THE INSOLVENCY REVIEW

SIXTH EDITION

Editor
Donald S Bernstein

THE LAWREVIEWS

© 2018 Law Business Research Ltd

THE INSOLVENCY REVIEW

SIXTH EDITION

Reproduced with permission from Law Business Research Ltd
This article was first published in November 2018
For further information please contact Nick.Barette@thelawreviews.co.uk

Editor
Donald S Bernstein

THE LAWREVIEWS

© 2018 Law Business Research Ltd

PUBLISHER
Tom Barnes

SENIOR BUSINESS DEVELOPMENT MANAGER
Nick Barette

BUSINESS DEVELOPMENT MANAGERS
Thomas Lee, Joel Woods

SENIOR ACCOUNT MANAGER
Pere Aspinall

ACCOUNT MANAGERS
Jack Bagnall, Sophie Emberson, Katie Hodgetts

PRODUCT MARKETING EXECUTIVE
Rebecca Mogridge

RESEARCHER
Keavy Hunnigal-Gaw

EDITORIAL COORDINATOR
Gavin Jordan

HEAD OF PRODUCTION
Adam Myers

PRODUCTION EDITOR
Martin Roach

SUBEDITOR
Helen Smith

CHIEF EXECUTIVE OFFICER
Paul Howarth

Published in the United Kingdom
by Law Business Research Ltd, London
87 Lancaster Road, London, W11 1QQ, UK
© 2018 Law Business Research Ltd
www.TheLawReviews.co.uk

No photocopying: copyright licences do not apply.
The information provided in this publication is general and may not apply in a specific situation, nor does it necessarily represent the views of authors' firms or their clients. Legal advice should always be sought before taking any legal action based on the information provided. The publishers accept no responsibility for any acts or omissions contained herein. Although the information provided is accurate as of September 2018, be advised that this is a developing area.
Enquiries concerning reproduction should be sent to Law Business Research, at the address above.
Enquiries concerning editorial content should be directed
to the Publisher – tom.barnes@lbresearch.com

ISBN 978-1-912228-58-4

Printed in Great Britain by
Encompass Print Solutions, Derbyshire
Tel: 0844 2480 112

ACKNOWLEDGEMENTS

The publisher acknowledges and thanks the following for their learned assistance throughout the preparation of this book:

ARENDT & MEDERNACH

BAKER MCKENZIE

BERNITSAS LAW

BHARUCHA & PARTNERS

BINDER GRÖSSWANG ATTORNEYS AT LAW

BIRD & BIRD SZEPIETOWSKI I WSPÓLNICY SP K

CLEARY GOTTLIEB

CLIFFORD CHANCE

DAVIS POLK & WARDWELL LLP

FALUDI WOLF THEISS ATTORNEYS-AT-LAW

GALDINO & COELHO ADVOGADOS

GILBERT + TOBIN

GSK STOCKMANN

MANNBENHAM ADVOCATES LIMITED

MATHESON

OSCÓS ABOGADOS

PRAGER DREIFUSS AG

RESOR NV

SLAUGHTER AND MAY

WEERAWONG, CHINNAVAT AND PARTNERS LTD

WHITE & CASE

© 2018 Law Business Research Ltd

CONTENTS

PREFACE..vii
Donald S Bernstein

Chapter 1 AUSTRALIA..1
Dominic Emmett and Peter Bowden

Chapter 2 AUSTRIA..15
Gottfried Gassner and Georg Wabl

Chapter 3 BRAZIL..26
Mauro Teixeira de Faria and Rodrigo Saraiva Porto Garcia

Chapter 4 CANADA..40
Michael Nowina and Sarah Faber

Chapter 5 ENGLAND & WALES..49
Ian Johnson

Chapter 6 FRANCE..80
Fabrice Baumgartner and Aude Dupuis

Chapter 7 GERMANY..89
Andreas Dimmling

Chapter 8 GREECE..102
Athanasia G Tsene

Chapter 9 HONG KONG..119
Scott Bache, Joanna Charter and Robert Child

Chapter 10 HUNGARY..135
Zoltán Faludi, Enikő Lukács and Diána Boross-Varga

© 2018 Law Business Research Ltd

Chapter 11 INDIA 145
Justin Bharucha

Chapter 12 IRELAND 159
Julie Murphy-O'Connor

Chapter 13 ISLE OF MAN 171
Miles Benham and Carly Stratton

Chapter 14 ITALY 184
Gaetano Iorio Fiorelli and Eliana Maria Fruncillo

Chapter 15 LUXEMBOURG 195
Pierre Beissel and Sébastien Binard

Chapter 16 MEXICO 212
Darío U Oscós Coria and Darío A Oscós Rueda

Chapter 17 NETHERLANDS 230
Lucas P Kortmann and Abslem Ourhris

Chapter 18 POLAND 244
Bartłomiej Niewczas and Patrycja Piotrowska

Chapter 19 RUSSIA 255
Pavel Boulatov

Chapter 20 SINGAPORE 285
Nish Shetty, Elan Krishna and Keith Han

Chapter 21 SPAIN 297
Iñigo Villoria and Alexandra Borrallo

Chapter 22 SWITZERLAND 307
Daniel Hayek and Laura Oegerli

Chapter 23 THAILAND 320
Suntus Kirdsinsap, Natthida Pranutnorapal, Piyapa Siriveerapoj and Thanawan Kirdsinsap

© 2018 Law Business Research Ltd

Chapter 24 UNITED STATES 330
Donald S Bernstein, Timothy Graulich and Christopher S Robertson

Appendix 1 ABOUT THE AUTHORS 359
Appendix 2 CONTRIBUTING LAW FIRMS' CONTACT DETAILS 375

© 2018 Law Business Research Ltd

PREFACE

This is the sixth edition of *The Insolvency Review.* Once again this volume offers an in-depth review of market conditions and insolvency case developments in key countries around the world. A debt of gratitude is owed to the outstanding professionals the world over who dedicated their time and talents 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 the fifth edition explored the trend in favour of insolvency regimes that offer debtors the opportunity to restructure debts and operations and emerge as going concerns. These regimes generally share certain core features, including an emphasis on reorganisation rather than liquidation, a stay of enforcement proceedings, continuity of management, protections for new financing, and claim classification and voting mechanisms that bind hold-out creditors to the terms of a restructuring if requisite conditions are met. Recent examples evidencing this trend include Singapore's sweeping reforms to its corporate insolvency laws,[1] which incorporate a number of features similar to those of US Chapter 11 and English schemes, and the recommendations set forth in the Proposal for a Directive of the European Parliament and of the Council on preventive restructuring frameworks, second chance and measures to increase the efficiency of restructuring, insolvency and discharge procedures and amending Directive 2012/30/EU (the Proposed Pre-Insolvency Directive).[2]

In some jurisdictions, approaches to insolvency that embrace these core principles have tended to favour a variety of interests other than those of creditors. Among other things, some offer enhanced protections to the debtor, shareholders or employees. For example, the new Singapore law lacks a provision that would allow for share capital to be transferred (or extinguished and reissued) to creditors or other parties without the approval of shareholders, and the Proposed Pre-Insolvency Directive does not provide the debtor's creditors with the opportunity to solicit votes on a competing restructuring plan or valuation estimate. Other jurisdictions (e.g., Mexico) provide certain constituencies, for example workers who are owed wages, priority status over secured creditors.

1 See Companies (Amendment) Bill 2017 (Bill No. /2017), available at https://www.mlaw.gov.sg/content/dam/minlaw/corp/News/CAB.pdf.

2 Proposal for a Directive of the European Parliament and of the Council on preventive restructuring frameworks, second chance and measures to increase the efficiency of restructuring, insolvency and discharge procedures and amending Directive 2012/30/EU (22 November 2016) (the Proposed Pre-Insolvency Directive), available at http://ec.europa.eu/information_society/newsroom/image/document/2016-48/proposal_40046.pdf.

© 2018 Law Business Research Ltd

While the trend of favouring non-creditor interests continues to gain traction in some jurisdictions, it is by no means universal. Some countries take a more 'pro-creditor' approach. Features of such regimes may include the automatic replacement of existing management with an administrator or liquidator, prohibitions on seeking court protection without creditor consent, the absence of a stay of enforcement proceedings such that secured creditors may foreclose on their property, and required compliance with the absolute priority rule.[3] While some creditor-friendly features, such as the absolute priority rule, are fully compatible with reorganisation, other features, like the absence of a stay or an absolute requirement that creditors consent to a reorganisation, make it more likely a debtor will liquidate. In such jurisdictions, reorganisation may be difficult or, as a practical matter, impossible without creditor support.

Increasingly, countries cannot be pigeon-holed into 'pro-creditor' or 'pro-debtor' categories. Rather, the various jurisdictions surveyed in this book and across the globe are on a continuum that ranges from strongly pro-creditor to strongly pro-debtor. Movement in either direction is justified by perceptions of trade-offs, for example between benefits to healthy companies ('*ex ante*' benefits) and benefits for firms in distress and their stakeholders ('*ex post*' benefits).[4] Creditor friendly regimes tend to claim *ex ante* benefits such as encouragement of lower borrowing costs, more robust capital markets and incentives for appropriate risk-taking, and optimal allocation of assets to their highest and best uses. Pro-debtor regimes tend to emphasise maximising the total value of assets of insolvent companies, preserving the going-concern value of viable enterprises that would likely be forced to liquidate in an overly creditor-friendly environment, and distributional considerations (such as mitigating hardships to employees and shareholders).

It is difficult to verify whether pro-creditor regimes generate *ex ante* benefits because the benefits are difficult to isolate and the causes and effects are hard to confirm.[5] A jurisdiction's insolvency regime is only one of many factors influencing the availability of and access to credit in a national economy. Recently, however, Germany's rather abrupt change from a highly pro-creditor insolvency regime to a very pro-debtor insolvency regime provided an opportunity to observe the effects of such a change at work. Earlier this year, the Harvard Law School Bankruptcy Roundtable[6] (the HLS Bankruptcy Roundtable) reported on a draft article by Canipek, Kind and Wende[7] evaluating this natural experiment.

3 See, e.g., La Porta, Rafael, Florencio Lopez-de-Silanes, Andrei Shleifer, and Robert W Vishny, Law and Finance, Journal of Political Economy, 1998, Vol. 106, No. 6, 1113–1155, available at https://www.journals.uchicago.edu/doi/pdfplus/10.1086/250042.

4 McGowan, Müge Adalet and Dan Andrews, Insolvency Regimes and Productivity Growth: A Framework for Analysis, Organisation for Economic Co-operation and Development, Economics Department Working Papers No., 1309, July 1, 2016, available at http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote= ECO/WKP(2017)57&docLanguage=En.

5 Fisher, Timothy C G and Martel, Jocelyn, The Impact of Debtor-Friendly Reforms on the Performance of a Reorganization Procedure (January, 18 2012). Available at SSRN: https://ssrn.com/abstract=1987543.

6 The Effect of Creditor Rights on Capital Structure, Investment, Profitability, and Risk: Evidence from a Natural Experiment, Harvard Law School Bankruptcy Roundtable, July 10, 2018, https://blogs.harvard.edu/bankruptcyroundtable/2018/07/10/the-effect-of-creditor-rights-on-capital-structure-investment-profitability-and-risk-evidence-from-a-natural-experiment.

7 Canipek, Aras, Axel Kind and Sabine Wend, The Effect of Creditor Rights on Capital Structure, Investment, Profitability, and Risk: Evidence from a Natural Experiment, March 2018, available at SSRN: https://ssrn.com/abstract=3121980.

© 2018 Law Business Research Ltd

The prior German insolvency regime favoured liquidation of the insolvent company and the sale of its assets. As Canipek et al. note, in the case of bankruptcy, existing management had to be replaced with an administrator, who in practice was often a person with limited management skills and a liquidation-oriented attitude. Ninety-nine per cent of all firms that filed for bankruptcy liquidated, with over half doing so within three months of the filing date.[8] On 1 March 2012, the then existing law was amended by the Act of the Further Facilitation of the Restructuring of Companies (ESUG). As discussed in detail in the Germany chapter of this book, ESUG incorporated many debtor-friendly elements, including a three-month stay period and an injunction against secured creditors for the duration of the case. To offer a sense of how significantly ESUG changed the nature of Germany's insolvency framework, Canipek et al. note that, on the well-known creditor rights index of La Porta et al., which varies between zero (poor creditor rights) and 4 (strong creditor rights), German bankruptcy laws shifted from a score of 3.5 to a score of 1.0.[9]

In the HLS Bankruptcy Roundtable post, Canipek et al. describe the conclusions of their study as follows:

> *In the study, we show that high-tangible-asset companies – which the reform predominantly affected – turned away from being overly risk-averse at the cost of profitability, relative to low-tangibility control firms. Specifically, weaker creditor rights motivated affected firms to increase financial leverage and to prefer the more flexible unsecured debt. Moreover, affected firms reduced unprofitable but risk-lowering expansions and sold off less profitable but easily-marketable assets that are useful in downturns by providing the liquidity that can prevent bankruptcy. Our results suggest that weaker creditor rights encourage firms to eliminate protection mechanisms formerly constructed to contract around liquidation-oriented bankruptcy provisions. This view is supported by the increased profitability and higher risk of treated firms after the reform.*

The stronger pre-ESUG creditor rights not only produced *ex post* deadweight losses in terms of inefficient liquidation, but also discouraged firms to make profitable investment decisions. This reveals *ex ante* inefficiencies of creditor rights, an aspect largely ignored in the extant literature.

This conclusion is interesting. If the argument for pro-creditor regimes is that they increase *ex ante* efficiency, then they need to actually deliver *ex ante* benefits. Canipek et al. offer empirical support for the proposition that pro-creditor insolvency regimes do not deliver the predicted benefits for healthy companies, since their selling points (for example, lower borrowing costs) come with inherent costs (for example, incentives to avoid insolvency even when it is inefficient to do so). However, while the HLS Bankruptcy Roundtable post suggests that broad implications may be taken from Canipek et al., the study is narrowly focused on comparing ESUG with the pre-ESUG regime. This leaves open the possibility that there may be combinations of pro-creditor and pro-debtor features in between these extreme formulas – regimes in a 'middle ground' – that strike an optimal balance.

In this sixth edition, readers will have the opportunity to consider the merits of restructuring regimes that take each approach and whether regimes that take a middle ground – exhibiting an appropriate combination of pro-debtor and pro-creditor features – are best.

8 id. at 7.

9 id. at 2.

© 2018 Law Business Research Ltd

One such 'middle-ground' approach – with a statutory stay of creditor remedies, continuation of the debtor-in-possession, a limited period for the debtor to exclusively control the reorganisation plan process and the possibility of creditor cramdown if the absolute priority rule is followed – will be quite familiar to our American readers.

The recent trend towards legal frameworks that adopt features of Chapter 11 perhaps demonstrates a growing belief that some pro-debtor features, like reorganisation and debtor control, are, on the whole, more conducive to wealth creation and preservation. Perhaps the trend is driven by competition for investment, on the theory that companies and investors would prefer to preserve going concern value in the case of a downturn, as is suggested by Singapore's recent enactments. Whatever the drivers, I expect that the trend away from liquidation and in favour of reorganisation will continue, and that, within the reorganisation framework, countries will continue to experiment with both pro-creditor and pro-debtor features in an to attempt to find the optimal balance.

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 I have noted in prior editions, this book is a significant undertaking because of the current coverage of developments we seek to provide. As always, 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
September 2018

© 2018 Law Business Research Ltd

Chapter 8

GREECE

Athanasia G Tsene[1]

I INSOLVENCY LAW, POLICY AND PROCEDURE

i Statutory framework and substantive law

Greek legislation and regulation pertaining to insolvency

The Bankruptcy Code was enacted by Law 3588/2007 (effective as of 10 July 2007), replacing older provisions on insolvency (both in connection with winding up and rehabilitation). The Bankruptcy Code has subsequently been amended several times, including by Law 3858/2010, 4013/2011, 4336/2015, 4446/2016, 4472/2017, 4491/2017 and 4512/2018. The Bankruptcy Code and each of the above laws amending the Bankruptcy Code include transitory provisions concerning insolvency proceedings opened before the entry into force of the new legislation. This chapter is limited to the insolvency proceedings currently available under the Bankruptcy Code, as amended and in force following its amendment by Law 4512/2018.

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

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.

Furthermore, Law 4469/2017 was very recently enacted and regulates out-of-court workouts available to debtors who are individuals and legal entities that are capable of being declared bankrupt, have revenues from business activities and are tax resident in Greece, provided that their financial indebtedness, tax indebtedness or other indebtedness to public law legal entities meets the criteria provided for in that law.

No analysis is included on the proceedings of settlement of debts of small businesses and professional and extraordinary debt settlement of Law 4307/2014 and Law 4460/2017, as they apply if certain criteria are met and are more likely to be relevant to small businesses. Furthermore, with respect to individuals, Law 3869/2010 (as amended and in force) applies

1 Athanasia G Tsene is a partner at Bernitsas Law.

© 2018 Law Business Research Ltd

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 this chapter.

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: (i) 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 subject to certain criteria being met); (ii) claims with a special privilege (which include those of secured creditors); and (iii) unsecured claims.

The opening of insolvency proceedings does not affect the priority ranking of validly created security (claims of item (ii) 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.

Where there are only claims with a general privilege and claims with a special privilege, claims with a general privilege may only be satisfied up to one-third of the proceeds of liquidation of the bankruptcy estate. Where there are claims of all three categories (general privilege, special privilege and unsecured), those with a general privilege are satisfied up to 25 per cent, those with a special privilege are satisfied up to 65 per cent and unsecured claims are satisfied up to 10 per cent of the proceeds of liquidation of the bankruptcy estate. Where there are no claims with a special privilege, those with a general privilege are satisfied up to 70 per cent and unsecured claims are satisfied up to 30 per cent of the proceeds of liquidation of the bankruptcy estate. Where there are only claims with a special privilege and unsecured claims, claims with a special privilege are satisfied up to 90 per cent and unsecured claims are satisfied up to 10 per cent of the proceeds of liquidation of the bankruptcy estate.

There is a material exception from the above allocation, as follows: under Article 156a of the Bankruptcy Code, if there are any new claims (arising after 17 January 2018) secured by a pledge or mortgage over assets that were not previously subject to security, allocation will be made in the following order:

a the generally privileged claims for rescue funding credit facilities;
b claims benefiting from special privilege (including secured claims);
c the other generally privileged claims (for taxes etc.) and the claims benefiting from special privilege for expenses incurred for the collection of fruit from the asset; and
d unsecured claims.

The above are subject only to a super-priority of any claims of employees arising before the declaration of bankruptcy, for unpaid salaries of up to six months, subject to a cap specified

© 2018 Law Business Research Ltd

in respect of those employees' claims and following deduction of court expenses, costs for the administration of the bankruptcy estate, the remuneration payable to the receiver and the collective claims (i.e. those arising after declaration of bankruptcy).

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.

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, for these purposes, deemed awareness applies in respect of a person or entity being an affiliate of the debtor within the meaning of Article 32 of Law 4308/2014); 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.

© 2018 Law Business Research Ltd

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 (these include mortgages, pre-notations of mortgage and pledges created in favour of banks to secure credit and loan agreements or already existing obligations);

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 has been repeatedly amended, 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 provisions of the Bankruptcy Code have often been used by debtors as a means of delaying creditors and not in a genuine effort to rehabilitate their failing businesses. The latest amendments of the Bankruptcy Code (in 2017 and 2018) introduced material changes in the provisions regulating the rehabilitation agreement, which are in the right direction but have not yet been tested in practice.

Therefore, creditors (especially banks) have so far tended to prefer to consider out-of-court 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.

© 2018 Law Business Research Ltd

iii Insolvency procedures

Under the Bankruptcy Code (as amended by the New Provisions and the Latest Amendments), the following insolvency proceedings are available for debtors meeting the insolvency criteria:

a bankruptcy, which is regulated by Articles 1–98 of the Bankruptcy Code (except for the simplified bankruptcy proceedings in respect of small debtors (provided that the debtor meets at least two of the following three criteria: (1) the value of the bankruptcy estate does not exceed €150,000; (ii) the net turnover based on the latest financial statements does not exceed €200,000; and (iii) the employees are no more than five in average), which are regulated by Articles 162–163(γ) of the Bankruptcy Code);

b a rehabilitation agreement under the Bankruptcy Code (Articles 99–106(στ)) entered into between a debtor and its creditors and then submitted to the court for ratification, where there is evidence of the actual or foreseeable inability of the debtor to pay its debts as they fall due; and

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

In addition to the above, special administration is available under Articles 68–77 of Law 4307/2014 (as amended) in respect of business undertakings that are capable of being declared bankrupt and are domiciled in Greece and meet certain criteria.

Bankruptcy and special administration are liquidation proceedings; note, however, that special administration is primarily intended to transfer the assets (or groups of 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 administration is a procedure that has been introduced in replacement of the special liquidation that was made available under an amendment of the Bankruptcy Code; special administration is a procedure required to be completed within a 12-month period and, failing completion, bankruptcy proceedings must be opened.

However, the rehabilitation agreement, restructuring plan and special administration 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 amendments of the Bankruptcy Code are intended to make these proceedings more expedient and efficient, including by setting stricter time frames for completion of various stages of these proceedings and by strengthening documentary and expert evidence requirements in connection with the rehabilitation prospects.

© 2018 Law Business Research Ltd

With respect to ancillary proceedings in Greece, the provisions of EU Regulation (EC) No. 1346/2000 (the Insolvency Regulation) and EU Regulation (EU) 2015/848 (the Recast 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; note, however, that special liquidation is no longer available under the Bankruptcy Code and special administration of Law 4307/2014 is not included in the proceedings falling within the scope of the Insolvency Regulation. Rehabilitation proceedings are listed in Annex A to the Recast Regulation and, therefore, are 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 procedure (Articles 99–106(στ) of the Bankruptcy Code) is available on the application of the debtor or any creditor in order for the court to ratify a rehabilitation agreement concluded between the debtor and creditors of the debtor (or between creditors of the debtor only).

This procedure is available: (1) in respect of a rehabilitation agreement concluded by the debtor and creditors of the debtor, if 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 there is a likelihood that the debtor will become insolvent unless rehabilitated; and (ii) in respect of a rehabilitation agreement concluded only by creditors of the debtor, if there is evidence that the debtor is in cessation of payments at the time the rehabilitation agreement was entered into by its creditors.

© 2018 Law Business Research Ltd

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.

Where a rehabilitation agreement has been concluded between the debtor and its creditors, the application for ratification of the rehabilitation agreement filed with the court must be supported by the following documents: (i) a copy of the signed private rehabilitation agreement; (ii) latest available financial statements of the debtor; (iii) certificate of outstanding indebtedness of the debtor towards the Greek state; and (iv) an expert report on the financial condition of the debtor, a list of the debtor's assets, the accuracy and completeness of the creditors' list, the market conditions and compliance with the legal criteria for ratification of the rehabilitation agreement, data provided by the debtor, the situation of the market and the satisfaction of the legal requirements for the ratification of the agreement; the expert is selected by the debtor and the contracting creditors.

Where the rehabilitation agreement is concluded only by the debtor's creditors, the documents of items (ii)–(iv) above must accompany the application for ratification only if already available to the creditors; if there are any missing documents, the court may suspend the issue of its judgment and order the debtor to provide them to the appointed expert (which is selected by the creditors). Eligible experts are banking institutions, certified auditors and auditing firms.

The hearing of the application for the ratification of the rehabilitation agreement is set no later than two months from filing. If the debtor is not a contracting party to the agreement, the debtor must be notified at least 20 days prior to the hearing. The court may also order notification of one or more creditors within a set period before the hearing. Furthermore, a summary of the application should be published in the Bulletin of Judicial Publications within five days from the submission of the application to the court.

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:

a the amendment of the financial terms of the creditors' claims (including, without limitation, changes with respect to the due dates or the interest rate, the replacement of interest payments with payments out of future profits or a change in the ranking order of existing security interests);

b the conversion of debt into equity whether by the issue of new shares or by the issue of convertible bonds;

c intercreditor arrangements whether by reference to the status of the creditors as creditors or by reference to their status as shareholders following conversion of debt into equity, including, without limitation, designation of new or different classes of senior and subordinated debt;

d the reduction of the amount of the creditors' claims, on account of principal or interest;

e the sale of the assets of the debtor;

f 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, the stay of individual creditor enforcement following ratification of the agreement for a specified period, such stay not being binding on dissenting creditors beyond three months after ratification of the agreement;

© 2018 Law Business Research Ltd

g the appointment of a person who will monitor compliance with the terms of the rehabilitation agreement, with the powers and duties provided for in the rehabilitation agreement; and

h additional payments that must be made 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 (*dialytiki airesi*) cancelling the rehabilitation agreement.

It may also include conditions precedent (*anavlitiki airesi*) with respect to all or any of its five terms, in which case there must be a longstop date within which any such condition precedent must be satisfied. This longstop date must not extend beyond nine 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. Where the approval of the general meeting of shareholders of the insolvent debtor is required for the implementation of the rehabilitation agreement, the Bankruptcy Code provides court protection seeking to prevent unreasonable delays or objections on the part of the shareholders by appointing a special representative authorised to exercise their voting rights, in order to efficiently enable the debtor and the creditors to implement the rehabilitation agreement.

The rehabilitation agreement must be approved by the required majority of creditors, being 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.

The hearing of the debtor's application is set no later than two months from filing. 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;

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; and

e where the ratification of a rehabilitation agreement is requested by the creditors, the debtor is deemed to consent if it has not notified the court that it objects until the hearing of the creditors' application.

The court will ratify the agreement without assessing whether the criteria of item (a) has been met, if: (i) the agreement includes an explicit statement by the contracting creditors that they agree to the content of the business plan accompanying the rehabilitation agreement; (ii) 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

© 2018 Law Business Research Ltd

be affected; and (iii) 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 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. The court judgment ratifying or denying ratification of a rehabilitation agreement must be published, without undue delay, with the General Commercial Registry and the Bulletin of Judicial Publications of the Single Fund of Independent Professionals, on application of the debtor or any creditor.

Once ratified by the court, the rehabilitation agreement becomes fully binding on the debtor and on all creditors, including creditors who did not agree to it. It is not binding, however, on creditors whose claims came into existence following the opening of rehabilitation 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, if the debtor is generally and permanently unable to pay its debts as they fall due. 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; in addition, the debtor may apply for the commencement of bankruptcy proceedings if there is a likelihood of such inability, provided that the debtor's application is accompanied by a proposal for a restructuring plan under Articles 107 et seq. of the Bankruptcy Code. Third parties will not receive any notice of an application to commence bankruptcy proceedings.

The Bankruptcy Court declares bankruptcy if, based on the financial information made available to it, the debtor's estate is sufficient to cover the costs of the 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. Commencing from 29 December 2016, as the receiver can be appointed an individual (being a lawyer, an auditor or first rank accountant) certified by the Committee of Insolvency Practitioners and registered with the Registry of Insolvency Practitioners. The debtor is deprived of the administration of its pre-bankruptcy estate but is not deprived of the administration of its post-bankruptcy estate.

© 2018 Law Business Research Ltd

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. In any case, bankruptcy proceedings will lapse: (i) after a period of 10 years from the stage of the proceedings that is called the union of creditors; (ii) after a period of 15 years from the declaration of bankruptcy; (iii) upon the final approval and ratification of a restructuring plan; (iv) upon completion of liquidation of the bankruptcy estate; or (v) upon repayment of all debts (including interest and principal) which fell due before the declaration of bankruptcy.

Debtors that are individuals may apply to the court for their discharge towards their creditors in respect of debts that were not satisfied from the proceeds of liquidation of the bankruptcy estate. That application may be filed after the second anniversary of the declaration of bankruptcy or after the date of cessation of the bankruptcy proceedings (whichever comes first) and the discharge may be declared by the court if the debtor is found by the court to have acted in good faith and in a spirit of cooperation at the time of declaration of bankruptcy and throughout the bankruptcy proceedings. No discharge can be declared for debts resulting from wilful misconduct or grossly negligent conduct on the part of the debtor. These criteria are not examined and the discharge is effective anyway upon 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 three months of the date of the declaration of bankruptcy (the three-month period may be extended by the court for a further period of not more than one month, 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 creditors representing at least 60 per cent of the total liabilities of the debtor (including at least 40 per cent of secured claims and other claims with a special privilege), together with their application to the court for the declaration of bankruptcy in respect of the debtor. Calculation of the above percentages must be made and confirmed by a qualifying accountant or auditor on the basis of the latest published financial statements of the debtor (or the debtor's accounting books and records, as the case may be).

For these purposes, 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.

© 2018 Law Business Research Ltd

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). The draft restructuring plan may not provide for the reduction of claims to less than 10 per cent of their original amount and must provide for repayment within three years.

The court will set a date not more than two months from declaration of bankruptcy or from initiation of a restructuring plan process (as the case may be under (a) or (b) above), 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 and the bankruptcy officer 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;

© 2018 Law Business Research Ltd

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 administratio

Law 4307/2014 (Articles 68–77) introduced special administration, in respect of business undertakings that are capable of being declared bankrupt and are domiciled in Greece. Special administration is available in respect of qualifying debtors that are: (i) generally and permanently unable to pay their debts as they fall due; or (ii) in respect of a debtor being a company limited by shares (*société anonyme*), meet the criteria for an application for dissolution of the company by court decision under Article 48 of Law 2190/1920 for at least two consecutive financial years (including on the basis that the own funds of the company have fallen below one-tenth of the paid-up share capital).

Special administration commences with the filing of an application to the court of first instance of the debtor's principal place of business; the application is submitted by one or more creditors (including, at least, one credit institution or a financial leasing company or a factoring company supervised by the bank of Greece), provided that such creditor or creditors represent claims of at least 40 per cent of the aggregate debtor's indebtedness. The application must also nominate the proposed special administrator and be accompanied by a declaration by that proposed special administrator that it will accept to take on this role, if appointed by the court.

Upon filing of the application for the special administration any pending insolvency proceedings are automatically suspended. During the period commencing at filing of the application until the issue of the court judgment on the application, the court may, on application by a third party with legitimate interest, order a stay of individual enforcement proceedings against the debtor, a prohibition of disposals by the debtor or any other appropriate preventive measure.

If the debtor is placed under special administration, all enforcement proceedings are automatically suspended until completion of the special administration. Upon publication of the judgment placing a debtor into special administration, the powers of the constitutional bodies and of the management of the undertaking are transferred to the special administrator.

For the appointed special administrator to continue the operation of the business and to cover special administration expenses (including its remuneration), the special administrator may conclude financing agreements or agreements for the supply of goods or services that will benefit from the first ranking privilege of Article 154(a) of the Bankruptcy Code.

The special administrator is mandated to liquidate at least 90 per cent of the book value of the debtor's business and assets through public tender within 12 months from the date of issue of the court judgment on the application for the placement of the debtor into special administration.

Liquidation may be effected either by sale of the business as a whole or by sale of operational parts of the business or by sale of individual assets. The results of the public tender must be ratified by the court. The claims of the creditors will be satisfied out of the proceeds of the liquidation of the debtor's assets.

© 2018 Law Business Research Ltd

If the 12-month deadline is not met, the special administration proceedings are terminated and the special administrator must file an application for the declaration of debtor's bankruptcy.

v Control of insolvency proceedings

All insolvency proceedings under the Bankruptcy Code are opened by court judgment (with the exception of the rehabilitation agreement, which is first entered into between the debtor and creditors and 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.

Creditors can commence bankruptcy proceedings, can also reach a rehabilitation agreement between creditors and submit it to the court for ratification and can also commence special administration proceedings. They can also participate in the proceedings by lodging their claims, supporting (or opposing) various steps of the proceedings (where permitted under the Bankruptcy Code, depending on the type of the proceedings) and also participate 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, other creditors or other parties, 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, on credit institutions and investment firms.

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)).

The implementation of the BRRD by virtue of Law 4335/2015 has been material for the purposes of the recapitalisation of the Greek banks in 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

© 2018 Law Business Research Ltd

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.

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

vii Cross-border issues

The Insolvency Regulation, the Recast 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. However, the most recent amendments of the Bankruptcy Code are in the right direction and may also prove helpful for the purposes of restructuring, including of large or medium corporates.

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 (International Monetary Fund(IMF), EC and European Central Bank). During these 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]

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

© 2018 Law Business Research Ltd

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.

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 have been 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. The most recent amendments were introduced as part of these deliverables.

GDP remained flat in the last three years, with a positive development since the first quarter of 2017, combined with an increase of investment cost and positive growth of household consumption. The economy has stabilised after the crisis in 2015, there is a slight but steady drop in unemployment rates (primarily because of an increase in part-time employment) and the primary fiscal balance has been in surplus in the past three years, supported by ongoing fiscal consolidation.

However, the remaining (though relaxed) capital controls, the high taxation rates (combined with persistent estimated tax evasion rates), the volume of non-performing loans (in respect of which Greek banks in the last semester of 2017 started to take radical measures by sales of non-performing portfolios, which are expected to continue) and the limited access to financing continue to present serious challenges and hold back investment, while poverty and inequality remain among the highest in the euro area.[6]

3 ibid.

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

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

6 See http://iobe.gr/docs/economy/en/ECO_Q2_06072017_PRE_EN.pdf and http://iobe.gr/docs/economy/ECO_Q2_06072017_REP_GR.pdf.

© 2018 Law Business Research Ltd

The final review of the ESM Financial Assistance Facility Agreement was successfully completed in June 2018 and the ESM programme has expired; in addition to the short-term debt relief measures that are already in place, medium-term debt relied measures are contemplated in order to ensure debt sustainability.[7, 8] On 11 July 2018, the EU Commission activated an enhanced surveillance framework for Greece, intended to ensure continuation of the implementation of all key reforms adopted under the ESM programme and sustain their objectives, as well as complete certain key structural reforms initiated under the ESM programme against agreed deadlines.

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 24 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.

7 www.consilium.europa.eu/en/press/press-releases/2018/06/22/eurogroup-statement-on-greece-22-june-2018/pdf.

8 https://www.esm.europa.eu/assistance/greece/efsf-programme-greece-expired.

© 2018 Law Business Research Ltd

V TRENDS

Law 4335/2015 (which, among other things, transposed the BRRD into Greek law) and the recent amendments (during the period 2015–2018) of the Bankruptcy Code and of the Code of Civil Procedure, as well as of Law 4307/2014 (including on special administration) and Law 3869/2010 on over-indebted individual debtors were 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. It is expected that these reforms will continue to be implemented, including because of the enhanced surveillance framework activated by the EU Commission in July 2018.

© 2018 Law Business Research Ltd

Appendix 1

ABOUT THE AUTHORS

ATHANASIA G TSENE

Bernitsas Law

Athanasia joined the firm in 2001 and is joint head of the banking, finance and capital markets 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. She has been working on the legal and regulatory aspects of the development of a secondary market of non-performing loans in the portfolios of Greek systemic banks and has been advising Greek and international clients on these matters. 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.

BERNITSAS LAW

5 Lykavittou Street
106 72 Athens
Greece
Tel: +30 210 361 5395
Fax: +30 210 364 0805
atsene@bernitsaslaw.com
www.bernitsaslaw.com

© 2018 Law Business Research Ltd

ISBN 978-1-912228-58-4

© 2018 Law Business Research Ltd