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Changes to the Bankruptcy Code enacted by virtue of Greece's third bail-out program (law 4336/2015)

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Introduction

By virtue of law 4336/2015 (Government Gazette № 94/14.08.2015, the "Law") the Greek legislator enacted significant changes to the Greek Bankruptcy Code (Law 3588/2007) in the context of implementing the terms of the country's third bail-out program. The new provisions principally pertain to i) the revision of procedural deadlines, ii) the amendment of rehabilitation proceedings (in Greek: «διαδικασία εξυγίανσης»), iii) the amendment of special liquidation proceedings (in Greek: «ειδική εκκαθάριση»), iv) privileges, and v) the profession of bankruptcy administrator (in Greek: «διαχειριστής αφερεγγυότητας»). In addition to the aforementioned categories, individual provisions can be singled out tackling particular matters that thematically do not fall within said categories. These provisions are dealt with in the last part of the present note. More specifically:

i) Revision of procedural deadlines

In an attempt to render insolvency proceedings swifter and thus a more efficient and effective tool, important procedural deadlines, namely the deadlines for notice of creditors, verification of claims, expression of objections before the court of bankruptcy and issuance of judgment on those objections, have been considerably abridged.

ii) Amendment of rehabilitation proceedings

In order to ensure availability of a preventive restructuring framework, the new Law grants debtors access to rehabilitation proceedings allowing them to restructure their business at an early stage, as soon as it becomes apparent that there is a likelihood of insolvency. Hence, under the new Law:

- rehabilitation proceedings can open not only when there is a present or eminent inability of the debtor to pay off debts, but also when, according to the Court's judgment, there is merely a likelihood of insolvency that can be remedied through rehabilitation;
- rehabilitation is possible anew, three years post approval of the previous rehabilitation agreement;
- the time frame of negotiations between the debtor and its creditors in the context of rehabilitation proceedings is statutorily extended to up to four months, while a further extension is possible for an overall period of twelve months if the Court finds that there is indeed progress in the negotiations;
- individual and collective enforcement actions are automatically stayed in case a rehabilitation agreement is submitted to the Court for approval prior to the opening of rehabilitation proceedings,

until the Court issues its decision on the approval of the agreement;

- subject to certain requirements safeguarding the protection of the creditors' legitimate interests, the Court approves the rehabilitation agreement submitted by the debtor as above without scrutinizing the viability of the business in question (new par. 2a of article 106g);
- in addition to the aforementioned possibility of automatic stay of individual and collective enforcement actions in case of submission of a rehabilitation agreement prior to the opening of the rehabilitation proceedings, temporary stay of individual enforcement actions against the debtor is likewise granted by the Court, provided that certain requirements are met indicating that there is a high probability that a debtor - creditor agreement will be reached and that execution of such agreement will prevent the creditor's cease of payments.

iii) Amendment of special liquidation proceedings

The objective of the new provisions is to simplify the special liquidation proceedings and render them an efficient tool for the continuous operation of the insolvent debtor's business activity. To this end:

- the subjective scope of application of special liquidation is expanded to encompass any legal entity afflicted by a general and permanent inability to pay off debts already due (cease of payments);
- the requirement of a solvent investor interested in purchasing the business's assets is abolished;
- only creditors representing at least 60% of the total claims against the debtor are entitled to intervene in the pertinent court proceedings;
- the law provides for a lump sum payment of the designated price for the purchase of the debtor's business;

- upon acceptance of the liquidation petition, individual enforcement actions against the debtor are stayed;
- financing and other consideration received during the liquidation procedure fall under the privilege of art. 154 (a) of the Bankruptcy Code (first class general privilege);
- the appointed liquidator has to bear particular professional qualifications and is liable only for fraud (dolus) and gross negligence.

iv) Privileges

The Bankruptcy Code provisions that are relevant to privileges have been amended to reflect the respective changes implemented in the Greek Code of Civil Procedure ("GCCP"). Most importantly, the Greek State is now ranked as a preferential creditor (fourth class) with regard to claims pertaining to VAT and taxes, withheld or imposed, including any increments and interest. In accordance with the new Law, public social security entities are likewise ranked as fourth-class preferential creditors. Having regard to the grave financial and humanitarian crisis that struck the Greek society and business reality, the Law provides for a new class of preferential creditors (third class), namely those having claims pertaining to the supply of food necessary for the sustenance of the debtor and the debtor's spouse and children. Concurrency of general and special privileges is resolved by application of the corresponding provision of the GCCP (art. 977).

v) Bankruptcy Administrator

As of January 1st 2016, the duties currently carried out by bankruptcy trustees, mediators, special assignees and special liquidators shall fall into the competence of natural persons or legal entities publicly registered as bankruptcy administrators. Issues concerning the procedural and substantial professional requirements, qualifications, access to and practicalities of the profession will be regulated by a presidential decree that will be issued in this respect.

vi) Other provisions

Amongst other provisions of the Bankruptcy Code that have been amended by virtue of the new Law, we highlight the ones that stand out as most significant for business practice. Under the new Law, the event of bankruptcy does not constitute a ground for immediate termination of continuous contractual relationships, unless a particular statutory provision so provides. In practical terms, this means that the so-called “ipso facto” contractual clauses, i.e. clauses pursuant to which a contract is automatically terminated in the event of the parties’ bankruptcy, are rendered void. At the same time the Law introduces an important exception to this provision, namely that “ipso facto” clauses are valid in financial agreements, i.e. agreements for the provision of banking, credit, investment and insurance services.

Last but not least, a new article 170a has been added to the Bankruptcy Code stipulating that as of January 1st 2016, honest entrepreneurs (natural persons) shall be fully discharged of their debts that were subject of bankruptcy after a period of 3 years (instead of 10 years under the previous regime) starting from the court’s decision to open bankruptcy proceedings.

Conclusion

In conclusion, the new provisions put into effect by virtue of law 4336/2015 implementing Greece’s third bail-out program, in line with the European Commission’s recommendation “on a new approach to business failure and insolvency” (dated 12.03.2014), aim at ameliorating the accessibility and effectiveness of insolvency proceedings, thus maximizing the business’s total value not only as regards the relevant stakeholders, namely the business’s owners, employees and creditors, but also for the economy as a whole. The enacted measures are only part of a greater reform of insolvency legal framework planned to ensue over the coming months. As a first token of this reform, the abovementioned provisions appear to be a positive step, the effectiveness of which remains to be tested in practice.