposes, all claims are evidenced on the basis of the books and records of the debtor. Secured creditors vote as a single class.

Where a formal process is opened, the hearing of the debtor's application is set no later than two months from filing. Following that hearing, the court may order the opening of rehabilitation proceedings for a period not exceeding four months. On application by the debtor, the mediator or any creditor, this period may be extended by the court (but the period cannot exceed 12 months in aggregate), if the court assesses that there are reasonable expectations for the debtor's restructuring and that the collective recoveries of creditors are not prejudiced.

If the creditors and the debtor cannot agree a rehabilitation agreement or the debtor abandons any effort to enter into a rehabilitation agreement with the creditors in compliance with the applicable quorum and majority requirements, the mediator must promptly and formally notify the court, which will revoke the judgment opening the rehabilitation process, notify the debtor of the same and terminate the appointment of the mediator and any appointed administrator. The debtor has no recourse against such a notification. The appointment of the mediator and any appointed administrator are automatically terminated on the expiry of the set period for reaching a rehabilitation agreement.

If a rehabilitation agreement is approved by the creditors in compliance with the applicable quorum and majority requirements, it must be submitted to the court for ratification by the debtor, the mediator or any creditor, supported by an expert's report on the viability of the debtor's business. The court will ratify a rehabilitation agreement duly approved by the creditors if the following criteria are cumulatively met:

a it is likely that the debtor will remain viable following the ratification of the rehabilitation agreement;

b the rehabilitation agreement is not likely to be detrimental to creditors' collective recoveries;

c the rehabilitation agreement is not the result of malicious, wrongful of unlawful acts of the debtor, any creditor or third party, including acts committed in breach of antitrust laws; and

d the rehabilitation agreement treats creditors of the same class equally, provided that deviations from the equal treatment principle may be permitted for a serious business or social reason explained in detail in the court judgment, or where the affected creditors have consented to unequal treatment.

The court will ratify the agreement without assessing whether the criteria of item (a) has been met, if: (1) the agreement includes an explicit statement by the contracting creditors that they agree to the content of the business plan accompanying the rehabilitation agreement; (2) the agreement includes a detailed list of the contracting and non-contracting creditors and of their respective claims and also includes specific reference to those creditors (contracting or non-contracting) that will be affected by the agreement and of the way in which they will be affected; and (3) the agreement and the accompanying business plan have been duly notified to all non-contracting creditors affected by the agreement (including by publication in accordance with the requirements of the Bankruptcy Code).

The mediator, the debtor, the creditors (as parties to the rehabilitation agreement) and a representative of the employees have a right to be heard at the ratification hearing. Any party having a legitimate interest may also join in the proceedings without any prior

formalities. The court's judgment ratifying the rehabilitation agreement is only subject to third-party opposition, a remedy available to persons who are not parties to the proceedings. The court's judgment denying ratification is subject to appeal by a party to the proceedings.

Bankruptcy

Under the Bankruptcy Code, bankruptcy proceedings commence by a declaration of the court on the application of any creditor, the debtor or the attorney general. Furthermore, the debtor itself is obliged to commence bankruptcy proceedings within 30 days of the date on which it became unable to repay its debts. Third parties will not receive any notice of an application to commence bankruptcy proceedings.

A judgment of the Bankruptcy Court declaring bankruptcy is enforceable from the morning of the date of its publication by the Bankruptcy Court. However, the bankruptcy declaration may be subject to revocation by the Bankruptcy Court or appeal before the Court of Appeals or the Supreme Court. The declaration may also be opposed or reinvestigated before the Bankruptcy Court. The initiation of any of these proceedings does not, of itself, suspend the enforceability of the bankruptcy declaration.

The purpose of bankruptcy is to ensure that the debtor's property is liquidated for the satisfaction of the creditors' claims in accordance with their respective rights of priority.

From the declaration of bankruptcy, a bankruptcy officer is appointed and is responsible for the administration of the debtor for the purposes of liquidating and distributing the proceeds of liquidation to the creditors, in accordance with their respective rights of priority. The debtor is deprived of the administration of its pre-bankruptcy estate but is not deprived of the administration of its post-bankruptcy estate.

A 'judge rapporteur' (i.e., a judge of the Bankruptcy Court) is also appointed to supervise the procedure and submit reports when required; the bankruptcy officer will seek the prior approval of the judge rapporteur in relation to various actions during the performance of his or her duties.

During the bankruptcy procedure, creditors can give notice of their claims to the court and the bankruptcy officer. The bankruptcy officer is assisted by the committee of creditors (elected by the meeting of creditors), which also monitors the proceedings. Decisions of the meeting of creditors or of the committee of creditors (as the case may be) are required for various matters (including in respect of the continuation of the operation of the business, if considered necessary to preserve the value of the assets); specific majority percentages apply, depending on the stage of the proceedings and the matter on which decision must be made.

If at any stage it is determined that there is no cash available to finance the bankruptcy proceedings, the court may issue a judgment ordering the cessation of the proceedings; this is the case for the majority of bankruptcy proceedings. Otherwise, the exit route is by way of a rehabilitation agreement (if so requested by the debtor upon filing for bankruptcy) or by way of a restructuring plan. Alternatively, the bankruptcy proceedings may terminate with a declaration of reorganisation of the debtor (if the debtor is able to pay its pre-bankruptcy debts in full). The proceedings will also lapse after a period of 10 years from the date of the bankruptcy declaration or the final approval of a restructuring plan, and in any case after a period of 15 years from the declaration of bankruptcy or the final approval and ratification of a restructuring plan.

Restructuring plan

A restructuring plan may be initiated on the application to the court of:

a the debtor, either at the same time as its application to be declared bankrupt or within four months of the date of the declaration of bankruptcy (the four-month period may be extended by the court for a further period of not more than three months, provided that it is evidenced that the extension would not be detrimental to the creditors and there are serious indications that the creditors would accept the restructuring plan); or

b the bankruptcy officer appointed by the Bankruptcy Court (if no application for a restructuring plan has been submitted by the debtor together with its bankruptcy application, but not later than within three months of the expiry of the four-month period set out above). To make such an application the bankruptcy officer must have submitted the report provided for under the Bankruptcy Code on the possibility of restructuring and rehabilitating the debtor; an extension may be granted by the court on the same terms and conditions as above.

For these purposes, a draft restructuring plan must be submitted to the Bankruptcy Court for pre-ratification and the Bankruptcy Code includes specific requirements on the content of the draft restructuring plan. Creditors must approve a draft restructuring plan before it is implemented. Accordingly, creditors will receive notice of the meeting to discuss and vote on the restructuring plan. There is, however, no general obligation to inform third parties of the meeting to consider the restructuring plan.

Creditors secured by a mortgage, pre-notation of a mortgage or a pledge will continue to be secured by that security interest except to the extent that the draft restructuring plan provides otherwise (i.e., the plan can affect secured creditors' rights).

Within 20 days of submission of the draft restructuring plan to the court for pre-ratification, the court will examine the draft plan and will reject it if it does not meet the requirements of the Bankruptcy Code. A court judgment rejecting the draft restructuring plan and denying its ratification is not subject to appeal.

If the court does not reject the draft restructuring plan, it will set a date (not more than three months from the date of its decision not to reject the draft plan) for the special meeting of the creditors (attended by the judge rapporteur), who will need to discuss and vote on the approval of the restructuring plan. Creditors not affected by the restructuring plan are not entitled to vote at the meeting. Creditors not attending the meeting are deemed to vote in favour of the restructuring plan unless their claim is reduced to nil by the restructuring plan, in which case they are deemed to reject the restructuring plan. The restructuring plan must be approved by creditors representing at least 60 per cent of the total claims against the debtor (including at least 40 per cent of any secured claims).

Following its approval by the creditors, the restructuring plan is submitted to the court for ratification. The debtor, the bankruptcy officer and the creditors' committee may provide their comments to the court. Any party with a legitimate interest in the debtor's restructuring may also intervene in the process. If the restructuring plan provides that specific obligations have to be performed or other steps have to be taken by the debtor or by other parties prior to the ratification of the restructuring plan by the court, the restructuring plan will only be ratified by the court following the performance of such obligations or the taking of those steps.

Following the hearing, the court may ratify the restructuring plan or reject the restructuring plan (of its own motion or on the application of a creditor having a legal

interest in the plan) on the express rejection grounds provided for in the Bankruptcy Code. The ratifying or rejecting judgment of the court is subject to appeal. The filing of an appeal does not suspend the restructuring process contemplated by the restructuring plan.

When the judgment ratifying the restructuring plan becomes final and conclusive (i.e., it is no longer subject to appeal) the restructuring plan becomes binding on all creditors (including any dissenting creditors, any creditors that have not filed their claims and any creditors that have not attended the meeting of creditors) and the bankruptcy process is concluded. The restructuring plan will then form the basis for the reopening of individual enforcement proceedings against the debtor by creditors. Furthermore, the court's judgment itself constitutes an enforceable right in respect of any obligation undertaken in the restructuring plan.

The Bankruptcy Code also provides for the circumstances in which a ratified restructuring plan may become void or voidable, and the consequences of cancellation. Furthermore, the restructuring plan is automatically cancelled if the debtor is declared bankrupt by the court after the ratification of the restructuring plan by the court. Following such an automatic cancellation:

a any claims of creditors not fully discharged under the restructuring plan are restored to their status as they existed prior to the ratification of the restructuring plan by the court;

b security interests released under the restructuring plan will not revive unless expressly provided to the contrary in the restructuring plan and annotated in the public books of the competent land register or cadastre;

c security interests created pursuant to the restructuring plan continue to secure the relevant secured claims up to the amount and for the time agreed in the restructuring plan unless the restructuring plan provides otherwise; and

d claims arising from financing granted after the ratification of the restructuring plan by the court rank as generally privileged claims.

Special liquidation

Special liquidation in operation, regulated by Article 106(ia) of the Bankruptcy Code as amended by the Latest Amendment (effective from 19 August 2015), is available to debtors with a proven inability to pay their due monetary obligations in a general and permanent manner (cessation of payments), on application of the debtor or of creditors representing at least 20 per cent of creditors' claims. The hearing date is set within 20 days of submission of the application, and the judgment of the court must be issued within one month of the hearing.

The application for the opening of special liquidation proceedings is published with the General Commercial Registry, which is available to the public for inspection, and (if submitted by creditors) must be notified to the debtor. The application may be supported or opposed by creditors (in case of opposition, by creditors representing at least 60 per cent of creditors' claims, including at least 40 per cent of secured claims). The court judgment placing a debtor into special liquidation and appointing a liquidator is non-appealable, subject only to opposition by third parties that did not participate at the hearing because they were not duly invited. A court judgment rejecting an application for the placement of the debtor into special liquidation is subject to appeal within 30 days from publication of the judgment and the hearing of the appeal must take place within two months from filing of the appeal.

Following placement into special liquidation, the liquidator must promptly draw an inventory of the debtor's assets and prepare a tender offer document in order to invite interested parties to submit binding offers at a cash price payable upon signing of the transfer agreement. The debtor's assets must be sold within 12 months of the preparation by the liquidator of the inventory report; this period may be extended by the court for a further six-month period. If these deadlines are not met, the special liquidation proceedings are automatically terminated and, if at that time a bankruptcy application is pending, it is examined by the court.

v Control of insolvency proceedings

All insolvency proceedings under the Bankruptcy Code are opened by court judgment (with the exception of the possibility of reaching a rehabilitation agreement, which is subsequently ratified by the court) and completion of each stage of the proceedings is under the supervision, and subject to a judgment or order, of the competent court.

With the exception of bankruptcy and special liquidation, creditors cannot commence any other type of insolvency proceedings in respect of a debtor, but they can participate in the proceedings by lodging their claims, supporting (or opposing) various steps of the proceedings (where permitted under the Bankruptcy Code) and also participating in meetings of creditors; specific majority percentages are required by reference to the type and stage of the proceedings under the Bankruptcy Code. Creditors are also entitled to apply for temporary measures intended to preserve the business or the assets of the insolvent debtor (or to oppose any such measures applied for by the debtor or other creditors, as the case may be) in accordance with the provisions of the Bankruptcy Code.

Specific duties are provided for under the Bankruptcy Code for the members of the board of directors. Failure to file (or delay in filing) for bankruptcy upon cessation of payments exposes the directors to personal and criminal liability. The same applies where bankruptcy results from gross negligence or wilful misconduct of the directors, or in the case of loss-making or extraordinarily risky transactions, inappropriate borrowings, misleading or incomplete company books and records, failure to prepare and approve financial statements or inventories as required by law, undue disposals or deterioration of assets, or preferential payments to the detriment of other creditors. Furthermore, the directors have personal and criminal liability in cases of tax indebtedness, in accordance with tax legislation.

vi Special regimes

Banks, broker dealers, insurance companies and other regulated financial institutions are excluded from the general insolvency regime of the Bankruptcy Code. Specific provisions apply with respect to their reorganisation and winding up; these provisions transpose into Greek law relevant EU Directives. See Section V, *infra*, on credit institutions and investment firms.

No special insolvency rules apply to corporate groups outside the regulated financial sector.

vii Cross-border issues

The Insolvency Regulation and the ratified UNCITRAL Convention are relevant (within their respective scopes of application) to territorial jurisdiction and cross-border insolvency requiring main proceedings in Greece and secondary proceedings outside Greece or vice versa.

Furthermore, Law 3458/2006 transposes into Greek law EU Directive 2001/24/EC on the reorganisation and winding up of credit institutions with respect to relevant cross-border issues, and Law 4335/2015 transposes into Greek law EU Directive 2014/59/EU on recovery and resolution of credit institutions and investment firms (the Banks Recovery and Resolution Directive; BRRD).

There is limited Greek court precedent concerning cross-border insolvency cases and none of that precedent deals with matters that could be regarded as controversial in the context of the domestic legislation or of the above provisions that are relevant to cross-border insolvency.

There is market precedent to suggest that in the case of large corporates with activities in different jurisdictions various structures have been used or considered (by means of a change of place of registered office outside Greece or by cross-border corporate transformations) with a view to enabling the debtor and its creditors to achieve restructuring under foreign law, primarily in order to ensure successful completion within a shorter period and protect against uncertainties resulting from the recent enactment and subsequent amendments of the Bankruptcy Code.

II INSOLVENCY METRICS

Greece went into recession during the third quarter of 2008 and has proceeded with fiscal adjustments and structural reforms as required by the Economic Adjustment Programme under the financial support scheme agreed with the Troika (IMF, EC and ECB). During these six years of recession, there has been a substantial gradual decline in domestic consumption, investment and fixed capital formation, in parallel with a substantial increase in exports and an unprecedented increase in unemployment (27.8 per cent – the highest level on record).[2]

The fiscal performance in 2013 resulted in a primary surplus (which allowed the Greek state to return to the international capital markets by issuing new bonds). At the same time, a decline in the interest rate of Greek bonds, a slight increase of household consumption and a slower decline in public consumption, together with an expectation for a stable increase of public expenditure for investment and a strong upward trend of the exports of services (outpacing the marginal contraction expected in the exports of goods) were suggested by economists as indications that in 2014 the Greek economy was on the road to recovery after six years of recession.[3] The political and economic uncertainty in the first semester of 2015 reversed that positive development; the capital controls imposed in June 2015 further strengthened the downward trend of the Greek economy in 2015.

In July 2015, the Greek government submitted a request for financial assistance to the ESM. An agreement was reached between Greece and the European Institutions, with input from the IMF, and the Financial Assistance Facility Agreement with the ESM and the reform agenda set out in a Memorandum of Understanding were approved on 19 August 2015. It is expected that the strong commitment demonstrated by the Greek authorities to the policy conditionality underlying the ESM macroeconomic adjustment programme will continue and will restore the Greek economy to a sustainable path.

2 Source: Foundation for Economic and Industrial Research (IOBE), The Greek Economy 2/14, Quarterly Bulletin, No. 76, July 2014.

3 Ibid.

During the first semester of 2015, the political and economic uncertainty, the deterioration of the macroeconomic environment, the outflow of deposits, the increase of non-performing loans and the capital controls had a negative impact on the Greek banks; the ESM Financial Assistance Facility Agreement provided for a specific buffer to be used for potential bank recapitalisation and resolution needs,[4,5]; the recapitalisation of the Greek systemic banks was successfully completed within 2015. Within the context of the ESM Financial Assistance Facility Agreement specific deliverables are provided for on the part of the Hellenic Republic, including for the purposes of assessing the currently applicable provisions of the Bankruptcy Code with a view to introducing any further changes that may be considered appropriate.

III PLENARY INSOLVENCY PROCEEDINGS

There is no publicly available Greek court precedent concerning recent and significant plenary insolvency proceedings in Greece involving large corporates or corporate groups. The available Greek court precedent involves small and medium insolvency cases, without any major controversial issues and not relevant to complex business or financial restructuring measures; therefore, no points worth noting can be drawn from the available court precedent.

However, during the past 18 months there have been voluntary restructuring arrangements involving:

a multinational groups with a Greek subsidiary outside any insolvency proceedings under the Bankruptcy Code and without a closely foreseeable insolvency of the Greek subsidiary;

b Greek project companies within project finance schemes; and

c Greek corporates in respect of indebtedness under corporate loans.

In all these cases, the arrangements have been entered into in an effort to ensure the continuation of operations and to agree rescheduling of existing indebtedness, new funding (where required) and new inter-creditor arrangements in a timely manner, before the occurrence of any event or circumstance that could present a real risk to the creditors or to the debtor's business. The details of these restructuring arrangements cannot be disclosed, as they are subject to confidentiality, in accordance with the practice followed in financing transactions.

IV ANCILLARY INSOLVENCY PROCEEDINGS

There is very limited publicly available Greek court precedent concerning ancillary insolvency proceedings in Greece for foreign-registered companies during the past 12 months.

4 www.consilium.europa.eu/en/press/press-releases/2015/08/14-eurogroup-statement/.

5 http://esm.europa.eu/assistance/Greece/index.htm.

V TRENDS

Law 4336/2015 (which, among others, includes the Latest Amendment and amendments to Law 3869/2010 on over-indebted individual debtors) was enacted as a prior action for the purposes of the ESM Financial Support Facility Agreement, with the intention of improving the legal framework pertaining to business and non-business insolvency in line with the reforms agreed with the European Institutions and the IMF.

Law 4335/2015 was also enacted as a prior action; it amends the Code of Civil Procedure (with a view to expediting court and enforcement proceedings) and, as discussed in Section I.vii, *supra*, also transposes the BRRD into Greek law.

The implementation of the BRRD by virtue of Law 4335/2015 is material for the purposes of the recapitalisation of the Greek banks (expected to be completed by the end of 2015) and will provide the authorities with a credible set of tools to intervene sufficiently early and quickly in an unsound or failing institution so as to ensure the continuity of the institution's critical financial and economic functions, while minimising the impact of an institution's failure on the economy and financial system. In particular, four resolution tools and powers (sale of business, bridge institution, asset separation and bail-in) will be immediately available (except that the general bail-in resolution tool did not apply before 1 January 2016) and may be used alone or in combination where the relevant resolution authority considers that:

a an institution is failing or likely to fail;

b there is no reasonable prospect that any alternative private sector measures would prevent the failure of such an institution within a reasonable time frame; and

c a resolution action is in the public interest.

A most significant change introduced by the Latest Amendment concerns the insolvency practitioners. The functions of a bankruptcy officer, mediator, representative of creditors or liquidator (as the case may be under the Bankruptcy Code, depending on the type of proceedings) will be carried on by an individual or legal entity registered in a special register and qualified to act as insolvency practitioner. A Presidential Decree is expected to be issued on recommendation of the Minister of Justice providing for the necessary formal and substantive qualifications of insolvency practitioners, their appointment and termination of appointment, their powers and duties and their supervision and liability.

Appendix 1

ABOUT THE AUTHORS

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Athanasia joined M & P Bernitsas Law Offices in 2001 and is head of the banking and finance group. At the core of Athanasia's practice is vast experience of structuring, drafting, negotiating and advising on the feasibility and implementation of international financial transactions. She advises extensively on derivatives and collateral arrangements as well as on regulatory compliance. Athanasia has significant experience in advising corporates and international and domestic credit and financial institutions on financial restructurings and insolvency proceedings. Her clients include all the major banks and financial institutions with a local presence, and she has acted in innovative and groundbreaking deals that have paved the way for future transactions in the banking sector. Prior to joining the firm she worked with the Commercial Bank of Greece.

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