ZEPOS & YANNOPOULOS

Restructuring/Insolvency Newsletter

Recent Changes in Restructuring and Insolvency Law

18 December 2015

Greece has lately reformed its national restructuring and insolvency law to improve the existing statutory legal framework and enhance its effectiveness in domestic cases. These reforms may have been partly fueled by regulatory competition in times of crisis but were mainly triggered by the commitment of the Greek State to reforms towards the European authorities in the context of a Memorandum of Understanding negotiated and agreed between the European Commission (on behalf of the European Stability Mechanism - ESM) and the Greek State. Against this background, Greece introduced Law 4336/2015 regarding the ratification of the Financial Assistance Facility Agreement with the ESM, which includes, among others, amendments to the national restructuring and insolvency law. These amendments are to a large extent in line with the "Restructuring Recommendation" of the European Commission issued in 2014 ("RR") pushing towards harmonisation with respect to Member States' restructuring regimes. The most remarkable amendments thereof are the following:

In this issue:

Providing for the survival of ongoing contracts in bankruptcy

Pursuant to Article 31 par. 1 and 2 of the Greek Bankruptcy Code (hereinafter "GBC"), as amended, the initiation of a bankruptcy proceeding may no longer be seen as a reason to terminate an ongoing contract by virtue of an ipso facto contractual clause. A special treatment is introduced for ongoing financial contracts contemplating the provision of banking, security and investment services, which are excluded from the above rule, and therefore can be automatically terminated or amended due to the bankruptcy of a debtor, to the extent this has been agreed upon and provided by virtue of a relevant clause in force prior to the declaration of its bankruptcy. To be noted that this amendment is in line with best international practice and aims at preserving the value of the business, also by leaving an area of discretion as to the continued validity of contracts, regardless of the initiation of bankruptcy proceedings.

Accelerating bankruptcy proceedings

Articles 93 et seq. GBC, as amended, provide for the shortening of the regular bankruptcy proceedings making them more efficient by setting stricter timeframes for completion of various stages thereof. In particular, creditors have only one month from the declaration of bankruptcy (reduced from three months previously) to announce their claims, while the bankruptcy administrator ("syndic") must verify them as a general rule within a month (reduced from three months previously) with the option to extend the timeframe up to three months. On the other hand, a new deadline of ten days from the judicial verification of the claims is set for the filing of objections before the bankruptcy court, which has to conduct the hearing within twenty days from the above filing.

Defining the conditions of the pre-bankruptcy rehabilitation procedures and extending their duration

As to the rehabilitation procedure of Article 99 et seq. GBC, new criteria are being set regarding the opening of the proceedings. More specifically, except for the case of debtor's cessation of payments or the situation of imminent cessation of payments, rehabilitation proceedings can from now on be initiated when actual inability of the debtor to meet its obligations as they fall due is yet not present but there is a likelihood of the debtor become insolvent and the competent court considers that its insolvency could be avoided through the recovery procedure. It is worth noting that this amendment is in line with the "RR" of the European Commission which aims at giving financially distressed companies the opportunity to enter into a restructuring at an early stage. On the other hand, as the above criterion has not yet been further refined by the legislator, it appears that this burden will be for bankruptcy courts to bear. Additionally, imminent is the risk of misuse of the procedure by solvent companies trying to coerce a compromise with their creditors, although fully capable

of fulfilling their existing obligations. Furthermore, the overall duration for negotiating and concluding a rehabilitation agreement has been extended to a more realistic period of four months, with the possibility of extending it further up to twelve months, provided that certain conditions are met.

Decreasing the procedural costs

The provision of Article 100 par. 5 GBC regarding the obligation to pay a fee up to Euros 7,000 as an amount to cover various procedural costs, i.e. costs of professionals involved in the proceeding is abolished. The legislator thereby aimed at making the procedure more attractive and available to more debtors by reducing the total cost pertaining to a rehabilitation proceeding. At the same time, of course, it may not be excluded that the decrease of procedural costs may pave the way for the filing of unmeritorious rehabilitation applications.

Staying third party enforcement in the context of pre-bankruptcy rehabilitation

Pursuant to Article 103 par. 1a GBC, as currently introduced, a stay of individual creditor enforcement action may be automatically granted by the bankruptcy court under the condition that creditors representing at least 30% of the total value of the outstanding claims against the debtor, including 20% of the secured claims, proceed to a formal statement to the bankruptcy court that they participate in the negotiations for the conclusion of a rehabilitation agreement. In such case and provided that the bankruptcy court deems that the plan has a reasonable prospect of being implemented and preventing insolvency of the debtor, a stay limited to a period not exceeding four months would be granted, enabling the debtor to resist the piecemeal dismemberment of his business during the pendency of rehabilitation negotiations. A renewal could be available only on the debtor providing evidence of progress in the negotiations and subject to a maximum total duration of twelve months. An automatic stay suspending the right of the creditors to enforce a claim against the debtor shall also be granted in case of an agreement already reached with the requested majority of the creditors and brought to the bankruptcy court solely for ratification (pre-packed agreement). To be noted that, until the current amendment, staying enforcement was possible only via an injunction order.

Introducing a new ratification pattern for rehabilitation agreements

As to the ratification of the agreement by the court, a new paragraph 2a is added to Article 106ζ (106 f) GBC, according to which the bankruptcy court is no longer tasked with assessing the sustainability of the rehabilitation plan and deeming the likelihood of its success, before ratifying the rehabilitation agreement between the debtor and its creditors. Additional requirements for this purpose are now that (i) a notification of the agreement to the dissenting (non-approving, albeit bound) creditors has taken

place and (ii) the agreement itself includes a detailed record of the identity of all creditors and an explicit statement of the contracting creditors that they agree with the plan provisions. In this way, the legislator pushes towards simplification of the ratification process and alleviation of court overload by facilitating a quick ratification of the rehabilitation agreement depending mainly on the objective criterion of the actual consent of the contracting creditors.

Streamlining special liquidation proceedings

Pursuant to Article 106ια (106 k) GBC, as amended, the proceedings of the "special liquidation" are modernised with a view to being more attractive to debtors and their creditors by facilitating a quick auction of the distressed debtor's business. By way of background, the "special liquidation" proceedings are not regular liquidation proceedings but a stand-alone restructuring model aiming primarily at transferring the business as a whole to third parties and thus preserving the value of the financially distressed debtor. To this end, a liquidator is being appointed by the court to continue the debtor's business as a going concern and conduct a public auction for its transfer to the highest bidder. Some of the most remarkable amendments thereon are the following:

- To ensure the necessity of the opening of such proceedings, the latter can be requested either by the debtor, as long as it has ceased payments in a general and durable manner, or by creditors representing at least 20% of total value of the claims against the debtor
- To enhance expediency, the court hearing takes place within twenty days from the filing of the application and the court decision is issued within one month from the above hearing
- For the same reason, it is no longer required as a condition of validity of the court application to present a creditworthy investor interested in purchasing the debtor's business
- To avoid possible abuses and time delay, interventions by third parties aiming to block the progress of the procedure and finally prevent the transfer of the business shall be filed only by creditors representing at least 60% of the total value of the claims including 40% of the value of secured claims
- To enhance the prospects of success, the opening of the "special liquidation" proceedings brings also the benefit of an automatic stay on creditor enforcement actions during the whole special liquidation process

It is obvious that the "special liquidation" proceedings of Article 106ια (106 k) GBC is a good alternative to reorganising a financially distressed debtor, since it allows for the sale of the business on a going concern basis to a new owner in an auction without the need for bargaining with stakeholders to secure a restructuring of liabilities. In times of crisis, however, illiquid markets may create the risk of sales on a

break-up basis ("fire sale" prices), producing a result equivalent to liquidation.

Amending the condition for approval of a reorganisation plan

The provision of Article 110 GBC, according to which the proposed haircut in the restructuring plan may not fall below 20% of the initial debt, is abolished as inefficient.

Altering the ranking of creditors' claims

Article 154 GBC in connection with Article 977 of Civil Procedure Code ("CPC"), following latest amendments of the CPC (Law 4335/2015) on the ranking of creditors and the priority of their claims in enforcement and insolvency proceedings, abandon the absolute priority of certain generally privileged claims (claims on account of VAT, claims of employees and social security funds) over all other claims, and rather give priority to the special privileged claims of the secured creditors and those of the unsecured creditors, provided that these claims co-exist with above mentioned general privileged claims. This amendment aims at protecting the interests of secured and unsecured creditors against prior and full satisfaction of public creditors in enforcement proceedings which normally resulted in the poor satisfaction of the former. This is in line with a strong opposition in theory over the provision for priority of general privilege, in the sense that it seldom left room for the satisfaction of the remainder of creditors.

Introducing new conditions for the discharge of claims

Pursuant to Article 170a GBC, as lately added, following the "RR" the individual entrepreneur debtor may be fully discharged of its debts after three years as of the declaration of his bankruptcy, provided that it acted in good faith and satisfied the additional requirements of Article 167 GBC, i.e. it was granted a "debt relief order" by the insolvency court.

Providing for the Insolvency Practitioner

Last but not least, pursuant to Article 170a GBC, as lately added, a regulated insolvency profession is established in line with best international practice. Commencing from 1 January 2016, the powers of a bankruptcy administrator (syndic), mediator, representative of creditors, or (special) liquidator, as the case may be under the different proceedings of GBC, may be carried on by an individual or legal entity registered in a special register and qualified to act as an 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 thereof, their special powers and

duties as well as their supervision and liability. As there is no practical experience so far, it is crucial for the legislator to ensure that insolvency practitioners are suitably equipped with the necessary practical skills, industry knowledge and legal expertise to tackle a number of complex insolvency cases in the Greek economy.

Final remarks

The above amendments should be seen as an effort to reform the domestic bankruptcy and restructuring law in an efficient way by making it more attractive and user-friendly for the parties involved. To achieve this and additionally to avoid moral hazard and abuse, the modernisation agenda included among others the introduction of measures to address the backlog of cases, the acceleration and rationalisation of insolvency proceedings, the establishment of a regulated insolvency profession, the encouraging of debtors to initiate a restructuring at an early stage and the protection of secured and unsecured creditors against the absolute priority of the public creditors in case of enforcement proceedings. In this way, a level playing field is being produced in which debtors and creditors can find good prospects to protect their personal rights in a fair balance.

For further information, please contact:

Dr Emmanuel Mastromanolis at e.mastromanolis@zeya.com
Stergios Frastanlis at s.frastanlis@zeya.com

ZEPOS & YANNOPOULOS

newsletters@zeya.com
www.zeya.com

280, Kifissias Ave.
152 32 Halandri
Athens Greece

Tel.: (+30) 210 69 67 000
Fax: (+30) 210 69 94 640

◆

Established in 1893, Zepos & Yannopoulos is one of the leading and largest Law firms in Greece providing comprehensive legal and tax services to companies conducting business in Greece.